

## Legal Elements of the Community Protocol

Community  
Protocols  
Toolbox

5



# 5

## LEGAL ELEMENTS OF THE COMMUNITY PROTOCOL

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## Booklet 5

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# LEGAL ELEMENTS OF THE COMMUNITY PROTOCOL

## 1. CHALLENGES AND OPPORTUNITIES

One important focus of community protocols is on understanding laws and policies, asserting rights and responsibilities, and clearly defining what the community requires for external actors to appropriately engage with them. The legal empowerment process behind it requires time and energy, but it is an important element of developing a community protocol.

In the context of extractive industries, land rights are particularly important, and communities face several challenges in this respect. First, many countries do not recognize or respect indigenous peoples' and local communities' customary laws and traditional authorities, institutions and decision-making processes. This can undermine ancestral systems of caring for territories and natural resources that can ultimately impact culture and the protection of biodiversity.

Second, there is inadequate recognition of customary land rights. Although there have been a range of land tenure reforms worldwide to address historical injustices, many of these programmes have not placed sufficient emphasis on customary systems of tenure, stewardship or trusteeship. Additionally, women often lack formal rights to land tenure. Common property resources such as forests and rangelands remain particularly vulnerable, because states often consider them unoccupied or unregistered and thus available for allocation to individuals or corporations. This situation is a fundamental source of insecurity and actual or potential dispossession for up to half a billion people across Africa. Similar situations exist in many formerly colonized countries, such as those in South Asia. Insecure land rights often mean that indigenous peoples and local communities are unable to legally enforce their customary ownership, rules and control, particularly when the government issues exploitative concessions and other permits in their territories.

Third, very few countries provide communities with rights to sub-soil resources. Indeed, even in countries that have passed legisla-

tion that recognizes community land rights, this legislation is often undermined by laws regulating access to natural resources, including sub-soil resources. This is particularly evident in the context of laws relating to mining that reserve ownership rights over minerals for the state irrespective of other laws providing land ownership rights to communities.

At the same time, there is evidence of positive legislative developments at both the international and national levels. The last two decades have seen a proliferation of provisions in international instruments that support indigenous peoples' and local communities' rights over their territories, areas and resources. These provisions are not limited to human rights instruments, but can be found across the full spectrum of international law and policy. There are also many examples of judgments from regional and national courts that support communities' rights, including a growing body of jurisprudence on Aboriginal title. Indigenous peoples and local communities are not merely stakeholders, but are rights-holders who must be respected and recognized as the stewards of their territories, areas and natural resources.

## 2. INFORMATION TO INCLUDE IN THE PROTOCOL

With this background in mind, community protocols can serve as a way to highlight the rights that communities have, and to link those rights to the community's cultural practices and future goals. The community may wish to include the following main types of information, among others in the community protocol: customary laws, rights, and responsibilities and the norms and values that underpin them; specific national and international laws and policies; assertions of overlaps or conflicts between legal systems; community-defined terms and conditions for engagement of external actors; messages directed toward specific external actors to either cease harmful activities or engage in constructive ones; and visions and plans for the future.

**NOTE:** *For facilitators, conducting an in-depth review of laws and policies relevant to the community can be an important part of the protocol process. For comprehensive guidance and information on this see Annex 6 of the Framework Methodology on Community Protocols in the Context of Extractive Industries, available at <http://naturaljustice.org/wp-content/uploads/2015/09/Framework-methodology.pdf>. The information gathered as part of the legal review set forth in Annex 6 will help provide a baseline of information that can be used to devise advocacy strategies, educate the community on its rights, and help to deepen the protocol process.*

### a. Customary Laws

Community protocols provide an opportunity for communities to inform external parties of the customary laws that apply to the community as well as to those outside of the community. It is up to the community to decide how much detail to provide, but some categories of information to consider including are:

- What are the customary laws that relate to the community's territory or area? How are the boundaries defined? This may include rules or regulations for the use of resources, sharing of traditional knowledge, and timing of important social-cultural events.
- How do these laws regulate different aspects of the community's ways of life (for example, social, cultural, spiritual, environmental, economic, and political)?

- What are their underlying values and norms? How are these values and norms reinforced and passed on to other authorities or younger generations?
- What are the community's customary rights and responsibilities related to local crops, plants, livestock breeds, and wildlife over the areas and habitats in which they are found, cultivated, bred, kept, or grazed?
- Are there any taboos or restricted areas from which no resources should be taken (during certain times or permanently)?
- How is the community organized or what is its governance structure? Who should external parties speak to if they want to engage in activities that will impact the communities' territory or culture? How should that interaction take place?
- What information would the community like to know before making any decisions? Consider listing key questions that they should answer up front.
- Once this information is presented, how would the community respond to different requests or proposals?
- What would the community do if their customs were not properly adhered to? Are there any conflict resolution processes that the community would like to highlight?

**NOTE:** *National Laws*

*National laws are a critical component of the protocol and will be relevant to several specific issues such as land, water and mineral rights. National laws and how to find them are discussed in more detail below in Section 2.c **Other Categories of Rights.***

## b. International Laws and Policies that Support Communities

In the regional and international context, the concept of “law” is often interpreted differently from the national context. It is beyond the scope of this Booklet to touch on the complex debate surrounding the legal status of instruments agreed to between two or more states. Nevertheless, there are numerous regional and international treaties, resolutions, policies and guidelines that provide progressive and substantive support for the rights of communities and thus can either reinforce rights set forth at the national level or fill in gaps where national legislation does not exist.

Two important instruments in this regard need to be singled out.

The first is the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration), adopted in 2007. This contains provisions affirming indigenous peoples' right to self-determination, to practice their cultures, and to own and control their traditional lands, territories, and resources. The second is *International Labour Convention (ILO) No. 169* (entry into force in 1991), a binding legal treaty that addresses similar categories of rights to the UN Declaration. Both of these are important international instruments to consider when developing community protocols, including in the context of extractive industries.

In addition to the UN Declaration and ILO 169, several other instruments are also relevant to communities in the context of extractive industries. These include instruments addressing human rights and guidelines and policies relevant to business and finance.

### i. Human Rights

At regional and international levels, many instruments enumerate human rights in a variety of different contexts, such as civil and political rights, the rights of children, and the rights of women. These human rights instruments are broadly applicable to the kinds of challenges that communities face when impacted by extractive activities. Some of the most prominent instruments are listed below, although it is important to note that this list is intended to serve as a starting point only.

#### **Regional Instruments**

- The African Charter on Human and Peoples' Rights
- The African Charter on the Rights and Welfare of the Child
- The American Convention on Human Rights, 1969, and its Protocols of 1988 and 1990
- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
- The European Convention on Human Rights
- The Framework Convention for the Protection of National Minorities

**NOTE:** *More Regional Resources*

*There are other regional instruments, including those not directly related to human rights, that may be of importance depending on the context of the protocol. For more information on regional human rights treaties, see *The Major Regional Human Rights Instruments*, available at <http://www.ohchr.org/Documents/Publications/training9chapter3en.pdf>.*

### **International Instruments**

There are ten core international human rights treaties, and more information on those treaties is available on the website of the UN Office of the High Commissioner of Human Rights (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>). Although all those treaties are significant in their own way, there are three instruments of particular importance that together form what is commonly referred to as the International Bill of Human Rights. These instruments greatly influenced the human rights instruments that were subsequently adopted at the regional and international level:

- Universal Declaration of Human Rights
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights

### **ii. Guidelines and Policies Relevant to Business and Finance**

In addition to the proliferation of internationally agreed instruments supporting community rights, more and more businesses, banks and international institutions have adopted guidelines and policies designed to reduce impacts on the environment and human rights. Because large-scale extractive activities by definition generally involve corporations and financial institutions, those guidelines and policies are also very relevant for communities to consider when developing community protocols. These include:

#### **a. Guidance/Policies for Businesses**

**The UN Guiding Principles on Business and Human Rights (Guiding Principles):** The Guiding Principles were endorsed by the UN Human Rights Council in 2011 and have seen broad acceptance by corporations, international institutions, and many within civil society. The Guiding Principles are a voluntary set of guidelines based on three pillars: the state's duty to protect human rights, the corporate responsibility to respect human rights, and need for remedy if those rights are violated. For more information, visit <http://business-humanrights.org/en/un-guiding-principles>.

#### **The Organization for Economic Co-operation and Development (OECD):**

The OECD is an international economic organisation of 34 countries, the majority of which are developed and located in North America and Europe. The OECD has issued Guidelines for Multinational Enterprises that contain provisions on human rights. The OECD also

requires member countries to establish a dispute resolution process known as National Contact Points to address allegations of non-compliance with the Guidelines. For more information visit <http://www.oecdwatch.org/oecd-guidelines>.

#### **Guidance from the International Council on Mining and Metals (ICMM):**

The ICMM is a membership organization of mining companies that commit to adhering to certain guidelines and reporting requirements. These guidelines include the *Indigenous Peoples and Mining Position Statement* which addresses the ICMM's position on free prior and informed consent. For more information visit <https://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining>.

#### **b. Guidance/Policies for Finance**

Businesses are just one part of the extractives value chain. Another part consists of financial institutions that lend capital to the business enterprises engaged in extractive activities. These institutions can play a major role in whether and how extractive activities are undertaken.

**Development Finance Institutions (DFIs):** All of the major DFIs – such as the World Bank, the International Finance Corporation, and the African Development Bank – that often provide financing for large-scale extractive projects have policies in place governing both the DFI as well as the DFI's clients. These include the Performance Standards of the International Finance Corporation (IFC), which has policies on indigenous peoples and free, prior and informed consent as well as the Environmental and Social Safeguards of the World Bank. Regional DFIs such as the African Development Bank also have similar policies in place. These policies are mandatory for the DFI and client to follow, and all of the major DFIs have grievance mechanisms in place to deal with allegations that their policies have been violated. For more information visit: <http://grievancemechanisms.org/grievance-mechanisms>.

**Private Financial Institutions:** Private financial institutions also play a role in financing extractive activities. Many of these institutions have signed on to a voluntary code called the Equator Principles, which are set of standards for identifying and managing social and environmental risk in project financing. They are based largely on the IFC's Performance Standards and reference the Guiding Principles as well.

For more information, visit: <http://www.equator-principles.com/index.php/about-ep/about-ep>

These guidelines and policies are some of the major efforts directed specifically at business and finance institutions. How they are utilized will be very context-specific and depend upon the strategy that communities wish to implement. The International Federation for Human Rights (FIDH) has published an in-depth guide on a broad array of tools, including those discussed in this Booklet, to combat corporate harms. Their resource, entitled *Corporate Accountability for Human Rights Abuses*, is available at <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/Updated-version-Corporate-8258>.

### c. Other Categories of Rights at the National and International Level

This section addresses both national and international laws and policies that support the rights of communities and that may be relevant in the context of developing a community protocol. It sets forth some of the major interconnected categories of laws applicable to community protocols in the extractives context. These categories are provided as a general guide to help approach the legal review process, but it is important not to overly compartmentalize laws and policies that may be relevant to the issues and priorities of the community. There are at least as many ways of organizing legal frameworks as there are countries in the world, and laws supporting communities can certainly be found in more categories than those listed here.

The categories set forth below are not distinct from human rights, and indeed several human rights instruments are cited in support. Instead, these categories attempt to provide some direction in understanding which instruments may be the most useful in a given situation. At the national level, laws can be found in many different sources, such as in the national constitution, national and provincial legislation, local government regulations, agency or ministry policies and judgments issued by courts. Most countries provide access to their laws online through their official websites, although the level of organization and website upkeep will vary widely. Other resources for finding national laws are available as well, and where relevant to a particular category they are noted below.

Regional sources are not addressed in this section because those instruments will generally only be relevant to protocols being developed in the corresponding region. The FIDH guide on Corporate

Accountability for Human Rights Abuses provides a detailed breakdown of regional instruments and grievance mechanisms. The guide is available at <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/Updated-version-Corporate-8258>.

At the international level, most instruments can be found online through general Internet searches. For more information on language in international instruments that is relevant to the categories set forth below, please refer to the Living Convention, which is a compendium of internationally recognized rights that support indigenous people and local communities. The Living Convention organizes provisions in international instruments by category and reproduces them verbatim so that users can determine at a glance what the relevant international law or policy is on a particular topic. It is available at: <http://naturaljustice.org/resources-and-research/the-living-convention/>.

#### LAND

Extraction of natural resources often takes place on lands traditionally occupied or used by communities. Most countries will have national laws that regulate ownership of or access to land. Additionally, land laws can be organized under a variety of issues and topics that might not at first glance appear related to “land.” For example, in the section of the South African Constitution dealing with human rights, there is a provision entitled “property,” which among other things calls on the state to take measures to enable citizens to gain access to land on an equitable basis<sup>1</sup>. Many countries also have or are in the process of drafting laws that regulate land occupied by communities. For example, the Kenyan parliament is currently (as of January 2016) debating a bill on community land which will become part of Kenya’s national legislation once it is passed. For more information see the Kenya Community Land Bill 2015 at <http://www.isk.or.ke/userfiles/Community%20LandBill%202015.pdf>.

#### National

One resource for finding out more about national laws and policies related to land is the Food and Agriculture Organization’s (FAO) Gender and Land Rights Database (available at <http://www.fao.org/gender>

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<sup>1</sup> *Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights* §25(3): “The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

landrights-database/country-profiles/en/). This database has profiles of over 84 countries and provides several categories of information, including information on land tenure and related institutions. The United States Agency for International Development (USAID) also maintains a web portal with information on land tenure and property rights of many countries (available at <http://www.usaidlandtenure.net/country-profiles>).

#### **International**

- UN Declaration
- ILO 169
- FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO Tenure Guidelines)
- Tkarhwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities

#### **WATER**

Extractive activities can impact water sources that communities rely on for their livelihoods. These impacts can take a variety of forms, including polluting or reducing access to water resources. Often, countries have laws governing water access and use that can be relevant in the extractives context.

#### **National**

The FAO and the World Health Organization have jointly developed a database of national legal frameworks governing water resources in selected countries (available at <http://www.waterlawstandards.org>). Some of the topics covered in the database include whether there is a basic water law in the country; who owns water; who is authorized to use water and how; and the nature of the government's administrative structure for water resources management.

#### **International**

- International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination Against Women
- Convention on Wetlands of International Importance (Ramsar Convention)

- Convention on the Rights of the Child
- FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security

#### **CULTURAL HERITAGE**

The cultural heritage of communities is impacted in a variety of ways by extractive activities, including through displacement and the influx of new cultures when people from outside the community come to work. Many countries do have laws in place to protect cultural heritage. For example, Slovenia has a law that makes cultural heritage surveys an obligatory element of plans for infrastructure development (Slovenia Cultural Heritage Protection Act (1999), available at [http://www.unesco.org/culture/natlaws/media/pdf/slovenia/slov\\_order\\_promulgation\\_culturalheritage\\_protection\\_act\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/slovenia/slov_order_promulgation_culturalheritage_protection_act_engtof.pdf)).

#### **National**

One source for finding national cultural heritage laws is the database maintained by the UN Educational, Scientific and Cultural Organization (UNESCO) (available at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=33928&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=33928&URL_DO=DO_TOPIC&URL_SECTION=201.html)). This database allows users to search by a variety of criteria, including country, theme, language and date.

#### **International**

- International Covenant on Civil and Political Rights
- Universal Declaration of Human Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Rights of the Child
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions
- UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage
- UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage
- Declaration on the Rights of Minorities

## MINING LAWS

In the context of extractives, it is important to also determine whether there are national laws or policies that govern mining and sub-surface rights. Generally, countries reserve sub-surface ownership rights regardless of any other land rights that they recognize. Even where countries have provided for community ownership of minerals in national legal frameworks, these rights have often not materialized. For example, in the Philippines, the *Indigenous Peoples Rights Act* provides for communities' rights of ownership to natural resources, including mineral rights. However, the *Mining Act* reserves ownership of mineral resources for the state, and it is the *Mining Act* that often prevails<sup>2</sup>.

### **National**

Many countries have laws and policies that specifically address mining. One resource for finding mining laws is the FAO's Legal Office, which maintains a database of national laws on several different topics, including the ones addressed in this Booklet (available at <http://faolex.fao.org/faolex/index.htm>). In Africa, there is the Africa Mining Legislation Atlas, which uses a map-based interface to provide information on most African countries (available at <http://www.a-mla.org>). Additionally, internet searches for specific countries should help identify the text of mining and mineral legislation if it is available.

### **International**

Although there is not yet an overarching international law of mining, most of the international instruments referenced here are relevant to mining in one way or another, whether it is in regard to land, impacts on culture, or other category. Some relevant instruments include:

- Convention on Biological Diversity
- Convention on the Law of the Sea

## ACCESS AND BENEFIT SHARING

Access to and extraction of natural resources raises difficult questions about who should benefit from those activities, what form the benefits should take, and how benefits are distributed. Although

some countries – such as Chile, Papua New Guinea, and South Africa – do have mining regulations that include requirements for benefit sharing or other initiatives designed to help communities grow, these requirements are still relatively rare.

### **National**

One of the first places to look would be in the country's mining laws and associated policies. In 2001, the World Bank published a resource called *Sharing Mining Benefits in Developing Countries* that notes the benefit-sharing policies of several countries and provides examples of how agreements were reached in practice (available at <http://www.sds.org/wp-content/uploads/2011/06/WB-Sharing-Mining-Benefits-in-Developing-Countries.pdf>).

### **International**

- *Convention on Biological Diversity*
- *Nagoya Protocol on Access and Benefit Sharing*
- *Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities*
- *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*

## ACCESS TO INFORMATION

In order to respond to challenges posed by extractive activities, communities must have proper information. This includes information related to disclosure of contracts between governments and extractive companies, making rules and regulations for natural resource licenses and concessions available in a public database, and publishing timely reports on oil, gas and mining operations. For more information, see the Open Government Guide, available at <http://www.opengovguide.com/topics/extractive-industry/>.

### **National**

Many countries have laws governing disclosure of and access to information. One resource for finding national access to information laws is the Right to Information Rating, which provides the text of access to information laws of over 100 countries (available at <http://www.rti-rating.org/country-data>).

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<sup>2</sup> See Report No. 16, *The Philippines (2012), analyzing national legislation in the context of ICCAs*, available at <http://naturaljustice.org/wp-content/uploads/2015/09/Asia-Regional-Philippines.pdf>.

### ***International***

- Convention on Access to Information, Public Participation In Decision-Making, and Access to Justice In Environmental Matters (Aarhus Convention)

### **IMPACT ASSESSMENTS**

Impact assessments on issues such as the environment and culture can help identify and address the effects that extractive activities inevitably have. Many countries have legislation setting forth requirements for impact assessments, including circumstances under which they must be prepared and what they must address.

### ***National***

The FAO, the International Union for the Conservation of Nature (IUCN) and the UN Environment Programme (UNEP) jointly maintain a database of environmental law called ECOLEX (available at <http://www.ecolex.org/ecolex/ledge/view/SimpleSearch;DIDPFDSIjsessionid=DA D2340C9C5DB6A3F42712AA27CB10FB>). Using the advanced search feature of the database allows users to search by keyword and country, which can return results for laws on impact assessments.

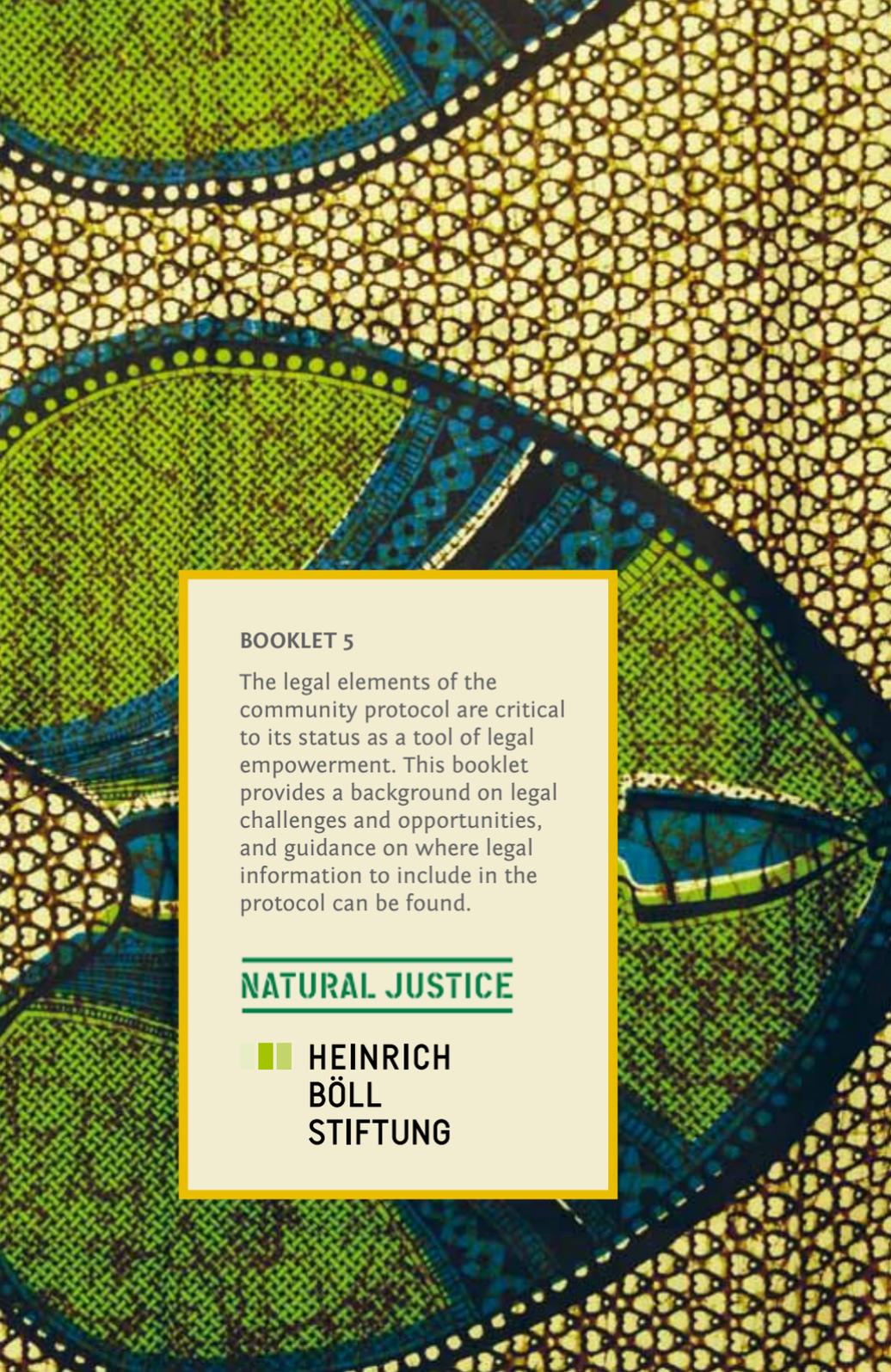
### ***International***

- Akwe: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities

## **3. CONCLUSION**

The above categories are just some of types of laws that are relevant to communities impacted by extractive industries. Legal mapping is very context-dependent, and the same law in the same country may be relevant to different communities in different ways. Therefore, it is very important for facilitators to work with community members to identify the major issues that they are facing and their purposes for developing a community protocol. Based on these discussions, relevant laws can be selected that can support the community's call for protection and respect of its rights.





## BOOKLET 5

The legal elements of the community protocol are critical to its status as a tool of legal empowerment. This booklet provides a background on legal challenges and opportunities, and guidance on where legal information to include in the protocol can be found.

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## NATURAL JUSTICE

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