

# INTEGRATING RULE OF LAW AND GLOBAL DEVELOPMENT: FOOD SECURITY, CLIMATE CHANGE, AND PUBLIC HEALTH

2013

U.S. Agency for International Development (USAID)

# PREFACE

## **American Bar Association Rule of Law Initiative**

The American Bar Association (ABA) Rule of Law Initiative promotes legal reform efforts in over 60 countries in Africa, Asia, Central and Eastern Europe, Latin America, the Caribbean, the Middle East, and North Africa. It traces its origins to 1990, with the creation of the ABA's Central European and Eurasian Law Initiative (CEELI) and the opening of its first overseas office in Sofia, Bulgaria, in 1991. The ABA launched sister initiatives in Asia in 1998, and in Africa, Latin America, and the Caribbean in 2000. In 2003, the ABA launched its Middle East program. In 2006, these regional programs were consolidated into a single entity now known as the ABA Rule of Law Initiative. Today, the Rule of Law Initiative has approximately 500 professional staff working in the United States and abroad, including a cadre of short- and long-term expatriate volunteers who typically spend from three months to two years in the field providing technical assistance.

The Rule of Law Initiative's work in the field is supported by the Research and Assessments (R&A) Office which is composed of a team of lawyers based in the Initiative's headquarters in Washington, D.C. The R&A Office develops and implements a series of highly regarded assessment tools, provides in-depth assessments of draft legislation at the request of host country partners, conducts legal research, and produces a variety of papers and resource guides on rule of law issues. To date, the R&A Office has developed assessment tools in the following areas: Judicial Reform, Legal Profession Reform, Prosecutorial Reform, Legal Education Reform, Human Trafficking, Human Rights, Access to Justice and Women's Rights.

# INTEGRATING RULE OF LAW AND GLOBAL DEVELOPMENT: FOOD SECURITY, CLIMATE CHANGE AND PUBLIC HEALTH

2013

This publication was produced for review by the United States Agency for International Development.

## **Acknowledgements**

The American Bar Association Rule of Law Initiative (ABA ROLI) wishes to thank the team who developed the conceptual framework and content of *Integrating Rule of Law and Global Development: Food Security, Climate Change, and Public Health*. Tessa Khan, Senior Legal Analyst, served as the lead author of the guide, and Paulina Rudnicka, Senior Legal Analyst, served as co-author. They benefited immensely from the advice and guidance of the following independent consultants: Dr. Erica Harper, Food Security and Rule of Law Advisor; Dr. Stephen Humphreys, Climate Change and Rule of Law Advisor; and Lara Stemple, Public Health and Rule of Law Advisor. ABA ROLI wishes to extend particular thanks to Ali Kaba of the Sustainable Development Institute; Rachael Knight of Namati; and Jennifer Gatsi-Mallet, Aivy Fungai Rutize, Laimi Tuuthigilwa Shaanik, and Lama Kemanya of the Namibian Women's Health Network for generously facilitating the research conducted for the case studies. ABA ROLI is extremely grateful for the time and assistance rendered by those who agreed to be interviewed for this project. Finally, Jessie Tannenbaum (Senior Legal Analyst, ABA ROLI) and Simon Conte (Director, Research and Assessments Office, ABA ROLI) provided valuable comments and oversight during the development of the guide, and Nicole Cellone (Research Fellow, ABA ROLI) provided significant research assistance.

## **DISCLAIMER**

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.



# CONTENTS

- INTRODUCTION ..... 1**
- FOOD SECURITY AND THE RULE OF LAW ..... 5**
  - 1. Context ..... 5
  - 2. What is the relevant legal framework? ..... 6
  - 3. Core principles ..... 8
  - 4. Entry points for programming ..... 12
    - 4.1 Developing a national strategy ..... 12
    - 4.2 Access to justice and legal empowerment ..... 14
    - 4.3 Legislation and law reform ..... 16
    - 4.4 Claims mechanisms ..... 17
  - 5. Land reform ..... 18
  - 6. Case Study: Community Land Titling in Liberia ..... 21
  - 7. Food Security and Rule of Law Resources ..... 24
- CLIMATE CHANGE AND THE RULE OF LAW ..... 33**
  - 1. Context ..... 33
  - 2. What is the relevant legal framework? ..... 33
  - 3. Core principles ..... 35
  - 4. Entry points for programming ..... 38
    - 4.1 Developing a national strategy ..... 38
    - 4.2 Access to justice and legal empowerment ..... 39
    - 4.3 Claims mechanisms ..... 41
    - 4.4 Anti-corruption programming ..... 42

4.5	Land governance .....	43
5.	Case Study: REDD+ in Indonesia .....	45
6.	Free, Prior and Informed Consent.....	49
7.	Climate Change and Rule of Law Resources.....	51
	<b>PUBLIC HEALTH AND THE RULE OF LAW .....</b>	<b>63</b>
1.	Context .....	63
2.	What is the relevant legal framework? .....	64
3.	Core principles.....	67
4.	Entry points for programming .....	74
4.1	Developing a national strategy .....	74
4.2	Legislation and law reform .....	75
4.3	Access to justice and legal empowerment.....	77
4.4	Accountability mechanisms .....	79
4.5	Anti-corruption programs.....	80
5.	Case Study: End Forced Sterilization Campaign in Namibia.....	82
6.	Public Health and Rule of Law Resources .....	87

## INTRODUCTION

Food insecurity, climate change, and poorly governed public health systems threaten to drastically interfere with human development. Each undermines the basic human rights of entire populations. Over 800 million people are estimated to suffer from chronic undernourishment.<sup>1</sup> People worldwide continue to be vulnerable to communicable and non-communicable illnesses: three out of eight of the UN Millennium Development Goals address health concerns, including HIV/AIDS, maternal health, and child mortality. The burdens of chronic hunger and ill health in turn preclude individuals and groups from enjoying other human rights. Climate change provides another stark scenario. The observed and predicted impacts of extreme weather events, increasing temperatures, and rising sea levels endanger human rights ranging from the rights to health, adequate food, and housing, to rights associated with livelihood and culture.<sup>2</sup>

Within the field of rule of law development, these issues are frequently assigned to a realm in which law and governance-oriented strategies are assumed to have little impact. Food security, for example, may be perceived to be a matter for agricultural scientists, public health crises the concern of medical specialists, and climate change a subject for environmental scientists.

This guide is intended to change that view. The promotion of the rule of law, especially when founded on a human rights-based approach, can significantly advance objectives in each of these fields. This guide demonstrates the fundamental connection between rule of law and human rights and food security, public health, and climate change. It makes specific recommendations for rule of law programs and provides case studies that demonstrate the value of legal strategies in each context.

### The need for a rights-based, rule-of-law response

Food insecurity, poor public health, and the adverse impacts of climate change each have multi-dimensional causes. The determinants of health, for example, are legal, socio-economic, and environmental: beyond the quality of health services, they include social, legal, and economic barriers to accessing health services, and vulnerability to high-risk practices and behaviors. This is reflected in the priority given to the elimination of HIV-related discrimination in the global response to HIV/AIDS.<sup>3</sup> When people living with HIV/AIDS enjoy legal, social, and political equality, they are more likely to seek testing, receive counseling, and maintain treatment regimens.

The conditions necessary for food security and an effective response to climate change are similarly broad. The ability of communities to feed themselves partly depends on national and international food markets, the demand for land, and the accessibility of natural resources. As in the public health context, laws and public institutions exercise a critical influence on each of these factors. This is reflected in the UN Food and Agriculture Organization's (UN FAO) emphasis on the need for States to align their legal frameworks, including legal and policy measures affecting land tenure, with the right to food.<sup>4</sup> Addressing each of these challenges therefore necessitates a cross-sectoral response that encompasses the legal and regulatory environment.

International human rights provide a robust normative framework to direct such responses. This guide calls for rights-based programming for a number of reasons. First, the substantive content of rights and their corresponding duties have been elaborated and supported by broad consensus, providing a clear standard against which to measure progress. Second, rights-based programs build on obligations already voluntarily assumed by governments, including the right to adequate food and the right to health. Third, a rights-based approach is likely to lead to more effective and sustainable outcomes.<sup>5</sup> Procedural guarantees, such as rights to information and participation and freedom from discrimination, strengthen

community ownership of programs and afford uniform protection to all individuals and groups, including the most vulnerable.<sup>6</sup> UN FAO, for example, states that grounding programs in the right to adequate food is necessary not only to address the root causes of hunger, but to achieve greater, more sustainable impact.<sup>7</sup>

To that end, the chapters in this guide start by anchoring each issue (in Chapter One, food security; in Chapter Two, climate change; and in Chapter Three, public health) in international human rights law. With respect to food security and public health, the focus is on the right to adequate food and the right to health, respectively. The human rights framework relevant to climate change is more diffuse, and Chapter Two sets out the different human rights dimensions of the response to climate change. These rights provide the foundation for the program guidance that follows.

Program ideas in each chapter are organized under entry points familiar to rule of law practitioners: development of a national strategy; access to justice and legal empowerment; law reform; claims mechanisms; and anti-corruption programming. Land governance is also a separate – and critical – entry point for food security and climate change programs. Examples are given in each chapter of policies and programs that are illustrative of the approaches being discussed. Each chapter culminates in a case study that explores in greater detail the contribution of rule of law programs to positive outcomes pertaining to food security, public health, and climate change.

Core principles for rule of law programs are a separate and key component of each chapter. The integration of these principles into program design, implementation, and evaluation is essential if programs are to be relevant, effective, inclusive and sustainable. The principles are: active participation of affected communities; substantive gender equality; non-discrimination and attention to vulnerable groups; and accountability. While the approaches to programming in each chapter are intended to inspire program development, the adaptation of programs to local contexts through the application of these principles is fundamental.

It is hoped that this guide will broaden the appreciation of rule of law practitioners of the impact of law and justice on human development. The guide serves as a primer on issues that practitioners may not have previously considered, and ideally will spark conversations and ideas for programming among practitioners, donors, and local stakeholders. A list of resources is included at the end of each chapter for practitioners looking for more detailed programming guidance, or for those interested in deepening their understanding of these multifaceted and evolving development challenges.



---

<sup>1</sup> FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO), THE STATE OF FOOD INSECURITY IN THE WORLD at 8 (2012).

<sup>2</sup> UN Human Rights Council Res. 18/22 U.N. Doc. A/HRC/RES/18/22 (17 October 2011); UN Human Rights Council Res. 10/4 U.N. Doc. A/HRC/RES/10/4 (25 March 2009); UN Human Rights Council Res. 7/23 U.N. Doc. A/HRC/RES/7/23 (23 February 2008); see, INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE ( 2008); UN HUMAN RIGHTS COUNCIL, REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS UN Doc A/HRC/10/61 (15 January 2009); HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BACKGROUND PAPER: HUMAN RIGHTS AND CLIMATE CHANGE ( 2008); UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD U.N. Doc. A/HRC/7/5 at [51] (10 January 2008), A/HRC /7/5/Add.2 at [11] [15].

<sup>3</sup> Eliminating HIV/AIDS-related discrimination is a top priority of the Joint United Nations Program on HIV/AIDS (UNAIDS) its ten cosponsors, other international organizations, donors, technical assistance providers, and HIV/AIDS advocates around the world.

<sup>4</sup> FAO COUNCIL, VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY at 7,8 (adopted November 2004 by 127<sup>th</sup> Session of the FAO Council).

<sup>5</sup> OHCHR, FREQUENTLY ASKED QUESTIONS ON A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION (2006) [hereinafter FAQ ON A HUMAN RIGHTS-BASED APPROACH]; REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS U.N. Doc. A/HRC/10/61 at [80] (15 January 2009).

<sup>6</sup> OHCHR, FAQ ON A HUMAN RIGHTS-BASED APPROACH, *supra* note 5, at 18; INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE 6-8 ( 2008); REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS UN Doc A/HRC/10/6 at [81], [82] (15 January 2009).

<sup>7</sup> FAO, GUIDANCE NOTE: INTEGRATING THE RIGHT TO ADEQUATE FOOD INTO FOOD AND NUTRITION SECURITY PROGRAMS (2012).



# FOOD SECURITY AND THE RULE OF LAW

## I. Context

### I.1 What is food security and why is it under threat?

Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. The four pillars of food security are food availability, stability of food supply, access to food, and utilization of food, which incorporates food safety and nutritional well-being.<sup>1</sup>

Food security is a complex and multidimensional problem. Various situational, environmental, and political stresses contribute to food insecurity, including:

- **Situational or economic pressure:** Large-scale production coupled with globalized commoditization means that food is cheaper. The prices small-scale farmers have to charge are too low to make their livelihoods sustainable. As a result, they become net food buyers, but their low, non-competitive incomes may mean that they cannot afford sufficient food.<sup>2</sup>
- **Increasing land scarcity:** The availability of land is decreasing due to population growth, environmental degradation, changing climate conditions, and conflict.<sup>3</sup> This scarcity is being exacerbated by wealthy nations and multi-national corporations that are increasingly seeking to acquire large tracts of land for biofuel projects, conservation purposes, or agricultural production.<sup>4</sup> In many cases, governments facilitate land grants with a view to attracting investors that may bring commercial, agricultural or industrial growth and contribute to improvements in gross domestic product. The land appropriated is usually held by individuals and groups with low tenure security (customary rights holders, pastoralists/livestock herders, and hunter-gatherers), including those who depend on communal resources.<sup>5</sup>
- **Climate change:** Climate change threatens the ability of entire regions to feed themselves.<sup>6</sup> Agricultural productivity is dependent on the services rendered by ecosystems including rainfall, soil nutrient availability, insects for pollination, and certain pests, each of which is affected by climate change.<sup>7</sup> Ocean acidification has resulted in declining fish stocks, rising sea levels have caused salinization which makes water unsuitable for irrigation, and an increase in drought-affected areas threatens the productivity of communities relying on agriculture.<sup>8</sup>

### I.2 Who are the food insecure?

In 2012, 870 million people were estimated to be food insecure.<sup>9</sup>

The impacts of the different pressures contributing to food insecurity are felt disproportionately by the poorest countries and the most vulnerable within those countries (small-scale farmers, indigenous peoples, and others who depend on land and water resources for their livelihoods). Hunger is not the result of insufficient levels of production, but rather of unequal access.<sup>10</sup> The food insecure cannot afford the food that is available on the markets or they lack the necessary resources to produce food themselves.<sup>11</sup>

Further, the food insecure are often not just hungry; they are disadvantaged over a range of rights. They may face gender, religious, or ethnic discrimination; be illiterate; unemployed; lack property, property

rights or access to resources; or have a medical condition such as HIV/AIDS. These factors often work in complement to prevent the food insecure from realizing their right to food, essential services, and just remedies.

Two conclusions can be drawn from this. First, strategies aimed at promoting food security need to be multifaceted and respond to needs in a cross-sectoral manner. For example, food security is affected by tenure security, climate change, and access to resources. Second, food insecurity is at least in part connected to social inequalities and discrimination. Strengthening the entitlements of the food insecure as legal entitlements, including through access to justice and legal empowerment approaches, can significantly contribute to sustainable food security.<sup>12</sup> Finally, empowering rights-holders will increase their capacity to participate in food and nutrition-related decisions that concern them.

## **2. What is the relevant legal framework?**

### **2.1 The right to food**

The right to adequate food as a basic human right was first recognized in the Universal Declaration of Human Rights (1948) as a component of the right to an adequate standard of living.<sup>13</sup> It became legally binding when the International Covenant on Economic, Social, and Cultural Rights entered into force in 1976.<sup>14</sup> It has subsequently been recognized in numerous binding international and regional instruments,<sup>15</sup> as well as non-binding instruments including recommendations, guidelines, resolutions and declarations.<sup>16</sup>

By anchoring responses to food security in the right to food, policies and programs are more likely to be responsive to the priorities of rights-holders: the right to food “empowers people to be active participants in decision making”.<sup>17</sup> Further, by viewing people as rights-holders, rather than passive objects of policy, new insights are gained into causes of food insecurity such as discrimination and socio-economic exclusion.<sup>18</sup>

#### Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food

In 2004, the UN Food and Agriculture Organization (FAO) Council adopted the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Voluntary Guidelines). The Voluntary Guidelines are not legally binding but draw upon international law. They reflect the consensus among FAO member countries on what needs to be done to promote food security through a human rights based approach in areas including food aid, nutrition, education strategies, access to resources, and legal frameworks and institutions, and to implement state obligations under Article 11 of the International Covenant on Economic, Social and Cultural Rights.

### 2.1.1 Key elements of the right to food

In 2002, the UN Special Rapporteur on the right to food defined the right to adequate food as a right “to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.”

The key elements of the right to food are:

- **Availability:** Food must be available via natural resources (e.g. through production by cultivation, animal husbandry, fishing, hunting, gathering, etc.) or available for purchase.
- **Accessibility:** People must have economic and physical access to food. Families should be able to afford adequate food without compromising other basic needs, such as school fees, medicine, or rent. Everyone should be able to access food, including those with physical constraints such as children, the sick, persons with disabilities, and the elderly.
- **Adequacy:** Food must satisfy dietary needs, taking into account an individual’s age, living conditions, health, occupation, sex, etc. Food is not adequate if, for example, it does not supply necessary nutrients for physical and mental development (which may, for example, be different for pregnant women or children). Food should be safe for human consumption and free from adverse substances or contaminants, and food should be culturally acceptable (consistent with religious requirements, for example).

The Committee on Economic, Social, and Cultural Rights has also stressed that the right should “not be interpreted in a narrow and restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients” and that it should be acceptable within a given culture.<sup>19</sup> Food practices, education on hygiene, nutrition training, and considerations such as provision of healthcare and breastfeeding are therefore all important components of the right to food and should inform food policy design, implementation, and monitoring. In short, the right to food requires that each person has access to the resources necessary to produce, earn, or purchase adequate food; not only to prevent hunger, but also to ensure good health and well-being.

### 2.1.2 What are a State’s obligations with respect to the right to food?

The primary responsibility for the realization of the right to food belongs to the State.<sup>20</sup> The State is required to provide an enabling environment in which people can use their full potential to produce or procure adequate food for themselves and their families.<sup>21</sup> To fulfill their obligations to the right to food States must respect, protect, and fulfill the right.

- **Respect:** States must respect every person’s right to food by not restricting access to resources that in turn impair access to food, especially when such practice is discriminatory, inadequately compensated or without due process.
- **Protect:** States must protect the right to food by taking steps to ensure that action by private entities does not negatively affect resource access, and therefore impair ability to gain access to food.

- **Fulfill:** States are required to take steps to ensure access to natural resources. This may include securing existing access through improving protection (leaseholds or titles) of natural resource rights, or increasing access to natural resources through restitution, redistribution, or other programs.<sup>22</sup>

Actions or omissions can represent a violation of the right to food by the State even when such action has been committed by third parties.

It should be noted that there are two indivisible dimensions of the human right to adequate food: the right to be free from hunger and the right to adequate food. The right of everyone to be free from hunger implies an obligation that takes immediate effect. The right to adequate food, however, because of its complexity, may be realized “progressively”.<sup>23</sup> In practical terms, this requires the state to adopt the necessary legal, administrative, financial, social, and other measures at a national and international level to respect, protect, and fulfill the right.

### 3. Core principles

The following principles are essential to the design and implementation of all rule-of-law programs, and should be equally observed when designing and implementing programs intended to promote food security.

#### 3.1 Active participation of affected communities

The free, active, and meaningful participation of affected communities in policies and programs intended to promote food security is essential to understand the particular challenges they face, and to design and implement an effective, sustainable response. It is necessary, for example, for communities to explain how they view their food needs and who within a community has the most difficulty accessing food. Participation should be incorporated throughout a program work plan, including into any baseline assessment, program design and targeting, implementation, and monitoring and evaluation. Techniques for facilitating participation in the context of food assistance, and development programming more generally, are discussed in a number of resources.<sup>24</sup>

Participatory programming offers a number of important advantages. Participation empowers communities by recognizing and building upon the knowledge and skills they already possess, and by strengthening the voice of the most vulnerable.<sup>25</sup> In the context of food security, this process of empowerment can help rights-holders to achieve “communal cohesiveness and decision-making authority to influence and improve their own food security.”<sup>26</sup> A participatory approach is also a necessary step to observe other key principles that should govern program design and implementation, including accountability and non-discrimination.

For free, active, and meaningful participation to take place, rights-holders need to be able to participate without being excluded because of language, distances involved, time, the cost of participation, security concerns, or other social and cultural norms that constrain their participation.<sup>27</sup> Being sensitive to these constraints – for example, daily work schedules, or child care responsibilities – is critical. Special efforts should be made to ensure the participation of groups that are especially vulnerable to food insecurity and that are frequently politically and economically marginalized. These groups include persons living with HIV/AIDS; indigenous persons; non-proprietary rights-holders; and the poor and those dependent on small-scale agriculture (discussed further in Section 3.3).

The Voluntary Guidelines invite states to “ensure that relevant institutions provide for full and transparent participation of the private sector and of civil society, in particular representatives of the groups most affected by food security.” (Guideline 5.4)

### 3.2 Substantive gender equality

Women bear primary responsibility for feeding their families and are often the “guardians of food security” within their communities.<sup>28</sup> However, women are themselves at particular risk of food insecurity.

Women’s vulnerability to food insecurity stems principally from discrimination in both laws and social customs, which manifests in poor access to and control over land and productive resources.<sup>29</sup> According to the UN Special Rapporteur on the Right to Food, while women make up 80% of the world’s agricultural labor force, they own less than 1% of land and account for less than 1% of credit offered to farmers globally.<sup>30</sup> Women also do not have equal access to benefits such as training, information, knowledge, transport, and social networks.<sup>31</sup> Such disparities are estimated to lead to a 20-30% gap between what men and women farmers are able to produce.<sup>32</sup> Where women do have access to land, they generally utilize it for the well-being of their household – whether by producing food or otherwise generating income.<sup>33</sup>

Women and girls are also frequently less favored in the intra-household distribution of food.<sup>34</sup> Unequal distribution of food leads to increased malnutrition, which can reduce learning potential, increase reproductive and maternal health risks, and lower productivity. These factors trap women in a cycle of poverty and under-nutrition. Women’s chronic underrepresentation means that their food needs are often overlooked in strategy development, law reform, and development programs.<sup>35</sup>

Effectively strengthening food security therefore requires that special efforts be made to identify and address the social and legal impediments to productivity women face in agriculture and other sectors. Programs should be premised on a robust gender analysis and, consistent with gender indicators, should address existing barriers to achieve equal participation of women in decision-making over issues that affect their productivity and equal access to supportive programs and services.<sup>36</sup>

The Voluntary Guidelines observe that “States may wish to give priority to channeling food assistance via women as a means of enhancing their decision-making role and ensuring that the food is used to meet the household’s food requirements.” (Guideline 13.4)

### 3.3 Non-discrimination and attention to vulnerable groups

Equitable access to resources and enjoyment of rights requires an understanding of the particular challenges facing vulnerable groups. With respect to programs intended to promote food security, special efforts are required to identify, prioritize, and give preference to vulnerable groups in order to overcome barriers to their food security and ultimately bring them to a position where they enjoy equality with others. Identifying who within a community is at particular risk of food insecurity is a context-specific exercise that should be carried out with the active participation of community members. While attention should not be limited to these groups, vulnerable groups might include persons living with HIV/AIDS; indigenous persons; non-proprietary rights holders; the poor and those dependent on small-scale agriculture; and internally displaced persons.

### **3.3.1 Persons living with HIV and AIDS**

HIV/AIDS makes people more vulnerable to food insecurity and, in turn, food insecurity makes them more susceptible to HIV/AIDS.<sup>37</sup> Stigma, inability to engage in employment, and the costs of health treatment and medicine (which can result in distress sales of land and income-producing assets) place families with HIV/AIDS-affected members at greater risk of food insecurity.<sup>38</sup> At the same time, migration and exploitative work arrangements due to food insecurity can heighten susceptibility to, or exacerbate, HIV/AIDS. The nutritional needs of people living with HIV/AIDS also rise considerably, partly due to the body's inability to absorb consumed nutrients, and partly because the body needs more energy to cope with the infection.<sup>39</sup> Improved nutrition can extend the productive lives of infected persons, enabling them to provide for themselves and their families more effectively.

### **3.3.2 Indigenous persons**

Indigenous peoples make up a significant percentage of the food insecure.<sup>40</sup> A key issue is the depletion of their natural resources, mainly through the expropriation of their lands, which are often regarded as belonging to the State or unused. As a result, indigenous peoples are often displaced to the least fertile and most fragile lands, where it is difficult to grow enough food for sustenance or earn a livelihood. Such displacement also prevents indigenous populations from pursuing their traditional way of life, which has implications for the “cultural acceptability” component of the right to food. For indigenous populations, traditional livelihoods such as hunting, fishing, gathering, shifting cultivation or rotational agriculture, pastoralism, and high mountain agriculture are often important aspects of cultural identity.<sup>41</sup> The key challenge is that, despite international protection of the rights of indigenous peoples, states often fail to recognize the existence of indigenous land use, occupancy, and ownership and fail to accord legal status and legal rights to protect that use, occupancy, and ownership.<sup>42</sup>

### **3.3.3 Non-proprietary rights holders**

Non-proprietary rights holders, which may include artisanal fisherfolk, pastoralists, agro-pastoralists, forest-dwellers, and other customary rights holders, face some of the same vulnerabilities as indigenous populations. As land becomes scarcer, their weak tenure leaves them at increased risk of being excluded from the land, fishing areas, and grazing grounds they rely upon. This may be driven by government reform, transnational land acquisition, and/or the illegal land appropriation (see Section 5 for further discussion of the connection between land access and food security).<sup>43</sup>

### **3.3.4 The poor and those dependent on small-scale agriculture**

The poor allocate a large share of their household resources to food purchases. In times of rising food costs, they become more vulnerable to the risk of food insecurity. A particular example is small scale farmers, who increasingly have to compete against larger productive units for access to land and water with the result that they often cultivate plots that are small or are pushed into areas that are less sympathetic to agricultural production. As they are less competitive than large-scale production units, the price they receive for their crops is too low, making them net food buyers with low purchasing power.<sup>44</sup>



### 3.3.5 Internally displaced persons

In the last few decades, there has been a marked upward trend in the number of internally displaced persons (IDPs) worldwide.<sup>45</sup> IDPs face particular challenges in meeting their food and nutrition needs, whether they are in an urban or rural context.<sup>46</sup> Their ability to access food and means of production is often undermined by their placement in areas that are affected by conflict, remote, or otherwise removed from the source of their traditional livelihoods.<sup>47</sup> Conflict-affected persons are also more likely to suffer from eating difficulties that may cause malnutrition even when food is available.<sup>48</sup> Moreover, food delivery may exacerbate existing vulnerabilities and power structures as IDPs often face discrimination in assistance from host communities.<sup>49</sup>

The Voluntary Guidelines invite States to “systematically undertake disaggregated analysis on the food insecurity, vulnerability and nutritional status of different groups in society, with particular attention to assessing any form of discrimination that may manifest itself in greater food insecurity and vulnerability to food insecurity, or in a higher prevalence of malnutrition among specific population groups, or both, with a view to removing and preventing such causes of food insecurity or malnutrition.” (Guideline 13.2)

## 3.4 Accountability

Within the human rights framework, the notion of accountability pertains to the accountability of duty-bearers towards rights-holders. It demands that the State be answerable for the fulfillment of its human rights obligations. Accountability should similarly be expected of program proponents whose actions have an impact on the rights of individuals or communities.

In the context of programs to promote food security, accountability to right-holders can be facilitated in two ways. First, the right of affected communities to accessible information is essential. Information must be made available that enables rights-holders to recognize and understand the implications of programs.<sup>50</sup> The Voluntary Guidelines make several recommendations in this regard, including that States “inform the general public of all available rights and remedies to which they are entitled under the right to adequate food.”<sup>51</sup> Second, there should be provision for rights-holders to participate in the design and implementation of the monitoring and evaluation plan for programs. By assuming this role, rights-holders are not only made aware of the objectives of programs, but are motivated to collect and reflect on data to ensure programs are meeting their expectations.<sup>52</sup>

## 4. Entry points for programming

Food insecurity is a multi-dimensional problem that requires a broad and cross-sectoral response. The realization of the right to food depends on the enjoyment of other human rights, in particular, the right to property and to adequate housing, freedom from discrimination, and the rights of indigenous peoples not to be displaced from their lands.<sup>53</sup>

As part of their obligation to promote the right to adequate food, States should develop a responsive and efficient legal and regulatory framework that clarifies the rights and obligations of rights-holders and duty-bearers, and provides an enabling environment to implement the right to food.<sup>54</sup> The development of such a framework has implications for national constitutions, laws, courts and administrative fora, accountability mechanisms, and government policies and programs.

### 4.1 Developing a national strategy

National strategies for the progressive realization of the right to adequate food should be part of any existing overarching national development strategy.<sup>55</sup> Such a strategy creates an enabling environment for people to realize their right to food and associated rights.<sup>56</sup> A national strategy should:

- identify clear priorities for resource allocation and centers for accountability, including in institutions at a local, regional, and national level;
- demonstrate multisectoral cooperation and show clear links with a broader development framework;
- respond to the multi-faceted nature of food insecurity by, for example, incorporating measures to modify discriminatory values and customary laws/practices that limit women's access to and control over resources;<sup>57</sup> and
- set clear timeframes and measurable targets for realizing the dimensions of the right to food that require progressive implementation.<sup>58</sup>

A continuous process of consultation and dialogue between civil society and coordinating bodies should be established to ensure the participation of civil society in the development of food security strategy. For example, civil society should have permanent, adequate representation in national food security councils.<sup>59</sup>

#### 4.1.1 Right to Food Assessment

The development of a national strategy should be premised on a careful assessment that identifies who is food insecure and the causes of food insecurity, together with an assessment of the legal, policy, and institutional environment supporting the right to food.<sup>60</sup> The latter should encompass existing legislation, policy and administrative measures, current programs, systematic identification of existing constraints, and availability of existing resources.<sup>61</sup>

Ideally, assessments should be conducted in partnership with governments, both to facilitate access to relevant data and to build the government's support for any resulting recommendations. Further, multi-disciplinary teams that include food and nutrition security specialists are most qualified to assess patterns of food insecurity,<sup>62</sup> as data should be disaggregated for gender, age, health and nutritional

status, and vulnerability (with particular attention to assessing any form of discrimination that may manifest itself in greater food insecurity, vulnerability to food insecurity, or malnutrition).<sup>63</sup> In some countries, it may be possible to draw on existing assessments that have been previously conducted by organizations such as FIAN or the UN Special Rapporteur on the Right to Food.<sup>64</sup>

### ***Participation of the food insecure***

Assessments or consultations that rely on broad samples may unintentionally discriminate against vulnerable groups. For example, they may focus on household heads, community leaders, or more accessible populations. Moreover, those vulnerable to food insecurity are less likely to be inclined to engage with authorities responsible for collecting information or strategy development, either due to social norms, because they lack formal identity or land rights, or because of geographic or linguistic constraints. Participation also increases awareness around the right to food and empowers people to realize and claim their right to food.<sup>65</sup>

Specific measures should therefore be taken to ensure the participation of all groups in a community. Such measures might include:

- engaging female data collection and needs assessment staff;
- running focus group discussions for food insecure; and
- organizing meetings at varied times and locations that are convenient for vulnerable groups.

#### **4.1.2 Entry points**

- Capacity-building for civil society organizations with respect to right to food advocacy. FAO's capacity-building tools provide detailed guidance in this regard.<sup>66</sup>
- Education of policy-makers, including formal education and professional training on the right to food and associated rights.<sup>67</sup> FAO's capacity-building tools provide detailed guidance in this regard.<sup>68</sup>
- Advocating for the institutionalization of food programs that target the vulnerable so that they are legal entitlements rather than policy options.<sup>69</sup> Institutionalizing programs has a number of important advantages, including:
  - creating sustainability;
  - limiting the risk of resources being diverted as a result of corruption or clientelism;
  - strengthening accountability for the achievement of program objectives, particularly if courts or other independent institutions are empowered to monitor implementation, including recourse for victims of inadequate or discriminatory implementation;
  - reducing any stigma attached to participating in a program, which could otherwise significantly reduce the participation of eligible persons.<sup>70</sup>
- Establishing or strengthening oversight and monitoring mechanisms to monitor government compliance with the obligations necessary to realize the right to food, and to monitor general progress toward food security.<sup>71</sup> These mechanisms might include:
  - ombudspersons, specialist NGOs, or national human rights institutions to oversee the performance of administrative offices and courts.
  - procedural reform to promote government transparency and freedom of information, including making records (for example, of land transactions), laws, and transcripts publicly available.

### Brazil's National Strategy

The Brazilian government has taken important steps to embed the right to food in its policy framework, starting with *Fome Zero* (Zero Hunger), a national cross-sectoral strategy launched in 2003. In 2011, Brazil adopted a rights-based Food and Nutritional Security Plan, setting up a Food and Nutritional Security Chamber involving nineteen ministries. The plan provides for continuous monitoring and evaluation of the progressive realization of the right to food which is overseen by a committee of its National Council on Food and Nutrition Security (CONSEA). The committee includes civil society representatives. The CONSEA is a cross-sector participatory body that advises on the formulation of food and nutrition security policies and defines guidelines to ensure the human right to adequate food. Two-thirds of the 57-member body represents civil society.

Brazil has also created a Special Commission for Monitoring Violations of the Human Right to Adequate Food and a National Rapporteur on the Right to Food, Water, and Land. The National Rapporteur works to mainstream the right to food in policy, law, and the work of public prosecutors, and was instrumental in the inclusion of the right to food in the food security framework law. Investigations of right to food violations at the local level have led to reports, public hearings, and court cases, such as the Maceio favelas class action.

## 4.2 Access to justice and legal empowerment

Upholding the right to food requires that people understand their rights and can access claims mechanisms and receive timely and fair outcomes. A key challenge is that those most vulnerable to having their right to food violated – such as the poor, minorities, women, customary rights holders, and pastoralists – are often those least able to access justice. These groups often have little insight into formal legal constructs: laws may not be well disseminated, be available in local languages, or may be too complex to understand. Even when such persons are aware of their rights, they may have difficulty accessing and enforcing their rights because of practical obstacles, such as cost, time, distance to travel, and barriers to communication, as well as the procedural complexity of laws.

Enhancing the access to justice of the food insecure requires a response to these challenges. Empowering communities themselves to actively identify and participate in the process of reform is essential. For example, communities may negotiate their own responses to food insecurity through the development of community development agreements that set out the terms, safeguards, and benefits of development projects that impact them.<sup>72</sup>

### 4.2.1 Entry points

- Raising community awareness of legislation pertaining to the right to food,<sup>73</sup> as well as related bodies of law such as land law and natural resource management. Programs should take account of differences in access to information, linguistics, and literacy and should specifically target the food insecure. Examples include radio programs, street theatre, print media (newspapers, posters, or cartoons) or community workshops.<sup>74</sup>
- Establishment of State or CSO-based legal support services (legal aid, legal clinics, or paralegals) to assist individuals and communities to ensure their rights are protected in the context of land acquisitions; environmental degradation; changes in land use, etc. All services should target those who are most food insecure, and should include measures to meet the needs of vulnerable groups, such as:
  - fee waivers for indigent applicants;
  - mobile services for isolated groups;

- designating specific days during which trained staff process women's or indigenous persons' claims;
  - availability of translators or lawyers who speak minority languages.
- Community training in formal legal and administrative processes, including in the practical skills necessary to process claims. Training should specifically target the food insecure and address such groups' time, security and resource constraints. Issues for training might include:
    - how to locate relevant government authorities;
    - the required documentation, the costs involved and available support services;
    - how to obtain assistance for illiterate applicants or translators where necessary.
  - Capacity-building for civil society organizations<sup>75</sup> regarding:
    - advocacy for legal and policy reform and enhanced protections in areas such as land, fisheries, access to natural resources, and environmental protection;
    - how to claim the right to food in courts. Social movements and CSOs have been instrumental to the 'most precedent-setting and large-scale' litigation of economic, social and cultural rights.<sup>76</sup> For detailed guidance on how to litigate the right to food at a national level, see IDLO's *Advancing the Realization of the Right to Food through Litigation*.<sup>77</sup>
  - Making courts more accessible to the food insecure. Steps might include:
    - reducing and simplifying filing procedures, streamlining case processing to reduce the number of times that disputants need to appear in court, eliminating or reducing case filing costs (particularly for indigent persons), providing free legal aid services, employing translators or multilingual court staff, and allowing cases to be heard in local dialects.

#### The Right to Food in South Africa's Equality Court

The case of *Kenneth George and others v Minister of Environmental Affairs & Tourism* is an example of a legal process and outcome that was protective of the right to food of traditional fisherman in South Africa. The case was prompted by the passage of a law that allocated fishing quotas to commercial fishing operations, but excluded traditional fisherman who were small-scale fishers. As a result, the traditional fishermen were prevented from engaging in fishing, depriving them of their livelihood. The nutritional status of affected communities subsequently deteriorated.

Various NGOs supported the fishermen to bring a class action against the relevant Ministries on the basis that their right to a traditional livelihood had been violated. Ultimately, an agreement was reached that permitted nearly 1,000 traditional fisherman to fish and sell their products. The agreement was formalized in one of South Africa's Equality Courts, which facilitates access to courts and participation by parties, and uses a less formal procedure. The Court also ordered that a 'new policy and legislative process needed to be developed by all parties concerned that would include all traditional fishers in South Africa and accommodate the socio-economic rights of these fishers'.

*Kenneth George and others v Minister of Environmental Affairs & Tourism (EC 1/2005: Order)*

### 4.3 Legislation and law reform

Integrating the right to food in domestic legislation is a means of establishing long-term binding obligations for State actors and other stakeholders.<sup>78</sup> There are three main forms:

- *Recognition of the right to food in a national Constitution:*<sup>79</sup> Constitutional recognition is the strongest form of legal protection. It implies that all laws in a country should be consistent with the constitutional norm and, in cases of conflict, the constitutional norm will prevail.<sup>80</sup> It provides courts and human rights institutions with a standard by which to measure government action. Constitutionally-protected rights may also promote an enabling environment due to the ‘trickle down’ impact of a Constitution on laws, policies, and programs, although any relevant laws should be reviewed to ensure their consistency with the right. Constitutional recognition is also a tool of empowerment; it can be used demand policies and laws that promote the right to food.<sup>81</sup> Constitutional recognition can be explicit or implicit, listed in a Bill of Rights, or as a directive principle. Most often, provisions mirror the language of human rights treaties, stating rights and freedoms in broad terms. The Special Rapporteur on the right to food has stated that for constitutional provisions to be effective, they should be supported by a framework law.<sup>82</sup>
- *Recognition of international or regional treaty obligations in domestic legislation.*
- *Framework laws:* Framework laws provide an institutional framework for cross-sectoral rights protection, judicial recourse, implementation and monitoring: it is the umbrella beneath which institutions can be built, systems created and relevant secondary legislation implemented.<sup>83</sup> Framework laws should expressly situate the right to food at the center of policies and programs.<sup>84</sup> Key provisions might include:
  - definitions of the right to food and corresponding obligations for public authorities;<sup>85</sup>
  - guarantees of non-discrimination and substantive equality, including special measures for vulnerable groups;<sup>86</sup>
  - institutional apparatus for implementation of the right, including mechanisms for civil society participation;
  - procedures for monitoring institutions;<sup>87</sup>
  - procedures and remedies for right to food violations.<sup>88</sup>

### Community participation

Any law or policy reform process should be participatory and inclusive.<sup>89</sup> To ensure meaningful participation of civil society, and to overcome any capacity gaps on the part of CSOs, mechanisms for participation should be defined clearly in law and institutionalized.<sup>90</sup> Consultations should actively facilitate the participation of the food insecure.

The draft Law on the Right to Adequate Food of Peru requires the State to “guarantee citizens’ participation in the formulation, implementation and monitoring of the state policies aiming at the realization of the right to adequate food.” (Article IX)

LEY GENERAL DE SEGURIDAD ALIMENTARIA Y NUTRICIONAL (Proyecto de Ley) (2010)

### 4.3.1 Entry points

- Assessment of the legislative framework for compatibility with the right to food,<sup>91</sup> with particular attention to identifying explicit or implicit discriminatory practices. Focus areas might include:
  - laws regulating the use of and access to natural resources;
  - land and fisheries laws, including land titling laws and inheritance laws;
  - laws protecting indigenous persons.
  
- Technical assistance regarding constitutional or legislative reform, particularly with respect to enhancing the protections of the food insecure. FAO's *Guide on Legislating for the Right to Food* provides extensive guidance in this regard.<sup>92</sup> A specific area of reform might include strengthening measures to protect the food security of vulnerable groups.<sup>93</sup> For example:
  - strengthening women's equal access to economic resources, including to micro-credit and ownership of land, water and other resources.<sup>94</sup>
  - requiring that public authorities prioritize vulnerable groups in programs related to food security.<sup>95</sup>

Guatemala's 2005 Law on the National Food and Nutritional Security System is the country's framework law for food security. Its objectives are to eradicate malnutrition, ensure vulnerable groups have access to basic necessities, and the promotion of socio-economic development. It sets out guiding principles for relevant institutions, including transparency, equity, sustainability, food sovereignty, and citizen participation. Further, it promotes transparency and accountability by requiring that programs are based on objective information and methods, and that programs are continuously monitored and assessed.

LEY DEL SISTEMA NACIONAL DE SEGURIDAD ALIMENTARIA Y NUTRICIONAL decreto número 32-2005 (2005)

## 4.4 Claims mechanisms

Enjoyment of the right to food requires the availability of mechanisms for obtaining adequate, effective and prompt remedies to rights violations.<sup>96</sup> Claim mechanisms might include administrative,<sup>97</sup> judicial,<sup>98</sup> or quasi-judicial mechanisms.<sup>99</sup> As the right to food has not been tested in many national courts, the jurisprudence remains limited.<sup>100</sup> However, the growing number of successful cases illustrate that courts will play an increasingly important role in upholding and promoting the right to food, and that their decisions can play a fundamental role in empowering rights-holders and correcting rights-restricting laws and policies.

### 4.4.1 Entry points

- Establishment and/or strengthening of administrative, judicial, and quasi-judicial mechanisms with jurisdiction over cases involving the right to food or related rights.
  
- Inclusion of right to food issues in law school and other university programs. Model curricula on the right to food and associated rights can be drafted in partnership with local universities.<sup>101</sup>
  
- Training for judges and lawyers on defending and adjudicating right to food cases.<sup>102</sup> Even when the right to food is protected in constitutions, judges and lawyers may not have a sufficient

understanding of the legal dimensions of the right, and there is evidence that training has led to the right being more frequently relied on in judgments.<sup>103</sup> Targeting young lawyers is also recommended.<sup>104</sup>

- Training government officials, such as land administrators, on the relevance of the right to food in their work and practical means of supporting the right to food, particularly how the realization of the right to food is connected to issues such as land reform, planning and development, fisheries regulation, trade agreements, business and food market regulation, and environmental management. Training might extend to the business community and the media.<sup>105</sup>

### The Right to Food in India

In 2001, a public interest claim was filed by the People's Union for Civil Liberties in India's Supreme Court following widespread malnutrition and deaths from acute hunger in the State of Rajasthan. The famine occurred in the context of a national food surplus, which included unused grain stores in Rajasthan. The claimants argued that, consistent with Indian laws, including Article 21 of the Indian Constitution which protects the right to life, the government was required to enforce existing food distribution schemes and policies. The Court found in favor of the claimants and issued a number of interim orders requiring the State to enforce these protective measures, especially with respect to vulnerable groups. In so doing, the court transformed "beneficiaries of assistance programs into stakeholders of justiciable rights, reminded state governments of their constitutional obligations, and fostered a shift in the perception of judges regarding their role as guardians of the right to food." Subsequent interim orders by the court have strengthened the implementation of food schemes across India, including a midday meal scheme under which more than 118 million Indian primary-school children are given a daily meal. The case has also served as an advocacy tool; it has contributed significantly to the expansion of the National Campaign on the Right to Food, and CSOs such as the Human Rights Law Network rely on the case in legal education programs for the Indian judiciary.

*People's Union for Civil Liberties (PUCL) v. Union of India, W.P. (Civ.) No. 196/2001 (2001)*

## 5. Land reform

Land is fundamental to food security; 80 percent of the world's hungry depend on access to land and other natural resources for their livelihoods.<sup>106</sup> Land tenure and administration systems, which determine the conditions for exercising ownership and rights to use and access land, are thus critically important for realizing the right to food.<sup>107</sup> The Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food urge States to facilitate equitable, sustainable access to land and resources, including the protection of tenure security.<sup>108</sup>

### Land acquisitions and the food crisis

The 2008 global food crisis occurred in the context of major food-importing, capital-exporting countries losing confidence in global markets as a stable and reliable source of food. The crisis (coupled with the impacts of the global financial crisis) led to renewed interest in agriculture and biofuel production, as well as land speculation by investors. This sparked a trend toward large-scale transnational acquisitions and leasing of land by countries, often with a view towards ensuring their own food security.<sup>109</sup> Since 2006, it is estimated that between 15 and 20 million hectares of farmland in developing countries have been subject to transactions or negotiations involving foreign investors.<sup>110</sup> The countries most affected



are in Southeast Asia, Central Asia, Latin America, and, particularly, Africa.<sup>111</sup> These countries are attractive because of the perception of land availability, a climate that is conducive to crop production, and the relative affordability of land and local labor.<sup>112</sup>

While these trends may present opportunities to improve the welfare of rural communities,<sup>113</sup> their food security may also be threatened by displacement from land to which they lack formal legal title. These communities generally include indigenous peoples, smallholders, and groups such as herders, pastoralists, and fisherfolk.<sup>114</sup>

When these groups are dispossessed of their land and deprived of access to productive resources, their food security decreases.<sup>115</sup> Such smallholders cannot acquire more land in order to increase production and, because large-scale agribusiness is often highly mechanized, they are often unable to be re-employed. Forest-based communities, whose diets and livelihoods are often intrinsically tied to access to forest ecosystems, may also have their food security undermined by climate change mitigation projects such as REDD+ (discussed in detail in Chapter 2, Section 4.5).<sup>116</sup> Landless laborers are another group that may be affected; rising land prices mean that the land they farm may be sold, or appropriated if the landholder's title is insecure.

States may therefore be required under international law to regulate land acquisitions, since States are obliged to prevent others — including private actors such as firms — from encroaching on the ability of groups and individuals to feed themselves.<sup>117</sup>

## 5.1 Strengthening community land tenure

The principal response to this problem is land reform that ensures tenure security and access to land for those who depend on land for their livelihood, particularly the rural poor, women, and other marginalized groups.<sup>118</sup> The best approach for strengthening tenure will depend on the local social, legal, and policy context and should be determined through a participatory process with the communities in question.<sup>119</sup> There are, however, a number of important advantages associated with communal land tenure over individual land titling, particularly with respect to the promotion of food security.

- Communal tenure encompasses all of the natural resources within a community's customary boundaries, including grazing lands, fisheries, or wetlands, which may not be captured by individual title;<sup>120</sup>
- Because tenure is enjoyed collectively by the community, the ability of poor or vulnerable community members to access land and other resources is theoretically protected;<sup>121</sup>
- Communal tenure may be a more efficient way for communities to protect their land, given the cost and time associated with individual land titling;<sup>122</sup> and
- There is evidence that communal tenure may provide incentives for community members to invest in improving productivity of the land because of internal rules which assign rights to individual households.<sup>123</sup>

### Two models: community land titling and community-based land management

Two important models of communal tenure are community land titling by reference to customary boundaries and community-based land management. Community land titling allows communities to exercise private collective ownership over land. Community-based land management, conversely, retains the State's ownership of the land, but delegates management of the land and resources to the community.

Both models have the potential to protect local food security, livelihoods, and environmental values, and prevent encroachment on the land by outside investors.<sup>124</sup> Community land titling, however, is undoubtedly a more protective mechanism. Indigenous communities' claim to permanent title to their land is also supported by a number of international and regional instruments.<sup>125</sup>

The appropriate form of tenure will depend on the local context and the views of the community; for example, existing legal frameworks may favor community-based management of land and resources, especially in relation to forests.<sup>126</sup> Another consideration is that community-based land management denotes a variety of approaches to access, use and management rights – ranging from permanent (albeit conditional) use rights to limited benefit-sharing.<sup>127</sup> More narrowly conceived arrangements may not be protective of communities' food security.

Either model should include safeguards to protect the equal access to, and use of, land and resources by marginalized or vulnerable groups, including women, orphans, pastoralists, and people living with HIV/AIDS.<sup>128</sup> Further, legal tenure may not be sufficient to stop land from being acquired or accessed by the State or private actors without the agreement of communities.<sup>129</sup> The principle of free, prior, and informed consent (discussed in Chapter 2, Section 4.5) is crucial in this regard to ensure that any changes in tenure, land use, or benefit-sharing arrangements are informed by participatory, equitable processes.<sup>130</sup>

## 5.2 Entry points

- Promoting legislative reform to formally recognize and protect communal land tenure.
- Providing support to communities to strengthen communal land tenure. The process for determining and formalizing the appropriate form of tenure should be rights-based and fully participatory and should ensure that the rights of marginalized and vulnerable groups are protected. This may include assisting communities with:
  - participatory mapping of their land. Note that conflict-resolution strategies should be an integral part of any boundary mapping exercise;
  - registration of the community as a legal entity, where this is a precondition for tenure.
- Programs to ensure non-discriminatory and gender-sensitive land policies and practice,<sup>131</sup> including:
  - law reform to eliminate laws and practices that directly or indirectly discriminate against women.<sup>132</sup> For example, supporting efforts to ensure that legal title to land owned by a married couple includes the names of both husband and wife;
  - capacity-building for women's NGOs or paralegals to provide legal education, advice and assistance to women to facilitate the exercise of their rights. The provision of advice and concrete assistance is crucial as awareness and literacy-raising programs may not in themselves be sufficient to enable women to exercise their rights.<sup>133</sup>
- Capacity-building of communities and CSOs with respect to the process of free, prior and informed consent (see Chapter 2, Section 4.5).
- Revision of tenancy laws and anti-eviction laws to strengthen the rights of those with weak tenure security and prevent their displacement or dispossession.
- Ensuring laws regulating the State's ability to expropriate land include procedural safeguards to protect the rights of affected groups and individuals.<sup>134</sup>

- Capacity-building of local government officers in land, environmental, and natural resource law, including how to promote participatory and equitable rural land distribution.<sup>135</sup>

## 6. Case Study: Community Land Titling in Liberia

Land in Liberia is being acquired via large-scale concessions at an alarming rate. A recent Oxfam report estimates that over 30 percent of the land in Liberia has been distributed to concessionaires in the last five years alone.<sup>136</sup> In the absence of a process that respects customary claims to land and resources, these acquisitions threaten to undermine the food security of rural communities in which hunger is already prevalent.<sup>137</sup>

The Community Land Titling Initiative (CLTI) is a program launched by IDLO in 2009 to investigate how to best support communities in Liberia, Mozambique, and Uganda to register their land by reference to customary boundaries. The program, which is now being managed by Namati, has brought to light a number of best practices and guiding principles for facilitating community land protection, including the optimal type and level of legal support to communities and how to effectively protect the rights of vulnerable groups within communities.<sup>138</sup> Further, research conducted in five of the study communities in Liberia, together with a thorough evaluation of CLTI by the implementing partners, suggests that the process of documenting community land has strengthened practices that protect the food security of communities.

### Food security context

Despite promising agricultural and climatic conditions, years of political and social instability and poorly developed infrastructure have severely hampered the productivity of Liberia's agricultural sector. As a result, Liberia's rate of agricultural production is among the lowest in West Africa,<sup>139</sup> leaving the country highly reliant on imports and vulnerable to international fluctuations in food prices.<sup>140</sup> In 2010, the World Food Program reported that 41% of Liberians have a level of food intake that is less than acceptable, although this figure masks the significant disparity between rural and urban households. In rural areas, people are three times more likely to be food insecure than in urban areas.<sup>141</sup>

In Rivercess County, where the CLTI study communities are situated, 54.5% of households are reported to be food insecure.<sup>142</sup> In the clans of Bars, Zarque, Duah, Central Morweh and Jowein, community members described their diets as mostly comprised of rice, vegetables such as cassava, pumpkin, and okra, "bush meat" (meat from wild animals), and fish. The vast majority of this food is locally farmed or hunted by community members. As a supplementary measure, youth in the communities reported selling locally grown palm products and bush meat to buy rice or fish in the nearest city. In each case, access to community land and resources is critical for communities to feed themselves.

### Legal context

The legal framework governing land in Liberia is currently in a state of flux. In 2009, the Liberian government established a commission to review and revise the country's land policy, including resolution of the ambiguity created by several statutes that purport to regulate communal land title.<sup>143</sup> As a result, the organizations implementing the CLTI – the Sustainable Development Institute (SDI) and IDLO – and the Land Commission of Liberia worked together to devise a valid process for documenting and formalizing the customary land of the twenty study communities.<sup>144</sup> The process is confirmed in a

Memorandum of Understanding (MOU) between SDI, IDLO, and the Land Commission. It requires that study communities:<sup>145</sup>

- work with neighboring communities to harmonize and document the boundaries of their land;
- draft and adopt by-laws to govern intra-community land and natural resource administration; and
- draft and adopt intra-community land and natural resources management plans.<sup>146</sup>

As a whole, these activities appear to have positively contributed to the food security of the study communities in several ways. First, the process of mapping their land and devising land and natural resources management plans renewed awareness among community members of the connection between their land and their livelihoods. The participatory nature of the process of land documentation – particularly the inclusion of women, who were previously excluded from discussions about land – also assisted groups within a community to understand the effect their activities were having on the food security of the community as a whole. Accordingly, the by-laws and management plans the communities ultimately created are geared toward conservation and sustainable use of community land and resources, including food sources. Finally, the by-laws and management plans include rules to ensure that outside actors do not invest in community land without first reaching an agreement with the community that is consistent with the community's welfare.

### **Renewed consciousness of the connection between land and livelihood: mapping and devising natural resources management plans**

To prepare for the harmonization of land boundaries with neighboring communities, each community engaged in a participatory mapping exercise to ensure internal agreement about the boundaries of their land and the natural resources (such as creeks, rivers, and forests) contained within those boundaries.<sup>147</sup> Women, youth, and elders created maps in separate groups before coming together to agree on a final map.<sup>148</sup> A number of community members described this experience as the first time they had considered the limits of their land and the finite amount of land available to them for farming.<sup>149</sup>

The process of coming together to identify all of the resources on community land drew attention to the integral role of those resources in sustaining their livelihoods. For example, when the communities devised natural resources management plans – a highly participatory, iterative process – they were encouraged to consider all of the resources that were of value to them. While they initially focused on commodities such as gold and timber, community members ultimately broadened their view to consider more mundane resources they relied upon for their daily survival, such as thatch, wild animals, mud, and medicine trees.<sup>150</sup> The input of the women's groups was particularly important in this regard; women oversee the preparation and distribution of food in most households and are more conscious of the value of resources, such as creeks where women fish, that are necessary to feed their families but were otherwise overlooked by men.<sup>151</sup>

Because of their participatory nature, discussions about natural resource management also exposed disagreements between groups about how particular resources should be used. One tension that emerged was between the short-term exploitation of a resource and a more sustainable, but less immediately profitable, approach. For example, in one community elders and youth disagreed over the access of youth to palm trees – a cash crop – for the purpose of harvesting palm nuts. The youth claimed that they relied on palm harvesting for a major component of their income. The elders, however, expressed that the amount of time the youth spent harvesting palm nuts was unsustainable and also precluded them from planting rice and other food products consumed by the community, thereby undermining the community's food supply.<sup>152</sup> With the arbitration of the women's group, the community ultimately agreed to restrict the harvesting of palm products for three months a year.<sup>153</sup>

The inclusion of elders in these discussions and in the ongoing management of resources was important, since they appear to have the clearest sense of the relative food security of their towns. Elders stated that the level of hunger in their clans has generally been increasing, and that this was one reason it was important to safeguard the long-term sustainability of resources.<sup>154</sup>

### **Content of by-laws and land and natural resources management plans**

The content of the by-laws and land and natural resources management plans reflect this commitment to sustainable use of community resources, including food sources. Each town drafted their own rules, and all of the rules were subsequently debated and agreed upon at clan level.<sup>155</sup> A number of clans devised rules to specifically address the sustainability of their food supply, including rules about the number of traps that are allowed to be set when hunting, limitations on permissible methods of fishing, and a commitment to learning animal husbandry methods so that the community is less reliant on hunting wild animals.<sup>156</sup> Further, some communities decided to set aside reserve land or reserve forest, on which no hunting, mining, fishing, or farming is allowed, for the community's future benefit.<sup>157</sup>

Preliminary research indicates that community members are observant of the by-laws and land and natural resources management plans.<sup>158</sup> Discussions with women, elders, and youth in five clans suggested that, on the whole, community members are aware of the rules and abide by them irrespective of formal enforcement.<sup>159</sup> A number of community members commented that, because they were involved in the process of drafting the rules, they were naturally inclined to respect them. However, because the by-laws and management plans were not formally adopted by the communities, the application of the rules across different towns may vary.

### **Framework for negotiating with outside investors**

One of the most significant processes formalized in communities' by-laws and natural resources management plans was a framework for regulating the activity of outsider investors, including individuals engaged in artisanal extractive activities and companies.<sup>160</sup> Communities devised rules to ensure that outside investors engaged in open and transparent negotiations with the community; that they contributed to the community's development and prosperity; and that there are safeguards in place to ensure against abuse by the investor.<sup>161</sup> A number of communities identified encroachment by outsiders as one of the key threats to their food security. They also stated that since the new rules were drafted, there have been cases of community representatives speaking to small-scale Liberian logging companies to try to ensure that the community's welfare is protected.<sup>162</sup>

In short, even before communities are awarded title to their land, the participatory process of documenting community land has affected the attitudes and practices of community members to become more explicitly protective of their food security. By coming together to consider the limits of their land and identify resources that are required for the survival and livelihood of the community, community members were prompted to devise rules governing their actions and the actions of outside investors that are consistent with the sustainability of those resources.

## 7. Food Security and Rule of Law resources

### Realizing the Right to Food: General

FAO COUNCIL, VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY (*adopted November 2004 by 127<sup>th</sup> Session of the FAO Council*)

FAO, RIGHT TO FOOD, MAKING IT HAPPEN: PROGRESS AND LESSONS LEARNED THROUGH IMPLEMENTATION (2011)

UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD *Building resilience: a human rights framework for world food and nutrition security* U.N. Doc. A/HRC/9/23 (8 September 2008)

### Realizing the Right to Food: Assessments, Legislation, Access to Justice, and Legal Empowerment

FAO, RIGHT TO FOOD ASSESSMENT CHECKLIST: ASSESSING THE RIGHT TO FOOD IN THE NATIONAL DEVELOPMENT CONTEXT at 7 (2009)

FAO, RIGHT TO FOOD CURRICULUM OUTLINE (2009)

FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD (2009)

FAO, GUIDE TO CONDUCTING A RIGHT TO FOOD ASSESSMENT (2009)

WORLD FOOD PROGRAMME, PARTICIPATORY TECHNIQUES AND TOOLS: A WFP GUIDE (2001)

### Realizing the Right to Food: Land Governance

KIRSTEN EWERS ANDERSEN, COMMUNAL TENURE AND THE GOVERNANCE OF COMMON PROPERTY RESOURCES IN ASIA (FAO, Land Tenure Working Paper 20 2011)

LUISA CRUZ, RESPONSIBLE GOVERNANCE OF LAND TENURE: AN ESSENTIAL FACTOR FOR THE REALIZATION OF THE RIGHT TO FOOD (FAO, Land Tenure Working Paper 15, 2010)

ELIZABETH DALEY & CLARA MI-YOUNG PARK, GOVERNING LAND FOR WOMEN AND MEN (FAO, Land Tenure Working Paper 19, 2011)

RACHAEL KNIGHT, JUDY ADOKO, TERESA AUMA, ALI KABA, ALDA SALOMAO, SILAS SIAKOR, ISSUFO TANKAR, PROTECTING COMMUNITY LANDS AND RESOURCES: EVIDENCE FROM LIBERIA, MOZAMBIQUE AND UGANDA (Namati and IDLO, 2012)

Rachael Knight, *The Community Land Titling Initiative: An Investigation into the Protection of Customary Land Claims*, in WORKING WITH CUSTOMARY JUSTICE SYSTEMS: POST-CONFLICT AND FRAGILE STATES (Erica Harper ed., IDLO 2011)

FAO COUNCIL, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY (2012) (*endorsed May 2012 by Committee on World Food Security*)

FAO, REFORMING FOREST TENURE (2011)

Focus On Series, FAO, THE RIGHT TO FOOD AND ACCESS TO NATURAL RESOURCES (2007)

UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, U.N. Doc. A/65/2813 (11 August 2010)

UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD *Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge* (28 December 2009) U.N. Doc. A/HRC/13/33/Add.2

UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, COMMENTS ON THE INTERNATIONAL GUIDELINES ON SECURING SUSTAINABLE SMALL-SCALE FISHERIES (2012)

#### Realizing the Right to Food: Country and Region Studies

VALÉRIA BURITY ET AL, EXIGIBILIDADE: MECHANISMS TO CLAIM THE HUMAN RIGHT TO ADEQUATE FOOD IN BRAZIL (FAO, Right to Food Studies, 2011)

CHRISTOPHE GOLAY, THE RIGHT TO FOOD AND ACCESS TO JUSTICE: EXAMPLES AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS (FAO, Right to Food Studies 2009)

SPECIAL RAPPORTEUR FOR THE RIGHT TO FOOD, A RIGHTS REVOLUTION: IMPLEMENTING THE RIGHT TO FOOD IN LATIN AMERICA AND THE CARIBBEAN (2012).

Briefing Note, SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, COUNTRIES TACKLING HUNGER WITH A RIGHT TO FOOD APPROACH (2010)

#### Realizing the Right to Food: Women and Vulnerable Groups

FAO, WOMEN – KEY TO FOOD SECURITY (2011)

LIDIJA KNUTH, THE RIGHT TO ADEQUATE FOOD AND INDIGENOUS PEOPLES: HOW CAN THE RIGHT TO FOOD BENEFIT INDIGENOUS PEOPLES? (FAO, Right to Food Studies, 2009)

USAID, WFP, AED, FOOD ASSISTANCE PROGRAMMING IN THE CONTEXT OF HIV (2007)

<sup>1</sup> FAO COUNCIL, VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY at [15] (*adopted* November 2004 by 127<sup>th</sup> Session of the FAO Council) [hereinafter FAO, VOLUNTARY GUIDELINES].

<sup>2</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPOREUR ON THE RIGHT TO FOOD, U.N. Doc. A/65/281 3 (11 August 2010).

<sup>3</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPOREUR ON THE RIGHT TO FOOD, U.N. Doc. A/65/281 5-6 (11 August 2010).

<sup>4</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPOREUR ON THE RIGHT TO FOOD, U.N. Doc. A/65/281 5-6 (11 August 2010).

<sup>5</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPOREUR ON THE RIGHT TO FOOD, U.N. Doc. A/65/281 Section III (11 August 2010).

<sup>6</sup> UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPOREUR ON THE RIGHT TO FOOD, U.N. Doc. A/HRC/7/5 at [51] (10 January 2008), A/HRC/17/5/Add.2 at [11] [15]; UN Human Rights Council Res. 7/14, U.N. Doc. A/HRC/RES/7/14 (*adopted* 27 March 2008); UN Human Rights Council Res. 10/12, U.N. Doc. A/HRC/RES/10/12 (*adopted* 26 March 2009); UN Human Rights Council Res.13/4, U.N. Doc. A/HRC/RES/13/4 (24 March 2010); UN Human Rights Council Res. 16/27, U.N. Doc. A/HRC/RES/16/27 (25 March 2011).

<sup>7</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPOREUR ON THE RIGHT TO FOOD, U.N. Doc. A/65/281 at 6 (11 August 2010).

<sup>8</sup> UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPOREUR ON THE RIGHT TO FOOD: LARGE-SCALE LAND ACQUISITIONS AND LEASES: A SET OF MINIMUM PRINCIPLES AND MEASURES TO ADDRESS THE HUMAN RIGHTS CHALLENGE, U.N. Doc. A/HRC/13/33/Add.2 (28 December 2009); COLUMBIA LAW SCHOOL – HUMAN RIGHTS INSTITUTE, CLIMATE CHANGE AND THE RIGHT TO FOOD: A COMPREHENSIVE STUDY (2009); see, generally, Office of the Special Rapporteur on the Right to Food “Right to Food”, at <http://www.srfood.org/index.php/en/right-to-food>.

<sup>9</sup> FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO), THE STATE OF FOOD INSECURITY IN THE WORLD at 8 (2012).

<sup>10</sup> LUISA CRUZ, RESPONSIBLE GOVERNANCE OF LAND TENURE: AN ESSENTIAL FACTOR FOR THE REALIZATION OF THE RIGHT TO FOOD 3 (FAO, Land Tenure Working Paper 15, 2010) [hereinafter LUISA CRUZ, RESPONSIBLE GOVERNANCE OF LAND TENURE].

<sup>11</sup> Briefing Note, SPECIAL RAPPOREUR ON THE RIGHT TO FOOD, COUNTRIES TACKLING HUNGER WITH A RIGHT TO FOOD APPROACH (2010) [hereinafter SPECIAL RAPPOREUR, COUNTRIES TACKLING HUNGER].

<sup>12</sup> SPECIAL RAPPOREUR, COUNTRIES TACKLING HUNGER *supra* note 11, at 13 (2010).

<sup>13</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 25 (*adopted* December 10, 1948 by U.N. G.A. Res. 217A(III), U.N. Doc. A/810): “Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food...”.

<sup>14</sup> INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS art. 11 (*adopted* December 16, 1966 by U.N. G.A. Res. 2200A/XXI, *entered into force* January 3, 1976, U.N. Doc. A/6316) [hereinafter ICESCR].

<sup>15</sup> It is also recognized in international instruments such as CONVENTION ON THE RIGHTS OF THE CHILD art. 24(2)(c) and 27(3) (*adopted* November 20, 1989 by U.N. G.A. Res. 44/25, *entered into force* September 2, 1990, U.N. Doc. A/44/49); CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN art. 12(2) (*adopted* December 18, 1979 by U.N. G.A. Res. 34/180, *entered into force* September 3, 1981, U.N. Doc. A/34/46); CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES arts. 25(f) and 28(1) (*adopted* December 13, 2006 by U.N. G.A. Res. 61/106, *entered into force* May 3, 2008, U.N. Doc. A/61/61). The right to food is also recognized in regional instruments such as the ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS (PACT OF SAN JOSE, COSTA RICA) (*adopted* Nov. 22, 1969 by Organization of American States, *entered into force* July 18, 1978, O.A.S. Treaty Series No. 36); the AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (*adopted* 1990 by the Organization of African Unity, *entered into force* Nov. 29, 1999, AU Doc. CAB/LEG/24.9/49) (1990) and the PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (*adopted* July 11, 2003 by African Union Assembly, *entered into force* Nov. 25, 2005, AU Doc. CAB/LEG/66.6).

<sup>16</sup> See, eg, ROME DECLARATION ON WORLD FOOD SECURITY (*adopted* Nov. 13, 1996 by World Food Summit); WORLD FOOD SUMMIT PLAN OF ACTION (*adopted* Nov. 13 1996 by World Food Summit); FAO Voluntary Guidelines *supra* note 1.

<sup>17</sup> FAO, RIGHT TO FOOD, MAKING IT HAPPEN: PROGRESS AND LESSONS LEARNED THROUGH IMPLEMENTATION at 170 (2011) [hereinafter FAO, MAKING IT HAPPEN].



<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, 3-4.

<sup>20</sup> *Id.*

<sup>21</sup> This would include wage policies or social safety nets enable citizens to realize their right to adequate food: Office of the Special Rapporteur on the Right to Food “Right to Food”, at <http://www.srfood.org/index.php/en/right-to-food>. Note that only when people are not able to feed themselves with their own means, for instance because of an armed conflict, natural disaster or because they are in detention, is the State is under an obligation to directly provide food.

<sup>22</sup> Focus On Series, FAO, *The Right to Food and Access to Natural Resources*, 2 (2007).

<sup>23</sup> COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS [hereinafter CESCR], GENERAL COMMENT NO. 12: THE RIGHT TO ADEQUATE FOOD (*adopted* May 12, 1999, U.N. Doc. E/C.12/1999/5).

<sup>24</sup> See, eg, WORLD FOOD PROGRAMME, *PARTICIPATORY TECHNIQUES AND TOOLS: A WFP GUIDE* (2001) [hereinafter WFP, *PARTICIPATORY TECHNIQUES AND TOOLS*]; UNHCR, *A COMMUNITY-BASED APPROACH IN UNHCR OPERATIONS* (2008); CARE, *EMBRACING PARTICIPATION IN DEVELOPMENT* (1999).

<sup>25</sup> WFP, *PARTICIPATORY TECHNIQUES AND TOOLS* *supra* note 24, at 13.

<sup>26</sup> *Id.*, 18.

<sup>27</sup> FAO, *MAKING IT HAPPEN* *supra* note 17, at 20.

<sup>28</sup> DANIEL MAXWELL & KEITH WIEBE, *LAND TENURE AND FOOD SECURITY: A REVIEW OF CONCEPTS, EVIDENCE AND METHODS*, (Land Tenure Center: University of Wisconsin-Madison, Research Paper no. 129, 1999); FAO, *VOLUNTARY GUIDELINES* *supra* note 1, at Guideline 13.4: “States may wish to give priority to channeling food assistance via women as a means of enhancing their decision-making role and ensuring that the food is used to meet the household’s food requirements.”

<sup>29</sup> LUISA CRUZ, *RESPONSIBLE GOVERNANCE OF LAND TENURE* *supra* note 10 at 19-20.

<sup>30</sup> Office of the Special Rapporteur on the Right to Food “Right to Food”, at <http://www.srfood.org/index.php/en/right-to-food>.

<sup>31</sup> FAO, *WOMEN – KEY TO FOOD SECURITY* at 4 (2011); REBECCA HOLMES ET AL, *GENDER VULNERABILITIES, FOOD PRICE SHOCKS AND SOCIAL PROTECTION RESPONSES* at 4 (ODI, Background Note, August 2009).

<sup>32</sup> FAO, *WOMEN – KEY TO FOOD SECURITY* at 4 (2011).

<sup>33</sup> Terry Sunderland, *Food Security: why is biodiversity important?* 13(3) *INTERNATIONAL FORESTRY REVIEW* 265-275 at 270 (2011).

<sup>34</sup> UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, *Building resilience: a human rights framework for world food and nutrition security* U.N. Doc. A/HRC/9/23 at [23] (September 8, 2008) [hereinafter SPECIAL RAPPORTEUR, *BUILDING RESILIENCE*]; see, also, FAO, *THE STATE OF FOOD AND AGRICULTURE 2010-2011* (2011); ELIZABETH DALEY & CLARA MI-YOUNG PARK, *GOVERNING LAND FOR WOMEN AND MEN* (FAO, Land Tenure Working Paper 19, 2011).

<sup>35</sup> Office of the Special Rapporteur on the Right to Food “Right to Food”, at <http://www.srfood.org/index.php/en/right-to-food>.

<sup>36</sup> See, eg, USAID, *GENDER EQUALITY AND FEMALE EMPOWERMENT POLICY* at Chapter 5: Operational Principles of the Gender Equality and Female Empowerment Policy (2012); FAO, *WOMEN – KEY TO FOOD SECURITY* at 6 (2011).

<sup>37</sup> USAID, WFP, AED, *FOOD ASSISTANCE PROGRAMMING IN THE CONTEXT OF HIV* at 13-15 (2007).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> UN OHCHR, FAO, *THE RIGHT TO ADEQUATE FOOD* at 12 (UN OHCHR, FAO, undated).

<sup>41</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD U.N. Doc. A/65/281 at 7-8 (August 11, 2010); LIDIJA KNUTH, *THE RIGHT TO ADEQUATE FOOD AND INDIGENOUS PEOPLES: HOW CAN THE RIGHT TO FOOD BENEFIT INDIGENOUS PEOPLES?* at 9 (FAO, Right to Food Studies, 2009).

<sup>42</sup> ILO Convention 169, the UN Declaration on the Rights of Indigenous Peoples, and Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination each offer some protection of indigenous land and resource rights. See, also, the World Food Summit Global Plan of Action (1996); LIDIJA KNUTH, *THE RIGHT TO ADEQUATE FOOD AND INDIGENOUS PEOPLES: HOW CAN THE RIGHT TO FOOD BENEFIT INDIGENOUS PEOPLES?* at 40-44 (FAO, Right to Food Studies, 2009).

<sup>43</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD UN Doc A/65/281 at 9-13 (August 11, 2010).

- <sup>44</sup> SPECIAL RAPORTEUR, BUILDING RESILIENCE *supra* note 34, at 6, 22, 23, 31, 40, 41; FAO, SMALLHOLDER FARMERS IN INDIA: FOOD SECURITY AND AGRICULTURAL POLICY at 26-31 (2002); IFAD, SMALLHOLDER AGRICULTURE AND FOOD SECURITY IN THE 21<sup>ST</sup> CENTURY (2009); UNGA, INTERIM REPORT OF THE UN SPECIAL RAPORTEUR ON THE RIGHT TO FOOD UN Doc A/65/281 at 3 (August 11, 2010).
- <sup>45</sup> WFP, HUMANITARIAN ASSISTANCE IN CONFLICT AND COMPLEX EMERGENCIES at 22 (2009).
- <sup>46</sup> INTERNATIONAL DISPLACEMENT MONITORING CENTRE, HEALTH AND NUTRITION at 73 (undated) [hereinafter IDMC, HEALTH AND NUTRITION]; WFP, HUMANITARIAN ASSISTANCE IN CONFLICT AND COMPLEX EMERGENCIES at 23 (2009); Christian Curtis, *The Right to Food as a Justiciable Right: Challenges and Strategies*, 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 317-337 (2007).
- <sup>47</sup> IDMC, HEALTH AND NUTRITION (UNDATED) *supra* note 46.
- <sup>48</sup> IDMC, HEALTH AND NUTRITION (UNDATED) *supra* note 46.
- <sup>49</sup> See, eg, WFP, HUMANITARIAN ASSISTANCE IN CONFLICT AND COMPLEX EMERGENCIES at 55 (2009); IDMC, HEALTH AND NUTRITION (UNDATED) *supra* note 46, at 74.
- <sup>50</sup> UN SPECIAL RAPORTEUR ON THE RIGHT TO FOOD, COMMENTS ON THE INTERNATIONAL GUIDELINES ON SECURING SUSTAINABLE SMALL-SCALE FISHERIES at [5] (2012).
- <sup>51</sup> VOLUNTARY GUIDELINES *supra* note 1, at Guideline 7.3; see, also, Guidelines 9.6, 9.7, and 10.6.
- <sup>52</sup> WFP, PARTICIPATORY TECHNIQUES AND TOOLS *supra* note 24, at 19; FAO, RIGHT TO FOOD ASSESSMENT CHECKLIST: ASSESSING THE RIGHT TO FOOD IN THE NATIONAL DEVELOPMENT CONTEXT at 7 (2009).
- <sup>53</sup> Focus On Series, FAO, The Right to Food and Access to Natural Resources, at 1 (2007).
- <sup>54</sup> VALÉRIA BURITY ET AL, EXIGIBILIDADE: MECHANISMS TO CLAIM THE HUMAN RIGHT TO ADEQUATE FOOD IN BRAZIL at 11-13 (FAO, Right to Food Studies, 2011); FAO, MAKING IT HAPPEN *supra* note 17, at 7.
- <sup>55</sup> VOLUNTARY GUIDELINES *supra* note 1 at Guideline 3.1; CESCR, GENERAL COMMENT NO. 12: THE RIGHT TO ADEQUATE FOOD at [21] (adopted May 12, 1999, U.N. Doc. E/C.12/1999/5).
- <sup>56</sup> SPECIAL RAPORTEUR, COUNTRIES TACKLING HUNGER *supra* note 11.
- <sup>57</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPORTEUR ON THE RIGHT TO FOOD, U.N. Doc. A/65/281 at 16 (August 11, 2010); VOLUNTARY GUIDELINES *supra* note 1 at Guideline 10.8.
- <sup>58</sup> UN SPECIAL RAPORTEUR FOR THE RIGHT TO FOOD, A RIGHTS REVOLUTION: IMPLEMENTING THE RIGHT TO FOOD IN LATIN AMERICA AND THE CARIBBEAN at 6 (2012).
- <sup>59</sup> VOLUNTARY GUIDELINES *supra* note 1 at Guideline 5.4.
- <sup>60</sup> FAO, MAKING IT HAPPEN *supra* note 17, at 36.
- <sup>61</sup> VOLUNTARY GUIDELINES *supra* note 1, at Guideline 3.2.
- <sup>62</sup> FAO, GUIDE TO CONDUCTING A RIGHT TO FOOD ASSESSMENT at 6 (2009).
- <sup>63</sup> VOLUNTARY GUIDELINES *supra* note 1, at Guideline 13.2.
- <sup>64</sup> See, e.g., FAO, “Right to Food Latest News” at [www.fao.org/righttofood/KC/downloads/vl/en/indexes/Assessment.htm](http://www.fao.org/righttofood/KC/downloads/vl/en/indexes/Assessment.htm)
- <sup>65</sup> SPECIAL RAPORTEUR, COUNTRIES TACKLING HUNGER *supra* note 11 (2010).
- <sup>66</sup> See, e.g., FAO, “Right to Food Publications” at <http://www.fao.org/righttofood/publications>
- <sup>67</sup> See, e.g., advocacy and training campaigns are taking place in countries such as Brazil, Mozambique, India, Philippines, and Guatemala to provide government officials with a better understanding of the right to food and its implications: FAO, MAKING IT HAPPEN *supra* note 17.
- <sup>68</sup> FAO, “Right to Food Publications” at <http://www.fao.org/righttofood/publications>
- <sup>69</sup> In Brazil, for example, the *Programa Nacional de Alimentação Escolar* (National School Feeding Program) exists under a legislative framework, whereas the *Bolsa Família* program is not a legal entitlement and could thus be abolished. In India, the National Employment Guarantee Scheme existed under the National Rural Employment Guarantee Act which stipulates the government’s legal obligations SPECIAL RAPORTEUR, COUNTRIES TACKLING HUNGER *supra* note 11 (2010).
- <sup>70</sup> SPECIAL RAPORTEUR, COUNTRIES TACKLING HUNGER *supra* note 11 (2010); see also VOLUNTARY GUIDELINES *supra* note 1, at Guidelines 3.9, 3.4. and 3.5.
- <sup>71</sup> FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at 149 (and, generally, Part 3.12) (2009).
- <sup>72</sup> CENTRE FOR SOCIAL RESPONSIBILITY IN MINING, GOOD PRACTICE NOTE: COMMUNITY DEVELOPMENT AGREEMENTS (2011).
- <sup>73</sup> VOLUNTARY GUIDELINES *supra* note 1, at Guidelines 7.3, 11.10; see, e.g., the capacity-building and advocacy materials that have been developed by OHCHR and FAO: FAO, “Training and Advocacy Materials” at [http://www.fao.org/righttofood/publications/en/?tx\\_mblnewsevent\\_organizer=19848](http://www.fao.org/righttofood/publications/en/?tx_mblnewsevent_organizer=19848)

<sup>74</sup> FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at Parts 3.7, 3.8 (2009).

<sup>75</sup> See, e.g., the capacity-building and advocacy materials that have been developed by OHCHR and FAO: FAO, “Training and Advocacy Materials” at

[http://www.fao.org/righttofood/publications/en/?tx\\_mblnewsevent\\_organizer=19848](http://www.fao.org/righttofood/publications/en/?tx_mblnewsevent_organizer=19848)

<sup>76</sup> Malcolm Langford, *Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review* 11 SUR-INTERNATIONAL JOURNAL OF HUMAN RIGHTS 91-122 at 94 (2009).

<sup>77</sup> IDLO, ADVANCING THE REALISATION OF THE RIGHT TO FOOD THROUGH LITIGATION (2013)

<sup>78</sup> VOLUNTARY GUIDELINES *supra* note 1, at Guideline 7.

<sup>79</sup> Examples include South Africa, Brazil, Congo-Brazzaville, Haiti, Nicaragua, and Ukraine, Bolivia and Ecuador. Other States, such as Brazil, Colombia, Cuba, Ecuador, Guatemala, and Paraguay have established the right to food for particularly vulnerable groups within their populations, including children, teenagers, elderly persons, indigenous populations, and detainees. A weaker option is the inclusion of access to food (as opposed to the right to food) as a principle, or a social or political constitutional end or objective (e.g. Bangladesh, Ethiopia, Guatemala, India, Malawi, Nigeria, Pakistan, Uganda, the Dominican Republic, the Islamic Republic of Iran, and Sri Lanka).

<sup>80</sup> FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at 33 (2009).

<sup>81</sup> SPECIAL RAPPORTEUR, COUNTRIES TACKLING HUNGER *supra* note 11 (2010); FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at 38 (2009).

<sup>82</sup> UN SPECIAL RAPPORTEUR FOR THE RIGHT TO FOOD, A RIGHTS REVOLUTION: IMPLEMENTING THE RIGHT TO FOOD IN LATIN AMERICA AND THE CARIBBEAN at 4 (2012).

<sup>83</sup> CHRISTOPHE GOLAY, THE RIGHT TO FOOD AND ACCESS TO JUSTICE: EXAMPLES AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS, at 47-48 (FAO, Right to Food Studies 2009); SPECIAL RAPPORTEUR, COUNTRIES TACKLING HUNGER *supra* note 11 (2010); FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at 57-8 (2009).

<sup>84</sup> UN SPECIAL RAPPORTEUR FOR THE RIGHT TO FOOD, A RIGHTS REVOLUTION: IMPLEMENTING THE RIGHT TO FOOD IN LATIN AMERICA AND THE CARIBBEAN at 5 (2012); FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD (2009).

<sup>85</sup> FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at Parts 3.3, 3.5 (2009).

<sup>86</sup> *Id.*, Part 3.4.

<sup>87</sup> *Id.*, 111-113.

<sup>88</sup> *Id.*, 111.

<sup>89</sup> VOLUNTARY GUIDELINES *supra* note 1, at Guideline 5.4; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 25 (*adopted* December 16, 1966 by U.N. G.A. Res. 2200A/XXI, *entered into force* March 23, 1976, U.N. Doc. A/6316) [hereinafter ICCPR]: Article 25 guarantees the right to participation in the formulation and implementation of policy.

<sup>90</sup> FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at 111 (2009).

<sup>91</sup> *Id.*, Part 4.

<sup>92</sup> See, e.g., FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at Parts 2, 3 (2009).

<sup>93</sup> See, e.g., FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at 113-117 (2009).

<sup>94</sup> VOLUNTARY GUIDELINES *supra* note 1, at Guideline 8.6; See, generally Office of the Special Rapporteur on the right to food, “Right to Food” at <http://www.srfood.org/index.php/en/right-to-food>.

<sup>95</sup> FAO, GUIDE TO LEGISLATING THE RIGHT TO FOOD at 113-117 (2009).

<sup>96</sup> VOLUNTARY GUIDELINES *supra* note 1, at Guideline 2.4; SPECIAL RAPPORTEUR, COUNTRIES TACKLING HUNGER *supra* note 11 (2010); see, also, CESCR, GENERAL COMMENT NO. 12: THE RIGHT TO ADEQUATE FOOD at [21] (*adopted* May 12, 1999, U.N. Doc. E/C.12/1999/5).

<sup>97</sup> Such mechanisms allow rights-holders to claim realization of rights from the public institutions directly responsible for providing public services and fulfilling rights.

<sup>98</sup> VALÉRIA BURITY ET AL, EXIGIBILIDADE: MECHANISMS TO CLAIM THE HUMAN RIGHT TO ADEQUATE FOOD IN BRAZIL at 19, 27-29 (FAO, Right to Food Studies, 2011).

<sup>99</sup> Examples include national human rights commissions or adjudicative processes established to hear right to food-related cases.

<sup>100</sup> FAO, MAKING IT HAPPEN *supra* note 17 at 29-30.

<sup>101</sup> *Id.*, 21. See educational tools developed by FAO/OHCHR: FAO, “Training and Advocacy Materials” at [http://www.fao.org/righttofood/publications/en/?tx\\_mblnewsevent\\_organizer=19848](http://www.fao.org/righttofood/publications/en/?tx_mblnewsevent_organizer=19848)

<sup>102</sup> FAO, MAKING IT HAPPEN *supra* note 17, at 25; see, e.g., FAO, RIGHT TO FOOD CURRICULUM OUTLINE (2009) and other educational tools developed by FAO/OHCHR: FAO, “Training and Advocacy Materials” at

[http://www.fao.org/righttofood/publications/en/?tx\\_mblnewsevent\\_organizer=19848](http://www.fao.org/righttofood/publications/en/?tx_mblnewsevent_organizer=19848); see, also, IDLO STUDY ON ADVANCING THE RIGHT TO FOOD THROUGH LITIGATION (2013) .

<sup>103</sup> UN SPECIAL RAPPORTEUR FOR THE RIGHT TO FOOD, A RIGHTS REVOLUTION: IMPLEMENTING THE RIGHT TO FOOD IN LATIN AMERICA AND THE CARIBBEAN at 7 (2012).

<sup>104</sup> *Id.*

<sup>105</sup> See, e.g., FAO, RIGHT TO FOOD CURRICULUM OUTLINE (2009) and other educational tools developed by FAO/OHCHR: FAO, “Training and Advocacy Materials” at [http://www.fao.org/righttofood/publications/en/?tx\\_mblnewsevent\\_organizer=19848](http://www.fao.org/righttofood/publications/en/?tx_mblnewsevent_organizer=19848);

<sup>106</sup> LUISA CRUZ, RESPONSIBLE GOVERNANCE OF LAND TENURE *supra* note 10, at 3.

<sup>107</sup> *Id.*; see, also, VOLUNTARY GUIDELINES *supra* note 1, at Guidelines 8.1, 8.3, and 8.10.

<sup>108</sup> VOLUNTARY GUIDELINES *supra* note 1 at Guidelines 8.1, 8.3, and 8.10.

<sup>109</sup> The rationale is that countries purchasing or leasing land abroad in order to grow staple crops will be less dependent on the international markets to acquire the food they need to feed their populations: UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD: *Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge*, U.N. Doc. A/HRC/13/33/Add.2 (28 December 2009) [hereinafter REPORT OF THE SPECIAL RAPPORTEUR, LARGE-SCALE LAND ACQUISITIONS AND LEASES].

<sup>110</sup> *Id.*

<sup>111</sup> LUISA CRUZ, RESPONSIBLE GOVERNANCE OF LAND TENURE *supra* note 10, at 4; Press release, UN Special Rapporteur on the Right to Food, The UN Special Rapporteur on the Right to food recommends principles and measures to discipline land grabbing (June 11, 2009).

<sup>112</sup> REPORT OF THE SPECIAL RAPPORTEUR, LARGE-SCALE LAND ACQUISITIONS AND LEASES *supra* note 109.

<sup>113</sup> Concentrated investment in rural areas can improve the access of local producers to domestic, regional and international markets; reduce poverty by creating employment; promote technology transfer; and increase public revenue through taxation and export duties: REPORT OF THE SPECIAL RAPPORTEUR, LARGE-SCALE LAND ACQUISITIONS AND LEASES *supra* note 109.

<sup>114</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD U.N. Doc. A/65/281 (August 11, 2010).

<sup>115</sup> LUISA CRUZ, RESPONSIBLE GOVERNANCE OF LAND TENURE *supra* note 10, at 7; UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD U.N. Doc. A/65/281 (August 2010); Press release, UN Special Rapporteur on the Right to Food, The UN Special Rapporteur on the Right to food recommends principles and measures to discipline land grabbing (June 11, 2009); KIRSTEN EWERS ANDERSEN, COMMUNAL TENURE AND THE GOVERNANCE OF COMMON PROPERTY RESOURCES IN ASIA at 7 (FAO, Land Tenure Working Paper 20 2011) [hereinafter KE ANDERSON, COMMUNAL TENURE].

<sup>116</sup> M Arnold, B Powell, P Shanley and TCH Sunderland, *Editorial note: Forests, Biodiversity and Food Security* at 259, 260, 263 13 INTERNATIONAL FORESTRY REVIEW 259-264 (2011).

<sup>117</sup> ICESCR *supra* note 14, at art. 11; REPORT OF THE SPECIAL RAPPORTEUR, LARGE-SCALE LAND ACQUISITIONS AND LEASES *supra* note 109; see, also, UN GENERAL ASSEMBLY, INTERIM REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, 'FISHERIES AND THE RIGHT TO FOOD,' U.N. Doc. A/67/268 (August 8, 2012).

<sup>118</sup> SPECIAL RAPPORTEUR, BUILDING RESILIENCE *supra* note 34, at [21]; see, also, ICESCR *supra* note 14, at art. 11(2)(a) which refers to developing or reforming agrarian systems as a means of ensuring the fundamental right to be free from hunger; see also VOLUNTARY GUIDELINES *supra* note 1, at Guidelines 8.1, 8.3, 8.10.

<sup>119</sup> FAO COUNCIL, VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY at Guideline 4.10 (*endorsed* May 2012 by the Committee on World Food Security); FAO, REFORMING FOREST TENURE at 2 (2011).

<sup>120</sup> KE ANDERSON, COMMUNAL TENURE *supra* note 115, at 3; Rachael Knight, *The Community Land Titling Initiative: An Investigation into the Protection of Customary Land Claims, in* WORKING WITH CUSTOMARY JUSTICE SYSTEMS: POST-CONFLICT AND FRAGILE STATES 145 (Erica Harper ed., IDLO 2011) [hereinafter R KNIGHT, THE COMMUNITY LAND TITLING INITIATIVE]

<sup>121</sup> R KNIGHT, THE COMMUNITY LAND TITLING INITIATIVE *supra* note 120, at 147.

<sup>122</sup> *Id.*; KE ANDERSEN, COMMUNAL TENURE *supra* note 115, at 7.

<sup>123</sup> KE ANDERSEN, COMMUNAL TENURE *supra* note 115, at 8; Terry Sunderland, *Food Security: why is biodiversity important?* 13(3) INTERNATIONAL FORESTRY REVIEW 265-275 at 270 (2011).

<sup>124</sup> KE ANDERSEN, COMMUNAL TENURE *supra* note 115 at 1, 26.

<sup>125</sup> CONVENTION NO. 169 OF THE INTERNATIONAL LABOR ORGANIZATION ON INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES Part II (adopted June 27, 1989 by General Conference of the International Labor Organization at its 76<sup>th</sup> meeting, entered into force September 5, 1991); UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (adopted September 13, 2007 by UN G.A. U.N. Doc. A/61/295); see, also, jurisprudence of the Inter-American human rights system as cited in INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, INDIGENOUS AND TRIBAL PEOPLES RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (2010).

<sup>126</sup> Mark Poffenberger, *People in the forest: community forestry experience from South-East Asia* at 67, 5 International Journal Environment and Sustainable Development 57-69 (2006).

<sup>127</sup> FAO, REFORMING FOREST TENURE at 33 (2011). For an overview of community forestry in Nepal, which is frequently cited as a relatively successful model in terms of improving natural resource management and rural governance, see Hemant Ojha, Lauren Persha, Ashwini Chhatre, Community Forestry in Nepal (IFPRI, Discussion Paper 00913 2009).

<sup>128</sup> R KNIGHT, THE COMMUNITY LAND TITLING INITIATIVE *supra* note 120, at 147; UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD UN Doc A/65/281 at 12 (August 11, 2010).

<sup>129</sup> R KNIGHT, THE COMMUNITY LAND TITLING INITIATIVE *supra* note 120, at 147; FAO, REFORMING FOREST TENURE at 45 (2011).

<sup>130</sup> REPORT OF THE SPECIAL RAPPORTEUR, LARGE-SCALE LAND ACQUISITIONS AND LEASES *supra* note 109); see, also, Press release, UN Special Rapporteur on the Right to Food, The UN Special Rapporteur on the Right to food recommends principles and measures to discipline land grabbing (June 11, 2009).

<sup>131</sup> VOLUNTARY GUIDELINES *supra* note 1, at Guideline 8.6.

<sup>132</sup> CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN arts. 13-16 (adopted December 18, 1979 by U.N. G.A. Res. 34/180, entered into force September 3, 1981, U.N. Doc. A/34/46) [hereinafter CEDAW]: Art. 14(2)(g) guarantees the right of women to equal treatment in land and agrarian reform, as well as in land resettlement schemes, and art. 16, which provides for women's equal rights in marriage with respect to ownership, management, enjoyment and disposal of property, including on divorce. See, also, UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD U.N. Doc. A/65/281 at 16 (August 11, 2010).

<sup>133</sup> ELIZABETH DALEY & CLARA MI-YOUNG PARK, GOVERNING LAND FOR WOMEN AND MEN (FAO, Land Tenure Working Paper 19, 2011).

<sup>134</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD UN Doc A/65/281 at 19 (11 August 2010).

<sup>135</sup> Dubravka Bojic et al (FAO), *Legal Empowerment of Rural Poor: A Pathway Out of Poverty*, in INNOVATIONS IN RULE OF LAW at 57, 58 (Juan Carlos Botero et al, eds., HiiL, World Justice Project 2012).

<sup>136</sup> Briefing Note, Oxfam, Our Land, Our Lives: Time Out on the Global Land Rush at 2 (2012)

<sup>137</sup> Briefing Note, Oxfam, Our Land, Our Lives: Time Out on the Global Land Rush (2012); The level of hunger in Liberia was categorized in 2012 by the International Food Policy Research Institute as 'serious': INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, GLOBAL HUNGER INDEX Figure 2.4 (2012).

<sup>138</sup> These findings should undoubtedly inform any subsequent efforts to strengthen communal land tenure: see, RACHAEL KNIGHT, JUDY ADOKO, TERESA AUMA, ALI KABA, ALDA SALOMAO, SILAS SIAKOR, ISSUFO TANKAR, PROTECTING COMMUNITY LANDS AND RESOURCES: EVIDENCE FROM LIBERIA, MOZAMBIQUE AND UGANDA at 179-205 (Namati and IDLO, 2012) [hereinafter R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES]

<sup>139</sup> WFP, THE STATE OF FOOD AND NUTRITION INSECURITY IN LIBERIA: COMPREHENSIVE FOOD SECURITY AND NUTRITION SURVEY (2010).

<sup>140</sup> Rice imports account for roughly 60% of the country's total consumption: UN JOINT PROGRAM ON FOOD SECURITY AND NUTRITION, FOOD SECURITY AND NUTRITION IN LIBERIA: Fact Sheet (2011).

<sup>141</sup> WFP, THE STATE OF FOOD AND NUTRITION INSECURITY IN LIBERIA: COMPREHENSIVE FOOD SECURITY AND NUTRITION SURVEY (2010).

<sup>142</sup> *Id.*

<sup>143</sup> R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 51-55 (2012).

<sup>144</sup> *Id.*, 56-57.

<sup>145</sup> Based on local governance structures, it was determined by community leaders that the optimal 'community' unit for the CLTI was a clan: R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 34.

---

<sup>146</sup> For the text of the key tenets of the MOU, see R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 56.

<sup>147</sup> *Id.*, 62.

<sup>148</sup> *Id.*, 62, 63.

<sup>149</sup> *Id.*, 121; ABA ROLI-led community discussion in Bars, Zarque (December, 2012).

<sup>150</sup> R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 121.

<sup>151</sup> *Id.*, 65; ABA ROLI-led community discussion in Zarque, Duah, Central Morweh (December 2012).

<sup>152</sup> R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 96-97.

<sup>153</sup> *Id.*

<sup>154</sup> ABA ROLI-led discussions in Bars, Zarque, Duah, Central Morweh, and Jowein (December, 2012).

<sup>155</sup> R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 96-97.

<sup>156</sup> *Id.*, 122; see, eg, Land and natural resources management plans of Boetarr and Zarque.

<sup>157</sup> R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 123; see, e.g., Land and natural resources management plans of Zarque, Jowein and Central Morweh.

<sup>158</sup> R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 116; ABA ROLI-led discussions in Bars, Zarque, Duah, Central Morweh and Jowein.

<sup>159</sup> ABA ROLI-led discussions in Bars, Zarque, Duah, Central Morweh and Jowein (December, 2012)

<sup>160</sup> R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 124.

<sup>161</sup> R KNIGHT ET AL, PROTECTING COMMUNITY LANDS AND RESOURCES *supra* note 138, at 125-126; see, e.g., by-laws and land and natural resources management plans of Central Morweh; Bars; Zarqui; Jowein; Duah.

<sup>162</sup> ABA ROLI-led discussions in Bars and Central Morweh (December, 2012).

# CLIMATE CHANGE AND THE RULE OF LAW

## I. Context

### I.1 Climate Change and Human Development

Climate change is broadly understood to refer to a change of climate, over and above natural climate variability, that is directly or indirectly attributable to human activity.<sup>1</sup> It is predominantly caused by an increase in the level of greenhouse gases in the Earth's atmosphere.<sup>2</sup> The implications of climate change for human development, given the observed and projected impacts on the human and natural environment, are immense. These impacts include an increase in drought-affected areas, rising sea-levels, ocean acidification, and an increased risk of extreme weather events.<sup>3</sup> The resulting pressures – including substantially reduced water availability, disruption in agricultural production, coastal flooding, and significant negative health impacts, such as increases in malnutrition and the spread of vector-borne diseases<sup>4</sup> – threaten a broad range of human rights, including the rights to health, food, housing, and rights associated with livelihood and culture.<sup>5</sup>

Developing countries are particularly vulnerable to climate change. A combination of geographical exposure, relatively greater dependence of their economies on climate-sensitive sectors such as agriculture, and relatively less comprehensive management of natural resources heighten the effects of climate change and makes adaptation to these effects more challenging.<sup>6</sup> Within those countries, and indeed in developed countries, those who are socially and economically disadvantaged are at the greatest risk, and typically have the least influence in policy-making.<sup>7</sup>

The international community has met climate change with responses that are generally consistent with one of two strategies: mitigation or adaptation. Mitigation refers to actions and policies to reduce or prevent the emission of greenhouse gases. Adaptation refers to the process of strengthening the ability of a system to adjust to climate change.<sup>8</sup> The latter encompasses a continuum of actions from those intended to respond to specific climate change impacts to programs that are more broadly concerned with building resilience and adaptive capacity, including initiatives that can be characterized as general development programs.<sup>9</sup> Adaptation and mitigation strategies are inevitably linked, as the effectiveness of mitigation actions will determine the scale of adaptation necessary. Given the unpredictability of the impacts of climate change, if concentrations of greenhouse gases are not stabilized adaptation will prove to be practically impossible.

## 2. What is the relevant legal framework?

### 2.1 The UNFCCC and UN REDD+

Although climate change poses an enormous threat to human development, international attempts to develop a response have been marked by disagreement and disunity. The only legally binding targets for reducing greenhouse gas emissions are set out in the 1997 Protocol (Kyoto Protocol) to the UN Framework Convention on Climate Change (UNFCCC), which sets targets for developed countries to reduce their emissions.<sup>10</sup> The UNFCCC itself contains important principles for addressing climate change which have significant normative weight given the near universal ratification of the treaty.<sup>11</sup> The States Parties to the UNFCCC (known as the Conference of Parties, or COP) meet annually to review the progress of States and elaborate new standards under the treaty.

## The carbon market

One of the ways in which the Kyoto Protocol permits parties to meet their emission reduction targets is by trading emissions.<sup>12</sup> Parties who have not reached their permitted level of emissions are able to sell their excess emission “units” to other parties, thereby establishing a “carbon market” (so called because carbon dioxide is the principal greenhouse gas). The international carbon market continues to grow, with a number of national and regional trading schemes – such as the EU emissions trading scheme – already active.<sup>13</sup>

## UN REDD+ (Reducing Emissions from Deforestation and Degradation, plus reforestation and sustainable forest management)

Forest ecosystems capture and contain significant reserves of carbon dioxide. Deforestation and degradation of forests therefore cause considerable emissions of greenhouse gases, estimated to account for up to 18% of global greenhouse gas emissions.<sup>14</sup> Forests act as “carbon sinks”: carbon dioxide is absorbed from the atmosphere and locked into the tissues of plants and trees and organic matter underground.<sup>15</sup> Deforestation not only releases that carbon dioxide into the atmosphere; it also destroys a mechanism for locking away future carbon emissions. REDD+ is a mechanism established under the UNFCCC that aims to “create a financial value for the carbon stored in forests”<sup>16</sup> by generating carbon credits for the preservation of forests and forest resources. Although the way in which REDD+ programs will ultimately intersect with carbon markets is far from certain, a significant amount of funding has already been invested in REDD+ “readiness” activities, that is, national-level strategies to prepare countries to receive funding based on demonstrated reductions in emissions related to deforestation. REDD+ activities are likely to have considerable implications for people living in forests or accessing forest resources, including indigenous peoples and forest-dependent communities.<sup>17</sup>

Since 2007, more than USD 2.5 billion has been pledged by governments through various funding mechanisms to support REDD+ programs, of which half a billion dollars has been disbursed.<sup>18</sup> REDD+ programs are currently being supported in 46 different countries across Asia, Africa, and Latin America and the Caribbean.<sup>19</sup>

The legal and governance implications of REDD+ are discussed in detail in this chapter’s case study.

### Funding Mechanisms

A number of funds have been set up under the UNFCCC framework (and other multilateral and bilateral instruments) to assist developing countries to finance adaptation and mitigation programs. Assistance may take the form of grants, loans or technical assistance. Further, the UN Clean Development Mechanism encourages developed countries to finance ‘clean development’ projects in developing countries, as a means of meeting their emission reduction targets under the Kyoto Protocol.



## 2.2 A rights-based approach

International human rights principles have a critical role to play in any response to climate change. In the absence of consensus on so many aspects of the international response to climate change, human rights supply a ‘set of internationally agreed values around which common action can be negotiated and motivated’.<sup>20</sup>

There are a number of clear connections between climate change and human rights: first, the effects of climate change are projected, and have already been observed, to undermine the enjoyment of a wide range of human rights.<sup>21</sup> Second, there is increasing support for the view that mitigation and adaptation strategies must be compatible with human rights principles.<sup>22</sup> Human rights principles therefore provide an important framework for the orientation of rule of law programs concerned with climate change.

A human rights-based approach to programming requires that programs be normatively based on international human rights standards and practically oriented to promote and protect human rights.<sup>23</sup> These rights are primarily derived from the International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR), which have been ratified by most countries. Development programs should support States to respect, protect and fulfill the rights set out in the ICCPR and ICESCR, which include the rights to life and property; adequate food, housing and water; and the highest attainable standard of health.

Aside from the intrinsic value of human rights,<sup>24</sup> a rights-based approach is likely to lead to more effective, coherent, and sustainable programs.<sup>25</sup> The protection of procedural guarantees – such as rights to information, participation, and the accountability of duty-holders – strengthen community ownership of programs, and the universality of rights protects the most vulnerable.<sup>26</sup> These principles, which are essential to the design and implementation of all rule-of-law programs, are discussed in greater detail below.

## 3. Core principles

### 3.1 Active participation of affected communities

The free, active and meaningful participation of affected communities in policies and programs that respond to climate change is essential to understand the particular challenges that they face, effectively target any response, and strengthen the sustainability of programs.<sup>27</sup> Further, participatory programming empowers communities by recognizing and building upon the knowledge and skills they already possess, and by strengthening the voice of the most vulnerable.<sup>28</sup>

The international community has clearly recognized the importance of community participation in the context of decisions related to the environment.<sup>29</sup> For example, the Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters<sup>30</sup> (Aarhus Convention) commits European and Central Asian countries to a rights-based approach to climate change governance, including early, effective, and ongoing public participation in decision-making.<sup>31</sup> Adaptation and mitigation measures often affect natural resources on which communities rely, and public participation is necessary to ensure that the rights of these communities are protected in the course of implementing these measures.

Participation requires the active involvement of a broad range of stakeholders in decision-making and action.<sup>32</sup> Participation must be an inclusive process: individuals and groups must be able to participate

without being excluded because of language, distance, time, associated costs, security concerns, or other constraining social and cultural norms.<sup>33</sup> Special efforts should be made by program proponents to ensure the participation of women, indigenous groups, and other groups that face social or economic marginalization. For example, the mere presence of women at discussions may not be enough; attention needs to be paid to social and cultural inequalities that restrict women's free and equal participation, such as limited education, discriminatory attitudes, and intimidation.<sup>34</sup> Because of the context-specific vulnerabilities and challenges impeding participation of different groups, participatory processes will generally be iterative and require a flexible approach to program design and development.

Participation should be incorporated throughout a program work plan, including into any baseline assessment, program design and targeting, implementation, and monitoring and evaluation. Techniques for facilitating participation in the context of climate change-related programs, and development programming more generally, are discussed in a number of resources.<sup>35</sup>

### **3.2 Substantive gender equality**

Women and girls in developing countries are likely to be disproportionately affected by climate change. This is partly due to the particular dependence for their livelihoods on climate-sensitive sectors, such as agriculture and water-collection; long-standing inequalities in the distribution of property, assets, and decision-making power that makes diversification of these livelihoods more difficult; and heightened vulnerability in the context of climate-induced disasters because of higher rates of illiteracy and a lack of access to relevant information.<sup>36</sup>

Increased health risks and shortages of food and water as a result of climate change also threaten to intensify the workloads of women with respect to domestic work and caring for family members. This reduces their opportunities to participate in decision-making and community activities and further exacerbates their vulnerability.<sup>37</sup> On the other hand, when even limited space has been made for women to participate in community fora, this has been found to influence cultural norms as to women's decision-making capacity, motivate other initiatives among women, and ultimately strengthen their role and agency outside the home.<sup>38</sup>

Programs that seek to address the effects of climate change should therefore be premised on a robust gender analysis and, consistent with gender indicators, should overcome existing barriers to achieve equal participation and benefit-sharing by women at all levels of the program.<sup>39</sup>

### **3.3 Non-discrimination and attention to vulnerable groups**

A key pillar of a rights-based approach to programming is ensuring that the benefits of programs are equally shared and not just enjoyed by national or local elites.<sup>40</sup> In the context of climate change-related programs, special efforts should be made to identify and prioritize vulnerable groups: groups that have high exposure to the impacts of climate change and low adaptive capacity to respond and adjust to those impacts.<sup>41</sup> For each program, this will require mapping and collecting data about the demographics of communities that is disaggregated, as far as possible, on the grounds of ethnicity, gender, location, and so on.<sup>42</sup> Measures can then be taken in the design of programs to ensure substantive equality between different groups. Groups that tend to be particularly vulnerable to the effects of climate change are indigenous persons, minorities, and the poor, including those dependent on smallholder agriculture.

### 3.3.1 Indigenous persons and minorities

In a number of countries, indigenous communities maintain an extremely close physical and cultural connection to the land on which they live and associated natural resources. Traditional livelihoods such as hunting, fishing, gathering, shifting cultivation or rotational agriculture, pastoralism, and high mountain agriculture are important aspects of cultural identity.<sup>43</sup> Changing weather patterns and measures intended to mitigate climate change, such as REDD+ activities or biofuel plantations, together with weak or undocumented tenure over their land, place indigenous communities at particular risk of displacement and threatens their livelihoods and cultural practices.<sup>44</sup>

Like indigenous communities, other minorities, generally defined as non-dominant groups within a State with a shared religious, ethnic, or linguistic identity,<sup>45</sup> are at greater risk of being negatively affected by climate change. As a result of economic and social marginalization in many countries, minorities are more likely to live in “more marginal and more exposed areas”.<sup>46</sup> Further, minorities may be discriminated against in the delivery of basic service provision, thereby exacerbating the impacts of natural disasters borne by these communities.<sup>47</sup>

### 3.3.2 The poor, including those dependent on smallholder agriculture

It is frequently asserted that the poor in developing countries are particularly vulnerable to the impacts of climate change because poverty limits adaptive capacity to the changes wrought by climate change, and insecure rights to resources exacerbate vulnerability.<sup>48</sup> However, for programming to be effectively targeted, a more nuanced disaggregation of the capacities of poorer populations should be conducted. For example, small-scale farmers are likely to face a number of challenges because of climate variability; in Africa, the UN Intergovernmental Panel on Climate Change predicts that the area suitable for agriculture, the length of growing seasons, and overall yield potential are expected to decrease, as a result of which yields from rain-fed agriculture could be reduced by up to 50% by 2020.<sup>49</sup>

## 3.4 Accountability

In the human rights framework, duty-bearers are accountable towards rights-holders. Accountability demands that the State be answerable for the fulfillment of its human rights obligations. Accountability should similarly be expected of program implementers whose actions have an impact on the rights of individuals or communities.

In the context of programs that relate to climate change, the accountability of implementers to rights-holders can be facilitated in two ways. First, the right of affected communities to accessible information is essential. Information must be made available that enables rights-holders to recognize and understand the implications of programs. The right to information in this context is supported by a number of international instruments.<sup>50</sup>

Second, there should be provision for right-holders to participate in the design and implementation of the monitoring and evaluation plan for programs. By assuming this role, rights-holders are not only made aware of the objectives of programs, but are motivated to collect and reflect on data to ensure programs are meeting their expectations.<sup>51</sup>

## 4. Entry points for programming

Ensuring that responses to climate change are both effective and rights-protective requires a multi-sectoral, multi-stakeholder approach. It requires that legislators, judges, lawyers, civil society organizations, and communities are aware of the implications of climate change, including its impacts on human rights. To account for all of these impacts, the development of a national climate change strategy or framework must be an inclusive and participatory process. Because legal and policy processes around climate change are relatively recent, education and training programs for personnel in government ministries, courts and administrative fora is critical to ensure an understanding of international and national obligations pertaining to the environment and associated rights, particularly relating to land. Capacity-building for communities and representative organizations around the same issues is necessary to ensure that neither climate change nor responses to climate change undermine human rights.

### 4.1 Developing a national strategy

A number of countries have developed national climate change policies or strategies that are intended to identify and coordinate domestic mitigation and adaptation measures.<sup>52</sup> Under the UNFCCC, for example, least developed countries are encouraged to formulate National Adaptation Programs of Action (NAPAs) to identify urgent adaptation needs and develop and implement relevant programs and National Adaptation Plans (NAPs) for more medium and long term adaptation processes.<sup>53</sup> Adaptation strategies are often implemented at a local level – for example, a program that supports farmers switching from one crop variety to another more drought-resistant variety. Although the importance of community-level input has been formally recognized by the UNFCCC Conference of Parties,<sup>54</sup> the priorities of local communities may be overlooked in the process of developing adaptation plans. Ensuing practices may in fact harm some communities, including minority or indigenous groups.<sup>55</sup> It is therefore imperative that policies are designed with the fully-informed participation of affected communities.

#### 4.1.1 Entry points

- Capacity-building for local civil society organizations (CSOs) to ensure that the process of devising a national climate strategy or national adaptation program is participatory and inclusive. Assistance may involve:
  - Training CSOs to encourage community participation and mobilization with respect to national consultations about climate policy, including training in participatory research methodologies.
  - Working with CSOs to raise awareness at a community level of adaptation and climate policy planning.
  - Training CSOs to advocate on behalf of their communities and engage with national-level processes on climate change policy.
- Providing assistance to legislators and policy-makers to:
  - Ensure climate policies are consistent with the State's human rights obligations under national, regional or international law, including adequate procedures for public notice and participation.
  - Harmonize domestic laws and institutions with international requirements so that States can participate in regional and international climate policy arrangements. For example, the Clean Development Mechanism, which allows developing countries to earn tradable carbon credits, requires the creation of a Designated National Authority that approves the participation of local projects in the CDM.

- Fulfill reporting obligations of States to international bodies (such as national communications to the UNFCCC), including finance mechanisms.

#### Mexico's General Law on Climate Change

Mexico's geography, biodiversity, and levels of poverty make it particularly vulnerable to climate change. At the same time, Mexico's level of greenhouse gas emissions is especially high. In 2012, with the passage of its General Law on Climate Change, Mexico became the first developing country to pass comprehensive national legislation to address climate change. The General Law aligns Mexico's laws with its international commitments, including the UNFCCC and Kyoto Protocol, and develops a cross-sectoral legal and institutional framework to coordinate national, state and local initiatives to address climate change in Mexico. The law was developed with the active participation of civil society and includes the protection of the right to a healthy environment as one of its principal objectives.

LEY GENERAL DE CAMBIO CLIMÁTICO (6 June 2012); Legal Working Brief, THE NEW GENERAL LAW ON CLIMATE CHANGE IN MEXICO: LEADING NATIONAL ACTION TO TRANSITION TO A GREEN ECONOMY (IDLO 2012)

## 4.2 Access to justice and legal empowerment

There are two dimensions of the human rights implications of climate change: first, climate change itself threatens to undermine a range of human rights; second, policy responses to climate change may harm human rights. Upholding the rights of communities affected in either context requires that people are aware of their rights and can access mechanisms to protect and enforce them. A key challenge is that those whose rights are particularly endangered by climate change – women, indigenous groups, minorities, and the poor – are often those least able to access justice. Strengthening the access to justice of these groups requires addressing impediments to their awareness of laws, including language barriers and limited dissemination of laws, and their ability to enforce them, which may be hindered by cost, time and procedural complexity.

Empowering communities to actively identify actual and potential harms to rights and participate in the response is essential, whether by working directly with communities or strengthening the capacity of organizations that facilitate access to legal redress.

### 4.2.1 Entry points

- Capacity-building for local CSOs on rights-based approaches to climate change. This may encompass education on the human rights implications of climate change – including rights to adequate food, health, and housing – and how to strengthen rights protections or claim redress for harms, including advocacy for legal and policy reform.
- Increasing public awareness of climate change-related legislation and policy (including related bodies of law such as land law and natural resource management) using mechanisms that take account of differences in access to information, literacy, and language, and that are inclusive of vulnerable groups. Examples include radio programs, street theatre, print media (newspapers, posters), and community workshops.
- Establishing legal aid and legal support services, whether delivered through organizations or paralegals, to assist individuals and communities (targeting those who are most vulnerable) to defend

their interests against environmental degradation, or to protect their land from acquisition by the state or outsiders without due process. Possible bases of liability in connection to climate change are considered in the section on rights-based litigation, below.

- Creating fora for the exchange of knowledge and practice between community-based advocacy groups in different countries and regions.

#### Community-based natural resource management in Ecuador

The management of the rich, unique eco-systems in Ecuador's Yasuni Biosphere Reserve has historically lacked a clear legal framework. It has been the site of poorly-regulated extractive industry and environmental crimes, often to the detriment of local indigenous communities. The concerns of local communities have also been overlooked in national-level policy processes.

Working at a local level and with the Ministry of Environment, the UN Joint Program under the MDG-F clarified the legal and institutional framework for the management of the Reserve, including achieving formal political recognition of a Management Committee. The Management Committee, which has a representative and inclusive Board, has become a vehicle for negotiation of agreements between the Government and local communities. This has led to the active participation of all stakeholder in public policy relating to the Reserve, the inclusion of local-level planning processes in the development of a Management Plan for the Reserve, and the prevention of environmental crimes in the Reserve through the use of an awareness-raising campaign.

UNEP, SEEDS OF CHANGE: CONTRIBUTING TO CLIMATE CHANGE SOLUTIONS at 42-43 (2012)

### **4.2.2 Rights-based litigation**

Strategic rights-based litigation can prompt governments to act to protect rights that are being threatened by climate change, or to reform problematic mitigation or adaptation policies. There are a number of challenges associated with holding governments liable for causing or contributing to climate change-related harms, including the cumulative and extra-territorial effects of greenhouse gas emissions, and jurisprudence on this basis of liability remains limited.<sup>56</sup> Instead, States may be held responsible for failing to protect rights that have been violated by the effects of climate change, such as the right to a healthy environment, adequate food, housing, or health.

Even though developing countries may not be principally responsible for the changing climate, litigation may encourage stricter regulation of industry, including foreign corporations, and may provide extra impetus for those States to negotiate a more just international climate change framework.

Rights-based litigation may have a number of advantages. It can help to shift the status of communities from passive beneficiaries to active right-holders, mobilize public opinion, and ultimately influence social and political discourse around an issue.<sup>57</sup> Indeed, it is advisable that litigation be complemented by broad-based social mobilization, public awareness campaigns, and policy monitoring.<sup>58</sup> There are a number of possible rights that may be invoked by communities affected by climate change.

### ***Right to a clean environment***

The right to a clean or healthy environment is increasingly recognized in national constitutions, particularly in developing States.<sup>59</sup> While it is unclear whether climate-changing pollution comes within the scope of this kind of right, several regional human rights systems have developed jurisprudence exploring the connection between human rights and the environment.<sup>60</sup> For example, the African Commission on Human and Peoples' Rights has focused on the infringement of the rights of indigenous and tribal people by extractive industries that have caused environmental damage to, and ultimately displacement from, their traditional land.<sup>61</sup> Further, the Inter-American Court has recognized that indigenous and tribal people have a proprietary right over their traditional lands, and has developed safeguards – including independent environmental and social assessments, consultations, and, in some cases, free, prior, and informed consent – before the State can approve particular development projects.<sup>62</sup>

### ***Rights to food, health and housing***

Rights to food, health and housing are protected in a number of jurisdictions.<sup>63</sup> Each of these rights is at imminent risk of being undermined by climate change; for example, the Special Rapporteur on the Right to Food and the UN Human Rights Council have repeatedly elucidated the relationship between climate change and decreasing food security.<sup>64</sup> While each of these rights has been successfully enforced through litigation on at least one occasion,<sup>65</sup> they are yet to be recognized in the context of climate-related litigation.

### ***Rights of indigenous peoples and minorities***

A proliferating body of national and international law protects the rights of indigenous peoples against harm to their territories and livelihoods. Most significantly, the adoption of the UN Declaration on the Rights of Indigenous Peoples by 144 countries provides that “[i]ndigenous peoples and individuals have the right not to be subjected to...destruction of their culture” and calls on governments to “provide effective mechanisms for prevention of, and redress for...any action which has the aim or effect of dispossessing them of their lands, territories or resources.”<sup>66</sup> The UN Committee for the Elimination of Racial Discrimination recently recommended, in a response to a submission on behalf of indigenous communities in Indonesia concerning new oil palm plantations that threatened to displace thousands of people, that Indonesia “secure the possession and ownership rights” of communities before proceeding.<sup>67</sup> Other protections available to communities affected by development projects are discussed further in the case study.

## **4.3 Claims mechanisms**

For climate change policy to develop in a way that is consistent with the rights and priorities of groups most affected by climate change, mechanisms for obtaining adequate, effective, and timely remedies to rights violations must be available.<sup>68</sup> Moreover, effective dispute resolution mechanisms can function to increase the adaptive capacity of communities by ensuring, for example, that rights to collective resource management are protected. Claims mechanisms might include administrative,<sup>69</sup> quasi-judicial,<sup>70</sup> or judicial mechanisms.<sup>71</sup> The increasing volume of rights-based litigation illustrates that courts – and, in turn, judges and lawyers – will play an increasingly important role in shaping environmental policy, and that the decisions of adjudicatory bodies can be critical to the empowerment of rights-holders and correction of rights-restricting laws and policies.

### **4.3.1 Entry points**

- Targeted, continuing training for judges and lawyers in environmental law and associated rights.<sup>72</sup> Training can encompass the international legal framework pertaining to climate change,

including relevant rights, and judicial trends in national, regional and international jurisdictions. Specifically, judges should be trained on the obligations present in international environmental law, including the promotion of sustainable development, the “polluter pays” and precautionary principles, and the principle of intergenerational equity.

- Further training and networking between judiciaries may consider overall domestic frameworks for environmental protection; environmental crimes and sanctions; laws pertaining to natural resource management, including mining, fishing, and forestry-related activities; land use planning and control; public notice and participation procedures; and environmental impact assessments.<sup>73</sup> A number of resources exist to guide the design of such trainings.<sup>74</sup>
- Support for environmental law clinics in law schools. Model curricula on environmental law and associated rights can be drafted in partnership with local universities.
- Workshops for government officers on the legal and human rights implications of climate change, and best policy practices from comparable jurisdictions.
- Strengthening the capacity of local dispute-resolution mechanisms to adjudicate environmental or socio-environmental conflicts. This will need to be informed by a baseline study of socio-environmental disputes, including participatory assessment. The program may include conflict-resolution training for key local stakeholders, such as community leaders, law enforcement authorities, and civil society representatives.<sup>75</sup>
- Creation of complaints mechanisms for funded programs, such as REDD+ activities and other local mitigation strategies.

#### Strengthening local conflict-resolution mechanisms in Peru

Conflict related to natural resources in communities in the Santo Tomás River Basin in Peru has been recently exacerbated by local mining activities and the vulnerability of the area to climate change. In response, the UN MDG-F Joint Program collaborated with Peru’s Ministry of Justice to conduct capacity training on conflict resolution. This included the development of manuals and workshops adapted to local conditions which covered communication skills, extrajudicial settlements and the constructive management of disputes, and the development of a module on the management of socio-environmental conflicts in the Andean region. The trainings targeted local authorities and communities and graduated 36 court conciliators, all recognized by the Ministry of Justice.

UNEP, SEEDS OF CHANGE: CONTRIBUTING TO CLIMATE CHANGE SOLUTIONS at 4-5 (2012)

#### **4.4 Anti-corruption programming**

Accurately monitoring carbon emissions will be fundamental to the development and implementation of effective climate change policy. As discussed in Section 2, participation in the carbon market and mechanisms such as REDD+ and the CDM require that States monitor and allocate their carbon emissions. In view of the complex carbon and financial accounting this entails, there is ample room for corrupt practice on the part of industries and governments.<sup>76</sup>

Much of the emissions monitoring will take place in the context of industries with extremely poor track



records of good governance and transparency, such as the forestry sector.<sup>77</sup> Rule of law programs can help to increase transparency and strengthen governance mechanisms in these sectors. In view of the challenges of developing effective anti-corruption programming, the design and implementation of programs should be premised on the participation at all stages of local stakeholders. Further, programs should be aligned with the UN Convention against Corruption and reflect the principles of community participation, proper management of public affairs and public property, integrity, transparency, and accountability.<sup>78</sup>

The Aarhus Convention requires States to make any information pertaining to the environment effectively accessible by informing the public of the type and scope of information held by public authorities and the process by which it can be obtained

UNECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS, art. 5(2) (AARHUS CONVENTION)

#### 4.4.1 Entry points

- Support legal and regulatory reform that establishes anti-corruption safeguards as integral elements in the design and implementation of mitigation programs.<sup>79</sup> This may include:
  - Establishment of independent, effective oversight and monitoring bodies for mitigation mechanisms in specific industries, e.g. forestry, fossil fuels, and alternative energy. It is essential that these mechanisms have effective enforcement powers, and clear and detailed mandates that include reporting mechanisms. E.g. regular independent audits of national REDD+ revenues are essential.<sup>80</sup>
  - Public mechanisms for documenting corruption, such as anti-corruption hotlines and legal advice centers.
  - Community participation in the verification and monitoring of mitigation projects, such as REDD+ activities.
- Strengthen public accessibility of information pertaining to the environment, including policies and programs affecting the environment. This may be done by:
  - Strengthening the legal framework for freedom of information to ensure that information is made available within a reasonable time and without an interest having to be stated on the part of the requesting party.<sup>81</sup>
  - Creating databases or registers of relevant information that are easily accessible to the public through public telecommunications networks.<sup>82</sup>
  - Establishing clear points of contact for the public for requests for information.<sup>83</sup>

#### 4.5 Land governance

Large-scale exploitation of land and natural resources is a significant contributing factor to climate change. Deforestation, for example, is estimated to account for up to 18% of global greenhouse gas emissions.<sup>84</sup> Climate change mitigation strategies, however, such as REDD+ projects and the expansion of biofuel production, may themselves have detrimental implications for land use and, consequently, for the communities accessing that land.

In the absence of effective land management and community engagement, climate change mitigation projects have the potential to undermine the access of local communities to resources and land that are critical to their livelihoods and culture.<sup>85</sup> This is especially true of activities in the forestry sector: it is

estimated that 90% of the 1.2 billion people living in extreme poverty around the world depend on forest resources for some part of their livelihood.<sup>86</sup> At the same time, governance of the forestry sector in many countries is notoriously weak.<sup>87</sup> The vast amount of illegal logging in a number of places, such as the Brazilian Amazon where illegal logging is estimated to account for between 35-72% of all logging, is enabled by incoherent legal frameworks, poor law enforcement, a lack of transparency of forest-related decision-making and information, corruption, and a lack of clarity and enforcement of tenure rights.<sup>88</sup>

REDD+ projects are predicated on the value of a previously under-valued natural resource: carbon stocked in forests.<sup>89</sup> The question of who has rights to the carbon and how the financial benefits deriving from REDD+ are to be shared must be resolved by both governments, project proponents, and forest-dependent communities in a manner that is equitable and respects the tenure – whether customary or formal – of local communities.<sup>90</sup> Where local communities have weak tenure over their land, steps can be taken to strengthen that tenure. As discussed in Section 5 of Chapter 1, communal land tenure has a number of important advantages over individual title, especially in relation to rights to use or access communal resources. Further, devolving forest management to local communities correlates with improvements in the condition of forests, carbon stocks, and local livelihoods, especially when women participate in forest governance institutions.<sup>91</sup>

Whether or not a community's tenure over land is formally recognized, governments and project proponents must respect the right of customary communities to free, prior, and informed consent (FPIC) to externally imposed programs or policies that affect their land, resources, or practices. The right to FPIC is sourced in a number of international instruments, including the UNFCCC.<sup>92</sup> The content of each element of FPIC has recently been elaborated upon by the UN REDD Program,<sup>93</sup> and its definition is appended at the end of this chapter. In short, FPIC is a right that requires a project proponent to engage in an ongoing process of negotiation with a community, with consent sought at key stages in the process.<sup>94</sup> The process by which valid consent is achieved must itself be negotiated with the community so that it accords with their decision-making structures, institutions, and approaches to resource management.<sup>95</sup> Respecting the right of communities to FPIC is a challenging, time and resource-intensive process. In the context of REDD+, it is also a principle that is being newly applied; it requires flexibility and openness to an iterative learning process on the part of project proponents. Nonetheless, the minimum standards that must be met by parties intending to impose programs or policies that affect communities have been clearly articulated.<sup>96</sup>

The UNFCCC also requires the full and effective participation of local communities in REDD+ projects,<sup>97</sup> and this should be guaranteed in both policy processes<sup>98</sup> and at a project level.<sup>99</sup> This is especially important with respect to benefit-sharing arrangements under REDD+ given the potential value attached to carbon.<sup>100</sup>

#### 4.5.1 Entry points

- Conducting a baseline assessment of forestry governance, whether at a national or sub-national level. This may include participatory evaluations of forestry governance institutions.<sup>101</sup>
- Working with governments to introduce and strengthen independent mechanisms for oversight of forestry governance, such as national-level independent monitors of forest law enforcement and governance.
- Working with relevant government ministries to ensure that the full and effective participation of affected communities is guaranteed in all policy processes and outcomes related to REDD+, including drafting national or sub-national guidelines on operationalizing FPIC,<sup>102</sup> and the

establishment of grievance mechanisms.<sup>103</sup>

- Supporting law and policy reform processes that clarify the legal and regulatory framework governing land, with a specific focus on converting customary claims to land and resources into legal entitlements.
- Assisting communities to strengthen their tenure over customarily-held land and resources. For further guidance, see Chapter 1, Section 5.
- Training CSOs in land-related capacity-building for local communities. This may include education about their rights under national and international law; conflict management; and basic financial management.<sup>104</sup>
- Raising the awareness of forest-based communities about REDD+ projects.<sup>105</sup> Communities often heavily depend on project proponents for information about REDD+, highlighting the need for independent sources of information or legal advice.<sup>106</sup> Independent legal support services may be provided through paralegals or community facilitators<sup>107</sup> that are active throughout the community's engagement with a project.<sup>108</sup>
- Educating communities in local languages about their land-related rights and potential remedies, including their right to free, prior, and informed consent.
- Capacity-building for communities and CSOs with respect to the principle of FPIC.<sup>109</sup>
- Assisting communities to access mechanisms for resolving complaints and grievances against project proponents.<sup>110</sup>

## 5. Case Study: REDD+ in Indonesia

Indonesia emits the third-highest volume of greenhouse gas emissions of any country in the world.<sup>111</sup> 80% of those emissions result from the destruction of tropical rainforest, much of which grows on peat swamp and stores twenty times more carbon than forest on mineral soils.<sup>112</sup> The extraordinary rate of deforestation – principally driven by logging, mining, and oil palm plantations<sup>113</sup> – is among the reasons Indonesia has been the site of numerous REDD+ demonstration efforts. As of March 2010, more than 30 REDD+ pilot projects had been established in the archipelago.<sup>114</sup> This has been accompanied by a number of high-profile commitments by the Indonesian government to curb deforestation in Indonesia, including a pledge to reduce the country's emissions from land use, land change, and forestry by 26% by 2020,<sup>115</sup> and a USD1 billion agreement with Norway to support Indonesia's attempts to reduce deforestation and forest degradation.<sup>116</sup> All of this activity has taken place, however, within a legal, regulatory, and governance context that poses significant challenges to Indonesia's ability to fulfill its REDD-related commitments effectively and consistently with its international obligations.<sup>117</sup>

### Indonesia's legal and governance context

In preparation for its participation in REDD+, the Indonesian government has engaged in a number of legal and institutional reforms,<sup>118</sup> including devising a national REDD+ strategy. The national strategy sets out principles on which the implementation of REDD+ in Indonesia will be based – effectiveness, efficiency, fairness, transparency and accountability – and identifies the need for land tenure reform; better forest management; consistent law enforcement to improve forestry governance; and equitable

benefit-sharing.<sup>119</sup> It also makes an explicit commitment to FPIC in the implementation of all REDD+ programs and projects.<sup>120</sup> However, REDD+ projects are taking place in Indonesia in the absence of the legal and policy reform necessary to give real effect to these principles.<sup>121</sup>

Indonesia's land tenure framework has direct implications for REDD+. More than 9,000 villages are estimated to be located in forested areas<sup>122</sup> and there has historically been significant conflict relating to ownership and control of land and resources.<sup>123</sup> In 2010 alone, the Indonesian Statistics Agency estimated that 22.5-24.4 million hectares of land were subject to conflict as a result of unclear boundaries between villages and State forests.<sup>124</sup> Although Indonesia's Forestry Law designates 70% of Indonesia's landmass as State forest, less than 10% has been fully gazetted as such.<sup>125</sup> Consequently, much of this area has been allocated by the Ministry of Forestry for large-scale development activities, despite being claimed by forest-based (or customary) communities. Further, forestry activities come under the purview of multiple ministries and both sectoral and general laws and regulations, leading to inconsistencies and contradictions within the legal framework.<sup>126</sup>

Considerable ambiguity exists over the entitlement of forest-based communities to land and resources under Indonesian law. While some domestic provisions acknowledge the rights of customary communities<sup>127</sup> and Indonesia voted in favor of the UN Declaration on the Rights of Indigenous Peoples, the Forestry Law indicates that customary forest is State forest and thus subject to State control, rendering customary rights in forested areas extremely weak.<sup>128</sup>

Indonesian law also provides for co-management of forests by forest authorities and local community groups or villages. However, because of the considerable time, cost, and expertise required to facilitate such a claim, very few villages have successfully obtained this management right.<sup>129</sup> Finally, the question of how the benefits associated with carbon capture are to be allocated under Indonesian law is not clearly answered.<sup>130</sup> Given the difficulties customary communities face in securing ownership and use rights over land and the precedence given to State and commercial actors, it seems unlikely that benefits will accrue to communities.<sup>131</sup>

Forestry governance in Indonesia is also seriously compromised by a lack of transparency and pervasive corruption.<sup>132</sup> Illegal activity significantly contributes to deforestation in Indonesia: one study estimates that between 40-61% of all logging in Indonesia is illegal.<sup>133</sup> There is evidence of corruption in the processes of issuing permits for forest management and the distribution of revenue from the exploitation of forest resources.<sup>134</sup> While the government has made efforts to address this, including by establishing a Corruption Eradication Commission in 2002, forestry governance remains largely opaque and unaccountable.

The Center for International Forestry Research has recommended that, in view of the serious governance challenges in Indonesia, the reliance of the Indonesian economy on the exploitation of natural resources, and unresolved tenure issues, "the introduction of the REDD+ mechanism in Indonesia should be treated very cautiously."<sup>135</sup>

### **Kalimantan Forests and Climate Partnership<sup>136</sup>**

In 2010, Central Kalimantan was selected as a pilot province for REDD+ activities in Indonesia.<sup>137</sup> The Kalimantan Forests and Climate Partnership (KFCP) is a REDD+ demonstration activity established in 2009 under the auspices of the Indonesian-Australian Forest Carbon Partnership.<sup>138</sup> It was described in a joint statement by the Indonesian and Australian governments as "the first large-scale demonstration activity of its kind in the world."<sup>139</sup> The stated goal of the KFCP is "to demonstrate a credible, equitable and effective approach to reducing greenhouse gas emissions from deforestation and forest degradation,

including from the degradation of peatlands, that can inform a post-2012 global climate change agreement and enable Indonesia's meaningful participation in future international carbon markets."<sup>140</sup>

The main project component is demonstrating the reduction of deforestation and degradation of peat swamp forest in Kapuas District in Central Kalimantan.<sup>141</sup> The project area is part of the Ex-Mega Rice Project Area, which was drained in preparation for conversion to rice-growing, and is classified as state forest. Some of the peripheral canals created to drain the swamp are now used for transport.<sup>142</sup> The project area includes nine villages inhabited by approximately 9,000 indigenous Dayak people, who use nearby land for food crop and rubber cultivation.<sup>143</sup> According to the KFCP design document, the project involves engagement with communities; mapping community land and addressing customary land tenure issues; developing and trialing methods to rehabilitate degraded peatland, including blocking canals to re-flood a sub-section of the peatland; fire mitigation and re-planting native peat swamp forest tree species; and improving local peoples' livelihoods.<sup>144</sup> The village engagement process is described in the design document as bound by a number of principles, including participation and local ownership, gender sensitivity, providing the opportunity for free and informed consent, and the do no harm principle.<sup>145</sup>

In addition to the difficulties unique to Indonesia's legal and policy context, KFCP has had to address the challenges that are common to REDD+ projects.<sup>146</sup> These include communicating with villagers about the project activities and obtaining their informed consent to those activities.

For the free, prior and informed consent of villagers to be established,<sup>147</sup> villagers must have a clear idea of all aspects of the organization and administration of the REDD+ project, including potential positive and negative implications, their legal rights and responsibilities, and available alternatives to participation in the project.<sup>148</sup> According to documents published by the main project proponent, the first phase of the project was to "socialize" community members, which included conducting a socio-economic baseline survey and creating a community engagement team comprised of 14 community facilitators who live and work in the affected villages.<sup>149</sup> Building on this process, the KFCP developed, through a participatory process, village agreements that set out the management, governance, and finance arrangements under which the REDD+ activities are to take place, including the kind of activities that the KFCP will fund.<sup>150</sup> The agreements state that all villagers have the right to full and effective participation in the program, and that KFCP respects customary laws, including those governing natural resources.<sup>151</sup> The agreements were ratified through formal village meetings and endorsed by the village head and a local customary leader.<sup>152</sup>

Several NGOs, however, have challenged this process. They claim that, while there is evidence of general good will in villages towards the KFCP, even after the conclusion of the village agreements some villagers were not sufficiently informed of the project or the agreements.<sup>153</sup> Further, it is not clear that villagers were provided with independent advice and information about the project.<sup>154</sup> NGOs have also claimed that some of the activities have been counterproductive for villagers, such as the blockage of canals that have reportedly impeded access to land used by farmers.<sup>155</sup>

Another important element of the right to FPIC is ensuring that there is a grievance mechanism that communities can access in the event of a dispute with project proponents.<sup>156</sup> The KFCP village agreements set out a grievance procedure that was developed and agreed by community representatives and KFCP.<sup>157</sup> Again, this is challenged by NGOs that claim that some villagers are not aware of a mechanism for making their complaints known to the proponents.<sup>158</sup> Such contestation is illustrative of the challenges of achieving, in practice, the consent and full and effective participation of affected communities.

It is critical to highlight that the challenges KFCP has faced with respect to the principle of free, prior and informed consent are by no means unique.<sup>159</sup> UN-REDD is reviewing the experiences of stakeholders in REDD+ projects, and its findings indicate the common challenges associated with operationalizing FPIC. For example, in its comparative study of REDD+ pilot projects in the Asia-Pacific region, in two out of the three projects profiled, community members had misconceptions about the nature of REDD+ projects even after awareness-raising measures had been implemented.<sup>160</sup> These projects have generated numerous “lessons learned,” including the importance of tailoring methods of communication to different demographics within a community to account for differences in literacy; leaving adequate time for awareness-raising, absorption of information, and internal community discussion; and the value of using trained facilitators from the villages’ own communities so that it is easier to establish trust.<sup>161</sup>

Finally, the KFCP is being implemented on State land on which other ownership rights, including those of customary communities, are not formally recognized. Again, this is not a characteristic that is unique to KFCP. Because the overwhelming portion of Indonesia’s State forest has not been formally gazetted, REDD+ projects all over Indonesia are taking place on land to which the legal claims of customary communities have not been recognized.<sup>162</sup> The vast majority of the KFCP demonstration site is categorized as Production Forest,<sup>163</sup> and the rights of indigenous communities to access the land and resources are subordinate to State interests despite the presence of Dayak communities on the land for generations. Although KFCP is assisting communities to map the customary boundaries of their land, IAFCP has taken the position that it “will not attempt to change the legal status and customary rights of land and territory in the village”<sup>164</sup> and that, if clear land tenure laws are a precondition of project development, “no projects would then ever be developed or they would all be developed in the same handful of places.”<sup>165</sup>

However, in the absence of formal recognition of customary communities’ claim to their land and resources, the potential for conflict rooted in community demands for control of their land and resources remains high. Members of the communities in the demonstration site have been criminalized in the past for small-scale logging on land to which they have a customary claim.<sup>166</sup> There is also evidence that communities have voiced their concern over the implementation of KFCP activities on their land despite the lack of formal recognition of their tenure.<sup>167</sup>

Further, without clear protection of customary rights, there is no guarantee that any future benefits pertaining to carbon stock on the land will be equitable. While this is not a relevant concern under the KFCP, which does not seek to generate any profit from carbon stock, the success of future REDD+ activities will depend on the resolution of tenure issues. As stated by the Center for International Forestry Research, it is imperative “that tenure be defined clearly and firmly to ensure certainty of property rights and, in turn, equitable distribution of benefits.”<sup>168</sup>

## 6. Free, Prior and Informed Consent

The following definition is excerpted from the UN-REDD Program's "Guidelines on Free, Prior and Informed Consent".<sup>1</sup> The definition builds on the elements of a common understanding of free, prior and informed consent endorsed by the UN Permanent Forum on Indigenous Issues at its Fourth Session.

### Free

Free refers to a consent given voluntarily and absent of "coercion, intimidation or manipulation." Free refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed:

- Stakeholders determine process, timeline and decision-making structure;
- Information is transparently and objectively offered at stakeholders' request;
- Process is free from coercion, bias, conditions, bribery or rewards;
- Meetings and decisions take place at locations and times and in languages and formats determined by the stakeholders; and
- All community members are free to participate regardless of gender, age or standing.

### Prior

Prior means "consent is sought sufficiently in advance of any authorization or commencement of activities." Prior refers to a period of time in advance of an activity or process when consent should be sought, as well as the period between when consent is sought and when consent is given or withheld. Prior means at the "early stages of a development or investment plan, not only when the need arises to obtain approval from the community."

- Prior implies that time is provided to understand, access, and analyze information on the proposed activity. The amount of time required will depend on the decision-making processes of the rights-holders;
- Information must be provided before activities can be initiated, at the beginning or initiation of an activity, process or phase of implementation, including conceptualization, design, proposal, information, execution, and following evaluation; and
- The decision-making timeline established by the rights-holders must be respected, as it reflects the time needed to understand, analyze, and evaluate the activities under consideration in accordance with their own customs.

### Informed

Informed refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.

Information should:

- Be accessible, clear, consistent, accurate, constant, and transparent;
- Be delivered in appropriate language and culturally appropriate format (including radio, video, graphics, documentaries, photos, oral presentations);
- Be objective, covering both the positive and negative potential of REDD+ activities and consequences of giving or withholding consent;

<sup>1</sup> UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 18-20 (2013)

- Be complete, covering the spectrum of potential social, financial, political, cultural, environmental impacts, including scientific information with access to original sources in appropriate language;
- Be delivered in a manner that strengthens and does not erode indigenous or local cultures;
- Be delivered by culturally appropriate personnel, in culturally appropriate locations, and include capacity building of indigenous or local trainers;
- Be delivered with sufficient time to be understood and verified;
- Reach the most remote, rural communities, women and the marginalized; and
- Be provided on an ongoing and continuous basis throughout the FPIC process.

### **Consent**

Consent refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected peoples or communities. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community. Consent is:

- A freely given decision that may be a “Yes” or a “No,” including the option to reconsider if the proposed activities change or if new information relevant to the proposed activities emerges;
- A collective decision determined by the affected peoples (e.g. consensus, majority, etc.) in accordance with their own customs and traditions;
- The expression of rights (to self-determination, lands, resources and territories, culture); and
- Given or withheld in phases, over specific periods of time for distinct stages or phases of REDD+. It is not a one-off process.

While the objective of consultation processes shall be to reach an agreement (consent) between the relevant parties, this does not mean that all FPIC processes will lead to the consent of and approval by the rights-holders in question. At the core of FPIC is the right of the peoples concerned to choose to engage, negotiate and decide to grant or withhold consent, as well as the acknowledgement that under certain circumstances, it must be accepted that the project will not proceed and/or that engagement must be ceased if the affected peoples decide that they do not want to commence or continue with negotiations or if they decide to withhold their consent to the project.



## 7. Climate Change and Rule of Law: Resources

### Climate Change: General

INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2007, CLIMATE CHANGE 2007: SYNTHESIS REPORT – SUMMARY FOR POLICY MAKERS (*adopted* November 12-17 2007 by IPCC Plenary XXVII)

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (*adopted* 9 May 1992 by Intergovernmental Negotiating Committee *entered into force* 21 March 1994, U.N. Doc. A/AC.237/18)

NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE (2006)

WORLD BANK, TURN DOWN THE HEAT: WHY A 4°C WARMER WORLD MUST BE AVOIDED (2012)

### Climate Change and Human Rights

Edward Cameron, Marc Limon, *Restoring the Climate by Realizing Rights: The Role of the International Human Rights System* 21 REVIEW OF EUROPEAN, COMPARATIVE AND INTERNATIONAL ENVIRONMENTAL LAW 204-219 (2012)

SÉBASTIEN JODOIN, RIGHTS-BASED FRAMEWORKS FOR CLIMATE FINANCE (Sustainable Development Law on Climate Change, Legal Working Paper Series, CISDL IDLO 2010)

INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE (2008)

REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, ANALYTICAL STUDY ON THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT, U.N. Doc. A/HRC/19/34 (16 December 2011).

REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS U.N. Doc. A/HRC/10/61 (15 January 2009)

UN HUMAN RIGHTS COUNCIL RES. 18/22, HUMAN RIGHTS AND CLIMATE CHANGE (*adopted* 17 October 2011 by UN Human Rights Council, U.N. Doc. A/HRC/RES18/22)

### Women and Vulnerable Groups

BRIDGE, GENDER AND CLIMATE CHANGE: MAPPING THE LINKAGES (2008)

CLIMATE CHANGE AND GENDER JUSTICE (Geraldine Terry ed., Oxfam 2009).

CARE, UNDERSTANDING VULNERABILITY TO CLIMATE CHANGE (2011).

CARE, CLIMATE VULNERABILITY AND CAPACITY ANALYSIS HANDBOOK (2009)

MINORITY RIGHTS GROUP INTERNATIONAL, THE IMPACT OF CLIMATE CHANGE ON MINORITIES AND INDIGENOUS PEOPLES (2008)

Legislative reform, Access to Justice, and Legal Empowerment

Legal Working Brief, THE NEW GENERAL LAW ON CLIMATE CHANGE IN MEXICO: LEADING NATIONAL ACTION TO TRANSITION TO A GREEN ECONOMY (IDLO 2012)

IDLO-CISDL, COMPENDIUM OF LEGAL BEST PRACTICES ON CLIMATE CHANGE POLICY (2011)

CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE (Richard Lord QC, Silke Goldberg, Lavanya Rajamani, Jutta Brunnée eds, Cambridge University Press 2012)

John Pendergrass, *Educating Judges about Environmental Law* 3 JOURNAL OF COURT INNOVATION 306-314 (2010)

UNEP, SEEDS OF CHANGE: CONTRIBUTING TO CLIMATE CHANGE SOLUTIONS at 5 (2012)

Public Integrity and Transparency

ODI, CLIMATE FINANCE THEMATIC BRIEFING: REDD+ FINANCE (2012)

TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT: CLIMATE CHANGE (2011)

TRANSPARENCY INTERNATIONAL, CLIMATE GOVERNANCE INTEGRITY (2011)

UNECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (adopted 25 June 1998)

WORLD BANK, JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING (2012)

Land and Resource Governance

KIRSTEN EWERS ANDERSEN, COMMUNAL TENURE AND THE GOVERNANCE OF COMMON PROPERTY RESOURCES IN ASIA (FAO, Land Tenure Working Paper 20 2011)

MARCUS COLCHESTER, FREE, PRIOR AND INFORMED CONSENT: MAKING FPIC WORK FOR FORESTS AND PEOPLES (The Forest Dialogue 2010)

Victoria Tauli-Corpuz, Parshuram Tamang, *Oil palm and other commercial tree plantations, monocropping: impacts on indigenous peoples' land tenure and resource management systems and livelihoods* (Working Paper produced for the UN Permanent Forum on Indigenous Issues, 6th session U.N. Doc E/C.19/2007/CRP.6 (May 2007)

UNREDD+

ANALYSING REDD+: CHALLENGES AND CHOICES at 194 (Arild Angelsen ed., CIFOR 2012)

JANE DUNLOP, REDD, TENURE AND LOCAL COMMUNITIES: A STUDY FROM ACEH, INDONESIA (IDLO 2009)

PATRICIA PARKINSON, ANDREW WARDELL, LEGAL FRAMEWORKS TO SUPPORT REDD PRO-POOR OUTCOMES (Sustainable Development Law on Climate Change, Legal Working Paper Series CISDL

IDLO 2010)

RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+: PRINCIPLES AND APPROACHES FOR POLICY AND PROJECT DEVELOPMENT (2011)

UN-REDD PROGRAM, LESSONS LEARNED: ASIA-PACIFIC (2011)

UN-REDD PROGRAM, FREE, PRIOR AND INFORMED CONSENT FOR REDD+ IN THE ASIA-PACIFIC REGION: LESSONS LEARNED (2012)

UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT (2013)

See, *also*, IDLO, Legal Preparedness for REDD+ series at <http://www.idlo.int/english/WhatWeDo/Programs/ClimateFinance/Pages/Project.aspx>.

<sup>1</sup> UN FRAMEWORK CONVENTION ON CLIMATE CHANGE at art 1(2) (*adopted* 9 May 1992 by Intergovernmental Negotiating Committee *entered into force* 21 March 1994, UN Doc. A/AC.237/18) [hereinafter UNFCCC].

<sup>2</sup> NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE, Part I (2006) [hereinafter STERN REVIEW]; WORLD BANK, TURN DOWN THE HEAT: WHY A 4°C WARMER WORLD MUST BE AVOIDED, Chapter 2 (2012) [hereinafter WORLD BANK, TURN DOWN THE HEAT].

<sup>3</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2007, CLIMATE CHANGE 2007: SYNTHESIS REPORT – SUMMARY FOR POLICY MAKERS (*adopted* November 12-17 2007 by IPCC Plenary XXVII) [hereinafter IPCC, SUMMARY FOR POLICYMAKERS]; STERN REVIEW *supra* note 2, at Part II; WORLD BANK, TURN DOWN THE HEAT *supra* note 2, at Chapter 2.

<sup>4</sup> IPCC, SUMMARY FOR POLICYMAKERS *supra* note 3; STERN REVIEW *supra* note 2, at Part II; WORLD BANK, TURN DOWN THE HEAT *supra* note 2, at Chapter 2.

<sup>5</sup> UN HUMAN RIGHTS COUNCIL RES. 18/22, HUMAN RIGHTS AND CLIMATE CHANGE (*adopted* 17 October 2011 by UN Human Rights Council, U.N. Doc. A/HRC/RES18/22); UN HUMAN RIGHTS COUNCIL RES. 10/4, HUMAN RIGHTS AND CLIMATE CHANGE (*adopted* 25 March 2009 by UN Human Rights Council, U.N. Doc. A/HRC/RES10/4); UN HUMAN RIGHTS COUNCIL RESOLUTION 7/23 (*adopted* 23 March 2008 by U.N. Human Rights Council, U.N. Doc. A/HRC/RES7/23); see INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE (2008) [hereinafter ICHRP, CLIMATE CHANGE AND HUMAN RIGHTS]; REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS U.N. Doc. A/HRC/10/61 (15 January 2009); HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BACKGROUND PAPER: HUMAN RIGHTS AND CLIMATE CHANGE (2008); UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD U.N. Doc. A/HRC/7/5 at [51] (10 January 2008), A/HRC/7/5/Add.2 at [11] [15].

<sup>6</sup> STERN REVIEW *supra* note 2 at 92; ICHRP, CLIMATE CHANGE AND HUMAN RIGHTS *supra* note 5, at 25.

<sup>7</sup> ICHRP, CLIMATE CHANGE AND HUMAN RIGHTS *supra* note 5, at 6; REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, ANALYTICAL STUDY ON THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT, U.N. Doc. A/HRC/19/34 at [1] (16 December 2011).

<sup>8</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2007, CLIMATE CHANGE 2007: SYNTHESIS REPORT at 56 (*adopted* November 12-17 2007 by IPCC Plenary XXVII).

<sup>9</sup> ANDREW MCDEVITT, CLIMATE CHANGE ADAPTATION at 7 (Governance and Social Development Resource Centre, Topic Guide 2012) [hereinafter MCDEVITT, CLIMATE CHANGE ADAPTATION].

<sup>10</sup> For more information on the content and status of the Kyoto Protocol, see UNFCCC, “Kyoto Protocol” at [http://unfccc.int/essential\\_background/kyoto\\_protocol/items/6034.php](http://unfccc.int/essential_background/kyoto_protocol/items/6034.php)

<sup>11</sup> For example, common but differentiated responsibilities, and precautionary measures. It also obliges Annex I countries to take into account economic and social development when giving financial and technical assistance to developing countries.

<sup>12</sup> KYOTO PROTOCOL TO THE UNFCCC at art. 17 (*adopted* 11 December 1997 at third session of the Conference of the Parties to the UNFCCC, *entered into force* 16 February 2005 U.N. Doc FCCC/CP/1997/7/Add.1).

<sup>13</sup> For an overview of the EU Scheme, see Factsheet, EUROPEAN COMMISSION, THE EU EMISSIONS TRADING SYSTEM (EU ETS) (undated).

<sup>14</sup> CIFOR, CLIMATE CHANGE MITIGATION: AVOIDING DEFORESTATION AND GREENHOUSE GAS EMISSIONS, ENHANCING FOREST CARBON STOCK at 1 (2012).

<sup>15</sup> *Id.*

<sup>16</sup> UN-REDD Program, “About REDD+” at <http://www.un-redd.org/aboutredd/>

<sup>17</sup> RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+: PRINCIPLES AND APPROACHES FOR POLICY AND PROJECT DEVELOPMENT at 7 (2011) [hereinafter RECOFTC, GIZ, FPIC IN REDD+].

<sup>18</sup> ODI, CLIMATE FINANCE THEMATIC BRIEFING: REDD+ FINANCE (2012).

<sup>19</sup> Current as of writing. For the most recent overview of UN-REDD Program Partner Countries, see UN-REDD Program, “Partner Countries” at [http://www.un-redd.org/Partner\\_Countries/tabid/102663/Default.aspx](http://www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx).

<sup>20</sup> ICHRP, CLIMATE CHANGE AND HUMAN RIGHTS *supra* note 5, at 8.

<sup>21</sup> *Supra* note 5.

<sup>22</sup> REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS UN Doc A/HRC/10/61 at [80] (15 January 2009); UN HUMAN RIGHTS COUNCIL RES. 10/4, HUMAN RIGHTS AND CLIMATE CHANGE at [4] (*adopted* 25 March 2009 by UN Human Rights

Council, U.N. Doc. A/HRC/RES10/4); DECISION 1/CP.16, THE CANCUN AGREEMENTS: OUTCOME OF THE WORK OF THE AD HOC WORKING GROUP ON LONG-TERM COOPERATIVE ACTION UNDER THE CONVENTION (*adopted 10 December 2010 by the Conference of Parties to the UNFCCC, U.N. Doc. FCCC/CP/2010/7/Add.1*); ICHRP, CLIMATE CHANGE AND HUMAN RIGHTS *supra* note 5, at viii; Edward Cameron, Marc Limon, *Restoring the Climate by Realizing Rights: The Role of the International Human Rights System* 21 REVIEW OF EUROPEAN, COMPARATIVE AND INTERNATIONAL ENVIRONMENTAL LAW 204-219 (2012).

<sup>23</sup> OHCHR, FREQUENTLY ASKED QUESTIONS ON A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION at 15 (2006) [hereinafter OHCHR, FAQ ON A HUMAN RIGHTS-BASED APPROACH].

<sup>24</sup> *Id.*

<sup>25</sup> REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS UN Doc A/HRC/10/61 at [80] (15 January 2009).

<sup>26</sup> OHCHR, FAQ ON A HUMAN RIGHTS-BASED APPROACH *supra* note 23, at 18; ICHRP, CLIMATE CHANGE AND HUMAN RIGHTS *supra* note 5, at 6-8; REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS U.N. Doc. A/HRC/10/61 at [81], [82] (15 January 2009).

<sup>27</sup> Bob Alexander, Cecile de Miliano, Chandra Sekhar Bahinipati, *Participation of the most vulnerable in Disaster Risk Reduction and Climate Change Adaptation decision-making and action* in DISASTER RISK REDUCTION AND CLIMATE CHANGE ADAPTATION: CASE STUDIES FROM SOUTH AND SOUTHEAST ASIA 54 (Neysa Setiadi, Joern Birkmann, Philip Buckle, eds., United Nations University Institute for Environment and Human Security, 2010).

<sup>28</sup> WORLD FOOD PROGRAMME, PARTICIPATORY TECHNIQUES AND TOOLS: A WFP GUIDE at 13 (2001)13.

<sup>29</sup> RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT 1992, Principle 10 (*adopted 14 June 1992 by the UN Conference on Environment and Development, UN Doc A/CONF.151/62 1992*); UNFCCC *supra* note 1, at art. 6; UNECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (*adopted 25 June 1998*) [hereinafter AARHUS CONVENTION].

<sup>30</sup> AARHUS CONVENTION *supra* note 29.

<sup>31</sup> AARHUS CONVENTION *supra* note 29, at arts. 6, 7, 8.

<sup>32</sup> Bob Alexander, Cecile de Miliano, Chandra Sekhar Bahinipati, *Participation of the most vulnerable in Disaster Risk Reduction and Climate Change Adaptation decision-making and action* in DISASTER RISK REDUCTION AND CLIMATE CHANGE ADAPTATION: CASE STUDIES FROM SOUTH AND SOUTHEAST ASIA 54 (Neysa Setiadi, Joern Birkmann, Philip Buckle, eds., United Nations University Institute for Environment and Human Security, 2010).

<sup>33</sup> FAO, RIGHT TO FOOD, MAKING IT HAPPEN: PROGRESS AND LESSONS LEARNED THROUGH IMPLEMENTATION at 170 (2011).

<sup>34</sup> BRIDGE, GENDER AND CLIMATE CHANGE: MAPPING THE LINKAGES at 22 (2008) [hereinafter BRIDGE, GENDER AND CLIMATE CHANGE].

<sup>35</sup> See, e.g., CARE, CLIMATE VULNERABILITY AND CAPACITY ANALYSIS HANDBOOK (2009); BRIDGE, GENDER AND CLIMATE CHANGE *supra* note 33; UNHCR, A COMMUNITY-BASED APPROACH IN UNHCR OPERATIONS (2008); CARE, EMBRACING PARTICIPATION IN DEVELOPMENT (1999).

<sup>36</sup> BRIDGE, GENDER AND CLIMATE CHANGE *supra* note 34; McDEVITT, CLIMATE CHANGE ADAPTATION *supra* note 9, at 13; UNDG, INTEGRATING CLIMATE CHANGE CONSIDERATIONS IN THE COUNTRY ANALYSIS AND UNDAF at 6 (2010).

<sup>37</sup> BRIDGE, GENDER AND CLIMATE CHANGE *supra* note 34, at 17.

<sup>38</sup> UN, HUMAN DEVELOPMENT REPORT 2011 at 65 (2011).

<sup>39</sup> See, e.g., USAID, GENDER EQUALITY AND FEMALE EMPOWERMENT POLICY at Chapter 5 (2012).

<sup>40</sup> OHCHR, FAQ ON A HUMAN RIGHTS-BASED APPROACH *supra* note 23, at 24.

<sup>41</sup> This is the definition of 'vulnerability' in the REDD+ SOCIAL AND ENVIRONMENTAL STANDARDS at footnote 2 (10 September 2012).

<sup>42</sup> OHCHR, FAQ ON A HUMAN RIGHTS-BASED APPROACH *supra* note 23, at 24.

<sup>43</sup> UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD UN Doc A/65/281 at 7-8 (11 August 2010); LIDIJA KNUTH, THE RIGHT TO ADEQUATE FOOD AND INDIGENOUS PEOPLES: HOW CAN THE RIGHT TO FOOD BENEFIT INDIGENOUS PEOPLES? at 9 (FAO, Right to Food Studies, 2009).

<sup>44</sup> MINORITY RIGHTS GROUP INTERNATIONAL, THE IMPACT OF CLIMATE CHANGE ON MINORITIES AND INDIGENOUS PEOPLES (2008) [hereinafter MRG, THE IMPACT OF CLIMATE CHANGE ON MINORITIES AND INDIGENOUS PEOPLES]; Briefing Paper, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, ASIA INDIGENOUS PEOPLES PACT

FOUNDATION, INDIGENOUS KNOWLEDGE AND PEOPLES NETWORK, INDIGENOUS PEOPLES AND CLIMATE CHANGE (2009).

<sup>45</sup> For discussion of the definition of minorities under international law, see OHCHR, MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION at 2 (2010).

<sup>46</sup> MRG, THE IMPACT OF CLIMATE CHANGE ON MINORITIES AND INDIGENOUS PEOPLES *supra* note 44, at 2.

<sup>47</sup> *Id.*, 6.

<sup>48</sup> MCDEVITT, CLIMATE CHANGE ADAPTATION *supra* note 9, at 13; GSDRC, HELPDISK RESEARCH REPORT: CLIMATE CHANGE AND SOCIAL EXCLUSION I (2008); CARE, UNDERSTANDING VULNERABILITY TO CLIMATE CHANGE (2011).

<sup>49</sup> IPCC, SUMMARY FOR POLICYMAKERS *supra* note 3, at 13.

<sup>50</sup> RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT 1992, Principle 10 (*adopted* 14 June 1992 by the UN Conference on Environment and Development, U.N. Doc. A/CONF.151/62 1992; UNFCCC *supra* note 1 at art. 6; AARHUS CONVENTION *supra* note 29, at arts. 4, 5.

<sup>51</sup> WORLD FOOD PROGRAMME, PARTICIPATORY TECHNIQUES AND TOOLS: A WFP GUIDE at 10 (2001); FAO, RIGHT TO FOOD ASSESSMENT CHECKLIST: ASSESSING THE RIGHT TO FOOD IN THE NATIONAL DEVELOPMENT CONTEXT at 7 (2009).

<sup>52</sup> See, e.g., IDLO-CISDL, COMPENDIUM OF LEGAL BEST PRACTICES ON CLIMATE CHANGE POLICY (2011)

<sup>53</sup> UNFCCC, “Chronological Evolution of the LDC Work Program and Introduction to the Concept of NAPA” at [http://unfccc.int/cooperation\\_support/least\\_developed\\_countries\\_portal/ldc\\_work\\_programme\\_and\\_napa/items/4722.php](http://unfccc.int/cooperation_support/least_developed_countries_portal/ldc_work_programme_and_napa/items/4722.php)

<sup>54</sup> Decision 5/CP.17, REPORT OF THE CONFERENCE OF PARTIES ON ITS SEVENTEENTH SESSION (U.N. Doc. FCCC/CP/2011/9Add.1 15 March 2012).

<sup>55</sup> BRIDGE, GENDER AND CLIMATE CHANGE *supra* note 34 at 50, 51; MRG, THE IMPACT OF CLIMATE CHANGE ON MINORITIES AND INDIGENOUS PEOPLES *supra* note 44, at 8,9 (2008).

<sup>56</sup> See, e.g., CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE at [3.08] (Richard Lord QC, Silke Goldberg, Lavanya Rajamani, Jutta Brunnée eds, Cambridge University Press 2012).

<sup>57</sup> See, e.g., *Minister of Health v Treatment Action Campaign (no 2)* (2002) 5 SA 721 (2002).

<sup>58</sup> John Squires, Malcolm Langford, Bret Thiele, ROAD TO A REMEDY (Australian Human Rights Centre 2005).

<sup>59</sup> CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE at [3.30] (Richard Lord QC, Silke Goldberg, Lavanya Rajamani, Jutta Brunnée eds, Cambridge University Press 2012); REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, ANALYTICAL STUDY ON THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT, UN Doc A/HRC/19/34 (2011) at [30] (16 December 2011): more than 70% of the world’s national constitutions include an explicit reference to environmental rights and/or responsibilities.

<sup>60</sup> REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, ANALYTICAL STUDY ON THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT, UN Doc A/HRC/19/34 (2011) at [30] (16 December 2011).

<sup>61</sup> *SERAC and CESR v Nigeria*, Comm. No. 155/96 (27 May 2002); *Centre for Minority Rights Development (Kenya) ad Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Comm. No. 276/2003 (4 February 2010).

<sup>62</sup> See, e.g., *Moiwana Community v. Suriname*, 15 June 2005; *Claude-Reyes, et al. v. Chile*, 19 September 2006; *Sawhoyamaya Indigenous Community v. Paraguay*, 29 March 2006.

<sup>63</sup> See e.g., Constitutions of South Africa, India, Brazil, Bolivia, Ecuador, Kenya.

<sup>64</sup> UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD U.N. Doc. A/HRC/7/5 at [51] (10 January 2008), A/HRC/17/5/Add.2 at [11] [15]; UN HUMAN RIGHTS COUNCIL RES. 7/14 U.N. Doc. A/HRC/RES/7/14 (*adopted* 27 March 2008); UN HUMAN RIGHTS COUNCIL RES. 10/12 U.N. Doc. A/HRC/RES/10/12 (*adopted* 26 March 2009); UN HUMAN RIGHTS COUNCIL RES.13/4 U.N. Doc. A/HRC/RES/13/4 (24 March 2010); UN HUMAN RIGHTS COUNCIL RES. 16/27 U.N. Doc. A/HRC/RES/16/27 (25 March 2011).

<sup>65</sup> Right to food: *People’s Union for Civil Liberties (PUCL) v. Union of India*, W.P. (Civ.) No. 196/2001 (2001); *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v. Government of WP* (Civ.) No. 2991/1995 (1997). For further discussion of the enforcement of the right to food, see IDLO, ADVANCING THE REALIZATION OF THE RIGHT TO FOOD THROUGH LITIGATION (2013) (forthcoming). Right to health: *Minister of Health v Treatment Action Campaign (no 2)* 5 SA 721 (2002); see citations in RtH chapter. Right to housing: *Republic of South Africa v Grootboom (1)* 1 SA 46 (2001); *Port Elizabeth Municipality v Various Occupiers* 1 SA 217 (2005).

<sup>66</sup> UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES art. 8 (*adopted* September 13, 2007 by the UN General Assembly UN Doc A/61/295) [hereinafter UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES].

<sup>67</sup> COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION, UN Doc CERD/IDN/CO/3 at [17] (15 August 2007).

<sup>68</sup> UN HUMAN RIGHTS COUNCIL, REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RELATIONSHIP BETWEEN CLIMATE CHANGE AND HUMAN RIGHTS, U.N. Doc. A/HRC/10/61 at [83] (15 January 2009).

<sup>69</sup> Such mechanisms allow rights holders to claim realization of rights from the public institutions directly responsible for providing public services and fulfilling rights.

<sup>70</sup> For example, human rights commissions or adjudicative processes established to hear rights or environment-related cases.

<sup>71</sup> VALÉRIA BURITY, LUISA CRUZ, THAÍS FRANCESCHINI, EXIGIBILIDADE: MECHANISMS TO CLAIM THE HUMAN RIGHT TO ADEQUATE FOOD IN BRAZIL at 19 (FAO, Right to Food Studies, 2011).

<sup>72</sup> “Deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law.”: JOHANNESBURG PRINCIPLES ON THE ROLE OF LAW AND SUSTAINABLE DEVELOPMENT, Preamble (adopted 18-20 August 2002 at Global Judges Symposium).

<sup>73</sup> John Pendergrass, *Educating Judges about Environmental Law* 3 JOURNAL OF COURT INNOVATION 306-314 at 310 (2010)

<sup>74</sup> See, e.g., John Pendergrass, *Educating Judges about Environmental Law* 3 JOURNAL OF COURT INNOVATION 306-314 at 310 (2010); European Commission, “EU Environmental Law Training Package” at

[http://ec.europa.eu/environment/legal/law/training\\_package.htm](http://ec.europa.eu/environment/legal/law/training_package.htm); UNEP, “Division of Environmental Law and Conventions, Judges Program” at <http://www.unep.org/delc/judgesprogramme/tabid/78617/Default.aspx>.

<sup>75</sup> UNEP, SEEDS OF CHANGE: CONTRIBUTING TO CLIMATE CHANGE SOLUTIONS at 5 (2012).

<sup>76</sup> For a broader discussion of this topic, see TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT: CLIMATE CHANGE (2011).

<sup>77</sup> *Id.*, Part 6.

<sup>78</sup> UN CONVENTION AGAINST CORRUPTION (adopted 31 October 2003 by UN General Assembly, entered into force 14 December 2005, U.N. Doc. A/RES/58/4).

<sup>79</sup> For guidance, see, e.g., TRANSPARENCY INTERNATIONAL, CLIMATE GOVERNANCE INTEGRITY PROGRAM at <http://www.transparency.org/programmes/detail/cgip>

<sup>80</sup> UN-REDD PROGRAM, LESSONS LEARNED: ASIA-PACIFIC

<sup>81</sup> AARHUS CONVENTION *supra* note 29, at arts. 4 and 5.

<sup>82</sup> AARHUS CONVENTION *supra* note 29, at art. 5.

<sup>83</sup> AARHUS CONVENTION *supra* note 29, at art. 5.

<sup>84</sup> CIFOR, CLIMATE CHANGE MITIGATION: AVOIDING DEFORESTATION AND GREENHOUSE GAS EMISSIONS, ENHANCING FOREST CARBON STOCK I (2012).

<sup>85</sup> See, e.g., Victoria Tauli-Corpuz, Parshuram Tamang, *Oil palm and other commercial tree plantations, monocropping: impacts on indigenous peoples’ land tenure and resource management systems and livelihoods* (Working Paper produced for the UN Permanent Forum on Indigenous Issues, 6th session UN Doc E/C.19/2007/CRP.6 (May 2007); RECOFTC, GIZ, FPIC IN REDD+ *supra* note 17, at 7; KIRSTEN EWERS ANDERSEN, COMMUNAL TENURE AND THE GOVERNANCE OF COMMON PROPERTY RESOURCES IN ASIA at 14 (FAO, Land Tenure Working Paper 20 2011) [hereinafter KE ANDERSEN, COMMUNAL TENURE]; TOM GRIFFITHS, SEEING ‘REDD’? FORESTS, CLIMATE CHANGE MITIGATION AND THE RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES (2008); JANE DUNLOP, REDD, TENURE AND LOCAL COMMUNITIES: A STUDY FROM ACEH, INDONESIA (IDLO 2009); UNGA, INTERIM REPORT OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD UN Doc A/65/281 at 6 (11 August 2010).

<sup>86</sup> WORLD BANK, SUSTAINING FORESTS: A DEVELOPMENT STRATEGY 3 (2004).

<sup>87</sup> WORLD BANK, JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING (2012).

<sup>88</sup> SAM LAWSON, LARRY MACFAUL, ILLEGAL LOGGING AND RELATED TRADE: INDICATORS OF THE GLOBAL RESPONSE xiii, 12 (Chatham House 2010).

<sup>89</sup> KE ANDERSEN, COMMUNAL TENURE *supra* note 85, at 36.

<sup>90</sup> For example, representatives of indigenous peoples highlighted concerns relating to tenure at global summit on climate change: “All initiatives under REDD must secure the recognition and implementation of the human rights of Indigenous Peoples, including security of land tenure, ownership, recognition of land title according to traditional ways, uses and customary laws and the multiple benefits of forests for climate, ecosystems, and Peoples before taking any action.” (ANCHORAGE DECLARATION art. 5 (adopted 24 April 2009 by Indigenous Peoples’ Global Summit on Climate Change).

<sup>91</sup> TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT: CLIMATE CHANGE 318 (2011); ELIZABETH DALEY & CLARA MI-YOUNG PARK, GOVERNING LAND FOR WOMEN AND MEN, 24 (FAO, Land Tenure Working Paper 19, 2011).

<sup>92</sup> UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES *supra* note 64 at arts.10, 19, 32; ILO CONVENTION CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES (*adopted* 27 June 1989 by General Conference of the ILO, entered into force 5 September 1991) [hereinafter ILO CONVENTION NO. 169]; UN CONVENTION ON BIOLOGICAL DIVERSITY art. 8(j) (*adopted* 5 June 1992 by UN Conference on Earth and Development, entered into force 29 December 1993); UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT (2013); CLIMATE, COMMUNITY & BIODIVERSITY ALLIANCE, CLIMATE, COMMUNITY & BIODIVERSITY PROJECT DESIGN STANDARDS (2<sup>nd</sup>Ed., 2008); REDD+ SOCIAL AND ENVIRONMENTAL STANDARDS (10 September 2012); DECISION 1/CP.16, THE CUNCUN AGREEMENTS: OUTCOME OF THE WORK OF THE AD HOC WORKING GROUP ON LONG-TERM COOPERATIVE ACTION UNDER THE CONVENTION (*adopted* 10 December 2010 by Conference of Parties to the UNFCCC, UN Doc. FCCC/CP/2010/7/Add.1). The UN-REDD Program and World Bank Forest Carbon Partnership Facility (FCPF) have issued joint guidance on the requirements for effective stakeholder engagement and full and effective participation of local stakeholders in the context of UN-REDD Programs, and state that FPIC is essential. The same guidance states, in the context of the FCPF, that proponents should act in a way that is “substantially equivalent” to the principle of FPIC: UN-REDD PROGRAM, WORLD BANK FOREST CARBON PARTNERSHIP FACILITY, GUIDELINES ON STAKEHOLDER ENGAGEMENT IN REDD+ READINESS WITH A FOCUS ON THE PARTICIPATION OF INDIGENOUS PEOPLES AND OTHER FOREST-DEPENDENT COMMUNITIES (April 20, 2012); see, also, UNITED NATIONS DEVELOPMENT GROUP GUIDELINES ON INDIGENOUS PEOPLES’ ISSUES (2008). For a broad discussion of international standards, statements and jurisprudence affirming the existence of the right to FPIC, see UN-REDD PROGRAM, LEGAL COMPANION TO THE UN-REDD PROGRAM GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT(2013); MARCUS COLCHESTER, FREE, PRIOR AND INFORMED CONSENT: MAKING FPIC WORK FOR FORESTS AND PEOPLES (The Forest Dialogue 2010).

<sup>93</sup> UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT (2013).

<sup>94</sup> UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT (2013); RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+ *supra* note 17; OXFAM, GUIDE TO FREE, PRIOR AND INFORMED CONSENT (2010).

<sup>95</sup> UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 18-20 (2013); RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+ *supra* note 17, at 11; OXFAM, GUIDE TO FREE, PRIOR AND INFORMED CONSENT (2010).

<sup>96</sup> The definition of the elements of FPIC that is most commonly referred to is based on the definition endorsed by the UN Permanent Forum on Indigenous Issues (REPORT OF THE INTERNATIONAL WORKSHOP ON METHODOLOGIES REGARDING FREE PRIOR AND INFORMED CONSENT (*endorsed* by the UN Permanent Forum on Indigenous Issues at its Fourth Session in 2005 UN Doc E/C.19/2005/3 2005) It is cited, for example, as the basis of the definition of FPIC given in the UN-REDD Guidelines on FPIC: UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 18 (2013).

<sup>97</sup> DECISION 1/CP.16, THE CUNCUN AGREEMENTS: OUTCOME OF THE WORK OF THE AD HOC WORKING GROUP ON LONG-TERM COOPERATIVE ACTION UNDER THE CONVENTION at [72] (*adopted* 10 December 2010 by Conference of Parties to the UNFCCC, UN Doc. FCCC/CP/2010/7/Add.1). While the precise content of the requirement of “full and effective participation” is still evolving, the UN-REDD Program and the World Bank’s Forest Carbon Partnership Facility recognize that, at a minimum, it requires free, prior and informed consent at key stages of a project’s development: UN-REDD PROGRAM, WORLD BANK FOREST CARBON PARTNERSHIP FACILITY, GUIDELINES ON STAKEHOLDER ENGAGEMENT IN REDD+ READINESS WITH A FOCUS ON THE PARTICIPATION OF INDIGENOUS PEOPLES AND OTHER FOREST-DEPENDENT COMMUNITIES 2 (April 20, 2012).

<sup>98</sup> The UN-REDD Program Requirements Relevant to Stakeholder Engagement mandate, for example, the representation of indigenous or forest-dependent communities on National REDD+ Steering Committees or equivalent bodies, as well as processes for transparency and accountability, and addressing grievances: UN-REDD PROGRAM, WORLD BANK FOREST CARBON PARTNERSHIP FACILITY, GUIDELINES ON STAKEHOLDER ENGAGEMENT IN REDD+ READINESS WITH A FOCUS ON THE PARTICIPATION OF INDIGENOUS PEOPLES AND OTHER FOREST-DEPENDENT COMMUNITIES 12-14 (April 20, 2012). See, also, UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT Section 3.1 (2013).

<sup>99</sup> While the precise content of the requirement of “full and effective participation” is still evolving, the UN-REDD Program and the World Bank’s Forest Carbon Partnership Facility recognize that, at a minimum, it requires free, prior, and informed consent at key stages of a project’s development: UN-REDD PROGRAM, WORLD BANK FOREST



CARBON PARTNERSHIP FACILITY, GUIDELINES ON STAKEHOLDER ENGAGEMENT IN REDD+ READINESS WITH A FOCUS ON THE PARTICIPATION OF INDIGENOUS PEOPLES AND OTHER FOREST-DEPENDENT COMMUNITIES 2 (April 20, 2012).

<sup>100</sup> KE ANDERSEN, COMMUNAL TENURE *supra* note 85, at 36.

<sup>101</sup> JANE DUNLOP, REDD, TENURE AND LOCAL COMMUNITIES: A STUDY FROM ACEH, INDONESIA 63-68 (IDLO 2009)

<sup>102</sup> UN-REDD PROGRAM, FREE, PRIOR AND INFORMED CONSENT FOR REDD+ IN THE ASIA-PACIFIC REGION: LESSONS LEARNED Section 4.0 (2012).

<sup>103</sup> Regarding national-level grievance mechanisms, see, UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT SECTION 5 (2013).

<sup>104</sup> RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+ *supra* note 17, at 46.

<sup>105</sup> KE ANDERSEN, COMMUNAL TENURE *supra* note 85, at 38.

<sup>106</sup> Ida Aju Pradnja Resosudarmo et al, *Local Hopes and Worries about REDD+ Projects* in ANALYSING REDD+: CHALLENGES AND CHOICES at 193 (Arild Angelsen ed., CIFOR 2012).

<sup>107</sup> ABA ROLI interview with Bernard Steni, Anggi Putri of HuMa, September 25, 2011.

<sup>108</sup> RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+ *supra* note 17 at 49, 50; see, also, WOMEN'S INITIATIVES FOR SOCIETY, CULTURE, AND ENVIRONMENT, INC., PHILIPPINES, GUIDANCE FOR COMMUNITY-LEVEL FPIC FACILITATORS available at [www.unredd.net/index](http://www.unredd.net/index); UNREDD PROGRAM VIETNAM, MANUAL FOR INTERLOCUTORS TO CONDUCT FPIC VILLAGE CONSULTATION MEETINGS (undated).

<sup>109</sup> For detailed guidance, see, e.g., UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT (2013); RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+ *supra* note 17, at 49, 50; WOMEN'S INITIATIVES FOR SOCIETY, CULTURE, AND ENVIRONMENT, INC., PHILIPPINES, GUIDANCE FOR COMMUNITY-LEVEL FPIC FACILITATORS available at [www.unredd.net/index](http://www.unredd.net/index); UNREDD PROGRAM VIETNAM, MANUAL FOR INTERLOCUTORS TO CONDUCT FPIC VILLAGE CONSULTATION MEETINGS (undated).

<sup>110</sup> RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+ *supra* note 17, at 51-54; ASIA INDIGENOUS PEOPLES PACT, REDD+ IMPLEMENTATION AND THE CONCERNS OF INDIGENOUS PEOPLES (undated).

<sup>111</sup> Fact Sheet, NORWAY-INDONESIA PARTNERSHIP, NORWAY-INDONESIA PARTNERSHIP REDD+ (2010) available at <http://www.norway.or.id/PageFiles/404362/FactSheetIndonesiaGHGEmissionMay252010.pdf>

<sup>112</sup> ERIK OLBREI, STEPHEN HOWES, A VERY REAL AND PRACTICAL CONTRIBUTION? LESSONS FROM THE KALIMANTAN FORESTS AND CLIMATE PARTNERSHIP 7 (ANU Development Policy Centre, Discussion Paper 16 2012) [hereinafter OLBREI ET AL, LESSONS FROM THE KFPCP]; Fact Sheet, INDONESIA-AUSTRALIA FOREST CARBON PARTNERSHIP, LEARNING BY DOING – THE KALIMANTAN FORESTS AND CLIMATE PARTNERSHIP (2012) available at <http://iafcp.or.id/publication/cat/10/Factsheets>.

<sup>113</sup> OLBREI ET AL, LESSONS FROM THE KFPCP *supra* note 112, at 29.

<sup>114</sup> GIORGIO BUDI INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA: DRIVERS, AGENTS AND INSTITUTIONS 60 (CIFOR, ICEL, Working Paper 2012) [hereinafter INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA].

<sup>115</sup> This commitment was made in speech to G20 leaders by President Susilo Bambang Yudhoyono in September 2009: "Indonesia CO2 pledge to help climate talk" available at <http://www.reuters.com/article/2009/09/29/idUSSP49560>; see, also, INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 115, at x.

<sup>116</sup> Norwegian Embassy, "Norway-Indonesia REDD+ Partnership – Frequently asked questions" at [http://www.norway.or.id/Norway\\_in\\_Indonesia/Environment/-FAQ-Norway-Indonesia-REDD-Partnership/](http://www.norway.or.id/Norway_in_Indonesia/Environment/-FAQ-Norway-Indonesia-REDD-Partnership/).

<sup>117</sup> ABA ROLI interview with Bernard Steni, Anggi Putri of HuMa, September 25, 2011.

<sup>118</sup> BERNADINUS STENI, SENTOT SETYASISWANTO, NO REASON TO DELAY: PORTRAIT OF FPIC IN REDD+ DEMONSTRATION ACTIVITIES PROJECT IN CENTRAL KALIMANTAN AND CENTRAL SULAWESI xii, xiii (HuMa, 2011) [hereinafter B STENI, NO REASON TO DELAY].

<sup>119</sup> INDONESIAN REDD+ TASK FORCE, REDD+ NATIONAL STRATEGY (2012).

<sup>120</sup> INDONESIAN REDD+ TASK FORCE, REDD+ NATIONAL STRATEGY, 2.2.5.2 (2012) 2.2.5.2.

<sup>121</sup> INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 49, 95; see, eg, MINISTER OF FORESTRY, REGULATION NO. P.68/MENHUT-II/2008 ON THE ESTABLISHMENT OF DEMONSTRATION ACTIVITIES FOR REDUCING CARBON EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION (2008): no reference is made to the rights of forest-based communities in the Regulation.

<sup>122</sup> INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 13, 49, 95.

<sup>123</sup> Conflicts have been most frequent when concession or protected areas overlap with community agricultural land, thus limiting communities' access to benefits from forests: INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 38; PHILIP WELLS ET AL, INDONESIAN CONSTITUTIONAL COURT RULING NUMBER

45/PUU-IX/2011 IN RELATION TO FOREST LANDS: IMPLICATIONS FOR FORESTS, DEVELOPMENT AND REDD+ at 17 (2012).

<sup>124</sup> MINISTRY OF FORESTRY (MOF) AND CENTRAL STATISTICS AGENCY (BPS), IDENTIFIKASI DESA DI DALAM DAN SEKITAR KAWASAN HUTAN 2009 (2009).

<sup>125</sup> INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 99.

<sup>126</sup> *Id.*, 20.

<sup>127</sup> See, e.g., CONSTITUTION OF INDONESIA art. 18B(2) (1945, 2<sup>nd</sup> Amendment); NATIONAL ACT NO. 41/1999 art. 67 (1999); LAW NO 24/2003, which gives customary law communities legal standing to submit petitions to the Constitutional Court; BASIC AGRARIAN LAW NO. 5/1960 art. 3 (1960).

<sup>128</sup> INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 34.

<sup>129</sup> For example, as of 2010, only one village had successfully obtained official designation as *Hutan Desa* or Village Forest: RATNA AKIEFNAWATI ET AL. STEWARDSHIP AGREEMENT TO REDUCE EMISSIONS FROM DEFORESTATION AND DEGRADATION (REDD) IN INDONESIA 18 (ASB Partnership for the Tropical Margins, Policy Brief, 2010).

<sup>130</sup> INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 34, 35.

<sup>131</sup> INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 35.

<sup>132</sup> B STENI, NO REASON TO DELAY *supra* note 117, at xiii; OLBREI ET AL, LESSONS FROM THE KFCP *supra* note 112, at 28, 29; INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 23.

<sup>133</sup> SAM LAWSON, LARRY MACFAUL, ILLEGAL LOGGING AND RELATED TRADE: INDICATORS OF THE GLOBAL RESPONSE xvii (Chatham House, 2010).

<sup>134</sup> INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 23.

<sup>135</sup> *Id.*, 49, 95.

<sup>136</sup> For the most recent information on KFCP, see Indonesia-Australia Forest Carbon Partnership, “KFCP” at <http://iafcp.or.id/content/page/44/KFCP>

<sup>137</sup> INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 68.

<sup>138</sup> Factsheet, INDONESIA-AUSTRALIA FOREST CARBON PARTNERSHIP, INDONESIA-AUSTRALIA FOREST CARBON PARTNERSHIP (2012) at <http://iafcp.or.id/publication/cat/10/Factsheets>.

<sup>139</sup> INDONESIA-AUSTRALIA FOREST CARBON PARTNERSHIP, JOINT STATEMENT BY AUSTRALIA AND INDONESIA (13 June 2008) available at <http://www.climatechange.gov.au/government/initiatives/international-forest-carbon-initiative/~media/publications/international/indonesia-australia.pdf>; see, also, Australian Government: Department of Climate Change and Energy Efficiency, “Action under the International Forest Carbon Initiative” at <http://www.climatechange.gov.au/government/initiatives/international-forest-carbon-initiative/action.aspx>

<sup>140</sup> AUSTRALIA-INDONESIA PARTNERSHIP, KALIMANTAN FORESTS AND CLIMATE PARTNERSHIP (KFCP) DESIGN DOCUMENT 2 (2009) [hereinafter KFCP DESIGN DOCUMENT]

<sup>141</sup> *Id.*, 3.

<sup>142</sup> *Id.*, 8.

<sup>143</sup> *Id.*, 3; see, also, Factsheet, INDONESIA-AUSTRALIA FOREST CARBON PARTNERSHIP, BENEFIT SHARING AND ENGAGING WITH COMMUNITIES (2012) at <http://iafcp.or.id/publication/cat/10/Factsheets>.

<sup>144</sup> KFCP DESIGN DOCUMENT *supra* note 140, at 24-31.

<sup>145</sup> *Id.*, 26.

<sup>146</sup> Ida Aju Pradnja Resosudarmo et al, *Local Hopes and Worries about REDD+ Projects* in ANALYSING REDD+: CHALLENGES AND CHOICES at 193 (Arild Angelsen ed., CIFOR 2012); Tom Blomley, Michael Richards, *Community Engagement Guidance: Good Practice for Forest Carbon Projects* in BUILDING FOREST CARBON PROJECTS 13 (Johannes Ebeling and Jacob Olander eds. 2011).

<sup>147</sup> The KFCP Design Document commits the project to respecting the “free and informed consent” of villagers: KFCP DESIGN DOCUMENT *supra* note 140, at 26; see, also, Letter from Jacqui de Lacy, Minister-Counsellor and Senior Representative, AusAID, to Yayasan Petak Danum Kalimantan Tengah (2011) which commits KFCP to the human rights obligations set out in the UN Declaration on the Rights of Indigenous Peoples, available at <http://www.forestpeoples.org/sites/fpp/files/publication/2011/05/letter-kfcp.pdf>; for the right of indigenous peoples to FPIC under international law and agreements, see *supra* note 90.

<sup>148</sup> Ida Aju Pradnja Resosudarmo et al, *Local Hopes and Worries about REDD+ Projects* in ANALYSING REDD+: CHALLENGES AND CHOICES at 194 (Arild Angelsen ed., CIFOR 2012); RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+ *supra* note 17, at 21; UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 19, 20 (2013); Tom Blomley, Michael Richards, *Community Engagement Guidance: Good Practice for Forest Carbon Projects* in BUILDING FOREST CARBON PROJECTS 10 (Johannes Ebeling and Jacob Olander eds. 2011).

<sup>149</sup> Factsheet, INDONESIA-AUSTRALIA FOREST CARBON PARTNERSHIP, BENEFIT SHARING AND ENGAGING WITH COMMUNITIES (2012) at <http://iafc.org/publication/cat/10/Factsheets>.

<sup>150</sup> Factsheet, INDONESIA-AUSTRALIA FOREST CARBON PARTNERSHIP, VILLAGE AGREEMENTS (2012) at <http://iafc.org/publication/cat/10/Factsheetsm> see, e.g., VILLAGE AGREEMENT BETWEEN KFCP AND DESA KALUMPANG, available at <http://iafc.org/publication/cat/6/Other-documents>.

<sup>151</sup> *Id.*, 1, 2.

<sup>152</sup> *Id.*, 3.

<sup>153</sup> FOREST PEOPLES PROGRAMME, YAYASAN PUSAKA, UNFULFILLED PROMISES: A NOTE ON THE KFCP'S RECENT ATTEMPTS TO RESPECT THE RIGHTS OF AFFECTED COMMUNITIES ON THE KAPUAS RIVER, CENTRAL KALIMANTAN (5 September 2012) [hereinafter FPP, UNFULFILLED PROMISES]; B STENI, NO REASON TO DELAY *supra* note 118, at 24-25, 37; ABA ROLI interview with Patrick Anderson of Forest Peoples Program (20 September 2012); ABA ROLI interview with Mena Sutra of AMAN (21 September 2012).

<sup>154</sup> UNREDD recommends using community facilitators that are “mutually accountable to the...REDD Program, the government and the community” and are neutral and trustworthy so that “transparent, accurate and complete information is completed” including positive and negative impacts and risks: UNREDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 46 (2013)

<sup>155</sup> FPP, UNFULFILLED PROMISES, *supra* note 153; CHRIS LANG, CONTROVERSY SURROUNDING AUSTRALIA'S KALIMANTAN FOREST AND CLIMATE PARTNERSHIP REDD PROJECT DEEPENS (11 September 2012) available at <http://www.redd-monitor.org/2012/09/11/controversy-surrounding-australias-kalimantan-forest-and-climate-partnership-redd-project-deepens/>

<sup>156</sup> RECOFTC, GIZ, FREE, PRIOR AND INFORMED CONSENT IN REDD+ *supra* note 17, at 51-54; UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 34 (2013).

<sup>157</sup> See, e.g., VILLAGE AGREEMENT BETWEEN KFCP AND DESA KALUMPANG, available at <http://iafc.org/publication/cat/6/Other-documents>.

<sup>158</sup> FPP, UNFULFILLED PROMISES, *supra* note 153; ABA ROLI interview with Patrick Anderson of Forest Peoples Program (20 September 2012); CHRIS LANG, CONTROVERSY SURROUNDING AUSTRALIA'S KALIMANTAN FOREST AND CLIMATE PARTNERSHIP REDD PROJECT DEEPENS (11 September 2012) available at <http://www.redd-monitor.org/2012/09/11/controversy-surrounding-australias-kalimantan-forest-and-climate-partnership-redd-project-deepens/>

<sup>159</sup> See, e.g., Nguyen Quang Tan et al, EVALUATION AND VERIFICATION OF THE FREE, PRIOR AND INFORMED CONSENT PROCESS UNDER THE UN-REDD PROGRAM IN LAM DONG PROVINCE, VIETNAM (RECOFTC, 2010); UN-REDD PROGRAM, LESSONS LEARNED: VIETNAM UN-REDD PROGRAM, PHASE I (2012).

<sup>160</sup> UN-REDD PROGRAM, FREE, PRIOR AND INFORMED CONSENT FOR REDD+ IN THE ASIA-PACIFIC REGION: LESSONS LEARNED Section 3.0 (2012).

<sup>161</sup> UN-REDD PROGRAM, FREE, PRIOR AND INFORMED CONSENT FOR REDD+ IN THE ASIA-PACIFIC REGION: LESSONS LEARNED (2012); see, also, UN-REDD PROGRAM, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT Annex VI (2013); UN-REDD PROGRAM, LESSONS LEARNED: ASIA-PACIFIC 9-10 (2011).

<sup>162</sup> In relation to REDD+ activities in Central Sulawesi province, see, B STENI, NO REASON TO DELAY *supra* note 118 at 50; In relation to REDD+ projects in Aceh province, see, JANE DUNLOP, REDD, TENURE AND LOCAL COMMUNITIES: A STUDY FROM ACEH, INDONESIA (IDLO 2009).

<sup>163</sup> KFCP DESIGN DOCUMENT *supra* note 140, at 18;

<sup>164</sup> See, e.g., VILLAGE AGREEMENT BETWEEN KFCP AND DESA KALUMPANG, *supra* note 157.

<sup>165</sup> KFCP DESIGN DOCUMENT *supra* note 140, at footnote 11.

<sup>166</sup> KFCP DESIGN DOCUMENT *supra* note 140, at 18-19.

<sup>167</sup> Letter from Yayasan Petak Danum Kalimantan Tengah to the Australian Delegation to Central Kalimantan (24 February 2011) available at <http://www.forestpeoples.org/sites/fpp/files/publication/2011/03/letter-australian-delegation-central-kalimantan-february-2011-re-kfcp-pilot-redd-project.pdf>; CHRIS LANG, CONTROVERSY SURROUNDING AUSTRALIA'S KALIMANTAN FOREST AND CLIMATE PARTNERSHIP REDD PROJECT DEEPENS (11 September 2012) available at <http://www.redd-monitor.org/2012/09/11/controversy-surrounding-australias-kalimantan-forest-and-climate-partnership-redd-project-deepens/>; see, also, Comments of Secretary of the Department of Climate Change and Energy Efficiency which suggest that the KFCP's progress has been delayed because of complex land tenure issues and 'resolving the land tenure issues has taken longer than first thought': AUSTRALIAN SENATE HANSARD, ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE 102 (21 May 2012)

<sup>168</sup> INDRATO ET AL, THE CONTEXT OF REDD+ IN INDONESIA *supra* note 114, at 95.



# PUBLIC HEALTH AND THE RULE OF LAW

## I. Context

### I.1 What is public health and public health governance?

According to the World Health Organization (WHO), health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.<sup>1</sup> Public health is the science and art of improving the health of communities through organized efforts. Accordingly, public health strategies are targeted at populations rather than individuals.<sup>2</sup> The primary objectives of public health are: 1) surveillance, prevention, treatment, and reduction of disease and other physical and mental conditions; 2) promotion of healthy behaviors; and 3) prolongation of life. The conditions for the public's health are broad, encompassing informational, environmental, socio-economic, political, and legal determinants.<sup>3</sup>

Public health governance consists of the means by which society collectively seeks to ensure the conditions under which the population can live with the highest attainable standard of health and well-being. Governance is primarily within the domain of national and local governments which work to preserve the public's health through health systems and – increasingly – by incorporating health goals across all other public sectors. This reflects the understanding that health cuts across numerous aspects of government policy and that effective public health governance requires a “health in all policies” approach.

In addition to governments, major stakeholders that influence public health include: the private sector (particularly private health providers as well as pharmaceutical and biotechnology industries); private and public employers (conditions of work, occupational health); academia (biomedical research); donors and technical assistance providers; the media; and civil society (including non-governmental organizations providing health services).<sup>4</sup> Given the role of law, regulation, and policy in public health governance, there is also a growing recognition of the significant contributions that lawyers and rule of law experts make to the public health agenda.

### I.2 What are the threats to public health?

The world's population faces numerous communicable and non-communicable health hazards, including enduring diseases (e.g., HIV/AIDS, tuberculosis, and malaria); emerging or resurgent infections (e.g., West Nile Virus, severe acute respiratory syndrome, influenza, and bacterial pneumonias); sexual and reproductive health risks (e.g., sexually transmitted infections and maternal mortality); child mortality; chronic diseases; foodborne and waterborne illnesses; and mental health disorders. If a disease occurs in excess of what would normally be expected in a defined community, geographical area, or season, it is considered an outbreak which may reach a level of an epidemic or a pandemic.<sup>5</sup> Disease outbreaks tend to cause severe social, economic, and political stress in affected communities. Advanced response planning and preparedness are critical in helping to mitigate their impact.

Historically, attention of public health experts has been directed to controlling transmissible diseases, improving the environment, and providing safe drinking water.<sup>6</sup> Today, threats to public health are understood to be more complex and intertwined. Major stresses include:

- Biological and physiological factors.

- Environmental hazards, such as natural and man-made disasters; air, water, and food contamination; and exposure to toxins and radiation.
- Individual risk behaviors, such as smoking, substance abuse, unprotected sex, a high-calorie diet, and sedentary lifestyle.
- Risk factors exogenous to the individual, including physical, social, economic, policy, and legal determinants of health.

Because these biological, social, and environmental factors continuously interact to determine health, an effective public health practice must utilize a broad set of interventions,<sup>7</sup> involve a diverse cross-section of stakeholders, and pay due attention to the most affected populations.

### **1.3 Global health and development**

Public health is a highly complex matter that requires a broad holistic, multidisciplinary, and multisectoral approach based on two premises:

- Health is central to human development. On the one hand, securing a certain level of health-related development is a prerequisite for the overall sustainable development of a country. On the other hand, broader development strategies, including rule of law programming, can have significant impacts on the health of affected populations.
- The ability of people to enjoy an adequate level of health is a key development goal in itself.

Health-related issues are prominent in the current UN Millennium Development Goals (MDGs) framework; three out of eight goals directly refer to health conditions. They include: reducing child mortality (goal no. 4); improving maternal health (goal no. 5); and combating HIV/AIDS, malaria & other diseases (goal no. 6). MDGs are also inter-dependent: all MDGs influence health and health influences all MDGs.<sup>8</sup>

The promulgation in 2005 of the revised International Health Regulations (IHR) was a recent milestone in global health. Binding on most countries, including all WHO member states, the IHRs are designed to foster international cooperation to address global health threats, particularly those that have the potential to rapidly spread through expanding travel and trade. The IHRs outline the obligations of States to report certain disease outbreaks and public health events to WHO and to strengthen their existing capacities for public health surveillance and response.<sup>9</sup>

## **2. What is the relevant legal framework?**

### **2.1 The right to health**

Public health and human rights law are synergistic, each being fundamentally concerned with advancing human wellbeing. A rights-based approach to health is widely recognized as essential to achieving global health goals. It entails using the international human rights framework to improve public health outcomes in an equitable manner. In this context, the links between public health and the rule of law are most evident.

International law guarantees every person the right to the highest attainable standard of physical and mental health (“right to health”), which, according to the UN Committee on Economic, Social and Cultural Rights (UNCESCR), is conducive to living a life in dignity and indispensable for the exercise of

other human rights.<sup>10</sup> The right to health was first recognized in the Constitution of WHO and the Universal Declaration of Human Rights (UDHR), and was strongly articulated in the International Covenant on Economic, Social, and Cultural Rights (ICESCR). It has subsequently been guaranteed under numerous international instruments.<sup>11</sup>

The ICESCR sets out the following steps that must be taken by States to achieve the full realization of this right:

- Provision for the reduction of the stillbirth-rate and of infant mortality, and for the healthy development of the child.
- Improvement of all aspects of environmental and industrial hygiene.
- Prevention, treatment, and control of epidemic, endemic, occupational, and other diseases.
- Creation of conditions which would guarantee medical service and attention for all in the event of sickness.

The ICESCR also requires States to ensure the right of everyone to safe and healthy conditions of work.<sup>12</sup>

The UN High Commissioner for Human Rights and WHO emphasize that the right to health is relevant to all States because every State has ratified at least one international human rights treaty recognizing the right to health. The right to health or the right to health care is also embedded in over 100 national constitutions.<sup>13</sup>

### 2.1.1 Key elements of the right to health

The right to health is not the same as the right to be healthy. Rather, the right to health entails the right to enjoyment of a variety of goods, services, facilities, and conditions necessary for its fulfillment. The right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition; housing; access to safe and potable water and adequate sanitation; safe and healthy working conditions; and a healthy environment.<sup>14</sup>

The right to health contains both freedoms and entitlements. Freedoms encompass the right to control one's health and body and the right to be free from interference, such as non-consensual medical treatment and experimentation. Entitlements include the right to a system of health protection which provides everyone with equal opportunity to enjoy the highest attainable standard of health.<sup>15</sup>

The right to health contains the following interrelated and essential elements:

- **Availability:** Functioning public health and health-care facilities, goods (including essential medicines), services, and programs have to be available in sufficient quantity. Services and programs should be offered by trained medical and professional personnel receiving domestically competitive salaries.
- **Accessibility:** Health facilities, goods, and services have to be accessible to everyone without discrimination. The accessibility component has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility (affordability), and information accessibility.
- **Acceptability:** All health facilities, goods, and services must be compliant with medical ethics, culturally appropriate, sensitive to gender and life-cycle requirements, and designed to respect confidentiality and improve the health status of those concerned.

- **Quality:** Health facilities, goods, and services must be scientifically and medically appropriate and of good quality. This requires, among other things, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.<sup>16</sup>

### What are a State's obligations in respect of the right to health?

International human rights instruments place the primary responsibility for the progressive realization of the right to health on States. States must ensure the satisfaction of, at the very least, the minimum essential level of the right to health to the maximum of available resources. Consequently, a difficult financial situation and underdevelopment do not absolve them from the obligation to take steps to fulfill the core content of the right to health which takes immediate effect. These steps must be deliberate, concrete, and targeted towards the full realization of the right to health. The core content of the right to health that should be secured for all includes: 1) essential primary care; 2) essential medicines; 3) equitable distribution of all health facilities, goods, and services; and 4) nondiscriminatory access to health facilities, goods, and services, especially for vulnerable populations.<sup>17</sup>

To fulfil their health-related obligations States must:

- **Respect:** States must respect every person's right to health by refraining from interfering, directly or indirectly, with the enjoyment of the right. Among others, States may not: deny or limit equal access for all persons to health services; impose or enforce discriminatory practices as a State policy; prohibit or impede traditional healing practices and medicines; market unsafe drugs; apply coercive medical treatments (with some exceptions which must be strictly defined); censor, withhold, or intentionally misrepresent health-related information; prevent people's participation in health-related matters; unlawfully pollute air, water, and soil; or limit access to health services as a punitive measure.
- **Protect:** States must protect the right to health by taking steps to ensure that third parties do not interfere with, or negatively affect, its enjoyment. Among others, States must: ensure equal access to private health services; control the marketing of medical commodities; ensure that health professionals meet appropriate standards of education, skill, and ethical conduct; and protect society from harmful traditional practices and gender-based violence.
- **Fulfill:** States are required to facilitate, provide, and promote the right to health, i.e., take positive actions that create, maintain, and restore the health of the population. This may include appropriate legislative, administrative, budgetary, judicial, promotional, and other measures, such as: adoption and implementation of a national health policy and national policy on occupational safety and health services; provision of sexual and reproductive health services as well as immunization programs against infectious diseases; promotion of medical research and health education; and dissemination of appropriate health-related information.<sup>18</sup>

Violations of the right to health occur when the right is not respected, protected, or fulfilled. The right to health would be violated if, for example, a State failed to implement universal infection control precautions in healthcare settings or if a State denied access to health services to a particular social group. Actions or omissions in the context of the right to health can lead to State accountability even when they have been committed by third parties, such as private health clinics and pharmaceutical companies.



### 3. Core principles

The following principles are essential to the design and implementation of all rule of law programs, and should be equally observed when designing and implementing public health programs.

#### 3.1 Active participation of affected communities

The concept of community participation in public health has been supported by the international community for a number of decades. It has evolved to include a variety of methods and approaches, all of which are based on three assumptions:

- health programs are likely to be more effective if solutions to health problems are tailored to a particular community's social structures and sociocultural context;
- communities have a wide range of assets which can have positive impact on public health outcomes, including localized knowledge about health needs and disparities; planning and management capacities; communications experience; ability to leverage local resources; and collaborative spirit;<sup>19</sup> and
- health systems should be less technocratic and more people-centered, i.e., focused on the holistic well-being of individuals, communities, and populations rather than just on disease.

Some of the most important concepts of community participation in public health programming include community-based participatory research as well as community organizing, mobilization, and empowerment. These processes aim at increasing intended program beneficiaries' ability to act as agents of change rather than passive recipients, i.e., to identify and analyze their own health problems and subsequently design, implement, monitor, and evaluate programs that address self-defined needs.<sup>20</sup> One of the most influential examples of community participation in public health is the principle of GIPA, i.e., Greater Involvement of People Living with HIV and key populations in HIV-related programs.<sup>21</sup>

The role of technical assistance providers is therefore to act as facilitators, and to support community members to become actively involved in decisions and activities affecting their own health. This requires information sharing, collaboration, and ultimately giving full responsibility for, and ownership of, health matters to the community. Such participation can ultimately lead to more equitable, sustainable, and cost-effective health programs, in addition to respecting communities' decision-making autonomy.<sup>22</sup>

The 1978 Declaration of Alma Ata International Conference on Primary Health Care affirmed that people have the right and duty to participate individually and collectively in the planning and implementation of their health care, and that successful delivery of health care requires maximum community participation in the planning, organization, operation and control of related programs.

DECLARATION OF ALMA-ATA, arts. III, VII(5).

#### 3.2 Substantive gender equality

Gender equality and female empowerment are universally recognized as core development objectives, fundamental for the realization of human rights, including the right to health.<sup>23</sup> Gender-related inequalities and power imbalances clearly impose large costs on the health and well-being of men, women, and children, and affect their ability to improve their lives.<sup>24</sup> Harmful gender norms not only contribute to excess female mortality and morbidity across their lifecycle; they also affect men and boys by encouraging risk-taking and by limiting their health-seeking behavior.<sup>25</sup> According to UNCESCR, a

gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women.<sup>26</sup> Consequently, disaggregation of health and socio-economic data according to gender and pursuing effective, evidence-based investments in substantive gender equality are critical to remedying inequalities in health and achieving better results in the health sector.<sup>27</sup>

Gender integration or mainstreaming involves:

- **Gender analysis:** the process of identifying and assessing the implications for women and men of any planned action to ensure that development benefits and resources are effectively and equitably targeted to both women and men.<sup>28</sup>
- **Gender strategy:** reducing gender gaps through reorganization and improvement of mainstream policies and resource allocations with the ultimate goal of achieving gender equality.<sup>29</sup>

Integrating a gender perspective is essential to any health-oriented development program, from strategy and program design, through research and implementation, to monitoring and evaluation. While gender mainstreaming is crucial, it cannot replace specific policies and programs which address health issues that are unique to women, men, transgender, and intersex people.<sup>30</sup>

### 3.3 Equality and non-discrimination

The principle of non-discrimination, which requires that all people in similar situations be treated equally, is a cornerstone of international human rights law. In the context of the right to health, it should be ensured that:

- all people have equal access to health care, to the underlying determinants of health, and to the benefits of health development programs;
- health policies and development programs do not have any negative impacts on vulnerable populations; and
- no one is discriminated against based on his or her health status.

#### Equality in access to health care

Under international law, States are obliged to ensure the right of access to health facilities, goods, services, and underlying determinants of health, as well as to means and entitlements for their procurement, on a non-discriminatory basis, especially for vulnerable or marginalized groups. Discrimination, which can lead to the impairment of the equal enjoyment or exercise of the right to health, is prohibited on any ground, including race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, sexual orientation, physical or mental disability, gender identity, health status, and civil, political, social or other status. Both direct and indirect discrimination, which can result, for example, from inappropriate health resource allocation, is prohibited, even in times of severe financial constraints.<sup>31</sup>

#### Non-discrimination on the basis of health status

Certain medical conditions, such as physical or mental disability and HIV/AIDS, are often described as diseases of social exclusion or stigmatized diseases. People living with these conditions face stigmatization, ostracism, marginalization, vilification, and pervasive human rights abuses such as discrimination, harassment, violence, torture, and inhuman or degrading treatment and punishment. Some of these violations are entrenched in national laws and policies. The only binding international instrument that explicitly prohibits all discrimination, including denial of reasonable accommodation, on the basis of a specific medical condition is the Convention on the Rights of Persons with Disabilities.<sup>32</sup> However, all major international human rights treaties have been interpreted to include health status

(including HIV status) as a ground on which discrimination is prohibited.<sup>33</sup> States must also adopt measures to address widespread stigmatization of people on the basis of their health status. Direct and indirect discrimination of any kind by both public and private entities must be eliminated formally and substantially.<sup>34</sup>

The protection of public health is often cited by States to restrict human rights on the basis of health status. UNCESCR warned States against instituting discriminatory restrictions in the interests of public health.<sup>35</sup> Further, individuals should be able to challenge every restriction of the right to non-discrimination and obtain a remedy against its abusive application. The burden of justifying the restriction lies with the State.<sup>36</sup>

### 3.4 Attention to vulnerable populations, the principle of equity, and universal access

The impacts of various threats to public health are felt disproportionately by certain populations within each State. These vulnerable groups not only experience unique health risks and needs; they also face substantial barriers to access to essential health services and goods, often as a result of economic, socio-cultural, political, and legal inequalities. While evaluations of vulnerability should always be specific to the local context, the most vulnerable groups in the context of public health often include:

- Indigent and homeless people;
- Rural populations;
- Women and girls;
- Children and youth;<sup>37</sup>
- Elderly people;
- People with diseases of social exclusion;
- Mobile populations<sup>38</sup> and people in humanitarian settings;<sup>39</sup>
- Marginalized populations;<sup>40</sup> and
- People under state custody.<sup>41</sup>

Special efforts are required to identify, prioritize, and give preference to vulnerable populations in order to overcome barriers to their access to health services and ultimately bring them to a position of equality with others. These efforts are often referred to as reasonable accommodations or positive measures, i.e., necessary and appropriate modifications or adjustments that enable marginalized groups to enjoy the right to health on an equal basis with others.<sup>42</sup>

Reasonable accommodations are required to fulfill the principle of equity or fairness, which calls for like cases to be treated alike and different cases differently. Ideally, these accommodations should take the form of legal entitlements aimed at ensuring that vulnerable populations gain sustainable access to comprehensive health services.

The 2005 WHO Resolution on Sustainable Health Financing, Universal Coverage and Social Health Insurance urges States to endorse three principles, which are consistent with WHO's concepts of health for all and primary health care:

- **Universal access:** ensuring access to key preventive, curative, and rehabilitative health interventions for all at an affordable cost.
- **Financial-risk protection:** ensuring that the cost of care does not put people at risk of financial catastrophe.
- **Equity in financing:** ensuring that households contribute to the health system on the basis of ability to pay.<sup>43</sup>

### **3.4.1 Indigent and homeless people.**

Extreme poverty, which affects approximately 1.2 billion people around the globe, creates ill health because it exposes people to greater personal and environmental health risks, associated with a lack of access to decent housing, clean water, adequate food, and sanitation, as well as evidence-based health information and health care. According to WHO, the lower an individual's socioeconomic position the worse their health.<sup>44</sup>

Among the indigent, homeless people, especially those living in rural areas, are at particularly high risk of a broad range of acute and chronic illnesses. In addition, many homeless people suffer from diseases which preceded and in some circumstances caused homelessness. The most common of these are mental illnesses and AIDS.<sup>45</sup>

### **3.4.2 Rural populations.**

Rural populations tend to experience significant health disparities, including weaker health status and higher mortality rates. For example, it is estimated that rural children under five in developing regions are about 1.4 times more likely to die than their urban counterparts.<sup>46</sup> There are also large gaps between rural and urban women in terms of their access to antenatal care and skilled birth attendants. In addition, significant evidence indicates that rural populations are less likely to receive HIV treatment than urban populations.<sup>47</sup> These disparities are caused, to a large extent, by limited access to quality health services, including preventative care, resulting from poor infrastructure, a smaller health care workforce, a greater prevalence of social and cultural barriers and violence against women, lower education levels, and limited opportunities to reduce poverty and hunger.<sup>48</sup>

### **3.4.3 Women and girls.**

Across the globe, women and girls confront manifold violations of their human rights, which significantly impact their ability to protect themselves from, and cope with, ill health. Over half a million women and girls die each year from largely preventable and treatable complications of pregnancy or childbirth. About one in seven women of reproductive age have an unmet need for effective contraceptives, and the burden of sexually transmitted infections is more than five times that of men. Women and girls are also disproportionately affected by HIV and AIDS, which constitutes one of the leading causes of death and disease among women between 15 and 49 years of age.

Among the most prevalent factors that create, increase, or reinforce women's vulnerability to ill health include biological and physiological factors as well as inequality, stereotyped gender norms, violence against women, and harmful traditional practices, such as early marriage, female genital mutilation, and preferential feeding and care of male children.

### **3.4.4 Children and youth.**

In 2011, nearly 6.9 million children under the age of five died even though about two-thirds of child deaths can be prevented through practical, low-cost interventions delivered by health workers in clinics and in communities. Studies indicate that a child born in a developing country is over 13 times more likely to die within the first five years of life than a child born in a developed country.<sup>49</sup> The main health risks for young children include pneumonia, diarrhea, malaria, measles, and malnutrition; the latter is estimated to contribute to more than one third of all child deaths.<sup>50</sup> Young people, particularly adolescents, also face many challenges to their health because of their relative vulnerability and pressure

from society, including peers, to adopt risky health behaviours.<sup>51</sup> In addition, at least 20% of young people experience some form of mental illness, which is often associated with a high rate of suicide in this age group.<sup>52</sup> Young people are also at high risk of acquiring HIV. These challenges are exacerbated by the fact that adolescents undergo rapid physical, cognitive, and social changes, including sexual and reproductive maturation.<sup>53</sup>

### **3.4.5 Elderly people.**

The functional capacity of an individual's biological system naturally declines in late adulthood. Therefore, aging individuals face increased risk of having at least one chronic, non-communicable disease. In addition, an estimated 25-30% of people aged 85 or older have some degree of cognitive decline, and many elderly people are at high risk of maltreatment at home or in care facilities.

Presently, the world's population is rapidly aging. According to WHO, between 2000 and 2050, the proportion of people over 60 years old will double from about 11% to 22%, reaching 2 billion in 2050. The majority of older people will be living in developing countries. These demographic trends present both opportunities and challenges, including increased need to promote health, prevent chronic diseases, as well as enhance geriatric primary and long-term health care.<sup>54</sup>

### **3.4.6 Marginalized groups.**

Marginalized groups are exposed to a myriad of physical, social, economic, and policy factors which significantly impact their health and well-being. All of them face some level of discrimination in health care settings. In addition, some of them, for example people who use drugs, sex workers, and LGBTI people, are often targeted with highly repressive laws, policies, and law enforcement practices which contribute to their risk environment in the context of public health. These include laws and policies that govern sex work, sexual acts between people of the same sex, drug use, access to harm reduction measures (e.g., clean needles and syringes, bleach, and condoms), possession of drugs and drug paraphernalia, drug treatment, and coercive and compulsory health measures, such as forced HIV, STI and drug testing and treatment as well as segregation in health care facilities, prisons, and detention facilities.

### **3.4.7 People with diseases of social exclusion.**

People who suffer from conditions that cause or exacerbate their marginalization, such as HIV/AIDS and physical or mental disability, tend to have greater unmet healthcare needs in addition to increased susceptibility to secondary conditions, co-morbid conditions, age-related conditions, engaging in health risk behaviors, and higher rates of premature death. People with disabilities and people living with HIV encounter many barriers in access to adequate and timely health services, ranging from discrimination in health care settings, physical barriers, and highly prohibitive costs of medical services.<sup>55</sup>

### **3.4.8 Mobile populations and people in humanitarian settings.**

Migration and human displacement are global phenomena. Mobile populations are estimated to include 1 billion people, including 214 million international migrants, 740 million internal migrants, and an unknown number of mobile people who are undocumented.<sup>56</sup> The scale, speed, diversity, and disparity of modern migration flows have turned the health of mobile populations and health matters associated with human displacement into a significant global public health challenge. In addition to an increased risk for the spread of infectious diseases, conditions surrounding the migration process can increase

vulnerability to ill health, particularly in the case of undocumented migrants and those who migrate involuntarily, including refugees, asylum seekers, internally displaced people, and victims of trafficking in persons.

There is also a compelling concern that the health needs of mobile populations are usually not adequately met, both in transit and at destination. In fact, many States explicitly restrict access to health care and social protection for certain migrant groups. Aside from structural barriers, mobile populations encounter a range of factors, situations, and behaviors that exacerbate their vulnerability to ill-health. These include poverty, instability, deplorable living and working conditions, food insecurity, lack of access to clean water and medicine, cultural and linguistic barriers, xenophobia, marginalization, exploitation, violence, unfamiliarity with the new community, and absence or disruption of treatment for chronic conditions.<sup>57</sup> People impacted by humanitarian crises face similar and often more acute risks, regardless of whether they are displaced or not.

### **3.4.9 People under state custody.**

People under state custody tend to have poorer health than the general population.<sup>58</sup> First, they frequently come from sections of society with high levels of social exclusion and poor health.<sup>59</sup> Second, detention often entails not only a reduced opportunity to recover from an existing illness or substance abuse, but also a highly elevated risk of contracting a serious, life-threatening illness, such as tuberculosis, HIV/AIDS, hepatitis C, drug dependency, mental health problem, and malnutrition.<sup>60</sup> Third, most penitentiary and detention facilities of the world are unhealthy and lack adequate nutrition, sanitation facilities, and health services. Finally, infection-spreading activities, such as unprotected sex, drug use, and tattooing are common, while harm reduction measures are rarely available.

## **3.5 Transparency and public integrity**

Given the diversity, nature, and scale of health care demand and procurement, the health sector is exceedingly prone to corruption.<sup>61</sup> The burden of corruption in health care can have great social costs and can be the difference between life and death, particularly for the poor and vulnerable populations:<sup>62</sup> it deprives people of access to health care, leads to wrong treatments being administered, facilitates counterfeiting of drugs, and undermines the efforts of the donor community in providing vital aid for global public health.<sup>63</sup>

Corrupt practices take many forms, including: absenteeism (not showing up for work yet claiming a salary); theft of drugs and medical supplies; demand for informal payments for services and medications;<sup>64</sup> performance of unnecessary medical procedures; bribes and kickbacks (e.g., from private suppliers to win government procurement contracts or register drugs without requisite information); procurement and insurance fraud; unethical drug promotion; diversion of supplies in the distribution system for private gains; embezzlement of health care funds; and interest politics in the health budget formulation process.<sup>65</sup> In some countries, up to 80 per cent of non-salary health funds never reach local facilities and an average of 5.59 per cent of annual global health spending (which includes donor financing) is lost to fraud, error, leakages, pilferage, and accounting irregularities.<sup>66</sup>

Some of the primary reasons for corruption in the health care system include: weak or non-existent rules, regulations, monitoring, and enforcement; poor management and supervision of health workers; improperly designed procurement procedures; over-regulation; lack of accountability; low salaries among health professionals limited offers of services coupled with high demand; and information imbalances between providers and patients and suppliers and providers.<sup>67</sup> Evidence shows that corruption leads to rising costs and massive stock-outs<sup>68</sup> of essential drugs, vaccines, contraceptives, and

medical supplies; biased distribution of health care facilities and goods; sale of substandard or counterfeit medicines; and unavailability of adequate and affordable health services.<sup>69</sup>

Integrating anti-corruption interventions in public health programs and policies in order to increase transparency and integrity at all levels of health governance is critical for achieving better public health outcomes.<sup>70</sup>

### **3.6 Accountability**

Within the human rights framework, the notion of accountability pertains to the accountability of duty-bearers towards rights-holders. It demands that the state be answerable for the fulfillment of its human rights obligations. Accountability should similarly be expected of program proponents whose actions have an impact on the rights of individuals or communities.

In the context of programs to promote good public health, accountability to right-holders includes the monitoring of implementers' conduct, performance, and outcomes which can be facilitated in two ways. First, the right of affected communities to accessible information is essential. Information must be made available so that rights-holders can recognize and understand the implications of programs. Second, there should be provision for rights-holders to participate in the design and implementation of the monitoring and evaluation plan for programs. By assuming this role, rights-holders are not only made aware of the objectives of programs, but are motivated to collect and reflect on data to ensure that programs are meeting their expectations, that they do not undermine the right to health, and that they include the interests of disadvantaged individuals, communities, and populations. Accountability for the fulfillment of the right to health is also concerned with ensuring that health systems are improving and that the right to health is being progressively realized for all.<sup>71</sup>

## 4. Entry points for programming

Rule of law strategies that promote good governance, increase access to justice, reduce corruption, and protect fundamental human rights are extremely important to public health. The rule of law and public health intersect most concretely and most commonly in the context of reproductive rights, HIV-related discrimination, and tobacco control. Legal strategies employed across the world to address these global public health concerns have proved that the rule of law can be a powerful tool in ensuring positive public health outcomes.

Good laws, regulatory frameworks, and justice institutions can broaden people's access to health care services and commodities, including essential medicines; improve the quality of health services; enhance social support for people affected by chronic conditions; help to protect people from discrimination on the basis of their health status; and ensure States' accountability for discharging its obligations related to the right to health.

### 4.1 Developing a national strategy

The international community has recognized that an effective health system – encompassing both health care and the underlying determinants of health – is an essential element of a healthy and equitable society. Designing a comprehensive national health system strategy is therefore a fundamental obligation of States, stemming from the right to health.<sup>72</sup>

According to WHO, a health system is a core social and political institution, which “consists of all organizations, people and actions whose primary intent is to promote, restore or maintain health.” It includes “six essential building blocks:” 1) health services; 2) health workforce; 3) health information system; 4) access to essential medical products, vaccines, and technologies; 5) health financing system; and 6) leadership, governance, and stewardship. The last building block is indispensable in ensuring the existence of an adequate strategic policy framework.<sup>73</sup>

A national health strategy should consist of an effective legal and regulatory framework that operationalizes the right to health and creates an enabling environment for people to realize their health-related freedoms and entitlements. It should:

- clarify the rights and obligations of rights-holders and duty bearers;
- identify clear priorities for resource allocation;
- create oversight, accountability, monitoring, and evaluation mechanisms; and
- demonstrate multisectoral cooperation.

A process of developing, implementing, monitoring, evaluating, and updating the national health strategy must be fully participatory and transparent, and must reflect the needs, priorities, and socio-cultural sensitivities of vulnerable populations and communities affected by health disparities. Assessments should not rely on broad samples that may discriminate against vulnerable groups. For example, focus group discussions should be organized at times and locations that are convenient for vulnerable and marginalized groups. Other research methods (e.g., surveys and questionnaires) should be tailored to the literacy level of study participants.



### 4.1.1 Entry points

- Preparing a health situational analysis informed by suitably disaggregated data. Such an assessment should include the characteristics of the population (e.g. birth, death, and fertility rates, gender, age); health needs of the population (e.g. incidence and prevalence by disease); and the capacity of available public and private health services.
- Conducting operational or implementation research into the social, economic, cultural, political, policy, legal, and institutional issues that support or obstruct the right to health. The research should:
  - measure the impact of specific legal norms, policies, programs, and conditions present in the country on people's access to health services and on the effectiveness of public health interventions;
  - determine whether the State has committed appropriate resources and taken concrete steps to ensure the right to health in an equitable manner.
- Subjecting a health plan to a human rights impact assessment to ensure its consistency with the State's national and international human rights obligations. Among other impacts, the assessment should evaluate implications of specific measures (such as fees for public health services) on the rights of the poor and vulnerable populations.
- Strengthening measures that modify or eliminate discriminatory customary norms and practices that cause ill health or create barriers to effective access to health services and commodities. These include, for example, harmful traditional practices, violence against women, and repressive law enforcement practices targeting marginalized populations, such as sex workers, people who use drugs, or LGBTI people. This is particularly important if these practices hinder people's access to pharmacies and health or harm reduction facilities.

## 4.2 Legislation and law reform

Realization of the right to health is not feasible without a clear, equitable, and human rights-oriented legal framework. International standard-setting documents urge States to explicitly recognize the right to health in national law in order to establish long-term binding obligations, and give rise to legal accountability, for state and non-state actors with responsibilities for health systems. Preferably, the right to health should be recognized in the national constitution which is the strongest form of legal protection and a tool of empowerment.

In addition to a general formulation, States are encouraged to adopt more detailed laws and policies clarifying duties, freedoms, and entitlements stemming from the right to health. For example, they should regulate such issues as blood safety, access to essential medicines, non-discrimination in health care settings, and quality of medical care. States should adopt a framework health law which will serve as an umbrella beneath which institutions and systems can be built or strengthened, and relevant subsidiary legislation implemented.

A framework health law should:<sup>74</sup>

- establish mechanisms for monitoring the implementation of national health strategies and plans of action;
- list targets to be achieved and the time-frame for their achievement;
- provide for means by which right to health benchmarks could be achieved;

- demonstrate the intended collaboration with civil society, the private sector, and international organizations; and
- outline institutional responsibility for the implementation of the right to health along with possible recourse procedures.

At a minimum, national legislation should include the following key provisions related to public health:

- Definition of the right to health listing freedoms, entitlements, and corresponding obligations for public authorities.
- Prohibition of discrimination on the basis of health status.
- Prohibition of discrimination in health care settings.
- Special measures for vulnerable populations which are construed as legal entitlements rather than just policy options.
- Interventions aimed at overcoming barriers in access to health care services.
- Measures to address corruption in the health sector.
- Institutional and legal apparatus for implementation, including mechanisms for civil society participation.
- Accountability mechanisms, including remedies for violations of the right to health.
- Monitoring and evaluation mechanisms to assess progress.

It is also imperative that States:

- Accede to and duly implement all relevant international health treaties, commitments, and agreements, for example WHO Framework Convention on Tobacco Control and UN Convention on the Rights of Persons with Disabilities.<sup>75</sup>
- Reform their health-financing systems with a view to achieving universal coverage.
- Repeal or amend regressive and punitive laws, e.g., those around HIV transmission, sex work, drug use, or homosexuality, that create access barriers and block effective responses to certain conditions and diseases, such as HIV/AIDS or sexually transmitted infections.
- Establish necessary regulatory frameworks, e.g., awareness raising and e-Health initiatives, aimed at improving people's access to health-related information.
- Introduce flexibilities in trade law, intellectual property law, patent law, tax law, and government procurement law to intensify access to affordable and good-quality essential medicines, medical products, and technologies.<sup>76</sup>

#### **4.2.1 Entry points**

- Assessment of health-related laws and policies for compatibility with the right to health and other human rights.
- Inclusive consultations on the adequacy and direction of the legal and regulatory framework.
- Technical assistance on constitutional and legislative reform, particularly with respect to enhancing the protections of the vulnerable populations and creating a more enabling environment for the progressive realization of the right to health.

### Decriminalization of Possession and Use of Illicit Drugs in Portugal

In 2001, Portugal adopted a law decriminalizing the possession and use of illicit drugs in small amounts. Decriminalization was combined with a public health reorientation that directed additional resources towards treatment and harm reduction. Although small increases in illicit drug use among adults have been documented since the new legislation went into effect, an overwhelmingly positive impact of the legal reform is widely acknowledged. For example, data shows an increase in the number of people on methadone and buprenorphine treatment for drug dependency; a reduction in opiate-related deaths and infectious diseases; and lower HIV infection rates among people who use drugs. The Portuguese legislative model is now considered by many experts as “the new flagship of harm reduction” and “a public health policy founded on values such as humanism, pragmatism, and participation.”

HARM REDUCTION INTERNATIONAL, THE GLOBAL STATE OF HARM REDUCTION: TOWARDS AN INTEGRATED RESPONSE 158 – 161(2012); GLOBAL COMMISSION ON HIV AND THE LAW, HIV AND THE LAW: RISKS, RIGHTS HEALTH 34 (2012); ABA ROLI, HIV/AIDS LEGAL ASSESSMENT TOOL: ASSESSMENT METHODOLOGY MANUAL 106-110 (2012)

## **4.3 Access to justice and legal empowerment**

Under international law, States are obliged to adopt laws and other measures that are necessary to establish legal protection of, and give effect to, human rights. Consequently, if a State fails to discharge its obligations related to the right to health, affected individuals should have the capacity to exercise their right to an effective legal remedy, regardless of whether the violation was committed by a person acting in an official capacity.

A key challenge is that those most vulnerable to having their right to health violated encounter multiple barriers to access to justice, including lack of legal awareness; unavailability or unaffordability of legal aid; and obstructed access to forums administering justice because of cost, time, language barriers, distance, procedural complexity, privacy and security concerns, and fear of intimidation, harassment, and stigmatization during legal proceedings. Enhancing access to justice for people who experience violations of their right to health is therefore crucial. One way to achieve this is to build the capacity of organizations that facilitate access to legal redress.

### **4.3.1 Entry points**

- Civic education and legal literacy programs that raise public awareness and teach practical skills about the operation of the justice system and about freedoms, entitlements, and responsibilities derived from the right to health. The format of information disseminated through these programs must be appropriate to the mobility, resources, linguistics, and literacy of the target groups. Examples may include: public service announcements through radio, television, internet, mobile phones, and print media (newspapers, magazines, and know-your-rights brochures); online social networking initiatives; community meetings, workshops, and trainings; street law programs in local schools; peer and door-to-door education; and various forms of art (posters, cartoons, street theater, and traditional or popular music productions). Rights-based messaging about public health has the potential to empower populations to demand that the State fulfill its health-oriented obligations.

- Working with community, religious, and traditional leaders, especially when health disparities in a particular community are linked to local customs and traditional practices, such as sexual widow cleansing, female genital mutilation, or early marriage.
- Capacity-building for civil society organizations regarding the advancement the right to health, including advocacy for legal and policy reform and community-driven initiatives, such as social advocate programs.<sup>77</sup>
- Mobilizing the legal profession to advance the right to health. This may involve:
  - training law students, attorneys, and paralegals on health law in the context of human rights and developing related curricula for law schools and continuing legal education programs;
  - partnering with local bar associations and private law firms to create a cadre of legal professionals who specialize in health-related case work and are willing to provide *pro bono* assistance to vulnerable populations;
  - establishing and/or building the capacity of legal clinics, CSOs, and legal aid systems to handle health-related cases and address health disparities in local communities;
  - creating medical-legal partnerships and multifaceted referral systems;
  - forming mobile teams of legal and health professionals who can address the needs of isolated and hard-to-reach populations; and
  - pursuing strategic public interest litigation.<sup>78</sup>

All services should target vulnerable groups, and should include measures to meet their needs, such as fee waivers for indigent applicants.

#### Holistic Services for Survivors of Sexual and Gender-Based Violence in the Democratic Republic of Congo (DRC)

Since 2008, the ABA Rule of Law Initiative (ABA ROLI) has been providing holistic services to survivors of sexual and gender-based violence (SGBV) in the DRC where rape is commonly used as a weapon of war. Through mobile legal aid clinics, as well as programs for travelling lawyers and paralegals, ABA ROLI offers legal, quasi-legal, and psychological assistance to SGBV survivors, enabling them to know their rights and initiate legal cases against the perpetrators. To increase the availability of psychological assistance for SGBV survivors, ABA ROLI has helped establish an association responsible for training a cadre of mental health professionals, and has promoted peer learning and advocacy for greater access to mental health services, particularly in remote, rural areas. In addition, ABA ROLI has partnered with HEAL Africa Hospital to provide medical support to SGBV survivors. The organization has also implemented Ushindi and CASE (Care, Access, Safety, and Empowerment) programs with International Medical Corps and Inter-Church Medical Alliance. These programs integrate medical, legal, psychosocial, and economic support services for SGBV survivors in South Kivu and train local health care professionals and community leaders on the legal aspects of SGBV cases, including forensic and evidentiary issues. Finally, ABA ROLI has distributed sexual assault evidence collection kits for local health care providers in rural areas to preserve evidence of rape and aid police and prosecutors in investigating and mounting successful cases.

ABA ROLI, Democratic Republic of Congo Programs, at: [www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/africa/democratic\\_republic\\_congo.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo.html); International Medical Corps, Ushindi Program, at: <http://www.imaworldhealth.org/capacity-building-training/ushindi.html>; see also Tessa Khan & Jim Wormington, *Mobile Courts in the DRC: Lessons from Development for International Criminal Justice*, OXFORD TRANSITIONAL JUSTICE RESEARCH WORKING PAPER SERIES (2011)

## 4.4 Accountability mechanisms

Enjoyment of the right to health requires the availability of mechanisms for obtaining effective and timely remedies to rights violations. Accountability mechanisms can take many different forms, including: periodical audits, institutional health sector reviews, health resource and expenditure trackers, and medical surveillance mechanisms; citizen oversight of resources and results; and complaint, grievance, or disciplinary procedures. They may involve health commissioners and local health councils; patients' committees and public hearings; media and civil society organizations; expert review groups; national quasi-judicial or judicial bodies; and international human rights bodies.<sup>79</sup> For groups who are unable or unwilling to access formal legal systems, informal justice systems and alternative dispute resolution processes can be a key source of protection provided that they administer justice in a way that is consistent with human rights principles and that they do not reinforce harmful traditional norms or practices. In addition, national human rights institutions, such as ombudspersons and human rights commissions, can be utilized, for example when patterns of gross and systematic rights violations are uncovered and when national justice institutions fail to provide adequate protection.

A growing body of case law illustrates that justice institutions play a powerful role in upholding and promoting the right to health, and that their decisions can lead to structural changes that ensure better health outcomes not only for the individual claimants but also for entire communities.

### 4.4.1 Entry points

- Creating and supporting a range of effective, transparent, accessible, and independent monitoring, evaluation, and accountability mechanisms, such as multisectoral coordinating entities that monitor particular aspects of public health (e.g., national AIDS commissions or national commissions for women's and children's health) and compacts, i.e., formal agreements between governments and partners that require reporting on partner commitments and disbursements, and externally funded expenditures on health.<sup>80</sup>
- Building the capacity of the justice system to investigate and adjudicate cases involving a violation of the right to health and to assess compensation for damages suffered as a result of violation. This might involve:
  - training and developing handbooks for judges, court personnel, and law enforcement officers;<sup>81</sup>
  - enhancing public trust in the judiciary and making justice forums more user-friendly for claimants – for example, through judicial community outreach concerning court services and procedures, adequate signage in courts, flexible case scheduling with expanded or non-traditional hours, provision of translation and child care services, proper accommodations for individuals with disabilities, simplified filing procedures, fee waivers, and volunteer-in-service programs, which rely on local community members to serve as initial contacts for the public entering the courthouses;<sup>82</sup>
  - ensuring timely or accelerated enforcement of remedies, especially if the remedy is intended to improve the health of the plaintiff; and
  - amending codes of professional conduct for justice system actors to include prohibition of discrimination on the basis of health status.
- Trial monitoring to ensure that forums administering justice uphold the right to a fair trial, i.e., treat all parties equally, protect the privacy and security of claimants, do not engage in unlawful practices such as harassment, discrimination, or stigmatization, and provide timely dispute

resolution, particularly in cases that involve terminally ill parties or plaintiffs seeking access to life-saving treatment.

#### Maternal Death Audits in India

In 2004, in response to India's high rate of maternal mortality, the Center for Reproductive Rights in collaboration with the Human Rights Law Network launched a global litigation campaign to legally ensure a woman's right to survive pregnancy and childbirth. The campaign resulted in many groundbreaking decisions, including a landmark judgment of the Delhi High Court in the case *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others* which was historic in emphasizing the importance of conducting maternal audits as a matter of policy (audits produce data that can be used to make evidence-based recommendations to improve obstetric service delivery). Following the judgment, in 2010, India's Union Health and Family Welfare Minister, who is responsible for health policy, issued a directive for an audit of maternal deaths to be rolled out at all community and facility levels across the country. Although the directive has not been adequately implemented in all Indian states, some progress is evident. For example, the Tamil Nadu's Maternal Death Audit reporting system is widely cited as a model accountability intervention in the context of maternal health. Tamil Nadu is also known for extending secondary health services in the rural areas through the establishment of 80 Comprehensive Emergency Obstetrics and Neonatal Centers and 385 ambulances. As a result, rural women in the state of Tamil Nadu can now reach a comprehensive emergency obstetric and neonatal health facility within a half an hour from their homes.

THE WORLD BANK, MATERNAL DEATH AUDIT AS A TOOL REDUCING MATERNAL MORTALITY (2011); CENTER FOR REPRODUCTIVE RIGHTS & HUMAN RIGHTS LAW NETWORK, MATERNAL MORTALITY IN INDIA: USING INTERNATIONAL AND CONSTITUTIONAL LAW TO PROMOTE ACCOUNTABILITY AND CHANGE 12-13, 25, 54 (2008); CENTER FOR REPRODUCTIVE RIGHTS & HUMAN RIGHTS LAW NETWORK, MATERNAL MORTALITY IN INDIA: USING INTERNATIONAL AND CONSTITUTIONAL LAW TO PROMOTE ACCOUNTABILITY AND CHANGE – 2011 UPDATE 10, 13, 18, 23 (2011); *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Others*, W.P. (C) (No. 8853/2008); The World Bank, India: Improving Child and Maternal Health in Tamil Nadu, at: <http://go.worldbank.org/OSIPPIHSW0>.

## 4.5 Anti-corruption programs

Strengthening the capacity of national institutions to address corruption in the health sector, to promote good governance in the pharmaceutical sector, and to combat trafficking in counterfeit medical products is critical in building strong and equitable public health systems. Related programs should be aligned with the UN Convention against Corruption and should reflect the principles of the rule of law, community participation, proper management of public affairs and public property, integrity, transparency, and accountability.

### 4.5.1 Entry points

- Developing and implementing diagnostic tools for evaluating the performance of a health system and assessing the health sector's vulnerability to corruption. Such assessment may be broad or focus on certain key areas, such as drug selection, promotion, and procurement.
- Conducting external audits or anti-corruption participatory monitoring of health facilities.
- Technical assistance in developing and strengthening a legal and regulatory regime to address corruption in the health sector. The legal regime should criminalize bribery and other corrupt

activities, and include: effective preventive anti-corruption policies targeting both the public and private health sectors; measures to enhance accounting and auditing standards in the health sector; procedures on access to public information; and effective, proportionate, and dissuasive civil, administrative or criminal penalties.

- Providing support to, and increasing public participation in, the health budget formulation and monitoring processes.
- Enhancing the role of the government in the regulation of the pharmaceutical market and establishing appropriate systems of health procurement, based on transparency, competition, and objective criteria in decision-making. Particular attention should be paid to drug registration, market authorization, and selection to eliminate openings in the market for counterfeit and substandard medicines. This can be done, for example, by promoting the use of essential drug lists, setting up a well-resourced drug agency, creating effective quality assurance systems, ensuring pricing transparency in procurement (e.g., through publishing all procurement tender bids and checking prices against international benchmarks), controlling the marketing of medical equipment and medicines, conducting ongoing market surveillance of drugs, adequately managing the supply chain, and running a public awareness campaign to help educate customers about how to identify counterfeit drugs.
- Strengthening the capacity of national institutions to prevent, investigate, prosecute, and adjudicate cases of corruption in the health sector.
- Promoting ethical behavior, better service delivery, and accountability within the healthcare workforce through adequate licensing procedures, professional codes of conduct, job performance monitoring, incentive structures (e.g., performance bonuses and merit-based promotion policies), and, where appropriate, disciplinary sanctions.

#### Stop Stock-outs Campaign in Uganda

Launched in 2009, Stop Stock-outs Campaign was a regional initiative in six African countries aimed at increasing national budgetary allocations for the purchase of essential medicines; ensuring efficiency and transparency in the procurement, supply, and distribution of these medicines; and ending massive stock-outs of essential medicines in public health facilities. In Uganda, the campaign was carried out by a consortium of five CSOs and consisted of capacity-building workshops for CSOs and the media; public awareness raising; 'Pill Check Week' initiative; and government lobbying. The 'Pill Check Week' initiative involved public oversight of selected health facilities focused on spot-checking of essential medicine stock-outs. After visiting pharmacies covered by the study, activists used mobile text messaging (SMS) to report their results. The data was processed by FrontlineSMS (free open source software) and uploaded to a website called Ushahidi ('testimony' in Swahili). The website showed specific locations of up to 250 stock-outs of 10 key essential medicines. The campaign is credited with influencing the government's decisions to centralize the procurement and distribution of drugs under National Medical Stores, reduce bureaucracy in the procurement process, and establish a Monitoring Unit to investigate and curb theft of medicines in public hospitals. As a result of the Monitoring Unit's actions, several health providers and officials were arrested and as many as 80 cases of corruption were brought to courts across the country.

See UNDP, *Fighting Corruption in the Health Sector: Methods, Tools, and Good Practices* 57-60 (2011); Stop Stock-outs! at: <http://stopstockouts.org>; Medicines Transparency Alliance (MeTA), *Case Study: Stop Stock-outs Campaign* (2010); FrontlineSMS, *Mapping Medicine Availability via SMS*, at: <http://www.frontlinesms.com/2009/07/01/mapping-medicine-availability-via-sms>

## 5. Case Study: End Forced Sterilization Campaign in Namibia

### Background

The End Forced Sterilization Campaign is a participatory rule of law project launched in 2008 by a coalition of Namibian CSOs in response to alleged cases of forced and coerced sterilization of HIV-positive women in Namibia's public hospitals.<sup>83</sup> Information about the practice emerged at the Young Women's Dialogue<sup>84</sup> in Windhoek, Namibia, when three participants revealed that they had been sterilized without informed consent. All three women had been enrolled in the prevention of vertical (mother to child) transmission of HIV (PMTCT) program and underwent arbitrary sterilization while delivering their children via caesarian section. Fact-finding research and investigation<sup>85</sup> revealed that significant numbers of indigent Namibian women living with HIV had been coerced or forced into sterilization in three state hospitals: in Katutura and Central State Hospitals in Windhoek and in Oshakati State Hospital in the northern part of the country.<sup>86</sup> The women came from disadvantaged communities and had limited English proficiency.<sup>87</sup> In most cases, the lack of informed consent was evident because the patients were neither presented with complete, accurate, and appropriately conveyed information about the procedure nor given an opportunity to opt out.<sup>88</sup>

Unlawful sterilization, rooted in deep prejudice and stigma, has led to negative physical and mental health outcomes for women who underwent the procedure. In many cases, it also damaged their self-esteem and affected relationships with their spouses, partners, and families. In addition, the women have endured increased levels of ostracism and social isolation in their communities because an inability to bear children is viewed as a significant detriment in Namibia's patriarchal society. The negative impact of the practice was exacerbated by the fact that most of the patients neither received counseling nor postoperative instructions. Moreover, many of the women have limited access to health services because of poverty, significant distance to the nearest health care provider, and HIV-related discrimination in health care settings. The practice also jeopardizes the health care system as a whole because fear of discrimination and mistreatment discourages women from seeking sexual and reproductive health services and can undermine the government's gains in the response to HIV/AIDS.

### Legal Context

Experts stress that there is no medical reason for sterilizing women on the basis of their HIV status and that sterilization is not justifiable as a public health measure.<sup>89</sup> Moreover, coerced and forced sterilization constitutes violence against women and an egregious violation of fundamental human rights under the Namibian Constitution and the country's international human rights obligations.<sup>90</sup> In addition to the right to health, these rights and freedoms include the right to life; the rights to liberty, dignity, and integrity of the person (including the right to physical integrity and sexual and reproductive self-determination); the rights to found a family and to determine the number and spacing of children; the right to equality; freedom from discrimination and inhuman and degrading treatment; the right to information; and the right to non-interference in one's privacy. These rights are also articulated in Namibia's National Policy on HIV/AIDS, which contains well-crafted provisions related to human rights and non-discrimination, and recognizes that the low status of women in the society is one of the root causes of Namibia's high HIV prevalence. The policy explicitly states that women and girls have the right to have control over, and to decide responsibly, free of coercion, discrimination and violence, on matters related to their sexuality and reproductive health, and that they shall have equal access to appropriate, sound HIV-related information and women-friendly sexual and reproductive health services.<sup>91</sup> Lastly, the principles of equality, non-discrimination, and enabling the legal and policy environment for public health interventions are incorporated into the National Strategic Framework for HIV and AIDS Response in Namibia 2010/11-2015/16.



Namibia's legal and policy framework does not delineate an adequate procedure for ascertaining informed consent in health care settings. The amended Abortion and Sterilization Act of 1975 does not articulate the principle of informed consent. The Ethical Guidelines for Health Professionals require medical providers to obtain informed consent on an on-going basis but the process is not specified.<sup>92</sup>

### Objectives and Components of the Campaign

The End Forced Sterilization Campaign has sought to condemn and break the silence on forced and coerced sterilization of women living with HIV in Namibia's state hospitals; stop the practice of sterilization without a patient's full and informed consent; seek redress for affected women; hold the government accountable for its failure to respect, protect, and fulfill the right to health; challenge health-related policies and practices that have a disparate impact on marginalized populations; and raise public awareness about human rights in the context of public health.

The campaign consists of the following elements: legal aid and strategic public interest litigation; social justice advocacy and lobbying; community lawyering and mobilization; public awareness raising; and outreach to tribal leaders, the media, and international human rights bodies. The project is implemented by a coalition of CSOs led by NWHN which works in close partnership with the AIDS Law Unit of the Legal Assistance Centre (LAC), Women's Solidarity Namibia, AIDS Rights Alliance of Southern Africa (ARASA), Women's Leadership Center, and Sister Namibia. The coalition has received significant assistance from the Southern Africa Litigation Centre (SALC) based in Johannesburg, South Africa. The campaign is funded primarily by the Open Society Initiative for Southern Africa (OSISA) and constitutes an integral component of the Stop Torture in Health Care project undertaken by the Open Society Foundations (OSF).

### Legal Interventions

Immediately after the cases of alleged forced and coerced sterilization had emerged, NWHN and its partners commenced a legal advocacy campaign to exert pressure on the Namibian government, in particular on the Ministry of Health and Social Services (MOHSS), to immediately stop the practice and issue official circulars proscribing sterilization without informed consent to all hospitals in Namibia. When it became clear that lobbying alone would not bear concrete results, the coalition made a decision to proceed with strategic public interest litigation. After reviewing multiple claims, LAC selected the 15 strongest cases for potential litigation. Ultimately, due to limited financial and human resources, only three test cases against MOHSS were lodged in Namibia's High Court in Windhoek.<sup>93</sup> The plaintiffs received free legal advice and representation from LAC. In addition, the coalition provided the litigants with resources necessary to secure evidence and participate in court hearings.

The plaintiffs alleged that they were victims of unlawful sterilization performed without informed consent by medical providers who were employed by the defendant and acted as agents of the government. The claims in all three cases were based on violation of common law (wrongful and intentional assault, breach of a duty of care, and harm-causing negligence) and infringement of rights guaranteed and protected under the Namibian Constitution, particularly the rights to life, liberty, and human dignity; the right to found a family; and the right to equality and non-discrimination.<sup>94</sup> In addition, the plaintiffs asserted that they had been sterilized because they were HIV positive and that this constituted impermissible discrimination on the grounds of their health status. Each plaintiff sought an award of monetary compensation in the amount of NAD 1 million (approximately USD 116,959)<sup>95</sup> for having been sterilized without informed consent. In addition, each litigant claimed NAD 200,000 (approximately USD 23,391) for the violation of the right to equality and non-discrimination.

In 2009, the government attorneys challenged the lawsuits on the grounds of statute of limitations. The High Court ruled in favor of the plaintiffs on this point, which allowed the cases to be heard on the merits.<sup>96</sup>

In his ruling delivered on July 30, 2012, the High Court judge held the government liable for its failure to obtain informed consent before performing sterilization procedures on the plaintiffs. However, the judge found no convincing evidence that the women had been sterilized because they were HIV positive. Therefore, the discrimination claim was dismissed.<sup>97</sup> Several months later, the government lodged an appeal to the Supreme Court against the ruling in one of the three cases. As a result, the process of determining damages has stalled. In the meantime, NWHN and its partners asked the Office of the Ombudsman in Namibia to press MOHSS to implement the judgment.

Despite the delay and the loss on the HIV discrimination claim, experts view the judgment, which constitutes a formal precedent, as a legal victory and an excellent interpretation of the principle of informed consent.

### Community Mobilization and Public Advocacy

The public advocacy campaign was officially launched in October 2009 with a press conference held at LAC. At the event, the coalition unveiled a public petition demanding that the government of Namibia, in particular MOHSS, immediately stop sterilizing women without their full and informed consent. The briefing was accompanied by an official press release.

In the meantime, coalition partners selected three spokespersons for the campaign, created an advocacy messaging stating “Non-Negotiable, My Body, My Womb, My Rights,” produced advocacy materials (posters, banners, and T-shirts), and engaged in intense community mobilization activities which galvanized several hundred concerned citizens to speak out against unlawful sterilization. The coalition organized community mobilization and legal awareness raising workshops involving 16 women’s support groups in Katutura (Windhoek’s township) and conducted outreach at local high schools, universities, and youth cultural centers. In addition, numerous women’s organizations were asked to mobilize their networks. Finally, the coalition organized three public marches and silent protests in public hospitals attracting more than 300 demonstrators. The protests coincided with court hearings. Symbolically, activists marched from two public hospitals in which coerced sterilizations had been performed to the High Court. This grassroots effort collected more than 1,000 signatures on the public petition, which was later formally presented to MOHSS along with a report documenting 40 cases of unlawful sterilization.

The End Forced Sterilization Campaign has also included a strong media outreach component. The coalition partners wrote several press releases, ensured media presence in the courtroom and during public demonstrations, and held a well-attended sensitizing training for journalists during the trial. This resulted in excellent coverage of the judgment in local, national, and international media. The issue has also frequently appeared in social media, in a popular weekly radio show “Women Call Now” run by one of the campaign’s spokespersons, and in Sister Namibia’s quarterly magazine and Women’s Voices radio show. Establishing a productive relationship with the media was crucial in the coalition’s effort to send clear, powerful, and evidence-based messages to the society aimed at breaking HIV-related stigma, reducing misconceptions about HIV transmission and child-bearing, promoting cultural acceptance of reproductive rights, changing societal attitudes toward women living with HIV, and gaining increased public support for the campaign.

Additional components of the End Forced Sterilization Campaign included:

- Meetings with two tribal leaders in the northern part of Namibia; and
- Human rights advocacy at the international level, involving outreach to international human rights and global health bodies, including UN Special Rapporteur on Extreme Poverty and Human Rights, UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, WHO, African Commission on Human and Peoples' Rights, and Global Commission on HIV and the Law. The issue was also presented at various international forums, including the XIX International AIDS Conference in Washington, DC.

### Impact, Challenges, and Unintended Consequences

The End Forced Sterilization Campaign encountered several challenges, setbacks, and unintended negative consequences, which to a large extent were caused by scarce financial and human resources and a lack of well-developed strategy. The CSOs involved in the coalition neither signed a teaming agreement nor otherwise formalized their partnership. They did not engage in formal strategic planning which led to several strategic gaps. For example, the coalition did not have a clear vision for how to collect funds and how to engage a cross-section of stakeholders in the campaign. As a result, only a few women's rights organizations joined the project and the campaign failed to involve religious groups and the private sector. Reportedly, many civil society groups viewed unlawful sterilization as an isolated problem affecting only women living with HIV. Both the process of collecting evidence and the legal proceedings were lengthy, which caused frustration and plummeting morale in the community, particularly among affected women who did not have an opportunity to present their cases in court. Because of the lack of funding, 12 cases which were initially selected for litigation have yet to be filed.

Further, the coalition was not well-prepared to deal with a diverse group of plaintiffs or to manage different expectations arising from the campaign. Multiple layers of discrimination and psychological suffering endured by the sterilized women, and the non-confrontational nature of Namibian culture, were also cited as major challenges. The campaign organizers and the plaintiffs also faced backlash from some sections of the community who believed that HIV-positive women should not have children because they are "unworthy of reproduction." They argued that doctors did them a favor by sterilizing them, and that suing the government and/or health care providers was unthinkable and inappropriate. In addition, rumors spread that NWHN intended to discourage all women from undergoing sterilization as a form of contraception.

The most disconcerting setback was the government's failure to take a strong and public stand against unlawful sterilization and to take concrete measures to actively prevent the practice from occurring. In addition, the government's unsympathetic attitudes toward the plaintiffs and the appeal lodged in the Supreme Court sent a wrong message to the society and exacerbated stigma against women living with HIV in health care settings. An unfortunate chilling effect that accompanied the campaign negatively affected women's access to reproductive and sexual health services because many providers began refusing to perform consensual sterilization procedures, fearing negative publicity and potential lawsuits. Reportedly, several doctors demanded that patients obtain sworn affidavits from the police stating that they consented to sterilization.

Despite the challenges and setbacks, there is a general sense among coalition partners and affected women that the campaign has been successful in achieving its short- and long-term objectives, including strengthening the right to health at the collective level and ensuring positive public health outcomes in Namibia. First, the legal victory in a national court put the government and health care providers on notice that they can be found legally liable for negligence, for performing unnecessary and arbitrary

medical procedures, and for otherwise violating patients' rights. Second, the campaign has increased the public's legal awareness in the context of public health and empowered subjugated communities to assert the right to health through legal means. Reportedly, while no new cases of forced or coerced sterilization were documented after the judgment was issued, several women came forward with claims related to other medical issues, such as maternal and newborn health. Third, the campaign has boosted the women's rights movement and created a much needed space for public dialogue about sexual and reproductive rights as well as HIV-related stigma and discrimination, despite the plaintiffs' loss on this score. Lastly, the campaign and the partial success in court gave the affected women a sense of validation, broke the fear of holding the government accountable for infringing the right to health, and illustrated the critical role of social justice advocacy and community participation in asserting fundamental rights and freedoms. It is likely that the legal proceedings would have lasted considerably longer and might have not been successful without strong public pressure. In sum, the campaign has had positive impact not only in terms of a legal victory, but also in a social sense: it created a solid foundation for transformative accountability of the government vis-à-vis the right to health and set a stage for a positive structural change in Namibia's public health system.

## 6. Public Health and Rule of Law: Resources

### Public Health Governance: General

Belinda Bennett et al., *Health Governance: Law, Regulation and Policy*, PUBLIC HEALTH 207 (2009).

GAVIN MOONEY, *THE HEALTH OF NATIONS* (Zed Books 2012).

LLOYD F. NOVICK ET AL., *PUBLIC HEALTH ADMINISTRATION: PRINCIPLES FOR POPULATION-BASED MANAGEMENT* (2nd ed., Jones & Bartlett Publishers 2008).

Jennifer Prah Ruger, *Normative Foundations of Global Health Law*, GEORGETOWN LAW JOURNAL 423-443 (2008).

WHO, *EVERYBODY BUSINESS: STRENGTHENING HEALTH SYSTEMS TO IMPROVE HEALTH OUTCOMES - WHO'S FRAMEWORK FOR ACTION* (2007).

WHO, *MONITORING THE BUILDING BLOCKS OF HEALTH SYSTEMS: A HANDBOOK OF INDICATORS AND THEIR MEASUREMENT STRATEGIES* (2010).

### Right to Health: General

UNCESCR, GENERAL COMMENT NO. 14: THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH para. 1 (*adopted* August 11, 2000, U.N. Doc. E/C.12/2000/4)

UN, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH (Jan. 31, 2008, U.N. Doc. HRC/7/11).

UN HIGH COMMISSIONER FOR HUMAN RIGHTS & WHO, *THE RIGHT TO HEALTH: FACT SHEET NO. 31* (2008).

### Women and Children

PADMINI MURTHY & CLYDE LANFORD SMITH, *WOMEN'S GLOBAL HEALTH AND HUMAN RIGHTS* (Jones & Bartlett Publishers 2010).

UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, GENERAL RECOMMENDATION NO. 24: ARTICLE 12 OF THE CONVENTION (WOMEN AND HEALTH) (*adopted* May 2, 1999, U.N. Doc. A/54/38/Rev.1).

UN COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL COMMENT NO. 3: HIV/AIDS AND THE RIGHTS OF THE CHILD (*adopted* March 17, 2003, U.N. Doc. CRC/GC/2003/3).

UN COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL COMMENT NO. 4: ADOLESCENT HEALTH (*adopted* July 1, 2003, U.N. Doc. CRC/GC/2003/4).

Public Integrity, Accountability, and Access to Justice

Kristina Gryboski et al., *Working with the Community for Improved Health*, HEALTH BULLETIN 2 (Population Reference Bureau 2006).

Luisa Cabal et al., *What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?*, HEALTH AND HUMAN RIGHTS (2003).

Oscar A. Cabrera & Alejandro Madrazo, *Human Rights as a Tool for Tobacco Control in Latin America*, SALUD PÚBLICA DE MÉXICO (2010).

Siri Gloppen, *Litigation as a Strategy to Hold Governments Accountable for Implementing the Rights to Health*, HEALTH AND HUMAN RIGHTS (2008).

Alicia Ely Yamin, *Toward Transformative Accountability : Applying a Rights-Based Approach to Fulfill Maternal Health Obligations*, INTERNATIONAL JOURNAL OF HUMAN RIGHTS 95-231 (2010).

Mikey Rosato et al., *Community Participation: Lessons for Maternal, Newborn, and Child Health*, THE LANCET (2008).

Rose Cuison Villazor, *Community Lawyering: an Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, NEW YORK UNIVERSITY JOURNAL OF LEGISLATION AND PUBLIC POLICY (2005).

UNDP, FIGHTING CORRUPTION IN THE HEALTH SECTOR: METHODS, TOOLS, AND GOOD PRACTICES (2011)

WHO, STRATEGIC ALLIANCES: THE ROLE OF CIVIL SOCIETY IN HEALTH (2001).

Harm Reduction

HARM REDUCTION INTERNATIONAL, THE GLOBAL STATE OF HARM REDUCTION: TOWARDS AN INTEGRATED RESPONSE 158 – 161 (2012)

Specific Medical Conditions: Legal Empowerment and Access to JusticeHIV/AIDS

ABA AIDS COORDINATING COMMITTEE, HIV & AIDS BENCHBOOK (2<sup>nd</sup> ed., Joshua Bachrach & Cynthia Knox eds., 2012).

ABA ROLI, HIV/AIDS LEGAL ASSESSMENT TOOL: ASSESSMENT METHODOLOGY MANUAL (2012).

GLOBAL COMMISSION ON HIV AND THE LAW, HIV AND THE LAW: RISKS, RIGHTS HEALTH (2012).

INTER-PARLIAMENTARY UNION, UNAIDS & UNDP, TAKING ACTION AGAINST HIV AND AIDS: A HANDBOOK FOR PARLIAMENTARIANS (2007).

UNAIDS, HIV IN AFRICA IN THE 21<sup>ST</sup> CENTURY: BRIEF FOR THE JUDICIARY (2009).

UNAIDS, REDUCING HIV STIGMA AND DISCRIMINATION: A CRITICAL PART OF NATIONAL AIDS PROGRAMS (2007).

UNAIDS, POLICY BRIEF ON THE GREATER INVOLVEMENT OF PEOPLE LIVING WITH HIV (2007).

UNAIDS, UNAIDS ACTION FRAMEWORK: ADDRESSING WOMEN, GIRLS, GENDER EQUALITY AND HIV (2009).

UNAIDS, HIV-RELATED STIGMA, DISCRIMINATION AND HUMAN RIGHTS VIOLATIONS: CASE STUDIES OF SUCCESSFUL PROGRAMS (2005).

UNAIDS & INTERNATIONAL DEVELOPMENT LAW ORGANIZATION, TOOLKIT ON HIV-RELATED LEGAL SERVICES (2009).

UNAIDS & CANADIAN HIV/AIDS LEGAL NETWORK, COURTING RIGHTS: CASE STUDIES IN LITIGATING THE HUMAN RIGHTS OF PEOPLE LIVING WITH HIV (2006).

UNITED NATIONS DEVELOPMENT FUND FOR WOMEN [UNIFEM], TURNING THE TIDE: CEDAW AND THE GENDER DIMENSIONS OF THE HIV/AIDS PANDEMIC (2001).

UN HIGH COMMISSIONER FOR HUMAN RIGHTS & UNAIDS, INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS (2006).

WORLD BANK, THE GENDER AND LEGAL DIMENSIONS OF HIV/AIDS: WOMEN'S ACCESS TO JUSTICE AND THE ROLE OF THE JUDICIARY (2005).

WORLD BANK, LEGAL ASPECTS OF HIV/AIDS: A GUIDE FOR POLICY AND LAW REFORM (2007).

### Sexual and Reproductive Health

CENTER FOR REPRODUCTIVE RIGHTS & HUMAN RIGHTS LAW NETWORK, MATERNAL MORTALITY IN INDIA: USING INTERNATIONAL AND CONSTITUTIONAL LAW TO PROMOTE ACCOUNTABILITY AND CHANGE – 2011 UPDATE (2011)

NWHN, IHRC & NORTHEASTERN UNIVERSITY LAW SCHOOL, AT THE HOSPITAL THERE ARE NO HUMAN RIGHTS: REPRODUCTIVE AND SEXUAL RIGHTS VIOLATIONS OF WOMEN LIVING WITH HIV IN NAMIBIA (2012).

OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, TECHNICAL GUIDANCE ON THE APPLICATION OF A HUMAN RIGHTS-BASED APPROACH TO THE IMPLEMENTATION OF POLICIES AND PROGRAMS TO REDUCE PREVENTABLE MATERNAL MORBIDITY AND MORTALITY (July 2, 2012, U.N. Doc. A/HRC/21/22).

SOCIO-LEGAL INFORMATION CENTRE, HUMAN RIGHTS LAW NETWORK, UP-SCALING THE LEGAL INITIATIVE IN INDIA FOR REDUCING MATERNAL MORTALITY AND ADVANCING YOUNG PEOPLE'S REPRODUCTIVE HEALTH AND RIGHTS (2011).

### Drug Dependence

UNODC, FROM COERCION TO COHESION: TREATING DRUG DEPENDENCE THROUGH HEALTH CARE, NOT PUNISHMENT (2010).

<sup>1</sup> CONSTITUTION OF THE WORLD HEALTH ORGANIZATION preamble (*adopted* July 22, 1946 by International Health Conference, Official Records of WHO, no. 2, p. 100, *entered into force* April 7, 1948).

<sup>2</sup> Lloyd F. Novick, Cynthia B. Morrow, *Defining Public Health: Historical and Contemporary Developments*, in PUBLIC HEALTH ADMINISTRATION: PRINCIPLES FOR POPULATION-BASED MANAGEMENT 1-2 (2nd ed., Jones & Bartlett Publishers 2008) [hereinafter *Defining Public Health*].

<sup>3</sup> Belinda Bennett et al., *Health Governance: Law, Regulation and Policy*, PUBLIC HEALTH 207 (2009) [hereafter *Health Governance: Law, Regulation and Policy*].

<sup>4</sup> *Health Governance: Law, Regulation and Policy*, *supra* note 3, at 207.

<sup>5</sup> **Epidemic** is the occurrence in a community or region of cases of an illness specific health-related behavior, or other health-related events clearly in excess of normal expectancy. **Pandemic** is an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people. See, e.g., WHO, Disease Outbreaks, at: [http://www.who.int/topics/disease\\_outbreaks/en](http://www.who.int/topics/disease_outbreaks/en).

<sup>6</sup> *Defining Public Health*, *supra* note 2, at 5.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> MDGs are supposed to be achieved by 2015. As the target date approaches, the global community has engaged in a debate about the post-2015 development agenda. This “global conversation” is led by the United Nations Development Group and consists of more than 50 national consultations and a series of global thematic consultations, including a global consultation on health. See WHO, Health in the Post-2015 UN Development Agenda, at: [http://www.who.int/topics/millennium\\_development\\_goals/post2015/en/index.html](http://www.who.int/topics/millennium_development_goals/post2015/en/index.html).

<sup>9</sup> WHO, What are the International Health Regulations, at: <http://www.who.int/features/qa/39/en/index.html>.

<sup>10</sup> UNCESCR, GENERAL COMMENT NO. 14: THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH para. 1 (*adopted* August 11, 2000, U.N. Doc. E/C.12/2000/4) [hereinafter UNCESCR, GENERAL COMMENT NO. 14 ON THE RIGHT TO HEALTH].

<sup>11</sup> The Declaration of Alma-Ata describes health as the “most important world-wide social goal” requiring action by actors outside the health sector. See DECLARATION OF ALMA-ATA art. I (*adopted* September 12, 1978 by the International Conference on Primary Health Care) [hereinafter DECLARATION OF ALMA-ATA]. The right to health is also guaranteed under the International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women [CEDAW], Convention on the Rights of the Child [CRC], International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention on the Rights of Persons with Disabilities, and in the following regional human rights treaties: African (Banjul) Charter on Human and Peoples' Rights, the Additional Protocol to American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and the European Social Charter.

<sup>12</sup> ICESCR arts. 7, 12.

<sup>13</sup> UN HIGH COMMISSIONER FOR HUMAN RIGHTS & WHO, THE RIGHT TO HEALTH: FACT SHEET NO. 31 at 1, 10 (2008).

<sup>14</sup> UNCESCR, GENERAL COMMENT NO. 14 ON THE RIGHT TO HEALTH, *supra* note 10, para. 4.

<sup>15</sup> *Id.* para. 8.

<sup>16</sup> *Id.* para. 14.

<sup>17</sup> *Id.* paras. 30-31, 43.

<sup>18</sup> *Id.* paras. 33-37, 50-52.

<sup>19</sup> KRISTINA GRYSOSKI ET AL., WORKING WITH THE COMMUNITY FOR IMPROVED HEALTH 2 (Health Bulletin 2, Population Reference Bureau, 2006) [hereinafter WORKING WITH THE COMMUNITY FOR IMPROVED HEALTH]; UN, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH para. 41 (Jan. 31, 2008, U.N. Doc. A/HRC/7/11).

<sup>20</sup> See, e.g., Rose Cuison Villazor, *Community Lawyering: an Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, NEW YORK UNIVERSITY JOURNAL OF LEGISLATION AND PUBLIC POLICY (2005).

<sup>21</sup> The international community endorsed the principle of GIPA in the UN Declaration of Commitment on HIV/AIDS, which states that the full involvement and participation of people living with HIV/AIDS, young people and civil society actors is crucial to the development of effective responses to the HIV/AIDS epidemic. See DECLARATION OF COMMITMENT ON HIV/AIDS para. 33 (*adopted* June 27, 2001 by U.N. G.A. Res. S-26/2); see also ABA ROLI, HIV/AIDS LEGAL ASSESSMENT TOOL: ASSESSMENT METHODOLOGY MANUAL 44 (2012).

<sup>22</sup> WORKING WITH THE COMMUNITY FOR IMPROVED HEALTH, *supra* note 19, at 2-3; Mikey Rosato et al., *Community Participation: Lessons for Maternal, Newborn, and Child Health*, THE LANCET (2008); see also Meredith Minkler et al.,



*Community-Based Participatory Research: Implications for Public Health Funding*, AMERICAN JOURNAL OF PUBLIC HEALTH (2003).

<sup>23</sup> USAID, GENDER EQUALITY AND FEMALE EMPOWERMENT POLICY 3 (2012) [hereinafter GENDER EQUALITY AND FEMALE EMPOWERMENT POLICY].

<sup>24</sup> World Bank

<sup>25</sup> GENDER EQUALITY AND FEMALE EMPOWERMENT POLICY, *supra* note 23, at 7.

<sup>26</sup> UNCESCR, GENERAL COMMENT NO. 14 ON THE RIGHT TO HEALTH, *supra* note 10, paras. 9, 20.

<sup>27</sup> GENDER EQUALITY AND FEMALE EMPOWERMENT POLICY, *supra* note 23, at iv; UNCESCR, GENERAL COMMENT NO. 14 ON THE RIGHT TO HEALTH, *supra* note 10, para. 20.

<sup>28</sup> UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP], INTRODUCTORY GENDER ANALYSIS & GENDER PLANNING TRAINING MODULE FOR UNDP STAFF 9 (2001).

<sup>29</sup> UNDP, EMPOWERED AND EQUAL: GENDER EQUALITY STRATEGY 2008-2011 (2008); Council of Europe, Gender Mainstreaming, at: [http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/index\\_en.asp](http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/index_en.asp).

<sup>30</sup> See, e.g., WHO, GENDER ANALYSIS IN HEALTH (2002). Integrating a gender perspective in health-related policies and programs with an aim of promoting better health outcomes for both women and men is strongly recommended by the UNCESCR. See UNCESCR, GENERAL COMMENT NO. 14 ON THE RIGHT TO HEALTH, *supra* note 10, paras. 20, 52.

<sup>31</sup> UNCESCR, GENERAL COMMENT NO. 14 ON THE RIGHT TO HEALTH, *supra* note 10, paras. 12 (b), 18-19, 22, 26, 30, 50, 57.

<sup>32</sup> **Persons with disabilities** are defined as people who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. See [CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES](#) arts. 1, 2 (adopted December 13, 2006 by U.N. G.A. Res. 61/106, entered into force May 3, 2008, U.N. Doc. A/61/611).

<sup>33</sup> ABA ROLI, HIV/AIDS LEGAL ASSESSMENT TOOL: ASSESSMENT METHODOLOGY MANUAL 27-28 (2012).

<sup>34</sup> UNCESCR, GENERAL COMMENT NO. 20: NON-DISCRIMINATION IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS para. 8 (adopted July 2, 2009, U.N. Doc. E/C.12/GC/20) [hereinafter UNCESCR, GENERAL COMMENT NO. 20 ON NON-DISCRIMINATION].

<sup>35</sup> UNCESCR, GENERAL COMMENT NO. 20 ON NON-DISCRIMINATION, *supra* note 34, para. 33.

<sup>36</sup> SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (adopted September 28, 1984 by the UN Economic and Social Council, U.N. Doc. E/CN.4/1984/4).

<sup>37</sup> A **child** is any person between 0 and 18 years of age; an **adolescent** is any person between 10 and 19 years of age; **youth** (young people) are people between 15 and 24 years of age.

<sup>38</sup> **Mobile populations** are people who move from one place to another temporarily, seasonally, or permanently for voluntary and non-voluntary reasons (migrants, refugees, internally displaced people, and key employment groups involving mobility, such as truck drivers, seafarers, transport and agricultural workers, itinerant workers, and mobile employees of large industries).

<sup>39</sup> **People in humanitarian settings** are people affected by humanitarian crises, including man-made and natural disasters, such as earthquake, flooding, civil conflict, and war.

<sup>40</sup> **Marginalized populations** are groups of people who suffer some form of social exclusion which results in discrimination in some or all aspects of their lives. In the context of public health, marginalized groups often include minorities (e.g., ethnic, national, or religious), people who belong to lower casts in societies that practice the caste system, sex workers, people who use drugs, and people who experience social exclusion because of their gender identity or sexual orientation, e.g., lesbian, gay, bisexual, and transgender (LGBT) people.

<sup>41</sup> **People under state custody** are people who are detained by state actors or under state authority, regardless of whether they have been formally arrested or convicted of a crime. This includes people in prisons, pretrial detention, and immigration detention.

<sup>42</sup> See, e.g., [CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES](#) art. 2 (adopted December 13, 2006 by U.N. G.A. Res. 61/106, entered into force May 3, 2008, U.N. Doc. A/61/611).

<sup>43</sup> RESOLUTION ON SUSTAINABLE HEALTH FINANCING, UNIVERSAL COVERAGE AND SOCIAL HEALTH INSURANCE (adopted May 25, 2005 by World Health Assembly, WHA58.33); see also Bart Jacobs et al., *Addressing Access Barriers to Health Services: an Analytical Framework for Selecting Appropriate Interventions in Low-Income Asian Countries*, HEALTH POLICY AND PLANNING 289 (2012).

---

<sup>44</sup> WHO, Poverty and Health, at: <http://www.who.int/hdp/poverty/en>; WHO, Poverty, at: <http://www.who.int/topics/poverty/en>.

<sup>45</sup> COMMITTEE ON HEALTH CARE FOR HOMELESS PEOPLE, INSTITUTE OF MEDICINE, HOMELESSNESS, HEALTH, AND HUMAN NEEDS 39-41 (National Academy Press 1988); see also HCH Clinicians' Network, *Hard to Reach: Rural Homelessness & Health Care*, HEALING HANDS (2001).

<sup>46</sup> UN Women Watch, Facts & Figures: Rural Women and the Millennium Development Goals, at: <http://www.un.org/womenwatch/feature/ruralwomen/facts-figures.html>.

<sup>47</sup> *Id.*

<sup>48</sup> NATIONAL ADVISORY COMMITTEE ON RURAL HEALTH AND HUMAN SERVICES, REDUCING HEALTH DISPARITIES IN RURAL AMERICA: KEY PROVISIONS IN THE AFFORDABLE CARE ACT POLICY BRIEF 1 (2011).

<sup>49</sup> UN DEPARTMENT OF PUBLIC INFORMATION, GOAL 4: REDUCE CHILD MORTALITY FACTSHEET (2008).

<sup>50</sup> UN DEPARTMENT OF PUBLIC INFORMATION, GOAL 4: REDUCE CHILD MORTALITY FACTSHEET (2010);

WHO, What are the Key Health Dangers for Children? at: <http://www.who.int/features/qa/13/en/index.html>; Every Beat Matters, About the Issue, at: <http://www.everybeatmatters.org/about>.

<sup>51</sup> UN COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL COMMENT NO. 4: ADOLESCENT HEALTH para. 2 (*adopted* July 1, 2003, U.N. Doc. CRC/GC/2003/4) [hereinafter UNCRC, GENERAL COMMENT NO. 4 ON ADOLESCENT HEALTH].

<sup>52</sup> UNCRC, GENERAL COMMENT NO. 4 ON ADOLESCENT HEALTH, *supra* note 51, para. 22; WHO, 10 Facts on Adolescent Health, at: [http://www.who.int/features/factfiles/adolescent\\_health/facts/en/index.html](http://www.who.int/features/factfiles/adolescent_health/facts/en/index.html).

<sup>53</sup> UNCRC, GENERAL COMMENT NO. 4 ON ADOLESCENT HEALTH, *supra* note 51, para. 2.

<sup>54</sup> WHO, Interesting Facts About Ageing, at: <http://www.who.int/ageing/about/facts/en/index.html>; WHO, About Ageing and Life Course, at: [http://www.who.int/ageing/about/ageing\\_life\\_course/en/index.html](http://www.who.int/ageing/about/ageing_life_course/en/index.html); WHO, Older People and Primary Health Care, at: [http://www.who.int/ageing/primary\\_health\\_care/en/index.html](http://www.who.int/ageing/primary_health_care/en/index.html); WHO & US DEPARTMENT OF HEALTH AND HUMAN SERVICES, GLOBAL HEALTH AND AGING 2-5 (2011).

<sup>55</sup> WHO, Disability and Health, at: <http://www.who.int/mediacentre/factsheets/fs352/en/index.html>.

<sup>56</sup> WHO & INTERNATIONAL ORGANIZATION FOR MIGRATION, HEALTH OF MIGRANTS – THE WAY FORWARD 3 (2010).

<sup>57</sup> *Id.* at 3, 9; Alice Ghent, Overcoming Migrants' Barriers to Health, BULLETIN OF THE WORLD HEALTH ORGANIZATION (2008); see also WHO, Migrant Health, at: [http://www.who.int/hac/techguidance/health\\_of\\_migrants/en/index.html](http://www.who.int/hac/techguidance/health_of_migrants/en/index.html).

<sup>58</sup> WHO, HEALTH IN PRISONS: A WHO GUIDE TO THE ESSENTIALS IN PRISON HEALTH 3, 10, 16 (2007) [hereinafter WHO, HEALTH IN PRISONS]; OPEN SOCIETY JUSTICE INITIATIVE, PRETRIAL DETENTION AND HEALTH: UNINTENDED CONSEQUENCES, DEADLY RESULTS 11 (2011). For example, prevalence of HIV infection in South African prisons was reported to be about 40% in 2006, which was double the level in the general population. See Abiola C. Senok & G. A. Botta, *Human Immunodeficiency Virus and Hepatitis Virus Infection in Correctional Institutions in Africa: Is This the Neglected Source of an Epidemic?*, JOURNAL OF MEDICAL MICROBIOLOGY 481-482 (2006). As of 2009, the Prisons Service in Zambia employed only 14 health care workers – including one physician – to serve its 15,300 prisoners. See HUMAN RIGHTS WATCH, UNJUST AND UNHEALTHY: HIV, TB, AND ABUSE IN ZAMBIAN PRISONS 5 (2010).

<sup>59</sup> WHO, HEALTH IN PRISONS, *supra* note 58, at 15-16.

<sup>60</sup> WHO, Prisons and Health, at: <http://www.euro.who.int/en/what-we-do/health-topics/health-determinants/prisons-and-health>.

<sup>61</sup> Taryn Vian, *Health Care*, in FIGHTING CORRUPTION IN DEVELOPING COUNTRIES: STRATEGIES AND ANALYSIS 43-44 (ed. Bertram I. Spector, Kumarian Press, Inc. 2005) [hereinafter Taryn Vian, *Health Care*].

<sup>62</sup> UNDP, FIGHTING CORRUPTION IN THE HEALTH SECTOR: METHODS, TOOLS, AND GOOD PRACTICES 6 (2011) [hereinafter UNDP, FIGHTING CORRUPTION IN THE HEALTH SECTOR]; Taryn Vian, *Health Care*, *supra* note 61, at 44; Transparency International, Health, at: <http://www.transparency.org/topic/detail/health>.

<sup>63</sup> WHO, CURBING CORRUPTION IN MEDICINES REGULATION AND SUPPLY (2010); TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2006: CORRUPTION AND HEALTH xvi-xvii (2006).

<sup>64</sup> Studies of informal payments have shown that health workers, for example in Tanzania, deliberately create shortages in the supply of services and medications in order to gain surplus payments from patients who are made to believe that they must pay under-the-table fees to obtain better health services. See, e.g., UNDP, FIGHTING CORRUPTION IN THE HEALTH SECTOR, *supra* note 62, at 22.

<sup>65</sup> UNDP, FIGHTING CORRUPTION IN THE HEALTH SECTOR, *supra* note 62, at 6, 37; Taryn Vian, *Health Care*, *supra* note 61, at 43.

<sup>66</sup> UNDP, FIGHTING CORRUPTION IN THE HEALTH SECTOR, *supra* note 62, at 24, 54; Transparency International, Health, at: <http://www.transparency.org/topic/detail/health>.

<sup>67</sup> UNDP, FIGHTING CORRUPTION IN THE HEALTH SECTOR, *supra* note 62, at 11-12.

<sup>68</sup> **Stock-out** is a temporary unavailability of one or more medicines in a pharmacy. A stock-out can be documented at one point-in-time or over a period of days, weeks, or months. See Stop Stock-Outs Campaign, What are Stock-outs?, at: <http://stopstockouts.org/stop-stock-outs-campaign/what-are-stock-outs>.

<sup>69</sup> UNDP, FIGHTING CORRUPTION IN THE HEALTH SECTOR, *supra* note 62, at 11-12.

<sup>70</sup> *Id.* at 11.

<sup>71</sup> The UN Special Rapporteur on the right of everyone to the enjoyment of the right to the highest attainable standard of physical and mental health has stressed that the design of accountability mechanisms in the context of public health requires creativity, imagination, and understanding of the distinctive characteristics and challenges of health systems. See UN, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH paras. 64-65, 101, 103 (Jan. 31, 2008, U.N. Doc. HRC/7/11) [hereinafter 2008 REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO HEALTH].

<sup>72</sup> UNCESCR, GENERAL COMMENT NO. 14 ON THE RIGHT TO HEALTH, *supra* note 10, paras. 53-56.

<sup>73</sup> WHO, EVERYBODY BUSINESS: STRENGTHENING HEALTH SYSTEMS TO IMPROVE HEALTH OUTCOMES - WHO'S FRAMEWORK FOR ACTION 2-3 (2007); WHO, MONITORING THE BUILDING BLOCKS OF HEALTH SYSTEMS: A HANDBOOK OF INDICATORS AND THEIR MEASUREMENT STRATEGIES vi (2010).

<sup>74</sup> UNCESCR, GENERAL COMMENT NO. 14 ON THE RIGHT TO HEALTH, *supra* note 10, paras. 53-56.

<sup>75</sup> See, e.g., JEN KATES & REBECCA KATZ, U.S. PARTICIPATION IN INTERNATIONAL HEALTH TREATIES, COMMITMENTS, PARTNERSHIPS, AND OTHER AGREEMENTS (The Henry J. Kaiser Family Foundation 2010).

<sup>76</sup> **Access to medicine** is a fundamental element in achieving progressively the full realization of the right to health. Generic production, providing essential medicines at a fraction of the cost of brand-name medicines, is a preferred solution for addressing public health goals, but it is often restricted by the rules of intellectual property protection established by the World Trade Organization [WTO] in the Agreement on Trade Related Aspects of Intellectual Property Rights [TRIPS Agreement]. With that said, the WTO Declaration on the TRIPS Agreement and Public Health [Doha Declaration] gives States flexibilities to interpret and implement the TRIPS Agreement in a manner supportive of protection of public health and promotion of access to medicines for all. Therefore, States should incorporate TRIPS flexibilities into the national legislation and promote regional trade in generic medicines. See ABA ROLI, HIV/AIDS LEGAL ASSESSMENT TOOL: ASSESSMENT METHODOLOGY MANUAL 57-58 (2012).

<sup>77</sup> See, e.g., WHO, STRATEGIC ALLIANCES: THE ROLE OF CIVIL SOCIETY IN HEALTH (2001).

<sup>78</sup> Strategic public interest litigation in the context of public health has been particularly successful with respect to the rights of people living with HIV (e.g., expanding access to antiretroviral treatment and reducing HIV-related discrimination in education and employment), sexual and reproductive rights (e.g., expanding access to legal abortion and contraception, and reducing maternal mortality), and tobacco control. See, e.g., Siri Gloppen, *Litigation as a Strategy to Hold Governments Accountable for Implementing the Rights to Health*, HEALTH AND HUMAN RIGHTS (2008); UNAIDS & CANADIAN HIV/AIDS LEGAL NETWORK, COURTING RIGHTS: CASE STUDIES IN LITIGATING THE HUMAN RIGHTS OF PEOPLE LIVING WITH HIV (2006); SOCIO-LEGAL INFORMATION CENTRE, HUMAN RIGHTS LAW NETWORK, UP-SCALING THE LEGAL INITIATIVE IN INDIA FOR REDUCING MATERNAL MORTALITY AND ADVANCING YOUNG PEOPLE'S REPRODUCTIVE HEALTH AND RIGHTS (2011); Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Rights to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW (2010); Luisa Cabal et al., *What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?*, HEALTH AND HUMAN RIGHTS (2003); Oscar A. Cabrera & Alejandro Madrazo, *Human Rights as a Tool for Tobacco Control in Latin America*, SALUD PÚBLICA DE MÉXICO (2010).

<sup>79</sup> See, e.g., WHO COMMISSION ON INFORMATION AND ACCOUNTABILITY FOR WOMEN'S AND CHILDREN'S HEALTH, KEEPING PROMISES, MEASURING RESULTS (2011) [hereinafter KEEPING PROMISES, MEASURING RESULTS]; see also WHO & INTERNATIONAL HEALTH PARTNERSHIP, COUNTRY ACCOUNTABILITY FRAMEWORK: A TOOL FOR ASSESSING AND PLANNING IMPLEMENTATION OF THE COUNTRY ACCOUNTABILITY FRAMEWORK FOR HEALTH WITH A FOCUS ON WOMEN'S AND CHILDREN'S HEALTH (2012).

<sup>80</sup> Country compacts are highly recommended by WHO which asserts that they constitute an important step to reinforce a relationship of mutual cooperation and trust in achieving shared public health objectives. See, e.g., KEEPING PROMISES, MEASURING RESULTS 4, 16, 18, 22.

<sup>81</sup> See, e.g., ABA AIDS COORDINATING COMMITTEE, HIV & AIDS BENCHMARK (2<sup>nd</sup> ed., Joshua Bachrach & Cynthia Knox eds., 2012); UNAIDS, HIV IN AFRICA IN THE 21<sup>ST</sup> CENTURY: BRIEF FOR THE JUDICIARY (2009).

<sup>82</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, RESOURCE GUIDE ON STRENGTHENING JUDICIAL INTEGRITY AND CAPACITY 85-86 (2011).

<sup>83</sup> **Coerced sterilization** occurs when financial or other incentives, misinformation, or intimidation tactics are used to compel an individual to undergo the procedure. Sterilization may also be required as a precondition of other health services or employment. **Forced sterilization** occurs when a person is sterilized without her knowledge or is not given an opportunity to provide consent. See OPEN SOCIETY FOUNDATIONS, AGAINST HER WILL: FORCED AND COERCED STERILIZATION OF WOMEN WORLDWIDE 2.

<sup>84</sup> Young Women's Dialogues were launched in 2004 by the International Community of Women Living with HIV/AIDS (ICW) to explore and address the specific needs and concerns of young HIV-positive women (aged 18–30) and to develop an appropriate advocacy agenda to promote their rights. See ICW, Developing Advocacy Skills of Young Positive Women: Young Women's Dialogues, at: <http://www.icw.org/node/398>.

<sup>85</sup> ICW, THE FORCED AND COERCED STERILIZATION OF HIV POSITIVE WOMEN IN NAMIBIA (2009).

<sup>86</sup> Field research conducted in 2010 involved interviews with 238 women living with HIV in Windhoek and in the northern part of Namibia. The study uncovered and documented 40 cases of forced and coerced sterilization. See NWHN, IHRC & NORTHEASTERN UNIVERSITY LAW SCHOOL, AT THE HOSPITAL THERE ARE NO HUMAN RIGHTS: REPRODUCTIVE AND SEXUAL RIGHTS VIOLATIONS OF WOMEN LIVING WITH HIV IN NAMIBIA (2012).

<sup>87</sup> English is an official language of Namibia and is commonly used in public health facilities throughout the country, in both oral and written communications. This includes medical consent forms.

<sup>88</sup> Interviews with women who had been subjected to arbitrary sterilization revealed the following methods of force and coercion employed by medical personnel: 1) failure to request consent; 2) failure to communicate with a patient in a language understandable to her; 3) obtaining consent under duress or based on misinformation and misrepresentation (e.g., requesting a patient to sign a sterilization consent form presented under a guise of a caesarian section consent form or demanding consent to sterilization as a precondition to access other health services, such as child delivery or abortion); 4) failure to provide a patient with information about other contraceptive options and/or about the nature, effects, risks, consequences, and side-effects of sterilization; 5) recording inaccurate information in a patient's medical records; and 6) failure to release medical records upon a patient's request. Most study participants asserted that they had been unaware about having undergone sterilization until their postpartum medical examination.

<sup>89</sup> PMTCT programs are extremely successful. When an HIV-positive mother receives anti-retroviral drugs during pregnancy, labor, and delivery, has her baby by caesarian section, and avoids breastfeeding, the chance of passing the infection to her baby falls to less than 2 per cent. The newborn babies are also given treatment after birth to protect them. Namibia is approaching universal access to antiretroviral drugs [hereinafter ARVs] for PMTCT. With relatively little loss to follow-up, the coverage of ARVs for PMTCT for the mother and infant has reached 90-93% and 88% respectively. UNAIDS country profile for Namibia shows a steady decline of new child infections since the mid-2000s. See AIDS.gov, Pregnancy and Childbirth, at <http://aids.gov/hiv-aids-basics/prevention/reduce-your-risk/pregnancy-and-childbirth>; UNICEF, NAMIBIA: PMTCT FACTSHEET (2010); MOHSS, NAMIBIA: GLOBAL AIDS RESPONSE PROGRESS REPORT 30-35 (2012); UNAIDS, [Namibia](http://www.unaids.org/en/regionscountries/countries/namibia), at <http://www.unaids.org/en/regionscountries/countries/namibia>.

<sup>90</sup> Namibia is a State Party to all major international and regional human rights treaties, including ICCPR, ICESCR, CEDAW, CRC, the African (Banjul) Charter on Human and Peoples' Rights, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Unless otherwise provided, the general rules of public international law and international agreements binding upon Namibia form part of the law of Namibia. See CONSTITUTION OF THE REPUBLIC OF NAMIBIA art. 144 (*adopted* Feb. 9, 1990 by Constituent Assembly, *as amended*) [hereinafter CONST.].

<sup>91</sup> NATIONAL POLICY ON HIV/AIDS paras. 1.1, 1.2, 1.3.5, 2.3.1 (*approved* March 14, 2007 by National Assembly).

<sup>92</sup> ETHICAL GUIDELINES FOR HEALTH PROFESSIONALS art. 2 (3) (*adopted* 2010 by Health Professions Council of Namibia).

<sup>93</sup> The judicial power in Namibia is vested in the Supreme Court of Namibia, the High Court of Namibia, and the Lower Courts of Namibia (Magistrate Courts). See CONST. art. 78. Because of the amount of damages claimed by the plaintiffs, the cases were filed in the High Court. There is no class action rule in Namibia. To simplify the court proceedings, the three cases were consolidated and only one judgment was issued. Nevertheless, each of the claims instituted by the plaintiffs was decided on its own merits because they formally related to separate incidents.

---

<sup>94</sup> CONST. arts. 5-10.

<sup>95</sup> In this publication, Namibian dollars (NAD) are converted to United States dollars (USD) at the average rate of conversion at the time when interviews for the case study were conducted (USD 1.00 = NAD 8.55).

<sup>96</sup> All three cases required a complex set of evidence ranging from the plaintiffs' health passports and oral testimonies; medical examination, affidavit, and oral testimony by an independent health provider; psychological evaluations; and hospital records obtained through subpoenas in the discovery process. The CSO coalition ensured that victims' identity was not revealed to the public.

<sup>97</sup> *LM and Others v. Government of the Republic of Namibia* (I 1603/2008, I 3518/2008, I 3007/2008) NAHC 211 (July 30, 2012).

