

Mes. Karima Bennoune

Special Rapporteur in the Field of Cultural Rights
United Nations Human Rights Special Procedures

Per Email: srculturalrights@ohchr.org

1 May 2020

Dear Madam,

SUBMISSION: CULTURAL RIGHTS AND CLIMATE CHANGE

Natural Justice is pleased to make a submission in response to your call for contributions to answer your specific questions related to cultural rights and climate change.

Natural Justice is a non-profit organisation rooted in the struggles of communities in Africa. As a team of lawyers and legal experts, the organisation specialises in human rights and environmental law in pursuit of social and environmental justice. Natural Justice strives to enhance the collective rights of people and protect the sacred relationships of indigenous peoples and local communities with nature. Its work is informed by the values, knowledge and self-determination of the communities they stand in solidarity with.

Through legal empowerment, research, litigation and supporting community led movements, Natural Justice helps communities to know the law, use the law and shape the law. Natural Justice's focus includes enhancing community access to land and governance of natural resources, contributing to the struggle against harmful extractive and infrastructure developments, strengthening community actions towards the climate crisis supporting processes for recognising traditional knowledge and access and benefit sharing, supporting community rights within conservation and customary use.

Natural Justice is working in eight African countries to support communities defend and affirm their rights to lands, a healthy environment, resources and culture. Natural Justice has a strong track record in the influencing space at the African Union level and the global UN processes. It operates out of three Hubs, in Cape Town, Nairobi and Dakar, with a staff of 35, including lawyers, legal researchers, administration and finance.

We are honoured to provide our submission as a collaborative effort of a number of our staff, in the attached response, focusing on questions 1, 4 and 9, but linked to many of the other questions.

We welcome any questions or queries, or any request for further information in respect of any of the examples we have provided.

Our website is available at www.naturaljustice.org.

Yours sincerely,



Melissa Groenink

Programme Manager: Climate Change
Email: melissa@naturaljustice.org.za

**SUBMISSION TO THE SPECIAL RAPPORTEUR FOR IN THE FIELD OF CULTURAL RIGHTS:
CULTURAL RIGHTS AND CLIMATE CHANGE**

Question 1.

What negative impacts of climate change on culture, heritage and the enjoyment of cultural rights by all have been documented in your context? Are particular groups, such as women, persons with disabilities, indigenous peoples, rural persons or peasants, and youth or future generations, as well as cultural practitioners being impacted in specific and disproportionate ways? What efforts are being undertaken to inventory and monitor such impacts?

Local communities and indigenous peoples in Africa are deeply impacted by the effects of climate change, which threaten their efforts to conserve and defend their lands, ways of life, bio-cultural resources and associated traditional knowledge. Among them are the ICCAs (Indigenous peoples' and local communities' conserved territories and area) and pastoralists.

ICCAs

ICCAs are areas that have been conserved and governed by local communities and/or indigenous peoples for generations, and include sacred natural sites, which are one of the oldest forms of culture-based conservation and have special spiritual significance to peoples and communities according to the African Commission on Human and Peoples Rights (ACHPR).¹ Many of the custodial communities of the ICCAs or sacred natural sites have intimate cultural links with their territory, which often manifest themselves through the consideration of particular resources, natural habitats or areas as having sacred value. This is usually because their history and that of their ancestors, their ancestral cultural practices, or their way of life are linked to them. Access to these sites or resources must respect rituals or other cultural practices. Harvesting is not allowed in some of these sites, such as the case of sacred forests or *Ala fady* in Madagascar. Most of the time, there are customary and traditional institutions and rules that ensure that these values are maintained, respected and transmitted. This motivates communities to conserve resources and protect them from threats of degradation, and consequently on their local cultural identity.

Many of these ICCAs and sacred natural sites are threatened by various pressures². Serious internal threats are generally linked to the erosion of local knowledge and attachment to the local environment, the loss of local languages and practices, or the abandonment of traditional learning processes within communities (relations between elders and youth). As for external threats, they are often linked to exploitation initiatives and practices without consideration or respect for the customary rules and practices of local communities.

¹ Staff from Natural Justice sit as experts on African Commission on Human and Peoples Rights.

² Natural Justice has participated in studies on ICCAs in several countries, which the summary document is available at the following link: <https://naturaljustice.org/wp-content/uploads/2015/09/International-Law-and-Jurisprudence-English.pdf>.

Pastoralists

In sub-Saharan Africa, arid and semi-arid areas³ are inhabited by an estimated 386 million people, including pastoralists who depend on natural resources for their livelihood⁴, maintaining spiritual and cultural connections to their lands. Many of the impacts of climate change in these areas are characterised by variability in rainfall patterns and extreme weather events such as recurrent droughts, floods and wind storms⁵, and as a result, indigenous pastoral communities will be uniquely impacted by the changing environmental conditions.

These natural resources have been dwindling through land use change, like in Kenya where traditional grazing land is being acquired by the government for large development projects, roads, renewable energy, and conservation⁶. The encroachment on rangelands coupled with the increasingly worse cycles of drought and flood have forced many pastoralists to abandon their way of life⁷. The forced change in lifestyle has plunged many, already vulnerable communities into abject poverty. The 1992 drought in Somalia and the famine that followed infamously led to mass migration from Somalia to Kenya. An unstable political environment coupled with unseasonably harder drought made Somalia uninhabitable for its people, former pastoralists migrated, often on foot, to become refugees with little to no prospects to make a life⁸.

Question 4.

What are ways in which culture and cultural resources, such as traditional knowledge, are being used to mitigate and/or adapt in the face of climate change? Where available, please share examples of best practices for applying traditional knowledge and cultural practices, such as those of indigenous peoples, peasants and fisher people, including traditional fire management and agricultural techniques that should be considered in developing mitigation and adaptation responses. What is being done to inventory and preserve such cultural resources that could be useful to addressing climate change?

In addressing this question, we have considered the manner in which farmers and pastoralists are able to utilise their cultural practices to adapt to the impacts of climate change, and consider the use of Community Protocols as a best practice tool for adaptation and participation.

The case of Analavory farmers in Madagascar

In Madagascar, agriculture is one of the sectors most affected by the impacts of climate change. The farmers of Analavory in the Itasy Region, Madagascar, are one of the communities partnered by Natural. This community has strengthened their collective rules through a *Dina* (unwritten customary rules of living in society which is an integral part of Malagasy culture) by integrating measures to fight bushfires and other practices harmful to cropland and biodiversity, which are impacted by and contribute to climate change. In general, the *Dina* is sacred to Malagasy society. Non-compliance often incurs moral sanctions such as the indifference of community members in case of misfortune or hardship.

The Analavory farmers use their traditional knowledge about the creation, selection and cultivation of agricultural seeds to maintain agricultural production in the face of climate change. Many seed varieties are now being neglected because they are less productive due to changing climatic

³ Arid and semi-arid areas cover nearly two thirds of the African continent - Galvin et al. [2001](#).

⁴ Conway [2009](#); IPCC [2015](#); Thornton et al. [2007](#); Adhikari et al. [2015](#).

⁵ IPCC [2007](#), [2013](#).

⁶ Kenya Vision 2030 Flagship Projects Progress Report. 2014

⁷ Humanitarian Policy Group 2009.

⁸ Munger 2015.

conditions, and the creation and use of short-cycle and resistant varieties are prioritised. However, farmers still attach particular value to traditional rice varieties such as *Rojo Mena*, which is an integral part of their cultural identity. A community seed bank has been set up, with the support of partners, to conserve local seed varieties, and a tool for documenting observations and traditional knowledge related to the use of these seeds has been developed. This enables them to safeguard the knowledge and facilitate its transmission to the next generation.

The Analavory case illustrates the contribution of customary and traditional rules, conservation practices and traditional knowledge related to agricultural resources to their climate resilience and adaptability.

The case of pastoralists

By its very nature, mobile pastoralism adapts to climatic variability, and has done so for millennia, allowing pastoralists to transform seeming ‘wastelands’ into productive assets⁹. However, when people do not have access and use rights enshrined in law they are especially exposed to climatic shocks and other crises, such as the global Covid-19 pandemic. Particularly given the cultural resources of pastoralist communities, strengthening their level of engagement¹⁰ is absolutely critical. The process of building community members ability to interact with legal instruments, the institutions that deal with them and the fora where decisions are discussed and made, means that a voice from the people who are most affected, have direct knowledge on the impacts, and have evidence that can contribute to relevant policy changes, is one of the missing pieces in many of our current legal spheres.

Land tenure and access rights, recognising the need for pastoral mobility and communal land tenure, and valuing the contributions of customary structures in place, will allow pastoral communities’ inherent adaptive capacities to be expressed in the face of increasing and more extreme weather conditions and variabilities¹¹. Together being a low-input system with well-established traditional management institutions, pastoralism practices are a practical and cost-effective land use option in the drylands.

Community Protocols

Community protocols are tools developed by communities to reinforce and communicate their visions, values, aspirations, practices and the holistic ties which they maintain with their environment¹². They can also refer to community rules according to their customary, national and international law. For most communities, traditional knowledge and environmental elements are integral to this process. Community protocols can be used to communicate this information to third parties who approach communities (government, NGOs, private sector, etc.), whilst also reminding community members of their collective organisation, visions and aspirations. Community protocols therefore serve as a basis for deeper participation of indigenous people and local communities, inter-stakeholder communication and engagement.

Factors central to the formulation of the community protocols are the way in which communities’ ways of life are connected to the land, how their values contribute to the conservation and sustainable use of their resources and how their lives are contingent on a healthy ecosystem. Most community partners consider themselves a part of a dynamic interplay between the environment and their ways of life, animals (in the case of the livestock keepers), medicinal plants, culture, and spirituality. Community protocols can be used by communities to reaffirm their spiritual and cultural relationships,

⁹ CELEP 2018.

¹⁰ Engagement can be strengthened through mechanisms such as community based legal empowerment. There is a tendency to focus on more ‘visible’ land users, such as farmers, which results in biases against other groups who have less capacity to advocate for themselves.

¹¹ Deressa *et al* 2011.

¹² For the past ten years, Natural Justice has supported the extensive development of Community Protocols. Examples of community protocols can be found at <https://naturaljustice.org/community-protocols/>

and reaffirm their fundamental roles and responsibility as guardians of their territories, lands and natural resources.

For example, the development of community protocols by forest-dependent communities is one way in which communities may be able to respond to and ensure the local integrity of climate change initiatives like REDD. In many cases, their local traditional knowledge offers great insight into forest conservation. By articulating aspects of their culture such as bio-spirituality and customary laws and practices that have helped conserve the forests, indigenous local communities are able to directly refer to and call upon the international and national laws intended to support their traditional ways of life. A community protocol can be used to express this relationship and examine the forests within a greater ecological and bio-cultural context, thus preventing carbon emissions.

Community Protocols: The case of rooibos farmers in South Africa

In the Cederberg region of South Africa, rooibos is grown by both commercial and small-scale indigenous farmers, the latter being holders of the traditional knowledge of the uses of rooibos, which carries numerous health benefits. Those who come from the Khoikhoi and San indigenous communities, often poor and under-resourced, are returning to rooibos farming as a source of local development and a chance to connect to their traditional knowledge. However, these farmers have seen changes already happening in the environment around them and know they need to learn to adapt their farming methods in order to continue to produce rooibos, which is only found in the Cederberg and nowhere else in the world. They are connecting to older farmers with experience, but who have also kept their traditional knowledge strong, as well as turning to newer methods of adaptation, such as keeping climate records and using mentorship programmes to train up emerging farmers.¹³

Rooibos farming communities utilised a community protocol process to articulate free prior informed consent in relation to rooibos. A copy of this community protocol is available.¹⁴ The Community Protocol acts as a cultural resource for over 30 communities, and explains how external actors may gain consent to use the knowledge of the Khoikhoi in relation to Rooibos. It establishes Rooibos not merely as an agricultural commodity for sale, but a customary resource with many properties, which is intimately connected to the Khoikhoi peoples. This process also allowed the Cederberg's indigenous farming communities to contend with their indigenous identity. It allowed these stewarding communities to be active negotiators with the Rooibos industry. It further contains a section on the rights of the Khoikhoi people in relation to international and South African law. South Africa developed key national legislation recognising community protocols as valid community tools for consent. Community protocols are, therefore, a legal tool expressing our local communities' living customary law.

¹³ See further at <https://oxpeckers.org/2017/02/rooibos-farmers-go-wild-survive/> and <https://www.indigo-dc.org/climate-change.html>.

¹⁴ See <https://naturaljustice.org/the-launch-of-the-rooibos-bcp-a-new-beginning/>.

Question 9.

Are cultural rights defenders who are working on climate-related harms to culture and cultural rights facing specific challenges in their work, and are they at particular risk of threats, harassment and human rights violations? If so, how should these human rights defenders be better protected and supported?

Statistics released by Global Witness in 2018 estimated the number of killings of environment and land defenders at more than three (3) people per week.¹⁵ This deteriorating trend has worsened over the years with more governments adopting draconian laws and policies intended to curtail the exercise of various Constitutional rights and freedoms such as the right to assemble, hold peaceful demonstrations and challenge unsustainable development and infrastructural projects.

Challenges faced by cultural rights defenders in Africa include:

1. Massive land grabbing of ancestral lands

Illegal land acquisition by governments in the name of development and conservation initiatives has left several communities, who have traditionally been the best conservators of their territories of life, homeless. The recent forced eviction of the Sengwer indigenous group by the Kenya Forest Service (KFS) from the Embobout Forest, coupled with violence against frontline defenders from the community is an illustration of the nature of risks they face.

Through a recent amendment of Kenya's land laws by the Land Value (Amendment) Act, the government can compulsorily acquire land and take physical possession before compensating affected communities so long as such compensation is paid within one year. According to this law, compensation for community land is determined based on the market value approach which does not take into consideration other non-monetary values such as cultural, emotional and traditional values attached to community lands.

2. Physical violence and killing

Violence and extrajudicial killings are also tactics used by states and companies to silence defenders. The police and other state machinery are often used to propagate these human rights violations in an environment of impunity. Where such incidents are reported to relevant institutions, neither proper investigations are conducted nor are the perpetrators held accountable for their actions.

3. Threats, harassment and intimidation

Threats, harassment and intimidation of defenders by companies, governments and political leaders using the police and local authorities are among the most common challenges that defenders face. Members of the Ogiek Peoples' Development Program (OPDP), who work to protect the land rights of the Ogiek indigenous people living in the Mau Forest Complex have been the subject of death threats and intimidation from political quarters and neighbouring communities. These incidents have happened despite the positive judgment issued by the African Court on Human and Peoples' Rights¹⁶ in which the court acknowledged, among other things, the crucial role that indigenous communities have played in protecting local ecosystems and in conserving and protecting land and natural resources. In the court's view, the denial of land rights to the Ogiek community resulted in the violation of their religious and associated cultural rights.

4. Incarceration and criminalization

¹⁵ Without factoring in the number of unreported cases, the total number of defenders who were killed in 2018 while fighting to secure the lands and environment was 164.

<https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/>.

¹⁶ African Union 2017.

Defenders around the world face the risk of unlawful arrests, detention and subjection to criminal proceedings. In such instances, they become more vulnerable to human rights violations and get entangled in lengthy and costly legal suits that will force them to divert their attention from their activities.

Based on the requests received for emergency support by Natural Justice – which manages the African Environmental Defender’s Fund Program on behalf of the International Land Coalition (ILC) – most defenders are forced to go into hiding due to the issuance of arbitrary arrest warrants by the State or the execution of illegal arrests on allegations of committing a criminal offence. For instance, the authorities in Kenya often intentionally misinterpret and misuse the provisions of Section 5 of the Public Order Act to imply that protestors need to obtain permits from the police before holding their demonstrations whereas the law requires the defenders to simply notify the police about their intended activities.

5. Enactment of unconstitutional laws

Through our work on laws and policy reforms which involves tracking the legislative processes in different countries and participating in the processes, Natural Justice has documented instances where governments have used the law as a tool of oppression by legitimizing their efforts to undermine fundamental human rights and freedoms such as the freedom of expression and association. Such laws have been used to increase the risks associated with participating in climate and cultural rights activism.

In Kenya, Parliament introduced an amendment bill to the Public Order Act whose effect was to hold the organizers of peaceful demonstrations strictly liable under criminal law where such demonstrations become violent even if they are not responsible for those acts. This unconstitutional restriction on the right to assemble will severely affect the ability of environmental, climate and cultural activists to hold leaders accountable for their actions and push for social change.

Preventing or minimising risks posed to environment and land defenders requires more collaboration and coordination across regions and different sectors. Some of the interventions that can be made to protect and support environment and land rights defenders include: -

- (i) Monitoring, documenting and regularly reporting of all incidents of human rights violations and reduction in civic spaces across the globe in a coordinated way.
- (ii) Joint advocacy and awareness campaigns through networks of civil society organizations in order to put pressure on governments to create an enabling environment for human rights defenders that will enable them conduct their activities without interference and most importantly enact laws and regulations intended to protect them.
- (iii) Establishment of a defenders’ fund whose object is to support defenders through emergency situations. Natural Justice has been supporting frontline environment and land rights defenders in the communities we work with through a defender’s emergency fund (<https://envirodefenders.africa/>). In addition to this fund, Natural Justice is in the process of building a network of lawyers across Africa who can offer legal support on a pro-bono basis.
- (iv) Capacity building and training of frontline defenders on digital security and online safety. Training will enhance the defenders’ resilience and ability to protect themselves.

REFERENCE LIST

Adger N, Dessai S, Goulden M, Hulme M, Lorenzoni I, Nelson R, Naess O, Wolf J, Wreford A (2009) Are there social limits to adaptation to climate change? *Climatic Change* 93:335–354.

Adhikari, Umesh A., Pouyan Nejadhashemi, and Sean A. Woznicki. 2015. Climate change and eastern Africa: A review of impact on major crops. *Food and Energy Security* 4 (2): 110–132.

African Union, “African Commission on Human and Peoples’ Rights V. Republic of Kenya,” 26 May 2017, <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>. [Accessed 1 May 2020].

Amdu B, Ayehu A, Deressa A (2013) Farmers’ perception and adaptive capacity to climate change and variability in the upper catchment of Blue Nile, Ethiopia. The African Technology Policy Studies Network (ATPS), Nairobi, Kenya.

CELEP Policy Brief “Sustainable pastoralism and land-use change in the East African drylands” May 2018, No. 2, available at <http://www.celep.info/wp-content/uploads/2018/05/Policybrief-land-use-change-May-2018-.pdf>. Accessed 22 April 2020.

Conway, G. 2009. The science of climate change in africa: impacts and adaptation. In Discussion Paper, 1. Grantham Institute for Climate Change, Imperial College London, London, United Kingdom <http://www.ask-force.org/web/Global-Warming/Convay-Science-Climate-Change-Africa-2008.pdf>. Accessed 22 April 2020.

Deressa, T.T., R.M. Hassan, and C. Ringler. 2011. Perception of and adaptation to climate change by farmers in the Nile basin of Ethiopia. *The Journal of Agricultural Science* 149 (1): 23–31.

Galvin, K.A., Thornton, P. and Boone, R. (2001) Adaptation to Climate Variability and South African Livestock Systems: Lessons for Long-term Climate Change 1-3.

Humanitarian Policy Group. 2009. Pastoralism and climate change: Enabling adaptive capacity Available at: <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4317.pdf> (Accessed 23 April 2020).

IPCC 2007. Climate change 2007: Impacts, adaptation and vulnerability. Contribution of Working Group II to the Fourth Assessment. https://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4_wg2_full_report.pdf. [Accessed 20 April 2020].

IPCC 2013. Working group I contribution to the IPCC fifth assessment report climate change 2013: The physical science basis summary for policymakers. <http://www.ipcc.ch/report/ar5/wg1/> [Accessed 20 April 2020].

IPCC 2015. Climate Change 2014 Synthesis Report. Intergovernmental Panel on Climate Change. https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf. [Accessed 21 April 2020].

KCET. 2019. The Disproportionate Impact of Climate Change on Indigenous Communities. [online] Available at: <https://www.kcet.org/shows/tending-nature/the-disproportionate-impact-of-climate-change-on-indigenous-communities> [Accessed 22 April 2020].

Kenya Vision 2030 2014. Flagship Projects Progress Report. 2014. Accessible at <http://vision2030.go.ke/inc/uploads/2018/05/V2030-Flagship-Projects-Progress-Report-Nov-2014.pdf> [Accessed 1 May 2020].

Munger, S. 2015. The hunger of war: The Somali famine of 1991-92. <https://seanmunger.com/2015/02/25/the-hunger-of-war-the-somali-famine-of-1991-92/> [Accessed 22 April 2020].

Pure.iiasa.ac.at. (2016). Climate change and pastoralism: impacts, consequences and adaptation. Available at: <http://pure.iiasa.ac.at/id/eprint/14114/> [Accessed 26 April 2020].

Thornton, P., M. Herrero, A. Freeman, O. Mwai, E. Rege, P. Jones, and J. McDermott. 2007. Vulnerability, climate change and livestock—Research opportunities and challenges for poverty alleviation. SAT eJournal | ejournal.icrisat.org 4 (1): 1–23.