



EUROPEAN UNION



*Submission to the African Commission*

## **A Call for Legal Recognition of Sacred Natural Sites and Territories, and their Customary Governance Systems**



Submission to the African Commission:  
A Call for Legal Recognition of Sacred natural sites and territories,  
and their Customary Governance Systems (2015)

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## ABOUT THIS REPORT

The backdrop to this report is a world in which governance of land and natural resources is under unprecedented pressure. Governments wrestle with the demands upon their natural resources posed by a relentless drive for resource-extraction and industrial development, whilst they attempt to balance and preserve the cultural and traditional values that root their peoples.

The African Commission on Human and Peoples' Rights (African Commission) has the mandate and the capacity to lead its member countries towards the vision contained in its Charter, namely one in which precedence is given to indigenous African culture and customary governance systems over the colonial systems that dominated the continent for so long. Central challenges revolve around custodianship of land, with growing incentives and legislation for foreign companies to access Africa's land, resources and markets as part of trade liberalization.

This report focuses on the voice of custodian communities from six African countries, who have taken it upon themselves to revive and protect their valuable traditions and cultures by taking their case to the African Commission. In their statement, they emphasise how their customary governance systems operated since before recorded time, derived from their sacred natural sites and territories. Their Call to Action forms the essence of the legislative response requested from the African Commission – to develop policy and legal recognition for sacred natural sites and territories, and their customary governance systems.

The report provides context and analysis as motivation for the legislative response that is being sought. A discussion of plural legal systems is provided, commencing with a reminder that the African Charter is committed to plural or multiple legal frameworks. The developing legal jurisprudence within the countries of Africa in favour of recognising the importance of sacred natural sites and territories is briefly described, with the African Charter related Endorois and Ogiek cases providing important guiding precedents.

A body of annexures accompanies the main narrative, with explicit policy and legislative instruments to recognise and protect custodian communities, that they may continue to revive and preserve their sacred natural sites and territories and related customary governance systems; three practical case studies where legislative recognition and protection has been actively sought; and a collation of statements by the African Commission which support the objectives of this report.

A film, "Revival" (celebrating customary law and sacred natural sites in Bale, Ethiopia - <https://vimeo.com/143994002>), developed by custodian communities accompanies this report, and both materials contribute to a wider framework of work, supported by the European Union, aimed at strengthening African civil society organisations in their responses to the rapid growth of extractive activities - with a particular focus on seed, water and sacred natural sites.

*This report is dedicated to the growing number of communities in Africa who are working to revive their rich indigenous knowledge, customary governance systems and ancestral lands to ensure future generations are able to maintain the continuity of their heritage. We pay tribute to those who have led the way in this vital task, in spite of the increasing pressures they face from the different forms of land grabbing and extraction.*

## Acknowledgements

**Roger Chennells**, author of the report, is a human rights lawyer at Chennells Albertyn, Stellenbosch, South Africa, with a long history of working with indigenous communities. He has a passion for the environment and for the rights of indigenous peoples.

The **African Biodiversity Network (ABN)** was founded, in 2002, to ignite and nurture a growing African network of individuals and organisations working passionately from global to local level, with capacity to resist harmful developments, and to influence and implement policies and practices that promote recognition and respect for people and nature. ABN members are working to strengthen: the revival of indigenous seed and associated knowledge, contributing to food sovereignty; traditional ecological governance systems, protecting areas of ecological, socio-cultural and spiritual importance; and a proactive youth movement, celebrating culture and biodiversity, across Africa.

**The Gaia Foundation (Gaia)** is committed to regenerating cultural and biological diversity, and restoring a respectful relationship with the Earth. Together with long-term partners in Africa, South America, Asia and Europe, we have been working for more than 30 years with indigenous and local communities to secure land, seed, food and water sovereignty, revive indigenous knowledge, protect sacred natural sites, and strengthen community ecological governance.

The African Biodiversity Network and The Gaia Foundation would like to thank all those who have contributed to this report.

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<b>ABOUT THIS REPORT</b>	<b>1</b>
Acknowledgements	2
Abbreviations	4
Key Terms	4
Glossary	5
<b>EXECUTIVE SUMMARY</b>	<b>7</b>
<b>1. STATEMENT BY AFRICAN CUSTODIAN COMMUNITIES</b>	<b>9</b>
<b>2. PLURAL LEGAL SYSTEMS IN AFRICA</b>	<b>12</b>
2.1 Legal pluralism - some definitions and history	12
2.2 Origins of Customary Law	14
2.3 Earth as the Source of Law	15
2.4 Growing Recognition of Indigenous Traditions and Customary Governance Systems	16
2.5 Africa's Path in Recognising Indigenous Traditions and Ancestral Lands	17
2.6 The Voice of Africa's Custodian Communities	19
<b>3. CONCLUSION</b>	<b>20</b>
<b>4. CALL TO ACTION</b>	<b>21</b>
<b>ANNEXURES</b>	<b>23</b>
Annexure 1. Charting the Revival and Recognition of Sacred Natural Sites and Territories, and Customary Governance Systems, across Africa and Internationally	24
Annexure 2. African Case Studies: Securing Legal Protection for Sacred Natural Sites (Benin, Ethiopia and Kenya)	27
Annexure 3. Legislation and Declarations on Sacred Natural Sites and Territories, and Customary Governance Systems	33
Annexure 4. Statements by the African Commission relating to Sacred Natural Sites and Territories, and Customary Governance Systems	36
Bibliography	39

## Abbreviations

ABN	African Biodiversity Network
ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CEG	Community Ecological Governance
CIKOD	Centre for Indigenous Knowledge and Organisational Development, Ghana
EJ	Earth Jurisprudence or Earth Law
Gaia	The Gaia Foundation, UK
GRABE-Benin	Groupe de Recherche et d'Action pour le Bien-Etre au Benin
ICCA	Indigenous Peoples' and Local Community Conserved Areas and Territories
ICE	Institute of Culture and Ecology, Kenya
ILO	International Labour Organisation
IUCN	International Union for Conservation of Nature
MELCA-Ethiopia	Movement for Ecological Learning and Community Action, Ethiopia
NAPE	National Association of Professional Environmentalists, Uganda
SNST	Sacred natural sites and territories
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

## Key Terms

**Indigenous Peoples** - An official definition of "indigenous" has not been adopted by any UN-system, but modern understanding of the term is based on self-identification. The term indigenous refers to peoples and communities whose ancestry is rooted in a particular territory, location or geographical area, from which they derive their stories of origin, spiritual practices, knowledge, identity, and customary governance systems. In this report, the term indigenous peoples is applied in a broad and inclusive sense - it refers to peoples who range from hunter-gatherers, pastoralists and fisher-folk groups to tribal chiefdoms and traditional communities.

**Sacred natural sites** - Sacred natural sites are commonly referred to as sites of ecological, cultural and spiritual importance, defined in the IUCN-UNESCO publication *Sacred natural sites: Guidelines for Protected Area Managers* as "Areas of land or water having special spiritual significance to peoples and communities". They are natural features, such as mountains, springs, lakes, forests, waterfalls, caves, that include not just the horizontal domains of plants, animals, and ancestral spirits, but also vertical domains reaching deep into the Earth, beyond the subsoil, rocks and minerals, and up into the celestial constellations in the sky, embedded in cultural landscapes, seascapes, indigenous territories or ancestral lands.

**Ancestral Lands / Territories** - refers to the physical, spiritual and energetic domains rather than political administrative boundaries. Territories may also be known as biocultural landscapes. Note that sacred natural sites usually exist within such territories, hence the inclusive term used namely sacred natural sites and territories, or ancestral lands. In this report we use the terms 'ancestral lands' or 'territories' interchangeably, making the link between language used in the African Charter (ancestral lands) and language used in other international fora (territories).

## Glossary

**African Charter** - the African Charter on Human and Peoples' Rights (ACHPR), or the Banjul Charter, is the human rights instrument formed by the African Union.

**African Commission** - the African Commission on Human and Peoples' Rights was established under article 30 of the African Charter in 1986, with jurisdiction over the rights set out in the Charter.

**Community Ecological Governance (CEG)** - is a term developed by The Gaia Foundation, the African Biodiversity Network and partners to describe customary governance systems rooted in the laws of Earth. Elders play a vital role in upholding the ecological knowledge and customs, practiced over generations, which sustain the wellbeing of sacred natural sites, ecosystems, territories and communities. CEG continues to contribute to the emerging philosophy and practice known as Earth Jurisprudence or Earth Law underpinning customary governance systems.

**Customary Governance Systems** - are governance systems that are usually derived through ancestral 'stories of origin', which establish the relationship of a culture to every aspect of life, and which embrace customary beliefs, values, practices, laws and institutions relating to ancestral lands and to sacred natural sites.

**Custodian Communities** - Sacred natural sites and territories are protected as part of Customary Governance Systems by a particular community, clan or tribe. They subscribe to and implement the Laws of Origin (see below) in their governance and protection of the sacred natural site, on behalf of the broader community.

**Earth Jurisprudence or Earth Law** - is a philosophy and practice which recognises Earth as the primary source of law. It recognises that human laws and governance systems were traditionally derived from and complied with Earth's laws, which govern life. The term was first proposed by cultural historian Thomas Berry, who promoted the need for an Earth-centred jurisprudence, inspired by indigenous communities who have maintained these practices for millennia. For more information visit: [www.earthjurisprudence.org](http://www.earthjurisprudence.org)

**Laws of Origin** - are the principles, values and norms that underpin a community's customary governance system. These laws were given or emerged at the time of Creation, are regarded as non-negotiable, and are required to be practiced and passed down from one generation to the next. They are derived from the laws that govern life on the Earth which recognise the interrelationship between all members of the Earth Community.

**Story of Origin** - is the mythic, ancestral story of how a people and its culture came to be in this world, on the Earth, and how and where it first came to be. It is the foundational story of a people, giving it a particular identity and a set of laws. The Story of Origin is not the same as the history of the people which refers to chronological events.

*“Sacred natural sites are the source of life. Sacred natural sites are where we come from, the heart of life. They are our roots and our inspiration. We cannot live without our sacred natural sites and we are responsible for protecting them.”*

(Statement by African Custodian Communities, Ethiopia, 2015)



## EXECUTIVE SUMMARY

This report presents the case for developing legal instruments and policies which recognise sacred natural sites and territories, and their customary governance systems.

The African Charter on Human and Peoples' Rights (hereafter referred to as the African Charter) promotes a core vision for the continent, based upon the eradication of the vestiges of colonialism on the one hand, and the simultaneous revival of the virtues and dignity of original African traditions on the other. Commitment to this cause is deeply embedded in the principles of the African Charter, which are intended to guide member states regarding the importance of cultural life, traditional morals and values, and respect for customary laws and governance systems which underpin achievement of this core vision.

This report aims to provide the African Commission on Human and Peoples' Rights (hereafter referred to as the African Commission) with persuasive and substantive arguments relating to a core element of original African traditions, namely sacred natural sites and their customary governance systems. It calls for a decisive policy and legislative response, to develop legal provisions for the recognition and protection of indigenous peoples' capacity to maintain their ways of life and identity.

Sacred natural sites are places of ecological, cultural and spiritual importance, embedded in ancestral lands. They are recognised as such by indigenous peoples around the world, and Africa is no exception. They are at the heart of traditional customs, values, norms and principles from which customary governance systems are derived. Furthermore, custodian communities of sacred natural sites and territories are the foundation of Africa's identity and heritage, which is at the core of the vision of the African Charter. And yet, since the colonial era, sacred natural sites and territories have been systematically undermined and violated. **With the continued expansion of industrial development and a renewed scramble for Africa's 'natural resources' – land, mineral, metal and fossil fuel wealth – sacred natural sites and territories, and their custodian communities, are at the frontline. The African Commission is called on to invoke the African Charter in order to defend them against this onslaught.**

On a positive note, there has been increasing international recognition of indigenous sacred natural sites and territories and their associated governance systems. There are also a number of legal precedents for their recognition at national and regional levels. This report outlines the precedents in Africa, as well as internationally, and calls on the African Commission to add its weight to these developments.

A statement and Call to Action by custodian communities from six African countries form the nucleus of the report. The African custodian communities describe in their own collective voice, firstly how they are determined to maintain and protect the ancestral traditions in their territories and, secondly, why this is so important. They explain how sacred natural sites are critical points of energy in their sacred lands and territories, without which their ancestral, or *a priori*, governance systems cannot function.

The report provides a body of legal and policy support for the custodians' statement, drawn both from the African Charter as well as from international and domestic law. Africa is committed to respect and maintain plural legal systems, as clearly stated in the African Charter. The importance of respecting and balancing plural or multiple legal systems is particularly relevant for countries where ancestral legal systems were dominated in the past by colonial powers. Hence, the report recommends that African countries should recognise *a priori* legal systems as part of their commitment to a proud African identity, to better navigate a development path where the integrity and heritage of the continent is maintained.

Developments in international law and practice over the past decades are described, reflecting a rapidly evolving consensus on the importance of customary governance systems. It is noted that the values of culture and tradition that are contained within customary governance systems cannot be separated from the spiritual paradigm that the custodian communities describe, one which is expressed globally in an emerging philosophy of law called Earth Jurisprudence. The developing legal jurisprudence within the countries of Africa is also described, with the African Charter related *Endorois* and *Ogiek* cases providing important guiding precedents.

The report concludes with a bold Call to Action from the custodian communities, with explicit policy and legislative instruments to recognise sacred natural sites and territories, and their customary governance systems.

The following key points emanate from this report.

- Sacred natural sites and territories play a critical role in protecting biodiversity, essential for building climate change resilience for the ecosystems on which food systems depend.
- Custodian communities, who maintain customary governance systems to protect sacred natural sites and territories, play an essential role in preserving the traditional values of Africa, and require legal recognition and support to do so, given their growing vulnerability to increasing pressures from the different forms of land grabbing and extraction.
- Sacred natural sites and territories are the bedrock of customary governance systems, which are not able to flourish without legal protection.
- Recognition of customary governance systems as part of plural legal systems forms an essential component of respecting the essence of Africa, as set out in the African Charter.
- Sacred natural sites and territories should be recognised as no-go areas for any kind of destructive industrial activity, especially mining and other extractive activities, in alignment with growing international recognition and threats.

As empirical support, annexures to the report provide practical examples of custodian communities in Benin, Ethiopia, South African, Kenya and Uganda, who have proceeded to seek legal recognition and strengthen protection for their sacred natural sites and territories. These provide encouraging precedents showing that even in the lack of a coherent legislative environment, African countries have the will and capacity to protect these important foundations of culture and tradition. A listing of relevant international and regional legal instruments, and a collation of statements by the African Commission, further support the objectives of this report.

The report is accompanied by a film, "Revival" (celebrating customary law and sacred natural sites in Bale, Ethiopia - <https://vimeo.com/143994002>), developed by the custodian communities, and contributes to a wider framework of work supported by the European Union, strengthening the capacity of African civil society organisations to respond to the rapid growth of extractive activities.

#### **Custodian communities of Africa call upon the African Commission to:**

- ✓ Develop legislation and policy for the recognition of sacred natural sites and ancestral lands and the customary governance systems that protect them.
- ✓ Pass a resolution recognising sacred natural sites and territories, and their customary governance systems, as contributing to the protection of human and cultural rights.
- ✓ Adopt this statement and report, and use the principles within it as a guide for interpreting the African Charter, to recognise customary governance systems which protect sacred natural sites and territories as part of Africa's plural legal systems.
- ✓ Take into consideration African practices and precedents when interpreting the African Charter, as required by Article 61 of the Charter, to further develop a body of African jurisprudence which recognises customary governance systems and sacred natural sites and territories as no-go areas for any form of destructive or industrial development such as mining and extractive activities.

#### **Custodian communities of Africa call upon their own governments to:**

- ✓ Uphold their obligations and commitments under African and international law to recognise sacred natural sites and territories and their customary governance systems, and the rights of custodian communities in law and in policy.
- ✓ Recognise and respect, at all levels of governance, the intrinsic value of sacred natural sites and territories and that these places are no-go areas for industrial development.
- ✓ Recognise and enforce the African Charter on Human and Peoples' Rights (ACHPR), in particular provisions relating to the rights to social and cultural development, self-determination and participation in governance, and respect of customary laws and governance systems.

# 1. STATEMENT BY AFRICAN CUSTODIAN COMMUNITIES

## THE RECOGNITION AND PROTECTION OF SACRED NATURAL SITES AND TERRITORIES, AND CUSTOMARY GOVERNANCE SYSTEMS, IN AFRICA

24 March 2015, Lake Langano Custodian Meeting, Ethiopia

*This Statement and Call to Action was drawn together by African custodian communities of sacred natural sites from the following areas: Tharaka, Meru, Kamba, Kikuyu and Maasai in Kenya; Buganda and Bunyoro in Uganda; Bale and Sheka in Ethiopia; Venda in South Africa; and Adjarra, Avrankou and Adjohoun in Benin. It is based on the 2012 Statement of Common African Customary Laws for the Protection of Sacred Natural Sites and Territories, drafted in Nanyuki, Kenya, 28th April 2012.*

### Preamble

We, a coalition of custodian communities of sacred natural sites from six African countries, are working together to revive our traditions and to protect our sacred natural sites and territories. We are deeply concerned about our Earth because she is suffering from increasing destruction despite all the discussions, international meetings, facts and figures and warning signs from Earth.

The future of our children and the children of all the species of Earth are threatened. When this last generation of elders dies, we will lose the memory of how to live respectfully on the planet, if we do not learn from them now. Our generation has a responsibility like no other generation before us. Our capacity to stop the current addiction to money from destroying the very conditions of life and the health of our planet, will determine our children's future.

Africa is a plural legal continent, currently recovering from generations of colonial and post-colonial cultural, social and economic devastation. Sacred natural sites and territories are central to the cultural values, morals and traditions and customary laws which we need to revive our customary governance systems.

We call on the African Commission, governments in Africa, as well as corporations, law and policy makers, and civil society, to recognize that Africa has sacred natural sites and territories and custodian communities who are responsible for protecting them in accordance with our customary governance systems. We call for this in order to protect the well-being of our continent, and of the planet.

### Sacred natural sites and territories

The whole Earth is sacred. Within the body of our Earth there are places which are especially sensitive, because of the special role they play in our ancestral lands. We call these places sacred natural sites. Each sacred natural site plays a different but important role, like the organs in our body. All of life is infused with spirit.

Sacred natural sites are embedded in territories, which relate to the horizontal, vertical and energetic domains. A territory includes plants, animals, the ancestors' spirits, all life in the land, including humans, and reaches deep into the Earth including and beyond the subsoil, rocks and minerals, and up into the celestial constellations in the sky.

Sacred natural sites and territories exist everywhere, including in Africa. They are spiritual places created by God at the time of the Creation of our Earth, where our custodian communities have been praying and giving offerings since time immemorial. Our responsibility is to protect God's Creation, and to ensure that these especially sacred places are not disturbed in any way. Their role and significance cannot be replaced.

Sacred natural sites and territories are sources of law. They are centres of knowledge and inter-generational learning. Our customary governance systems are established through our relationship with and responsibility for sacred natural sites and territories. Our customary laws are derived from the laws of the Earth, as interpreted from and applied at our sacred natural sites and territories. As custodians, we have a responsibility to ensure that our governance systems comply with the laws of the Earth, the laws that govern life. Our common customary laws that apply to all our sacred natural sites and territories are stated as follows.

## Our Common Customary Laws

- Sacred natural sites are the source of life. Sacred natural sites are where we come from, the heart of life. They are our roots and our inspiration. We cannot live without our sacred natural sites and we are responsible for protecting them.
- Sacred natural sites are places where spiritual power is potent. They are energetic points in the landscape. They are places where God, spirits and ancestors are present. The sacredness of the sacred site reaches deep into the Earth and up into the sky. They are places of worship, like temples, where we custodians are responsible for leading prayers and offering rituals with our clan and communities.
- Sacred natural sites are natural places in our ancestral territory, such as sources of water, rivers, crossing points, wetlands, forests, trees, and mountains which are home for plants, animals, birds, insects and all of life. Our sacred natural sites protect the diversity of plants and animals and all the life which belong in our ecosystem. Because of the threats from the outside world, they are now the last safe places for God's creation.
- Sacred natural sites are the home of rain, which falls for all communities, our land, and all of life. When there is drought, for example, we carry out rituals in our sacred natural sites, which bring rain. The potency of our Sacred natural sites and our practices are able to stabilize some of the local climatic changes. However this is increasingly disturbed due to industrial society's destructive beliefs and behaviour towards sacred natural sites and the Earth as a whole.
- Each sacred site has a story of origin, of how they were established by God at the time of the creation of the Universe. Sacred natural sites existed before people. They are not made by humans. Sacred natural sites were revealed to our ancestors who passed on the original story and law of creation of how they came to be in our territory.
- Sacred natural sites are places where we pray and perform rituals to our God through invoking the spirit of our ancestors and all of creation. Rituals strengthen our relationship amongst ourselves as a community, with our land, our ancestors and our God. Our offerings, such as indigenous seed, milk, honey, and sacrifices of goats, sheep or cows, are our way of sharing and giving thanks to God and God's creation, our Earth.
- These rituals and prayers maintain the order and health of our communities and our territories. As custodians we are responsible for ensuring that we carry out the required rituals during the year, such as before we plant our seeds or reap our harvests. They cleanse and potentise our people and our sacred natural sites.
- Sacred natural sites are places of healing, peace and justice. When our communities have problems, for example with ill health or lack of rain, we do a specific ritual to deal with the challenges. After we receive the blessing, we perform a thanksgiving ritual. Sacred natural sites are places free from corruption, theft and lies. They are places where we can resolve conflict and maintain harmony among people and all beings. There are different rituals for different needs.
- Each sacred site has custodians chosen by God at the time of creation. Not everyone is a custodian of sacred natural sites. Custodians lead the rituals for our clans and communities. There are men and women custodians with different roles. Custodians have to lead a disciplined life following certain customs, restrictions, times and protocols, according to the ancestral law, in order for our rituals to be acceptable and to have effect.
- Sacred natural sites are sources of wisdom. This wisdom and the knowledge gained by our ancestors over generations, is passed on from generation to generation. We are responsible for ensuring that our ancestral knowledge of how to live respectfully on Earth is passed on to the next generation of custodians. This knowledge cannot be learnt through writing and books, but is earned through life-long experience and rigorous practice with our elders.
- Sacred natural sites are connected to each other and function as a network or system. If one is damaged it affects all the others. Together we, as custodians of different countries, are protecting networks of sacred natural sites across Africa.
- Sacred natural sites give us the law of how to govern ourselves so that we maintain the order and wellbeing of our territory. Cutting of trees, taking away water or disturbing sacred natural sites in any way is prohibited. These laws are non-negotiable.
- We are responsible for protecting our sacred natural sites and territories through our customary governance systems, which are based on our ancestral law of origin. Our sacred natural sites and our governance systems need to be recognised and respected on their own terms, so that we are able to maintain our cultural and ecological integrity and continuity. We are responsible to our ancestors, who have nurtured our traditions for generations, and to the children of the future, to ensure that they inherit a healthy Earth.

- Sacred natural sites are no-go areas – sacred natural sites are places which need to be respected by everyone, so that they remain the way God made them - in their diversity of life forms. We are responsible to ensure their continuity and wellbeing. This means they are out of bounds for any other activities:
  - i) **Not for relocation** - no one can remove a sacred natural site from its original natural place and locate it elsewhere. Sacred natural sites are created by God and embedded in the territory. Our ancestral heritage, traditional knowledge and customary governance systems, and our future life path are rooted in our sacred natural sites and ancestral territory.
  - ii) **Not for tourism** – as these are holy places which are not for entertainment. There are many other places where tourists can go.
  - iii) **Not for other religious activities** – just as we do not do our rituals in churches and mosques, or criticise other religions, because we respect the diverse ways in which humans pray to God, others should respect our indigenous ways.
  - iv) **Not for research and documentation** – because sacred natural sites are our holy places with related spiritual knowledge and practices, and cannot be written down by others. We are the only ones who can write down what we wish to communicate to others, because it is our sacred knowledge.
  - v) **Not for mining or extractive activities** – because these are our holy places, our temples, and they play a vital role in maintaining the health of our Earth – as sources of water, rain, plants, animals, regulating climate, and maintaining energetic stability.
  - vi) **Not for any industrial 'development' or 'investments', meaning land- grabbing in all its forms** - because sacred natural sites are not for making money. Our children need a healthy planet with clean air, water and food from healthy soils. They cannot eat money as food or breathe money or drink money. If there is no water, there is no life.
  - vii) **Not for foreign law** – because sacred natural sites give us the Law of Origin, which existed since creation of the Universe, before humans. The dominant legal system should recognize our customary laws, which are based on the laws of life.
  - viii) **Not for foreign seed** – our rituals and prayers require only indigenous seeds which custodians have planted themselves, as this is what our ancestors and the territory recognise as acceptable. Genetically modified (GM) seed is strictly prohibited and our territories are GM free areas.
  - ix) **Not for any other activities which may undermine the Law of Origin and the life of our sacred natural sites and our Earth.**

*The work of the custodian communities in Africa is accompanied by the African Biodiversity Network (ABN) through its partners MELCA-Ethiopia, Mupo Foundation, National Association of Professional Environmentalists (NAPE), GRABE-Benin, Institute for Culture and Ecology (ICE), Centre for Indigenous Knowledge and Organisational Development (CIKOD) and The Gaia Foundation.*

## 2. PLURAL LEGAL SYSTEMS IN AFRICA

The African Charter on Human and Peoples' Rights (African Charter)<sup>1</sup> reaffirms in its preamble the pledge to eradicate all forms of colonialism from Africa, as well as to incorporate the "virtues of their historic traditions and the values of African civilization" in its conceptualizing of such rights. Inherent in the evolving jurisprudence of the Charter is its vision and desire to affirm the dignity and human rights of the African peoples as part of the 'modern' world, whilst honouring the 'historic traditions' that are unique to the indigenous inhabitants of the continent.

Further implied in this vision lies the strong commitment to acknowledge and recognise the value of *a priori* laws, systems, institutions and traditions, namely those that governed peoples in Africa prior to the colonial epoch. Africa already recognises *a priori* or pre-existing governance systems as part of plural legal systems, as is set out below, but this report appeals for the process to be strengthened. Article 17 of the African Charter requires State parties to promote and protect "morals and traditional values recognised by the community" and Article 61 states that "African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine" shall be taken into consideration by the African Commission. These values are predicated upon respect for the ancestral legal systems of Africa, and have been affirmed in the evolving jurisprudence of the African Charter as expressed through the work of the African Commission and its instruments.

This chapter, presented in support of the Statement by custodian communities, first defines and describes how plural or multiple legal systems co-exist, even if not fully recognised, in most countries of the world, examining in particular those which have acknowledged the ancestral cultural traditions that predated the 'modern' governance systems. It is apparent that in most cases the pre-existing governance systems have been largely dominated by subsequent legal systems. The narrative discusses the sources of such *a priori* legal systems, which are predicated upon a spiritual connection with the Earth and ancestral lands: referred to as sacred natural sites and territories. It then proceeds to examine how such systems have become both acknowledged and incorporated into some international and domestic laws, both in Africa and beyond. Finally the current position within Africa is discussed in more detail, returning to the continent's stated aim to respect and acknowledge the laws and culture that prevailed before colonial invasion. The concluding section motivates the views firstly that the pre-existing or *a priori* legal systems of Africa, referred to frequently as 'indigenous',<sup>2</sup> should be legally recognised, more consciously acknowledged and respected; and secondly that respecting and recognising indigenous laws that protect ancestral lands and sacred places is essential for the advancement of Africa and its peoples.

In the words of the custodians, "*Sacred natural sites give us the law of how to govern ourselves so that we maintain the order and wellbeing of our ancestral territory*".<sup>3</sup>

### 2.1 Legal pluralism - some definitions and history

Law and legal traditions are at the heart of legal pluralism. A 'legal tradition' is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society, and the way law is made. The globally dominant legal tradition, which is rooted in Western culture, has its origins in both Roman law and canon law.<sup>4</sup> Most countries today follow one of the two major legal traditions, namely common law or civil law.<sup>5</sup> These dominant legal traditions differ in fundamental ways from customary governance systems, as is discussed further below.

Law on the other hand is defined in the modern parlance as "*a system of rules which a particular country or community recognises as regulating the actions of its members, and which it may enforce by the imposition of penalties*".<sup>6</sup> However, this defines the material implications of modern law, which hold an entirely different meaning from the *a priori* indigenous systems that have served humankind for millennia.

1 African Charter on Human and Peoples' Rights Adopted in Nairobi June 27, 1981 entered into force October 21, 1986.

2 The term 'indigenous' is defined in the Glossary.

3 Statement on the recognition and Protection of Traditional and Indigenous Sacred natural sites and territories in Africa, Annexure 1.

4 J.C. Smith (1968) "The Unique Nature of the Concepts of Western Law" The Canadian Bar Review (46:2 pp 191-225) in Ssaba Varga (ed) Comparative Legal Cultures (Dartmouth: England).

5 <http://law.berkeley.edu/library/robbins/commonlawcivillaw>.

6 Definition of law available at: [https://www.google.co.za/?gfe\\_rd=cr&ei=LzyzVbLhN0So8weQsrBgDg&gws\\_rd=ssl#q=law+definition](https://www.google.co.za/?gfe_rd=cr&ei=LzyzVbLhN0So8weQsrBgDg&gws_rd=ssl#q=law+definition).

The earliest practitioners of indigenous legal traditions or laws were the original inhabitants of the continents of the world, who have been variously described as indigenous, traditional, native, aboriginal or first peoples depending on the context. These terms refer in all cases to the ancestral relationship to land which give these original peoples their identity and from which their laws are derived. References to the customary legal framework of such early inhabitants are invariably based upon this profound connection to land, and the African Commission "*recognises customary land rights resulting from occupation and use since time immemorial*".<sup>7</sup> The domination or assimilation of the original peoples by subsequent populations is the central concern of this discussion, because it is now threatening their very existence.

Legal pluralism is the existence of multiple legal systems within one geographic area,<sup>8</sup> or alternatively, when countries have more than one source of law in their legal system.<sup>9</sup> At its simplest form, legal pluralism could be described as the assertion that law is more than state law, which has been developed since the origin of the state.

Such plural legal systems are particularly prevalent in former colonies where the law of a colonial authority tends to persist, and to generally override the pre-existing traditional legal systems or customary laws. As an example, a country in Africa might commonly have four distinct and overlapping systems, namely: customary or indigenous law which has been in operation since before recorded time; English common law operating since colonial occupation; statutory law that was developed since independence; and religious laws.<sup>10</sup> Many countries describe themselves as being "multi-judicial", such as Canada which embraces common law, civil law and indigenous legal traditions, and draws on many sources of law.<sup>11</sup>

The multiple overlapping of laws tends to lead to anomalies and contradictions as different legal systems compete with one another for influence in society. Indeed, the concept and meaning of legal pluralism is subject to many forms of definition and analysis, and has been described as having had a 'combative' origin.<sup>12</sup> The African Commission's Working Group of Experts on Indigenous Populations in their report on their visit to Kenya in 2010 acknowledged that customary laws are often treated as subordinate to a nation's laws:

*"Indigenous communities in Kenya, like most others in Africa, often rely on their African customary law. However, Kenya's legal framework subjugates African customary law to written laws. [...] African customary law is placed at the bottom of the applicable laws. This is unfortunate given the wide cross-section of people who still rely on African customary law as a source of law, particularly indigenous communities. Indeed, the fact that most indigenous communities rely on their traditions and customs to seek recognition and protection of their human and peoples' rights and its relegation to the lowest echelons in the hierarchy of applicable law, means that most of these communities have to labour for recognition of their fundamental human rights".*<sup>13</sup>

However some countries do recognise diverse legal traditions that respect different cultural and sub-national groupings, and some such as Scotland, South Africa, France, Egypt and the USA state of Louisiana, prefer to term their combination of civil and common law systems "bi-judicial".<sup>14</sup> Other countries dealing with plural legal systems have created Recognition Acts for affirming the status of pre-existing systems of law. These countries, which are also described as "multi-judicial", include the Pacific Island States, Papua New Guinea, Peru, Bolivia, Colombia and Ghana.<sup>15</sup> Australia's law reform commission followed this trend, and proposed an Aboriginal Customary Law Recognition Act in its review of how to incorporate indigenous legal traditions, though this recommendation has not yet been implemented.<sup>16</sup>

The jurisprudence of the African Charter is replete with references to legal pluralism, and the need to respect the ancestral or customary laws that pre-date modern law. The report of the Working Group on Indigenous Populations/ Communities, after

7 ACHPR Report of the Country Visit of the Working Group on Indigenous Populations/Communities and Information Visit to the Central African Republic 15-28 January 2007 (43rd Ordinary Session, 2007) p.50.

8 Griffiths, Anne (1996) "Legal Pluralism in Africa: The Role of Gender and Women's Access to Law". PoLAR 19 (2): 93-108.

9 Simpson, AWB (1988) "Invitation to Law" p.53-82.

10 Adejumo, Adetoun. O (2014) "The Effect of Plural Legal Systems on International Human Rights Law and Practice and its Impact on Women". Available at: [http://effectius.com/yahoo\\_site\\_admin/assets/docs/Adetouns\\_article11980958.16763114.pdf](http://effectius.com/yahoo_site_admin/assets/docs/Adetouns_article11980958.16763114.pdf).

11 Borrows, John (2006) "Indigenous Legal Traditions in Canada". Canadian Law Commission, ProQuest ebrary p.3.

12 Griffiths, John (1986) "What is Legal Pluralism?", Journal of Legal Pluralism (24). Available at: <http://commission-on-legal-pluralism.com/volumes/24/griffiths-art.pdf>.

13 ACHPR Report of the Country Visit of the Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya 1-19th March 2010, p.56.

14 Borrows, John (2005) "Indigenous Legal Traditions in Canada". Washington University Journal of Law and Policy: Access to Justice, the social responsibility of lawyers. Vol 19, 167-223, 171, note 29.

15 Borrows, John (2005) "Indigenous Legal Traditions in Canada". Washington University Journal of Law and Policy: Access to Justice, the social responsibility of lawyers. Vol 19, 167-223, 216, note 235.

16 Ibid: p.216.

visits to Kenya, Central African Republic, Congo, Botswana, Namibia, Cameroon, Liberia, and Mozambique amongst others, repeatedly affirmed the importance of the connection between human communities and land which have their origins "*since time immemorial*".<sup>17</sup>

## 2.2 Origins of Customary Law

Broadly speaking, human societies tend to describe law as either emanating from an external source, such as from natural, ancestral or divine origins, or alternatively from internal sources namely ethical or moral codes devised by people with a certain form of societal control in mind. Among the acknowledged sources of law are divine rights, natural rights, human rights, and common law, derived from precedent. Humans derive laws from these sources, and proceed to codify and institutionalise them in a variety of ways which are beyond the scope of this discussion. It is pertinent to note that the English common law system, so ubiquitous as a source of 'modern' law, once existed as unwritten customary law.

Customary laws are those laws and customs maintained by people who identify themselves as 'indigenous',<sup>18</sup> also often termed first peoples or aboriginals as previously noted,<sup>19</sup> have been endorsed in the jurisprudence of the African Charter.<sup>20</sup> The word indigenous is derived from the French word *indigene*, meaning 'belonging to the Earth', whilst *aborigine* in Latin means 'from the beginning'.<sup>21</sup>

The self-identification by a people as indigenous is a core criterion for indigenous peoples, based on their chosen adherence to the spiritual values and practices of the origins they acknowledge. The following quote from an indigenous leader in Colombia speaks to the spiritual and cultural dimensions of land, and emphasizes why sacred natural sites and territories are inextricably part of *a priori* culture and law.

"Since time immemorial, the sacred territory of the Sierra Nevada has been the foundation of our culture. It contains the laws and the symbols that determine our way of thinking and our identity. We should all comply with these norms and laws to safeguard the Universe".<sup>22</sup>

Over decades indigenous peoples across the world have been coming together in their struggles to gain recognition for their existence and for assuring the conditions of their cultures to regenerate and continue into the future, after centuries of repression – of land, language, spirituality, knowledge, cultural practices, law and governance systems. This has begun to have an impact as the world has shown greater acknowledgement and respect towards the importance of indigenous peoples and their rights, exemplified by the African Commission's recognition of the existence and self-identification of indigenous peoples in Africa,<sup>23</sup> and the United Nations engaging for two decades in negotiations to recognise the rights of indigenous peoples.<sup>24</sup> The work during these decades of indigenous peoples and their allies culminated in widely ratified and influential legal enactments such as the ILO 169 Convention 1989,<sup>25</sup> the United Nations Declaration on the Rights of Indigenous Peoples of 2007,<sup>26</sup> as well as the Nagoya Protocol which affirmed the rights of indigenous peoples to their traditional knowledge.<sup>27</sup>

17 ACHPR Report of the Country Visit of the Working Group of Indigenous Populations/ Communities and Information visit to the Central African Republic 15-28 January 2007 (43rd Ordinary Session 2007) p.50.

18 See Glossary, and IWIGIA (2010) *The Indigenous World 2010: Report of the International Work Group on Indigenous Peoples*, p.4-5. Available at: [http://www.un.org/esa/socdev/unpfii/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf).

19 See Burger, Julian (1990) *Gaia Atlas of First Peoples*, Gaia Books Ltd, London.

20 For example in the Endorois and Okiek cases. See footnotes 42 and 46.

21 Estimates of indigenous peoples vary from a low base of 250 million people or 4% of the world population based upon a narrow interpretation of the term, to a far higher percentage where for example the entire original populations of continents such as Africa and South America qualify as indigenous.

22 Statement by Mama Jacinto, Kogi Indian of the Sierra Nevada de Santa Marta, Colombia. Extract from an interview with The Gaia Foundation, 2007.

23 See for example Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003); and Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous People (2007), available at: <http://www.achpr.org/mechanisms/indigenous-populations/un-advisory-opinion/>.

24 United Nations Decade for the Rights of Indigenous Peoples, 1982 to 1992, 1993 to 2003.

25 ILO 169 Convention 1989, Article 1, available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_100897.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100897.pdf).

26 <https://www.hrc.co.nz/your-rights/indigenous-rights/our-work/undrip-and-treaty/>.

27 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation. Convention on Biological Diversity. Available at: <https://www.cbd.int/abs/about/>.



## 2.3 Earth as the Source of Law

Underpinning the diversity of laws and customs practiced by indigenous peoples worldwide are *a priori* laws based upon and derived from the laws of the Earth, as reflected in the relationship with their ancestral land and stories of origin. Despite having different cosmologies and symbols, all derive their laws and customs from a central truth which regards Earth as the 'mother of all life', and as lawful and ordered. These traditions revere their ancestral lands as the primary source of all meaning and identity. Knowledge and wisdom of the ancient law is maintained by wise men and women elders, who are responsible for practicing rituals on the land, mediating with the ancestors, and passing their knowledge on to the following generations, to ensure continuity in the understanding that "*the land is the center of our Universe, the core of our culture, the origin of our identity as people*".<sup>28</sup>

The custodian communities who drafted the statement that forms the core of this report (see p.9) - motivating for the legal recognition of their sacred natural sites and territories and their customary governance systems in Africa - similarly articulate the ways in which these traditions have expressed honour and respect for their ancestral land.

Thomas Berry<sup>29</sup>, an influential cultural historian and philosopher grappling with the modern industrial world's headlong destruction of the Earth, drew inspiration from indigenous legal systems in describing a cosmology<sup>30</sup> which places the Earth as the ultimate referent for every mode of being and activity in the Earth. He traced how western thought became anthropocentric (human-centred) and mechanistic over recent centuries, and how the Earth became imagined as a soulless machine which could be controlled and dominated by humankind for human benefit.<sup>31</sup> He called for the acknowledgement of what he termed 'Earth Jurisprudence'. This he argued is the correct term for recognising that the Earth is the primary source of law, aligned with the cosmology of indigenous peoples, placing humankind as a constituent part of the Earth Community that draws rights from the Earth herself. Across the spectrum of their diversity, creation myths of 'first peoples' all carry a consciousness of humans as an inherent part of the community of life, which includes the non-human world and living systems. As part of the web of life, humans have since ancient times nurtured innate respect towards the mystery of creation.<sup>32</sup> Thomas Berry recognised that indigenous legal systems are founded upon the laws of the Earth, referring to the *a priori* principles of nature that are discoverable by humans, and which govern life on the planet as a single, yet differentiated community.<sup>33</sup>

Berry pointed out that human societies which derive their governance systems from the laws of the Earth, have continued to evolve over millennia, whereas those which have grown rapidly on the basis of destroying the foundations of life, have collapsed quickly. Meanwhile there is a growing realization that the current multiple crises of our time such as the sixth mass extinction of species and ecosystem collapse, social inequities between rich and poor, and the climate change crisis are brought about by the lack of adherence to the laws which govern life by the dominant legal systems. Movements exist worldwide calling for all legal systems to revert to the principles of Earth Jurisprudence<sup>34</sup> and respect of Earth's 'planetary boundaries'.<sup>35</sup> Indigenous peoples are playing an important role in this awakening to the root causes of our planetary crisis.

28 Burger, op cit p.20.

29 Berry, Thomas (2000) "The Great Work", Bell Tower, New York.

30 Cosmology is "the belief system, the unifying context and ultimate referent for all human understanding". Berry, Thomas (2006) "Evening Thoughts", Sierra Club Books, San Francisco, p.31.

31 For example, Rene Descartes 'desouled' the world by dividing it into mind and matter, every living being was a mechanism, a machine to be understood and managed, free from any spirit or vital principle. Berry, Thomas (2006), op cit p.26.

32 Berry, Thomas (1998) "The Dream of the Earth", Sierra Club Books, San Francisco, p.185.

33 Burdon, Peter (2011) The Great Jurisprudence. In "Exploring Wild Law" ed Burdon, Peter, Wakefield Press, South Australia p.64.

34 See the works of Cormac Cullinan, Stephan Harding, and Peter Burdon who have further explored ideas for development of Earth Jurisprudence, which seeks to acknowledge the place of humankind as belonging to and embedded in the Earth. For further information on the Earth Law Network see the Gaia Foundation's Earth Jurisprudence Learning Centre, available at: <http://www.gaiafoundation.org/earth-law-network>.

35 We have already exceeded the boundaries of three of nine planetary systems (climate change, biodiversity loss, and excess nitrogen and phosphorus production) according to Rockström, J et al. (2009) Planetary Boundaries: Exploring the Safe Operating Space for Humanity. Ecology and Society [online] 14(32) [www.ecologyandsociety.org/vol14/iss2/art32](http://www.ecologyandsociety.org/vol14/iss2/art32). Note proposal by Peter Roderick for a 'Declaration on Planetary Boundaries': [http://planetaryboundariesinitiative.org/?page\\_id=18](http://planetaryboundariesinitiative.org/?page_id=18).

## 2.4 Growing Recognition of Indigenous Traditions and Customary Governance Systems

According to the legal doctrine that held sway during colonial times, termed the *terra nullius* doctrine, indigenous legal traditions and customary governance systems did not constitute any form of recognizable governance: under this belief system, entire countries were deemed to be empty of legitimate rulers, 'ungoverned' and thus ripe for the taking. The prevailing ethos conveniently held that 'civilized' or written systems of law were required in order for a legal system to exist.

This infamous legal doctrine was firmly rejected as recently as 1980 in the well-known Australian case of *Mabo vs Queensland* government,<sup>36</sup> which resulted in the court's final and decisive recognition of the mistake underlying the *terra nullius* notion. Courts across the world adopted *Mabo*, accepted henceforth that indigenous peoples possess authentic legal traditions which long predate the colonial epoch, and also that they continue to possess them despite their lack of written form. The issues traversed in the *Mabo* case deserve deeper analysis, reflecting as they did, the clash between the worldviews of the colonial powers and the indigenous inhabitants of the lands they colonised.

In this case, the Queensland government argued that when the territory of a settled colony became part of the Crown's dominions, the law of England became the law of the colony, and by that law, the Crown acquired the "absolute beneficial ownership" of all land in the territory. Eddie Mabo and the Merriam people of the Torres Strait Islands claimed in opposition that in terms of their own form of *a priori* laws, they "owned, possessed and occupied" the islands under dispute. It should be noted that in this case Aboriginal or Native Title was accepted by the High Court for the first time in Australia, despite the lack of any written legal traditions maintained by the islanders, and based purely on the proven fact that the islanders maintained an authentic relationship to the land as "owners". In particular the court made the following key findings in relation to indigenous legal systems and rights to land:

- The common law recognised the concept of Native (or Aboriginal) Title;
- The source of Native Title was the traditional connection to or occupation of the land;
- The nature and content of Native Title was determined by the character of the connection or occupation under traditional laws or customs.

In its rejection of the *terra nullius* doctrine, the court established a precedent in favour of indigenous peoples worldwide, whose "pre-existing systems of law" were not couched in the formal paradigms espoused by the colonial powers, and did not require their recognition for their validity. The case opened the way for a widespread revision of the long history of cultural arrogance implicit in the colonial mindset, which regarded indigenous cultures as lacking in law or civilization.

International law continually develops, in a manner analogous to domestic law, as the prevailing mores, norms and values within its jurisdiction change through the agency of active citizens. Indeed, the last half-century has witnessed a significant evolution of law and consciousness following the devastation of two world wars, and leading to a revision of the former colonial world order and a revolution of consensus relating to human rights. Following the formation of the United Nations in 1945, the United Nations Declaration of Human Rights provided new benchmarks of what the world nations regarded as fundamental rights, and became a precursor to the massive body of declarations, conventions and treaties that underpin rights in the 'modern' era. And following the emancipation of former colonies, during the 20th Century, there has emerged a growing acknowledgement of the inherent worth to nations of their indigenous values, customs, and legal systems.

Article 8(j) of the Convention on Biological Diversity (CBD), ratified by 194 countries, is an example of a legal commitment that sums up the consensus of nations in this regard. Each contracting party is obliged, under this article, and subject to national legislation, 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 and promote their wider application with the approval and involvement of the holders of such knowledge..."*<sup>37</sup>

<sup>36</sup> *Mabo and others v Queensland (no 2)* (1992) 175 CLR 1, [1992] HCA 23.

<sup>37</sup> Article 10 (c) of the CBD further requires parties to: "Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements".

Another milestone legal instrument that reflected a changing world consciousness was the 2008 Constitution of Ecuador, which recognizes the distinct rights of nature, based upon the values articulated by their indigenous peoples. Following this initiative, the United Nations began a process in 2009 instigated by nine South American countries to develop a 'Universal Declaration of the Rights of Mother Earth', facing up to climate change, developmental challenges, and dedicated to restoring the rights of the Earth. These examples of an evolving Earth Jurisprudence are all deeply rooted in the cosmologies of indigenous peoples,<sup>38</sup> and in the *a priori* customary practices that require recognition within 'modern' plural legal societies.

Annexure 3 provides further detail on how international law has developed in the past decades to secure legal recognition of sacred natural sites and territories, and customary governance systems.

## 2.5 Africa's Path in Recognising Indigenous Traditions and Ancestral Lands

Africa has not been dormant amidst this rapidly evolving body of international law, as is evidenced by the considerable body of statute and jurisprudence emerging under the auspices of the African Union.

One such legal instrument is the African Model Law for the Protection of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources,<sup>39</sup> which was promulgated in order to guide African countries in their protection of collective rights. As stated in the preamble, the rights of local communities over their biological resources, knowledge and technologies that represent the very nature of their livelihood systems, and have evolved over generations of human history, "are of a collective nature and, therefore, are *a priori* rights which take precedence over rights based on private interests". This sentence is a reminder of the collective, rather than individual, paradigm of rights in Africa. Other rights, mentioned in the preamble and with more substantive treatment in the body of the Model law, are those relating to women as holders of cultural knowledge, to cultural diversity as a core value, and to the importance of knowledge of communities with regard to conservation and use of biological resources. All of these rights are inherent and incorporated within the customary governance systems related to sacred natural sites and territories described in the opening statement by custodian communities (see p.9). The African Model law therefore provides guidance to member states for the promulgation of such laws within their domestic jurisdictions.

As a further mechanism for advancing the jurisprudence of the continent, the African Commission on Human and Peoples' Rights was established by the African Union in 1986, tasked specifically with promoting and protecting human rights by interpreting the African Charter on Human and Peoples' Rights. The Commission, which reports to the Assembly of the African Union, hears individual complaints as well as cases from the 53 member states of the African Union, and together with the African Court<sup>40</sup> is designed to ensure that the countries of Africa are able to formulate and develop their own laws, in achieving the visionary objectives of the African Charter. A fundamental aspect of the entire jurisprudential model is that new ways of giving meaning to the Charter's vision should be brought to the attention of the African Commission, for consideration and possible enactment of further legislation.

A milestone precedent of the African Commission, in the interpretation of the African Charter regarding sacred ancestral lands and customary governance systems, has been the Endorois case. In 2003, a case was filed against the Kenyan Government for forcibly removing the Endorois, a Kenyan hunter-gatherer and pastoralist community, from their ancestral lands, in particular restricting access to a sacred lake. In 2009, the African Commission made the first ruling of an international tribunal to recognise indigenous peoples in Africa and their rights, as custodians to their ancestral lands. This was affirmed by the African Union on 4 February 2010.

The African Commission recognised the important role of sacred ancestral lands as 'the spiritual home' of the Endorois peoples in the practice of their religion.<sup>41</sup> Referring to the UN Declaration on the Rights of Indigenous Peoples, the Commission interpreted

38 Cullinan, Cormac (2003) "Wild Law: Protecting Biological and Cultural Diversity" Green Books, Devon p.23.

39 The African Model Law on the Rights of Communities, Farmers, Breeders, and Access to Biological Resources (2000). Available at: <https://www.cbd.int/doc/measures/abs/msr-abs-oau-en.pdf>.

40 Created under the 1998 Protocol on the African Court on Human and Peoples' Rights which entered into force on 25 January 2004. Available at: [http://africancourtcoalition.org/images/docs/legal-texts/african\\_court\\_protocol.pdf](http://africancourtcoalition.org/images/docs/legal-texts/african_court_protocol.pdf).

41 Baker and McKenzie LLP cited in Mupo Foundation, the Gaia Foundation and African Biodiversity Network (2012) 'Plural Legal Systems: The Venda Indigenous Laws of Origin and Industrial Laws' (Unpublished). Disclaimer: Baker & McKenzie (which includes Baker & McKenzie International and its

Article 8 of the African Charter as follows: "religion is often linked to land, cultural beliefs and practices, and [the] freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion."<sup>42</sup> The African Commission also interpreted the meaning of 'culture' as "including the spiritual and physical association with ancestral land, knowledge, belief, morals, values, law, customs and any other practices."<sup>43</sup>

It is noteworthy that the African Commission has confirmed and pronounced firmly on the relationship between indigenous peoples and their ancestral land, as emphasized by the following quotes from the Endorois case.

*"A key characteristic for most indigenous groups is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon",<sup>44</sup> and*

*"The African Commission notes that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples- that they have an unambiguous relationship to a distinct territory and ... between the people, their land, and culture".<sup>45</sup>*

The Endorois and Ogiek<sup>46</sup> cases provide powerful judicial precedents that should continue to guide and influence states in their local policies.

The African Commission's Working Group of Experts on Indigenous Populations has produced strong recommendations on the urgent need for countries to strengthen their commitment to the cultural rights of their indigenous peoples. Its statements such as the following capture the essence of the *a priori* rights in question:

*"Indigenous people have a special attachment to their ancestral lands. Land in the indigenous knowledge system is not just a material for use but also assumes spiritual proportions with special meaning. Deprivation or dispossession of their ancestral land threatens the very existence of their livelihood and spirituality. It also leads to degradation of the environment upon which indigenous livelihoods depend."<sup>47</sup>*

*"The relationship between culture as a way of life, spirituality, nature and language is strong in indigenous peoples' knowledge and livelihood systems. [...] An attack on one aspect of this cosmology is an attack on their way of life."<sup>48</sup>*

*"Respect for culture, spirituality and language constitute fundamental human rights for indigenous communities. That is indeed why international instruments such as UNDRIP gave significant importance to these rights, [Including...] their right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies [etc.]"<sup>49</sup>*

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42 Endorois case, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003, African Commission on Human and Peoples' Rights, 2010) paragraph 241. For full ruling please see: [http://www.iwgia.org/news/search-news?news\\_id=124](http://www.iwgia.org/news/search-news?news_id=124).

43 See Endorois case, para 250.

44 Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities (adopted at the 28th Session, 2003) quoted in African Commission, Communication 276/2003- *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, para 150.

45 Ibid: para 154.

46 Text available at: [http://www.iwgia.org/iwgia\\_files\\_news\\_files/0938\\_Elc\\_Civil\\_Suit\\_821\\_of\\_2012\\_0s.pdf](http://www.iwgia.org/iwgia_files_news_files/0938_Elc_Civil_Suit_821_of_2012_0s.pdf). On 17 March 2014 the Kenyan Environment and Land Court found that the Ogiek peoples' Constitutional rights to life, livelihood and not to be discriminated against had been contravened by their forcible eviction, and ordered for their resettlement. A hearing before the African Court on Human and Peoples' Rights is pending. For more information: <http://www.escr-net.org/node/365429>.

47 ACHPR Report of the Country Visit of the Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya, 1-19 March 2010, p.48.

48 Ibid, p.64.

49 Ibid, p.65.

## 2.6 The Voice of Africa's Custodian Communities

The first international statement by custodians of sacred natural sites from around the world was made in 2008 at the IUCN World Conservation Congress, where they were united in recognising that sacred sites are at the epicentre of indigenous territories and systems of governance:

*"Sacred natural sites and territories can be considered on the Earth, as a network of acupuncture points would be on the human body. They have a healing effect. We also consider that the relationship between them is critical and they cannot be seen in isolation from each other. The caretakers of these special places are maintaining these healing points but as our numbers become fewer our healing powers for the Earth diminish".*<sup>50</sup>

The first common statement on African sacred sites, ancestral territories and customary governance systems was drafted by custodian communities in 2012, and was developed further in 2015 to present to the African Commission (see p.9). The way in which they describe the central importance of sacred natural sites resonates through, and motivates this entire report:

*"Sacred natural sites are the source of life. Sacred natural sites are where we come from, the heart of life. They are our roots and our inspiration. We cannot live without our sacred natural sites, and we are responsible for protecting them".*<sup>51</sup>

These words describe core values of the collective legal systems described in the African Model Law, which have existed since time immemorial, before the successive invasions of the colonial epoch. The message contained in their statement states it to be the task of 'modern' states to recognise the importance of the *a priori* legal systems, and to provide them with acknowledgement, legitimacy and recognition as part of their domestic plural legal systems.

The ability of Africans to collectively enjoy human rights such as land, culture and traditions, is to a large extent dependent upon the health and vitality of their rural communities. Today, rural communities, using diversity based farming systems, provide 80% of the food on the continent on just 14.7% of the arable land.<sup>52</sup> The health of rural communities in turn relies upon the existence of customary governance systems charged with protecting sacred natural sites and territories. These legal systems comprise the ways of ordering society that pre-date the arrival of colonial powers, and which underpin an African value system where respect for others and respect for the land are intrinsic.

Traditional cultural values as promoted in Articles 17<sup>53</sup>, 18<sup>54</sup> and 61<sup>55</sup> of the African Charter are not able to survive and thrive unless such customary governance systems are legally recognised and custodians are supported in their roles as keepers of traditional values and practices. Africa should actively encourage and enable custodian communities to practice their ancestral rituals and ceremonies at these sacred places within their lands and territories where their stories of origin are affirmed, and where the ancestral ways are honoured. Where such traditional legal practices have not been stamped out by centuries of colonialism, the *a priori* legal systems maintained by such customary governance systems should be encouraged, recognised and protected as part of Africa's commitment to enable its peoples to reaffirm their original customs and values. The African Commission's recognition of customary governance systems, which protect the spiritual relationship of communities with their ancestral lands, is a strong foundation for African states to build on.

50 Statement of Custodians of Sacred natural sites and territories, IUCN World Conservation Congress 2008, available at: <http://www.sacredland.org/media/Custodians-Statement-WCC-Barcelona.pdf>

51 Statement on the Recognition and Protection of Sacred natural sites and territories and Customary Governance Systems in Africa (2015)

52 Available at: <https://www.grain.org/article/entries/4929-hungry-for-land-small-farmers-feed-the-world-with-less-than-a-quarter-of-all-farmland>

53 Article 17. The right to cultural life.

54 Article 18. The right to custodianship of traditional community values.

55 Article 61. The right to respect of customary laws.

### 3. CONCLUSION

This report carries a simple but weighty message, flowing from the African Charter's unequivocal and core vision to eradicate the vestiges of colonialism from the continent. This vision, as recorded in the preamble and present throughout the Charter, emphasises the virtues and the dignity of original African traditions, and leads to the important implication that they should be restored to their rightful status and allowed to flourish within modern states.

Africa is a plural legal continent, the fact of which should enable and encourage countries to recognise and respect the a priori customary governance systems of its peoples. The Endorois and Ogiek cases emphasis the important judicial precedents that have already been set in this regard. The jurisprudence of the African Charter is and should remain dynamic, responding as it does to the evolving needs and principles both of international law as well as of member African states.

Whilst ancestral lands have been long recognised as the foundations of the indigenous cultures and values that the African Charter holds important, this report has made explicit the importance of sacred natural sites that are embedded in ancestral lands. They are shown to be at the epicentre of the indigenous cultures, identity, meaning, legitimacy, obligations, laws, customs and values of Africa, the survival of which need to be assured for the protection of human rights of current and future generations.

The statement of the African custodian communities describes their central roles and functions with regard to the customary laws and values that they preserve, and explains how their sacred natural sites and territories are essential foundations to this task. In emphasising the threats faced by their sacred natural sites and territories, the custodian communities conclude with a Call to Action which is addressed both to the African Commission, as well as to their own governments, to take cognisance of their cause and to act upon their request for legal recognition.

In support of their statement, this report explains how in plural legal systems the recognition of original or *a priori* legal frameworks should be an essential dimension of the governance of modern states. It concludes by emphasising the Call to Action requesting a series of crucial responses - directed firstly to the Honourable members of the African Commission, and secondly to all governments in Africa.



*“Indigenous communities in Kenya, like most others in Africa, often rely on their African customary law. However, Kenya’s legal framework subjugates African customary law to written laws. [...] African customary law is placed at the bottom of the applicable laws.*

*This is unfortunate given the wide cross-section of people who still rely on African customary law as a source of law, particularly indigenous communities.*

*Indeed, the fact that most indigenous communities rely on their traditions and customs to seek recognition and protection of their human and peoples’ rights and its relegation to the lowest echelons in the hierarchy of applicable law means that most of these communities have to labour for recognition of their fundamental human rights. ”*

(ACHPR, Report of the Country Visit of the Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya, 1-19 March 2010)



## ANNEXURES

The following annexures are aimed at being persuasive and supportive of the Call to Action made by this report. They provide a brief history of the origins in Africa of reviving and asserting legal recognition for sacred natural sites and territories, and their customary governance systems, and a summary of the tangible precedents set in five different countries. Three case studies provide glimpses of sacred natural sites in Ethiopia, Benin and Kenya, and actions at the local level by custodian communities and their allies. A list of international developments and legal instruments, is followed by relevant extracts from statements by the African Commission.

## Annexure 1.

# Charting the Revival and Recognition of Sacred Natural Sites and Territories, and Customary Governance Systems, across Africa and Internationally

For more than 40 years, the protection of sacred natural sites has been supported by international instruments and initiatives, such as the Man and the Biosphere Programme (1970), the Ramsar Convention on Wetlands (1971), the World Heritage Convention (1972), the Convention on Biological Diversity (1992), and the Convention for the Safeguarding of Intangible Cultural Heritage (2003). **Annexure 3 provides a detailed list of laws and policies recognising sacred natural sites and territories.**

There is also broad acknowledgement of indigenous and traditional communities as custodians responsible for governing and protecting sacred natural sites and territories, with customary laws to regulate the care and guardianship they provide. The right to customary governance systems is enshrined in the African Charter on Human and Peoples' Rights (1982), and the right of traditional custodians to protect cultural sites and ancestral territories is similarly enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (2007).

**This growing level of international recognition for sacred natural sites has escalated since the early 2000s, acknowledging their role in the conservation of biological and cultural diversity, their contribution to community cohesion, to the connectivity of socio-ecological systems, and to climate change resilience.** Resolutions and recommendations of the International Union for the Conservation of Nature (IUCN), the world's largest global environmental organisation, reflect how the protection of sacred natural sites, the rights of traditional custodians, and governance by indigenous peoples and local communities, are now embedded in the global conservation movement. Other international fora, such as the CBD COP (Conference of the Parties to the Convention on Biological Diversity) and World Wilderness Congresses, have embraced this message and highlighted both the vulnerability of sacred natural sites and their important role in enhancing biodiversity.

There is also a growing call from communities, civil society networks and policy makers for establishing limits to industrial activities. The rate and scale of expansion of mining, extraction and other industrial activities is reaching into all forms of *de facto* legally recognized protected areas, including World Heritage Sites, sacred natural sites and territories, and fragile ecosystems – resulting in increasing dispossession and displacement of indigenous and local communities. Demands for no-go areas, which are off-limits for extractive industries and any form of development, were echoed in the IUCN Promise of Sydney (2014), which recommended "*appropriate laws, policies and programmes... to create No-Go areas within World Heritage Sites, Sacred Natural Sites and Territories and in other sites where Indigenous Peoples and local communities are conserving lands and resources, particularly from mining and other extractive and destructive industries*".

## Africa's growing revival and recognition of sacred natural sites and territories, and customary governance systems

As mentioned in this report, Africa has not been dormant amidst the rapidly evolving body of international law, as is evidenced by the jurisprudence emerging under the auspices of the African Union. There is also a growing movement of custodian communities, supported by civil society organisations, who are working directly to revive their sacred natural sites and secure legal protection – as outlined here and in Annexure 2.

For more than a decade, a group of African civil society organisations, supported by The Gaia Foundation (UK), has been exploring a different development path for the continent. The Gaia Foundation has facilitated experiential learning processes to reconnect African leaders to their rich bio-cultural heritage of ecological and spiritual knowledge; and worked with a partner organisation Gaia Amazonas, in Colombia, South America, to organise learning journeys for African leaders to experience the thinking and the work of indigenous people in the Amazon forest. More than 100 young African change-makers and community leaders have benefitted from these transformative experiences. Some have established local organisations working with indigenous communities to revive bio-cultural knowledge and practices, to restore sacred natural sites, seed and food sovereignty, and to strengthen customary governance systems. Together, they are building a network, advocating for systemic change.

The process of accompanying communities to revive their traditional knowledge, practices and customary governance systems, includes participatory and inter-generational activities, community dialogues, and practical exercises in developing eco-cultural maps and calendars. One of the goals is to secure legal recognition at multiple levels for sacred natural sites and territories. By strengthening traditional values and laws, which govern communities, they are able to make informed decisions about their cultural and social development priorities, and exercise their rights and responsibilities. These are the building blocks for rebuilding family and community cohesion, viable livelihood options, and restoring their relationship with their ancestral lands. The process enhances resilience in the face of climate change, biodiversity loss, and other challenges.

This work is currently taking place in Ethiopia, Kenya, Uganda, South Africa, Ghana and Benin, with similar initiatives at an earlier stage of development in other countries such as Zimbabwe. Communities in all countries are at various stages of securing the revival and recognition of their sacred natural sites and associated customary governance systems. **Together, they are developing precedents that contribute to building a body of African jurisprudence, which can guide the interpretation of the African Charter to recognise sacred natural sites and customary governance systems, as part of Africa's plural legal system.**

Some of these custodian communities have been involved in developing the statement that forms the core of this call to the African Commission (see p.9); others have been enabled to share their stories, gain visibility and support for their local actions to revive and protect sacred natural sites, and have helped to shape a number of international resolutions and recommendations, such as: IUCN Resolution 4.038 on Recognition and Conservation of SNS in protected areas (2008); IUCN Statement of Custodians of Sacred Natural Sites and Territories (Barcelona 2008); IUCN Recommendation 147 on Sacred Natural Sites- Support for Custodian Protocols and Customary Laws in the face of global threats and challenges (Jeju 2012); World Wilderness Congress Resolutions 11 and 12, recognising networks of sacred natural sites and territories, and asserting no-go areas for mining, respectively (WILD10, 2013); IUCN World Parks Congress - Promise of Sydney and Recommendations calling for the recognition of protected areas as no-go areas for mining and other destructive activities (2014).

To follow is a summary of tangible precedents of reviving and asserting legal recognition for sacred natural sites and territories, and their customary governance systems, in five countries.

Annexure 2 provides more detail with case studies from Benin, Ethiopia and Kenya.

Ethiopia	With support from MELCA-Ethiopia communities in four distinct areas of Ethiopia – in Sheka zone, Southern Nations Nationalities and Peoples Region; in Bale and Suba-Sebeta, Oromia region; and in Majang zone of Gambella region – are restoring and protecting indigenous sacred forests and cultural practices. They have been mapping their sacred natural sites and territories, and formed an alliance to protect sacred forests that are under threat from commercial agriculture. Their actions are contributing both to the development of local governance plans, and to negotiations with the Ethiopian Government for the legal recognition of sacred natural sites. In Sheka, a UNESCO Man and Biosphere Reserve was established in 2012, which recognises local communities' participation in the governance and protection of ecosystems, and prohibits commercial activities in the core zone of sacred and cultural forests and wetlands. Whereas communities in Bale have secured local government recognition of their customary laws, and the physical demarcation of 23 sacred natural sites as no-go areas for commercial projects.
Benin	Local communities in Ouémé department, in the south of Benin, have been reviving their cultural practices and customary governance systems, with the support of GRABE-Benin. Nine sacred forests have been registered and legally recognised in the communes of Avrankou, Adjarra and Adjohoun, as local protected areas, and the communities have formed local governance committees to protect the forests. These efforts form part of wider process whereby local communities and GRABE-Benin successfully advocated for the Benin government to pass a national Sacred Forest law (Interministerial Order No.0121, 2012). The law provides for the legal recognition of sacred forests as protected areas, and the recognition of communities as the custodians who govern and protect them, with responsibility for implementing forest management plans. It is a first in national legislation recognising sacred natural sites and territories in Africa.

South Africa	<p>Over the last five years, indigenous communities in Venda, Limpopo Province, have been working to document their traditional knowledge, practices and customary governance systems, and to seek legal recognition for a network of sacred natural sites. With support from the Mupo Foundation they are fighting to protect sacred sites and forests from the threats of tourism and the extractive industry. In 2010, an alliance of custodian communities, Dzomo la Mupo, secured a High Court interdict to stop tourism development from destroying a sacred waterfall. The court held that the tourism development violated the Ramunangi clan's constitutional cultural and spiritual rights, and breached planning regulations. The presiding judge of Limpopo High Court deemed that the waterfall is sacred in the same way a church building is regarded as a holy place, although subsequent contempt of court proceedings mean that a permanent protection for the waterfall has yet to be established. Meanwhile, in 2012, three custodian communities (clans) submitted applications for registration and legal recognition of their sacred natural sites under national heritage legislation, as no-go areas for any form of industrial development. Registration would also imply formal recognition of their customary governance systems. While discussions continue with South Africa's Heritage Resources Agency, the Venda process sets an exciting new precedent, and was featured in the joint UNEP-WCMC/UNDP publication (2013) "A toolkit to support conservation by indigenous peoples and local communities".</p>
Kenya	<p>Five custodian communities (clans) in Tharaka district have been engaged in a process of reviving and documenting their cultural practices and customary governance systems. Accompanied by the African Biodiversity Network (ABN), the Institute for Culture and Ecology (ICE) and Society for Alternative Learning and Transformation (SALT), they are working with National Museums of Kenya, to register for the legal recognition of Kathita River as a sacred natural site, protecting it from commercial development and other threats. The shared vision of communities in Tharaka builds on the successful advocacy work by these civil society organisations for the recognition of community lands, cultural practices, self-governance and the customary laws of minority and indigenous communities, within the new Kenyan Constitution and national legislation such as the Community Land Bill. A published report by ABN outlines opportunities within Kenya's legal framework for the recognition of sacred natural sites.</p>
Uganda	<p>Communities in Hoima and Bullisa districts of Bunyoro region, Uganda, are reviving their traditional practices and customary governance systems for the protection of sacred natural sites around Lake Albert. Accompanied by the National Association for Professional Environmentalists (NAPE), these communities are defending their ancestral lands from mining, commercial fishing, a game reserve and other activities which directly impact on and restrict access to the sacred sites, undermining their cultural and spiritual practices. A published report, by NAPE, on opportunities within Uganda's legal framework for the recognition of sacred natural sites also calls for their declaration as no-go areas for mining and other commercial projects. Work is underway to develop a legal precedent that will secure recognition of the rights of local custodian communities to govern and protect Lake Albert as a sacred lake. This would be another first in Africa, affording legal protection to an ecosystem based upon recognition of the customary governance systems of local communities.</p>

## Annexure 2.

# African Case Studies: Securing Legal Protection for Sacred Natural Sites

## 2.1 Legal Recognition of Sacred Natural Sites and Territories in Benin

Benin is home to a network of sacred natural sites, including forests, rivers and other water sources. According to a survey in 1999, a total of 2,940 sacred forests and sites were documented for a total surface area of 18,360 hectares (approximately 0.2 % of the country's area).<sup>56</sup>

Sacred natural sites are known in the local language as *Vodun zun*, meaning home of spirituality or house of *Vodun* (Benin traditional belief). Sacred forests are referred to as *Zun clan do vo* and *Oro-zun* meaning sacred forest of the god *Oro*. They are vital for the cultural and spiritual practices of the local communities; they are respected as the home of deities, and are places where communities perform traditional practices and rituals to protect the spirits. They are central to the traditional knowledge, cultural and spiritual/religious identity, and customary governance systems of the indigenous and local communities, who have been protecting these places for centuries in accordance with their customary laws. In addition to their cultural and spiritual value, Benin's sacred natural sites are important for the conservation of biodiversity, offering a refuge in the landscape for many species, such as pollinating insects, birds, pythons, tortoises, and medicinal plants. These species are integral to the health and functioning of the surrounding ecosystems, including the protection of water sources, the carbon cycle and reduction of soil erosion. Sacred forests also function as in-situ nurseries and gene pools, including for endangered species.

Current threats to sacred natural sites in Benin include deforestation for firewood and energy, unsustainable farming practices, increasing socio-economic pressures from urbanisation and population growth, and climate change. Biodiversity loss accounts for the disappearance of approximately 38% of medicinal plant species in Benin's sacred forests,<sup>57</sup> whilst mining and extractive activities continue to pose a real threat. Modern religions tend to demonise and erode traditional cultures and spiritual practices, which further undermines the protection of sacred forests in Benin.

### CUSTOMARY GOVERNANCE SYSTEMS

Custodian communities (clans) of sacred natural sites in southern Benin are known as the *Tolinou Houayénou*. In Avrankou, the *Tolinou Houayénou* has seven clans, with many families in each clan, each under the direction of the clan leader known as *Houédoutô*, and king known as *Aholou*. Women, especially knowledgeable elders, are responsible for the family and community prayers for the sacred natural sites, as well as for certain initiations in the family and the education of young women. They are called *Tangninon*, or mother or aunts of the family. Each clan or family has a sacred site, which constitutes a place of individual and collective prayer, which they protect through their customary laws.

The customary laws, or laws of origin, which protect Benin's sacred natural sites have existed since time immemorial, transmitted by the ancestors and passed on from generation to generation. These customary laws are respected as originating from the Earth and are aligned with the Earth's natural processes and cycles. The Earth God is known as *Le Sakpata*.

Customary laws include the prohibition of hunting, killing or eating of animals and plants, especially those respected as totems, within sacred natural sites. In addition, the cutting down of trees and destructive forms of development are prohibited. Access is prohibited for the uninitiated unless authorised by the custodians. The custodians are responsible for enforcing customary laws, and special permission may be given for the harvesting of medicinal plants for health care.

*"In the beginning there was Nature; culture and indigenous knowledge come from Nature. Nature cannot be protected in a sustainable way without the culture of that place. The erosion of culture leads to the destruction of Nature. It is critical to conserve the culture and knowledge of our ancestors for good ecological governance in service of Nature". (Oussou Lio Appolinaire, GRABE-Benin)*

<sup>56</sup> See study by Sokpon and Agbo, 1999 cited on <http://satoyama-initiative.org/en/benins-experience-in-the-management-of-sacred-forests-for-biodiversity-conservation/>.

<sup>57</sup> Research (unpublished) by Oussou Lio Appolinaire (GRABE-Benin), 2012.

## LEGAL RECOGNITION FOR SACRED NATURAL SITES AND CUSTOMARY GOVERNANCE SYSTEMS

The importance of Benin's ecosystems are acknowledged in the designation of UNESCO Biosphere Reserves and pending World Heritage sites, and many wetlands are recognised under the Ramsar Convention.

In 2012, Benin set a new precedent in Africa with a national law (Interministerial Order No.0121) for the preservation of sacred forests within the framework of its national system of protected areas. The law is grounded on the importance of sacred forests for biodiversity and ethno-cultural heritage. It recognises sacred forests and sites where gods, spirits and ancestors reside, and provides for the sustainable management, legal recognition, and integration of sacred forests as protected areas. The law also recognises that communities protect and govern sacred forests, and have a responsibility for implementing the 'management' plan for the forest.

The customary governance systems of communities are recognised by the Benin Constitution, and the country holds a national annual celebration, on 10th January, of traditional religions and cultural diversity. Despite constitutional recognition, however, there remains a need to further strengthen the respect and protection of the rights of communities, particularly to their spiritual relationship with their sacred lands.

### LOCAL ACTIONS TO PROTECT SACRED NATURAL SITES

GRABE-Benin contributed to the drafting of the national law on sacred forests, and subsequently followed-up by supporting local communities to lobby for its implementation at the local level.<sup>58</sup> Since 2013 communities in three regions - Avrankou, Adjarra and Adjohoun communes - have been working with GRABE-Benin to apply for registration and legal recognition of their sacred forests as protected areas, as well as recognition of the communities' rights to govern and protect them.

The process has involved working with elders in the communities, to revive and document traditional knowledge and customary laws of the sacred forests, and the use of community dialogues and mapping. Paralegal workshops, a legal report, and translation of the national Sacred Forest law and relevant municipal legislation into local languages (and into English),<sup>59</sup> have assisted the public in general to gain a better understanding, and local communities to feel more confident in asserting their rights and responsibilities to govern and protect their sacred forests and sites. Space was opened for dialogues between authorities and communities, for greater awareness of community rights and respect for traditional values.

Once the communities felt ready to share their knowledge publicly, they developed and submitted written applications for registration of their sacred natural sites to the government authorities of their respective communes. Their applications include information on the cultural, spiritual and ecological importance of the sacred forests and delimitation of the boundaries. Public consultation took place to clarify the community and other stakeholders' rights to the sacred forests. By late 2013, nine sacred forests (approximately 123 ha coverage) were legally recognised as part of the local protected area system - Latchè, Kogbomè and Wamon sacred forests in the Avrankou commune; Koun-Kountété, Anagodomè and Lindja sacred forests in the Adjarra commune; and Kpinkonzoun, Togboavazoun and Gogbozoun forests in the Adjohoun commune.

Local committees have been established, with training provided by GRABE-Benin on their rights and duties in the protection and recognition of these sacred forests. They are also working to upgrade the designation to national protected areas.

The communities began holding inter-generational dialogues and exchanges, documenting their traditional knowledge, and have collectively drawn ecological maps and calendars of the present threats to the sacred forests. The process has included recording their 'stories of origin' of how the custodian communities and sacred natural sites came to exist, and reviving customary governance systems such as the prohibition of killing or eating animals and plants which are respected as totems, and restricting access by uninitiated people to sacred forests. Along with the replanting of the forests and reintroduction of native wildlife, enforcement of these traditional practices is already deterring destruction of ecosystems from unsustainable practices and external threats of development.

58 GRABE-Benin entered into a formal agreement with the National Project, PIFSAP (Integration of Sacred Forests in the System of Protected Areas Project), which facilitated the making of the Interministerial Orders.

59 Available at: [http://www.gaiafoundation.org/sites/default/files/documents/Benin%20Sacred%20Forest%20law%20final%20English%20version%202014\\_0.pdf](http://www.gaiafoundation.org/sites/default/files/documents/Benin%20Sacred%20Forest%20law%20final%20English%20version%202014_0.pdf).

## 2.2 Legal Recognition of Sacred Natural Sites and Territories in Sheka, Ethiopia

In Ethiopia, sacred natural sites are respected as sources of life, water, cultural and spiritual values and tradition, identity, wisdom, community cohesion and livelihoods. They include forests, trees, water bodies such as rivers (known as *melca* in the local language), caves, rocks, hills, burial places or any other natural ecosystems defined and respected as such by the community. They are critical places where the custodian community gathers and conducts ritual and seasonal ceremonies for the health and wellbeing of the ecosystem and communities, as well as to address social problems such as disputes and illness in the community. Surrounding areas are often the source of livelihood for the communities, including traditional beekeeping, spice production and ecologically sustainable agriculture.

Sheka forest, in southern Ethiopia, endowed with the remnants of afro-montane wet natural forests, is home to endemic and endangered species of plants, birds and mammals, and plays an important role in the protection of watersheds of local and international significance. There are more than 200 sacred natural sites, which include *gudos* (sacred rocks, caves or hills covered by dense forest), *dedos* (a type of a large sacred tree surrounded by other smaller trees), *bashos* (sacred places near rivers in the forest) and *chechos* (wet lands).

Despite their invaluable importance for the spiritual connection of the community with the environment, their cultural identity and the wellbeing of the ecosystem, sacred natural sites and territories are seriously threatened across Ethiopia. In Sheka the main threat is posed by the expansion of large-scale commercial agricultural investments that transform the forest lands into tea or coffee plantations. Religious beliefs, as in other many countries, can undermine sacred natural sites and customary governance; as can modern education, which instils materialism and a disregard for spiritual values.

### CUSTOMARY GOVERNANCE SYSTEMS

Custodianship of sacred natural sites and territories is generally a role that is transferred from generation to generation through family lines. Usually, if a person is a custodian, his first-born son will become the successor of custodianship. Where it is a village or community that is responsible for a sacred natural site, there is always one chief custodian and other elders who act as co-custodians or companions.

The Shekacho people, in Sheka, have protected sacred natural sites for time immemorial through their customary governance system, which recognizes the sites as no-go areas except for spiritual and cultural purposes. Such customs have been passed over generations through oral communication and traditional practices. Their customs and related ritual ceremonies are strongly related to respecting Earth's laws. Every creature and being in a sacred natural site is respected and protected, and no one is allowed to cut a tree or kill a wild animal.

Sheka forest is divided into two areas – 'cultural forests' and other forest areas, which are governed by different customs. Cultural forests are respected as sacred and contain those areas known as *gudo*, *dedo*, *basho* or *checho*. They are off-limits for any purpose other than ritual ceremonies, conducted seasonally and led by custodians and elders.

Whereas the other forest areas, which tend to be larger and denser, are conserved through the Shekacho's complex traditional governance and land tenure system, called *kobo*, whereby the forest land is sub divided among members of the community for shared responsibility. The holder of a *kobo* governed forest land is allowed to use non-timber forest products, such as collecting honey, wild spices and natural forest coffee as means of income. At the same time the holder is responsible for protecting the forest land under their custodianship from any illegal acts such as logging. Clan leaders are responsible for ensuring these customary governance systems are observed.

### NATIONAL LEGISLATION FOR SACRED NATURAL SITES AND CUSTOMARY GOVERNANCE SYSTEMS

Ethiopia has passed several national laws, and ratified a number of international laws that provide a legislative framework for recognising sacred natural sites and territories, and their customary governance systems. However these laws are not well known or enforced by justice organs, law enforcement bodies and local communities.

### LOCAL ACTIONS TO PROTECT SACRED NATURAL SITES

Recognizing the threats to the Sheka forest, the local communities united to protect their forest, livelihoods, and their sacred natural sites. With assistance from MELCA-Ethiopia, a local non-government organisation, the communities began to revitalise their traditional culture, and to dialogue with local government. The work focussed on raising the awareness of the local community, as well as of local government entities, regarding the threats facing Sheka forest, and the value of conserving it for the existing and next generations, rather than giving up the valuable forests to investors for monoculture plantations.

The communities engaged in a process of rebuilding their cultural identity and customary governance systems to define their own cultural and social development. Clan leadership, which had been eroded under the Derg regime, began to be restored. Central to the process were community dialogues, intergenerational learning between elders and youth, and participatory 3-dimensional mapping. Community maps revealed over 200 sacred natural sites in the Sheka forest, and revealed the interconnected erosion of culture and the forest.

Awareness raising, law enforcement trainings for authorities, such as the judiciary and police, and evidence-based research,<sup>60</sup> increased the knowledge and confidence of both communities and government entities to assert community rights and responsibilities to protect Sheka forest. Over 50 clan leaders came together to form alliances and legally registered community organisations, to protect the sacred forest and restore the eroded traditional and customary practices. Alliances include the Anderacha *woreda* (district) and Masha *woreda* 'Forest community, Culture and Biodiversity Conservation Associations'.

These participatory approaches laid the groundwork for the community and local government to apply for the registration of Sheka forest as a UNESCO Biosphere Reserve. In 2010 a Management Unit was established to lead the nomination process, including representatives of local communities, MELCA-Ethiopia, the Sheka Zone Administration and government departments such as Trade and Industry, Agriculture, Justice, and the Development Association, and for consultation meetings with local communities and relevant stakeholders. The forest was delineated into three zones of protection (core, buffer and transitional). The core zone is part of the forest entirely reserved for long-term conservation and protected from human interference, except from traditional non-timber uses, collecting wild honey, spices and medicinal plants, spiritual and cultural practices. This is part of the forest wherein most of the sacred natural sites are found. The buffer zone is dedicated to conservation and certain human activities, but does not permit logging, permanent settlements and intensive agriculture such as monoculture plantations. In the transitional zone, traditional livelihoods and development may take place.

In July 2012, UNESCO adopted the nomination<sup>61</sup> and recognised Sheka Forest as a Biosphere Reserve, fulfilling the three required functions of conservation, development and education.<sup>62</sup> The regional government later issued a regulation for the protection of the Sheka forest Biosphere Reserve.

Communities in another region of Ethiopia, in Bale, have also been mobilised to protect their sacred natural sites and territories, with MELCA-Ethiopia providing a facilitatory role, using similar approaches and methodologies as in Sheka. The process of community intergenerational dialogues and eco-cultural mapping revealed the threats to and loss of their sacred natural sites and associated knowledge, traditions and customary governance systems, and reaffirmed the need for an integrated approach to protecting both ecosystems and culture. A space was opened for custodian communities to dialogue with local government, and as a result 23 sacred natural sites, in the Dinsho, Goba and Sinana *woredas* of Bale, have now been demarcated (fenced, for their protection) and certified by the local Land Administration and Environmental Protection (LAEP) offices as no-go areas.<sup>63</sup> Any agricultural expansion or private action in these designated sacred natural sites will be a violation of law, setting an important precedent. Custodians can institute a legal action based on the recognition and regulation of sacred natural sites issued by the local government, also the constitutional provision for their right to develop and pursue their culture and traditional practices.

60 Including publication of 'Forests of Sheka' by MELCA-Ethiopia. Available at: [http://www.melcaethiopia.org/index.php?view=article&catid=9%3Apublications&id=61%3Aforests-of-sheka&format=pdf&option=com\\_content&Itemid=8](http://www.melcaethiopia.org/index.php?view=article&catid=9%3Apublications&id=61%3Aforests-of-sheka&format=pdf&option=com_content&Itemid=8).

61 See <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/africa/ethiopia/sheka-forest/> (last accessed August 2015) and [http://melcaethiopia.org/index.php?option=com\\_content&view=article&id=97:the-sheka-forest-has-become-one-of-the-global-biosphere-reserves&catid=8:news&Itemid=7](http://melcaethiopia.org/index.php?option=com_content&view=article&id=97:the-sheka-forest-has-become-one-of-the-global-biosphere-reserves&catid=8:news&Itemid=7) (last accessed August 2015)

62 MELCA also works with the Ethiopian Civil Society College which encourages students to return to their local community to document their customary governance systems which protect the SNST. (MELCA to clarify relationship with Mellese/Ethiopian College. Any more information?) To reference as a footnote or include in main text?

63 Note the local government at the *woreda* (district) level are in charge of administering land in their territory and as such they can recognize a certain area as SNST and provide due protection. Government organs at this level cannot issue a law or policy.



## 2.3 Recognition of Sacred Natural Sites and Territories in Tharaka, Kenya

The Kathita river, in Tharaka, eastern Kenya, is home to at least 14 sacred natural sites, dotted along the river and in the surrounding area - waterfalls, water springs, forests.

For indigenous communities of Tharaka, the sacred natural sites are known as *Irii*, meaning something that is sacred which should not be touched or disrespected. *Irii* are important spiritual and cultural places where communities connect with their god, the ancestors and territory. They are places where the community pray and offer sacrifices to appease their ancestors and their god whom they call *Mwenenyaga* (meaning the righteous one who is as clean as snow) particularly when misfortune affects the community. *Irii* bring collective peace and cohesiveness with the living, the dead and the yet to be born, and call for accountability to each other and other natural beings.

The sacred natural sites of Kathita river also convey critical ecological information about rains and the farming calendar. One of the sites, called *Kibuka*, is a waterfall and the communities hear the changing sounds of the waterfall as the rains arrive; followed by the waterfall of *Ciamuria*, which also 'speaks' and changes its sound when the rains are coming. A rainbow often connects these two sacred natural sites with a third site, *Ndiairi*, along the Kathita river. This network of sacred natural sites communicates that rains are coming and farmers begin to prepare their land in good time.

Main threats to sacred natural sites in Tharaka include development projects, such as the construction of dams for irrigation and the generation of hydroelectric power. There is also encroachment by commercial farming, and land grabbing for mining.

### CUSTOMARY GOVERNANCE SYSTEMS

The customs, or laws of origin, of the Tharaka people date back to their story of origin, from *Mboa* where they came from. Their relationship with their ancestral lands and all that is connected with the land - sacred natural sites, animals (totems), food and seed systems - is based on a deep connection with nature, within which they belong as part and parcel of the whole. Some of the customs that protect sacred natural sites include the prohibition of grazing animals along the riverbanks, and the prohibition of hunting. These customs are inherent and cannot be negotiated.

Custodians from four Tharaka communities (clans) - *Mbura*, *Kitherini*, *Rurii* and *Gankina* - are responsible for governing and protecting the sacred natural sites along the Kathita river. In each clan there is a sub-clan and a particular family who performs rituals and ceremonies at each sacred natural site, on behalf of the whole clan and community. No one else is allowed to conduct rituals at their sacred natural site, and the sub-clan and family must be pure and righteous, and adhere to specific customs when carrying out their responsibilities.

Women have an important role in governance; they perform cleansing rituals for sacred natural sites, and hold to account anyone who desecrates a site. The wrongdoer may have to produce a goat, for example, as a penalty to appease the ancestors so that the entire community is not punished. The women take their responsibilities seriously, particularly as misfortune in the community often affects them more than men.

### NATIONAL LEGISLATION FOR SACRED NATURAL SITES AND CUSTOMARY GOVERNANCE SYSTEMS

There is no specific law in Kenya that recognises sacred natural sites directly, but there is a body of law that provides for the protection of sacred natural sites through the protection of culture and the environment. The 2010 Kenyan Constitution recognises the right to a clean environment, and the cultural practices, self-governance and customary laws of minority and indigenous communities. It also recognises, for the first time, community land as including ancestral lands. Although the Kenyan government recognises certain customary laws, the challenge has been that where customary law conflicts with the written law, the latter is taken as prevailing. However, if the Community Land Bill is passed then customary land tenure and associated community rights to land will be formally recognised in Kenya.

### LOCAL ACTIONS TO PROTECT SACRED NATURAL SITES

Custodian communities along the Kathita river have formed an alliance called *Kayu ka Muuro wa Kathita* (the voice of Kathita river). Their role is that of watchdog for the sacred natural sites, voicing the plight of the river, and they are working to secure its legal recognition as a sacred river. A coalition of community custodians, particularly of youth and women, has united and

developed a statement of who they are, calling on the government and other stakeholders to support them in their protection of sacred natural sites and legal recognition of Kathita river as sacred.

The communities have been reviving their traditional knowledge and customary governance systems through working with elders and holding community dialogues and exchanges. Developing eco-cultural maps and calendars of the sacred natural sites along the Kathita river have been pivotal in remembering the ancestral wisdom, customs and institutions in Tharaka; in identifying present threats to the sites, communities and livelihoods; and in mapping their future, in which they recuperate the wisdom and the customs of the past, and begin to define their cultural and social development on their own terms.

In 2014 they began a process of documenting customary governance systems for the protection of sacred natural sites, in their local language. They have been developing community governance plans, and produced a short film of their cause. With the assistance of the African Biodiversity Network and a local lawyer, the communities are working to have these customary laws registered and legally recognised by relevant government authorities, such as National Museums of Kenya. They are linking too with other communities - Maasai, Gikuyu, Kamba and Meru - who are also custodians of sacred natural sites and territories, becoming more confident in their community rights and responsibilities, and engaging with the media.

## Annexure 3.

# Legislation and Declarations on Sacred Natural Sites and Territories, and Customary Governance Systems

The following is a compilation of the most significant African and international legislation and declarations which recognise sacred natural sites and territories, and their customary governance systems. There is growing international recognition of sacred natural sites and territories as no-go areas for industrial development, and for the Earth-based customary governance systems of community Custodians.

### AFRICA

**African Convention on the Conservation of Nature and Natural Resources** (1968)<sup>64</sup> – encourages joint action on conservation of nature for present and future generations and recognises cultural values in ecosystem protection.

**Cultural Charter for Africa** (1976)<sup>65</sup> – provides for rehabilitation, restoration, preservation and promotion of African cultural heritage.

**African Charter on Human and People's Rights** (1982)<sup>66</sup> – requires states to promote and protect the collective rights and responsibilities of people including the 'unquestionable and inalienable right to self-determination', practice of customary laws, and to social and cultural development.

**African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources** (2000)<sup>67</sup> – recognises the rights of local communities to their biological 'resources' and knowledge as *a priori* (pre-existing), inalienable (cannot be given away) and imprescriptible (cannot be taken away).

**Charter for African Cultural Renaissance** (2006)<sup>68</sup> – recognises the importance of culture including spiritual value systems and traditions in promoting African identity and good governance, and the protection of tangible and intangible cultural heritage.

64 [http://au.int/en/sites/default/files/AFRICAN\\_CONVENTION\\_CONSERVATION\\_NATURE\\_NATURAL\\_RESOURCES.pdf](http://au.int/en/sites/default/files/AFRICAN_CONVENTION_CONSERVATION_NATURE_NATURAL_RESOURCES.pdf).

65 [http://au.int/en/sites/default/files/CULTURAL\\_CHARTER\\_AFRICA.pdf](http://au.int/en/sites/default/files/CULTURAL_CHARTER_AFRICA.pdf)

66 <http://www.achpr.org/instruments/achpr/>.

67 <http://www.cbd.int/doc/measures/abs/msr-abs-oau-en.pdf>.

68 [http://au.int/en/sites/default/files/CHARTER\\_FOR\\_AFRICAN\\_CULTURAL\\_RENAISSANCE.pdf](http://au.int/en/sites/default/files/CHARTER_FOR_AFRICAN_CULTURAL_RENAISSANCE.pdf).

### INTERNATIONAL

**Universal Declaration of Human Rights** (1948)<sup>69</sup> – recognises the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.

**International Convention on the Elimination of All Forms of Racial Discrimination** (1965)<sup>70</sup> – recognises the right to practice religion without discrimination.

**International Covenant on Civil and Political Rights** (1966)<sup>71</sup> – recognises the right to self-determination and religious freedom.

**International Covenant on Economic, Social and Cultural Rights** (1966)<sup>72</sup> – recognises the right to self-determination, social and cultural development.

**UNESCO's Man and the Biosphere's Programme** (1970)<sup>73</sup> – recognises biosphere reserves including a core zone (no/restricted activities), buffer zone (ecologically compliant activities permitted) and transition zones (for sustainable development).

**Ramsar Convention on Wise Use of Wetlands** (1971)<sup>74</sup> – provides for the conservation and 'wise use' of wetlands, recognising their ecological and cultural importance and the role of sacred natural sites in maintaining wetlands.

**UNESCO World Heritage Convention** (1972)<sup>75</sup> – protects cultural and natural heritage of outstanding value, including natural sites and cultural landscapes formed through the interaction between humans and nature.

**World Charter for Nature** (1982)<sup>76</sup> – recognises the intrinsic value of nature and regulates human activities according to Earth's limits and processes, based on principles of common heritage and the precautionary principle.

**International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries** (1989)<sup>77</sup> – recognises cultural and spiritual importance of lands and territories, community rights including to self-determination and customary governance systems, and requires states to assess the social, spiritual, cultural and environmental impacts of proposed development activities.

69 <http://www.un.org/en/documents/udhr/index.shtml>.

70 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

71 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

72 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

73 <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/man-and-biosphere-programme/about-mab/>.

74 [http://www.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671\\_4000\\_0\\_\\_\\_](http://www.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671_4000_0___).

75 <http://whc.unesco.org/en/conventiontext/>.

76 <http://www.un.org/documents/ga/res/37/a37r007.htm>.

77 [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:P12100_ILO_CODE:C169).

**UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992)**<sup>78</sup> – recognises and protects cultural and religious identity of minority groups.

**Convention on Biological Diversity (1992)**<sup>79</sup> – Article 8(j) requires State Parties to respect and maintain traditional knowledge and practices, which protect biodiversity; and Article 10(c) to protect and encourage customary use of biodiversity in accordance with traditional cultural practices.

**Operational Guidelines for the Implementation of the World Heritage Convention (1992)**<sup>80</sup> – recognises cultural landscapes as a category of World Heritage representing a relationship between humans and nature.

**IUCN Recommendation 2.82: Protection and conservation of biological diversity of protected areas from the negative impacts of mining and exploration (2000)**<sup>81</sup> – states that mining should not take place in IUCN category I–IV Protected Areas.

**The Earth Charter (2000)**<sup>82</sup> – encourages a shared responsibility for the well-being of the human family, the greater community of life, and future generations, and recognises the cultural and spiritual rights of indigenous peoples.

**UNESCO Universal Declaration on Cultural Diversity (2001)**<sup>83</sup> – recognises cultural diversity as a common heritage of humanity.

**UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003)**<sup>84</sup> – recognises and protects intangible cultural heritage, including intergenerational knowledge, oral traditions, practices, rituals and places relating with Nature and the Universe.

**IUCN 5th World Parks Congress Recommendations V.13: Cultural and Spiritual Values of Protected Areas, and V.26: Indigenous Peoples' and Local Communities Conserved Areas and Territories (2003)**<sup>85</sup> – recognises the role of Indigenous Peoples' and Local Communities Conserved Areas and Territories (ICCAs) in conserving ecosystems and recommends their recognition in national and international systems.

**CBD's Akwé: Kon Voluntary Guidelines (2004)**<sup>86</sup> – 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.

**CBD's Programme of Work on Protected Areas (2004)**<sup>87</sup> – calls for greater participation and recognition of indigenous peoples in the governance of protected areas; and **Aichi Target 11 of the Strategic Plan for Biodiversity (2011–2020)** recognises the important role of indigenous and local community conserved and governed areas.

**IUCN 3rd World Conservation Congress Resolution 3.049 Community Conserved Areas (2004)**<sup>88</sup> – recognises these areas as culturally important and governed by indigenous peoples.

**UNESCO Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage (2004)**<sup>89</sup> – promotes integration of tangible and intangible cultural heritage, with participation of indigenous communities.

**UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions (2005)**<sup>90</sup> – protects and promotes the cultural expressions of minority and indigenous people in protecting cultural diversity.

**United Nations Declaration on the Rights of Indigenous Peoples (2007)**<sup>91</sup> – recognises the rights of communities to cultural practice, customary governance systems and self-determination, including their spiritual relationships with, and rights to protect, their religious and cultural sites and ancestral territories.

**IUCN 4th World Conservation Congress Resolution 4.038 Recognition and Conservation of Sacred Natural Sites in Protected Areas;**<sup>92</sup> and **Recommendation 4.136 Biodiversity, protected areas, indigenous people and mining activities (2008)**.<sup>93</sup>

**IUCN and UNESCO Best Practice Protected Area Guidelines No. 16, Sacred Natural Sites: Guidelines for Protected Area Managers (2008)**<sup>94</sup> – recognises sacred natural sites and their integration into protected areas, and the role and rights of custodian communities in the protection and governance of these sites.

**IUCN WCPA Guidelines for Applying Protected Area Management Categories (2008)**<sup>95</sup> – promotes conservation of natural areas for cultural and spiritual purposes, with participation of local communities, and recognises the role of customary systems in defining and governing protected areas.

78 <http://www.ohchr.org/Documents/Publications/GuideMinoritiesDeclarationen.pdf>.

79 <http://www.cbd.int/convention/text/>.

80 <http://whc.unesco.org/archive/opguide12-en.pdf>.

81 [https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC\\_2000\\_REC\\_82\\_EN.pdf](https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2000_REC_82_EN.pdf).

82 <http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html>.

83 [http://portal.unesco.org/en/ev.php-URL\\_ID=13179&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html).

84 <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00006>.

85 <http://cmsdata.iucn.org/downloads/recommendationen.pdf>.

86 <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

87 See: <http://www.cbd.int/protected/pow/learnmore/intro/>.

88 [https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC\\_2004\\_RES\\_49\\_EN.pdf](https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2004_RES_49_EN.pdf).

89 [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=31373&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=31373&URL_DO=DO_TOPIC&URL_SECTION=201.html).

90 <http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/convention-text/>.

91 [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf).

92 <http://sacrednaturalsites.org/wp-content/uploads/2011/09/IUCN-Resolution-4038-Recognition-and-conservation-of-sacred-natural-sites-in-protected-areas.pdf>.

93 See: [https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC\\_2008\\_REC\\_136\\_EN.pdf](https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2008_REC_136_EN.pdf).

94 [http://cmsdata.iucn.org/downloads/pa\\_guidelines\\_016\\_sacred\\_natural\\_sites.pdf](http://cmsdata.iucn.org/downloads/pa_guidelines_016_sacred_natural_sites.pdf).

95 <https://portals.iucn.org/library/efiles/documents/PAPS-016.pdf>.

**IUCN World Conservation Congress Statement of Custodians of Sacred Natural Sites and Territories (2008)**<sup>96</sup> – recognises the whole Earth as sacred, and calls upon governments to recognise rights of indigenous peoples to govern their sacred natural sites and territories according to their own customs.

**World Wilderness Congress (WILD 9) Resolution 36 (2009)**<sup>97</sup> – promotes recognition and conservation of sacred natural sites in protected areas.

**Anchorage Declaration (2009)**<sup>98</sup> – reaffirms the sacred connection between nature and humans, and recognises the collective rights of indigenous peoples, particularly to custodianship, access and restitution of traditional and sacred lands and territories.

**CBD Tkarihwaï:ri Code of Ethical Conduct (2010)**<sup>99</sup> – to ensure respect for the cultural and intellectual heritage of indigenous and local communities.

**Opitsaht Declaration (2010)**<sup>100</sup> – recognises rights to self-determination in accordance with traditional values, practices and beliefs, to access territories; and promotes respect for traditional knowledge and practices in governing sacred sites in accordance with Earth's laws.

**Universal Declaration of the Rights of Mother Earth (2010)**<sup>101</sup> – recognises Mother Earth as a living being with rights to life, existence and to continue her vital cycles and processes free from human disruptions, requiring humans to ensure that their activities contributes to the wellbeing of Mother Earth, now and in the future.

**IUCN Whakatane Mechanism (2011)**<sup>102</sup> – encourages assessments of the impacts of protected area designation on indigenous peoples, including on their rights to land, self-governance, free prior and informed consent, and culture.

**IUCN 5th World Parks Congress Recommendation 147 Sacred Natural Sites (2012)**<sup>103</sup> – calls for support for custodian protocols and customary laws in the face of global threats and challenges.

**Statement on Common African Customary Laws for the Protection of Sacred Natural Sites (2012)**<sup>104</sup> – calls for recognition of these places as no-go areas for mining and industrial development, and for recognition of customary governance systems based on Earth's Laws.

**United Nations World Conference on Indigenous Peoples Alta Outcome Document (2013)**<sup>105</sup> – recognises the Earth-centred customary governance systems of indigenous peoples, recommending state recognition of communities' rights to protect sacred places, sites and cultural landscapes.

**World Wilderness Congress (WILD 10) Resolutions 11 and 12 Recognising Networks of Sacred Natural Sites and Territories and the Customary Governance Systems of their Custodian Communities; and 'No-Go Areas' for Mining and other Extractive Industries and destructive activities threatening World Heritage Sites, and Protected Areas, including Indigenous Peoples' and Local Communities Conserved Areas and Territories (ICCAs) and Sacred Natural Sites and Territories (2013)**<sup>106, 107</sup>

**United Nations World Conference on Indigenous Peoples Outcome Document (2014)**<sup>108</sup> – calls for implementation of the UNDRIP for the respect and protection of indigenous peoples' rights, including recognition of religious and cultural sites, and the contribution of indigenous peoples to the conservation of biodiversity.

**IUCN World Parks Congress Promise of Sydney (2014)**<sup>109</sup> – recommends "*appropriate laws, policies and programmes... to create no-go areas within World Heritage Sites, Sacred Natural Sites and Territories and in other sites where Indigenous Peoples and local communities are conserving lands and resources, particularly from mining and other extractive and destructive industries..*"

96 <http://www.sacredland.org/media/Custodians-Statement-WCC-Barcelona.pdf>.

97 See: <http://www.wild.org/blog/resolution-36-recognition-and-conservation-of-sacred-natural-sites-in-protected-areas/>.

98 <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/anchoragedeclarationapr09eng.pdf>.

99 <http://www.cbd.int/decision/cop/?id=12308>.

100 <http://www.naturaljustice.org/images/naturaljustice/opitsaht%20declaration-final.pdf>.

101 <http://therightsofnature.org/wp-content/uploads/FINAL-UNIVERSAL-DECLARATION-OF-THE-RIGHTS-OF-MOTHER-EARTH-APRIL-22-2010.pdf>.

102 <http://whakatane-mechanism.org/about-whakatane>.

103 [http://cmsdata.iucn.org/iucn.vm.iway.ch/downloads/resolutions\\_and\\_recommendations\\_2012.pdf](http://cmsdata.iucn.org/iucn.vm.iway.ch/downloads/resolutions_and_recommendations_2012.pdf).

104 [http://www.gaiafoundation.org/sites/default/files/documents/Statement%20of%20the%20Common%20African%20Customary%20Laws%20for%20the%20Protection%20of%20Sacred%20Sites%202012\\_0.pdf](http://www.gaiafoundation.org/sites/default/files/documents/Statement%20of%20the%20Common%20African%20Customary%20Laws%20for%20the%20Protection%20of%20Sacred%20Sites%202012_0.pdf).

105 See: [http://www.un.org/esa/socdev/unpfii/documents/wc/AdoptedAlta\\_outcomedoc\\_EN.pdf](http://www.un.org/esa/socdev/unpfii/documents/wc/AdoptedAlta_outcomedoc_EN.pdf).

106 [http://resolutions.wild10.org/wp-content/uploads/2013/10/Final-Resolution11\\_Sacred-Natural-Sites.pdf](http://resolutions.wild10.org/wp-content/uploads/2013/10/Final-Resolution11_Sacred-Natural-Sites.pdf).

107 [http://resolutions.wild10.org/wp-content/uploads/2013/10/res12\\_protected-areas-and-mining\\_final.pdf](http://resolutions.wild10.org/wp-content/uploads/2013/10/res12_protected-areas-and-mining_final.pdf).

108 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/69/L.1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/69/L.1)

109 [http://www.worldparkscongress.org/about/promise\\_of\\_sydney\\_vision.html](http://www.worldparkscongress.org/about/promise_of_sydney_vision.html).

## Annexure 4.

### Statements by the African Commission relating to Sacred Natural Sites and Territories, and Customary Governance Systems

The following quotations highlight some of the statements made by the African Commission, which recognise sacred natural sites and territories, and their customary governance systems.

'For indigenous peoples, land is more than just a means of subsistence. It is the basis of their cultural identity and spiritual and social wellbeing. However, states are increasingly implementing conservation programmes [etc. ...] which leads to the loss of ancestral lands belonging to indigenous peoples.'<sup>110</sup>

'Indigenous people have a special attachment to their ancestral lands. Land in the indigenous knowledge system is not just a material for use but also assumes spiritual proportions with special meaning. Deprivation or dispossession of their ancestral land threatens the very existence of their livelihood and spirituality. It also leads to degradation of the environment upon which indigenous livelihoods depend.'<sup>111</sup>

'To ensure that [...] indigenous populations/communities who are victims of historical land injustices, have independent access to and use of land and the right to reclaim their ancestral rights...'<sup>112</sup> [The right to property] 'protected under this article are rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership.'<sup>113</sup>

'A major and critical commonality is that many pastoralists, hunter-gatherers and other groups who have identified with the indigenous peoples' movement have often been evicted from their land or been denied access to the natural

resources upon which their survival as peoples depends. This dispossession is caused by a number of factors, such as dominant development paradigms favouring settled agriculture over other modes of production such as pastoralism and subsistence hunting/gathering; the establishment of national parks and conservation areas, and large-scale commercial enterprises such as mining, logging, commercial plantations, oil exploration, dam construction etc. This land alienation and dispossession, and dismissal of their customary rights to land and other natural resources, has led to an undermining of the knowledge systems through which the indigenous peoples have sustained life over the centuries and it has led to a negation of their livelihood systems and deprivation of their resources.'<sup>114</sup>

'Indigenous communities[']... spirituality is not recognized and respected.'<sup>115</sup>... 'The relationship between culture as a way of life, spirituality, nature and language is strong in indigenous peoples' knowledge and livelihood systems. [...] An attack on one aspect of this cosmology is an attack on their way of life.'<sup>116</sup>

... 'Respect for culture, spirituality and language constitute fundamental human rights for indigenous communities. That is indeed why international instruments such as UNDRIP gave significant importance to these rights. [Including...] their right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies [etc.]'<sup>117</sup>

'[T]he right to self-determination in its applications to peoples, including indigenous populations/communities, encompasses economic, social and cultural rights, including (but not limited to) the right to recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture.'<sup>118</sup>

'Indigenous communities in Kenya, like most others in Africa, often rely on their African customary law. However, Kenya's legal framework subjugates African customary law to written laws. [...] African customary law is placed at the bottom of the applicable laws. This is unfortunate given the wide cross-section of people who still rely on African customary law as a source of law, particularly indigenous communities. Indeed, the fact that most indigenous communities rely on their traditions and customs to seek recognition and protection of their human and peoples' rights and its relegation to the lowest echelons in the hierarchy of applicable law means that

110 African Commission of Human and Peoples' Rights, Intersession Report of the Working Group on Indigenous Populations/Communities in Africa, (54th Ordinary Session, 2013), para 64.

111 ACHPR, Report of the Country Visit of the Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya 1-19th March 2010, (50th Ordinary Session, 2011) p.48.

112 ACHPR, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, (Nov 2010), p.20.

113 Ibid, p.19.

114 ACHPR and IWIGA, Indigenous People in Africa: The Forgotten People? (Copenhagen: ACHPR / IWIGA, 2006), p.17.

115 ACHPR, Report of the Country Visit of the Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya, 1-19th March 2010, (50th Ordinary Session, 2011), p.17.

116 Ibid, p.64.

117 Ibid, p.65.

118 ACHPR and IWIGA, Indigenous People in Africa: The Forgotten People? (Copenhagen: ACHPR / IWIGA, 2006), p.17.

most of these communities have to labour for recognition of their fundamental human rights.<sup>119</sup>

'Very few African States officially recognise indigenous peoples in their constitutions and domestic laws. The terms used in laws and policies to refer to them are in contradiction with international law.'<sup>120</sup>

'[Recommendation:] Formal rules of procedure and evidence should not be imposed on traditional courts, as the customary procedure is generally compatible with rules of natural justice.'<sup>121</sup>

**276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya**<sup>122</sup>

'A key characteristic for most [indigenous groups] is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon'<sup>123</sup>

'What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.'<sup>124</sup> ... 'The African Commission notes that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture.'<sup>125</sup>

'The alleged violations of the African Charter by the Respondent State are those that go to the heart of indigenous rights – the right to preserve one's identity through

identification with ancestral lands, cultural patterns, social institutions and religious systems.'<sup>126</sup>

[After comparing the instant case with a similar one in Suriname dealt with by the IACtHR] 'The African Commission is of the view that the question of whether certain members of the community may assert certain communal rights on behalf of the group is a question that must be resolved by the Endorois themselves in accordance with their own traditional customs and norms and not by the State. The Endorois cannot be denied a right to juridical personality just because there is a lack of individual identification with the traditions and laws of the Endorois by some members of the community.'<sup>127</sup>

'The African Commission is of the view that the Endorois' forced eviction from their ancestral lands by the Respondent State interfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion.'<sup>128</sup>

'The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.<sup>129</sup>

'The African Commission shares the Respondent State's concern over the difficulty involved; nevertheless, the State still has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law.'<sup>130</sup>

'The jurisprudence under international law bestows the right of ownership rather than mere access. The African Commission notes that if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.'<sup>131</sup>

'In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession

119 ACHPR, Report of the Country Visit of the Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya, 1-19th March 2010, (50th Ordinary Session, 2011), p.56.

120 ACHPR, Intersession Report of the Working Group on Indigenous Populations/Communities in Africa, (52nd Ordinary Session, 2012), para 46.

121 ACPHR, Republic of South Africa: First Periodic Report on the African Charter on Human and Peoples' Rights (38th Ordinary Session, 2005) p.124.

122 The full Communication can be accessed here: [http://www.hrw.org/sites/default/files/related\\_material/2010\\_africa\\_commission\\_ruling\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf).

123 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003), quoted in AC, Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, (Hereafter: The Endorois Case), para 150.

124 Ibid, para 151.

125 Ibid, para 154.

126 Ibid, para 157.

127 Ibid, para 162.

128 Ibid, para 173.

129 Ibid, para 187.

130 Ibid, para 196.

131 Ibid, para 204.

entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.<sup>132</sup>

[Regarding Art 14 right to property – encroachment must be a) in the public interest and b) carried out in accordance with appropriate laws] ‘The ‘public interest’ test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples.<sup>133</sup>

**The Commission quotes with approval the Special Rapporteur of the UN Sub-Commission for the Promotion and Protection of Human Rights:**

‘Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.<sup>134</sup>

‘Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.<sup>135</sup>

[The Commission notes with approval the views of the Human Rights Committee that:] ‘culture manifests itself in many forms, including a particular way of life associated with the

use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>136</sup>

‘The African Commission is of the opinion that the Respondent State has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois, but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction.<sup>137</sup>

132 Ibid, para 209.

133 Ibid, para 212.

134 Nazila Ghanea and Alexandra Xanthaki (2005) (eds). ‘Indigenous Peoples’ Right to Land and Natural Resources’ in Erica-Irene Daes ‘Minorities, Peoples and Self-Determination’, Martinus Nijhoff Publishers, quoted at Para 212 of the Endorois Communication.

135 Ibid, para 241.

136 Human Rights Committee, General Comment 23 (Fiftieth Session, 1994), U.N. Doc. CCPR/C/21Rev.1/Add5, (1994). Para. 7, quoted in Para 243 of the Endorois Communication.

137 Ibid, para 248.



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