Recognising Sacred Natural Sites and Territories in Kenya:

An Analysis of how the Kenyan Constitution, National and International Laws can Support the Recognition of Sacred Natural Sites and their Community Governance Systems

Adam Hussein Adam

Published by: Institute for Culture and Ecology (Kenya),
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Cover photo: Kenya landscape, Kivaa - courtesy of Jess Phillimore

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About the Author

Adam Hussein is a champion of equality rights with special focus on cultural communication, diversity, inclusion and Earth Jurisprudence. He is a Doctoral Student in Transpersonal Psychology at Sofia University in California, and holds a Masters of Art in African Studies from Saint Mary's University of Minnesota. Adam is the current Equality and Citizenship programme coordinator at the Open Society Initiative for Eastern Africa; the chairperson to the board of PORINI (Eco-cultural Environmental group) and an advisory member to the Institute of Social Accountability (TISA). He was commissioned by the Institute for Culture and Ecology (ICE) to write this report with support from the African Biodiversity Network and the Gaia Foundation.

Dedication

This Report is dedicated to Thomas Berry for inspiring us all in the "Great Work" of understanding, developing and practicing Earth Jurisprudence, and to Ng'ang'a Thiong'o, Kariuki Thuku, and Professor Wangari Muta Maathai for their pioneering work in reviving and securing recognition of Earth Jurisprudence in Kenya.

Above all, I salute the resilience of Earth Jurists - all those advocating and living Earth Jurisprudence. You shall forever be in my heart.

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Abbreviations and Acronyms

ABN	African Biodiversity Network
ACHPR	African Charter on Human and Peoples' Rights
CBD	Convention on Biological Diversity
CBO	Community-Based Organisation
CEG	Community Ecological Governance
COP	Conference of Parties
EIA	Environmental Impact Assessment
EJ	Earth Jurisprudence
FPIC	Free Prior and Informed Consent
ICCA	Indigenous and Community Conserved Areas
ILO	International Labour Organisation
IUCN	International Union for the Conservation of Nature
MAB	UNESCO Man and Biosphere Reserve
NGO	Non-Governmental Organisation
NMK	National Museums of Kenya
NEMA	National Environment Management Authority
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation

Glossary of Key Words

Sacred Natural Sites are critical places within ecosystems, such as forests, mountains, rivers and sources of water, which are of ecological, cultural and spiritual importance, and exist as a network embedded within a territory.

Territory refers to the horizontal, vertical and energetic domains rather than political administrative boundaries. 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.

Community Ecological Governance (CEG) is a term developed by the African Biodiversity Network to describe traditional or customary governance systems rooted in the laws of Earth. CEG understands Sacred Natural Sites as places where the laws of Earth can be read, and from which customs, spiritual practices and governance systems are derived to protect the territory as a whole and maintain its order, integrity and wellbeing. Elders play a vital role in upholding the ecological knowledge and customs, practiced over generations, which maintain the wellbeing of Sacred Natural Sites, ecosystems, territories and local communities. CEG continues to contribute to the emerging philosophy and practice known as Earth Jurisprudence or Earth Law.

Earth Jurisprudence or *Earth Law* is a philosophy and practice which recognises Earth as the primary source of law. Human laws and governance systems have been derived from and must comply with Earth's laws which govern life in order to maintain the well-being of the whole Earth Community (plants, animals, ecosystems, Sacred Natural Sites, and all life, including humans). The term Earth Jurisprudence was first proposed by cultural historian Thomas Berry who was inspired by the wisdom of Earth, and of indigenous and local communities who have been living in harmony with Earth for millennia.

Executive Summary

Importance of Sacred Natural Sites and Territories: critical sanctuaries for biodiversity, culture and spirituality

For millennia, indigenous and local communities around the world have upheld the responsibilities of their great-great grandparents and their ancestors as the Custodians of Sacred Natural Sites and Territories. Sacred Natural Sites are critical places within ecosystems, such as forests, mountains, rivers and sources of water, which exist as a network embedded within a territory. Sacred Natural Sites are also of cultural and spiritual importance, as places where the ancestors' spirits of the community reside, and are akin to temples or churches where the Custodians carry out ceremonies and rituals. Elders within the community play a vital role in upholding the ecological knowledge and customs practiced over generations which maintain the well-being of Sacred Natural Sites, ecosystems, territories and local communities. These customary governance systems recognise Sacred Natural Sites and Territories as places where the laws of Earth can be read, and from which customs, spiritual practices and governance systems are derived to protect the territory as a whole. Therefore, Sacred Natural Sites and Territories are at the heart of ecological, spiritual and cultural practices, and governance systems of indigenous and local communities.

Despite their vital importance, Sacred Natural Sites and Territories in Kenya, and across Africa, are faced with increasing threats of destruction from economic and other developments which have also eroded the customary governance systems of their custodial communities. The failure to respect ecosystems, and the Sacred Natural Sites within them, has a direct impact on the lives and well-being of communities of present and future generations of all life.

This Report examines whether the Constitution of Kenya 2010 and the legal, policy and institutional framework in Kenya recognises and supports, or undermines, the rights and responsibilities of communities to govern and protect their Sacred Natural Sites and Territories, according to their customary governance systems and on their own terms.

Burguret River, Nanyuki, which flows from sacred Mt Kenya - photo by Jess Phillimore

Findings

Inadequate recognition of communities' customary governance systems of Sacred Natural Sites and Territories.

Certain national laws, for example the National Museums and Heritage Act 2006, Forests Act 2005, the Forests (Participation in Sustainable Forest Management) Rules 2009, the Environmental Management and Coordination Act 1999 and Environmental Management and Co-ordination (CBD) Regulations 2006 recognise and encourage community participation in protecting ecosystems and natural and cultural heritage, including Sacred Natural Sites. However, they do not go as far as recognising and supporting the rights and responsibilities of communities to *govern* and protect their Sacred Natural Sites and Territories *on their own terms*, according to their customary governance systems.

Many laws and policies are discriminatory against communities and, in practice, have been used to undermine customary governance systems of indigenous and local communities. Until recently, the majority of national laws and policies failed to recognise community land and customary land tenure, culture and spiritual-based approaches to protecting ecosystems. Further, the rights of communities to Free Prior and Informed Consent (FPIC)) – to be informed prior to potentially destructive activities to their lands, Sacred Natural Sites and Territories, and to give or withhold consent (say "no") - have not been respected. The trust land tenure system has allowed State institutions to monopolise the governance system and facilitate individualised and misuse of land for consumptive purposes. Further, the prevailing approach of these and other institutions has not been to involve communities in decision-making; where participation has been encouraged it has often been imposed and controlled. The rights and responsibilities of communities to self-governance of their Sacred Natural Sites and Territories have not been recognised and protected.

Human-centred and reductionist legal and policy frameworks.

The need to protect Sacred Natural Sites and Territories goes deeper than legal and policy frameworks, to a question of ethics. Generally laws and policies have been founded on an erroneous belief that Earth is just a 'resource' to be exploited and traded. By contrast indigenous and local communities recognise Earth as a living Being and as our life support system, and have derived customary governance systems to comply with Earth's laws. This wisdom and practice has inspired an emerging philosophy known as Earth Jurisprudence or Earth Law, which recognises Earth as the primary source of law. Human laws and governance systems are derived from and must comply with Earth's laws which govern life in order to maintain the well-being of the whole Earth Community (plants, animals, ecosystems, Sacred Natural Sites, and all life, including humans). This is recognised by indigenous and local governance systems across the planet. The African Biodiversity Network and its partners have been supporting communities to revive their Earth Jurisprudence practices, which they have termed "*Community Ecological Governance*" over the last 10 years.

While some laws do recognise the need to protect natural heritage and certain elements of Earth, such as forests and rivers, very few take an 'ecosystem' and holistic approach. Recognition of the need for protection is primarily for the benefit of humans rather than as a moral obligation to the whole Earth Community and future generations. Many laws fail to prevent destruction of Kenya's ecosystems and communities from growing exploitative threats, such as mining and tourism, and are complicit in undermining communities' responsibilities to protect their Sacred Natural Sites and Territories. Urgent change is needed to ensure the protection of Kenya's ecosystems and the lives, livelihoods and well-being of present and future generations.

Voluminous, complex and contradictory legal and policy frameworks.

Laws and policies in Kenya concerning Sacred Natural Sites and Territories are many, voluminous and complicated. In particular those pertaining to land contain a variety of contradictory provisions, some of which recognise, and others of which undermine, community rights and responsibilities to govern and protect their Sacred Natural Sites and Territories. Land administration has also been highly centralised, inefficient and often lacking in transparency.

Opportunities for legal recognition of Sacred Natural Sites and the customary governance systems of their custodial communities.

The Constitution of Kenya 2010 marks a pivotal shift and significantly alters Kenya's socio-cultural, political, legal and economic spheres. The previous lack of recognition of indigenous and local communities as legal entities with their own customary governance systems has now changed. The Constitution now explicitly recognises indigenous peoples as part of minority and marginalised communities, and acknowledges and supports community self-governance and their cultural norms. It requires the Government to involve communities in conserving and 'managing' lands and ecosystems. Cultural heritage, a right to a "*clean and healthy environment*" and duties for protecting the environment are also recognised and enshrined.

The Constitution embodies a just concept of land tenure by recognising community land and community land title, stating that "*all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals*" and that "*community land*", which includes ancestral lands, "*shall vest in and be held by communities*". It opens space for deeper discussion and recognition of communities' rights and customary governance systems.

Recent land reform, particularly through the Environment and Land Court Act 2011, the Land Act 2012, the Land Registration Act 2012, and the National Land Commission Act 2012, could be used to strengthen the recognition and support for Sacred Natural Sites and the customary governance systems of their custodial communities. They enshrine principles of community participation and respect for customary and cultural practices in the protection of land. These laws also promote a more equitable, transparent, rationalised and coherent legal framework for the governance of land, which can contribute to resolving historical land injustices. Implementation of the Constitutional provision for a Community Land Act is eagerly awaited, at the time of writing this Report, in order to address critical issues, including clarity and recognition of community land tenure, title and rights, and customary governance systems on their own terms, including the Earth Jurisprudence principles underpinning them.

There are opportunities for communities and civil society to participate in the ongoing legal reform process in Kenya, including in the interpretation and implementation of the Constitution and drafting of new laws and policies to comply with the Constitution. Government and all bodies should listen to the growing voices of custodial communities of Sacred Natural Sites who are asserting their rights and responsibilities to govern their Sacred Natural Sites and Territories according to their customary governance systems.

The Report makes the following recommendations:

Recommendations

For Government:

- Recognise community rights and responsibilities to govern their Sacred Natural Sites and Territories according to their customary governance systems, and on their own terms.
- Enforce the Kenyan Constitution and review existing, and draft new, legislative, policy and institutional frameworks to recognise communities' customary governance systems of Sacred Natural Sites and Territories.
- Enforce international instruments to which Kenya is a party, and ratify other relevant laws.
- Increase public awareness of national, regional and international laws that support the recognition of Sacred Natural Sites and Territories and their community customary governance systems.

For Civil Society:

- Support communities to revive and strengthen their customary governance systems, regenerate their networks of Sacred Natural Sites and Territories and secure legal recognition on their own terms.
- Promote understanding of Sacred Natural Sites and Territories as part of a network, important for biodiversity, ecosystems, culture, spirituality and governance, and as such need to be recognised as No-Go areas for development or any activities which could undermine Sacred Natural Sites and Territories and their governance systems.
- Pursue opportunities to use and enforce existing national legislation to support the recognition of communities' customary governance of Sacred Natural Sites and Territories.
- Advocate for review of and new legislative and policy frameworks to strengthen recognition and support for community customary governance of Sacred Natural Sites and Territories.
- Advocate for the recognition of Earth Jurisprudence / Law principles which underpin customary governance systems of indigenous and local communities.
- Assert international laws when advocating for recognition of community rights and responsibilities to govern and protect Sacred Natural Sites and Territories, and influence negotiations to develop stronger regional and international instruments.

For Communities:

- Reclaim responsibility for reviving and strengthening their customary governance systems to protect Sacred Natural Sites and Territories.
- Assert the principles and laws underpinning their customary governance systems of Sacred Natural Sites and Territories.
- Exercise community rights and responsibilities to govern Sacred Natural Sites and Territories.
- Secure legal recognition of principles, practices, customary laws and governance systems rooted in Earth's laws, and seek to establish precedent-setting cases to contribute to the development of Earth Jurisprudence.
- Nurture new young leadership in Community Ecological Governance with guidance from elders.
- Strengthen and support an alliance of Custodians of Sacred Natural Sites in Kenya and globally.

1. Introduction

"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 ecosystems. We call these places Sacred Natural Sites. Each Sacred Natural Site plays a different role, like the organs in our body. All of life is infused with spirit."[1]

1.1 Meaning of Sacred Natural Sites

Sacred Natural Sites are recognised by all cultures in all parts of the world. Sacred Natural Sites are places of ecological, cultural and spiritual importance. They are natural places which are the source of life and have a special role in nurturing the planet's ecosystems. For example, forests or mountains which are sources of rivers and rain, breeding grounds for certain species, springs and waterfalls which oxygenate water, or salt licks for animals. Sacred Natural Sites exist as a network embedded in ecosystems and territories.

"Sacred Natural Sites are the heartbeat of life."

Tetu Maingi, the Porini Association, Kenya

Sacred Natural Sites embody the interdependent relationship between Earth and human beings. In indigenous[2] and local community cultures, these places are regarded as cross-over points between the physical and the spiritual world: entry points into another consciousness. Sacred Natural Sites are spiritually important as places created by God, or the Creator, and as resting places for the spirits of ancestors. They are places of potent energy, understood by many to be like acupuncture points in the body of Earth, forming energetic networks. "*The sacredness of the Sacred Natural Site reaches deep into the Earth and up into the sky. They are places of worship, like temples.*"[3]

Each Sacred Natural Site has Custodians from the indigenous and local community who have a special responsibility to protect the Sacred Natural Site which they have done for millennia, from generation to generation. They are responsible for the rituals that maintain the health and vitality of the ecosystems, the well-being of local communities, and a respectful relationship between human beings and their territories.

Indigenous and local communities understand Sacred Natural Sites and Territories as their source of law which give them the knowledge and wisdom of how to govern themselves. They have developed Earth-based governance systems with customs, laws and practices to protect their territories and to deter threats of destruction to their Sacred Natural Sites. This has been respected by their ancestors, their great-great-grandparents, over generations.

1 African Biodiversity Network, *Statement of Common African Customary Laws for the Protection of Sacred Natural Sites* (2012), developed at the Sacred Natural Sites Custodian Meeting, Nanyuki, Kenya 28 April 2012, p1. Available at: http://www.africanbiodiversity.org/system/files/images/Statement%20of%20Common%20African%20Customary%20Laws%20for%20the%20Protection%20of%20SNS.pdf (last accessed 24/10/2012).

2 There are several definitions of the term "indigenous". Indigenous includes people, communities, and nations who claim a historical continuity, cultural affinity and sovereignty to their original territories. Practicing unique traditions, indigenous peoples retain their social, cultural, spiritual, governance, economic and political characteristics that are distinct from those of the dominant societies in which they live; see IWIGIA (2010) *The Indigenous World 2010: Report of the International Work Group on Indigenous Peoples*, pp4-5; available at: http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf (last accessed 24/10/2012). Note also ILO Convention 169 which recognises that self-identification is crucial to indigenous peoples; available at: http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm (last accessed 24/10/2012). In Kenya, the people who identify with the indigenous movement are mainly pastoralists and hunter-gatherers as well as other communities committed to reviving these distinct cultural traditions. The Constitution of Kenya now explicitly recognises indigenous communities as part of "*marginalised communities*" (Article 260); see Section 3.3.3 of this Report for further information.

3 African Biodiversity Network, *Statement of Common African Customary Laws for the Protection of Sacred Natural Sites* (2012), p2.

Guiding principles and practices include respect of Sacred Natural Sites as secret, forbidden or 'No-Go' areas for development[4], where disturbance of Sacred Natural Sites, for example the cutting of trees, is prohibited. Only Custodians may enter the Sacred Natural Sites for special reasons, for example to carry out their rituals, in accordance with the law of the Sacred Natural Sites and Territory, and customary[5] governance systems passed down over generations.[6] Such Earth-centred wisdom and customary governance systems have helped to safeguard the existence of Sacred Natural Sites and Territories in Kenya and in other parts of the world, for millennia.

1.2 Earth Jurisprudence

This cosmological understanding and stewardship of Earth are invaluable sources of wisdom to us all, at this time of deep crisis for our Earth. The Earth-based knowledge and customary governance systems of indigenous and local communities have inspired an emerging philosophy and practice known as "*Earth Jurisprudence*". The term Earth Jurisprudence was first proposed by cultural historian Thomas Berry who recognised that Earth is the primary source of law, from which human laws are derived and with which they must comply, for the integrity and well-being of the whole Earth Community and for future generations.

"Earth Jurisprudence is a living culture and puts life into otherwise dry concepts."

Ng'ang'a Thiong'o,
Earth Law advocate,
the Porini Association, Kenya

Thomas Berry understood the Earth Community as a "*communion of subjects, not a collection of objects*."[7] He challenged us to recognise that every member of the Earth Community has inherent rights that include the right to be, the right to habitat and the right to fulfil their role in the evolution of the Earth Community. The "Great Work" ahead is for humans to transform their destructive presence on Earth into a mutually enhancing relationship with Earth and to transform human-centred governance (laws, education, religion and economics) into Earth-Centred governance. Thomas Berry recognised that the two sources of inspiration for Earth Jurisprudence are Earth herself, and indigenous and local communities, who derive their governance systems from Earth's laws.

Over the past 10 years, the African Biodiversity Network (ABN)[8] and partners have been encouraging African communities to revive their traditional ecological knowledge, practices and customary governance systems which are deeply rooted in Earth Jurisprudence. They have developed the term "*Community Ecological Governance*" to describe these indigenous and local governance systems that have been practiced over generations. After much debate, the ABN and other allies agreed to refer to "*Earth Law*" as well as Earth Jurisprudence to increase accessibility to the principles underpinning those systems, and to reflect that Earth is the primary source of law.[9]

4 African Biodiversity Network, *Statement of Common African Customary Laws for the Protection of Sacred Natural Sites* (2012), p3. Note the IUCN Recommendation that mining should not take place in IUCN category I–IV Protected Areas (World Conservation Congress in October 2000). In 2012 an IUCN Motion adopted a presumption against development in Sacred Natural Sites and urged recognition of Custodians of Sacred Natural Sites' right to say 'no'. See IUCN Motion *Sacred Natural Sites -Support for Custodian Protocols and Customary Laws in the face of global threats and challenges*, adopted at the World Conservation Congress in Jeju, Republic of Korea, 6–15 September 2012. Available at: http://www.sacredland.org/iucn-approves-sacred-natural-sites-motion/ (last accessed 24/10/2012).

5 For the purpose of this Report customary includes the knowledge, traditions, practices, laws and institutions evolved and accepted by a community over time. Breach of customs and customary laws may lead to punishment in order to maintain harmonious relationships; see Feiring, Birgitte (2009) *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No.169* (International Labour Standards Department), pp81-82; available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf (last accessed 24/10/2012). For legal recognition of customary law see, for example, the African Charter on Human and Peoples Rights 1981, ILO 169 Convention 1989, and United Nations Declaration on the Rights of Indigenous Peoples 2009.

6 For further examples of prohibited activities in Sacred Natural Sites see African Biodiversity Network, *Statement of Common African Customary Laws for the Protection of Sacred Natural Sites* (2012).

7 See Berry, Thomas (1999) *The Great Work : Our Way into the Future* (New York: Bell Tower).

8 See: http://www.africanbiodiversity.org/ (last accessed 24/10/2012).

9 The term Earth Law emerged in 2009 from discussions at the Earth Jurisprudence International Retreat in Schumacher College, UK, which was co-organised with the Gaia Foundation. Participants, including Custodians of Sacred Natural Sites working with communities to revive Earth Jurisprudence or Earth Law, came together to distil shared principles and practices and co-evolve strategies for the future.

1.3 Recognition of Sacred Natural Sites and their custodial communities internationally and in Kenya

There is growing international recognition of the important role of Sacred Natural Sites in enhancing the resilience of ecosystems, conserving biodiversity and mitigating climate change.[10] There is also a growing recognition that it is the Earth-based knowledge and customary governance systems of indigenous and local communities which have protected Sacred Natural Sites and Territories over millennia. International organisations and governance frameworks such as the International Union for the Conservation of Nature (IUCN), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and the Convention on Biological Diversity (CBD)[11], recognise Sacred Natural Sites as culture-based approaches to protecting Earth and ecosystems, and increasingly recognise the rights and responsibilities of the custodial communities to protect their Sacred Natural Sites according to their customary laws and practices.

In May 2010, the CBD and the United Nations Environmental Programme (UNEP) carried out a major assessment of the current state of biodiversity. They warned that unless urgent action is taken, the natural systems that support life are at risk of collapse. The report drew particular attention to Sacred Natural Sites, noting that indigenous and local communities play a significant role in conserving substantive areas of high biodiversity.[12]

In Kenya, culture-based approaches to protecting ecosystems are also recognised and embodied in the new Constitution of Kenya adopted in 2010. The Kenya Constitution:

- *recognises the rights of people, including marginalised and indigenous peoples, to participate in a cultural life of their choice*[13]*;*
- *places Kenya's land in the hands of her people as a nation, a community and as individuals*[14]*; and*
- *provides for sound conservation and protection of ecologically sensitive areas*[15].

Kenyan partners of the ABN played an important role in the drafting of the Constitution, advocating for recognition of community rights to govern land and territory according to customary laws, culture and Earth Jurisprudence/Law principles. Those involved included Professor Wangari Maathai (Green Belt Movement), Ng'ang'a Thiong'o (Earth Jurisprudence advocate) and Kariuki Thuku (Porini Association, Kenya), with advice and support from Thomas Berry, Carlos Mares de Souza (Professor of Environmental Law and former Culture Secretary of Curitiba), Cormac Cullinan (lawyer from EnAct International, South Africa), Ian Mason (UK barrister) and the Gaia Foundation. While many progressive provisions embedding Earth Law principles were removed from the adopted Constitution, strong provisions on culture and community land remained. Work lies ahead to ensure the Constitution of Kenya 2010 is interpreted in a manner which upholds Earth Law principles underpinning customary governance systems.

10 See for example Community-based Initiative Livestock Initiative Programme (2004) *Ethnoveterinary Practices in Eastern Africa* (Intermediate Technology Development Group Eastern Africa (ITDG-EA)), and UNESCO-MAB (2003) *The Importance of Sacred Natural Sites for Biodiversity Conservation*,- Proceedings of an international workshop held in Kunming and Xishuangbanna Biosphere Reserve, People's Republic of China, 17–20 February 2003. Available at: http://unesdoc.unesco.org/images/0013/001333/133358e.pdf (last accessed 24/10/2012).

11 Note the text negotiated by the CBD Subsidiary Body on Scientific, Technical and Technological Advice mentioned Sacred Natural Sites for the first time, see http://www.cbd.int/doc/meetings/sbstta/sbstta-14/official/sbstta-14-05-en.doc (last accessed 24/10/2012). See Appendix for further international and regional laws supporting the recognition of Sacred Natural Sites and Territories and their custodial communities.

12 Secretariat of the Convention on Biological Diversity (2010) *Global Biodiversity Outlook 3* (Montreal), available at: http://gbo3.cbd.int/ (last accessed 24/10/2012). The Millennium Ecosystem Assessment (2005) *Ecosystems and Human Well-being* (Island Press, Washington) also recognises the cultural and social impacts from the loss of Sacred Natural Sites, available at: http://www.maweb.org/documents/document.356.aspx.pdf (last accessed 24/10/2012).

13 Article 11 (1)(2) of the Constitution of Kenya 2010; available at: http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf (last accessed 24/10/2012).

14 Article 61 of the Constitution of Kenya 2010.

15 Article 69(1) of the Constitution Kenya 2010.

1.4 Threats to Sacred Natural Sites and Territories

Despite these milestones, Sacred Natural Sites and Territories in Kenya and elsewhere in Africa are threatened with irreversible destruction from economic, social, political, religious and legal developments. This has been the trend since colonial times and has sadly persisted after independence. Since the global economic collapse in 2008, threats to Sacred Natural Sites and communal lands have further intensified.

"Every ecosystem is designed to provide for all living in it. We should remember that when we destroy Sacred Natural Sites, they have a way of reclaiming what has been taken away from them. People destroying our forests and Sacred Natural Sites are inspired by their stupidity and not their intelligence."

Munguti Kabibia, The Kamba Community, Kenya

The International Union for Conservation of Nature (IUCN) Resolution 4.038 on the Recognition and Conservation of Sacred Natural Sites in Protected Areas, states that many Sacred Natural Sites are at risk and subject to a wide range of pressures and threats, such as: impacts from the operations of extractive industries (e.g. mining, logging); encroachment by outsiders (e.g. poaching, illegal fishing, vandalism, looting of burial grounds and archaeological sites); poverty and population dynamics (e.g. new settlers, conversion to other faith groups); disrespectful tourism and recreational activities; degradation of neighbouring ecosystems; and climate change (e.g. extreme weather events, sea-level rise, drought, floods and erosion).[16]

Impact from the operations of extractive industries deserves a particular mention, as the scale, expansion and acceleration in mining, oil and gas extraction is staggering. These are major drivers of land grabbing globally, and pose a significant threat to the world's indigenous and local communities, farmers and local food production systems, and especially to precious water, forests, biodiversity, and Sacred Natural Sites on which life depends. The Report: *Opening Pandora's Box: the New Wave of Land Grabbing by the Extractive Industries and the Devastating Impact on Earth*[17] explains that the trend is driven by rising prices of metals, minerals, oil and gas because these more easily accessible sources have been depleted and this has acted as an incentive to explore and 'exploit' new and more pristine territories. This is combined with more sophisticated technologies to extract materials from areas which were previously inaccessible or 'uneconomic'; and a marked acceleration of global investments in extractive industries since the 2008 collapse of financial markets. The underlying stimulus are the thorny issues of consumption, planned obsolescence of products, and unsustainable production processes. According to the United Nations Environment Programme (UNEP) we are looking at a tripling in global annual 'resource' extraction by 2050 – a scenario that the Earth simply cannot sustain.[18]

Tourism is another activity that increasingly targets Sacred Natural Sites. The Convention on Biological Diversity (CBD) Guidelines on Biodiversity and Tourism Development[19] highlights environmental and biodiversity impacts, such as use of land and 'resources', extraction of building materials, erosion, disturbance of wildlife, damage to flora and fauna by tourists and for souvenir production, contamination of land and water, and noise. In addition, the impact of tourists who seek a cultural or religious experience - a comparatively new trend – can be highly disruptive for Sacred Natural Sites and their surroundings, often with no respect or concern for the culture and identity of the custodial communities.

Increased interest by academics and conservationists to research and document Sacred Natural Sites and the related knowledge and practices is an emerging issue. The danger is that the thirst for documenting cultural heritage can lead to researchers scouring places of ecological, cultural and spiritual importance, either oblivious or disrespectful of the sacredness and secrecy of the knowledge and customs related to Sacred Natural Sites.

16 See IUCN (2009) *Resolutions and Recommendations* (Gland, Switzerland), World Conservation Congress Barcelona, Spain, 5-14 October 2008, available at: http://cmsdata.iucn.org/downloads/wcc_4th_005_english.pdf (last accessed 24/10/2012).

17 Sibaud, Philippe (2012) *Opening Pandora's Box: the New Wave of Land Grabbing by the Extractive Industries and the Devastating Impact on Earth*, p8. Available at: http://www.gaiafoundation.org/sites/default/files/documents/Pandorasboxlowres.pdf (last accessed 24/10/2012).

18 Cited in Sibaud, Philippe (2012), p8.

19 Secretariat of the Convention on Biological Diversity (2004) *Guidelines on Biodiversity and Tourism Development: International guidelines for activities related to sustainable tourism development in vulnerable terrestrial, marine and coastal ecosystems and habitats of major importance for biological diversity and protected areas, including fragile riparian and mountain ecosystems* (Montreal: Secretariat of the Convention on Biological Diversity). Available at: http://www.cbd.int/tourism/guidelines.shtml?page=5 (last accessed 24/10/2012).

There is also the threat of exposure of Sacred Natural Sites on maps and a lack of respect for confidentiality of the location, and the custodial communities' knowledge and customary laws, of the Sacred Natural Sites. Bioprospecting[20] and biopiracy[21] are also increasing threats. Indigenous knowledge systems have very different criteria and understanding of what knowledge is, and how it is earned and transmitted, compared to western systems. It needs to be recognised and respected that it is for the custodial communities to decide whether and how to document their knowledge and Sacred Natural Sites on their own terms, as a way of securing their recognition.

In Kenya, economic development such as industrial agriculture, plantations, mining and other forms of land grabbing, are a significant cause of destruction, reducing forest cover and the resilience of biodiversity in Sacred Natural Sites. For example, in the Mau complex forest, natural vegetation has been replaced by commercial crop production. The effect of the destruction of Kenya's forests has led to intense drought and famine which has left millions, many of them children, hungry and dependant on food aid for survival, not only in arid and semi-arid areas but also otherwise fertile areas of the country. Many families have been forced away from their lands to city slums, disconnected from their Sacred Natural Sites and Territories and identity.

Government and dominant religions continue to undermine the cultural and spiritual knowledge and practice of customs which maintain the order and health of Sacred Natural Sites and ecosystems in Kenya. This happens in many ways through policy, law, prejudice, devaluing and ignoring of traditional ecological knowledge and practices in schools, media, agriculture, local government etc. As the younger generation lose respect and interest in their traditions due to western education, so the traditional knowledge about Sacred Natural Sites is also lost before it is transferred to the younger generation. The erosion of traditional knowledge and practices needs to be urgently halted before the elder generation with the living knowledge disappears.

A lack of legal recognition of Sacred Natural Sites and Territories, and the rights and responsibilities of their custodial communities is also threatening the protection of Sacred Natural Sites. There are few laws and policies that recognise and protect community rights to self-determination[22] and to govern their Sacred Natural Sites and Territories according to their Earth-centred knowledge and customary governance systems. Communities who lack security of land tenure are the most vulnerable to destruction. In the current industrial legal system Sacred Natural Sites fall within grey areas of governance; they are often affiliated with 'pseudo'-communities (artificial groups) under customary law but are 'owned' and controlled by State agents. These Sacred Natural Sites have become trust land, which some individuals use for political expedience.[23] Securing recognition of indigenous and local communities' land tenure is vital to enable their customary governance and protection of Sacred Natural Sites and Territories.

Human-centred approaches to law and policy which benefit humans only, for short term economic gain, also undermine the health and integrity of already threatened ecosystems. The protection of Sacred Natural Sites and Territories requires the recognition and implementation of the progressive philosophy of Earth Jurisprudence, which underpins traditional and customary governance systems.

20 Bioprospecting is defined in the Oxford English Dictionary as "*the action or process of searching for living organisms, for plant or animal species from which commercially valuable genetic material, biochemicals, medicinal drugs, etc., can be obtained.*" See: http://www.oed.com/ (last accessed 24/10/2012).

21 Biopiracy is "*the practice of obtaining commercially valuable genetic material, biochemicals, etc., from plant or animal species without fairly rewarding the country or community of origin, esp. by obtaining patents that restrict future use.*" See: http://www.oed.com/ (last accessed 24/10/2012).

22 Note the language of, and right to self-determination is not universally recognised in Kenya. However, the Constitution of Kenya 2010 now recognises the "***self-governance***" of the people and "***right of communities to manage their own affairs and to further their development***" (Article 174); see Section 3.3.3 of this Report for further information. At the international level, the right to self-determination or self-governance is at the heart of indigenous people's struggle worldwide; see (IWIGIA (2010) ***The Indigenous World***). All indigenous people have the right to self-determination to freely pursue their social, religious, cultural and economic development and to participate in decision-making according to their culture and customs. For more information see Charters, Clare and Stephenhagen, Rodolfo (2009) (Eds) ***Making the*** Declaration Work: The United Nations Declaration of Indigenous People (Copenhagen: IWIGIA). Available at: http://www.iwgia.org/iwgia_files_publications_files/making_the_declaration_work.pdf (last accessed 24/10/2012).

23 For further information see Section 3.1 of this Report.

Gathering of African Sacred Natural Sites Custodians, in Nanyuki, Kenya - photo by Jess Phillimore

1.5 Work of the African Biodiversity Network

In response to these challenges, the Institute for Culture and Ecology (ICE)[24] and the African Biodiversity Network (ABN) have been at the forefront in advocating for culture and spiritual -based approaches to protecting Earth, especially Sacred Natural Sites and Territories.

ABN was founded in 2002 and for the last decade has been supporting partners to work with indigenous and local communities to revive their traditional ecological knowledge, practices and governance systems. The partners pioneering this work are in Kenya, Ethiopia, South Africa, Uganda, Benin and are emerging elsewhere.

In 2008 and 2012, the ABN participated in the 4th and 5th IUCN Conservation Congress in Spain and Korea respectively, where it made numerous presentations on the work of its partners and communities to secure recognition of Sacred Natural Sites and Territories and associated customary governance systems. The ABN and allies also contributed to developing the Custodian Statement and IUCN Motion which emerged from these conferences.[25] At the national level, ABN participated in the process of drafting the Constitution of Kenya 2010 and is lobbying for stronger recognition of and support for Sacred Natural Sites, Community Ecological Governance, and Earth Law principles.

Following a series of intercultural dialogues and exchanges within and between countries, the ABN facilitated a meeting of custodial communities of Sacred Natural Sites from Kenya, Ethiopia, Uganda and South Africa in Nanyuki, Kenya, in April 2012. The Custodians developed a *Statement of their Common African Customary Laws for the Protection of Sacred Natural Sites* (See Appendix). The ABN is now working to share its experiences and lessons learnt and upscale this work to influence law and policy at the national, regional and international levels. To facilitate this process, a film "*Sacred Voices*" has been made to communicate messages from African Custodians of Sacred Natural Sites to the world.[26]

24 See: http://www.icekenya.org/ (last accessed 24/10/2012).
25 See Summary Table in Appendix for further information.
26 See the film Sacred Voices (2012) by the ABN and Gaia Foundation, available at: http://vimeo.com/49006743 (last accessed 24/10/2012).

1.6 This Report

As part of the ongoing strategy for the recognition of Sacred Natural Sites, ICE, with the support of ABN and the Gaia Foundation, commissioned this Report to examine whether the legal, policy and institutional frameworks in Kenya recognise and support, or undermine, the rights and responsibilities of communities to govern and protect their Sacred Natural Sites and Territories, according to their customary governance systems based on Earth Law principles, and on their own terms.

Reflecting 10 years of ongoing dialogues and exchanges among the ABN partners, communities and international allies, this Report draws on the community dialogues and eco-cultural mapping processes which are supporting the revival of traditional ecological knowledge, practices and governance systems of various communities, such as in Karima, Giitune and Kivaa in Kenya. Learning and working in solidarity with communities and networks in other countries, such as in Venda (South Africa), in Sheka, Bale and Sebeta-Suba (Ethiopia) and in Pirá Paraná (Colombia), have strengthened the development of local precedents and strategies for the recognition of community customary protection of Sacred Natural Sites. Such intercultural collaboration is also contributing to the development of national, regional and international precedents.

This Report involved extensive research and analysis of the Kenyan Constitution and its review processes, of national and international instruments, as well as discussions with advisors on these legal frameworks. This Report will be complemented by a forthcoming report of the African Biodiversity Network and the Gaia Foundation, which compiles detailed briefings and declarations on international and African regional laws that support the recognition of Sacred Natural Sites and Territories and their community customary governance systems.

The aim of this Report is to inform communities, NGOs, lawyers and policy makers of the importance of Sacred Natural Sites and Territories, of the emerging challenges, and of the Constitutional, legal, policy and grassroots initiatives and opportunities. It makes recommendations to strengthen the recognition of Sacred Natural Sites and Territories and the communities who protect them according to customary governance systems rooted in Earth Law principles.

It serves as a timely training and advocacy tool to call the alert to stop the destruction of Earth's last remaining sanctuaries of bio-cultural diversity and secure indigenous and local communities' rights and responsibilities to govern and protect their Sacred Natural Sites and Territories for present and future generations.

2. Sacred Natural Sites and Territories in Kenya – An Overview

Sacred Natural Sites exist across Earth. Each different cultural group has its own name in its local language for Sacred Natural Sites which embodies the deeper meaning of these sacred places. For example *Kaya* in Giriama, *Irii* in Tharaka and Meru, *Mathembo* in Kamba, *Karigai* in Gikuyu, Kenya.[27]

"Although the state of the world's indigenous peoples is alarming, there is some cause for optimism. The international community increasingly recognises indigenous peoples' human rights... Indigenous peoples themselves continue to organise for the promotion of their rights. They are the stewards of some of the world's most biologically diverse areas and their traditional knowledge about the biodiversity of these areas is invaluable. As the effects of climate change are becoming clearer, it is increasingly evident that indigenous peoples must play a central role in developing adaptation and mitigation efforts to this global challenge."

United Nations *State of the World's Indigenous People*, 2009

Sacred Natural Sites are natural features such as forests, mountains and caves, which play an important role in maintaining the health of ecosystems and communities. Sacred Natural Sites are rich in biological diversity. Many flora and fauna species are endemic in sacred forests. Studies of the Kaya Forest, for example, indicate that the forest is important for both biodiversity and culture,[28] and highlight the precarious situation of several species and the vital need to conserve forests and biodiversity found within these Sacred Natural Sites.[29]

Indigenous and local communities revere Sacred Natural Sites as holy places and set apart. "*Sacred Sites are special reserved [holy] places where our elders go to pray and talk to our Gods. These places mean so much to our Indigenous communities and deserve [a lot] of attention and protection*".[30]

Custodial communities have Stories of Origin to explain how the Sacred Natural Sites and Territories were created, why such places are sacred, and what the laws and customs of the Sacred Natural Sites are. These differ from one community and Sacred Natural Site to another but a common understanding is that the Sacred Natural Sites were created by God, or the Creator, and revealed to the ancestors of the custodial community, who respected and transferred the Story of Origin and the laws and customs orally over generations.[31] It is also understood that these Sacred Natural Sites play a vital role in maintaining the health and resilience of the ecosystems out of which the community is born.

Sacred Natural Sites play different roles in the ecosystems and for the communities, some are special places for thanksgiving in times of good harvests; other Sacred Natural Sites are special places for offerings for healing and restoring health, such as during droughts and epidemics. Only Custodians within the communities can enter the Sacred Natural Sites for special reasons and in accordance with the customs of the Sacred Natural Sites.

27 African Biodiversity Network, *Statement of Common African Customary Laws for the Protection of Sacred Natural Sites* (2012) p1.

28 Burgess ***et al*** reported that the proportion of endemic species in these forests was consistently high for all species groups. Examples included millipedes (about 80 percent of those found in the Kayas were endemic), molluscs (68 percent or 86 species), forest reptiles (51 percent or 24 species), vascular plants like ferns (37 percent or 554 species) and birds (10.5 percent or nine species); see Burgess, N. D, Clarke G. P. and Rogers W. A. (1998) "Coastal Forests of Eastern Africa: Status, Endemism Patterns and their Potential Causes" in *Biological Journal of the Linnaean Society* 64, pp337–367.

29 Githitho reported that in total, 782 of the species in eight biological groups were strictly endemic to the coastal forests; see Githitho, N Anthony (2003) "The Sacred Mijikenda Kaya Forests of Coastal Kenya and Biodiversity Conservation" in ***T****he Importance of Sacred Natural Sites for Biodiversity Conservation*, UNESCO-MAB Proceedings of the International Workshop held in Kunming and Xishuangbanna Biosphere Reserve, People's Republic of China, 17–20 February 2003 (Paris: UNESCO) pp27-35. Available at: http://unesdoc.unesco.org/images/0013/001333/133358e.pdf (last accessed 24/10/2012).

30 Mulenkei, Lucy (2000) *Protecting Knowledge-Traditional Resource Rights in the New Millennium*, paper presented at the Traditional Knowledge Conference, Vancouver, Canada, 23-26 February 2000, p2. Available at: http://www.ubcic.bc.ca/files/PDF/Mulenkei_Sites.pdf (last accessed 24/10/2012).

31 See African Biodiversity Network, *Statement of Common African Customary Laws for the Protection of Sacred Natural Sites* (2012).

Sabella Kaguna, Sacred Natural Sites Custodian, Tharaka, Kenya - photo by Jess Phillimore

2.1 Community Customary Governance of Sacred Natural Sites

For millennia, indigenous and local communities guided by knowledgeable elders have maintained the order and health of Sacred Natural Sites and Territories through customary governance systems, derived from the law of the Sacred Natural Sites, and the laws of Earth. Customs, taboos and spiritual practices regulate access to Sacred Natural Sites and how people should conduct themselves in relation to Sacred Natural Sites and their related territory. For example, in the Kaya Forest, the Kaya elders enforce the law of the Sacred Natural Sites and strictly forbid the cutting of trees, collection or removal of dead logs, twigs and any life form in the forest. Any human activities that could damage the forest around the Kaya Sacred Natural Sites, such as grazing livestock in the forest, are also forbidden. Traditional footpaths are strictly followed to avoid trampling on vegetation and disturbing the Sacred Natural Sites. Rare animals and especially large snakes should be left alone if encountered. Any structures necessary for ritual purposes are built using materials only from the Kaya Forest.

In addition to restrictions on physical activities near the Sacred Natural Sites, human behaviour is also regulated in order to maintain the integrity, balance and peace of the Kaya Forest. Members of the Kaya community may visit the Sacred Natural Sites and relate with them if they have permission from the ancestors. Community members also participate in rituals and ceremonies under the guidance of the elder Custodians of the Sacred Natural Sites. There is a custom that no blood may be spilled in the Kaya under any circumstances. "*These [customs] have proven fairly effective in reinforcing self-restraint among individual members of the group*"[32] in relation to Kaya Forest communities. If any blood is shed, whether or not it is intentional, intervention by spiritual leaders is required to ward off harm to those who transgressed.

The protection of Sacred Forests, such as the Kaya, over millennia is evidence of the effectiveness of traditional ecological governance systems. However Sacred Natural Sites and their custodial communities are under increasing threat.

32 Githitho, N Anthony (2003), p28.

Examples of Sacred Natural Sites in Kenya

Karima Forest[33]

Karima Forest is an *Ihoero* (Sacred Natural Site in local language) located in Othaya division of Nyeri County in central Kenya. It is a tapering dome-shaped volcanic hill with its highest point being at an altitude of 6000ft above sea level. It is located between the Sacred Kiriinyaga mountain (Mt. Kenya) and the Nyandarua (Aberdare) ranges about 150 kilometres north-east of Nairobi. It covers a surface area of about 265 acres. Having gone through significant destruction before independence, 70% of the total area of Karima Forest today is covered with exotic eucalyptus plantations, and is being contested by the local community who are asserting their rights and responsibilities to govern and protect their Sacred Natural Sites according to their customary governance systems.

Today Karima Forest is a trust land under the Nyeri County Council and is under the management of the Othaya Town Council. Karima Forest is recognised as protected under the Forests Act 2005. There are two shrines, *Kamwangi* and *Gakina* in Karima Forest, comprising 85 acres, which are gazetted under the National Museums of Kenya.[34]

Kaya Forests

The Mijikenda Kaya forests are the most well-known of Kenya's cultural heritage sites. "*Kaya*" means homestead. The area consists of several forest sites spread over 200 km in the contiguous Kenyan coastal districts of Kwale, Mombasa, Kilifi and Malindi. The Mijikenda people respect the Kaya forests as the abodes of their ancestors and are revered as Sacred Natural Sites. The Sacred Natural Sites owe their continued existence largely due to the cultural knowledge and practices of the nine coastal Mijikenda ethnic groups - the Giriama, Digo, Duruma, Rabai, Kauma, Ribe, Jibana, Kambe and Chonyi.

To date, 40 of the 47 known Sacred Natural Sites have been officially recognised under the National Museums of Kenya (NMK). The Coastal Forest Conservation Unit, formed in 1992 under the umbrella of the NMK, has the task of ensuring protection of the Kaya Forests in collaboration with local communities and civil society. The government of Kenya nominated the network of Sacred Natural Sites for inscription onto the World Heritage list and it was accepted by UNESCO in 2008.[35]

Giitune Forest

The Giitune Sacred Forest is an *Irii* (Sacred Natural Site in local language) on the eastern side of Mt. Kenya and is one of the numerous Sacred Natural Sites surrounding this UNESCO World Heritage Site. Giitune lies in a high rainfall area with fertile and well-drained volcanic soils. However, over-exploitation, illegal encroachment, lack of recognition of community land tenure and invasion of exotic tree and crop species threaten its indigenous biodiversity. Giitune is a community forest under the governance of the community and is "*heritage*" recognised and protected under the National Museums of Kenya.

Mathembo

Mathembo are Sacred Natural Sites in the Kamba community where the community offers sacrifices during droughts and epidemics or to give thanks for a good harvest. The trees and bushes growing in these places are highly protected and cutting them is prohibited. Kivaa Sacred Natural Site in Masinga is an example of an *Ithembo* (Sacred Natural Site in local language) which has been rehabilitated by the local community through revival of their cultural practices and governance systems related to ecosystems.

33 Distilled from discussions with the Karima community in collaboration with the Porini Association, Kenya.

34 The National Museums of Kenya (NMK) is a State institution established by the National Museums and Heritage Act, 2006. NMK is a multi-disciplinary institution whose role is to collect, preserve, study, document and present Kenya's past and present cultural and natural heritage. See: http://www.museums.or.ke/ (last accessed 24/10/2012) and Section 3.5 of this Report for more information.

35 See: http://whc.unesco.org/en/list/1231 (last accessed 24/10/2012).

2.2 Threats to Sacred Natural Sites and Territories in Kenya

The urgent need to protect Sacred Natural Sites and Territories in Kenya continues in the face of recent threats by economic development such as tea plantations, mining,[36] bioprospecting, land grabbing for extractive industries, biofuels, food exports and other developments.

In the Kaya Sacred Forest, for example, commercial bioprospecting for plants with medicinal properties has increased and been conducted without respecting the Free Prior and Informed Consent[37] of, or rejection by, the communities. For centuries, indigenous and local communities have depended on these plants for medicinal purposes and for other basic necessities like food, in compliance with the laws, cycles and regenerative capacity of Earth. Commercial bioprospecting, on the other hand, is driven by the need to make profit and expand markets. This fails to take into account the ecological, cultural and long-term impacts. Support for bioprospecting is largely driven by the assumption that "*Nature contains hidden assets of potentially huge, yet unknown values for humankind that could motivate and finance biodiversity conservation in the tropics.*"[38]

"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 our planet, if we do not learn from them. Our generation living now 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."

Statement of Common African Customary Laws for the Protection of Sacred Sites, 28 April 2012, Nanyuki Custodian Meeting, Kenya

Tea landscape, Kenya - photo by Jess Phillimore

36 Note the proposed Geology, Minerals and Mining Bill 2012 in Kenya; available at: http://www.cickenya.org/bills/geology-minerals-and-mining-bill-2012#comment-form (last accessed 24/10/2012). There have even been threats of mining in sacred forests (Kaya) recognised as heritage sites, for example in *Msambweni* and *Mtwapa*, Kenya; see Ndurya, Mazera, "Experts Raise the Red Flag Over Coastal Forest Loss" in the *Daily Nation* (10 October 2010).

37 A key principle now recognised in international law that a community must be properly consulted and has the right to give or withhold its consent prior to proposed projects that may affect land that it customarily owns, occupies or otherwise uses. See, for example, legal recognition in ILO Convention No. 169, 1989.

38 Community-based Initiative Livestock Initiative Programme (2004) *Ethnoveterinary Practices in Eastern Africa* (Intermediate Technology Development Group Eastern Africa (ITDG-EA), p24.

3. Legal and Policy Framework

There are a number of laws and policies in Kenya that can be used to support the recognition of Sacred Natural Sites and Territories, and the customary governance systems of their custodial communities.

3.1 Land Tenure prior to 2010

Land is the foundation of identity, culture, spirituality, livelihoods, politics and development of the people in Kenya. Land policies have been the most important factor in shaping Kenya's history. Yet land tenure in Kenya is a non-transparent process that is highly centralised and has caused many problems. The history of land tenure has been tremulous, with unfair exchanges of land going back generations. This began with the dispossession of communities from their lands under colonisation and continued since independence to recent illegal takeover by a few families and individuals for development, mining, commercial agriculture and so forth. Thousands of communities have been displaced from their homes and farms, often victims of politics. Many families live in informal settlements without legal title and have no land; if they do, they are such small parcels that they cannot even sustain a subsistence livelihood.

To compound the problem, the laws governing land have been voluminous, complicated, unfair and open to abuse. Land administration has been highly centralised, inefficient and lacking transparency. The land rights of many communities have been disregarded or are under threat, particularly minority groups such as forest dwellers and pastoralists. Without the recognition and security of customary land tenure, communities have been undermined in governing their land and territory and in preventing encroachment from industrial development. This has resulted in deterioration and in some cases the destruction of their sacred lands and ecosystems.

In traditional African societies during the pre-colonial era, "*land belonged to community groups like clans and ethnic groups instead of an individual. The rights of access to community land by the individual member of the group were assured and protected through a respected political authority.*"[39] However, colonial laws and policies not only introduced individual land ownership but viewed communal and customary land tenure as retrogressive and detrimental to the development and efficient utilisation of land holdings. The colonial administration used law and physical force to dispossess indigenous peoples of their ancestral land.[40]

After independence, the newly instituted government embarked on a massive process of individualisation of land tenure. The Registered Land Act 1968 "*provided a legal framework for individual land tenure and was the basis for the extinction of claims based on African customary land law*".[41] However, communities whose ways of life depended on collective tenure spoke out and, in an effort to appease such groups, the government enacted the Land (Group Representatives) Act 1968.[42] This Act provided for the governance and administration of group ranches. Under this regime, communities such as the Maasai pastoralists could consolidate their lands into a cooperative group ranch. A secretariat, elected by the community, headed the group ranch. While strong collective governance of land remained alive in a number of communities, there was a general shift of land tenure

39 Kenya Land Alliance (2005) *The National Land Policy in Kenya: Addressing Customary/Communal Land Issues* Issue 4, p3; available at: http://www.scribd.com/doc/28493718/Addressing-Customary-Land-Issues (last accessed 24/10/2012).

40 A systematic and "legal" process of alienating large tracts of land and dispossessing indigenous peoples of their land followed the declaration of protectorate status over Kenya by the British in 1895. The colonial powers justified these actions stating that Africans were not civilized enough to govern themselves, let alone administer their property rights. On that basis the British, as did many other colonial occupiers, used foreign laws and western conceptions of civilisation to dispossess Africans of their land. For instance the setting aside of what was known during colonial times as the white settlers' land in the Western Rift Valley by forcefully displacing the Pokot in what is today the Trans-Nzoia district. The Maasai claim that they were unfairly deprived of their lands by the British in what is referred to as the Anglo-Maasai treaties of 1904 and 1911.

41 Kenya Land Alliance cited in Mukundi, Wachira George (2009) *Validating Indigenous Land Rights in Kenya*, Doctoral Thesis at University of Pretoria, pp67-68; available at: http://upetd.up.ac.za/thesis/available/etd-01212009-162305/unrestricted/00front.pdf (last accessed 24/10/2012).

42 Mukundi, Wachira George (2009), pp67-68.

towards individual ownership as many of the secretariats did not represent the interests of the community and sold the community land to developers. Group representatives, in many cases without consulting the other members, disposed of land that was part of group ranches.

Under Chapter IX of the 1963 Kenyan Constitution[43], the term "*trust lands*" was used to refer to land governed by customary tenure or under the Land (Group Representatives) Act. Trust lands were vested in county councils, a local authority established for the benefit of persons resident on the land. In reality, county councils were government controlled[44] and it was possible for the council to convert trust land to other types of tenure or set it aside for any other use for the 'benefit of the community'. The President could also set aside trust land for similar purposes.

The effect of this land tenure system was that the governance of land was displaced from communities to the county council or the central government, and customary rights and governance systems were disregarded. There was widespread abuse of the law and much land was disposed of illegally by county councils.

This was the case in Karima Forest, which falls under "quasi - government forests" in the Trust Land Act, which has Othaya County Council as the 'custodian' of the land. While the Karima Sacred Natural Site is purportedly legally recognised, the reality is that communities are not recognised and supported as the traditional Custodians who have continued to govern and protect the Sacred Natural Sites and Territories for centuries. There are few meaningful opportunities for the communities to participate in governance and determining decisions relating to their Sacred Natural Sites and Territories.

The 1963 Kenyan Constitution also undermined the land rights of indigenous and local communities which were based on customary laws. Article 115(2) stated that:

> *"Each county council … shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual …."*

However it further stated:

> *"Provided that no right, interest or other benefit under African customary law shall have effect for purposes of this subsection so far as it is repugnant to any written law."*

This provision was open to abuse; it was ambiguous and lacked rationale about what would constitute legitimate or "*repugnant*" customs. The lack of recognition of customary rights and governance systems in Kenya's previous land tenure system undermined a community's ability to govern and protect Sacred Natural Sites and Territories, and it failed to prevent encroachment by government and other interested parties.

43 By the year 2000, Kenya's 1963 Constitution had been amended thirty times.
44 The county council is under the control of the Local Authority Ministry.

3.2 Kenya National Land Policy 2009[45]

After 46 years since independence, Kenya adopted a National Land Policy on 3rd December 2009 "*which heralded a new era in land use management and administration in Kenya*".[46] The government formulated a National Land Policy, through a wide consultative process, with the stated vision "*to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity*". The Land Policy is a living document to guide legislative, sectoral and institutional reforms. It will be reviewed every 10 years.

The National Land Policy aims to provide an overall framework which consolidates and simplifies the multiple and complex land laws. It seeks to address a wide range of critical issues including security of land tenure and rights, particularly of marginalised, forest, hunter-gatherer and pastoralist communities; access to land; public participation; environmental degradation; conflicts and restitution of historical injustices; equity; transparency and accountability; access to justice; reform of legal and institutional frameworks, and information systems.

The National Land Policy recognises the multiple meanings and roles of land stating (Section 29):

> *"Land is not just a commodity that can be traded in the market. It represents the following multiple values which should be protected by both policy and law:*
> *(a) Land is an economic resource that should be managed productively;*
> *(b) Land is a significant resource to which members of society should have equitable access;*
> *(c) Land is a finite resource that should be utilized sustainably; and*
> *(d) Land is a cultural heritage which should therefore be conserved for future generations."*

Section 1.5.1 states that implementation of the Policy will be guided by the following Land Policy Principles:

> *"(a) Equitable access to land for subsistence, commercial productivity and settlement, and the need to achieve a sustainable balance between these uses;*
> *(b) Intra- and inter- generational equity;*
> *(c) Gender equity;*
> *(d) Secure land rights;*
> *(e) Effective regulation of land development;*
> *(f) Sustainable land use;*
> *(g) Access to land information;*
> *(h) Efficient land management;*
> *(i) Vibrant land markets; and*
> *(j) Transparent and good democratic governance of land."*

The National Land Policy recognises community land and provides for its security by requiring the Government to (Section 66):

> *"(a) Document and map existing forms of communal tenure, whether customary or non-customary, in consultation with the affected groups, and incorporate them into broad principles that will facilitate the orderly evolution of community land law;*
> *(b) Repeal the Trust Land Act (Cap 288);*
> *(c) Define, in the Land Act, the term "community" and vest ultimate ownership of community land in the community;*

45 Text available at: http://www.ardhi.go.ke/ (last accessed 24/10/2012).

46 See Makathimo, Mwenda and Kaaria-Ogeto, Makena (2010) *Participation of Surveyors in Land Policy Formulation in Kenya: Examination of Best Practices*, paper delivered at the 2010 FIG Congress *Facing the Challenges – Building the Capacity,* Sydney, Australia, 11-16 April 2010; available at http://www.fig.net/pub/fig2010/papers/inv04%5Cinv04_makathimo_kaariaogeto_4663.pdf (last accessed 24/10/2012). For further information on land reform in Kenya see Kenya Land Alliance website: http://www.kenyalandalliance.or.ke/ (last accessed 24/10/2012).

(d) Lay out, in the Land Act, a clear framework and procedures for:
- *i. The recognition, protection and registration of community rights to land and land based resources taking into account multiple interests of all land users, including women;*
- *ii. Restitution of illegally acquired parts of trust land to the affected communities;*
- *iii. Governing the grant to, and regulation of, use rights to members;*
- *iv. Reversion of former Government land along the Coastal region to community land after planning and alienation of land for public usage;*
- *v. Governing community land transactions using participatory processes;*
- *vi. Accountability of groups, individuals and bodies entrusted with the management of community land, and community participation in the allocation, development and disposal of community land;*
- *vii. Incorporating mutually reinforcing customary mechanisms for land management and dispute resolution;*
- *viii. Members opting out of the communal arrangements and buying out of non-members;*
- *ix. Reviewing and harmonizing the Land (Group Representatives) Act (Cap 287) with the proposed Land Act;*
- *x. Setting apart of community land for public use; and …*

(e) Invest in capacity building for communal land governance institutions and facilitate their operations; and

(f) Facilitate flexible and negotiated cross-boundary access among communities."

The Policy also calls for the establishment of several institutions: the National Land Commission, the District Land Boards, District Land Tribunals, and Community Land Boards. A National Land Trust Fund will also be established.

Opportunities

The National Land Policy provides a necessary and stronger framework for the governance of land and redress of historical injustices. It recognises the multiple roles of land, including for cultural heritage, and the importance of protecting land, which is "finite", for future generations. The National Land Policy acknowledges customary land rights and boldly recognises community land, and that ultimate 'ownership' should vest in the community. As recognised in the National Land Policy these are important steps towards healing the injustices caused by colonial laws and policies which individualised land and treated customary land tenure and rights as inferior.[47]

"*While the policy does not cater for collective titling of land per se, it is possible that the category of "community land" is conceptually collective*."[48] The recognition of the term "community land" could help to address some pressing land issues, including the restoration of ancestral territories and land traditionally occupied by communities, such as the Ogiek and coastal communities, and the recognition of communally-governed forests and grazing areas. The National Land Policy paved the way for the amended Constitution of Kenya 2010, as discussed in more detail in Section 3.3 below.

Challenges

While the National Land Policy recognises the need to protect land for its ecological and cultural importance, in practice economic development of land continues to be a significant threat. As the National Land Policy is not legally binding, it is even more important to ensure the advocacy and monitoring of its implementation in subsequent laws.

47 See for example Sections 30 and 64 of the National Land Policy 2009.

48 Kipuri, Naumi (2010) "Kenya" in Mikkelsen Cæcilie (Ed) *The Indigenous World* 2010 (Copenhagen: IWIGIA Publication), p479; available at: http://www.iwgia.org/iwgia_files_publications_files/0001_I___2010_EB.pdf (last accessed 24/10/2012).

3.3 The Constitution of Kenya 2010[49]

The Constitution of Kenya 2010 is a milestone towards greater recognition of community governance. All existing and future laws and policies must be aligned with it. The Constitution recognises culture as inherent to Kenya and its peoples. It also fundamentally changes Kenya's land regime and makes environmental protection an obligation of everyone in the country. It has also introduced a number of changes to recognise indigenous peoples among minority and marginalised communities.

3.3.1 Principles

The Constitution sets out a number of key principles which are summarised below:

(i) Peace, national unity and integrity of the country;
(ii) Sovereignty of the Kenyan people and supremacy of the Constitution;
(iii) Respect for ethnic and regional diversity and inclusion of all communities in institutions of the State;
(iv) The well-being of the people and the basic needs of all;
(v) Democracy, good governance and the Rule of Law
(vi) Devolution of powers to facilitate the participation of people in local and national governance;
(vii) Full participation of the people in the management of public affairs;
(viii) Human rights, based on equality and non-discrimination as essential to social, cultural, religious, political and economic development;
(ix) Gender equity with women having equal rights to men and fair representation in State institutions;
(x) Independent institutions that review the abuse of power and violation of rights, and provide redress. Independent institutions also for politically sensitive tasks, such as managing the electoral process;
(xi) Competence, accountability, efficiency, discipline and independence of the judiciary.

Chapter 5 of the 2010 Constitution sets out the principles and framework for land reform in Kenya. Article 60(1) presents seven major policy areas:

"(a) equitable access to land,
(b) security of land rights,
(c) sustainable and productive management of land resources,
(d) transparent and cost effective administration of land,
(e) sound conservation and protection of ecologically sensitive areas,
(f) elimination of gender discrimination in law, customs and practices related to land and property in land; and
(g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution."

These principles reflect the struggle of different Kenyan groups on land issues before and after independence.

49 Text available at: http://www.kenyalaw.org/klr/index.php?id=741 (last accessed 24/10/2012).

3.3.2 Land Tenure

The highest law that governs land tenure in Kenya is the 2010 Constitution of Kenya. The 2010 Constitution endorses a fundamental principle that "*all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals*".[50] The Constitution groups land under three categories: public, community and private.

Public and private lands are the most common form of land ownership today. Public land is land held by a State institution and is designated as such by the Constitution. Public land is defined in Article 62 and includes forests, rivers, game reserves, national parks, or land declared to be public land by legislation. All minerals and mineral oils found on the land are classified as public land and are to be held in trust by the national government for the people of Kenya.

Community land is a new category of land ownership in the 2010 Constitution. Article 63 states that "*community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest*". The Constitution recognises community land as being inclusive of community forests, shrines and Sacred Natural Sites.

Article 63(2) goes on to say that community land comprises:

> *"(a) land lawfully registered in the name of group representatives under the provisions of any law;*
> *(b) land lawfully transferred to a specific community by any process of law;*
> *(c) any other land declared to be community land by an Act of Parliament; and*
> *(d) land that is—*
> *(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;*
> *(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or*
> *(iii) lawfully held as trust land by the county governments,*
> *but not including any public land held in trust by the county government under Article 62(2)."*

The largest component of community land will be what was designated as "trust land" in the 1963 Constitution, and its management is vested in county councils. Based on the fundamental principle that land belongs to the Kenyan peoples, the objective of the 2010 Constitution is to return ownership and control of trust land to the relevant communities, in accordance with their customary laws. However, the transition to community control will take time, as communities entitled to land must be identified and the multiple interests of all land users must be taken into account.

Unregistered community land will be in the custody of the county government. However, the county government cannot dispose of or use the land without regard to the rights of communities. Article 63(4) states that:

> *"Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively."*

The Constitution further requires that all freehold land owned by non-citizens will be converted to 99-year leases and all leases longer than 99 years will be reduced to 99 years (Article 65). Parliament will have to enact legislation to protect and provide appropriate access to public land. Further, it must prescribe the "*minimum and maximum land holding acreage with respect to private land*".[51] Legislation will have to ensure that all grants of public land are reviewed for their propriety or legality.[52] This presumably includes past transactions and provides for their retrospective invalidation if necessary or other means of redress.[53]

50 Article 61 of the Constitution of Kenya 2010.
51 Article 68(c)(i) of the Constitution of Kenya 2010.
52 Article 68(c)(v) of the Constitution of Kenya 2010.
53 Note also Article 40 which provides that, while the State has a duty to pay prompt and just compensation to the owner of private property it has acquired compulsorily, it is under no such duty when the property in question has been found to have been unlawfully acquired. This contrasts to the previous situation in which private rights on land were sacrosanct irrespective of the lawfulness of their acquisition. The new

Legislation will also have to ensure that the investments in property benefit local communities.[54] See Section 3.4 of this Report for further information.

Article 67 of the Constitution outlines the mandate of the National Land Commission, which includes investigating present or past illegal land transactions and injustices and recommending appropriate form of redress. There is potential for recovered land to be recognised as, and transferred to, community land. The National Land Commission should also encourage the application of traditional dispute resolution mechanisms in land conflicts.[55] The resolution of land disputes through traditional dispute processes is recognised as a Constitutional principle of land policy[56] and as a principle of courts and tribunals when exercising their functions.[57] Previously, such provisions were unavailable, and those who obtained titles to group owned lands often individualised them.

3.3.3 Culture

Culture is a central pillar to the 2010 Constitution. The Constitution "*recognises culture as the foundation of the nation and as the cumulative civilisation of Kenyan people and nation*"[58] and promotes respect for ethnic diversity and equality.[59]

The new Constitution now explicitly recognises minority and marginalised groups as being inclusive of indigenous peoples.[60] Article 260 has four definitions of "*marginalised communities*":

> *"(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as whole;*
> *(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as whole;*
> *(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or*
> *(d) pastoral persons and communities, whether they are (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as whole."*

Further, *" 'marginalized group' means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)"*.

The Constitution recognises the right of communities to practice their culture and imposes duties on the State to protect and promote cultural rights of the peoples. Article 44 of the Constitution states:

> *"(1) Every person has the right to use the language, and to participate in the cultural life, of the person's choice.*
> *(2) A person belonging to a cultural or linguistic community has the right, with other members of that community*

Constitution therefore only extends protection to legally acquired land rights; cited in Institute for Culture and Ecology (ICE) and Eston, Murithi (2011) *Civil Society Engagement in the Implementation of the Promulgated Constitution of Kenya 2010 and its Implication on Democratic Governance, Civil Liberties and Social and Environmental Justice*, report of a workshop held on 8 March 2011 by the Institute for Culture and Ecology, p19.

54 Article 66 of the Constitution of Kenya 2010.
55 Article 67(2)(f) of the Constitution of Kenya 2010.
56 Article 60(1)(g) of the Constitution of Kenya 2010.
57 Article 159(2)(c) of the Constitution of Kenya 2010.
58 Article 11(1) of the Constitution of Kenya 2010.
59 See for example Chapter 4 Bill of Rights, particularly Article 27 of the Constitution of Kenya 2010.
60 The previous Constitution did not recognise or use the term "indigenous title" or "indigenous people". Before the Universal Peer Review in May 2010, Kenya indicated, *"the term 'indigenous people' was not applicable, as all Kenyans of African descent were indigenous to Kenya . . . but recognised the vulnerabilities of minorities/marginalized communities."* HRC (2010) *Draft Report of the Working Group on the Universal Periodic Review on Kenya*, Eighth Session of the Human Rights Council's Working Group on the Universal Periodic Review recommendation 109.

(a) to enjoy the person's culture and use the person's language; or
(b) to form, join and maintain cultural and linguistic associations and other organs of civil society.
(3) A person shall not compel another person to perform, observe or undergo any cultural practice or rite."

The Constitution requires the State to "*promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage*".[61] In addition the State must "*recognise the role of science and indigenous technologies in the development of the nation*" and "*promote the intellectual property rights of the people of Kenya*".[62] Parliament shall enact legislation to "*ensure communities receive compensation or royalties for use of their cultures and cultural heritage*" and "*recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya*".[63]

Specifically in relation to indigenous and local communities, Article 56 also requires that:

"The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups –
(a) participate and are represented in governance and other spheres of life;
(b) are provided special opportunities in educational and economic fields;
(c) are provided special opportunities for access to employment;
(d) develop their cultural values, languages and practices; and
(e) have reasonable access to water, health services and infrastructure."

Article 21(3) of the Constitution also requires that all State organs and all public officers address the needs of vulnerable groups within society, including women, older members of society, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

The Constitution is also important in its recognition of local governance and the rights of communities to self-govern and determine their future. Article 174 promotes devolved government and its objectives include:

"(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
(d) to recognise the right of communities to manage their own affairs and to further their development;
(e) to protect and promote the interests and rights of minorities and marginalised communities."

Further, Article 197 requires respect for, and reflection of, cultural and gender diversity in the structure of devolved government.

These are important legal bases for communities to assert for the recognition of their rights to govern and protect their Sacred Natural Sites and Territories according to their customary governance systems; and to enforce the Constitution.

61 Article 11(2)(a) of the Constitution of Kenya 2010.
62 Article 11(2)(b) of the Constitution of Kenya 2010.
63 Article 11(3)(a) and (b) of the Constitution of Kenya 2010.

Kenya landscape: Tharaka District - photo courtesy of ABN

3.3.4 Environment

The 2010 Constitution recognises the importance of protecting the environment for the benefit of present and future generations.

The Constitution imposes eight obligations on the State in relation to the environment (Article 69(1)):

"(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
(b) work to achieve and maintain a tree coverage of at least ten per cent of the land area of Kenya;
(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
(d) encourage public participation in the management, protection and conservation of the environment;
(e) protect genetic resources and biological diversity;
(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
(g) eliminate processes and activities that are likely to endanger the environment; and
(h) utilise the environment and natural resources for the benefit of the people of Kenya."

Further, Article 42(a) recognises that a clean environment is a right of all and that everyone, individually and collectively, must cooperate with the State organ to conserve the environment, and ensure ecologically sustainable development and use of natural resources.[64]

64 Article 69(2) of the Constitution of Kenya 2010.

3.3.5 Analysis of Opportunities and Challenges of the Constitution

Opportunities

The recognition of Sacred Natural Sites and Territories is strengthened through the Constitution's provisions on culture, land, minority and indigenous peoples, and environmental protection. Although Sacred Natural Sites are not expressly referred to, they could be recognised as "*community land*", which includes ancestral land, or specifically as forests under the environment provisions of the Constitution.

Communities, particularly marginalised, minority and indigenous communities, could assert authority to govern and protect their Sacred Natural Sites and Territories by exercising their Constitutional rights to practice their cultural heritage, traditional knowledge and customs, and to self-govern (Article 174(d)). The Constitution's encouragement of resolving land disputes according to "*local community initiatives*" or traditional dispute processes, strengthens the recognition and supports the practice of communities' customary governance of land (see Section 3.4.3 of this Report for further information). The Constitutional requirement for respect and integration of cultural and gender diversity in the structure of devolved government goes some way in addressing the concerns of a lack of transparency and potential institutional discrimination.

The Constitution offers significant opportunities to transform and strengthen land tenure in Kenya. The Constitution now explicitly recognises community land and community land title, stating that "*all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals*" and that "*community land*", which includes ancestral lands, "*shall vest in and be held by communities*". This opens space for deeper discussion and recognition of communities' rights and customary governance systems.[65] By recognising community land, the Constitution returns some control back to the communities to govern their lands according to their customary laws and governance systems, and to prevent the privatisation of land for individual gain. The Constitution also recognises the participation of communities in decision-making processes that affect their lives, and in the governance and protection of ecosystems as a right and duty.

As a result of the commitment of the communities and organisations mentioned in Section 1.3 of this Report, the Constitution recognises some Earth Jurisprudence principles. For example the Constitution enshrines a strong version of the precautionary principle: to eliminate processes and activities that are likely to endanger the environment. Although likely to be a challenge in practice, applying this principle means activities, such as mining, tourism development and plantations could be prevented from destroying Sacred Natural Sites and Territories. In addition the Constitutional responsibility to protect ecosystems for present and future generations could be interpreted as for all species, not only humans. Earth Jurisprudence principles, which underpin customary governance systems of indigenous and local communities, could also be advocated through the Constitution's recognition of "*ancestral lands*", "*marginalised communities*", and cultural practices and customs.[66]

Further according to Article 259(1), the Constitution must be interpreted in a manner that:

"(a) promotes its purposes, values and principles;
(b) advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;
(c) permits the development of the law; and
(d) contributes to good governance."

65 Ronald argues that *"to rob the existence of a communality, the communal celebratory process, which forms the substance of much of our experience would deny one ethical constituent of our humanity"* Ronald, Garet (1983) "Community and Existence: The Rights of Groups" in *Southern California Law Review* 56, pp1016 - 1017

66 Also suggested in ICE and Eston, Murithi (2011), p21.

Ikwa waterfall, Kathita River, Kenya - photo courtesy of ABN

This Article provides an opportunity to advocate that community customary governance systems, based on Earth Jurisprudence principles, constitutes "*good governance*" which contributes to the "*development of the law*". Accordingly the Constitution should be interpreted from such an Earth Jurisprudence perspective.

In addition, Articles 2(5) and (6) of the Constitution provide that the general rules of international law and any treaty or convention ratified by Kenya shall form part of the law of Kenya. This means that communities can rely on international and regional law instruments and provisions to support the recognition of their rights to govern and protect their lands, Sacred Natural Sites and Territories. While the process will take longer than it did previously, clarification of the ratification process now makes it easier to pursue.[67]

Government and Parliament will have some discretion in implementing the new Constitution and in drafting subsequent laws to comply with the Constitution. The Constitutional provisions on land, culture, marginalised and indigenous communities, and environment are strong provisions which should be enforced, particularly when implementing other national and county legislation. Communities and civil society could lobby the various Constitutional bodies entrusted with implementing the Constitution, including the Commission for the Implementation of the Constitution[68], the Constitutional Implementation Oversight Committee, and the Kenya Law Reform Commission[69]. There is also a taskforce to draft legislation to implement the Land Use, Environment and Natural Resources provisions of the Constitution of Kenya.

The 2010 Constitution is the supreme law of Kenya. Therefore, any laws inconsistent with the rights and responsibilities contained within it will be struck out, declared invalid or amended to conform with the provisions of the Constitution. All ministries must align their policies with the Constitution within five years[70], i.e. by 2015. There is ongoing consultation and drafting of new laws on contentious issues such as land and environment, which gives communities opportunities to advocate for the recognition of their customary governance systems, based on Earth Law principles, which protect Sacred Natural Sites and Territories.

67 Previously the Minister of Foreign Affairs could ratify an international law but now all international laws must go before Parliament for ratification (Articles 71 and 72 of the Constitution of Kenya 2010). There are opportunities for the public to comment on legislation prior to ratification.

68 The responsibilities of the Commission for the Implementation of the Constitution include monitoring, facilitating and overseeing the development of legislation and administrative procedures, and coordinating with the Attorney General and Kenya Law Reform Commission in preparing and tabling legislation in parliament.

69 The Kenya Law Reform Commission (KLRC) is one of the agencies entrusted to prepare legislation to implement the Constitution, including developing a legal framework for the National Land Commission.

70 See Schedule 5 of the Constitution of Kenya 2010 for timeframes.

Challenges

While the Constitution recognises the right to religion (Article 32), it does not go as far as explicitly recognising the integral spiritual relationship between community and land, Sacred Natural Sites and Territory. By contrast this is recognised in Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007, which should be endorsed and recognised in national legislation. This states that "*Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources*".[71]

Further, the lack of explicit requirement for government and other bodies to inform communities prior to the potential development or "*disposal*" of community land, and to recognise their right to give or withhold consent (say "no") undermines the responsibility of communities to protect their Sacred Natural Sites and Territories, traditional knowledge and practices, and their customary governance systems. Therefore there is a need for communities and civil society to embrace opportunities, both in the expansive interpretation of the Constitution and in the drafting of subsidiary and other national laws, to safeguard these rights and responsibilities.

The Constitution's recognition of some Earth Jurisprudence principles is undermined by its language, which is rooted in industrialist values that view Earth as a 'resource', an 'object' to be 'exploited', 'managed' and 'used', rather than recognising Earth's intrinsic value and rights to maintain her integrity and balance. The Constitutional right to a healthy environment is indeed dependent on that balance. It will take time for Earth Jurisprudence principles to gain legal recognition and the required policy support in Kenya but there is a growing alliance of communities, particularly through the work of the ABN in Africa, who continue to revive and practice Earth Jurisprudence as a way of life, and advocate for its recognition in law and policy reform.

3.4 Emerging Legal Framework

Since 2009 there have been positive steps to revise, consolidate and rationalise land laws in Kenya through the passing of Kenya's Land Policy 2009, the Kenyan Constitution 2010, the Environment and Land Court Act 2011, and the recent enactment of the Land Act 2012, the Land Registration Act 2012, and the National Land Commission Act 2012, which are explained in more detail below. These laws generally adhere to the Kenyan Constitution, and complement the National Land Policy. It remains to be seen how these laws are implemented in practice and whether they will address multifaceted values and tensions; including between community governance of Sacred Natural Sites and Territories and growing economic development.

It is important to note that implementation of the Constitutional provision for a Community Land Act is still pending, at the time of writing this Report. This would be an opportunity to address issues including clarification and recognition of community land titles and rights, and customary governance systems on their own terms, including the Earth Jurisprudence principles underpinning them.

71 Text available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last accessed 24/10/2012).

3.4.1 The Land Act 2012[72]

This Act is another strong tool for communities to use to strengthen recognition of their customary governance and protection of Sacred Natural Sites and Territories.

The Land Act 2012 is one of the laws which came into force on 2nd May 2012 to give effect to the Constitution's requirement for the revision, consolidation and rationalisation of land laws. It aims to "*provide for the sustainable administration and management of land and land based resources*".

3.4.1.1 Principles

The Act endorses and implements the principles of land reform which were enshrined in Article 60(1) of the Kenyan Constitution. These principles are binding on the State, public officers and all people when enacting, applying or interpreting provisions of the Act, when making public policy decisions, and exercising functions and powers under the Act. The Act goes further to recognise and promote principles of public participation, especially of ethnic and marginalised communities, in decision-making. Section 4(2) states these principles as:

> *"(h) participation, accountability and democratic decision making within communities, the public and the Government; …*
> *(j) affording equal opportunities to members of all ethnic groups;*
> *(k) non-discrimination and protection of the marginalized; and*
> *(l) democracy, inclusiveness and participation of the people; and*
> *(m) alternative dispute resolution mechanisms in land dispute handling and management."*

3.4.1.2 Land Tenure

The Act endorses the Constitution's recognition of three land categories: public, private and community. It states that "*community land*" has the same meaning as in Article 63 of the Constitution, which includes ancestral lands. However issues including the 'management' of community land, and regulation of its potential sale and conversion into public or private land will be addressed in more detail in the law relating to community land enacted pursuant to Article 63 of the Constitution.[73]

At the time of writing this Report, the enactment of a new law relating to community land, the Community Land Act, is still pending. The Constitution requires this law by 2015 but Parliament has requested it be fast-tracked; discussions are indicating a law by 2013.[74] The draft Bill was rejected for lack of adequate consultation. The consultation process has restarted and many questions and interests are emerging. For example, how will communal land rights be defined? Which rights are communal and which are individual; and how do they interrelate? Will the Act recognise and safeguard the rights and responsibilities of communities to govern and protect their community land, including Sacred Natural Sites and Territories? If so, will this be on the communities' own terms in accordance with their customary governance systems, and in recognition of the Earth Jurisprudence principles underpinning them? How will the law address 'ownership', transfer, 'use', and access to community land? This new law needs to bring clarity and harmonise the law on community land. Given that approximately 65% of Kenya's territory is regarded as community land, this new law will have wide implications for land governance in Kenya.[75]

72 Text available at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/Land_Act____No_6_of_2012____1_.pdf (last accessed 24/10/2012).
73 The Land Act 2012, Sections 37 and 9(2) (d) respectively.
74 Kenya Secure Project (2012), *Analysis of Kenya's Land Act, Land Registration Act, and National Land Commission Act of 2012*, p5. See also Waringa, Tabitha (2012) *Taskforce on Community Land, Eviction and Resettlement Bills Kick Off* on Kenyan Ministry of Lands website (17 October 2012). Available at: http://www.lands.go.ke/index.php?option=com_content&task=view&id=457&Itemid=48 (last accessed 24/10/2012).
75 Kenya Secure Project (2012), p5.

Section 5(1)(d) of the Land Act explicitly recognises "*customary land rights, where consistent with the Constitution*" as a form of land tenure, whether formally recognised by legislation or not. It also requires "*equal recognition and enforcement*" and "*non- discrimination in ownership of, and access to land*" of customary land rights, as with all tenure systems (Section 5(2)). However the security of the "*rights of minority communities to individually or collectively access and use land and land based resources*" is dependant on further regulation by the Commission (Section 160(2)(a)).

The National Land Commission is entrusted to manage public land (Part II). In the allocation of public land marginalised communities and other interested parties must be notified.[76] The Commission is required to make further regulation on land ownership, access, and benefit-sharing with local communities whose land have been set aside for investment.[77]

Part VIII of the Land Act also provides some regulation for compulsory acquisition of land. It provides some safeguards, including that acquisition is for the "*public purpose*", and that persons connected or occupying the land are notified, have access to prompt, just and full compensation and redress, including about the propriety. The Commission is also required to register any conversions of land tenure and make further regulations[78] (see Section 3.4.2 of this Report for further information).

The Act also establishes a Land Settlement Fund (Section 135) which can be applied for displaced persons and conservation but also for development projects.

3.4.1.3 Environmental Protection

The Land Act also requires the protection of ecologically important land. The National Land Commission shall, according to Section 11:

> *"(1) … take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas.*
> *(2) … identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change."*

The National Land Commission must consult existing institutions dealing with conservation when fulfilling these duties (Section 11(3)).

The National Land Commission must ensure that certain public land is not allocated if it falls within forest and wildlife reserves; mangroves; wetlands; within the buffer zones of such reserves or within environmentally sensitive areas; watersheds, river and stream catchments; or natural, cultural, and historical features of exceptional national value.[79] The National Land Commission is also required to undertake an inventory of "*all land based natural resources*".[80]

Opportunities

The Land Act is an important contribution to strengthening the recognition of communities' customary governance systems. Communities could assert the Act's provisions, which recognise community land, customary land tenure and rights, and promotes traditional dispute resolution processes in resolving land disputes, to support the recognition of their customary governance and protection of Sacred Natural Sites and Territories.

76 The Land Act 2012, Section 14(5)(a).
77 The Land Act 2012, Section 12 (12)(a) and(e).
78 The Land Act 2012, Section 9(4) and (5).
79 The Land Act 2012, Section 12(2)(b), (c) and (e).
80 The Land Act 2012, Section 15(3).

The Act is notable for recognising equality and encouraging the participation of ethnic and marginalised communities as core principles of land reform. In light of the Act's participatory principle, the requirement for the National Land Commission to consult institutions dealing with conservation (Section 11(3)) could be interpreted expansively to involve communities and wider civil society in the governance of ecologically important land. The Act's recognition that ecologically important public land cannot be allocated implies respect for land as a common heritage.

The Land Act contributes to the reform of land laws and to providing a more equitable and transparent legal framework for land tenure.

Challenges

While there is a requirement for environmental protection, Section 12(3) of the Land Act 2012 requires that "*the Commission shall set aside land for investment purposes*". Although it must be ensured "*that the investments in the land benefit local communities and their economies*" (Section 12(4)), this provision does not go as far as respecting the rights of communities to Free Prior and Informed Consent – to be informed prior to the investment and to give or withhold consent (say "no"). The provision also does not prevent the loss and devaluing of land in favour of development. Therefore there is a need to ensure that the interpretation and enforcement of the Land Act aligns with the Kenyan Constitution's provisions that recognise community land, culture, community self-governance, and the precautionary principle for environmental protection.

The Land Act, like many other laws, regards land as a 'resource' which can be traded. However Sacred Natural Sites and Territories are not for profit but are deeply sacred and respected by communities as No-Go areas for development. Further the fundamental role and relationship of land with culture and spirituality are not explicitly recognised or promoted in the Land Act.

The Act also does not fully incorporate a community land framework and respect it on an equal footing with other forms of land tenure, thereby creating legal uncertainty concerning community land in Kenya.[81] The Act leaves specific details and regulations, such as the rights of minority communities, to future legislation. The content of future legislation will be important in order to ensure transparency, address historic injustices and provide for "*sound stewardship over public land resources*".[82]

Despite Constitutional requirement[83], the Land Act does not prescribe "*minimum and maximum land holding acreage with respect to private land*". Instead the Act defers regulation until after a scientific study on its viability by the Cabinet Secretary with public participation (Section 159). This Constitutional requirement is critical in light of the concern that large-scale private land owners may convert or transfer their land to community land.[84]

3.4.2 Land Registration Act 2012[85]

The Land Registration Act 2012 revises, consolidates and rationalises the registration of land titles. It came into force on 2nd May 2012. The Act applies to the registration of interests in public and private lands, and the registration and recording of community interests in land (Section 3).

81 Kenya Secure Project (2012), p4.
82 Kenya Secure Project (2012), p11.
83 Article 68(c)(i) of the Constitution of Kenya 2010.
84 ICE and Eston, Murithi (2011), p20.
85 Text available at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/Land_Registration_Act____No_3_of_2012_.pdf (last accessed 24/10/2012).

The Act provides for the recognition, registration and mapping of community land and title. It defines "*community*" as a "*clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest as provided under Article 63(1) of the Constitution, which holds a set of clearly defined rights and obligations over land and land-based resources*".

A Community Land Register is required for each "*land registration unit*" (Section 8)[86] including information on:

"(1)(a) a cadastral map showing the extent of the community land and identified areas of common interest;
(b) the name of the community identified in accordance with Article 63(1) of the Constitution and any other law relating to community land;
(c) a register of members of the community;
(d) the user of the land;
(e) the identity of those members registered as group representatives;
(f) the names and identity of the members of the group; and
(g) any other requirement as shall be required under the law relating to community land."

The Act provides the following safeguards:

Section 8(3) "*The Registrar shall not register any instrument purporting to dispose of rights or interest in community land except in accordance with the law relating to community land.*"

The Act also provides for prohibitions and restrictions on dealings with land for the "*prevention of any fraud or improper dealing*" (Section 76), and provides for rectification of the register where there are errors, omissions or at the consent of "*all affected parties*" (Section 79(1) and (2)).

Information in the Registry is accessible to the public "*subject to the Constitution and any other law regarding freedom of and access to information*" (Section 10) and upon payment of the prescribed fee (Section 7(2)). Payment is also required before interests in land can be registered (Section 88).

The main body entrusted with the land registration system is the Cabinet Secretary, with advice and monitoring by the National Land Commission. The Act defers more detailed regulation of the registration process to the pending Community Land Act and other regulations.

Opportunities

The Land Registration Act, particularly through its Community Land Registry, could be used to strengthen the recognition of community lands and connected Sacred Natural Sites and Territories. Communities could indicate on the map how the original boundaries of their community lands, and Sacred Natural Sites and Territories, have been eroded by colonisation and other development. The registration of community land could serve to deter potential threats such as unscrupulous transactions, tourism development and mining.

In order to prevent improper or illegal dealings in community lands the Kenya Secure Project has recommended that: regulations could be developed to provisionally register any unregistered community land before its official registration as community land. Further that until the community land legislation is enacted and implemented the National Land Commission should declare a moratorium on dealings in unregistered lands, including "*at a minimum, unalienated trust lands, registered group representative land (group ranches), ancestral lands of hunter/gatherer communities, and lands transferred to certain communities through specific laws.*"[87]

86 Note these registration units are defined by the National Land Commission (Land Registration Act 2012, Section 6(6)).
87 Kenya Secure Project (2012), p28.

Challenges

While the requirement for public access to the Register may promote transparency and accountability, a critical issue to be addressed is the level of disclosure on the Registry. Inappropriate disclosure of the location of Sacred Natural Sites and Territories, for example their Global Positioning System (GPS) coordinates and the associated traditional knowledge of their custodial community, may undermine their sacredness and increase their exposure to exploitation, for example by industrial development and academic research.

Therefore it is important that any mapping and registration of community lands should be performed on the communities' own terms, in ways which respect their Sacred Natural Sites and Territories and sacred knowledge. It is for the communities to determine what sacred knowledge is strictly confidential and cannot be disclosed, and how documentation should be communicated in their own way and language, and according to their own customary laws (See Sections 4.3.1 and 4.4.1 of this Report for community experiences and principles for registration of Sacred Natural Sites and Territories in Venda, South Africa, and in Pirá Paraná, Colombia). It is for government and all persons and organisations to recognise and apply this principle. Government also needs to recognise that registration of community land, and the connected Sacred Natural Sites and Territories, does not mean that communities are giving up their rights and responsibilities to govern and protect their Sacred Natural Sites and Territories but are affirming and securing recognition of their role.[88] There has been a recommendation that, during the drafting of the pending Community Land Act, communities lobby for recognition of their complete autonomy to implement their own systems for recording and registering communal land rights and tenure systems.[89]

The required information for registration of community land may prove difficult to provide in practice and could potentially exclude community customary institutions. For example, would "registered group representatives" apply only to group ranches?[90] Further, unless a limit is imposed through further regulation, the required payment for registering community land may be prohibitively expensive for communities, which could prevent registration and thereby undermine the security of land rights and increase land-based conflicts.[91]

The Act is limited in scope. As Section 4 states: "*This Act shall not prohibit or otherwise affect the system of registration under any law relating to mining, petroleum, geo-thermal energy or any other rights over land and land-based resources in respect of public land.*" This provision has potentially negative implications for reclaiming community land which has been taken over by mining and extractive industries, because such land is subject to registration under a different regime.

In addition the Act "*shall not apply to unregistered community land held in trust by county governments on behalf of communities under Article 63(3) of the Constitution*" (Section 8(4)). It is unclear how threats of encroachment to unregistered community land and violation of community rights by public and/or private claims could be prevented; and whether, and how, lands claimed to be community land will be recorded or registered in the interim period pending the new Community Land Act.[92] However the requirement under the National Land Commission (NLC) Act 2012 for the National Land Commission to ensure registration of all unregistered lands within 10 years (Section 5(3) and (4), NLC Act) could address these issues provided there is assistance to communities interested in seeking formal recognition of their lands under the law.[93]

88 This principle was asserted by Custodians of the network of Sacred Natural Sites and Territories in Venda, South Africa. See Section 4.3.1 of this Report for further information.
89 Kenya Secure Project (2012), p27.
90 Kenya Secure Project (2012), p27.
91 Kenya Secure Project (2012), p31.
92 Kenya Secure Project (2012), p27.
93 Kenya Secure Project (2012), p27.

3.4.3 National Land Commission Act 2012[94]

This Act, which came into force on 2nd May 2012, elaborates the functions and powers of the National Land Commission established in the Constitution.

The National Land Commission is a specialised institution entrusted with broad responsibilities which includes:

- managing public land (Section 5(1)(a)),
- managing and administering all unregistered trust land and unregistered community land (Section 5(2)(e)), within 10 years of commencement of the Act or an extended period (Sections 5(3) and (4)),
- advising on land title registration, and monitoring registration of all land rights and interests (Sections 5(1)(c) and 5(2)(b)),
- investigating present and historical injustices, at its own initiative or upon a complaint, and recommending appropriate redress (Section 5(1)(e)); within 2 years, the Commission must recommend to Parliament appropriate legislation for investigation and adjudication of such claims of injustice (Section 15),
- reviewing the propriety or legality of all grants or dispositions of public land, at its own initiative or upon a complaint, including by a community (Section 14(1)), with a power to correct or revoke the title except for bona fide purchasers (Sections 14(5),(6) and (7)),
- notifying complainants of its review and providing an opportunity to be heard (Section 14(3)),
- encouraging the application of traditional and alternative dispute resolution mechanisms (Sections 5(1)(f) and 5(2)(f)),
- ensuring that public land, and land 'managed' by designated State agencies, are sustainably 'managed' for future generations (Section 5(2)(c)),
- conducting research into land and natural 'resources', and developing a land information management system (Sections 5(1)(d) and 5(2)(d)),
- monitoring land use planning, and assessing land taxes (Sections 5(1)(h) and (g)), and
- all the powers necessary to execute its functions under the Constitution and other laws (Section 6).

Opportunities

Communities could draw on an underlying principle of the National Land Commission Act - justice and equity for past, present and future generations. The Act is commendable for recognising and encouraging traditional dispute resolution mechanisms, and thereby an important element of customary governance systems. Also for providing a forum for communities to make complaints about present or historical injustices, impropriety or illegality. There is also potential to draw on the Act to advocate for, and implement, Earth Jurisprudence principles. Through traditional dispute resolution processes, communities could advocate for justice for wider members of the Earth Community including ecosystems, Sacred Natural Sites and Territories, their ancestors and generations yet to be born. In addition the Commission's responsibility to ensure sustainable 'management' of land for future generations could be interpreted to include all species - humans and the wider Earth Community.

94 Text available at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/National_Land_Commission_Act____No_5_of_2012_.pdf (last accessed 24/10/2012).

There has been a recommendation that communities should have an opportunity to participate in the drafting and vetting of the required legislation on historical land injustices, which ought to draw on comparative international experiences and expertise of how other countries have addressed historical land injustices.[95] Further, the National Land Commission could be urged to recommend a strategy encouraging the national application of traditional dispute resolution mechanisms in land disputes.[96]

Challenges

Community participation in the National Land Commission is limited. For example, the conditions for membership of the Commission (Section 8) may serve to exclude community participation. While community members could argue to be co-opted into Committees established by the Commission, on the grounds that their "*knowledge and skills are necessary for the functions of the Commission*" (Section 16(2)), they would not have a right to vote and determine decisions. Further ensuring diversity of gender and ethnicity is not an explicit condition of membership to the Commission. Advocating for wider membership to include communities, particularly indigenous and ethnic groups, and women would strengthen the Commission's ability to fulfill its functions more equitably for the benefit of the Kenyan people, land, ecosystems and future generations.

The Act is a framework which leaves details to further regulations. Further clarity is needed on the Commission's relationship with other institutional bodies such as the Truth, Justice and Reconciliation Commission, and the Environment and Land Court (explained in more detail in Section 3.4.4 below), especially in clarifying the scope of jurisdiction to resolve disputes.[97]

3.4.4 Environment and Land Court Act 2011[98]

This Act gives effect to the Constitution's requirement "*to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land*" and provides for the Court's jurisdiction, functions and powers. The "*just, expeditious, proportionate and accessible resolution of disputes*" is the main aim of Act (Section 3(1)).

"*Environment*" is defined by the Act as "*the totality of nature and natural resources, including the cultural heritage and infrastructure essential for social-economic activities*".

The Court shall be guided by the following principles (Section 18):

"(a) the principles of sustainable development, including;
- *(i) the principle of public participation in the development of policies, plans and processes for the management of the environment and land;*
- *(ii) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law;*
- *(iii) the principle of international co-operation in the management of environmental resources shared by two or more states;*
- *(iv) the principles of intergenerational and intragenerational equity;*
- *(v) the polluter-pays principle; and*
- *(vi) the pre-cautionary principle;*

(b) the principles of land policy under Article 60(1) of Constitution (which includes ecosystem protection and equitable land access)*;*

(c) the principles of judicial authority under Article 159(2) of the Constitution (which includes recognition of traditional dispute resolution mechanisms)*;*

95 Kenya Secure Project (2012), pp43-44.
96 Kenya Secure Project (2012), p45. Note also its recommendation that the Commission analyses the National Land Policy and recommends amendments for its harmonisation with the Kenyan Constitution, p42.
97 Kenya Secure Project (2012), pp43 and 45.
98 Text available at http://www.kenyalaw.org/kenyalaw/klr_home/ (last accessed 24/10/2012).

(d) *the national values and principles of governance under Article 10(2) of the Constitution* (which includes transparency and accountability)*; and*

(e) *the values and principles of public service under Article 232(1) of the Constitution* (which includes non-discrimination and "representation of Kenya's diverse communities")."

The Court has a broad power to hear and determine disputes including those relating to public, private and community land; environmental planning and protection; land use planning, administration and management; climate issues; land title, tenure, boundaries; compulsory acquisition of land; mining, minerals and other natural 'resources'; trade and any other disputes relating to environment and land (Article 13(2)).

The Act also requires the Court to safeguard Constitutional environmental rights and freedoms. Section 13(3) states: "*Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution*." Therefore the Court must also adjudicate on disputes relating to the State's environmental obligations, including to protect traditional ecological knowledge and ecosystems, eliminate potentially ecologically destructive activities, and respect the right to a healthy environment. Disputes relating to the duty of all peoples to protect the environment can also be decided by the Court.

Court proceedings must be reasonably and equitably accessible.[99] They may take place in indigenous languages, and in other accessible communication formats and technologies (Sections 23(2) and (3)). Proceedings shall be in public,[100] and "*Opinion evidence*" and any "*just matter*" may be taken into account (Section 19(1)). Section 25 also requires that all appointments under this Act, for example of judges, shall respect Constitutional requirements of gender and ethnic equality. The "*principles of natural justice*" shall guide the Court (Section 19(2)).

The Act recognises and encourages the role of alternative dispute resolution, including traditional dispute resolution mechanisms, conciliation and mediation. This may be at the Court's own motion, with the agreement of, or at the parties' request (Section 20(1)). "*Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled*" (Section 20(2)).

Redress available includes: interim or permanent preservation orders including injunctions, prerogative orders, specific performance, damages, compensation, restitution, declaration and costs.[101] Breach of the Court's order is an offence liable to a fine or imprisonment.[102]

Opportunities

Access to justice is an underlying objective and principle of the Enironment and Land Court. This superior Court now provides communities and civil society with an additional forum to resolve environmental and land disputes including challenges to community land tenure, and growing threats of climate change and mining. Communities can assert the requirement to have their dispute resolved promptly, equitably and in their own language. The lower standard of admissible evidence, to include opinions, could favour communities who may be unable to afford expensive scientific studies or access relevant but restricted information from corporations and industries. The availability of an injunction means communities could request the Court to stop further destruction of their Sacred Natural Sites and Territories.

99 The Environment and Land Court Act 2011, Section 26.
100 The Environment and Land Court Act 2011, Section 17.
101 The Environment and Land Court Act 2011, Section 13(7).
102 The Environment and Land Court Act 2011, Section 29.

Communities have a strong opportunity to assert their custodial rights and responsibilities to govern and protect their Sacred Natural Sites and Territories. For example, in exercising its powers the Court recognises and must be guided by the traditional cultural and social principles of communities for environmental governance. Further, as explained in relation to the National Land Commission Act 2012, communities could assert their customary governance processes through "*traditional dispute resolution mechanisms*", and resolve environmental and land disputes on their own terms. The Environment and Land Court Act recognises that disputes may be more appropriately resolved through a reconciliatory approach where restoring harmony and healing are the primary goals, rather than an adversarial approach of blame. These processes along with the integrated jurisdiction of the Environment and Land Court strengthens the Court's ability to resolve disputes in a holistic way for humans, the wider Earth Community, and future generations of all species.

"*Natural justice*" could be interpreted and advocated as justice for humans and Nature or Earth, of past, present and future generations. Drawing on international Earth Jurisprudence precedents (see Section 4.1 of this Report), communities and civil society could also advocate and bring a case on behalf of ecosystems in the interest of natural justice, where the Rights of Nature have been violated. The power of the Court to punish those who destroy ecosystems could be interpreted expansively to recognise the crime of Ecocide (explained in more detail in Section 4.1.2 of this Report) and right of ecosystems to restoration.

Challenges

The Court does not specify who can bring forward a case before the Court, the standards for standing or *locus standi* of claimants, or the cost of court proceedings. These questions are deferred to further rules. Given the Act's objectives and principles for public participation and access to justice, communities and civil society should be enabled to bring forward a Court case, and could do so on behalf of ecosystems.

3.5 Other National Laws

Other national laws which could be drawn on to support the recognition of Sacred Natural Sites and Territories, and the customary governance systems of their custodial communities include:

3.5.1 The National Museums and Heritage Act 2006[103]

The National Museums and Heritage Act 2006 (revised in 2009) not only provides for the establishment, control, management and development of national museums but also provides for the identification, protection, conservation and transmission of natural and cultural heritage of Kenya.

The Act defines "*natural heritage*" in Section 2 as:

> *"(a) natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;*
> *(b) geological or physiographical formations of special significance, rarity or beauty;*
> *(c) precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science, conservation or natural beauty; or*
> *(d) areas which are or have been of religious significance, use or veneration and which include but are not limited to the Kayas."*

103 Text available at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/NationalMuseums_HeritageAct_Cap216_.pdf (last accessed 24/10/2012).

Section 2 also defines "*cultural heritage*" as:

> *"(a) monuments;*
> *(b) architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of universal value from the point of view of history, art or science;*
> *(c) groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding value from the point of view of history, art or science;*
> *(d) works of humanity or the combined works of nature and humanity, and areas including archaeological sites which are of outstanding value from the historical, aesthetic, ethnological or anthropological point of view; and includes objects of archaeological or palaeontogical interest, objects of historical interest and protected objects."*

The Act places such sites under the purview of State protection. The National Museums of Kenya is the State authority responsible for the conservation and management of national heritage. Land title remains in the name of the owner, potentially a community, but can be placed under custody of the Ministry. The National Museum must consult owners, including communities, before taking any decisions affecting their heritage (Section 40(3)).

The Minister of State for National Heritage and Culture can declare and gazette natural and cultural heritage sites, buildings and structures of historical interest such as monuments, and protected areas. A register of museums and declarations is accessible to the public.[104] The Minister can make or authorise the National Museum to make by-laws to control access to protected areas, including the prohibition or restriction of development, agriculture and any other activities likely to damage a monument or object of archaeological or palaeontological interest (Section 34). Entry into a protected area and breach of any prohibition or law made by the Minister is an offence (Section 36). The National Museum has powers of enforcement, particularly through heritage wardens, including cessation orders and powers of arrest (Part X).

Since 2006, the Kenyan Government has increased the registration of places with historical and cultural value under the National Museums of Kenya (NMK). Among those registered are the Oluchiri Sacred Natural Site[105], Asubwe Sacred Natural Site[106], Thaai Sacred Lakes[107], Nkunga Sacred Lake[108], Butitia Sacred Lake[109], Giitune Sacred Forest[110], Got Ramogi Hill[111], Kit Mikayi Stands[112], Abatondo Sacred Forest[113], and Ikhonga Murwi (Weeping Stone)[114].

104 Sections 25(1) and 26 of the National Museums and Heritage Act 2006.
105 Also known as Oluchiri Sacred Grove, situated in Ebusiekwe Sublocation, West Bunyore Location, Lwanda Division in Vihiga District.
106 Also known as Asubwe Sacred Grove, located in Ebusiekwe Sublocation, West Bunyore Location, Lwanda Division in Vihiga District.
107 All the water mass together with the surrounding marshes known as Thaai Sacred Lake covering an approximate area of two hundred and fifty hectares and located on the North-Eastern slopes of Mt. Kenya in Mucheene Forest, Kibirichia Location, Abothuguci West Division in Meru Central District.
108 All the area covered by water together with its steep shores known as Nkunga Sacred Lake measuring approximately one hundred and fifty acres.
109 All the area covered by water together with the surrounding marshes known as Bututia Sacred Lake measuring approximately two hundred and fifty acres.
110 All the area covering an indigenous forest known as Giitune Sacred Forest measuring approximately eighteen acres.
111 The hill known as Got Ramogi covering an area of approximately two hundred and eighty three hectares located in Ramogi Sub-location, Central Yimbo Location, Usigu Division, Bondo District.
112 All that area of land measuring approximately five acres on which the rock pedestal known as Kit Mikayi stands located in Kit Mikayi Sub-location, East Seme Location, Maseno Division, Kisumu District.
113 The forest on plot 436 measuring approximately two acres known as Abatondo Sacred Forest located in Sianduamba Sub-location, South West Bunyore, Luanda Division, in Vihiga District.
114 All the area of land measuring approximately half an acre on which stands the rock pedestal known as Ikhonga Murwi located along the Kisumu-Kakamega Road in Mukhonje Sub-location, Ilesi location, Shinyalu Division, in Kakamega District.

Opportunities

The National Museums and Heritage Act 2006's recognition of areas of ecological and religious significance, and of "*combined works of nature and humanity*" could be interpreted, and advocated as, including Sacred Natural Sites and Territories. Although not explicit, the definition of cultural heritage could be interpreted broadly as including intangible heritage, such as traditional knowledge and spiritual practices related to Sacred Natural Sites. Accordingly the need for protection of Sacred Natural Sites and their communities' customary governance systems would be recognised. Recognition as heritage under the Act could raise the profile of Sacred Natural Sites and Territories and act as a deterrent to encroachment by the public and other bodies.

The Act could support the recognition of community land title provided that there is clear land ownership and an identifiable community of interest, like in the case of Giitune Sacred Forest. The requirement to notify community owners before decisions are made concerning their heritage area could be interpreted as recognising their right to Free Prior and Informed Consent (FPIC) and to object or say "no" to activities which would affect their Sacred Natural Sites and Territories. The subsidiary National Museums and Heritage (Open Spaces and Areas of National Heritage)(Protection and Management) Rules 2009 also provides for some public participation through notification and consultation in the rehabilitation of a protected area.

Challenges

According to the Act it is the State and not the custodial community who is recognised as responsible for the governance and protection of cultural and natural heritage relating to Sacred Natural Sites and Territories. The Minister of State for National Heritage and Culture has overriding powers to overrule the community's use of natural and cultural heritage, although communities could challenge this decision by asserting their land 'ownership'. Further, there is no explicit recognition of the important role of customary governance systems and traditional institutions in protecting natural and cultural heritage, nor of communities' rights to give or withhold FPIC before decisions or activities are carried out in their Sacred Natural Sites and Territories. This undermines the Constitutional rights of communities to practice their culture and to self-governance. In practice, without strong community governance, the sites under State protection could be governed by individual elites rather than by the community. Therefore Sacred Natural Sites may end up becoming tourist destinations and historical relics, and thereby destroyed.

The State needs to recognise both Sacred Natural Sites and Territories, and the customary governance systems responsible for their protection on the community's own terms. Further discussion and clarification is needed on the interrelated but distinct meanings of 'heritage' (which may allow for tourism and other development) and Sacred Natural Sites (which are respected by custodial communities as No-Go areas for development).[115] The National Museums and Heritage Act 2006 needs to be reviewed and amended to conform with the Constitution of Kenya – a timely advocacy opportunity for communities and civil society to pursue.

3.5.2 The Forests Act 2005[116]

The Forests Act 2005 provides for the "*establishment, development and sustainable management, including conservation and rational utilisation of forest resources for the socio-economic development of the country*" (Preamble). The Act is applicable to "*all forests and woodlands on state, local authority and private land*" (Section 2).

115 This difference in meaning was asserted by Custodians of the network of Sacred Natural Sites and Territories in Venda, South Africa. See Section 4.3.1 of this Report for further information.

116 Text available at: http://www.kenyalaw.org/kenyalaw/klr_home/ (last accessed 24/10/2012).

The Act establishes a Forest Service (Section 4(1)), with a number of functions including the protection of forests in Kenya, particularly in water catchment areas for 'ecological services', and 'management' of State and provisional forests in consultation with the forest owners. The Forest Service's duties (Section 5) include to:

> *"(g) draw or assist in drawing up management plans for all indigenous and plantation state, local authority, provisional and private forests in collaboration with the owners or lessees, as the case may be;*
> *(h) provide forest extension services by assisting forest owners, farmers and Associations in the sustainable management of forests;*
> *(k) develop programmes and facilities in collaboration with other interested parties for tourism, and for the recreational and ceremonial use of forests;*
> *(l) collaborate with other organisations and communities in the management and conservation of forests and for the utilisation of the biodiversity therein; and*
> *(m) promote the empowerment of associations and communities in the control and management of forests."*

Section 33(4) recognises the need for the protection of Sacred Natural Sites, stating that:

> *"Sacred groves found in any state forest, nature reserve, local authority forest or private forest shall not be interfered with and any person who, without lawful authority, fells, cuts, damages or removes any such grove or tree or regeneration thereof, or biodiversity therein, or abets in the commission of any such act commits an offence."*

Mining is prohibited in forests areas containing sacred trees or groves, endangered species, a source of springs or water catchment area, or a forest of cultural importance (Section 42(1)). A licence and an Environmental Impact Assessment are required before mining can take place in any other forests (Sections 42(2) and 41(1)(c)).

Any forest area or woodland which has a particular environmental, cultural, scientific, or other special significance may also be declared as a nature reserve by the Minister, for the purpose of environmental protection (Section 32). Certain activities in nature reserves are prohibited without permission of the Director of the Kenya Forest Service. All indigenous forests and woodlands are also required to be sustainably 'managed' including for conservation of water, soil, biodiversity and a habitat for wildlife, and for "*cultural use and heritage*" (Section 41(1)).

The Act recognises a "*forest community*" as a group of persons who -

> *"(a) have a traditional association with a forest for purposes of livelihood, culture or religion;*
> *(b) are registered as an association or other organisation engaged in forest conservation."*

A forest community member may register as a Community Forest Association and apply for participation in the conservation and 'management' of a State or local authority forest (Section 46).

Section 22 of the Forests Act recognises customary forest rights, stating that:

> *"Nothing in this Act shall be deemed to prevent any member of a forest community from using, subject to such conditions as may be prescribed, such forest produce as it has been the custom of that community to take from such forest otherwise than for the purpose of sale."*

If a forest community wishes to use or conserve a grove or forest within a nature reserve for cultural, religious, educational, scientific or other reasons they must submit an application to the Forest Board. A person aggrieved by a refusal of their application may apply to the National Environment Tribunal, established under the National Environmental Management and Co-ordination Act (Sections 33(1)-(3)).

Section 36 provides for joint management of forests through an agreement between the Director of the Forest Service and a person, upon approval of the Board of the Kenya Forest Service, in order to ensure the conservation of biodiversity.

Opportunities

The Act explicitly recognises Sacred Natural Sites and communities' spiritual and cultural relationship with forests. The Forests Act is commendable for regulating mining and quarrying in Sacred Forests. Communities could assert the provisions for collaborative and joint management of forests for ecological, cultural and spiritual purposes, and monitor the implementation of the Forest Service's duty to "*promote the empowerment of associations and communities in the control and management of forests*" (Section 5(m)). To this effect, the Forest Service has to abide by the Forests (Participation in Sustainable Forest Management) Rules 2009 discussed in Section 3.7 below. Further there could be an opportunity for communities as "*persons knowledgeable in forestry matters*" to participate in the Forest Conservation Committee[117] and assist in the 'management' of forests, providing they are nominated by the forest association (Section 9).

With pending revision of this Act, within five years of enactment, there is an advocacy opportunity for communities to assert their governance of forests in land that was previously held in trust by their local authority. The Act also needs to be revised and amended according to international law (see Appendix Summary Table for more information). As stated in the Act's Preamble, Kenya has a commitment under international conventions and agreements to the conservation of forests and biological diversity.

Challenges

The community's governance of forests is not recognised as a right but as requiring permission and is conditional to meeting certain requirements. This approach undermines the self-governance of communities and their important role in protecting ecosystems. In practice the prevailing perception and approach has not been to include communities in decision-making processes; and where participation has been encouraged it is often imposed and controlled by the Government.

Further, overemphasis on "*consumptive*" conservation, for example tourism, weakens the Act's ability to support communities' ecological, cultural and spiritual-based protection of Sacred Natural Sites and Territories. The Forests Act has yet to be amended to conform with the Constitution of Kenya. This is a timely opportunity for communities and civil society to advocate for recognition of Constitutional principles including community self-governance, community land, and the precautionary approach to environmental protection.

3.5.2.1 The Forests (Participation in Sustainable Forest Management) Rules 2009

In exercising the powers under Section 59(2) of the Forests Act 2005, the Minister for Forestry introduced the Forests (Participation in Sustainable Forest Management) Rules 2009 ('FPM Rules'), through the recommendation of the Board of the Forest Service.

The FPM Rules apply to the participation of forest communities and private sector in the sustainable management of State forests. The Rules may be applied by the Forest Service in relation to provisional forests[118], and by local authorities.[119]

The Rules provide for the circumstances under which authorisations for human activities, including timber licences, permits and community forest management agreements[120], may be applied for, granted, varied, cancelled or declined. In addition the Rules set out the manner in which a person may exercise a right or privilege conferred by the authorisation.[121]

117 As established by Section 13(2) of the Forests Act.

118 The FPM Rules define provisional forests as mismanaged or neglected local authority or private forests according to Section 25 of The Forests Act 2005.

119 The Local Authority can only be involved in forest management with the consent of the Minister responsible for the Local Authority.

120 Rule 3 of the FPM Rules.

121 Rule 4 of the FPM Rules.

The Rules call on the Forest Service to present or adopt a five-year management plan of forests in the country. A person applying for an authorisation must prepare a site-specific forest management plan in accordance with the Forest Service's guidelines. The Forest Service must evaluate and approve such management plans based on social, economic, environmental and sustainability factors and shall issue permits for activities that do not significantly and irreversibly affect forest 'resources'.[122]

The Rules further call on the Forest Service to engage with all stakeholders, private sector, community forest associations and non-residents through specific agreements to participate in sustainable "*management*" of forest activities.[123] The Forest Service may enter into a joint management agreement with a forest association, non-governmental organisation and other organisations in the management of State forests, including indigenous forests, for forest conservation and non- consumptive uses (Rule 23). Interested persons, including communities, can apply for forest management if they meet certain conditions (including technical and financial capacity, Rule 23(2)). A community forest association may also apply for non-resident cultivation according to certain ecological and procedural conditions.[124]

Part III of the Rules relate to community participation. The Forest Service may invite and authorise community participation (Rules 41 and 42) and enter into a community forest management agreement with a registered community forest association "*wishing to conserve and utilize a forest for purposes of livelihood, cultural or religious practices*" (Rule 43). The community forest management agreement, set out in Form 5 of the Rules, recognises the customary rights under Section 22 of the Forests Act. It imposes duties on the forest association to protect and 'manage' the forest, protect sacred groves, and assist in preventing illegal harvesting and hunting. The Agreement also provides for a dispute settlement procedure in the case where the forest association is aggrieved by a Forest Service's decision relating to the implementation of the Agreement. The Agreement explicitly states that it does not confer exclusive possession of the forest area or create a lease or tenancy, and it may be terminated in certain circumstances.

Rule 44 sets out the community "*management unit*" stating:

"(1) For purposes of community participation, the management unit for a forest shall comprise
(a) the forest area under the jurisdiction of one forest station; or
(b) where geographical factors make separation of the unit into blocks more practical, individual forest blocks within the jurisdiction of one forest station.
(2) Each management unit shall be under a separate forest association, and the Service may decide whether the parties shall develop individual community management plans for each management unit or combined community management plans covering more than one unit.
(3) Where more than one forest association makes an application in respect of the same management unit, the Service shall encourage them to consolidate themselves into one association for purposes of the application.
(4) In cases where forest associations fail or refuse to consolidate into one, the Service may conclude an agreement with the forest association, which
(a) has the capacity to implement the activities set out in the community management plan; and
(b) is most representative of the interests of the wider forest community."

122 Rule 5 of the FPM Rules.
123 Rules 41 and 43 of the FPM Rules.
124 Rule 50 of the FPM Rules.

The FPM Rules also lay down procedures for the establishment of a Forest Community Association and for entering into a Community Forest Management Agreement with the Forest Service. Rule 45 states:

> *"(1) The Service and the forest community shall, before entering into a community forest management agreement:*
> *(a) identify the forest area proposed to be the subject of the agreement and its resources;*
> *(b) assess the method in which the forest community utilises the forest and the impact of such method; and*
> *(c) facilitate the formation of forest associations based on existing community structures.*
> *(2) Once a forest association is formed, the Service and the forest association shall—*
> *(a) facilitate the preparation or adoption of a community forest management plan in respect of the forest area; and*
> *(b) negotiate, draft and sign a community forest management agreement in respect of the forest area.*
> *(3) The Service shall apply the Participatory Forest Management Guidelines[125] in the implementation of community participation in forest management.*
> *(4) The Service shall, in consultation with the stakeholders, from time to time review and revise the guidelines specified under paragraph (3)."*

Furthermore, Rule 46 ensures that the Forest Service initiates the formation of a forest-level management committee consisting of:

> *"(a) representatives from the Service,*
> *(b) representatives from the forest association and*
> *(c) other stakeholders in the [forested] area*
> *to assist the forest association in the implementation of the community forest management agreement."*

The Forest Service is required to monitor and to offer technical services to the committee in accordance with Rules 47 and 48 respectively. Where a forest association, in implementing a Community Forest Management Agreement, engages in commercial activities the FPM Rules demand that the association comply with all the current laws and policies for the regulation of such activities.[126]

Opportunities

Both the Forests Act 2005 and the Forests (Participation in Sustainable Forest Management) Rules 2009 provide processes for community participation. The FPM Rules recognise customary practices, structures and institutions. Therefore communities could advocate for the recognition of, and support for, their customary governance systems of Sacred Forests which are guided by elders and Custodians, and are based on Earth Jurisprudence principles. Arguably the Act's reference to "*representative of the interests of the wider forest community*" (Rule 44(4)(b)) could be interpreted as including the human community as well as the natural forest community, including plants, animals, soil, air and water, of present and future generations.

Challenges

The Forests Act 2005 refers to State forests. As such, advocacy is needed to extend the recognition of community participation in all forests. While the FPM Rules provide an opportunity for communities to jointly protect and govern State forests, their participation is not a right but conditional to the Forest Service's authorisation, as well as their formalisation as a forest association.

125 Text available at: http://www.kenyaforests.org/index.php/publications/category/1-publications.html# (last accessed 24/10/2012).
126 Rule 49(1) of the FPM Rules.

Further, the FPM Rules' requirement to consolidate groups within one management unit is double edged. On the one hand it is desirable to avoid duplication, and foster collaboration. On the other, however, the process can be abused by powerful groups who could undermine the rights and responsibilities of communities to govern according to their own customary governance systems, and does not respect the cultural diversity of different groups.

Despite the FPM Rules' recognition of the role of communities in governing their forests, in practice, community members have token opportunities to engage as equals. There have been instances where government and other bodies force communities to participate in decision-making processes and form Community Forest Associations in ways which are contrary to local customs, values and governance systems. Community governance structures need to emanate from the community, and not be imposed by other bodies. They should be culturally appropriate in order to ensure the protection of land and territory. Further, the involvement of "*all stakeholders*" means the community is only one participant among many, and could be dominated and/or excluded by interests and power of other stakeholders, particularly the private sector. Communities need to be recognised as the traditional custodians with the authority to govern and protect their Sacred Natural Sites and Territories, according to their customary governance systems and on their own terms.

Similarly with the Forests Act, the FPM Rules are based on a human-centred consumptive and reductionist approach; for example, forests are divided into 'management units' and 'blocks' rather than recognised as an ecosystem, with indefinable boundaries, which interconnect with a wider network of ecosystems.

3.5.3 The Environmental Management and Coordination Act 1999[127]

The Environmental Management and Coordination Act 1999 provides a legal and institutional framework for the 'management' of the environment including biological diversity, lakes, forests, and mountains. The Act acknowledges that the environment constitutes the "*foundation of national economic, social, cultural and spiritual advancement*" and thus provides for the management and co-ordination of human activity and responsibilities.

The Act recognises and protects the traditional and customary interests of local communities within or near ecosystems. For example, "*traditional interests of local communities customarily resident within or around a lake shore, wetland, coastal zone or river bank or forest*" "*may*" be declared as "*protected interests*" by the Minister (Section 43). In the registration of "*forest land*" the Act requires that no action is taken "*which is prejudicial to the traditional interests of the local communities customarily resident within or around such forest or mountain area*" (Section 48(2)). The Act also recognises that the conservation of biological diversity should integrate traditional knowledge, and requires the National Environment Management Authority (NEMA) to issue relevant guidelines (Article 51(f)).

Section 3(1) of the Act recognises the right to a clean and healthy environment as including the need to access Sacred Natural Sites. Section 3(2) states:

> *"The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes."*

127 Text available at: http://www.kenyalaw.org/kenyalaw/klr_home/ (last accessed 24/10/2012).

The Act also provides the means to enforce this right to a healthy environment. In case of a contravention, the Act allows an aggrieved party to seek legal redress through a court of law. Section 3(3) of the Act states that an aggrieved person may apply for redress before the High Court to:

> *"(a) prevent, stop or discontinue any act or omission deleterious to the environment;*
> *(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;*
> *(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;*
> *(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and*
> *(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing."*

Section 3(5) also requires that the High Court, in exercising its authority on the entitlement to a clean and healthy environment, be guided by principles of sustainable development, which are the same as those guiding the Environment and Land Court (explained in Section 3.4.4 of this Report).

In terms of redress, a court may grant an "*environmental easement*" or "*environmental conservation order*" which imposes obligations on a person in respect of use of the land, including for mining and creation of migration corridors, in order to enhance the protection of the environment (Section 112).

According to Section 32, a public Complaints Committee is also available for communities to pursue redress against any person or NEMA in relation to the condition of the environment. The Committee can also initiate a complaint, make a report and recommendations on cases of environmental damage.

The Act requires any person proposing an activity to conduct an Environmental Impact Assessment and submit a report, before their licence may be granted (Section 58). Failure to comply or fraudulent information is a punishable offence.[128] However if the Director-General has not responded within 3 months to the application, the person may start the proposed activity.[129]

Section 7 of the Act establishes the National Environment Management Authority (NEMA), which is mandated to "*exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.*"[130] In addition, a key function of NEMA is to coordinate environmental management, including the assessment of biological species, integration of environmental considerations into development policies, enhancement of public awareness and advice on international legal obligations.[131] NEMA may also issue an environmental restoration order (Section 108).

The Act establishes other institutions for environmental management, including a policy-making body called the National Environment Council which is composed of diverse representatives from the government, public universities, research institutions, business community, and environmental non-governmental organisations appointed by the Minister for Environment and Natural Resources.[132] Further, a National Environment Action Plan Committee must prepare an Environmental Action Plan every five years containing: assessments of the values and roles of the environment, including for intragenerational equity; guidelines for environmental management; and recommendations of policy and legislative approaches for environmental protection.[133] This Plan is binding on all persons and government.[134]

128 Section 138 of the Environmental Management and Coordination Act 1999.
129 Section 58(9) of the Environmental Management and Coordination Act 1999.
130 Section 9(1) of the Environmental Management and Coordination Act 1999.
131 Section 9(2) of the Environmental Management and Coordination Act 1999.
132 Section 4(1) of the Environmental Management and Coordination Act 1999.
133 Section 37 of the Environmental Management and Coordination Act 1999.
134 Section 38(1) of the Environmental Management and Coordination Act 1999.

The Minister for Environment and Natural Resources may declare areas as "*protected natural environment*" for the purpose of preserving biological diversity, indigenous wildlife, ecological processes and systems.[135] The Minister must also draw up an annual report on the state of the environment, to be presented to the National Assembly as soon as is reasonably practical after its publication.[136] The Act also establishes a National Environment Trust Fund to further research into environmental management and capacity building.[137]

Opportunities

Communities could advocate the Act to support the recognition of their customary governance systems of Sacred Natural Sites and Territories. In particular through the Act's recognition of cultural and spiritual principles and traditional knowledge of communities for environmental protection, as well as the intergenerational and precautionary principles. In addition the Act's recognition of every person's right to a clean and healthy environment as including the need to access the environment for "*spiritual and cultural purposes*", could be interpreted as the need to access and relate with Sacred Natural Sites and Territories. The right could be further interpreted to recognise the right of ecosystems and Sacred Natural Sites to a healthy environment. As implicitly recognised in the Act, humans are interconnected with and are dependent on biological diversity and Earth. Therefore, a person's right to a healthy environment necessitates respect of Earth's right to maintain her ecological integrity, and a human responsibility to protect ecosystems and Earth as a whole.

The Act requires that there is public knowledge on the status of the environment, through annual parliamentary reports, which could be used in the advocacy of the right to a healthy environment. Pursuant to the Act communities have means to enforce this right and the duty for environmental protection, through a complaints procedure and legal redress which includes cessation of ecosystem destruction and restoration of the harm. Arguably compensation for "*any victim of pollution*" could be interpreted as, and advocated for, including ecosystems and Earth as a whole. Such interpretations and enforcement mechanisms would strengthen the recognition of Sacred Natural Sites and Territories and their customary governance systems based on Earth Jurisprudence principles.

The advisory role of the NEMA on international laws[138] provides an advocacy opportunity for the ratification and implementation of important international legal frameworks on the rights of indigenous and local communities, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007 and ILO Convention No. 169, 1989, and also emerging laws which recognise Earth Jurisprudence principles, such as the Universal Declaration on the Rights of Mother Earth (see Section 4.1.1 of this Report for more information).

Challenges

While the Act recognises the "*traditional interests*" of communities, it fails to recognise community participation as a guiding principle in ecosystem protection, or enable and promote community participation in protecting ecosystems. Furthermore, the Act does not enable the participation of communities in the institutions responsible for environmental 'management'. The institutions established under the Act are predominantly top down and industry biased. For instance membership to institutions such as NEMA and the public Complaints Committee[139] often require a business representative but no community members.

The rights of communities to participate in decision making in the National Environment Council is not recognised unless invited by the Minister, or through participation in NGOs, which are not always culturally or democratically representative.

135 Section 54 of the Environmental Management and Coordination Act 1999.
136 Section 9(3) of the Environmental Management and Coordination Act 1999.
137 Section 24 of the Environmental Management and Coordination Act 1999.
138 Section 9(2)(f) and (g) of the Environmental Management and Coordination Act 1999.
139 Section 31(e) of the Environmental Management and Coordination Act 1999.

The Act, like many laws, is predominantly human-centred through its language and approach, such as referring to 'segments' of the environment which can be 'managed'. The Act does not go as far as recognising the rights of ecosystems and Earth as whole, or that the violation of Earth's Rights could constitute a crime of *"Ecocide"* (see Section 4.1.2 of this Report for more information). Therefore there are advocacy opportunities for communities and civil society to inform NEMA and other institutions of the national and international laws which do recognise Earth Law principles (see Section 4.1 of this Report for more information) and urge their implementation and enforcement.

3.5.3.1 The Environmental Management and Coordination (CBD) Regulations 2006[140]

Closely linked to the Environmental Management and Coordination Act 1999 are the Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations 2006. These Regulations are equally informed by the Convention on Biological Diversity, which Kenya signed and ratified on 26 July 1994.

The Regulations were drawn by the office of the Minister for Environment and Natural Resources in keeping with the powers set out in Section 147 of the Environmental Management and Co-ordination Act 1999. The Regulations were drawn on recommendations made by NEMA and in consultation with relevant lead agencies.

The Regulations seek to *"conserve biological diversity"*, to provide *"access to genetic resources"* and to ensure *"benefit sharing"*. In conserving biological diversity, Regulations 4 to 8 call on NEMA to deal with the following:

4. *"Environmental Impact Assessment Licence"* - People are prohibited from engaging in *"any activity that may have an adverse impact on any ecosystem"* or *"lead to unsustainable use of natural resources"* without an Environmental Impact Assessment licence issued by NEMA;
5. *"Conservation of threatened species"* – NEMA shall *"impose bans, restrictions or similar measures on the access and use of any threatened species in order to ensure its regeneration and maximum sustainable yield"*;
6. *"Inventory of biological diversity"* – including *"threatened, endangered, or rare species"*, within 2 years of the Regulations and made publicly available;
7. *"Monitoring of status"* – of biological diversity *"to prevent and control their depletion"*; and
8. *"Protection of environmentally significant areas"*.

Access to genetic resources first requires a permit from NEMA (Regulation 9) accompanied by evidence of *"Prior Informed Consent"* defined as *"an international operation procedure for exchanging, receiving and handling notification and information by a competent authority"* from *"interested persons and relevant lead agencies"* (Regulation 9(2)). The public may make objections to the proposed permit which NEMA must review with the application and *"if satisfied that the activity to be carried out shall facilitate the sustainable management and utilization of genetic resources for the benefit of the people of Kenya, issue an access permit to the applicant"* (Regulation 11(1)).

140 Text available at: http://www.nema.go.ke/index.php?option=com_phocadownload&view=category&id=23:biodiversity-benefit-sharing-regulations&Itemid=594 (last accessed 24/10/2012).

Regulation 3(a) states the Regulations do not apply to:

> *"the exchange of genetic resources, their derivative products, or the intangible components associated with them, carried out by members of any local Kenyan community amongst themselves and for their own consumption".*

Opportunities

Through the Regulations and NEMA, communities could advocate for the need to protect rare species and biodiversity in their Sacred Natural Sites and Territories, and the duty of all persons not to harm or use ecosystems unsustainably. That the Regulations do not apply to community "*use*" of biodiversity could support the recognition of customary, cultural and spiritual practices related to biodiversity, on their own terms. Through the Act's requirement of Free Prior and Informed Consent and opportunity for objections to the proposed access to genetic resources, communities could assert their right to be consulted, and their implicit right to say "*no*" to use of their 'genetic resources'. Further, Part IV recognises that where biodiversity and genetic resources are accessed and used, there should be "*benefit-sharing*" in partnership with communities.

Challenges

As previously highlighted, recognition and support for community governance of ecosystems is lacking. Pursuant to the Regulations it is NEMA, not communities, who are entrusted with protecting ecosystems. While communities could assert the requirement for Prior Informed Consent before their genetic resources are accessed by other persons, there is no requirement that their consent is freely given without undue pressure. Nor that their implicit right to say *"no"* is respected and thereby access to their genetic 'resources' prohibited. Further, the Regulations presume that an access permit would be granted if it facilitates *"sustainable management"* and is for the *"benefit of the people of Kenya"*. In the absence of explicit definitions, communities could advocate for their broader interpretation to mean sustainability according to ecological criteria, such as Earth's laws and boundaries, which recognises Sacred Natural Sites as No-Go areas for development (see Section 4.1.3 of this Report for more information), and is for the *"benefit of the wider Earth Community"*. These higher standards could shift the presumption for access to genetic 'resources' towards a precautionary approach against potentially destructive activities.

As is a limitation with other laws, conservation and access to 'resources' that are not guided by ecological limits and boundaries, and which are not sensitive to cultural and spiritual values and practices, allow for the exploitation of Earth. Such laws do not prevent threats to Sacred Natural Sites and Territories such as tourism, 'biopiracy' and research academics seeking to use and profit from biodiversity. Even though the Regulations appear to recognise cultural knowledge they lack the depth found in the Convention on Biological Diversity (CBD)'s Article 8(j) (respect and preservation of traditional knowledge) and Article 10 (respect for customary use of biodiversity according to cultural and ecological requirements). In practice, NEMA's duty to protect biodiversity does not take priority over government's other interests such as economic development.

Communities have an opportunity to advocate for review and amendment of the parent Act and the Regulations in accordance to Constitutional requirements, particularly the respect of culture, self-governance of communities, encouragement of public participation in ecosystem protection, and the precautionary principle.

4. Recognition of Sacred Natural Sites in International Law

Kenya, like any country, is interconnected with a global community. Decisions and actions in Kenya affect other countries and Earth as a whole, and vice versa.

Many international laws recognise Sacred Natural Sites, the cultural and spiritual rights and responsibilities of their custodial indigenous and local communities, and their customary governance systems. Therefore international legal instruments could be used to complement and strengthen national recognition of community rights and responsibilities to govern and protect Sacred Natural Sites and Territories in accordance with their customary governance systems.

The Constitution of Kenya 2010 requires the implementation of international laws that Kenya is already party to. Article 2(6) states that *"[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"*. Article 2(5), which states that: *"[t]he general rules of international laws shall form part of the law of Kenya"* also provides an opportunity to advocate for the ratification and enforcement of other supportive international laws such as the ILO Convention No. 169, 1989, and endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007. This could strengthen recognition and support for Sacred Natural Sites and Territories, and the rights and customary governance systems of their indigenous and local communities. See the Appendix for a Summary Table and further information on international laws.[141]

4.1 Emerging International Law – the Recognition of Earth Law

There are also emerging international laws which recognise and embody Earth Jurisprudence principles, including recognition of the Rights of Nature, and a duty of care to Earth and future generations of all life. Drawing on these principles, communities could assert that Sacred Natural Sites and Territories have inherent rights to exist, to be undisturbed by development, and have a right to fulfil their functions as ecological, spiritual and cultural places and networks. Further, that we all have a responsibility to prevent any damage to ecosystems, and to contribute to the health and integrity of the Earth Community of past, present and future generations.

4.1.1 Universal Declaration of the Rights of Mother Earth

In April 2010, following the failure of the United Nations' Climate Change Summit in Copenhagen to set limits on greenhouse gas emissions, the Bolivian Government organised an alternative World People's Conference on Climate Change and Rights of Mother Earth, in Cochabamba, Bolivia, to coincide with Mother Earth Day on 22nd April. More than 35,000 people, including communities, NGOs, lawyers, academics, scientists and governments, participated from 140 countries. The participants drafted and adopted a Declaration of the Rights of Mother Earth[142], which built upon an earlier Declaration of Planetary Rights that was drafted by UK barrister Polly Higgins and South African lawyer Cormac Cullinan. The Declaration of the Rights of Mother Earth recognises Mother Earth as a Living Being with rights to life, to existence and to continue her vital cycles and processes free from human disruption. In 2012 the United Nations' Rio +20 Earth Summit recognised the need to live in harmony with Nature and paragraph 39 of the General Assembly's Resolution *"The Future We Want"* acknowledged that some countries recognise the Rights of Nature.[143]

141 Note also the forthcoming report of the African Biodiversity Network and the Gaia Foundation, which compiles detailed briefings and Declarations on international and African regional laws that support the recognition of Sacred Natural Sites and Territories and their Community Governance Systems.

142 See: http://therightsofnature.org/universal-declaration/ (last accessed 24/10/2012).

143 Available at: http://www.unep.org/rio20/portals/24180/Docs/727The%20Future%20We%20Want%2019%20June%201230pm.pdf (last accessed 24/10/2012). See also the United Nations' website *Harmony with Nature* available at: http://harmonywithnatureun.org/

4.1.2 Proposed United Nations Crime of Ecocide

In 2009 Polly Higgins, UK barrister and activist, called on the United Nations to adopt a law recognising mass destruction of ecosystems as a 5th international Crime against Peace - a Crime of *"Ecocide"*[144]. Ecocide would be defined as:

> *"The extensive damage, destruction to or loss of ecosystems of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished."*

Founded upon a duty of care to Earth, this crime against peace would be of strict liability and *erga omnes* (binding on all - even those States who are not signed up to the International Criminal Court (ICC)). Mining, fossil fuel extraction (e.g. Tar Sands development in Alberta, Canada) and mass deforestation could be classified as Ecocide.[145]

4.1.3 Proposed United Nations Declaration on Planetary Boundaries

In 2011 Peter Roderick, a public interest lawyer in the UK, proposed a draft United Nations Declaration on Planetary Boundaries[146] which would recognise and respect the necessary Earth-system processes which sustain all life, and promote responsibility for safeguarding these processes from serious or irreversible damage. The draft Declaration draws on research, published in *Nature* magazine 2009, which argues that there are nine critical Earth-system processes and associated thresholds which we need to live within in order to prevent irreversible or catastrophic environmental change at continental to global scales. According to the report, three of these boundaries have already been breached: climate change; biodiversity and the nitrogen cycle. The draft Declaration calls for humanity to recognise, respect and be responsible for not transgressing planetary boundaries.

4.2 African Laws[147]

4.2.1 The African Charter on Human and Peoples' Rights[148]

The African Charter on Human and Peoples' Rights (ACHPR) is the African continent's human rights charter, which came into force on 21 October 1986 in Nairobi and was ratified in Kenya on 23 January 1992. It is monitored by the African Commission on Human and Peoples' Rights and enforced by the African Court, established pursuant to the ACHPR. The ACHPR recognises and protects the collective rights of people, including *"the unquestionable and inalienable right to self-determination"* (Article 20(1)) and *"social and cultural development"* (Article 22(1)). The ACHPR could be used by communities to support the recognition of their customary governance systems and protection of Sacred Natural Sites and Territories.

(last accessed 24/10/2012). Note the Global Alliance for the Rights of Nature presented over 116,700 signatures from 113 nations and 189 organisations to the UN General-Secretary Ban Ki-Moon at the Rio +20 Summit, calling for recognition of the Rights of Mother Earth.

144 See: http://eradicatingecocide.com/ (last accessed 24/10/2012).

145 More than 10 countries have already recognised a form of Ecocide in their national laws, including Georgia, Kyrgyzstan, Russia and Vietnam. In the UK, a mock Ecocide trial was held in the UK Supreme Court on 30th September 2011; see http://www.thehamiltongroup.org.uk/common/ecocide.asp (last accessed 24/10/2012). Two fictitious company directors were found guilty of Ecocide in the Athabasca Tar Sands, Canada and were sentenced on 31st March 2012 through a Restorative Justice Process. For more information see: http://www.gaiafoundation.org/blog/the-sentencing-justice-for-the-earth-community (last accessed 24/10/2012).

146 See: http://planetaryboundariesinitiative.org/?page_id=18 (last accessed 24/10/2012).

147 See the Summary Table in Appendix 1 for more examples.

148 Text available at: http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf (last accessed 24/10/2012).

4.2.2 Kenya – The *Endorois* case[149]

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 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. Further, the Commission found that there had been a violation of the *Endorois*' right to social and cultural development under the African Charter for Human and Peoples' Rights. On 4 February 2010, the African Union affirmed the Commission report.

4.3 Customary Laws and Practices in Africa

The African Biodiversity Network (ABN) partners are working with indigenous and local communities to protect their networks of Sacred Natural Sites and Territories, by supporting the revival and practice of traditional ecological knowledge and customary governance systems, the distilling of guiding principles for the governance and protection of Sacred Natural Sites, and the securing of recognition in national, regional and international law and policy. By establishing legal precedents for the recognition of these guiding principles and customary laws, in Kenya and in Africa, the ABN are strengthening the legal recognition of Sacred Natural Sites and Territories and their customary governance systems, and are contributing to stronger recognition of Africa's pluri-legal systems. To follow are some examples of customary laws and practices of communities working with the ABN.

4.3.1 South Africa – Registration for the Recognition of the Network of Sacred Natural Sites in the Venda Territory[150]

The Mupo Foundation[151] is an NGO in South Africa which works with indigenous and local communities in Venda, Limpopo Province. Venda is an area of outstanding natural beauty and of vibrant traditional culture. In the foothills of the Soutpansberg, northern South Africa, the Mupo Foundation works with women and men elders, chiefs and local communities from seven different Clans to revive indigenous ecological knowledge and practices, to regenerate their territory, strengthen their sustainable livelihoods, and adapt and respond to the challenges of today. The communities' vision is "*to bring Mupo ecological order back to Venda, so that future generations of people and all species can live healthy lives*" (Mphatheleni Makaulule, Mupo Foundation).

"Destroying this Sacred Natural Site is killing us. Protection of Sacred Natural Sites is not for us only, it is for everybody. The rain will fall for everybody."

Vhomakhadzi of the Ramunangi Clan, Venda, South Africa.

Venda's forests, rivers, mountains and waterfalls are places of critical ecological, cultural and spiritual importance for the indigenous *vhaVenda* (Venda people). The Sacred Natural Sites, or *"Zwifho"* in local Venda language, are especially important as sources of springs that feed the rivers and provide water for the ecosystems and the communities. The *Zwifho* are respected as places formed by God, or the Creator, at the creation of the Universe, and are where the ancestors' spirits rest. *Zwifho* means *"to give and be given"* and they are places for ancient and ancestral rituals only and not for interference by other human activities. Each Sacred Natural Site is protected by a different Clan. These Clans are the traditional Custodians of the last remaining indigenous forests and Sacred Natural Sites in Venda. It is the *Vhomakhadzi* or women elders from each Clan who hold a particular responsibility for spiritual connection and for the ancient and ancestral rituals to protect the *Zwifho*. They are known as the "rainmakers" and they continue to practice their cultural tradition of rainmaking through maintaining the health and integrity of their local ecosystems.

149 *The Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya*, Communication 276/2003, African Commission on Human and Peoples' Rights, 2010. Text available at: http://www.minorityrights.org/9587/press-releases/landmark-%20decision-rules-kenyas%20removal-of-indigenous-people-from-ancestral-land-illegal.html%255d (last accessed 24/10/2012).

150 Cited from discussions with elders of *Dzomo la Mupo*, the organisation formed by knowledgeable elders and Custodians for the protection of *Mupo* (Mother Earth, the Universe – all of Creation which is not human-made) and *Zwifho* (Sacred Natural Sites) in Venda.

151 See: http://mupofoundation.org (last accessed 24/10/2012).

In October 2009 the Mupo Foundation, with support of the Gaia Foundation, organised a participatory eco-cultural mapping workshop.[152] More than 70 local people were supported to develop maps and calendars of the past ancestral order, present situation and future visions and plans. These maps form part of an ongoing process to revive traditional ecological knowledge and practices and regenerate the network of *Zwifho* (Sacred Natural Sites), and to secure recognition of the customary governance systems.

In May 2010, bulldozers almost destroyed one of the *Zwifho* (Sacred Natural Sites), at *Guvhukuvhu La Nwadzongolo* (now erroneously and publicly known as Phiphidi Waterfall), and violated the rights of the communities to make way for illegal tourism development. Many sacred trees were cut down and chalets were built near the Sacred Waterfall. This was an affront to the Venda people, for whom the Sacred Waterfall and Forest play a vital role in the rainmaking system of Sacred Natural Sites in Venda.

In response to this, the *Vhomakhadzi*, women elders, formed a committee called *Dzomo la Mupo* (Mouth and Voice of Earth) to defend and protect their network of *Zwifho*. They recognised that the destruction of one Sacred Natural Site would open the way to the destruction of other Sacred Natural Sites and thereby to their way of life.

Dzomo la Mupo courageously took the developer to court for violating their traditional and Constitutional, cultural and spiritual rights, and for breaching planning regulations. The Mupo Foundation and the Gaia Foundation supported *Dzomo la Mupo*'s application to the South African High Court for an interim court interdict, requiring developers to stop building the tourism complex in the Sacred Natural Site, pending a full hearing. The presiding Judge of the Limpopo High Court, Justice Mann, recognised the Constitutional rights of the custodial communities, and during the hearing he said that the whole Site was sacred, in the same way a church building is regarded as a holy place, even though the rituals are done only at the altar.[153]

Following breach of this order by the developers, the South African High Court extended the temporary court interdict, on 22nd February 2011, to the builders to once again stop illegal development at the Sacred Natural Site. Contempt of court proceedings and hearing of a permanent court interdict are under way.

To secure long-term protection of their network of *Zwifho* (Sacred Natural Sites), *Dzomo la Mupo* and their communities have come together and agreed to partially document their sacred knowledge in order to secure recognition of their indigenous "*Laws of Origin*", which are the guiding principles for protecting the network of Sacred Natural Sites and Territories. Three of the seven Clans of *Dzomo la Mupo* have developed a Profile and maps of their Sacred Natural Sites, a Constitution which documents the governance structure and system of the custodial Clan, a Glossary of Venda terms, and other supporting materials. The Mupo Foundation, Gaia Foundation, Chennells Albertyn attorneys and various advisors provided strategic and legal assistance.

On 10th September 2012 *Dzomo la Mupo* submitted an application, on their own terms, to the South African Heritage Resources Agency (SAHRA) for registration of the *Zwifho* (Sacred Natural Sites) under the South African Heritage Resources Act. In the application *Dzomo la Mupo* clarified that by registering the *Zwifho* (Sacred Natural Sites) they are not giving up their rights and responsibilities to govern and protect their *Zwifho* but are affirming and securing recognition of their role as Custodians. They also clarified the interrelated but distinct meanings of 'heritage' (which could allow for tourism and other development) and Sacred Natural Sites (which are respected as No-Go areas for development and any other activities which would undermine the *Zwifho* and territory). The process of national registration for the recognition of the network of *Zwifho* continues.

Venda's network of Sacred Natural Sites is also in the process of being recognised internationally through registration with the World Conservation Monitoring Centre (WCMC) as an Indigenous and Community Conservation Area (ICCA).

152 See the short film *Reviving Our Culture, Mapping Our Future* (2009), co-produced by Mupo Foundation, ABN and Gaia Foundation; available at: http://www.africanbiodiversity.org/content/latest/reviving_our_culture_mapping_our_future (last accessed 24/10/2012).

153 See *Nemarude and others vs Tshivhase Development Foundation and others*, Limpopo High court case 340/210.

These community-led processes in Venda are laying the foundation for the recognition of the network of Sacred Natural Sites and their customary governance systems under national and international laws. It is also setting a benchmark in terms of community processes to document and register Sacred Natural Sites and Territories on their own terms, and is inspiring other communities in Africa and elsewhere to revive and document the laws and governance systems of their Sacred Natural Sites and Territories.

4.3.2 South Africa - Defending the Mapungubwe UNESCO World Heritage Site in Limpopo

The Mapungubwe Cultural Landscape and National Park in Limpopo, which is also a UNESCO World Heritage Site and Biosphere Reserve, is threatened by mining by Coal of Africa (CoAL) at Vele colliery.

On 3rd August 2010, the Save Mapungubwe Coalition Group applied for a court order to stop mining in an area of critical ecological, cultural, spiritual and archaeological importance. The local communities were not consulted about the mining, and the ecological, cultural and social impacts of the mining were not fully taken into account prior to the proposed mining.

On 5th August 2010, the South African Environmental Management Inspectorate (Green Scorpions) issued a compliance order to CoAL to stop mining. In December 2010, the Centre for Child Law at University of Pretoria applied to intervene as *amicus curiae* in the interdict application arguing that the mining violates children's Constitutional rights to environmental and cultural heritage.[154]

In 2011, the Coalition entered into negotiations with CoAL to ensure that CoAL will adhere to strict environmental, social and accountability standards and regulatory frameworks to prevent and mitigate any impacts on Mapungubwe should any mining take place. The Coalition is advocating for the need to demarcate areas of heritage, ecological, biodiversity, cultural and hydrological importance and value, where mining should be restricted. In February 2011, a group of 13 NGOs proposed a list of such areas which was submitted to the Minister of Mineral Resources. The Coalition continues to call for recognition of World Heritage Sites, including the need for adequate "*buffer zones*" for all World Heritage Sites.[155]

4.3.3 Ethiopia – Registration for the Recognition of Sheka Sacred Forest

The Movement for Ecological Learning and Community Action (MELCA)[156] means "*a ford*" in local language. The word is used symbolically to show the link between generations, elders and youth, between culture and biodiversity, between western and indigenous science, and between communities and schools.

MELCA is working with communities, particularly in Sheka, Bale and Sebeta-Suba in the restoration and the protection of their indigenous Sacred Forests, bio-cultural diversity and practice of sustainable livelihoods. The traditional ecological knowledge of communities is at the heart of MELCA's approach, both at community and policy levels.

154 More information available at: http://www.savemapungubwe.org.za/ (last accessed 24/10/2012). Note communities and NGOs in South Africa are campaigning for legal recognition of 'No-Go zones' for mining and development in places of critical ecological and cultural importance, see: http://www.wwf.org.za/?3741/South-African-NGOs-propose-no-go-mining-zones (last accessed 24/10/2012).

155 See: http://www.savemapungubwe.org.za/ (last accessed 24/10/2012).

156 For more information see: http://www.melca-ethiopia.org/ (last accessed 24/10/2012). This summary is distilled from discussions with MELCA.

Sheka Forest[157] is one of the last remaining vine tropical forest areas in south-east Ethiopia. MELCA is supporting the communities in building resilience from threats of tea, coffee and eucalyptus plantations. MELCA has assisted the communities to revive their traditional ecological knowledge and practices, to unite and form a Sheka Forest Alliance, and to map (including three-dimensional Participatory Mapping) their networks of Sacred Natural Sites. These maps are supporting communities to develop governance plans for restoring their Sacred Natural Sites, and are serving as advocacy and negotiating tools with the Ethiopian Government for the recognition of Sacred Natural Sites and their custodial communities. A proposal for the drafting of a national law to support community governance and protection of Sacred Natural Sites is also under way.

In 2012, the Sheka people, with support from MELCA, applied for registration of Sheka Sacred Forest as a UNESCO Man and Biosphere (MAB) Reserve which recognises local communities' participation in the governance and protection of ecosystems. In July 2012, UNESCO accepted the nomination and the Sheka Zone has become the third MAB Reserve in Ethiopia. The Biosphere Reserve recognises a core zone in which certain human interference is prohibited in the sacred and cultural forests and wetlands. The Biosphere Reserve also serves as a demonstration site for environmental education and the link between culture and biodiversity, or cultural biodiversity.[158]

For the indigenous communities, intergenerational learning is at the heart of Sacred Natural Sites protection. The Social Empowerment through Group and Nature Interaction (SEGNI) Project, facilitated by MELCA, gives opportunities to disadvantaged youth to spend five days in the forests to learn about their traditional forest customs and their responsibilities under the guidance of knowledgeable elders. This initiative was selected by UNESCO for the project "*Linking Culture, Education and Sustainability: Good Practices and Experiences from Around the World*".[159] MELCA is also working with the Ethiopian Civil Service College where students are encouraged to learn from elders about the customary laws of their communities. Exchanges between elders of different communities are supporting them to revive and strengthen their customary governance systems and the protection of Sacred Natural Sites in the face of growing external pressures.

4.3.4 Statement of Common African Customary Laws for the Protection of Sacred Natural Sites

In April 2012, custodial communities of Sacred Natural Sites from Kenya, Ethiopia, Uganda and South Africa met in Nanyuki, Kenya. The Custodians shared their experiences of working with indigenous and local communities to revive their traditional ecological knowledge, practices and governance systems for protecting their Sacred Natural Sites and Territories. Sharing concerns of the growing threats to Earth, the Custodians developed a Statement of the Common African Customary Laws for the Protection of Sacred Natural Sites[160], with support of partner organisations in the African Biodiversity Network.

This Statement explains how each community has their own word in their local language to describe such potent places, which have a deeper meaning than the English term, 'Sacred Natural Sites'. Despite some differences, the customary laws that govern Sacred Natural Sites were remarkably similar. The principles enshrined in the Statement provide important guidance on how Sacred Natural Sites should be respected as No-Go areas for any activity, other than the required spiritual practices, and that the customary governance systems of custodial communities should be recognised.

157 For more information see: *The Sheka Forest Story - Wisdom from the Past, Resilience for the Future.* Film produced in collaboration with MELCA, ABN and Gaia Foundation, available at: http://www.africanbiodiversity.org/content/latest/sheka_forest_story (last accessed 24/10/2012).

158 See: http://www.melca-ethiopia.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 24/10/2012), and http://www.unesco.org/new/en/media-services/multimedia/photos/mab-2012/ethiopia/(last accessed 24/10/2012).

159 For more information see: http://insight.glos.ac.uk/sustainability/Education/unescoculture/Pages/ExamplesofGoodPracticeAll.aspx (last accessed 24/10/2012).

160 African Biodiversity Network, *Statement of Common African Customary Laws for the Protection of Sacred Natural Sites* (2012), developed at the Sacred Natural Sites Custodian Meeting, Nanyuki, Kenya 28 April 2012. Available at: http://www.africanbiodiversity.org/system/files/images/Statement%20of%20Common%20African%20Customary%20Laws%20for%20the%20Protection%20of%20SNS.pdf (last accessed 24/10/2012).

4.4 Customs and Laws in other Countries

Communities around the world continue to revive and practice their traditional wisdom and governance systems for the protection of Sacred Natural Sites and Territories. There is growing legal recognition of their customary laws and the Earth Jurisprudence principles which underpin them.

To follow are some examples of other precedents that are strengthening the recognition of Sacred Natural Sites and Territories and their inherent Rights, and the rights and responsibilities of their custodial communities to govern and protect them for present and future generations.

4.4.1 Colombia – Registration for the Recognition of Intangible Heritage of the Pirá Paraná River

"It is only in the Pirá Paraná river basin that sacred ancestral knowledge for managing the territory - including the rituals, the Yuruparí sacred instruments, the sacred plants like the yagé, coca and tobacco and the wisdom that is concentrated in Sacred Natural Sites - has been preserved, is practised, and is transmitted from one generation to the next."

Robertico Marín Noreña, Pirá Paraná River

> *"For the indigenous people of the Pirá Paraná, Hee Yaia~Kubua Baseri Keti Oka is an organic system of traditional knowledge aimed at maintaining the delicate balance of relations between humans and Nature and contains millennial wisdom for governing territory, time and life. It involves deep ancestral knowledge that is still valid and is manifest in ritual ceremonies, in social conduct and in cosmological, ecological and economic practices."*[161]

The local indigenous population, mostly belonging to Barasana, Eduria, Makuna, Bará, Tatuyo, Tuyuca and Carapana ethnic groups, live in small settlements and *''malocas"*[162] scattered along the banks of the Pirá Paraná River, a tributary of the Apaporis River in the south-eastern Colombian Amazon. In 1996, they formed ACAIPI (Association of Indigenous Captains and Authorities of the Pirá Paraná), led by their elders and traditional authorities, and with support from Gaia Amazonas, a Colombian NGO, they have worked to strengthen their cultural identity as the basis for governing their ancestral lands.

Their territory, legally recognised by the Colombian government as an *"indigenous resguardo"*[163], covers 5,400 square kilometres of tropical forest. As a *resguardo* it is recognised as protected as a collectively owned indigenous territory that cannot be sold or embargoed; however, the subsoil belongs to the nation and remains vulnerable to mining and other interests. One of the most immediate threats for the Pirá Paraná is from gold mining.

This is the *"heart-centre"* of a larger Sacred Territory, *Hee Yaia Godo~Bakari* (territory of the *"Jaguar Shamans of Yuruparí"*). The indigenous people of the Pirá Paraná sought legal recognition of their intangible heritage, and applied to the Ministry of Culture to recognise and include their traditional knowledge and governance system as part of the nation's Intangible Cultural Heritage.

Robertico Marin Noreña, a leader of the ACAIPI, explained that the government should only *recognise* intangible heritage; the custodial communities would be the ones to *protect* their heritage. The communities called for the recognition of their whole governance system as an intangible heritage, including their *malocas* (community longhouses), rituals, traditional healers, sacred plants, feathers and songs. Robertico gave an analogy of the body: "*We cannot only protect one organ. The finger, for example, is just as important as the heart*". All aspects of intangible heritage are important, and tangible heritage is inseparable from intangible heritage.

161 Cited from testimonies of ACAIPI leaders, with the support of Gaia Amazonas, edited by Nelson Ortiz and Silvia Gómez, and translated by Fiona Wilton (Gaia Foundation).

162 A large communal living space (wooden construction and thatched leaves for the roof), which represents the Universe according to indigenous cosmology. It functions as a centre for the majority of ritual activities, being the place for thought and territorial governance. Nowadays it also serves as a space for meeting, daily reflections and political decision-making.

163 The 1991 Colombian Constitution recognises indigenous ***resguardos*** as inalienable communal property and stipulates that these territories are to be governed by indigenous councils in accordance with the customs and traditions of local communities.

The community called for special measures to guarantee the permanence and secrecy of their Sacred Natural Sites and the transmission of their knowledge. They did not share detailed maps disclosing sacred knowledge. An important lesson is that the more authentic and more involved the community, the stronger the application for recognition as Intangible Cultural Heritage. The Ministry of Culture agreed and approved the application. As the ACAIPI explain:

> *"The prior organisational work of ACAIPI and the experience of ACAIPI in starting a participatory process of turning traditional knowledge into a cultural heritage of the nation has motivated other grassroots organisations to reflect on their own cultural heritage and to begin working internally to strengthen its transmission. It has also led to alliances and agreements between various organisations, in Colombia and in Brazil, for developing intercultural and trans-boundary processes that seek to jointly recognise and protect the Amazon macro-region."*[164]

On 5th August 2010, *Hee Yaia~Kubua Baseri Keti Oka*, was registered on Colombia's Representative List of Intangible Cultural Heritage of the Nation, followed by inclusion in the UNESCO list of Intangible Cultural Heritage in November 2011.[165] A Special Safeguard Plan has been approved, which acknowledges that only some of the indigenous wisdom can be revealed as the knowledge itself is sacred, likewise the location of Sacred Natural Sites should not be revealed.

4.4.2 Russia – Recognition of Sacred Natural Sites in the Altai as Ethno Parks[166]

The Altai Republic is a mountainous republic in Russia situated in southern Siberia, near the borders of Mongolia, Kazakhstan and China. The name *"Altay"* (or *"Altai"*) comes from Mongolian *"Altan"*, which means *"golden"*. The Altai is at the heart of the Story of Origin for many ethnic groups from the surrounding countries.

Indigenous Altaians have continued their ancient shamanic tradition, which is deeply rooted in respect of Earth as Sacred. Reading the laws of the land and their Sacred Natural Sites over the centuries, they have developed norms and customs to regulate their activities in order to contribute to the health and wellbeing of the sacred territory and all life.

As Chagat Almashev (Director of the Foundation for the Sustainable Development of Altai) explains:

> *"Sacred sites are distinguished by their strong natural energetic properties. In their own way, they are the acupuncture points of the planetary organism, through which all energy channels, helping to keep the ecological condition of the world's biodiversity intact. Each sacred place has its own function within the planetary organism."*[167]

In response to growing threats of privatisation in the 1990s the indigenous communities began creating Ethno-Parks, which they govern according to their traditional ecological knowledge and governance systems, through the leadership of Danil Mamyev. In 2001 Karakol Nature Park Uch Enmek was established and since then there are five Ethno-Parks. The UNESCO's recognition of the *"Golden Mountains of Altai"*, as a World Heritage Site, strengthens the recognition of the community governance and protection of these Sacred Natural Sites and Territories.

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164 Cited from testimonies of ACAIPI leaders, with the support of Gaia Amazonas, edited by Nelson Ortiz and Silvia Gómez, and translated by Fiona Wilton (Gaia Foundation).

165 For a short film submitted to the UNESCO List of Intangible Cultural Heritage see: Pirá Paraná (2010) http://www.youtube.com/watch?v=ddW3tpC-K28&feature=youtu.be (last accessed 24/10/2012).

166 Distilled from discussions with Danil Mamyev (Director of the Uch Enmek Nature Park), Chagat Almashev (Director of the Foundation for Sustainable Development of Altai), Altai communities in Russia, and Gleb Raygorodetsky (Adjunct Research Fellow at UNU-IAS Traditional Knowledge Initiative). See for further information: http://www.fsda.ru/text/home/mountain_news.html; and http://www.altaiproject.org/ (last accessed 24/10/2012).

167 Cited in Almashev, Chagat (2009) "Cultural Crossroads" in *Resurgence* 255; available at: http://www.resurgence.org/magazine/article2873-Cultural-Crossroads.html (last accessed 24/10/2012).

However energy development and mining increasingly threaten the territory and the UNESCO protected area status. A 1,700-mile natural gas pipeline threatens to cut through the sacred Ukok Plateau with devastating impacts on the unique ecosystems, sacred territory and the indigenous peoples of the region.[168] The local communities and international allies continue to advocate for halting the pipeline.[169]

On 20th June 2012 the regional government of the Altai Republic passed a Decree for the "*Preservation and Development of Sacred Sites of the Altai Republic*". The Decree recognises Sacred Sites as including mountains, rivers, springs, and ancestral lands as places of worship. It prohibits, for example, activities which would result in damage to the top soil, irreversible changes to the hydrological cycle, and destruction of natural habitats. Enforcement of this law is needed urgently to strengthen the recognition of Sacred Natural Sites and Territories, and to prevent their destruction from activities such as the gas pipeline.[170]

4.4.3 Ecuador – Constitutional Recognition of the Rights of Nature (*Pacha Mama*)

In 2008, the people and the Constitutional Assembly of Ecuador passed, with an overwhelming majority vote, the first Constitution in the world to state that "*Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes*" (Article 71). The Constitution also recognises Nature's legally enforceable rights as including restoration, independent of damage to humans (Article 72). Citizens have a right to a healthy and ecologically balanced environment and a reciprocal duty to respect the Rights of Nature.

Under the Constitution, communities can hold public authorities accountable for violating Nature's Rights. Several precedent-setting cases have been established which assert the Constitutional Rights of Nature. On 26th November 2010 an international alliance of environmental activists filed a case against British Petroleum (BP) in the Ecuadorian Constitutional Court to defend the Rights of Nature.[171] They advocated Article 71 of the Constitution which allows a citizen or group to file a case in the Constitutional Court of Ecuador for a violation which occurs in a different country but which affects Earth as a whole. Rather than seeking financial compensation, the Coalition called for BP to refrain from extracting oil, an amount at least equivalent to that spilled in the Gulf of Mexico.[172] The case is ongoing.[173]

168 It has been reported that this pipeline was approved by the Russian Altai Republic in October 2012 despite strong local and international opposition. Legal and regulatory complaints are being pursued to hold the authorities to account and to enforce their legal obligations. For more information see: http://www.culturalsurvival.org/news/campaign-update-russia-pipeline-construction-approved (last accessed 24/10/2012).

169 In 2011 UNESCO warned that such devastating impacts from the pipeline could lead to the inclusion of the area on the UNESCO List of World Heritage in Danger, and in June 2012 UNESCO urged for an alternative route. See: http://www.sacredland.org/unesco-experts-urge-alternate-route-for-altai-pipeline/ (last accessed 24/10/2012).

170 See original press release in Russian; available at: http://altai-republic.ru/modules.php?op=modload&name=News&file=article&sid=13719 (last accessed 24/10/2012). For more information see: http://www.culturalsurvival.org/news/good-news-russia-sacred-sites-are-protected-local-executive-power (last accessed 24/10/2012).

171 For further information see: Nnimmo Bassey (Chair of Friends of the Earth International) discussing *Justice for the Earth Community: Defending the Rights of Nature and Holding Corporations to Account* at Gaia Learning Centre, September 2011, available at: http://www.gaiafoundation.org/galleries/videos/nnimmo-bassey-on-justice-for-the-earth-community-keep-the-oil-in-the-soil (last accessed 24/10/2012). See also http://www.navdanya.org/news/142-historic-moment-in-the-defence-of-the-rights-of-nature (last accessed 24/10/2012).

172 Text of demands available at: http://indigenouspeoplesissues.com/attachments/article/7870/demand_ingles.nb.rev.pdf (last accessed 24/10/2012).

173 At the time of writing, BP had been summoned to appear before the Second Labour Court in Quito Ecuador. A date was yet to be set. See: http://www.ejolt.org/2012/08/bp-summoned-to-answer-for-assault-on-mother-earth-for-gulf-of-mexico-spill/ (last accessed 24/10/2012).

On 30th March 2011 in *Wheeler versus Director de la Procuraduria General Del Estado en Loja, Juicio*[174] the Provincial Court of Loja granted an injunction against the provincial government of Loja to stop violating the Constitutional Rights of the Vilcabamba River to exist and maintain its life cycles, structure, functions, and evolutionary processes. The Court ordered the government to present its environmental impact studies and develop a rehabilitation and remediation plan.[175]

The Constitution recognises and protects the rights of indigenous peoples to self-determination, including governance of their ancestral lands and territories according to their customs and traditional authorities. The Constitution also enshrines the principles of *"sumac kawsay"* (good living), intergenerational responsibilities, and strict application of the precautionary principle.[176]

4.4.3 Guatemala – Proposed Law on Sacred Sites

Since 1997, Oxlajuj Ajpop, an organisation of indigenous Maya spiritual leaders, has been advocating for, and developing, a Law Proposal on Sacred Sites in consultation with indigenous communities. This proposed law aims to secure recognition of Sacred Sites and Territories and their governance, access, use, and conservation by communities. It has not yet been accepted by all members of the Guatemalan Congress and the government, but negotiations continue. Oxlajuj Ajpop are also calling for a new Constitution and legal reform which respects Mother Earth, ecosystems and indigenous territories, and a "*socially and legally pluralistic state*".[177]

4.4.4 New Zealand - Recognition of the Rights of a River

On 30 August 2012, the *Whanganui River iwi* indigenous community and New Zealand Government signed an agreement which recognises the Rights of the Whanganui River, and the *Whanganui River iwi* as her Custodians.

The *Whanganui River iwi* indigenous community have a strong spiritual and cultural relationship with the River, based on an understanding that *"Ko au te awa, Ko te awa ko au" – "I am the river and the river is me"*. They have been advocating for legal recognition of the Rights of the River since 1873.

The agreement finally recognises the River as an integrated and living whole entity *"Te Awa Tupua"*, with legal rights and interests, and the *"owner"* of its own river bed. The *Whanganui River iwi* are now recognised as joint Guardians entrusted to protect the health and wellbeing of the River for present and future generations.[178]

174 Case No. 11121-2011-0010. This was the first successful Rights of Nature case under Article 71 of the Ecuadorian Constitution; available at: http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9388.2012.00744.x/abstract;jsessionid=1E4A2C8BF36F1459C754FD8F768F01B1.d04t02?userIsAuthenticated=false&deniedAccessCustomisedMessage= (last accessed 24/10/2012); and http://blogs.law.widener.edu/envirolawblog/2011/07/12/ecuadorian-court-recognises-constitutional-right-to-nature/ (last accessed 24/10/2012).

175 See: http://therightsofnature.org/first-ron-case-ecuador/. For progress on implementation see: http://therightsofnature.org/tag/vilcabamba-river/ (last accessed 24/10/2012).

176 Note also the legal recognition of the Rights of Nature in other countries, such as Bolivia through its Law of the Rights of Mother Earth; text available at: http://f.cl.ly/items/212y0r1R0W2k2F1M021G/Mother_Earth_Law.pdf (last accessed 24/10/2012). For more Earth Jurisprudence precedents see: Gaia Foundation Earth Jurisprudence Centre: http://www.gaiafoundation.org/earth-law-precedents (last accessed 24/10/2012).

177 For more information see Gomez, Felipe (2010) "Sacred Natural Sites: A Law on Sacred Sites in Guatemala" in *Policy Matters* (IUCN magazine) 17, pp119-123. Available at:http://www.compasnet.org/blog/wp-content/uploads/2010/11/Policy%20brief_16_A4.pdf (last accessed 24/10/2012).

178 See for more information: http://www.beehive.govt.nz/release/whanganui-river-agreement-signed (last accessed 24/10/2012).

5. Conclusion

Despite an overall lack of recognition of and support for community rights and responsibilities to govern and protect Sacred Natural Sites and Territories according to their customary governance systems, communities have remained Custodians of surviving Sacred Natural Sites and Territories for millennia. This is a tradition which Kenyans must continue. While there are many challenges, there are also significant opportunities to transform and strengthen land tenure in Kenya to recognise community governance and protection of Sacred Natural Sites and Territories on their own terms, and according to customary governance systems based on Earth Law principles. This Report highlights how progress could be made.

5.1 Opportunities

5.1.1 Some recognition of communities' customary governance systems of Sacred Natural Sites and Territories

There are some legal foundations to support the recognition of the rights and responsibilities of communities to govern and protect their Sacred Natural Sites and Territories according to their customary governance systems. Following the implementation of the Constitution of Kenya 2010, marginalised, minority and indigenous communities are now recognised, and respect for their equality is being promoted. Communities can now reclaim and exercise self-governance of their Sacred Natural Sites and Territories. The Constitution confers a 'triple advantage':

- It places culture at the heart of national civilisation and makes the promotion and protection of culture a right;
- It makes environmental protection a collective responsibility; and
- It recognises community land, including ancestral lands, as *''vest[ing] in and held by communities"* and recognises the right of communities to self-governance.

The recent land related laws such as the Environment and Land Court Act 2011, the Land Act 2012, the Land Registration Act 2012, and the National Land Commission Act 2012 enshrine the principles of community participation in the protection of land and ecosystems, recognise customary and cultural practices, promote intra and inter-generational equity, and provide for redress of historical land injustices, including through traditional dispute resolution mechanisms. Implementation of the Constitutional provision for a Community Land Act is pending, at the time of writing this Report, to address critical issues including clarity and recognition of community land tenure, title and rights, and customary governance systems on their own terms including the Earth Jurisprudence principles underpinning them. This Act has potential to strengthen further the recognition of and support for Sacred Natural Sites and Territories, and the customary governance systems of their custodial communities.

Other national laws and policies such as the National Museums and Heritage Act 2006, the Forests Act 2005, the Forests (Participation in Sustainable Forest Management) Rules 2009, the Environmental Management and Coordination Act 1999 and Environmental Management and Co-ordination (CBD) Regulations 2006 recognise and encourage community participation in forest and heritage 'management', as well as recognising customary practices and institutions. However they do not go as far as recognising and supporting the rights of communities to govern and protect their Sacred Natural Sites and Territories on their own terms, according to their customary governance systems based on Earth Jurisprudence principles.

5.1.2 Opportunities for legal reform

There are several opportunities to transform and to strengthen the legal system, particularly concerning land tenure in Kenya. For example, existing laws need to be revised and amended to align with the Constitution, and be interpreted more broadly to recognise Earth Jurisprudence and Community Ecological Governance principles. In drafting new laws, inspiration could be drawn from other national, regional and international laws, and the principles applied to the national context. Such opportunities are considered further in the Recommendations to follow (section 5.3).

5.2 Challenges

5.2.1 Inadequate recognition of communities' customary governance systems of Sacred Natural Sites and Territories

In current laws of Kenya, there is inadequate recognition of and support for communities' customary governance systems, particularly those that protect Sacred Natural Sites and Territories according to Earth Law principles. While some laws recognise the rights of indigenous and marginalised communities to participate in protecting ecosystems, they do not go as far as recognising the rights of communities to self-govern their lands and territories on their own terms, according to their culture and customary governance systems which are rooted in a different source of law. For example, there is a lack of recognition of a community's right to Free Prior and Informed Consent (FPIC) and to say "*no*" to potential misuse of their traditional knowledge and destruction of their Sacred Natural Sites and Territories by inappropriate development and other threats. This broader interpretation of FPIC is an integral prerequisite to the respect of cultural, spiritual, environmental and land rights of indigenous and marginalised communities, and to the respect of the right to self-governance more generally.[179]

5.2.2 Voluminous, complex and contradictory legal and policy frameworks

Laws and policies in Kenya concerning Sacred Natural Sites and Territories are many, voluminous and complicated. In particular, those pertaining to land contain a variety of contradictory provisions, some of which recognise, and others of which undermine, community rights and responsibilities to govern and protect their Sacred Natural Sites and Territories.

Land administration has also been highly centralised, inefficient and often lacking in transparency. In practice, ministries and institutions have not fully integrated crucial environmental conditions and cultural values into their policy-making processes. Many institutions have not involved communities in decision-making, or where participation has been encouraged, it has often been imposed and controlled from the top-down. The rights and responsibilities of communities to self-governance of their Sacred Natural Sites and Territories have not been recognised and protected. Mechanisms to resolve disputes between eco-cultural practices and economic development, and which recognise traditional dispute resolution processes, have also been lacking.

179 Note for example the United Nations Declaration on the Rights of Indigenous Peoples 2007, available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last accessed 24/10/2012); and ILO Convention No. 169, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314 (last accessed 24/10/2012).

Recent land laws, such as the Land Act 2012, should resolve some of these challenges through the revision, consolidation and rationalisation of the legal framework, and embodiment of principles of equity, transparency, public participation and encouragement of traditional dispute resolution processes. Therefore advocacy, participation in and monitoring of the implementation of these laws is important.

5.2.3 Human-centred and reductionist legal and policy frameworks

The dominant laws and policies concerning Sacred Natural Sites and Territories are framed in human-centred and reductionist values. They regard Earth as merely a 'resource' to be exploited rather than respected as a living Being and the life support system of all beings on Earth.

There is a lack of understanding that Earth is the source of law; that she is alive; and that all members of the Earth Community have the right to exist, the right to habitat and the right to participate in the evolutionary process. The current human-centred approach does not recognise that we are all fundamentally dependant on Earth for our survival.

While some laws do recognise the need to protect natural heritage and certain elements of Earth, such as forests and rivers, very few take an 'ecosystem' and holistic approach.[180] Recognition of the need for protection is primarily for human benefit rather than as a moral obligation to maintain the health and integrity of the whole Earth Community. As Thomas Berry warned, modern industrial law tends to be used to legitimise the destruction of Earth and bio-cultural diversity, rather than to recognise and support them.

Mike Jones, resilience practitioner and member of the Resilience Alliance Connector Group, explains:

> *"Institutions with centralised management systems impose a uniform set of rules for use of biodiversity that do not take into account the highly diverse and dynamic reality of Earth. This erodes the resilience that is necessary to maintain healthy ecosystems and sustain human livelihoods. The social and ecological context within which the laws operate, changes over time and across landscape in ways that do not fit with central control. In addition to denying those who live on the land the right to decide how the land will be 'used', 'command and control' approaches reduce the opportunity for innovation and learning at the local level. This legislative decoupling of people from the environment may ultimately lead to social and ecological collapse."*[181]

Just as the human-centred values underpinning legal and policy frameworks do not recognise our dependence on Earth, our life support system, they also do not recognise the diverse cultures in Kenya whose governance systems are founded in Earth Law principles. So far the legal, policy and institutional systems have failed to prevent destruction of Kenya's ecosystems and communities from growing exploitative threats, such as mining and tourism. What legacy are we leaving for future generations? Our survival depends on human laws complying with the laws of the Earth, the laws which govern all life.

180 The exceptions are the Environmental Management and Coordination Act 1999 and the Environment and Land Court Act 2011 which recognise the environment as including biological diversity and ecosystems as the "*foundation of social, cultural and spiritual advancement*", and the "*totality of nature*" including cultural heritage, respectively.

181 Mike Jones, resilience practitioner with Stockholm Resilience Centre. See: http://www.stockholmresilience.org/ and http://www.resalliance.org/ (last accessed 24/10/2012).

5.3 Recommendations

There are a variety of legal, policy, institutional measures and community initiatives which can be strengthened and developed to recognise community rights and responsibilities to govern their Sacred Natural Sites and Territories according to their customary governance systems. There are opportunities for us all to embrace and put into action. The Report makes the following recommendations:

5.3.1 For Government

5.3.1.1 ***Recognise community rights and responsibilities to govern their Sacred Natural Sites and Territories according to their customary governance systems, and on their own terms.*** In particular the recognition of self-governance, traditional ecological knowledge and practices, spirituality and culture, and participation in decision-making, including Free Prior and Informed Consent and right to say "no" to potentially destructive activities. Recognising customary governance systems on their own terms includes understanding that they are rooted in a different source of law. This requires recognition and respect that Earth's laws that govern life are primary, and that human laws need to be derived from and comply with Earth's laws in order to maintain the well-being of the Earth Community, of which humans are an inextricable part. Government and other bodies need to understand that it is the right and responsibility of the custodial communities of Sacred Natural Sites to *govern* and protect Sacred Natural Sites and Territories, and it is for the Government and other bodies to *recognise* this.

5.3.1.2 ***Enforce the Kenyan Constitution, and review existing and draft new legislative, policy and institutional frameworks to recognise communities' customary governance systems of Sacred Natural Sites and Territories.*** Following the implementation of the Constitution of Kenya 2010, all Acts of Parliament and policies should be realigned to uphold the Constitutional values and provisions. The 2012 IUCN Motion 54 urges "*national governments to develop appropriate policies, laws and programmes…that allow the custodians to continue to maintain and protect their sacred natural sites using their traditional practices and protocols, and in doing so respect the confidentiality of the sites and practices*."[182] Further, the participation of communities and civil society in institutions, such as the National Land Commission, needs to be recognised and facilitated. These actions would assist Kenya to fulfil its legal responsibilities to ensure the protection of land, ecosystems and communities for present and future generations.

5.3.1.3 ***Enforce international instruments to which Kenya is a party, and ratify other relevant laws.*** Articles 2(5) and (6) of the Kenyan Constitution provide that the general rules of international law and any treaty or convention ratified by Kenya shall form part of the law of Kenya. Therefore the Government needs to enforce international laws such as the Convention on Biological Diversity (CBD) and African Charter on Human and Peoples' Rights (ACHPR), ratify other instruments such as the UNESCO World Heritage Convention 1972 and ILO Convention No. 169, 1989, and endorse others including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007 and IUCN Sacred Natural Sites Guidelines for Protected Area Managers 2008 (see Appendix for further examples). For example, Article 25 of UNDRIP, which states that indigenous people have the right to maintain and strengthen their distinctive spiritual relationship with their land, needs to be recognised in national legislation to strengthen the recognition of Sacred Natural Sites and Territories, and their community governance systems.

"We call on Governments, corporations, law and policy makers, and civil society to recognize that Africa has Sacred Natural Sites and custodians who are responsible for protecting them, in order to protect the wellbeing of the planet."

Statement of Common African Customary Laws for the Protection of Sacred Sites, 28 April 2012, Nanyuki Custodian Meeting, Kenya

182 The IUCN Motion on Sacred Natural Sites: *Support for Custodian Protocols and Customary Laws in the face of global threats and challenges* was adopted following the World Conservation Congress in Jeju, Republic of Korea, 6–15 September 2012. Text available at: http://www.sacredland.org/iucn-approves-sacred-natural-sites-motion/ (last accessed 24/10/2012).

5.3.1.4 ***Increase public awareness of national, regional and international laws*** that support the recognition of Sacred Natural Sites and Territories and their community customary governance systems.

5.3.2 For Civil Society

5.3.2.1 ***Support communities to revive and strengthen their customary governance systems, regenerate the network of Sacred Natural Sites and Territories and secure legal recognition on their own terms.*** The advocacy capacity of communities needs to be strengthened, by accompanying communities to do rigorous work in reviving and enhancing their customary governance systems, and documenting, where appropriate, their traditional knowledge, customary laws and practices which are based on Earth's laws. Once this is established, paralegal training on relevant legal and policy instruments could strengthen work on the ground to secure legal recognition on the communities' own terms.

5.3.2.2 ***Promote understanding of Sacred Natural Sites and Territories as part of a network, embedded in ecosystems, which are important for biodiversity, culture, spirituality and governance, and for maintaining the resilience and health of ecosystems.*** Sacred Natural Sites and Territories need to be respected as No-Go areas for development or any activities which could undermine the health, integrity and law of Sacred Natural Sites, and Earth as a whole.[183]

5.3.2.3 ***Pursue opportunities to use and enforce existing national legislation to support the recognition of communities' customary governance of Sacred Natural Sites and Territories.*** For example:

- *Constitution of Kenya 2010* – recognises community land, including ancestral lands, and community land title. This opens space for deeper discussion and recognition of communities' rights and customary governance systems. Vigilance is required to ensure that other Constitutional provisions, particularly on minority and indigenous peoples, culture, self-governance and environment are enforced, and not watered down during the legislative process of new laws. Civil society, as well as communities, need to participate in public hearings, and identify and lobby the specific Ministries and Parliamentary Committees, the Commission for the Implementation of the Constitution, the Constitutional Implementation Oversight Committee, the Kenya Law Reform Commission and other bodies to monitor implementation.[184] A task force, including ABN partners in Kenya, could facilitate community and civil society participation in the policy process[185], and monitoring of enforcement.

- *The Land Act 2012* - should be monitored for its implementation of and compliance with the Constitution of Kenya, especially its land policy principles (Chapter 5). Advocacy is needed to support community land and rights, including through implementation of the Constitutional requirement for maximum and minimum acreage of private land, and the recognition of Free Prior and Informed Consent including a community's right to say "*no*" prior to development and other activities.

- *Land Registration Act 2012* - registration of community land could serve to deter potential threats to Sacred Natural Sites and Territories provided it is recognised on the communities' own terms, according to their customary governance systems and in ways which respect the privacy of Sacred Natural Sites and sacred knowledge of the custodial communities.

"We need to think beyond the boundaries and continue to plant seeds of innovation at this critical time."

Adam Hussein Adam.

183 See African Biodiversity Network, ***Statement of Common African Customary Laws for the Protection of Sacred Natural Sites*** (2012).
184 Recommendations of ICE and Eston, Murithi (2011), p20.
185 ICE and Eston, Murithi (2011), p25.

- *National Land Commission Act 2012* - recognition and encouragement of traditional dispute resolution mechanisms provides an opportunity to advocate for justice for wider members of the Earth Community including ecosystems, Sacred Natural Sites and Territories. Civil society could pursue opportunities to participate in the drafting of legislation on historical land injustices pursuant to this Act.

- *Environment and Land Court Act 2011* – provides civil society and communities with an opportunity to access the Court and secure redress for environmental damage, violation of their environmental rights and breach of environmental obligations of the Government and other bodies. The principle of "*natural justice*" could be interpreted and advocated as justice for humans and the Earth Community as a whole.

- *National Museums and Heritage Act 2006* - definition of "*cultural heritage*" could be interpreted as recognising Sacred Natural Sites and Territories and also related intangible heritage such as traditional knowledge and spiritual practices. Pending revision of the Act provides an opportunity to discuss and clarify the interrelated but distinct meanings of heritage and Sacred Natural Sites. Further to advocate for stronger recognition of and support for community protection of Sacred Natural Sites and Territories according to their customary governance systems, which includes recognition of their traditional institutions.

- *Forests Act 2005* - recognises Sacred Forests and community customary rights, and prohibits mining activities in Sacred Forests. With the Act's pending revision there is an opportunity for communities to assert their self-governance, particularly of forests previously held in trust by a local authority, and for advocating the recognition of Earth Jurisprudence principles which underpin their customary governance systems.

- *Environmental Management and Coordination Act 1999* - right to a clean and healthy environment, which includes "*access to*" Sacred Natural Sites and Territories, could be interpreted and advocated as the right of Sacred Natural Sites and Territories, and of present and future generations of all species, to maintain their health and integrity. Legal redress for "*any victim of pollution*" could be interpreted as including communities as well as ecosystems, and Earth as a whole.

- *The Environmental Management and Coordination (CBD) Regulations 2006* – its non-application to communities' customary use of "genetic resources" could be interpreted as recognising customary governance systems on their own terms. The requirement for Free Prior and Informed Consent which includes an opportunity to object prior to access of genetic resources could be advocated as a right of communities to say "no" and prohibit potentially destructive activities. To recognise Earth Jurisprudence principles the objective of "*sustainable management*" needs to comply with ecological criteria such as Earth's laws and boundaries, including recognition of Sacred Natural Sites and Territories as No-Go areas for development, and contribute to the integrity of the wider Earth Community.

5.3.2.4 ***Advocate for review of and new legislative and policy frameworks to strengthen recognition and support for community customary governance of Sacred Natural Sites and Territories.*** For example:

- *Kenya National Land Policy* - Civil society and communities need to monitor and contribute to its implementation and review every 10 years, particularly the investigation and resolution of historical land injustices.[186]

186 ICE and Eston, Murithi (2011), p19.

- *Several laws, particularly the National Museums and Heritage Act 2006, the Environmental Management and Coordination Act 1999 and Forests Act 2005*, have yet to be reviewed and amended to conform with the Constitution of Kenya. There is an opportunity to advocate for stronger recognition of indigenous and local communities as having the right, responsibility and authority to govern and protect their Sacred Natural Sites and Territories, according to their customary governance systems and on their own terms. Further, to enable more community participation in the governance and protection of ecosystems, including in relevant State institutions. The recognition and endorsement of Earth Jurisprudence principles needs to be advocated in the drafting of amendments and implementation of these legal instruments.

- *Other laws and policies need to be identified which have potential to undermine Sacred Natural Sites and Territories*, and community rights and responsibilities to their customary governance and protection. For example the proposed Geology, Minerals and Mining Bill 2012, which will regulate minerals exploration, prospecting, mining, processing and dealing.[187] Civil society and communities need to participate in the drafting process and advocate for review and amendment of such laws to align with the Constitution.

- *Community Land Act* –is still pending at the time of writing this Report. Important issues concerning land tenure, particularly community land title and rights, customary governance and registration of community land still need to be addressed. There is an important advocacy opportunity for communities and civil society to participate in the drafting of the Act to implement the Constitution's provisions.[188] Further to ensure recognition of communities' customary governance systems on their own terms including recognition of the Earth Jurisprudence principles underpinning them for the protection of Sacred Natural Sites and Territories.

- *Legislation to implement the Land Use, Environment and Natural Resources provisions of the Kenyan Constitution* is still pending by 2015. There should be opportunities to engage in consultations on drafting the law to ensure implementation of the Constitution of Kenya and for recognition of Earth Jurisprudence principles.

5.3.2.4 ***Advocate for the recognition of Earth Jurisprudence / Law principles which underpin customary governance systems of indigenous and local communities.*** There is a need to train the legal profession, particularly in the Kenyan Supreme Court, policy makers and academics to interpret legal and Constitutional provisions progressively in order to recognise principles of Earth Jurisprudence and thereby to support the practice of communities' governance systems which comply with the laws of Earth. For example, Article 259 of the Constitution of Kenya 2010, which requires that the Constitution is interpreted in a way which permits the development of the law and contributes to "*good governance*", could be used to advocate for the legal recognition of community governance of Sacred Natural Sites and Territories based on Earth Law principles. Article 56, which recognises minority and indigenous peoples' rights, could also support the recognition of traditional Earth-centred customs and governance systems.

187 At the time of writing this draft law is open for stakeholder consultation. Comments can be made to the Commission for the Implementation of the Constitution, and the text is available at: http://www.cickenya.org/bills/geology-minerals-and-mining-bill-2012#comment-form (last accessed 24/10/2012).

188 A taskforce on the Community Land Bill has been established and is inviting comments. For more information see the Kenya Ministry of Lands website; available at: http://www.lands.go.ke/index.php?option=com_frontpage&Itemid=1 (last accessed 24/10/2012) and the website of the Commission for the Implementation of the Constitution; available at: http://cickenya.org/home (last accessed 24/10/2012).

Other strategies to secure recognition of and promote customary governance systems founded in Earth Law principles include: establishing legal precedents which assert Earth Law principles; strengthening and connecting Earth Law working groups in Kenya and elsewhere;[189] and integrating Earth Law ethics and values in university syllabi and in civic education.

5.3.2.5 ***Assert international laws when advocating for recognition of community rights and responsibilities to govern and protect Sacred Natural Sites and Territories, and influence negotiations to develop stronger regional and international instruments.*** There is a need to lobby the Government to enforce international instruments which it is party to. For example, the African Charter on Human and Peoples' Rights (ACHPR), which Kenya ratified on 23 January 1992 and which forms part of national law, recognises the collective rights of African peoples, including "*the unquestionable and inalienable right to self-determination*" and to their "*social and cultural development*". The potential of its implementation and enforcement bodies, the African Commission and African Court, to interpret the ACHPR progressively and set and develop precedents in African States needs to be explored. Civil society could participate in meetings and working groups convened under such legal frameworks to call for stronger recognition of Sacred Natural Sites and Territories, and support for the customary governance systems of their custodial communities. In addition, the Kenyan Government needs to be urged to ratify other supportive laws (see Recommendation 5.3.1.3 for more information). To this end the National Environmental Management Authority's advisory role to the Government on the implementation of international laws provides such an opportunity.

5.3.3 For Communities

5.3.3.1 ***Reclaim responsibility for reviving and strengthening their customary governance systems to protect Sacred Natural Sites and Territories.*** The practice of traditional ecological knowledge and community rituals and customs passed over generations are integral to maintaining the sacredness and protection of Sacred Natural Sites and Territories from threats such as development into tourist destinations and historical relics. Strengthening the community's customary governance system is a fundamental prerequisite to protecting Sacred Natural Sites and Territories, and to securing appropriate legal recognition.

5.3.3.2 ***Assert the principles and laws underpinning their customary governance systems of Sacred Natural Sites and Territories.*** Appropriate documentation on the communities' own terms is a tool for asserting their governance systems which are rooted in the recognition that Earth is the primary source of law, with which humans need to comply in order to sustain life for present and future generations. For example, custodial communities of Sacred Natural Sites and Territories in Kenya, Uganda, Ethiopia and South Africa have worked together, with support of the ABN and Gaia Foundation, to develop a *Statement of Common African Customary Laws for the Protection of Sacred Natural Sites* (See Appendix). They have also developed eco-cultural maps[190], profiles and Constitutions to assert principles of Community Ecological Governance and Earth Jurisprudence. These customary principles and governance systems need to be recognised and embedded in local practices, advocacy strategies and in law and policy.

189 Organisations and alliances promoting Earth Jurisprudence include: the African Biodiversity Network (http://www.africanbiodiversity.org/); Gaia Foundation (http://www.gaiafoundation.org/content/earth-jurisprudence-earth-law); and Global Alliance for the Rights of Nature (http://therightsofnature.org/). For a map of Earth Jurisprudence initiatives see: http://www.gaiafoundation.org/earth-law-network (last accessed 24/10/2012).

190 For more information see: http://www.gaiafoundation.org/eco-cultural-maps-and-calendars (last accessed 24/10/2012). Also see the short film Reviving Our Culture, Mapping Our Future, co-produced by Mupo Foundation, ABN and Gaia Foundation, available at: http://www.africanbiodiversity.org/content/latest/reviving_our_culture_mapping_our_future (last accessed 24/10/2012).

5.3.3.3 ***Exercise community rights and responsibilities to govern Sacred Natural Sites and Territories.*** Communities need to pursue opportunities in existing laws to assert their community rights and responsibilities, such as to self-governance, and cultural and spiritual practices. There is also a need to advocate for and participate in the review and drafting of new legislation and policies in order to strengthen the legal recognition of Sacred Natural Sites and Territories and their customary governance systems (See Recommendations 5.3.2.2 and 5.3.2.3 for specific opportunities which equally apply to communities).

5.3.3.4 ***Secure legal recognition of principles, practices, customary laws and governance systems rooted in Earth's laws, and seek to establish precedent-setting cases to contribute to the development of Earth Jurisprudence.*** Communities can draw inspiration and contribute to the emerging Earth Jurisprudence precedents in Africa and globally (See Section 4.1 of this Report for further information).

"We cannot tire or give up. We owe it to the present and future generations of all species to rise up and walk!"

Professor Wangari Muta Maathai
(1940-2011)
Nobel Peace Laureate and founder of the Greenbelt Movement, Kenya

5.3.3.5 ***Nurture young leadership in Community Ecological Governance with guidance from elders in the community.*** As the *Statement of Common African Customary Laws for the Protection of Sacred Natural Sites* states: "*We are responsible for ensuring that our living 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*".

5.3.3.6 ***Strengthen and support an alliance of Custodians of Sacred Natural Sites in Kenya and globally***, to uphold common values and principles, and develop strategies to strengthen their protection of Sacred Natural Sites and Territories according to their Earth-centred customary governance systems. Explore collaboration with supportive organisations and environmental and human rights advocates to strengthen resilience to external threats, and to advocate for wider recognition and support for the Custodians of Sacred Natural Sites and Territories.

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Appendix 1:

Regional and International Laws
Recognising Sacred Natural Sites & Territories and their Custodians [Summary Tables]

Summary Table of African Laws

A) Binding legal instruments	*Legal status in Kenya*	*Important rights and responsibilities*
The African Convention on the Conservation of Nature and Natural Resources, 1968[191]	Ratified 12/05/1969	Encourages joint action on conservation for present and future generations and recognises cultural values in ecosystem protection.
The Cultural Charter for Africa, 1976[192]	Ratified 28/10/1981	Provides for rehabilitation, restoration, preservation and promotion of the African cultural heritage. Aims to eliminate oppression and discrimination.
The African Charter on Human and People's Rights (ACHPR), 1981[193]	Ratified 23/01/1992	Aims to eliminate all forms of foreign exploitation. Recognises collective rights and duties, cultural diversity and traditional values (e.g. Article 17), rights of community governance, including self-determination of social and cultural development, access and redress to lands/territories, and customary laws (e.g. Articles 19-24). Enforced by the African Commission on Human and Peoples Rights, which can draw inspiration from international laws in its findings; and African Court when national remedies have been exhausted. The Commission has given progressive Advisory Opinions including recognition of self-determination (*Ogoni* case, Nigeria) and right to cultural development (*Endorois* case, Kenya).[194] A decision made by the African Court is relevant throughout Africa.
Charter for African Cultural Renaissance, 2006[195]	Kenya yet to ratify	Replaces the Cultural Charter for Africa 1976. Recognises that "*culture should be regarded as the set of distinctive linguistic, spiritual, material, intellectual and emotional features of the society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs*" and promotes role of culture in good governance.
B) Non-binding persuasive instruments and Custodian Statements	***Status***	***Important rights and responsibilities***
Statement of Common African Customary Laws for the Protection of Sacred Natural Sites, Nanyuki, Kenya, 2012[196]	Developed by Custodians of Sacred Natural Sites from Kenya, Ethiopia, Uganda and South Africa	The principles enshrined in the Statement provide important guidance on how Sacred Natural Sites should be respected as No-Go areas for any activity other than the expected spiritual practices, and that their Custodian governance systems should be recognised. See Appendix 2 for more detail.

Summary Table of International Laws

A) Binding legal instruments	*Legal status in Kenya*	*Important rights and responsibilities*
International Covenant on Economic, Social and Cultural Rights, 1966[197] International Covenant on Civil and Political Rights, 1966[198]	Both acceded 01/05/1972	Recognises economic, social and cultural rights, including right to self-determination, health and education. Recognises political and civil rights, including right to self-determination, to life, freedom of religion, speech and assembly.
Ramsar Convention on Wetlands (1971, amended in 1982 and 1987)[199] Resolution VIII.19 (2002)[200] Resolution IX.21 (2005)[201]	Party to the Convention – came into force on 05/10/1990	Provides for conservation and "*wise use*" of wetlands and recognises ecological and cultural importance of wetlands. Calls for assessment of cultural and spiritual impacts, including on Sacred Natural Sites, customary law and practice (para 19(d). Recognises role of Sacred Natural Sites in maintaining wetland ecosystem, and as a cultural value and criteria for designating Ramsar sites.
UNESCO, World Heritage Convention concerning the Protection of the World Cultural and Natural Heritage, 1972[202]	Accepted (not ratified) 05/06/1991	Protects cultural and natural heritage of outstanding value, including natural sites and cultural landscapes formed through interaction between humans and Nature. Promotes public participation in identification, nomination and protection of heritage.[205] NGOs may be consulted by the World Heritage Committee (e.g. Article 10). Duties on States to identify, protect, conserve, rehabilitate and transmit cultural and natural heritage to future generations, integrate heritage protection into regional planning, and refrain from activities that may damage heritage (e.g. Articles 4-7). States can register sites of importance for natural and cultural heritage on World Heritage List, and threatened properties on to a List of World Heritage in Danger. States are encouraged to promote public participation through a participatory management scheme. Establishes a World Heritage Fund for the protection of heritage, and provides technical assistance in developing management plans.

ILO 169 on Indigenous and Tribal Peoples in Independent Countries, 1989[204]	Not yet ratified NB. Central African Republic was the first African country to ratify Convention on 30th August 2010[205]	Recognises and promotes: - Indigenous or tribal peoples including those defined by self-identification (Article 1(2)); - Collective rights to cultural, spiritual and religious practice, including relationship with Sacred Natural Sites (e.g. Article 13); - Rights of community governance, including right to self-determination, participation in the conservation of biodiversity, Free Prior and Informed Consent, traditional lands, institutions and customary laws (e.g. Articles 8 and 14); - Duty of State to assess the social, spiritual, cultural and environmental impacts by planned development activities (Article 7). Article 7(1) *"The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."* Article 14(1) *"The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."* Article 15 (1) *"The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources."* Article 15(2) *"In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."*

UN Convention on Biological Diversity (CBD), 1992[206]	Ratified 26/07/1994	The Convention has three objectives: conservation, sustainable use of, and fair and equitable sharing of benefits arising from biodiversity. It acknowledges the unique role of indigenous and local communities in conserving biological diversity and respects traditional and customary ecological knowledge and practices. Article 8(j) requires Parties, as far as possible and as appropriate, 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, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices."* Article 10(c) requires Parties to *"protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation and sustainable use requirements."* Note also Article 17 which requires Parties to facilitate the exchange of information including indigenous and traditional knowledge, and Article 18 on the development and use of technologies, including indigenous and traditional technologies. Parties must establish a system of protected area or areas where special measures need to be taken to conserve biological diversity, free from certain human activities (Article 8). Parties must develop and submit National Strategies, Plans and programs for biodiversity conservation, and monitor implementation and effectiveness (Articles 6 and 7). Governing body is the Conference of the Parties ("COP"), with authority to amend the CBD and review progress. 'Developing' countries can access new and additional resources from developed country Parties to meet the costs of implementing the Convention (Article 20), and access financial support from the Global Environment Facility (GEF).

UNESCO Convention for Safeguarding the Intangible Cultural Heritage, 2003[207]	Ratified 24/10/2007	Recognises and protects intangible cultural heritage, including intergenerational knowledge, oral traditions, practices, rituals and places relating with Nature and the Universe (e.g. Article 2). Promotes widest possible participation and requires Free Prior and Informed Consent of communities in nominating intangible heritage,[208] and involvement in heritage protection (e.g. Articles 11(b) and 15). [209] Accredited NGOs may advise the Committee on nomination and safeguarding measures. Duties on State Party to ensure the safeguarding, development and promotion of such intangible cultural heritage (e.g. Articles 11-15). State Parties can register sites of intangible cultural heritage on a representative list, and those in need of urgent safeguarding. Establishes the Intangible Heritage Fund.
UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions, 2005[210]	Ratified 24/10/2007	Protects and promotes cultural expressions of minority and indigenous people to protect cultural diversity (e.g. Article 2).
Nagoya Protocol CBD COP, 2010[211]	Signed 01/02/2012	Concerns the access to genetic resources and the fair and equitable sharing of benefits arising from their utilisation. Requires Free Prior and Informed Consent or approval, and involvement of indigenous and local communities, in the access to traditional ecological knowledge.
B) Non-binding persuasive instruments and Custodian Statements	***Status***	***Important rights and responsibilities***
Universal Declaration of Human Rights, 1948[212]		Recognises the inherent dignity, and the equal and inalienable rights, of all members of the human family as the foundation of freedom, justice and peace in the world.
UNESCO Man and the Biosphere Programme (MAB), 1970[213] UNESCO Seville Strategy for Biosphere Reserves, 1996[214]	6 sites to date are designated as MAB reserves, including Mt Kenya.	Promotes balanced relationship between humans and Nature. Recognises 3 zones: core zone (legally recognised, no/low impact activities), buffer (ecologically compliant activities permitted) and transition zone (for sustainable development). Develops sites for learning and applying integrated approaches to conservation. Promotes intercultural exchanges via World Network of Biosphere Reserves. Strategy elaborated following the Man And the Biosphere (MAB) Reserves which defines MAB reserves and designation process, and implementation indicators.

World Charter for Nature, 1982[215]		Formulates general principles and obligations to guide human conduct, laws and practice for Nature conservation. Recognises intrinsic value of Nature and her rights (implicit) (e.g. 1st and 4th general principle and Articles 6 and 10(d)). Regulates human activities according to Earth's limits and processes, and recognises common heritage and precautionary principles (Part II).
UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992[216]		Recognises and protects cultural and religious identity of minority groups (e.g. Article 1).
The Earth Charter, 2000[217]		*"Seeks to inspire in all peoples a sense of global interdependence and shared responsibility for the well-being of the human family, the greater community of life, and future generations."* Divided into four pillars 1) Respect and Care for the Community of Life; 2) Ecological integrity; 3) Social and Economic Justice and; 4) Democracy, Nonviolence and Peace; and sixteen main principles. Recognises critical elements of ecological governance e.g. respect of traditional knowledge (e.g. Principle 8(b)), cultural and spiritual rights of indigenous peoples (e.g. Principle 12), non-discrimination and self-determination.
UNESCO Universal Declaration on Cultural Diversity, 2001[218]		Recognises cultural diversity as a common heritage of humanity.
Indigenous and Community Conserved Areas (ICCAs), 2003	ICCAs are recognised in Kenya. [219]	Defined as: *"natural and/or modified ecosystems containing significant biodiversity values and ecological services, voluntarily conserved by (sedentary and mobile) indigenous and local communities, through customary laws or other effective means."* [220] Recognises Sacred Natural Sites, indigenous territories and bio-cultural heritage, and the cultural and spiritual relationships of indigenous and local communities with their lands. Recognises that communities have the authority to govern and protect their lands and territories, and that they have an important role in protecting ecosystems. Communities can register their Sacred Natural Sites and Territories and customary governance systems for international recognition as ICCAs.[221] The ICCA Registry is based on the principle of Free Prior Informed Consent, and recognises that communities decide what sacred knowledge is confidential and what is appropriate to disclose. The Fifth World Parks Congress (2003) and the Programme of Work on Protected Areas of the Convention on Biological Diversity (2004) have recognised the role of ICCAs in conserving ecosystems and recommended their recognition in national and international systems.

Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage, 2004[222]		Promotes integration of tangible and intangible cultural heritage, with participation of indigenous communities.
Akwé: Kon Voluntary Guidelines (CBD), 2004[223]		Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities. Requires full participation of impacted communities.
Addis Abba guidelines and principles (CBD), 2004[224]		Guidelines and Principles on sustainable use of biological diversity. *"The principles provide a framework to assist Governments, resource managers, indigenous and local communities, the private sector and other stakeholders on how to ensure that their use of the components of biodiversity will not lead to the long-term decline of biological diversity".*[225]
IUCN World Conservation Congress Bangkok Resolutions and Recommendations, 2004[226]		Recognises spiritual value of mountains[227] and Community Conserved Areas as culturally important and governed by indigenous peoples.[228]
UN Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007[229]	Abstained	Recognises and promotes: - Collective rights to cultural, spiritual and religious practices, including access to and relationship with Sacred Natural Sites and Territories (e.g. Articles 11, 12, 25); - Rights to lands and territories (e.g. Article 8, 10, 26 and 28); - Rights to protect the environment (e.g. Article 29); - Rights to customary governance systems, including to self-determination, Free Prior and Informed Consent, and participation (e.g. Articles 27, 32, 34). In Kenya in the *Endorois* case the African Commission for Human and Peoples' Rights cited the UNDRIP for recognising indigenous rights to land and cultural development. The UNDRIP has been integrated into national laws of numerous States e.g. Congo, Bolivia, Ecuador. The UNDRIP Governing bodies are the Permanent Forum on Indigenous Issues (UNPFII), Special Rapporteur on the rights of indigenous peoples, and Expert Mechanism on the rights of indigenous peoples.

IUCN Guidelines for Applying Protected Area Management Categories, 2008[230]	IUCN member	Protected area is defined as: *"A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long term conservation of nature with associated ecosystem services and cultural value."* Aims include: to conserve natural areas of national and international significance for cultural, spiritual and scientific purposes, and the participation of, and benefit to, local communities. Recognises the role of customary systems in defining and governing protected areas.[231] Recognises principle of good governance that protected areas should respect rights of traditional Custodians, institutions and customary laws. Six categories, defined according to management objectives: *Category I:* Strict Protection - A: Strict nature reserve - human visitation, use and impacts are strictly controlled and limited. B: Wilderness area – without permanent or significant human habitation. *Category II:* National park - provides environmentally and culturally compatible spiritual, scientific, educational and recreational opportunities. *Category III:* Natural monument or feature e.g. sacred cave, grove, waterfall - protected for outstanding feature, spiritual, cultural and traditional values. *Category IV:* Habitat/species management area, often needs regular, active interventions. *Category V:* Protected landscape/seascape – for significant ecological and cultural value, and promotes balanced interaction between people and Nature, traditional governance and spiritual values. *Category VI:* Protected area with sustainable use of natural resources – conservation of ecosystems and habitats, together with associated cultural values and traditional natural 'resource management' systems. Note: IUCN recommendation that mining should not take place in IUCN Category I–IV Protected Areas (World Conservation Congress in October 2000) and in World Heritage Sites (IUCN Statement, June 2011).[232] Protected Areas are listed on the World Database on Protected Areas (WDPA)[233] and the UN List of Protected Areas. IUCN Guidelines complement implementation of the World Heritage Convention and Ramsar Convention. The IUCN Guidelines are recognised by the UN CBD Programme of Work on Protected Areas, and Revised African Convention on the Conservation of Nature and Natural Resources, 2003.
Statement of Custodians of Sacred Natural Sites and Territories, IUCN World Conservation Congress Spain, 2008[234]		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.

IUCN, 'Sacred Natural Sites Guidelines for Protected Area Managers', Best Practice Protected Area Guidelines Series 16, 2008[235]		Recognises and defines 'Sacred Natural Sites' and recognises primacy role of community Custodians. Six Principles and 44 Guidelines, including to: i) Recognise Sacred Natural Sites in protected areas; ii) Integrate Sacred Natural Sites located in protected areas in planning processes; iii) Promote stakeholder consent, participation, inclusion and collaboration; iv) Encourage improved knowledge and understanding of Sacred Natural Sites; v) Protect Sacred Natural Sites whilst providing appropriate management and access, including secrecy of location; vi) Respect the rights of Custodians of Sacred Natural Sites.
Motion 53 (now Resolution 4.038)[236]		Promotes cultural and spiritual values in protected area management, and the rights of Custodians.
Motion 121 (now Resolution 4.09)[237]		Promotes diversity of concepts and values of Nature, including spiritual.
Anchorage Declaration, 2009[238]	Agreed by the indigenous people's representatives from Kenya. Not yet by the government	Reaffirms "*unbreakable and sacred connection*" between Nature and human communities *"as the material and spiritual basis for existence"* (Preamble). Recognises collective rights of indigenous peoples, including as Custodians to access and restoration of traditional land and Sacred Natural Sites and Territories.
Bio-cultural Community Protocols, 2009[239]		A Protocol developed by communities in the context of genetic 'resources', with potential to assert their ecological, cultural and spiritual values and customary laws, and the clear terms and conditions that regulate access of other stakeholders to their knowledge and 'resources'.
UN Resolution: Harmony with Nature, 2009[240]		Promotes a holistic approach to sustainable development. *"Recognizing that human beings are an inseparable part of nature and that they cannot damage it without severely damaging themselves."*[241]
Aichi Target (Decision x/2 CBD COP10 Strategic Plan (2011 -2020), 2010[242]	Adopted in 2010	Promotes *"living in harmony with Nature"*. By 2020 aims to *"take effective and urgent action to halt the loss of biodiversity in order to ensure that by 2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication."* Respects traditional ecological knowledge and customary practices, and full and effective participation of indigenous peoples (targets 14, 15 and 18).

Opitsaht Declaration, 2010[243]	Developed and adopted by Sacred Sites Custodians and organisations from 17 countries, including Kenya	In relation to Indigenous and Community Conserved Areas (ICCAs), Sacred Sites, and Bio-cultural Landscapes (BCLs). Recognises principles of self-determination in accordance with traditional values, worldviews, practices and beliefs, access to territories, and respect for traditional knowledge and practices in governing Sacred Natural Sites. Recommendations include: - Recognition of, and support to, Custodians; - Recognition that human governance is rooted in Earth laws; - Implementation of international laws such as UNDRIP, particularly the rights to self-determination and Free Prior and Informed Consent, and the Declaration of the Rights of Mother Earth.
The Universal Declaration of the Rights of Mother Earth, 2010[244]		Declaration developed and adopted at the World Peoples Conference on Climate Change and the Rights of Mother Earth in Bolivia, by communities, NGOs, lawyers, academics, scientists and Governments from around the world.[245] Recognises Mother Earth as a living Being with rights to life, existence and to continue her vital cycles and processes free from human disruptions. Recognises human obligations of respect and to ensure that the pursuit of human wellbeing contributes to the wellbeing of Mother Earth, now and in the future.
IUCN Whakatane Mechanism New Zealand, 2011[246]		Promotes a shift towards a 'new paradigm' of protected areas to recognise rights of indigenous peoples. 'Whakatane pilot assessments' review the impacts of protected area designation on indigenous peoples, including on their rights to land, self-governance, Free Prior and Informed Consent, and culture. Leads to recommendations and best practices. Part of a series of measures to review implementation of resolutions adopted in Barcelona 2008.
United Nations' General Assembly's Resolution "*The Future We Want*", Rio+20 Earth Summit, 2012 [247]		Recognises the need for humans to live in harmony with Earth. Paragraph 39 states that: *"We recognize that the planet Earth and its ecosystems are our home and that Mother Earth is a common expression in a number of countries and regions and we note that some countries recognize the rights of nature in the context of the promotion of sustainable development. We are convinced that in order to achieve a just balance among the economic, social and environment needs of present and future generations, it is necessary to promote harmony with nature."*

IUCN Motion 54, 2012[248]		Supports the recognition of Custodian Protocols and Customary Laws for the governance and protection of Sacred Natural Sites and Territories in the face of global threats and challenges. Recommendations include: - Adoption of a presumption against development that could damage or destroy Sacred Natural Sites, and develop mechanisms that recognise the right of indigenous peoples, local communities, faith groups and Custodians of Sacred Natural Sites to say "*no*" to mining or other industrial activities; -Enabling and encouragement of the development of community protocols, which respect the confidentiality of Sacred Natural Sites and associated practices, as a means for communities and Custodians of Sacred Natural Sites to assert their rights, and secure legal recognition of their Sacred Natural Sites and Custodial governance systems.

Footnotes to Appendix 1:

191 Text available on the African Union website: http://au.int/en/content/african-convention-conservation-nature-and-natural-resources (last accessed 24/10/2012).

192 Text available on the African Union website: http://au.int/en/content/cultural-charter-africa (last accessed 24/10/2012).

193 Text available at: http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf (last accessed 24/10/2012).

194 The *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya*, Communication 276/2003, African Commission on Human and Peoples' Rights, 2010. Text available at: http://www.minorityrights.org/9587/press-releases/landmark-%20decision-rules-kenyas%20removal-of-indigenous-people-from-ancestral-land-illegal.html%255d (last accessed 24/10/2012).

195 Text available on the African Union website: http://au.int/en/content/charter-african-cultural-renaissance (last accessed 24/10/2012).

196 See text at: http://www.africanbiodiversity.org/system/files/images/Statement%20of%20Common%20African%20Customary%20Laws%20for%20the%20Protection%20of%20SNS.pdf (last accessed 24/10/2012).

197 Text available on the Office of the High Commissioner for Human Rights (OHCHR) website: http://www2.ohchr.org/english/law/cescr.htm (last accessed 24/10/2012).

198 Text available on Office of the High Commissioner for Human Rights (OHCHR) website: http://www2.ohchr.org/english/law/ccpr.htm (last accessed 24/10/2012).

199 Text available on the Ramsar website: http://www.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671_4000_0__(last accessed 24/10/2012).

200 Ibid.

201 Ibid.

202 Text available on UNESCO website: http://whc.unesco.org/en/conventiontext (last accessed 24/10/2012).

203 See *Operational Guide for the Implementation of the World Heritage Convention* available on UNESCO website: http://whc.unesco.org/en/guidelines (last accessed 24/10/2012).

204 Text available on the International Labour Organization website: http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm (last accessed 24/10/2012).

205 For updates on ratifications see: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO (last accessed 24/10/2012).

206 Text available on the Convention of Biological Diversity website: http://www.cbd.int/convention/text/ (last accessed 24/10/2012).

207 Text available on UNESCO website: http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html (last accessed 24/10/2012).

208 See Criterion 4 of Nomination for the List of Intangible Cultural Heritage in Need of Urgent Safeguarding available on UNESCO website: http://www.unesco.org/culture/ich/index.php?lg=en&pg=00184 (last accessed 24/10/2012).

209 See *Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage* available on UNESCO website: http://www.unesco.org/culture/ich/index.php?lg=en&pg=00026 (last accessed 24/10/2012).

210 Text available on UNESCO website: http://www.unesco.org/new/en/unesco/themes/2005-convention/ (last accessed 24/10/2012).

211 Text available on Convention on Biological Diversity website: http://www.cbd.int/abs/text/ (last accessed 24/10/2012).

212 Text available on UN website: http://www.un.org/en/documents/udhr/index.shtml (last accessed 24/10/2012).

213 Text available on UNESCO website: http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/man-and-biosphere-programme/ (last accessed 24/10/2012).

214 Text available on UNESCO website: http://www.unesco.org/mab/doc/brs/Strategy.pdf (last accessed 24/10/2012).

215 For a list of designations see UNESCO MAB website: http://www.unesco.org/mabdb/br/brdir/directory/contact.asp?code=KEN (last accessed 24/10/2012).

216 Text available on United Nations website: http://www.un.org/documents/ga/res/37/a37r007.htm (last accessed 24/10/2012).

217 U.N. Doc. A/47/135, text available on OHCHR website: http://www2.ohchr.org/english/law/minorities.htm (last accessed 24/10/2012).

218 Text available on the Earth Charter Initiative website at: http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html (last accessed 24/10/2012).

219 Text available on UNESCO website: http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html (last accessed 24/10/2012).

220 See ICCA Registry website for more information, available at: http://www.iccaregistry.org/en/countries/3 (last accessed 24/10/2012).

221 Defined at the IUCN World Parks Congress in 2003.

222 For more information on the registration process see: http://www.iccaregistry.org/en/register (last accessed 24/10/2012).

223 Text available on UNESCO website: http://portal.unesco.org/culture/en/ev.php-URL_ID=31373&URL_DO=DO_TOPIC&URL_SECTION=201.html (last accessed 24/10/2012).

224 Text available on Convention on Biological Diversity website: http://www.cbd.int/traditional/guidelines.shtml (last accessed 24/10/2012).
225 Text available on Convention of Biological Diversity website: http://www.cbd.int/sustainable/addis.shtml (last accessed 24/10/2012).
226 Cited on the Convention of Biological Diversity website: http://www.cbd.int/sustainable/addis.shtml (last accessed 24/10/2012).
227 Text available on IUCN website: http://cmsdata.iucn.org/downloads/wcc_res_rec_eng.pdf (last accessed 24/10/2012). Although not legally binding, member States are obliged to act in a manner 'seriously' consistent with the IUCN objectives (Part 1 para. 12(c) of the IUCN statute).
228 Resolution 3.038.
229 Resolution 3.049.
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Appendix 2:

STATEMENT ON COMMON AFRICAN CUSTOMARY LAWS FOR THE PROTECTION OF SACRED NATURAL SITES

28 April 2012, Sacred Natural Sites Custodians Meeting, Nanyuki, Kenya

In April 2012, the African Biodiversity Network (ABN) organised a regional gathering of Sacred Natural Sites Custodians from four African countries (Kenya, Ethiopia, Uganda and South Africa). The Custodians met in Nanyuki, Kenya, to share their experiences in reviving their knowledge, practices and governance systems, as well as their concerns over the increasing threats to their Sacred Natural Sites and Territories. Custodians from these and other countries have been working with their communities to revive the memory and the practices for protecting their Sacred Natural Sites and rebuilding their traditional governance systems centred on these sites. They form a "community of practice" under the umbrella of ABN, which, together with partners, accompanies them to deepen their work and to build national, regional and international connections and alliances with other Custodians.

At the Nanyuki gathering they discussed how the English term, "Sacred Natural Sites", does not reflect the deep meaning embodied in their local languages - each tradition having their own word for these potent places. Despite some differences, the customary laws that govern Sacred Natural Sites are remarkably similar and provide important guidance, especially for outsiders, regarding how they should be recognised and respected as No-Go areas for any activity other than the expected spiritual rituals. The common customary laws expressed in this Statement were drafted and issued by the Custodians, with the support of the organisations who accompany them.

The Custodians invite you to share this "Statement on Common African Customary Laws for the Protection of Sacred Natural Sites" among your networks and especially with other Custodians. They are also keen to learn of similar laws, principles, protocols, statements or guidelines from Sacred Natural Sites Custodians, from the elders and guardians who are entrusted to safeguard the Sites of their clans or communities. They believe that the "Laws of Origin" governing the protection of Sacred Natural Sites are very similar for indigenous communities across the world.

The work of the Custodians is accompanied by the African Biodiversity Network (ABN)
through its partners Porini Association, MELCA-Ethiopia, Mupo Foundation,
National Association of Professional Environmentalists (NAPE),
Institute for Culture and Ecology (ICE), and the Gaia Foundation, UK.

STATEMENT ON COMMON AFRICAN CUSTOMARY LAWS FOR THE PROTECTION OF SACRED NATURAL SITES

28 April 2012, Sacred Natural Sites Custodians Meeting, Nanyuki, Kenya

We, custodians of Sacred Natural Sites from four 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 our planet, if we do not learn from them. Our generation living now 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.

We call on Governments, corporations, law and policy makers, and civil society to recognize that Africa has Sacred Natural Sites and custodians who are responsible for protecting them, in order to protect the wellbeing of the planet.

PREAMBLE

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 ecosystems. We call these places Sacred Natural Sites. Each Sacred Site plays a different role, like the organs in our body. All of life is infused with spirit.

Sacred Natural Sites exist everywhere, including in Africa. They are spiritual places created by God at the time of the Creation of our Earth, where our Custodial Clans 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 are sources of law. They are centres of knowledge and inter-generational learning. Our governance systems are established through our relationship with and responsibility for Sacred Natural Sites.

We are the generation of custodians who carry the responsibility of ensuring that we all learn from the elders of today, who are the last generation with living knowledge of nurturing the health and integrity of our Earth, passed on directly from generations before them.

We emphasize the importance of using our local language because it embodies the meaning given by our Creator. We each have a local name for our Sacred Natural Sites, for example *Zwifho* in Venda, South Africa; *Kaya* in Giriama, *Irii* in Tharaka and Meru, *Mathembo* in Kamba, *Karigai* in Ari Gikuyu, Kenya; *Awulia* in Afan Oromo and *Adbar* in Amharic, Ethiopia; and *Ihangiro* in Banyoro and Batoro, *Kiggwa* in Baganda, Uganda. We agreed to use 'Sacred Natural Sites' as a common term to describe our potent places, despite its limitation of meaning.

OUR COMMON CUSTOMARY LAWS OF SACRED NATURAL SITES

1. **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.

2. **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.

3. **Sacred Natural Sites are natural places in our 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.

4. **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.

5. **Each Sacred Natural 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.

6. **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.

7. **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.

8. **Sacred Natural Sites are places of healing and peace.** 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 where we can resolve conflict and maintain harmony among people and all beings. There are different rituals for different needs.

9. **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.

10. **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 living 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.***

11. **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.

12. **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.

13. **We are responsible for protecting our Sacred Natural Sites and Territories through our Custodial 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.

14. **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 tourism** – as these are holy places which are not for entertainment. There are many other places where tourists can go.
    ii. **Not for other religious activities** – just as we do not do our rituals in churches and mosques, or criticize other religions, because we respect the diverse ways in which humans pray to God, others should respect our indigenous ways.
    iii. **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.
    iv. **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.
    v. **Not for any '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.
    vi. **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.
    vii. **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 recognize as acceptable. Genetically modified (GM) seed is strictly prohibited and our Territories are GM free areas.
    viii. **Not for any other activities which may undermine the Law of Origin and the life of our Sacred Natural Sites and our Earth.**

We call on everyone to join forces and take responsibility to protect our Earth and respect Sacred Natural Sites, as our common duty to future generations at this time of deep crisis for life on our planet.

This statement was drawn together by the following Custodians of Sacred Natural Sites:

Munguti Kabibia, Murari Kanyoro, Sabella Kaguna, Mary Kathisya, Mwaro Baya Kaluwa, Sidi Thoya Maitha, Kazungu Mboro Thuva, HDr Rimberia Mwongo & HDr Jeremiah Imungi – *from Tharaka, Meru, Kamba and Magarini, Kenya*;

Sanabulya Edward, Kobulemi Serina, Nyangabyaki Perezi & Nyasirwaki Sadiki – *from Buganda and Bunyoro, Uganda*;

Kemal Hassen Tafo, Aman Mame Harke, Marshallo Temo Dermo & Lelisa Debele Denboba – *from Bale and Suba, Ethiopia*;

Mphatheleni Makaulule, Nevhutanda Nkhetheni Phineas, Netshidzivhe Mbengeni Nyamukamadi, Netshilungwi Makondelela Aron & Nevhutanda Nyamukamadi Nyadzanga – *from Venda, Limpopo Province, South Africa*.

Endorsements

"This report is an important contribution to understanding the Constitution of Kenya 2010, and other national laws, as strengthening the recognition and support for community protection of Sacred Natural Sites according to their customary governance systems. It shows the progressive development of Kenya's legal system towards recognising "Earth Law" principles, and sets the framework for developing laws to radically shape environmental stewardship in this country and beyond. Sacred Natural Sites are important ecological, cultural and spiritual phenomena on Earth whose protection by the custodial communities and respect by all are non-negotiable, for the health and wellbeing of present and future generations.""

- Gathuru Mburu (African Biodiversity Network)

"The Green Belt Movement (GBM) welcomes this report and the importance it places on community protection of Sacred Natural Sites in Kenya and the need for their wider recognition. Professor Wangari Maathai always hoped that Mukurwe wa Nyagathanga and other Sacred Natural Sites would be recognised as an integral part of Kenyan heritage. On behalf of GBM I look forward to our continued involvement in ensuring that Kenya's cultural heritage continues to be protected."

- Pauline Kamau (Green Belt Movement, Kenya)

"This publication is an important contribution to ongoing discussions on the role of communities in the protection of Sacred Natural Sites. It documents an increasingly endangered yet important model on how spirituality and culture coalesce in the furtherance of protecting biodiversity and ecosystems. It therefore paves the way for a re-imagined role for the oft ignored traditional governance systems of land."

- Korir Sing'Oei (Founding Trustee, Centre for Minority Rights Development (CEMIRIDE))

"For much of her life, Professor Wangari Maathai highlighted the link between culture and biodiversity. She would say that "culture is coded wisdom. Wisdom that has been accumulated for thousands of years and generations…All people have their own culture." And that "one is more likely to protect sites or forests, particularly when they are of a cultural significance."

- Francesca de Gasparis (Green Belt Movement, Europe)

"Sacred Natural Sites and community governing systems bring to the fore the true meaning of a sustainable relationship with Earth. Wisdom shows that the impacts of an immoral behaviour with Earth does not spare communities and their cultures. This Report sounds a clarion call for citizens everywhere to defend Mother Earth with all possible tools. This is a vital contribution to the urgent call for the recognition and full application of Earth Jurisprudence."

- Nnimmo Bassey (Coordinator, Oilwatch International)

"Indigenous peoples and local communities play a critical role in biodiversity conservation, in particular within natural areas that are often important for their sacred significance. Recognition of such areas and communities is increasing at national and global levels at a time when government commitments to conservation targets are often falling short. Studies like this one, focused on Sacred Natural Sites and relevant national laws and policies of Kenya, provide important opportunities to examine the challenges and opportunities that exist for increasing recognition, and thus support, for localised community conservation which underpins protection of Nature and sustainable livelihoods of people."

- Colleen Corrigan (IUCN- Theme on Indigenous Peoples, Local Communities, Equity and Protected Areas (TILCEPA))

"This report is not only timely but also gives a valuable insight into Community Ecological Governance Systems, which need to be revived and strengthened elsewhere. We can learn much from community Custodians and how to become responsible trustees of Earth. There is deepening global understanding on the urgent need to defend Sacred Natural Sites and Territories from the growing threats of Ecocide."

- Polly Higgins (Barrister and campaigner for Eradicating Ecocide)

"This Report is a very welcome contribution to the recognition of Sacred Natural Sites and should be of interest to policy makers in Kenya and elsewhere."

- Rachel Murray (Professor of International Human Rights Law, University of Bristol, UK)

Recognising Sacred Natural Sites and Territories in Kenya:

An Analysis of how the Kenyan Constitution, National and International Laws can Support the Recognition of Sacred Natural Sites and their Community Governance Systems

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