ACCESS TO JUSTICE AND THE RIGHT TO SUSTAIN NATURE

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Abstract
Access to justice is a fundamental right and a central principle for natural resource governance. Access to justice concerns the ability of individuals and communities who are negatively affected by the impingement of their rights to seek and obtain remedies for grievances through formal and informal institutions. Access to justice addresses both the rights of traditional natural resource stewards and others presented with threats associated with environmentally-harmful activities or other natural resource decisions that may undermine fundamental rights. This paper defines access to justice and contextualizes this important right in natural resource governance and environmental justice. It frames access to justice as a key tool for taking a rights-based approach, proposing a typology of initiatives communities can and are using to ensure access to justice is used and enforced. The paper further explores challenges arising from the colonial legacies that marginalise non-dominant systems of resource rights, governance, mediation and dispute resolution. Recommendations are provided to improve access to justice in relation to different types of natural resources users, stewards and those at risk from environmental practices which threaten the enjoyment of fundamental rights. The authors conclude that incorporating access to justice into a rights-based approach is gaining attention. They note that this growing momentum is, in part, influenced by social norms and the decolonisation of legal systems, while also highlighting the tragic rise in crimes against environmental defenders and those communities and peoples dependent on natural resource for their lives and livelihoods.

Keywords:
Access to justice, environmental justice, human rights, indigenous peoples, natural resources

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I. Introduction

Summary: This background paper examines access to justice as a fundamental right and a central principle for natural resource governance. Effective natural resource governance is facilitated by an understanding of access to justice, why it is fundamental to responsive governance of natural resources, and what challenges exist when translating the concepts and principles into effective actions.

In a world in which the growing demands and pressures on natural resources are leading to increased and on-going environmental destruction, pollution, resource scarcity, and political, social and economic instability, a natural resource governance framework must be rooted in a rights-based approach, guided by international human rights standards and principles, in order to identify the grievance that calls for redress for the harm these changes will cause (UNDP 2004). This framework must enable all people to exercise their fundamental rights, and in situations where these rights are limited or violated, access to justice must be defined, sought and institutionalised to create peaceful coexistence and sustainability.

Fortunately, social movements and civil actors worldwide are not only asserting the right to access to justice, but also strategically integrating access to justice as part of a suite of strategies to secure other rights, to resolve natural resource conflicts and to promote effective governance. Effectively used, access to justice helps reduce or prevent both social and environmental harms. These efforts are defining a new era of environmental rights, norms and standards that include a re-visioning of the relationship between humanity and a sustainable approach to living with biodiversity.
Access to Justice Defined: Access to justice concerns the ability of both individuals and communities who are affected by the enjoyment of their rights to seek and obtain remedies for grievances through formal and or informal institutions (UNDP 2005). Access to justice requires that there is transparency and accountability in decision-making processes (Boer, Martin, and Slobodian 2016) to prevent environmentally-harmful activities that may deny access to other fundamental rights. Thus, access to justice is a fundamental right in and of itself as well as a means for realizing and defending other human rights (Silverman 2015). It is intrinsically linked to the promotion and protection of human rights. In addition to securing rights to access and to use natural resources, access to justice also includes preventing or remedying negative environmental impacts.

Under international law, governments have duties and obligations to ensure adequate access to justice. Access to justice includes access to effective judicial proceedings, the right to a fair trial, and the right to an effective remedy. Thus, access to justice may take the form of formal or informal, judicial and non-judicial mechanisms. The different systems of access to justice can be synchronized to align with, and help elaborate international human rights laws, norms and standards. Formal mechanisms may include state courts or judicial and administrative proceedings, which may provide redress and/or a remedy. In addition, there are complementary non-court mediation methodologies for promoting access to justice, including alternative dispute resolution (ADR) and traditional dispute resolution mechanisms (TDRM). These can be led by state or non-state actors. Other informal approaches include traditional or customary justice systems such as tribal councils, and involvement of customary authorities, donors, business, civil society as well as social movements.

1 The rights to self-determination and Free Prior and Informed Consent (FPIC) are two examples of such rights that are interconnected in this way with access to justice. Self-determination affirms that indigenous peoples and local communities have historic and contemporary rights of governance within their territories. FPIC ensures transparency of information and participation in decision-making. Some historic access to justice decisions have placed emphasis on the relationship between natural resource use, cultural identity and the right to livelihoods.
Access to justice contributes to a global ethical response to the plethora of environmental crimes and harms resulting from unsustainable economic policies. Regardless of the specific approach, at its essence, access to justice focuses on one’s ability to seek and obtain a remedy for harm in compliance with human rights standards. However, people must understand their rights and how to assert and protect them. In addition, there are financial, linguistic, logistical and other challenges to access justice. And, once a remedy is provided, it must be enforced.

As an example, deforestation, forest degradation and other land use changes are rooted in economic and political institutions usually distant from the actual forest and the people who rely on the forest’s resources. There are now established international and national instruments meant to use economic incentives to slow deforestation. If, as a result of implementing the international climate mechanism of reducing emissions from deforestation and forest degradation, the conservation and enhancement of forest carbon stocks, and the sustainable management of forests (REDD+)\(^2\) this results in forest-dependent people being forced to relocate from their land, there has to be a mechanism in place with provides access to justice and recourse for negative impacts of what should be a positive environmental action. Defining national and regional recourse mechanisms to protect the rights of forest dwellers revolves around the effectiveness of access to justice to ensure adherence to rights norms that are defined in international laws and treaties. Controversy around the legitimacy of REDD+ as a policy that is meant to unite human rights, environmental conservation, economic beneficiation and national sovereignty draws our attention to the complexity of

ensuring access to justice where the local user has to contend with many other levels of policy and procedures.

Access to justice is often perceived as a bottom-up approach to justice reform and reconstruction. It also plays an important role in furthering transitional justice, which confronts past human rights violations (Moscati 2015), and contributes to the recognition and protection of human rights. All over the planet, communities are contesting the alienation of their historic user rights and asserting their current needs and roles in conservation and sustainability. There are also countless examples of industry investments and projects that result negatively on the environment and on communities. These challenges are stimulating greater legal and administrative awareness of the right to access environmental justice (UNDP 2014, Klein 2014). These efforts fall into a broader rubric of ‘environmental justice’ and a ‘rights-based approach to sustainable development.’ UNDP notes that in 1992, sixty states included environmental justice in their national constitutions and that by 2014 this had grown to one hundred and forty countries (UNDP 2014, 8).

When examining access to justice, reference is usually made to accessing a system of codified national laws, rights and procedures. However, the practical implementation of access to justice is often insufficient, making the operationalization of this right difficult (Boer, Martin, and Slobodian 2016). Moreover, the system itself may or may not coincide with local natural resource governance systems and may or may not comply with international norms and standards.

3 See Peacebuilding Initiative (n.d., note 37).
This paper starts by defining access to justice and analysing why it is essential in the context of natural resource governance. In recognizing the ongoing development pressures and that there is a range of natural resource governance issues that require access to justice, Section II, explains how access to justice underpins natural resource governance, particularly in protecting the poor and marginalized, and how civil society actors are seeking access to justice to both protect human rights as well as the environment. Section III deals with recognition – who recognizes access to justice as an important principle or strategy for responsive natural resource governance- and what instrument proves or is evidence of such recognition. Section IV examines the challenges of implementation and offers a typology of diverse ways in which different actors have pursued access to justice in natural resource governance. The paper concludes with a short list of recommendations to strengthen access to environmental justice at the local, national, regional and international levels.

II. Access to Justice Underpins Natural Resource Governance

Access to justice enables people to protect their environment, to resolve conflicts that impede other rights, and to proactively secure rights, all of which contribute to strong natural resource governance. Access to environmental justice is recognized as an essential tool to limit environmental degradation (Robinson 2012). It is particularly important in light of the lack of recognition of many individuals’ and communities’ rights to lands, territories and resources. Without access to justice, the rule of law is weak and the environment and the people who care for natural resources are harmed. Laws are ineffective if they cannot be enforced or if people cannot use the justice system to realise their rights (CLEP 2008).

Achieving access to justice is essential for natural resource governance. As consumption, development and other direct and indirect pressures continue to mount on
natural resources, they become more limited and overused, creating conflicts between
different stakeholders and inequalities of power, and resulting in the deprivation of rights. To
resolve these conflicts, the existence of access to justice mechanisms that provide effective
and inclusive processes supports good natural resource governance. Therefore, access to
justice provides for equitable and effective natural resource governance to remedy the taking
and destruction of property, to resolve disputes in decision-making over natural resources, and
to redress impacts of environmental damage. Without access to justice, people are unable to
exercise their procedural and substantive rights, including challenging discrimination and
demanding accountability. Access to justice should limit the abuse of power that leads to
unsustainable use of natural resources and either limits or outright violates the rights of the
most vulnerable communities, including future generations (UNDP 2014). Furthermore,
access to justice is important for restoring a framework that respects nature. Individuals and
all communities must have the ability and a means through which they can effectively
challenge the harmful effects of the dominionist\textsuperscript{4} perspective on nature and establish a new
legal and moral ethos that protects the environment (White 1967).

Access to justice is particularly important in protecting the poor and marginalized,
including indigenous peoples, local communities, women and youth, immigrants, even
refugees who would not have an historic claim to natural resources because it is essential to
protect and promote all other civil, cultural, economic, political and social rights (UNGA
2012). Moreover, poor and vulnerable groups suffer disproportionately from natural resource
damage despite contributing the least to environmental problems and despite their inability to

\textsuperscript{4} White (1967) triggered a major global reflection on whether the Christian church had promoted environmental
damage through the rise of a theology that said God had given man dominion over nature. This mind-set has
been challenged by theologians and philosophers placing more emphasis on the scriptural and ethical duty of
sustainable stewardship. For a discussion on religious trends and environmental policy (see Crawhall 2015, 124-5).
secure remedies and hold those who are responsible accountable (UNDP 2014). Not everyone who makes claims to resources is necessarily a rights-holder in the sense of ownership rights.

Ensuring access to justice requires that the system where the remedial action is sought is, in fact, capable of dispensing justice, which will influence the effectiveness and the approach to accessing justice, particularly with regards to use and governance of natural resources. Access to an unjust system will not provide a remedy for the original problem of environmental rights violation. Owing to the legal impacts of colonialism, mercantile capitalism and the emergence of elite-controlled post-colonial states, there has emerged a global phenomenon whereby locally evolved rule-governed systems of natural resource regimes have become delegitimised or undermined by higher levels of authority and decision-making. Those who control higher and more remote levels of power also assert rights over nature (i.e. acting in the ‘national interest’). These top-down systems of legislation and justice are typically less responsive to ecological indicators and may not prioritise the well-being of nature or of those dependent on natural resources. This modern disconnect has led to a legal and moral separation between human rights and justice on the one hand and the sustainability and resilience of natural systems on the other.

Social movements and other civil society actors are now more actively seeking access to justice both to protect human rights as well as conserve the natural environment. They are confronting the aforementioned structural challenges as well as those more immediately related to access to information, the inability of the most vulnerable to participate in decision-

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5 For Rio+20, the UNDP launched its controversial work on the Green Economy. Many in civil society criticised the Green Economy approach as underplaying human rights and justice in favour of an economic argument. The Green Economy summary however emphasised the problem of centralised decision-making that separated the local costs of industrial projects from the national benefits. UNDP argued that cost / benefit analysis needed to be completed at the local scale, before considering national interests. See (UNEP n.d.-a) for the original documents. See IPACC (2011) for an African indigenous people’s critique of the Green Economy report.
making, as well as a general unawareness among those harmed of how both judicial and non-judicial systems work. These efforts, as well as the evolution of recourse mechanisms, are part of multiple efforts to improve natural resource governance. Stronger integration of access to justice should work to challenge the historic process of decolonisation, affirm self-determination / autonomy of peoples, and configure systems of justice, administration and governance such that they are intercultural and coherent at different social and environmental scales.6

Strengthening these advocacy and administrative efforts and further integrating access to justice in natural resource governance is a necessary response to ongoing development pressures both to protect the environment as well as to defend those whose lives and livelihoods are intimately dependent on natural resources. Without the recognition that access to justice is fundamental to responsive governance, rights violations and environmental destruction will continue while ecosystem capacity deteriorates. In addition to the concerns about effective redress and equitable access to justice, we are also confronted with a surge in violence against environmental defenders, including extra-judicial killings, which are becoming more common despite recognition of and publicity around the problem (Global Witness 2016). This new form of injustice and violation of basic human rights is happening not only to those who loudly stand up against development pressures, but also to those who are unaffiliated with a specific movement and who are simply trying to survive7. Few of these victims are receiving the kind of protections and remedies that are clearly their fundamental rights. As the scale of violence against environmental activists increases, this adds another

6 Klein explores the rise of contemporary social movements which are attempting to assert the rights of communities to a safe and sustainable environment. These include a broad range of classes, nationalities, women and men. Klein casts the current resistance movement to environmental crimes and harmful environmental activities (pipelines, hydraulic fracting, toxic waste, etc) as ‘blockadia’ – the movement by peoples to resist environmental threats driven by the collaboration between private sector interests and state facilitation. Klein 2015, 294-305.

7 OHCHR (n.d.) notes rising violence against environmentalists.
dimension to achieving access to justice and assuring effective remedies to victims of such rights violations and abuses.

Advocacy for access to justice brings into being new social norms and expectations which for some countries are still part of the process of decolonisation and democratisation. In addition to being a fundamental right, access to justice is one strategy in a suite of actions aimed at achieving a remedy to confront both the different interests and agendas that undermine natural resource governance as well as the disconnection between people who steward and govern natural resources and the powers of remote entities that otherwise claim control over resources. These other entities are primarily state actors or private sector actors, both national and transnational.

International law emerges in a dialogic interaction of general principles of law, customary international law and the treaty system (Weeramantry 2009, 250, Weeramantry 2004). As social norms shift, national and international law also transform. Human rights has only be central to international law since the UN Universal Declaration on Human Rights in 1948. Environmental law only began to take on a substantive international standing in the 1960s and has only started moving onto centre stage since UNCED in 1992.

The law is responsive to changes in social systems, which themselves change political and economic paradigms. As courts and administrations deal with issues of access to environmental justice and hear the voices of those whose customary rights have been abrogated, it contributes to a new international consensus for reform and new remedies. The publication in 2015 of the Papal Encyclical, *Laudato Si*, demonstrates the global shift in consciousness about environmental conservation and social justice as twin objectives (Pope
Francis 2015). Weeramantry is arguing explicitly that as religious traditions reconsider environmental stewardship and rights, so this is influencing society, courts and international norms.

III. Access to Justice at International, National and Local Scales

The right to access to justice is a fundamental right recognized in international law.8 It is established in various international legal instruments, institutional bodies and other mechanisms that are formal and informal alike. The recognition of the right to access to justice places obligations on States9 to ensure compliance and to secure access to justice for all. There are UN Special Procedures, including Special Rapporteurs (SR), focused on investigating, monitoring and working on specific human rights problems; three of the SRs have dedicated mandates on environmental rights. Each of these individuals work to ensure access to justice is protected for a range of stakeholders, including women, environmental defenders, indigenous peoples, minorities, migrants, and impoverished people, among others.

As noted above, there are a number of international laws that establish access to justice as a fundamental right. Both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) played key roles in the battleground for non-state actors to assert their rights to govern and use their traditional territories and access natural resources according to their own cultures and knowledge systems. It was in this space that some of the most acute tensions surfaced between state sovereignty and the rights of peoples to be decision-makers and stewards of

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8 Relevant international laws include the International Covenant on Civil and Political Rights; the American Convention on Human Rights; the African Charter on Human and Peoples’ Rights; the International Labour Organization Convention No. 169; the Universal Declaration of Human Rights; the Rio Declaration; the Doha Work Programme on Article 6 of the UNFCCC; the Rio+20 outcome document; and the 2007 United Nations Declaration on the Rights of Indigenous Peoples.

9 It should be noted that obligations are dependent on the source of international law and whether a country has agreed to it impacts a State’s obligation. Ratification of treaties and conventions requires domestication of the international principles. Normative non-binding agreements have a moral influence, some quite significant.
natural resources, lands and territories. ICESCR and ICCPR helped to clarify the rights of peoples to participate in decisions related to natural resources as well as hold those accountable who violated those rights.

A key reference point in international law discussing access to justice with regards to natural resource governance and user rights is Principle 10 of the Rio Declaration (UNCED). The Rio Declaration itself reflects the international recognition of the intersection between environmental and natural resource justice issues; and Principle 10, specifically, highlights where access to justice emerged as global principle to remedy rights violations, secure participatory rights, rights to information and environmental rights, as well as to empower users and civil society organizations to assist in enforcement of existing laws. Since then, access to justice has resonated with social movements across the globe and an increased number of environmental cases have gone before various international courts (UNDP 2014). The Rio Declaration has been a trigger for emerging mechanisms to support access to environmental justice.

The 1998 Århus Convention establishes a number of procedural rights related to the environment, with a particular emphasis on the transparency of information related to environmental governance (Eliantonio 2011, 2). Specifically, it gives the public, including individuals and their associations, the right to review procedures to challenge decisions made without receiving information and without the ability to participate in environmental decision-

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10 Anaya (2004) explores in various places how the ICCPR upheld the self-determination rights of indigenous peoples in relation to their traditional lands and resources. Key cases dealt with natural resource rights in Canada and Sweden respectively (c.f., , 133, 133-7). Anaya argues that indigenous peoples repeatedly made use of the Covenants to confirm their right of self-determination. In practice, this right mostly dealt with overturning unjust actions by national courts or administration in relation to indigenous peoples’ use and governance of natural resources, lands and territories. See also Thornberry (1992).
11 UN Conference on the Environment and Development (UNCED); See GDRC (n.d.).
12 See the principles at (UNEP n.d.-b).
13 Schoukens (2015) provides a critical review of the limitations on the effectiveness of Århus Convention, specifically as a result of the Court of Justice of the European Union ruling of January 2015.
making. The Århus Convention provides a treaty basis for securing the right to access to justice on matters related to the environment. The Århus Convention and the post-Rio processes following up on operationalising Principle 10 attempt to strengthen national mechanisms and guarantees on access to justice.

The Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters\(^{14}\) focuses on supporting countries in their facilitation of access to information, public participation and access to justice in environmental matters (i.e. putting Rio Principle 10 into action and implementing it at the national and sub-national levels) to strengthen effective participation of all stakeholders in environmental decision-making.

In addition to where access to justice is explicitly recognized in international laws, it is important to note the interconnection and dependence of other fundamental rights such as self-determination, non-discrimination and equality. The right to self-determination enshrined in the ICCPR\(^{15}\) is relevant because it is an essential condition for the realization of other fundamental rights. It is particularly important for indigenous peoples and restoring their legal and governance systems based on human rights, traditional knowledge, values and principles. For indigenous peoples, self-determination is a collective right that enables the enjoyment of all other human rights. It provides for indigenous control and participation in justice processes (UNGA 2014). Therefore, self-determination has been framed as a remedy to decision-making by external forces (Anaya 2004, 103-4). In fact, the evolution of an understanding of self-determination has served a key legal and normative tool for indigenous peoples to assert as part of their approach to environmental justice and access to justice in relation to their

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\(^{14}\) See UNEP (2015).

\(^{15}\) See Article 1 International Covenant on Civil and Political Rights (OHCHR 1966).
historical lands, territories and natural resources. They have argued, successfully, that they are not just asking for rights within the colonial paradigm. They are asserting that they are holders of rights and that their right to exercise self-determination includes the just and rule-governed control of natural resources and associated usages. Whereas self-determination has been key for indigenous peoples’ to assert their mechanisms for natural resource governance and access to decolonised justice, Ghai has emphasised the notion of ‘autonomy’ as being appropriate to minorities or sub-national interest groups. Autonomy has the similar notion of a non-dominant collective asserting its own institutional and legal traditions and norms within a potentially conflicting national context (Ghai 2000). Natural resources and environmental justice are not only issues of concern for indigenous peoples; these issues affect the lives of many other communities who seek redress and access to justice.

Another key right, the right to Free Prior and Informed Consent (FPIC), recognised in the International Labour Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples, enables indigenous peoples access to environmental justice by requiring recognition of their civil and political rights (Zvobgo 2012, 37-40, 67) asserting that their territories and rights to natural resources and associated livelihoods should be recognised by government and that their “free, prior, and informed consent is necessary before development activities can take place on their territories.”16 FPIC, as an emerging international norm, is likely to take on greater for significance for all marginalised or challenged groups trying to assert their right to access justice and sustain their rights to govern natural resources.

International law continues to evolve around promoting access to justice to environmental matters. For example, just this year, the International Criminal Court

16 See Anderson (2011).
announced it would extend its remit to include “destruction of the environment,” “exploitation of natural resources,” and the “illegal dispossession” of land. It also included an explicit reference to land-grabbing\textsuperscript{17}. The expanding web of international instruments and procedures for domesticating access to justice could have positive impacts on natural resource governance. In explicit and implicit ways, these formal systems require access to competent authorities, judicial remedies, enforcement, and independent courts, as well as the ability to be recognized before the law (Silverman 2015, 13).

In addition to international laws recognizing access to justice, customary authorities, donors, business, civil society as well as growing social movements mobilizing to confront challenges to access to justice as it relates to natural resources continue to grow\textsuperscript{18}. Moreover, while there are established courts and other bodies to which those seeking access to justice may go, there are alternative ways to access to justice, such as ADR and traditional dispute resolution mechanisms.

Finally and fundamentally, the stewardship of natural resources across the planet is threatened by the current global reliance on fossil fuels and economic models based on a model of unlimited growth which requires ever increasing extraction of natural resources. According to some analysts it is capitalism, neoliberal fundamentalism and growth-based economic models that are unsustainable and are drivers of human rights violations and conflict (Klein 2014). The courts and legal systems may find themselves in a pivotal role in negotiating the transition from one global economic and energy paradigm to a new one. Promoting access to justice can be catalytic in bringing about such a shift. Jurists and lawyers

\textsuperscript{17} See Felder (2016)

\textsuperscript{18} Examples include the World Resources Institute’s The Access Initiative and data base (Petkova and Bruce 2003) and Open Society’s funding for access to justice projects in various countries (OSF 2015).
also play a key role in understanding the challenges of access to justice and acting on this in skilful ways.

IV. Key Strategies and Challenges in Securing Access to Justice

In this section, we provide some practical examples of how different communities and actors have attempted to ensure access to justice. Principle 10 and the Århus Convention both link access to justice with access to information, participation and due process. This means there are a range of actions possible when asserting access to justice. The following examples consider both a variety of strategies and a range of scales of action, given that natural resource governance happens at different scales, including transnational.

**Typology of Access to Justice Initiatives**

1) **Litigation:** Litigation refers to the act of bringing claims and arguing cases before judicial bodies. Litigation can test and affirm existing national legislation, draw out jurisprudence in national law, and / or elaborate international / multilateral jurisprudence or treaty principles. Litigation can improve national access to justice or have a regional or even international impact.

   *Example: The indigenous Nama people of Richtersveld used litigation to successfully win back their land, protect their resource rights and prevent negative environmental impacts from the Alexkor diamond mine company and the Republic of South Africa. Despite original losses in the Land Claims Court, the Constitutional Court overturned previous court decisions and affirmed the Nama people’s “Aboriginal title” based on international jurisprudence that guarantees fairness for minority indigenous pastoralists contesting environmental degradation. The ruling held that the onus to prove an original system of*
governance prior to colonisation should not be placed on the victim of colonisation. (Chan 2004)

2) **Capacity Building**: Capacity building includes coaching victims of environmental / natural resource abuses to understand their rights as well as educate them on the national / subnational legal mechanisms. Capacity building can also engage with magistrates, lawyers, civil servants, traditional authorities and police available to help enforce national legal, procedural and constitutional principles and norms so that they are effectively applied.

*Example: The Mbororo are a Fulani ethnic sub-group practicing pastoralism in northern Cameroon. After years of legal discrimination related to their efforts to sustain their livestock without secure land tenure, the national Mbororo organisation MBOSCUDA joined forces with the UK-based Village AiD to train paralegals to go to court with herders to explain national law and constitutional principles to herders, the police and judges. Despite clear constitutional provisions for rights to land, natural resources, settlements and fair procedures, private interests and corrupt officials prevented the recognition of the Mbororo’s rights. MBOSCUDA organized an access to justice campaign, providing paralegal support to herders in local courts and working to ensure that civil servants understood the herders’ legal rights. The campaign resulted in increasing the court officials’ understanding of the law as well as the perception of the herders’ culture and rights. The case created a legal and policy link between fundamental human rights, the right to use natural resources, the right to a non-dominant economic livelihood (i.e. pastoralism) and the obligation on the state to ensure access to justice and due process. (Salihu and Hickey 2005).*¹⁹

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¹⁹ See Fon and Ndamba (2008).
3) **Mediation**: Establishing mediatory bodies can help to find common approaches to law, rights and justice between communities and national institutions. Mediation is an approach to create an institutional process to secure access to justice without necessarily relying on costly and sometimes narrow litigation options. Meditation can be applied in a wide variety of contexts in both developing and developed countries to achieve access to justice. For example, UNDRIP recommends mediation as a way for fair and agreeable procedures to resolve conflicts between Indigenous Peoples (and their customary systems) and States.

**Example:** Litigation can be costly and technical, sometimes alienating or inaccessible for poor clients or people from rural areas. The 2010 Kenyan constitution provided new guarantees of access to justice and environmental rights. Muigua\(^{20}\) suggests that access to justice is potentially well promoted through ADR and TDRM. Muigua emphasises that litigation can also be inflexible, technicist and does not foster relationships. The combination of ADR and TDRM can achieve a just result that is culturally and socially more relevant. One of the best known examples of environmental conflict resolution and promotion of justice for northern Kenya was the case of the Borana pastoralists using their traditional dispute mechanism, the gada, to resolve governance and conflict over scarce water and grazing rights. The national system of natural resource management was not addressing the violent conflicts brought on by severe droughts. The resolution of the northern Kenyan conflict was found in mediation between communities struggling for water and grazing territory. The traditional dispute and rights mechanism turned out to be the culturally most effective option both in terms of environmental conservation and resolving violent conflict. (Adan 2010, Watakila 2015).

\(^{20}\) See Muigua (n.d.), Muigua and Francis (n.d.).
4) **Strengthening Customary Systems**: Strengthening customary institutions and natural resource governance regimes can help secure administrative justice, create evidence of pre-existing rights regimes has been a growing trend amongst indigenous and local communities, and promote sustainable natural resource management. This approach connects with Traditional Dispute Resolution described above in the third strategy.

*Examples: The Convention on Biodiversity’s Nagoya Protocol recognizes the need to support community biocultural protocols (BCP) that set out customary values, rights and rules about biocultural heritage. BCPs become explicit governance tools inside the community and in relation to outsiders to ensure equitable benefit sharing and reduce resource conflicts.*

The pastoralist Maldhari of Gujarat in India developed a community BCP based on an understanding of their specific community’s rights and used this to engage government and other stakeholders in an effort to secure community wellbeing (Shrumm and Jonas, 2012). The protocol resulted in discussions on access and benefit sharing for Banni buffalo and conservation plans for the national park. The CBD is a treaty body. The BCPs, supported by various NGOs including Natural Justice, are community processes to clarify and strengthen local governance and institutions. The stronger local institution can play an effective and influential role in promoting access to justice. BCPs define natural resource rights, duties, benefits, authority, decision-making processes, consent and dispute resolution mechanisms related to the landscape and natural resources.

5) **Legislation**: Influencing and elaborating national resource legislation is a way to assert customary or neo-customary rights. This includes private, semi-private or fully state based protected areas, ICCAs and CBNRM legal frameworks and land / resource tenure to provide indigenous rights and access to remedies through

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21 See “Biocultural Heritage: Promoting Resilient Farming Systems and Local Economies” (IIED n.d.)
22 Indigenous Peoples and Local Communities Conserved Areas (ICCAs) and Community-Based Natural Resource Management (CBNRM).
environmental legislation and frameworks. This is common in Africa and Latin America. This is increasingly done in reference to the Rio treaties and the IUCN’s guidelines (for example the Programme of Work on Protected Areas).

Example: Mexico adopted a General Law on Climate Change (GLCC) in April 2012 which is a rare example of climate law which addresses climate change from the perspective of the poor. GLCC establishes a comprehensive, cross-sectoral legal framework to coordinate national, state and local initiatives to address climate change. It aligns with international law including safeguard standards related to REDD+. In Article 2, the law’s principal objective is “to guarantee the right to a healthy environment.” Its Information System on Climate Change (SICC) promotes transparency and access to information, to be administered by the National Institute of Statistics and Geography (INEGI) (Article 76). (UNDP 2014, 23, IDLO n.d.)

6) **Oral Testimony and Judicial Standing:** In order to establish the enabling conditions to ensure a fair and just trial, relevant stakeholders must have the ability and the means to participate. Unfortunately, some relevant experts are not included in court cases because of who can be called as an expert and how different actors can have standing (locus standi) before a court. As courts are mostly designed according to colonial norms of justice, and rules on who is an interested party and who may provide expert evidence are determined within the institutions under elite control, it can be difficult for people with expert knowledge but without formal educational qualifications to have standing, and thus to seek remedies or other forms of access to justice.

Example: A major challenge for indigenous and marginalised local communities is to be physically present and able to speak in the institutions that control access to justice.

Courts, particularly those built on systems of racial discrimination, ethnic inequality or
colonial law provide a particular challenge for equity of access. The challenge is to secure
standing in front of a court and for testimony to be given in a culturally appropriate manner.
In a globally important case, the 1997 Delgamuukw decision of the Supreme Court of
Canada, Chief Justice Lamer placed emphasis on allowing indigenous chiefs and elders to
provide expert testimony to the court. Lamer overturned British Columbia’s Supreme Court
Chief Justice Alan McEachern’s ruling on the use of oral traditions for claims to Aboriginal
rights and title is a highly significant mark in judicial history. The Delgamuukw ruling
brought indigenous oral governance and evidence on a par with European written legal
traditions. It highlighted the centrality of land rights to aboriginal identity, rejecting the
notion that Provinces had the power to extinguish aboriginal title outside reserve lands.
Overall, Delgamuukw addressed indigenous self-determination over lands and resources as
both economically important and inherent to cultural identity. (Thom 2001, Mandell 1998).

Each of the above examples shows how communities and civil society have been
creative in promoting and realising access to justice with regards to natural resources and the
environment. The general trend identified here is favourable but for each few steps in the right
direction there are many challenges and set-backs.

First, if we accept the premise that each human language represents at least one
tradition of natural resource governance and rights, we can imagine that we have at least
seven thousand distinct systems of natural resource governance, each with its own set of
rights, duties and mechanisms for ensuring equity and sustainability23. Any discussion of
‘access to justice’ must be premised on the reality that we are trying to accommodate seven

23 Nettle and Romaine (2000, 45) present an argument that most human languages are ‘narrow-niched’ to
specific environmental and ecosystem contexts. Most human languages emerge out of the interaction of human
cultural systems with the sustainable exploitation of natural resources. Ostrom’s work (1990, 2009) and
Kauneckis (2014) on rule-governed systems of natural resource common pool resources further emphasises this
distinguishing feature of humanity.
thousand distinct ecologically-defined justice systems in relation to only a handful of codified legal regimes mostly dating from the colonial era.

From the local to the international levels, ensuring access to a court for a violation or rights related to land or natural resources rights is not easy. A rights-holder has the onus of demonstrating harm in order to demonstrate the requisite victim status. In Schoukens’ (2015) critique of the Århus Convention, he emphasises the exceptional difficulty for environmental NGOs in Europe to get access to courts as interested parties. In seeking a remedy for harm suffered, victims are denied justice through legal, political, economic, coercive, and other social processes (UNDP 2004). Moreover, the success of getting one case before a court does not guarantee that rights will be protected from future violations.

For all of the positive momentum around environmental justice, empowering stewards, promoting human rights norms and standards, and bringing diversity back into decision-making, there is also the reality of having to contend with political-economic currents that are corrupt and increasingly violent. In many countries, access to justice is either a fiction or grossly distorted to those with wealth and or power. For example, in the aforementioned case of the Mbororo, the judicial successes have been sustained by the community but at the price of human rights defenders now allegedly being the targeted for harassment, threats and unlawful imprisonment and torture.\(^{24}\)

While access to justice for natural resource governance is essential, pursuing legal remedies through either national or international channels is difficult as they are often either not accessible to the victims themselves, or are dangerous to pursue. Moreover, it is frequent

\(^{24}\) See Cordes (2013)
for local people who are confronted with a conflict over natural resources with a business entity to have to seek access to justice beyond their local levels, relying on national, regional and international recourse mechanisms that incur large transaction costs. Achieving access to justice is often a long process, involving costly stages from recognizing and claiming a grievance to enforcing a remedy.25

Even if a community has had some success in court, often it does not have the capacity to ensure that the decision will be enforced. One example of this situation is when the Endorois indigenous hunter pastoralists of Kenya were evicted from their traditional land for tourism development of a national park and a World Heritage Site. They sought justice through the African Commission on Human and peoples’ Rights (ACHPR). Despite receiving a successful ruling, the State still managed to convince the UNESCO World Heritage Committee to approve the World Heritage Site without the consent of the Endorois people, an act of contempt for the ACHPR decision26.

The fact that environmental and natural resource rights were not elaborated in the Universal Declaration on Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, or other international laws where access to justice is established could suggest that the link between access to justice and natural resource governance still needs to be better integrated. It is reasonable to conclude that access to justice is only one component of a broader rights-strategy. Eventually justice can only be secured where the indigenous or local governance systems have standing and legal support within the national context.

25 Peacebuilding initiative; see Sheelagh et al. (2002, 37) Safety, Security and Accessible Justice: Putting Theory into Practice
26 For a discussion of the case see Williams (2010); for the ACHPR ruling, see ACHPR (2009).
In December 1962, the UN General Assembly adopted resolution 1803 (XVII), which states that "Permanent sovereignty over natural resources" legally shifts natural resources rights to the State. In practice, this principle was well-established under colonial law, where the aim was for the colonising state to create a ‘legal’ framework empowering it to extract as much as feasible from the natural resource base of the colonised territories. With the eventual advent of decolonisation, the post-colonial states were particularly committed to asserting their sovereignty over the environment and natural resources, regardless of the implications for their own citizens or the environmental capacity of the territories (Cambou and Smis 2013, 359).

Efforts to promote and sustain access to justice for rights-holders in relation to natural resources has to contend with a long historical trend of alienation of rights from people who were traditionally responsible for nature conservation, governance and sustainable use. Arguably, natural resources rights and governance are part of the foundation of human culture and social systems. Moreover, there are historic and recent contestations of rights to use and duties to conserve natural resources, specifically regarding the tension between the modern State and traditional custodians or stewards of nature (Sheelagh et al. 2002). Emerging legal norms of the past decade include recognition of collective rights of such stewards, not being limited to the Western notion that rights are only associated with the individual.28

In considering the systems in place to provide remedies, we must ask questions about whose law is being upheld and see the obligation for pluralism in understanding bio-cultural diversity, which is both at the foundation of human civilisation and necessary to create a

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27 See ALIL (2016).
28 The African Charter on Human and Peoples’ Rights provides for redress of rights violations both for individuals and collective groups of people. This has been applied in a number of interpretations and was the basis for the African support for the UN Declaration on the Rights of Indigenous Peoples which brought collective rights more clearly into the international realm. See Crawhall (2011).
sustainable future. The smaller scales of natural resource custodians need to be protected by the law and to be empowered to protect the environment and sustain a common pool resource without interference. They form the basis of any viable future for the planet. The challenge to achieve justice, rights and sustainability is to find a harmonious relationship between customary governance systems, newly emerging natural resource governance and a legal and constitutional framework which is rights-based and places value on an inherently ecological understanding of natural resources and environmental integrity (Crawhall 2015, 125-6).

V. Recommendations

Access to justice for violations of natural resource rights and environmental degradation, particularly for marginalised or vulnerable groups is an international priority and a recognised right and duty. The strengthening of access to environmental justice must be addressed at local, national, regional and international levels. There are many tools and approaches which can strengthen both the capacity of rights-holders and duty-bearers. Specific movements and initiatives focused on access to justice are helping to raise awareness of the existing legal rights as well as promote avenues for claiming such rights.29

Strengthening civil society and customary institutions is an important lever in promoting access to justice,30 as is better integration of a rights-based approach to natural resource governance.

While it is challenging to translate access to justice into effective actions with sustained results, there is growing international consensus, emerging mechanisms and a wide range of constitutional and practical actions taking place at national level. The sense of who should have access to justice, fair play, and whose voices should be considered has also

29 See Peacebuilding Initiative (n.d.).
30 See USIP (n.d.).
changed. A new global movement is asserting the legal and ethical rights of nature. This movement is gaining legal momentum and should actively integrate access to justice as an instrument for preventing harm to people and the resources they depend on for their well-being, identity and livelihoods. It is noteworthy that the responsibility to actively mould a new era of justice, ecological and social values, rights and duties falls to our current generation. Justice systems, political leaders and civil servants responsible for access to justice find themselves in the midst of this massive paradigm shift between the old and the new ways of dealing with nature and sustainability. Though there is contestation, there is also agency and a growing social compact about the need to link human rights with environmental justice.

While access to justice should be used to remedy harm, it should also more positively secure rights, promote peaceful co-existence and prevent these harms from happening in the first place. To achieve a fair, accessible and just global legal framework for natural resource conservation and governance requires jurists and environmental advocates to restore a universal framework of respect for nature in both law and religion, putting ‘nature’ back into natural law and then applying this in an evolving jurisprudence.

Increasing awareness of rights-holders and duty-bearers to the benefit of conserving natural resources through effective protection of the rights of local stewards, including rights to information, participation, access and fair hearing as enshrined in international laws like the Århus Convention has to remain an international priority. Our introduction to a typology of actions from the bottom up and from the national state provides some thoughts on opportunities for further action.

We conclude this chapter with brief recommendations for transforming access to justice from a stated right into a reality. These proposals include: i) promoting greater
awareness of Principle 10 and effective cases of strengthening access to justice; ii) providing a deeper synthesis of typologies and results of access to justice campaigns; iii) affirming that ‘justice’ requires an effective decolonisation of legal systems as well as an effective integration of customary law within natural resource management, tenure, access and sustainable usage; iv) promoting a greater role for social movements in conservation decision-making; v) exploring complementary methodologies for promoting access to justice, including ADR and TDRM; vi) continuing to assert the relationships between effective conservation and the adherence to human rights, justice, equity, information and participation; vii) encouraging a more inclusive understanding of the value of nature in different cultures and constituencies; and, viii) engaging with indigenous peoples, local communities, vulnerable constituencies and faith-based global networks to achieve a shift in awareness and coherent action on access to justice and environmental sustainability. Integrating these actions into campaigns and everyday natural resource governance activities- taking a rights-based approach to natural resource governance- will go a long way in equitably and effectively responding to the increased stress on the planet and on the environmental stewards who live and labour every day to protect its natural resources.
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IUCN is a membership Union composed of both government and civil society organisations. It harnesses the experience, resources and reach of its 1,300 Member organisations and the input of some 15,000 experts. IUCN is the global authority on the status of the natural world and the measures needed to safeguard it.

CEESP, the IUCN Commission on Environmental, Economic and Social Policy, is an inter-disciplinary network of professionals whose mission is to act as a source of advice on the environmental, economic, social and cultural factors that affect natural resources and biological diversity and to provide guidance and support towards effective policies and practices in environmental conservation and sustainable development.

The Natural Resource Governance Framework (NRGF) is an IUCN initiative created for the purpose of providing a robust, inclusive, and credible approach to assessing and strengthening natural resource governance, at multiple levels and in diverse contexts. The NRGF is hosted by the IUCN Commission on Environmental, Economic and Social Policy (CEESP), working in close collaboration with the IUCN Secretariat and partners across the Union.