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I. INTRODUCTION

1. This report is made by Minority Rights Group International ("MRG") in relation to W.P. (C) No. 109/2008 titled Wildlife First & Ors. v. Ministry of Forest & Environment & Ors. MRG is a non-governmental organization based in London working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide. MRG works with over 150 organisations in nearly 50 countries. It has consultative status with the United Nations Economic and Social Council, observer status with the African Commission on Human and Peoples' Rights and is a civil society registered with the Organisation of American States. For 50 years, MRG has developed significant experience in the fields of minority rights, indigenous people rights and human rights law and as a result has extensive knowledge of relevant international legal standards and jurisprudence. It has been involved in human rights litigation in myriad contexts, including representing Mr. Finci in *Sejdic and Finci v Bosnia and Herzegovina* (Application Nos. 27996/06 and 34836/06) before the European Court of Human Rights (ECHR), as well as the Endorois community in *CEMIRIDE & MRG (on behalf of the Endorois Welfare Council) v Kenya* (Case No. 276/03) before the African Commission on Human and Peoples' Rights. MRG has also intervened in or submitted *amicus curiae* briefs before a range of international bodies, including in *African Commission of Human and People's Rights v. Kenya* (the 'Ogiek Case') (Application No. 006/2012) before the African Court on Human and Peoples' Rights, *Case of the Indigenous Communities of the Lhaka Honhat Association v. Argentina* before the Inter-American Court of Human Rights, as well as the ECHR cases of *Yumak and Sadak v Turkey* (Application No. 10226/03), *D.H. and others v the Czech Republic* (Application No. 57235/00), *Chagos Islanders v the United Kingdom* (Application No. 35622/04), *Pilav v Bosnia and Herzegovina* (Application No. 41939/07), *Bagdonavicius v Russia* (Application No. 19841/06) and *Fatmir Memedov v the former Yugoslav Republic of Macedonia* (Application No. 31016/17).

2. This report is made against the backdrop of the eviction of millions of families living in forest land whose applications for recognition of title under the *Forest Rights Act* (2006) have been rejected. The report seeks to demonstrate that (i) indigenous people enjoy a customary right to land under international law (*usus*) as recognised by courts around the

world; and (ii) they are the best custodians of the forest and environment, as recognised by the *Forest Rights Act 2006*, making their eviction detrimental to environmental protection.

3. This Report aims to evidence each claim in an effort to assist the Court in discharging its function.

II. INDIGENOUS PEOPLES HAVE A CUSTOMARY RIGHT TO THEIR TRADITIONALLY OCCUPIED LANDS AND TERRITORIES

4. International law protects collective rights of indigenous and tribal communities over ancestral lands they inhabited since time immemorial, emphasizing that such ownership is recognised in law through continuous occupation and use, notwithstanding lack of formal title. International standards emphasize that this right must be effective, cover the right to use land (*usus*) and to enjoy the fruits thereof (*fructus*).

5. This position is enshrined in treaties that are legally binding upon India, is clearly established in regional human rights systems globally, and in decisions of domestic courts. The paragraphs below will address the extent to which indigenous peoples' customary right to land is protected by (a) international treaties and declarations adopted within the framework of the United Nations, and regional human rights conventions such as the *European Convention on Human Rights*, the *Inter-American Convention on Human Rights* and the *African Charter on Human and Peoples' Rights* and case law; and (b) has been extensively recognised by domestic courts in various countries.

A. International Standards and Jurisprudence

6. India's participation in the international community creates rights and duties under international treaties and customary international law. This body of law places India under a legal obligation to recognise, implement and protect the rights of indigenous and tribal peoples to use and enjoy their ancestral land, irrespective of a formal property title.

7. It is supported in the following authorities:

    a. Article 11, *International Covenant on Economic, Social and Cultural Rights*, on adequate standards of living, wherein parties are required to take appropriate steps

to ensure realization, recognizing the essential importance of decisions based on free consent. This provision has been interpreted[1] as affording protection against forced evictions regardless of formal property title, a position further backed by General Comment No 4 of 13 December 1991 (CESCR), which emphasizes that the protection afforded by the Covenant encompasses 'informal settlements, including occupation of land or property'.[2]

b. Article 27, *International Covenant for Civil & Political Rights* supporting minority rights**,** backed by the Human Rights Committee's General Comment No. 23 (8 April 1994) emphasizing that parties are required to take 'positive legal measures of protection' to ensure indigenous peoples' customary right to land.[3]

c. *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') aimed at protecting the rights of indigenous peoples, which gives strong protection to the indigenous peoples' right to use and enjoy their traditional land.[4]

d. Article 26 UNDRIP provides:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

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1 Established by Resolution 1985/17 of the Economic and Social Council of 28 May 1985.

2 CESCR General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant, 13 December 1991) E/1992/23, paras 8(a) and 18.

3 CCPR, General Comment No 23: Rights of Minorities (Article 27, 8 April 1994) CCPR/C/21/Rev.1/Add.5, para 7.

4 United Nations Declaration on the Rights of Indigenous Peoples (adopted by the General Assembly on 13 September 2007) A/RES/61/295 (hereinafter, UNDRIP).

8. The consistent recognition in international treaties, built on state practice and *opinio juris*, is recognition of a crystallized customary principle of international law. This is supplemented by regional human rights systems, and case law, that guarantees the right to collective ownership of indigenous and tribal peoples over their ancestral land, even in the absence of formal title as demonstrated below.

1. The Inter-American Human Rights System

9. In *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) the Inter-American Court of Human Rights addressed the issue of the right of an indigenous community to use and enjoy its traditional land. The court developed an evolutionary interpretation of Article 21,[5] establishing that the right to property under the American Convention of Human Rights ('ACHR') includes the right of indigenous peoples to communal property over their ancestral land. It stated:

> … article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.[6]

10. It was clarified that in granting titles, the government should have taken into consideration 'customary practices' to the effect that 'possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration'.[7]

11. In *Moiwana Community Village v Suriname*, the Inter-American Court adjudicated the State's failure to guarantee the communities' safe return and occupation of their traditional land following an attack by the Suriname Army that forced their exit, noting:

> … in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – *mere*

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[5] Article 21 of the American Convention on Human rights provides: '1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law' (emphasis added).

[6] *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-Am. Ct. H.R., Judgment of 31 August 2001, para 148.

[7] Ibid, para 151 (emphasis added).

possession of the land should suffice to obtain official recognition of their communal ownership. That conclusion was reached upon considering the unique and enduring ties that bind indigenous communities to their ancestral territory. The relationship of an indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations.[8]

12. The court cited *Mayagna (Sumo) Awas Tingni Community v Nicaragua* to establish that 'their traditional occupancy of Moiwana Village . . . should suffice to obtain State recognition of their ownership'.[9]

13. These conclusions were ratified in three subsequent cases – *Yakye Axa v Paraguay*;[10] *Sawhoyamaxa Indigenous Community v Paraguay*;[11] *Xákmok Kásek Indigenous Community v Paraguay*[12] in which Paraguay was held internationally responsible under the ACHR because the formal recognition of the communal land rights of its indigenous and tribal peoples was not followed by a mechanism capable to secure the effective enjoyment of this right in practice.

14. In *Kaliña & Lokono Peoples v Suriname*, the court clarified the minimum content of the State's positive obligations concerning Article 21 of the Convention, emphasizing that Suriname had a duty to 'delimit, demarcate, grant title to, and ensure the use and enjoyment of the collective territory' as well as to 'secure the effective use and enjoyment of the communal property by avoiding the granting of titles to third parties'.[13]

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8 *Moiwana Community Village v Suriname*, Inter-Am. Ct. H.R., Judgment of 15 June 2005, para 131 (emphasis added).

9 Ibid, para 133.

10 *Yakye Axa v Paraguay,* Inter-Am. Ct. H.R., Judgment of 17 June 2005.

11 *Sawhoyamaxa Indigenous Community v Paraguay*, Inter-Am. Ct. H.R., Judgment of 29 March 2006.

12 *Xákmok Kásek Indigenous Community v Paraguay*, Inter-Am. Ct. H.R., Judgment of 24 August 2010.

13 *Kaliña and Lokono Peoples v Suriname*, Inter-Am. Ct. H.R., Judgment of 25 November 2016, paras 129 and 154.

15. The court referenced the principle of legal certainty, calling for formalization, through administrative and legislative measures, of an effective mechanism for delimitation, demarcation and grant of title in practically realising property rights. It found that '… the right to property of the indigenous and tribal peoples includes *full guarantees over the territories they have traditionally owned*, *occupied and used* in order to ensure their particular way of life, and their subsistence, traditions, culture, and development as peoples'.[14]

16. *Kaliña & Lokono* and other cases of the Inter-American Court are cited by other jurisdictions in deciding similar cases, including by the African Commission and the African Court on Human and Peoples' Rights, whose jurisprudence concerning the right to communal property will be analysed below.

2. The African Human Rights System

17. In the *Endorois* case, the African Commission established a violation of Article 14 of the African Charter of Human and Peoples' Rights ('ACHPR') against Kenya, finding that, despite the Kenyan Constitution and legislation providing formal recognition of the community's right over their ancestral land, accompanied by a mechanism of compensation in case of eviction, in practice, the Endorois were 'effective[ly] denied the ownership of their land'.[15] The Commission concluded that Kenya did not adhere to its obligation to guarantee that the community enjoyed 'the right to undisturbed possession, use and control of such property'.[16] In particular, the African Commission held that even when an indigenous community has unwillingly lost possession of their lands, it retains customary rights to those lands.[17]

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[14] Ibid, paras 133, 139 (emphasis added).

[15] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, African Cm. H.P.R., Case No 276/03, Decision of 25 November 2009, para 199.

[16] Ibid, para 186.

[17] The Commission concluded that '(1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.' Ibid, para. 209.

18. These principles were expanded by the African Court of Human and Peoples' Rights in the *Ogiek* case. The court confirmed that 'Article 14 may also apply to groups or communities' and that 'in effect, the right [to property] can be individual or collective'.[18] The court also cited UNDRIP, which, according to the Court, 'places greater emphasis on the rights of possession, occupation, use/utilization of land'.[19] The African Court recalled Ogiek occupation of the Mau Forest since time immemorial and concluded that '… they have the right to occupy their ancestral lands, as well as use and enjoy the said lands'.[20]

19. The Ogiek judgment shows positive cross-pollination between the jurisprudence of two distinct regional human rights systems. It also draws on the 'autonomous' notion of the right to property developed by the European Court of Human Rights, applied to indigenous claims over ancestral homelands.

20. These developments confirm the customary nature of the principle that States must ensure that indigenous and tribal peoples are in a position to use and enjoy, in an effective manner, their ancestral land, and offer the Honourable Supreme Court, clear precedents from different jurisdictions, especially in Latin America and Africa, facing similar problems to the matter before the Court.

B. Domestic Jurisprudence

21. There is also a growing body of domestic jurisprudence, consistent with UNDRIP Article 26(2), that recognises that indigenous peoples have a customary right of ownership or title to the ancestral lands that they currently possess.[21] This customary right is based on (i) pre-existing indigenous laws and practices (and a recognition that colonial annexation did not extinguish indigenous peoples' rights to their ancestral lands) and (ii) the common law principle that occupation is proof of possession. In the indigenous context, such possession can be established in the absence of clear evidence of uninterrupted physical occupation. Instead, courts have adopted more flexible standards that require decision-makers to

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[18] *African Commission on Human and Peoples' Rights v Republic of Kenya*, African Ct. H.P.R., App No. 006/2012, Judgment of 26 May 2017, para 123.

[19] Ibid, paras 125-127.

[20] Ibid, paras 128.

[21] See generally Claire Charters, Indigenous Peoples' Rights to Lands, Territories and resources in the UNDRIP, in The UN Declaration of the rights of Indigenous Peoples: A Commentary (Hohmann & Weller eds., 2018), p. 420.

consider evidence of customary tenure practices and a connection between past patterns of land use and current activities.

22. Domestic jurisdictions may apply different tests and standards to ascertain (i) the existence of customary legal title, (ii) whether subsequent government acts extinguish that title,[22] and (iii) the scope and content of legal protections afforded to indigenous peoples' customary title under the various domestic legal regimes. Nevertheless, courts across common law jurisdictions asses evidence related to customary indigenous land claims and apply applicable legal standards with reference to the particular indigenous community's customs and practices, thus acknowledging that the roots of indigenous title arise from indigenous customs and laws that preceded the acquisition of sovereignty by colonisers.

23. The Privy Council's seminal decision in *Amodu Tijani v The Secretary* articulates the definitive position of customary indigenous title at common law.[23] It recognises indigenous peoples have a customary right to their ancestral lands at common law and cautions against importing Western conceptions of ownership to determine whether an indigenous community has established a customary right to use and benefit from their ancestral lands.

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division

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[22] Significantly, in terms of item (ii) and the continuing validity of customary title following government acts that purport to extinguish such title, the New Zealand Court of Appeal has held that an indigenous peoples' customary title to their lands 'cannot be extinguished (at least in times of peace) *otherwise than by the free consent of the native occupiers*, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.' *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA), para 29 (citing *Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 23-24) (emphasis added). Regarding the validity of an act or process that purports to extinguish indigenous customary title, the Inter-American Commission has also held that States have an obligation to guarantee 'a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires, as a minimum, that *all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives*'. *Mary and Carrie Dann v United States*, Inter-Am. Cm. H.R. Report No. 75/02, Case 11.1140, 27 December 2002, para 140 (emphasis added).

[23] See *Kerajaan Negeri Selangor and others v Sagong Bin Tasi and others* (2005) MLJ; *Cal and Others v Attorney General of Belize* (18 October 2007) Claim Nos 171/2007, 172/2007 (citing *Amodu Tijani v The Secretary*, Southern Nigeria [1921] UKPC 80, 2 AC 399).

between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence.[24]

To illustrate this point, the Privy Council referred to a series of traditional or customary property interests in specific colonies that had no analogies in British property law. It emphasised that in India, unlike England,

> [t]he division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession, is unknown. *In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is may not be that of the individual, as in this country it nearly always is in some form*, *but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading*.[25]

Accordingly, at common law, courts assess whether an indigenous community has a customary right to land, as well as the nature and content of that right with reference to the specific community's customs and practices.

24. In *Tsilhqot'in Nation v British Columbia*, the Supreme Court of Canada recently awarded an indigenous community customary (or 'aboriginal') title to their lands based on a line of precedents recognising that indigenous land rights survive colonial settlement and remain

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[24] *Amodu Tijani v The Secretary*, Southern Nigeria [1921] UKPC 80, 2 AC 399, pp 402-404 (paginated p 3).

[25] Ibid (emphasis added).

valid unless extinguished by treaty or otherwise.[26] Like in other common law jurisdictions, Canadian courts recognise that although the Crown acquired radical or underlying title to the land at the time of colonial settlement, such title was burdened by the pre-existing legal rights of indigenous peoples.[27] In Canada, customary title (i) encompasses the right to exclusive use and occupation of the land (including the right to benefit from such land) for a variety of purposes and (ii) cannot be alienated in a way that deprives future generations of the control and benefit of the land.[28] Although the government may infringe on those customary rights, it may do so only on the basis of a compelling and substantial purpose that is consistent with the Crown's fiduciary duties to the group.[29]

25. In Canada, to establish customary title to ancestral lands, the indigenous community must show

> (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.[30]

26. Significantly, under the supreme court's test

    a. '[*r]egular use of the territory suffices to establish*' sufficient occupation under (1),

    b. continuity of occupation under (2) 'does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact' but rather, 'simply

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[26] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, para 10 (citing *Calder v Attorney-General of British Columbia* [1973] S.C.R. 313).

[27] Ibid, para 12 (citing *Guerin v The Queen* [1984] 2 S.C.R. 335).

[28] Ibid, paras 15, 18 (citing *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010, para 117).

[29] Ibid, para 18.

[30] Ibid, para 50.

means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times',[31] and

c. intent and capacity to hold the land drive the analysis under (3). Accordingly, evidence other groups or individuals were on the land is not incompatible with exclusivity of occupation.[32]

27. In the *Ngati Apa* case, the Court of Appeal of New Zealand unanimously held that customary indigenous title to land continues to exist until lawfully extinguished[33] and that the government bore the burden of proving extinguishment when it asserted that it owned all the land below the high tide in New Zealand.[34] In particular, the court emphasised that

> [a]ny property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature, as the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* held. The content of such customary interest is a question of fact discoverable, if necessary, by evidence (*Nireaha Tamaki v Baker* at 577*)*. As a matter of custom[,] the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom (as appears to be the position described in *St Catherine's Milling and Lumber Co v The Queen* and as the Tribunal in *William Webster's Claim* seems to have thought might be the extent of Maori customary property). On the other hand, the customary rights might 'be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference' (*Amodu Tijani v Secretary, Southern Nigeria* at 410). . . . The existence and content of customary property is

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31 Ibid, para 46.

32 It is ultimately a fact-intensive inquiry that must be approached from the both the indigenous and common law perspectives. 'Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control'. Ibid, para 48.

33 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA), para 19 (explaining that in New Zealand, 'land was not available for disposition by Crown grant until Maori property was extinguished. In the North American colonies land occupied or used by Indians was treated as vacant lands available for Crown grant. Even so, as the Supreme Court of the United States in *Johnson v M'Intosh* (1823) 21 US (8 Wheaton) 543 held, the Crown's interest and any grant made by it of the land was subject to the native rights (at 574, 603 per Marshall CJ). They were rights at common law, not simply moral claims against the Crown (at 603)').

34 Ibid, paras 148-149.

determined as a matter of the custom and usage of the particular community (*Tamihana Korokai v Solicitor-General* at 351 per Edwards J).[35]

28. The supreme court recently affirmed the proposition that the Maori owned all the land in New Zealand prior to colonisation and that the cession of sovereignty did not affect their property rights, which continued in time and were held under tribal custom.[36] Accordingly, in New Zealand, indigenous ownership continues under custom unless a legal transfer to the Crown can be shown.

29. In a landmark case in Malaysia, the state of Selangor's High Court recognised indigenous title to ancestral lands at common law and a duty on the government to pay compensation for forcibly evicting the indigenous community from their land.[37] The court of appeal upheld the high court's decision, emphasising two important principles derived from its analysis of common law jurisprudence.

> First, that the fact that the radical title to land is vested in the Sovereign or the State (as in the case here) is not an ipse dixit answer to a claim of customary title. There can be cases where the radical title is burdened by a native or customary title. The precise nature of such a customary title depends on the practices and usages of each individual community. And this brings me to the second important point. It is this. What the individual practices and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community. In other words[,] it is a question of fact to be decided (as it was decided in this case) by the primary trier of fact based on his or her belief of where, on the totality of the evidence, the truth of the claim made lies.[38]

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[35] Ibid, paras 31-32. In coming to this conclusion, the court of appeal cited the *Te Ika Whenua Inc Society* case: 'On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, *the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that* ***they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers****, and then only to the Crown and in strict compliance with the provisions of any relevant statutes*.' *Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 23-24 (emphasis added).

[36] *Paki v Attorney General* [2014] NZSC 118, [2015] 1 NZLR 67, paras 22, 68.

[37] *Sagong Tasi and Ors v Negeri Kerajaan Selangor and Ors* [2002] 2 CLJ 543.

[38] *Kerajaan Negeri Selangor and others v Sagong Bin Tasi and others* (2005) MLJ, para 12.

Significantly, the court of appeal clarified that an indigenous community may have customary rights at common law over lands vested in the State notwithstanding subsequent legislative acts purported to extinguish the land claim in question.[39] Ultimately, it is for the courts to decide whether the subsequent government act validly extinguished an indigenous community's pre-existing customary title to their lands and territories.

30. In Belize, the supreme court affirmed that traditional indigenous land tenure systems constituted property worthy of legal protection. It adopted a similar approach to the Malaysian court of appeal, finding that the claimants had established a right of customary ownership based on the community's historical relationship to and usage of the disputed lands.[40]

> [O]n the evidence in this case, the communal title to lands in Conejo and Santa Cruz Villages in the Toledo District, inheres in the claimants in accordance with Maya customary land tenure. The nature of this title is communal, entitling the members of the community to occupy, use the lands for farming, hunting, fishing and utilizing the resources thereon as well as for other cultural and spiritual purposes, in accordance with Maya customary law and usage.[41]

31. South African courts also recognise that indigenous peoples have a customary right to their ancestral lands. In the *Richtersveld Community* case, the Supreme Court of Appeal emphasised that (1) uninterrupted presence on the land need not amount to possession at common law for the purposes of assessing whether an indigenous community has a customary ownership right over land, and (2) a nomadic lifestyle is not inconsistent with the exclusive and effective right of occupation by indigenous peoples.[42] Affirming the court of appeal, the Constitutional Court of South Africa held that

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[39] Ibid, paras 13-31.

[40] *Cal and Others v Attorney General of Belize* (18 October 2007) Claim Nos 171/2007, 172/2007, paras 26-44.

[41] *Cal and Others v Attorney General of Belize* (18 October 2007) Claim Nos 171/2007, 172/2007, para 68.

[42] *Richtersveld Community and Others v Alexkor Ltd and Another* [2001] (4) All SA 563 (LCC), para 23. Moreover, according to the Supreme Court of Appeal, '[t]he undisputed evidence in this case shows that at the time of annexation the Richtersveld people had enjoyed undisturbed and exclusive occupation of the subject land for a long period of time. The right was rooted in the traditional laws and custom of the Richtersveld people. The right inhered in the people inhabiting the Richtersveld as their common property, passing from generation to generation. The right was certain and reasonable. The inhabitants and strangers alike were aware of the right and respected and observed it. I accordingly conclude that at the time of annexation the Richtersveld people had a 'customary law interest' in the subject land within the definition of

> In the light of the evidence and of the findings by the SCA (Supreme Court of Appeal) and by the LCC (Land Claims Court), we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its waters, to use its land for grazing and hunting and to exploit its natural resources above and beneath the surface. . . . We are satisfied that under the indigenous law of the Richtersveld Community[,] communal ownership of the land included communal ownership of the minerals and precious stones.[43]

32. A comparative analysis of the jurisprudence of various domestic legal systems thus confirms that indigenous and tribal peoples have a customary ownership right to their ancestral lands based on their traditional use and occupancy. Such traditional use or occupancy effectively vests legal title to those lands and territories in the indigenous community as a whole or even on an individual basis. The precise nature and incidents of such customary title will depend on the practices and usages of the specific indigenous or tribal community.[44] States consequently have an obligation to ensure that any acts by public or private parties that infringe on or purport to extinguish those customary ownership rights comport with applicable domestic and international standards protecting indigenous peoples' property interests in their ancestral lands.[45]

'right in land' in the Act. The substantive content of the interest was a right to exclusive beneficial occupation and use, akin to that held under common.' Ibid, paras 28-29.

[43] *Alexkor Ltd. v Richtersveld Community* [2003] 12 BCLR 130, paras 62, 64.

[44] *Amodu Tijani v The Secretary*, Southern Nigeria [1921] UKPC 80, 2 AC 399, pp. 402-404 (paginated p. 3); Kerajaan Negeri Selangor and others v Sagong Bin Tasi and others (2005) MLJ 289, para 12.

[45] Once an indigenous community establishes ownership based on customary tenure, such property rights are deserving of contemporary protection under various domestic instruments, including the constitution of the country in question. Courts have interpreted these protections liberally, in light of "evolving standards of decency that mark the progress of a mature society", including relevant human rights standards. *Cal and Others v Attorney General of Belize* (18 October 2007) Claim Nos 171/2007, 172/2007, paras 99-102. See also *Kerajaan Negeri Selangor and others v Sagong Bin Tasi and others* (2005) MLJ, paras 19-24.

III. INDIGENOUS PEOPLES ARE THE BEST CUSTODIANS OF THE ENVIRONMENT

A. International and Regional Standards

33. The preamble of UNDRIP recalls the need for indigenous and tribal protection in the face of "historic injustices, as a result of . . . their colonization and dispossession of . . . lands, territories and resources, . . . [which] prevent[ed] them from exercising . . . their right to development in accordance with their . . . needs and interests".[46] UNDRIP, signed by 141 countries, including India, further recognises the:

> … urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.[47]

34. UNDRIP emphasizes links between land and culture, stating indigenous rights to:

> … maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard".[48]

These fundamental rights encompass the

> … right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.[49]

States' responsibilities are identified as ensuring the full implementation and respect of these pivotal rights, through:

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[46] UNDRIP, Preamble, para 6.

[47] UNDRIP, Preamble, para 7.

[48] UNDRIP, Art. 25.

[49] UNDRIP, Art. 26(2).

> … legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[50]

35. Indigenous communities' way of life and culture is intrinsically linked to respect for nature through eons of traditional knowledge passed through generations, with a positive impact on the environment. UNDRIP recognises "… respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment".[51]

36. The climate crisis exacerbated by large-scale mechanized commercial destruction of forests by multinational corporations underlines the urgent need to recognize indigenous and tribal peoples as custodians of the environment. T he preamble of the *Paris Agreement* (COP21), signed and ratified by India, recognises the need for effective and progressive responses to the urgent threat of climate change on the basis of the best available scientific knowledge.[52]

37. Article 7(5) of COP 21 supports tribal knowledge contribution as the appropriate response of climate change, stating:

> … parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.[53]

38. A deep understanding of nature and use of sustainable practices over centuries maintained an ecological balance, disrupted recently by land aggression perpetrated by non-forest

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[50] UNDRIP, Art. 26(3).

[51] UNDRIP, Preamble, para 11.

[52] Paris Agreement, Preamble, para 4. Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[53] Paris Agreement, Art.7(5). Available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

dwelling communities including multinational corporations.[54] The purpose of forest for tribal communities' livelihoods tends to be to preserve nature using traditional knowledge. This is recognised by Experts on Climate Change. Patricia Espinosa, Executive Secretary, *UN Framework Convention on Climate Change* said:

> … Indigenous people must be part of the solution to climate change. This is because you have the traditional knowledge of your ancestors. The important value of that knowledge simply cannot—and must not—be understated. You are also essential in finding solutions today and in the future. The Paris Climate Change Agreement recognises this. It recognises your role in building a world that is resilient in the face of climate impacts.[55]

39. Traditional Ecological Knowledge (TEK), a common phrase, refers to "knowledge, practice, and belief regarding the relationship of living beings to one another and to the physical environment, which is held by peoples in relatively non-technological societies with a direct dependence upon local resources".[56] TEK, referred to as traditional environmental knowledge, emphasises different components and interactions of the environment. It encompasses knowledge of species of animals and plants, and biophysical characteristics of the environment through space and time. It is equated with scientific knowledge,[57] and considered the "intellectual twin to science".[58] Contemporary environmental protection combines TEK and science to confront conservation issues to enhance the effectiveness and resilience of conservation actions.[59]

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[54] See Rights and Resources Initiative, Replacing Fortress Conservation with Rights Based Approaches Helps Bring Justice for Indigenous Peoples and Local Communities, Reduces Conflict, and Enables Cost-effective Conservation and Climate Action, June 2018, p 7. Available at https://rightsandresources.org/wp-content/uploads/2018/06/Cornered-by-PAs-Brief_RRI_June-2018.pdf.

[55] Introduction to the Local Communities and Indigenous Peoples Platform (LCIPP) speech from Patricia Espinosa, Executive Secretary of the UNFCCC.

[56] Fikret Berkes, Traditional Ecological Knowledge in Perspective, in Traditional Ecological Knowledge: Concepts and Cases (Inglis ed, 1993). Available at http://library.umac.mo/ebooks/b10756577a.pdf.

[57] United Nations Environment Programme. 1998. Report of the fourth meeting of the parties to the convention on biodiversity. Nairobi (Kenya): United Nations Environment Programme. (U.N. Doc. UNEP/CBD/ COP/4/27).

[58] Vine Deloria Jr., Red Earth, White Lies, 1997 (New York: Harper and Row).

[59] Henrik Moller and Phil O'B. Lyver, Traditional Ecological Knowledge for Improved Sustainability: Customary Wildlife Harvests by Māori, in Indigenous People and Conservation for Rights to Resource Management form Conservation International (Painemilla, Rylands, Woofter & Hughes eds, 2010), p 229.

40. Indigenous and tribal presence on protected land around the world, has proven a low-cost positive contribution to land conservation and climate change. The *World Resource Institute* concludes that protecting indigenous peoples right to land constitutes "good economic sense".[60] Numerous studies demonstrate that indigenous Peoples achieve '… at least equal conservation results with a fraction of the budget of protected areas, making investment in indigenous peoples themselves the most efficient means of protecting forests".[61]

41. Moreover, a 2018 *Rights and Resources Initiative* analysis[62] supports finding that indigenous peoples are major conservation investors.[63] There is 2.8 times less deforestation in Tenure-Secure indigenous lands. According to the *World Economic Forum*, indigenous peoples are essential to preserving protected areas. They are the first guardian and most able to protect against deforestation.[64] Indigenous communities have combated desertification for centuries, following the rhythm of seasons and regenerating vegetation. While first in preserving the environment, indigenous people are unfortunately also first to suffer consequences of climate change as highlighted in the latest *Minority Rights Group* report on Climate Justice (2019).[65] Research highlights that '… indigenous peoples and local communities are effective conservationists, with stronger rights to land and forests positively associated with biodiversity outcomes'.[66]

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[60] Peter Veit & Helen Ding, Protecting Indigenous Land, October 2016. Available at https://www.wri.org/blog/2016/10/protecting-indigenous-land-rights-makes-good-economic-sense.

[61] Cory Rogers, Investing in Indigenous communities is most efficient way to protect forests, July 2018. Available at https://news.mongabay.com/2018/07/investing-in-indigenous-communities-most-efficient-way-to-protect-forests-report-finds/.

[62] The methodology, findings, and caveats of RRI's 2018 analysis of conservation funding reported here are available at http://www.corneredbypas.com.

[63] Rights and Resources Initiative, Replacing Fortress Conservation with Rights Based Approaches Helps Bring Justice for Indigenous Peoples and Local Communities, Reduces Conflict, and Enables Cost-effective Conservation and Climate Action, June 2018, pp 8-9. Available at https://rightsandresources.org/wp-content/uploads/2018/06/Cornered-by-PAs-Brief_RRI_June-2018.pdf.

[64] Hindou Oumarou Ibrahim, Why Indigenous People Are Key to Protecting our Forests, March 2016. Available at https://www.weforum.org/agenda/2016/03/indigenous-people-forest-preservation/.

[65] See Minority Rights Group, 2019 Trends Report on Climate Justice. Available at https://www.minorityrights.org. See also Hindou Oumarou Ibrahim, Why Indigenous People Are Key to Protecting our Forests, March 2016. Available at https://www.weforum.org/agenda/2016/03/indigenous-people-forest-preservation/.

[66] UN Secretary-General. 2016. Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz. 71st session of the UN General Assembly, 16 July 2016 (U.N. Doc. A/71/229).

42. Indian law is cognisant of the beneficial relationship between the forest and *adivasis*. Its earliest wildlife protected areas and forest reserves were created by *adivasi* communities who reserved landscapes for cultural, ethical, or economic reasons.[67] Several sites conserved by communities have been recognized for wildlife value and declared sanctuaries or national parks by state governments. In Punjab, lands belonging to the Bishnoi, with considerable blackbuck and Indian gazelle or Chinkara (Gazella bennettii) populations, have been declared the Abohar Sanctuary. In the Karera Great Indian Bustard Sanctuary, the declaration of the protected area led to a significant increase in the Blackbuck population, which devastated local people's crops, who became hostile to the sanctuary and contributed to elimination of the entire population of bustards (Ardeotis nigriceps), one of India's most endangered birds.[68] Indian law recognises the need for *Gram sabhas* to be empowered to protect wildlife and biodiversity, keeping destructive activities out of the forests in which they are given rights.[69]

43. International conventions, experts, and scientists from every continent have researched this question extensively and agree the positive impacts on the environment of indigenous and tribal communities, in preserving biodiversity and mitigating climate consequences. The UN Special Rapporteur on the Rights of Indigenous Peoples asks a fundamental question to every responsible State:

> Indigenous people's rights need to be protected in the best way possible, not just for them but because they are also able to provide solutions to many of the world's problems from climate change to biological diversity. It is in the self-interest of states and even corporations in the medium and long term to protect and listen to these people – the question is, will they realise this in time?[70]

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[67] Ashish Kothari & Neema Pathak, Indigenous and Local Community Based Conservation in India: Current Status and Future Prospects, in Indigenous People and Conservation for Rights to Resource Management form Conservation International (Painemilla, Rylands, Woofter & Hughes eds 2010), p 182.

[68] Ibid, p 185.

[69] Ibid, p 192.

[70] Matthew Taylor. Protect Indigenous People to Help Fight Climate Change, Says UN Rapporteur, The Guardian, 6 October 2017. Available at https://www.theguardian.com/world/2017/oct/06/protect-lives-indigenous-people-can-limit-climate-change-says-un.

B. Jurisprudence and Legal Commentary

44. In 2017 the African Court of Human and Peoples rights condemned Kenya for land rights violation for 15,000 Ogiek peoples based in the greater Mau Forest Complex (about 400,000 hectares).[71] The tribe was evicted with short notice from their ancestral land and the African Court found a violation of article 14 (right to property) of the ACHPR, interpreted in the light of Article 26 (right to land, territory and recourses) of UNDRIP.[72]

45. The Kenyan Government did not dispute Ogiek occupation of the Mau Forest since time immemorial, and the court held that they constitute an indigenous community with a right to occupy, use and enjoy their ancestral lands.[73] The court reiterated that the Kenyan government did not provide evidence that their presence is the cause for deterioration of the natural environment in the area. It concluded that the violation of the land rights of the Ogiek was unnecessary and disproportionate,[74] with the government not having adequately proven its claim that eviction would preserve the natural ecosystem of the Mau Forest. This was dismissed as a legitimate justification for interference in the Ogiek's exercise of their cultural rights under Article 17(2) and (3) of the African Charter.[75]

46. The Court emphasized the role of indigenous peoples, specifically hunter-gatherers, in conservation, clearly stating that forest preservation could not justify lack of recognition for Ogiek's indigenous or tribal status, nor denial of rights associated with that status. It explicitly confirmed that Ogiek could not be held responsible for Mau Forest depletion, nor could their eviction or denial of access to their land to exercise their right to culture be justified on this basis.

47. The Inter-American Court of Human Rights had also seized the opportunity to address the overlap between the rights of indigenous people and international environmental law in the *Kaliña and Lokono Peoples v Suriname*. As regards a limb of the complaint flowing from the persistence of the national reserve, the Court held that:

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[71] *African Commission on Human and People's Rights v Republic of Kenya*, Afr. Ct. H.R., Application N° 006/2012, 26 May 2017, para 6.

[72] Ibid, para 126.

[73] Ibid, para 128.

[74] Ibid, para 130.

[75] Ibid, 26 May 2017, paras 187-190

> … the Kaliña and Lokono peoples have the right to claim the possible restitution of the parts corresponding to their traditional territory adjoining the nature reserves under domestic law" and that "the State must weigh the collective rights of the Kaliña and Lokono peoples against the protection of the environment as part of the public interest . . . when implementing the delimitation, demarcation and titling of the corresponding traditional territories.[76]

48. The complaint flowed from restrictions indigenous peoples faced in using of their traditional lands that had been designated natural reserve. The Court held that:

> … the rights of the indigenous peoples and international environmental laws should be understood as complementary, rather than exclusionary, rights… [since] …the indigenous peoples may play an important role in nature conservation in light of the fact that certain traditional uses entail sustainable practices and are considered essential for the effectiveness of conservation strategies".[77]

The Court concluded that "respect for the rights of the indigenous peoples may have a positive impact on environmental conservation".[78]

49. This conclusion was based on the expert opinion of the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, who indicated to the Court that: "[i]nternational environmental law and international human rights law should not be considered separate, but rather interrelated and complementary, bodies of law",[79] and on the obligations arising from the *UN Convention on Biological Diversity* (1992), the *Ramsar Convention on Wetlands* (1971) and the *UN Framework Convention on Climate Change* (1998).[80] The conclusion that "the indigenous and tribal peoples can make an important contribution to such conservation" reached by the Court, has influenced the Special Rapporteurs on the rights of indigenous peoples and on the human right to a safe environment (see Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples,

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[76] *Kaliña and Lokono Peoples v Suriname*, Inter-Am. Ct. H.R., Series C No 309, Judgment of 25 November 2016, para 168.

[77] Ibid, para 173.

[78] Ibid, para 173.

[79] Ibid, para 174.

[80] Ibid, para 176.

A/71/229 (2016),[81] and Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/34/49 (2017)).[82] The latter stated that:

> …[p]rotecting the rights of those who live closest to nature is […] often the best or only way to ensure the protection of biodiversity… [given that] …[t]he knowledge and practices of the people who live in biodiversity-rich ecosystems are vital to the conservation and sustainable use of those ecosystems.

50. Two Regional Courts have touched upon this question, making ground-breaking but not complete rulings. There is now a real opportunity for the Indian Supreme Court to set a strong precedent and adjudicate on the fundamental right of IP to live in harmony with their culture by respecting their land rights, while they keep protecting the forest and keep participating in mitigating the inevitable consequences of climate change.

IV. CONCLUSION

51. The *Indian Forest Act* (2006) was hailed as a path-breaking progressive legislation that would finally overcome the colonial bias against indigenous and tribal peoples, enabling these communities, through a well-articulated process, to gain recognition of title for territories that were held in customary law, well before the arrival and departure of colonial rulers. In recognising communities' right to subsistence in the forest through sale of minor forest produce, the law showed understanding of forest dwellers and established an important marker in both conservation efforts, as well as the restoration of title that had been disrupted by the arrival of formal colonial law.

52. Unsatisfactory implementation of the Act, and arbitrary determinations of title have undermined *Adivasi* rights in India leading to a dual violation. First in denying swathes of communities the legitimate right to homes they have been careful to maintain against

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[81] Ibid, para 28; Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, A/71/229 (2016). Available at https://www.un.org/en/ga/ search/view_doc.asp?symbol= A/71/229.

[82] *Kaliña and Lokono Peoples v Suriname*, Inter-Am. Ct. H.R., Series C No 309, Judgment of 25 November 2016, para 59.

incessant large-scale commercial pressure and forces of ‘modernisation’; second in potentially removing the best custodians of the environment at a critical time.

53. There is clear evidence that vast swathes of Indian forests and wetlands have been destroyed, causing major environmental harm. The key issues the Court needs to determine in the current case are: (i) whether that destruction would have occurred if *Adivasi* title had been recognised and fully protected; and (ii) the extent to which their eviction with their subsistence lifestyle is best for the environment, at a time when positive measures are required to regenerate the life-giving qualities of the forests due to damage wreaked on the economy elsewhere and by others.