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# Navigating a sea of laws:

# the quests of small-scale fishing communities in Ghana and South Africa for protecting their customary rights

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**ABSTRACT:** After reflecting on the current status of international law and insights from studies on legal pluralism on the recognition of customary law, this chapter explores shared challenges and different approaches to ensuring the recognition of small-scale fishers' customary rights in Ghana and South Africa. The chapter concludes by drawing on international human rights law and international environmental law to identify procedural approaches to strengthen the protection for fishers' customary rights as a matter of implementation at the national level.

## 1. Introduction

In the past two decades there has been growing recognition of and support for indigenous peoples' and other communities' customary law in international environmental and human rights law (Trechera 2010; Tobin 2014; Knox 2018). In addition, the importance of customary systems of tenure in natural resource governance has been increasingly recognised, both for its local contributions to sustainability and culture (FAO 2012, FAO 2014, Sunde 2017, Jentoft and Bavinck 2019), as well as for its contributions to global objectives.

While these international developments have largely focused on land and terrestrial natural resources, the importance of legal pluralism for the governance of the ocean and marine resources is also receiving increasing attention internationally (Parlee and Wiber 2015; Gupta and Bavinck 2014; Jentoft and Bavinck 2019). This attention has been catalysed the struggles of indigenous peoples and small-scale fishing communities who have advocated for recognition of their customary systems of law and rights to marine resources (ICSF 2008; Sunde 2017). It has also come from within the arenas of both fisheries and marine conservation, as State and non-State actors seek policy reforms that will address conflicts over resources and promote resource sustainability in the face of past failures (Cinner and Aswani 2007; Bavinck *et al*. 2014).

Yet, although customary law has gained formal recognition in many national jurisdictions (Cuskelly 2011), many small-scale fishing communities' customary rights remain vulnerable due to a combination of factors: the complex legacy of colonialism in existing national legislation on natural resources, unduly restrictive approaches in statutory law, and continued prejudice towards all things customary (Sunde 2017; Jentoft and Bavinck 2019; Wilson 2020). In some cases, it may also be due to the lack of awareness that the ocean-related rights of Indigenous Peoples and local communities have been the object of misrepresentation, misrecognition or dispossession for decades and centuries (Wilson 2020).

After reflecting on the current status of international law and insights from studies on legal pluralism on the recognition of customary law, this chapter explores shared challenges and different approaches to ensuring the recognition of small-scale fishers' customary rights in Ghana and South Africa. The chapter concludes by drawing on international human rights law and international environmental law to identify procedural approaches to

strengthen the protection for fishers' customary rights as a matter of implementation at national level.

## 2. International recognition of customary fishing rights in the context of international biodiversity law and international human rights law

International human rights law requires States to recognize customary laws of indigenous peoples and other local communities as a way to protect their human rights to natural resources, as well as their rights to culture and livelihoods, property and/or development. International biodiversity law imposes obligations on States to recognize and protect customary laws as a way to acknowledge and support indigenous peoples' and local communities' contributions to environmental sustainability. While these two areas of international law have evolved in separate ways, and for different purposes, they have come, over time, to converge and complement each other in determining the content of State obligations and the modalities for their implementation (Morgera 2018).

In parallel, international recognition is growing of the global benefits of customary approaches: for instance, FAO has indicated that customary food systems are a "game-changing solution" for current global debates on sustainable food systems, the conservation of biodiversity and the realization of the right to food (FAO 2021, p. 42). FAO recognized that these food systems are "intimately connected to nature, promote the equitable distribution of resources and powers, while supporting indigenous identities and values" (FAO 2021, p. xiv) although they "continue to be marginalized in policy" and escape characterization by dominant approaches to food systems as linear value chains. (FAO 2021, p. xiv).

On the side of international human rights law, the UN Declaration of the Rights of Indigenous Peoples (UNDRIP),[i] calls upon States to give due consideration to customary laws and tenure systems in providing legal recognition and protection to indigenous peoples' territories and resources (Art. 26.3), 'establish(ing) and implement(ing), in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process(es)' (Art. 27), and providing effective remedies for all infringements of their rights (Art. 40).

Along similar lines, ILO Convention 169[ii] calls on States to pay 'due regard' to customary laws in applying national laws and regulations, (Art. 8) so that indigenous peoples can retain their own customs and institutions that are compatible with fundamental rights defined by the national legal system and with internationally recognised human rights. In addition, States shall prevent third parties from taking advantage of customs to secure the ownership, possession or use of land belonging to indigenous peoples (Art. 8). These obligations, while clear in scope and content, leave unclear which means of implementation should be used in the context of natural resource governance.

Under the Convention on Biological Diversity (CBD),[iii] in turn, we have more open-ended obligations, but detailed guidance on means of implementation to protect indigenous and local custodianship embedded in customary rules and practices (including linguistic diversity).[iv] A series of guidelines, adopted intergovernmentally and with inputs from indigenous peoples' representatives, explain how these obligations apply in the context of natural resource governance. For instance, CBD Parties defined, to the benefit of natural resource managers, customary laws as 'law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.' (Akwé: Kon Guidelines, para. c) CBD Parties are then expected to assess the potential impacts of development proposals affecting indigenous peoples' sacred and traditionally used resources

on their customary laws, including with regard to tenure, distribution of resources and benefits, or their knowledge with a view to identifying the need to 'codify certain parts of customary law, clarify matters of jurisdiction, and negotiate ways to minimize breaches of local laws.' (Akwé: Kon Guidelines, paras. 29, 34 and 60). In addition, CBD Parties are expected to ensure that environmental and other laws are implemented according to customary laws, whereby seeking free, prior informed consent of indigenous peoples is understood as a 'continual process of building mutually beneficial, ongoing arrangements … in order to build trust, good relations, mutual understanding, intercultural spaces, knowledge exchanges, create new knowledge and reconciliation.' (Mo'otz Kuxtal Voluntary Guidelines, para. 8)[v]

Further guidance, specifically targeted to fisheries managers has been developed, on the basis of international human rights and environmental law, under the aegis of the UN Food and Agriculture Organization (FAO) . The Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the context of Food Security and Poverty Eradication (SSF Guidelines)[vi] acknowledge that in many countries a range of tenure regimes may co-exist, although some may not be recorded or legally protected. The Guidelines call on States to "recognize, respect and protect all forms of legitimate tenure rights, taking into account, where appropriate, customary rights, to aquatic resources and land and small-scale fishing areas enjoyed by small-scale fishing communities" (SSF Guidelines, para. 5.4; Nakamura and Morgera 2021). To that end, States should take appropriate legal measures to identify, record and respect legitimate tenure right holders and their rights, recognizing 'local norms and practices, as well as customary or otherwise preferential access to fishery resources and land by small-scale fishing communities … in ways that are consistent with international human rights law' (SSF Guidelines, para. 5.4). In addition, formal planning systems should consider methods used by small-scale fishing, their customary tenure systems and decision-

making processes (SSF Guidelines, para. 10.2). At the same time, however, the SSF Guidelines recognize that 'customary practices for the allocation and sharing of resource benefits in small-scale fisheries, which may have been in place for generations, have been changed as a result of non-participatory and often centralized fisheries management systems, rapid technology developments and demographic changes.' (SSF Guidelines, Introduction) So processes of genuine engagement with and learning from indigenous peoples and small-scale fishers are necessary to understand the current status of customary laws, customary governance and customary tenure of fisheries resources.

To that end, the FAO Voluntary Guidelines on the Responsible Governance of Tenure[vii] (VGGT Guidelines) provide a method ology and set of guiding steps for States to ensure that policy, legal and organizational frameworks 'reflect the social, cultural, economic and environmental significance' of fisheries and 'the interconnected relationships between land, fisheries and forests and their uses, and establish an integrated approach to their administration,' (para. 5.3) which may require adapting national laws to customary laws with full and effective participation of all members or representatives of affected communities, including vulnerable and marginalized members (paras. 9.6–9.7). A series of practical steps are then identified, whereby States are to:

- first identify all existing tenure rights and right holders, whether recorded or not, by consulting indigenous peoples and other communities with customary tenure systems, smallholders and anyone else who could be affected (para. 7.3);
- provide support to tenure holders so that they can enjoy their rights and fulfil their duties (para. 7.5);

- ensure coordination between implementing agencies, as well as with local governments, and indigenous peoples and other communities with customary tenure systems (para. 5.6);
- publicize categories of legitimate tenure rights through a transparent process, recording indigenous peoples' and other communities' tenure rights and private sector's rights in a single recording system, or systems linked by a common framework (paras. 8.4 and 9.4);
- establish safeguards to avoid infringing on or extinguishing customary tenure, including legitimate tenure rights that are not currently protected by law, including for women and the vulnerable who hold subsidiary tenure rights (para. 5.6);
- Where it is not possible to provide legal recognition of tenure rights, prevent forced evictions that are inconsistent with their existing obligations under national and international law (para. 7.6); and
- provide access to justice if people believe their tenure rights are not recognized (para. 7.3).

On the whole, while all these international instruments have been developed at different times, and have different formal legal status, they are generally recognized as providing a coherent interpretation of relevant international binding obligations on States.[viii] Even where States may argue that relevant international treaties do not apply to them, these international legal materials must be understood as 'best practices' should be 'adopt(ed) as expeditiously as possible.' (Knox 2018, paras. 7–9) In other words, it would be extremely difficult for a State to defend an approach that goes against an internationally recognized best practice, particularly when it has agreed upon the international guidance after intensely participating in its negotiations (Morgera 2018).

## 3. Perspectives on legal pluralism

The recognition of customary laws and the role they can play in fisheries management is part of a wider acknowledgement that resource management is regulated through different legal regimes, including: international, regional, national and customary laws. One way to engage with these multiple normative layers is to employ the concept of legal pluralism, which can be defined as 'a situation in which two or more legal systems coexist in the same social field' (Merry 1988, p. 871).

Legal pluralism raises interesting questions on how these different legal scales operate together and how they are able to influence each other in order to create an inclusive best-practice approach, without distorting or creating tensions and/or contradictions between the different norms that are underpinning the legal scales. Based on the discussion of international law above, the recognition of customary law is not a discreet legal issue, but part of a wider i nquiry that touches upon other human rights issues, such as the right to health, food, education and so forth. Therefore, legal pluralism can be considered as part of a wider debate about global legal systems and how to manage legal hybridity. The global legal system consists of 'an interlocking web of jurisdictional assertions by state, international and non-state normative communities' (Berman 2007, p. 1159). Increasingly states must share jurisdiction over the same activity or they share their legal authority with multiple courts (e.g., at international, national and regional level) or indeed may share authority with non-state legal or quasi-legal norms. In these sites of hybrid legality, the overlapping legal authorities may clash and cause conflict and confusion. Different options exist to resolve such conflicts, the most common ones are imposing or reinstating the primacy of territorial or state governed legal systems or seeking universal harmonisation of legal systems and norms (Berman 2007). An alternative option that is endorsed by global legal pluralists is to embrace legal pluralism and

actively ‘seek to create or preserve spaces for conflict among multiple, overlapping legal systems.’ (Berman 2007, p. 1164) It studies the interaction between the different actors without suggesting a hierarchical ordering between them. Instead, it focuses on the plural procedural mechanisms, institutions and practices that provide a platform for the communication between plural voices (Berman 2007).

In this area of thinking, Teubner calls for moving away from distinguishing what is law and what is not law, and rather focus on what is legal and illegal (Teubner 1983, p. 1415). For Teubner and Fischer-Lescano, the major problem does not lie in the incompatibility between customary law and modern international or national law, but in how highly specialised action centres, may have, torn customary law through legal fragmentation ‘out of its context on which it has been embedded and transform it in their own metabolism.’ (Teubner and Fischer-Lescano 2008, p. 8) The end result is that the wider surviving strategies of indigenous peoples and local communities have become incorporated into mainstream society and therefore the whole process of knowledge production and recognition of customs and norms should be included in basic rights protection (Teubner and Fischer-Lescano 2008, p. 6). This supports reliance on international human rights law for recognizing customary law at the national level, with a view to avoiding infringements of other internationally protected human rights.

Similarly to international biodiversity law, legal pluralism also points to procedural pluralism as a way forward. One way of achieving this is through focusing on a technique that is widely used in anthropology and that is thick descriptions of the ways in which various procedural mechanisms, institutions, and practices actually operate as sites of contestation and creative innovation. This open up the opportunity, in implementing the procedural steps

identified in international legal instruments for the recognition of customary laws to employ different methods to support genuine and potentially transformative processes of recognizing traditional fishing rights. One of these could indeed be story-telling, as illustrated in Chapter xx.

## 4. Customary Fishing Rights and Wrongs: Reflections from Ghana and South Africa

The sections that follow will set out details of the legal and material environment in which day-to-day fishing activities and their governance plays out in Ghana and in South Africa. Both are characterised by the kind of complex plural 'sea' of legal discourse and overlapping regimes that has been discussed in section 3. We will discuss some of the differences and similarities between these two legally plural contexts, noting the implications for the actual or potential protection of small-scale fishers' access to the ocean, use of customary fishing techniques, and their preferred harvest. We will point out situations in which national legal mediation and decision-making processes appear to disadvantage or misunderstand both the situation and wishes of small-scale fishers.

### 4.1 Ghana

Ghana, with a 500km coastline, has a thriving and important trade in fisheries to which small-scale and semi-industrial fishers are a key contributor.[ix] Although robust stock assessment data is limited, the catastrophic decline in fish stocks, particularly affecting the sardinella species that are the mainstay of smaller vessels and local fishing trade (Cook *et al*. 2021) has increased the risk of economic and social destitution for many of the coastal communities who are

extremely economically poor and are not able to compensate for the attendant loss of livelihood. The decline is linked to many factors, including global warming, increased pollutants from terrestrial sources, and over-fishing (Atta-Mills *et al*. 2014). The threat presented by a loss of fish and fishing practice is about more than just economics. Fishing in Ghana also holds great significance for community, cultural, and spiritual life. Individual and group identities are closely linked to values and meanings that stem from fishing heritage and ongoing practice of fishing and its trade (Odotei 2002).

Research is exploring where customary governance systems become relevant in the move to secure the rights of small-scale fishing communities to fish stocks and to continue to practice long established fishing techniques, trade, and associated community activities in view of a declining resource base. This is not a straightforward issue in a context in which traditional authorities are currently positioned in national legal and policy reform efforts as interlocutors, tasked with integrating and even enforcing state-led fisheries policy and legal reform – a positioning that is often challenged by traditional authorities and their respective communities. Such reforms have very particular framing that may not easily align with indigenous and local community customary practice, these efforts are also hampered by a complex political environment in which fisheries across scales, including small-scale fishers, have effectively carried on fishing practice, often under customary management arrangements, in the gap between regulation as written and a relative lack of implementation of that regulation.

### *4.1.1 Customary law within the legally plural system of Ghana*

The roots of present-day legal pluralism in Ghana lie with British colonisation, via indirect rule, of the Gold Coast area from the 1800s. From the 1400s Portuguese, then Dutch and British companies battled to set-up and control profitable trading outposts in the region. The British ultimately gained the upper hand amongst competing colonial authorities. A series of treaties including the Bond of 1844, which were initially targeted at ensuring trading routes were undisturbed and military protection for the Fanti coastal communities, created the opportunity for the British to assume control of parts of the Gold Coast. The Bond of 1844 had required the chiefs to submit serious crimes such as murder and robberies to British jurisdiction. This laid the legal foundation for subsequent colonization of parts of the Gold Coast. Earlier in 1843, the British Settlements Acts was passed to empower colonial administrators on behalf of the British crown to "establish such laws, institutions and ordinances, and to constitute such courts and offices as may be necessary for the peace, order and good government" of the territories concerned. This declaration laid the groundwork for Ghana's contemporary legally plural system. Victor Essien (2020, p. 2) helpfully summarizes this original setting and its references to the continued recognition of customary law as part of this legal framework:

> In 1876, the Gold Coast Supreme Court Ordinance (No. 4 of 1876) was passed. Section 14 of the Ordinance stipulated that: "The Common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the colony obtained the local legislature, that is to say, on the 24th day of July 1874, shall be in force within the jurisdiction of the Court."
>
> Section 19 of this Act … reads in part as follows:
>
> Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the

said colony and territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience, not incompatible either directly or by necessary implication with any enactment of the colonial legislature.

The effect of these enactments was not only to create the foundations of a legally pluralistic system, but also one steeped in hierarchy and value judgments based on western philosophical ideologies of 'natural justice equity and good conscience' (repugnancy test) weighed against the customary law rules in these communities. At independence, the 'repugnancy test' was abolished along with the requirement to prove the existence of a customary law as facts before court. Nevertheless, customary law continues to fall under broader common law as a source of law in Ghana, recognised under the 1992 Constitution. Specifically, defined under Article 11(3) of the 1992 Constitution as the 'rules of law, which by custom are applicable to particular communities' Customary law is however still subject by the courts to a compatibility test and in Article 26(2) of the 1992 Constitution, 'customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited'. In ascertaining the rules of customary law, the Courts Act of 1993 (Act 459) notes that if there is doubt as to the existence or content of a rule of customary law relevant in any proceedings before a court, it may consider testimonies and or depositions of persons held to be knowledgeable in a particular custom, judicial precedents, textbooks and commentaries by scholars on particular customary law rules. It further notes that the court may request a House of Chiefs, Divisional or Traditional Council or other body with knowledge of the customary law in question to state its opinion which may be laid before the inquiry in written form (S. 55). As again, Essien (2020, p. 10) summarises 'under Sections 42 and 43 of the Ghana Chieftaincy Act, 1971 (with some later amendments) the National House of Chiefs and/or Regional House of Chiefs, can draft their declaration of customary law for approval and publication as legislative instrument by the President after consultation with the Chief Justice.'

In recent years, the House of Chiefs has developed a program to research and systematically record customary law, efforts that could perhaps assist with efforts to secure co-management and community tenure rights for certain sections of the fisheries.

The Constitution of Ghana therefore recognises the institution of Chieftaincy as the custodians and an arbiter of disputes that can concern customary laws, that is the system of customary values and norms of the nation. As noted by *Amegatcher JSC in Republic v National House of Chiefs & Ors (2019)* 'it is very clear from the intention of the framers of the Constitution and the law-makers that the responsibility given to the National and Regional Houses of Chiefs is to do everything within its power to preserve the customary practices of this revered institution in our culture. This is to be done by advising the individuals, bodies, and groups vested with the authority of state...'

The Chieftaincy Act, 2008 (Act 759) sets out the definition of the chief, the need for candidates to be eligible according to lineage, and the hierarchical structure of chiefs to be recognized at national level. Although customary law and the Chieftaincy is enshrined in formal law within the legally plural system, there is considerable debate about where and how the system could be reformed (Marfo 2019; Ubink 2007). Certainly, the colonial era created rupture in the system of Chieftaincy in part because those who remained in office during the colonial administration may have been able to do so because they acquiesced to the demands of colonial authorities, those who were not, were deposed and sometimes deported. This undermined faith in the system amongst communities that Chiefs were selected to represent and positioned traditional authorities, sometimes awkwardly, between customary and state authority, an ambiguity that remains an issue for those seeking to exercise customary authority. Despite its uneasy position within Ghana's legally plural system, traditional authorities are held

in high regard by communities as custodians of customary law.[x] This is not to say that customary law has not been subject to critique, with some arguing that such systems are sometimes inequitable and may not ensure gender equity (Britwum 2009; Tendayi *et al*., 2016).

This uncertainty has been further complicated by the lack of codification of customary law, and by the formal court system being vested with the power to decide the validity of customary laws. Judges in the Supreme Court, who are in many cases outsiders to the communities and customary practices which they have been called to adjudicate upon, have the final decision-making powers to the detriment of Chiefs. This has often resulted in litigants / complainants overriding the chief's decisions in superior courts. This practice, which started in colonial times, continues to persist today. In *Akwufio & Ors v Mensah & Ors (1898)*, the courts, overruled the decision of the chief of Winneba on the ban of 'Ali nets' which the chief and some of the fishermen believed was detrimental to the sustainability of the fishing industry. The court not only ignored existing marine tenure regimes and reinforced the then European perceptions of the sea as an unlimited resource which should be utilized more efficiently (Endemano Walker 2002). It also effectively disrupted the power of the chiefs to make decisions on matters of marine resources. More recently the Supreme Court has often had to make pronouncements on matters decided at the National House of Chiefs.[xi]

### 4.1.2 *Customary practice, traditional authorities and the marine spac*e

There are specific customary laws and traditions which relate to fisheries practice along the coast of Ghana, and these are managed by traditional authorities arranged in a hierarchy and associated with particular ethnic groups of fishers. These are loosely tied to areas of marine space although there is a strong history and contemporary practice of seasonal migration

amongst fishers in the region which routinely extends across the national borders of present-day Ghana and into Nigeria, Liberia, and further afield (Overa 2001). This movement is in keeping with the origins of commercial sea fishing in the region in which Ghanaian seafaring companies were a powerful force in the West African region particularly in the 19th and 20th century (Atta-Mills *et al*. 2004). Innovation in artisanal and industrial fishing methods is an important part of fishing culture in the region, and it was the modification of river boats for the sea in the 19th century which allowed the commercial fishing sector to emerge (Agbodeka 1992 in Atta-Mills *et al*., 2004). There is a continuity in efforts to adapt to changing conditions, as new technologies have become available.

The traditional authorities for small-scale marine fisheries run parallel to and in some communities in conjunction with traditional political authorities. Small-scale fishers are represented by a Chief Fisherman Apofohene (Fanti), Woleiatse (Ga-Adangme), Dotorwofia (Anlo) who is assisted by a council of men. Reflecting the gendered nature of fisheries in Ghana, the women are led by a Chief Fishmonger/Processor Konkohene (Fanti) and her council Besonfo in coastal communities. These positions, which may be hereditary or elected on merit, are responsible for upholding customary practices, fishing taboos in coastal communities as well as representing the interests of small-scale fishers.

This traditional governance model is however not acknowledged in the existing legal framework represented by the Fisheries Act (2002) Act 625 and related legislative instruments. The Act vests power for fisheries management in the National Fisheries Commission, recently housed under the Ministry of Fisheries and Aquaculture Development, created under the 1992 Constitution in order to manage fisheries resources and coordinate policy. There is broadly speaking, an acknowledgement of a problematic lack of clarity over the responsibilities and

powers of the Commission and of fisheries management across scales (Coastal Resources Center 2021, p. 22). In response, the national Fisheries Management Plan (2015-2020)[xii] proposes as solutions reducing 'excessive fishing effort' and reviewing and enforcing existing regulations. For the fishing sector that uses canoes (which may be motorised or non-motorised), solutions proposed included the survey and registration of canoes, 'education of fishers in collaboration with traditional authorities and local assemblies', and a heavy emphasis on the development of co-management systems in communities (Fisheries Commission 2015, p. 22).

The 2020 Co-Management Plan for the Fisheries Sector adopted as part of the current wave of reforms adopted the FAO definition of co-management as 'a partnership arrangement between the government and the local community of resource users, sometimes also connected with agents such as NGOs and research institutions, and other resource stakeholders, to share the responsibility and authority for the management of a resource.' The intention of the policy is that it will delegate fisheries management responsibilities and authority to resource users and other stakeholders through a 'pluralistic management approach' to co-management units or areas.

Traditional authorities are thus to play specific roles in the co-management process and to be involved in management committees. The specifics of this involvement are not set out in the policy, but it is noted that 'the process of empowerment of traditional authorities must be accompanied by careful integration of conventional co-management approaches with traditional beliefs and practices' and that 'co-management processes and institutions should build on existing forms of functional and traditional management where they exist and have some degree of efficiency'. The Policy references 'Traditional Institutions and women' in one specific section noting that 'The roles of traditional authorities in fishing communities varies

from place to place and do not usually appear to promote good fishing practice. However, overall, they represent a positive force for good management even though their influence in some circumstances has been compromised over time' …. 'Chief Fishermen have over the years been a fulcrum for resource management due to their widespread respect and social influence in fishing communities … This Policy will encourage the involvement of traditional institutions such as the Chief Fisherman (in maritime areas), and river priests or the fisher folk headman (in inland fishing communities), in the co-management committees … To ensure their effective supervision by the Traditional Area or community chieftaincy, the Ministry will liaise with the Ministry of Chieftaincy and Traditional Affairs to recognize the position of the Chief Fisherman, whether by inheritance or by appointment by fishers, under the Chieftaincy arrangement in Ghana.' (Government of Ghana, Ministry of Fisheries and Aquaculture 2020) A similar arrangement is proposed for the traditional institution of the 'fish market queen' and her elders, though there is no reference to recognizing the position under Chieftaincy arrangements.[xiii]

This reference to traditional authorities 'not usually appear(ing) to promote good fishing' picks up on a general set of tensions within the current regulatory environment. On the one hand the view that small-scale fishers represented by traditional authorities such as the Chief Fishermen are to blame for the challenges within the fishing industry including the IUU fishing.[xiv] On the other hand, traditional fishing authorities, who are not constitutionally precluded from participating as political party members, can also sometimes be seen to be partisan in their dealings deeply entangled in the culture of 'political influence' which is a limiting factor in the successful development and implementation of legal and policy reforms (Stark *et al*., 2019). Traditional authorities are part of the political nexus that is concerned with securing electoral votes and the good will of fisheries communities that have a relatively large

sway in terms of political influence. These complexities in the positioning of traditional authorities raises questions about whether these custodians of customary law and practice, will be able to integrate these systems into conventional co-management approaches in the way that the policy directs. There may be particular difficulties for Chief Fishermen who already struggle to arbitrate disputes, and maintain the trust in their authority by the communities.[xv]

Where these efforts have been successful, and where the co-management policy seems to make the most of traditional and customary systems of practice is in the case of relatively bounded areas of marine space and relatively specific small-scale fishing practice.[xvi] Where the co-management policy may face particular difficulty is in the areas in which there is significant conflict over both space and resources across fisheries scales. The most critical of these areas will be in relation to Ghana's inshore coastal region where access to fishing of pelagic fish stocks (particularly sardinella species) have been the source of clashes between fisheries groups of a similar size as well as across scales. It is in these areas that the desired shift from 'open access' fisheries to managed units,[xvii] will be particularly challenging and in which the issue of rights-based approaches and international law more broadly may be best placed to mediate in ensuring that small-scale fishers have equitable access to resources and that customary management systems, values, and practices are protected and effectively integrated into new arrangements.

Furthermore, fishers in this area, although almost always in agreement that fish stocks are in catastrophic decline, have thus far benefitted in some cases from the freedom that came from a lack of regulation of their activities, allowing them to follow customary practice without the need to justify this to authorities. This along with overcrowding in the sector and competition with industrial trawlers has led to considerable tension which policy and legal

reforms have so far failed to sufficiently resolve. This competition is further heightened by other ocean-based activities such as oil prospecting which has excluded fishers from resource rich waters in and around the buffer zone introduced around the oil rigs, sea defence projects as well as pressures from the tourism industry which has meant that small scale fishers find themselves potentially being squeezed out in the access to the resources of the ocean.[xviii]

On the whole, it remains to be seen if the 2020 co-management fisheries policy, and follow-up regulations and plans will sufficiently protect small-scale fishers' customary rights. Research is needed to establish where and how small-scale fishing communities continue to draw on customary law and both 'traditional' and other formal legal processes in efforts to govern fishing and associated activities. In addition, an investigation is needed of whether there is a route to protecting and elevating the rights of small-scale fishers by harnessing international law to further limit the size and influence of industrial fishing fleets.

### 4.2 South Africa

South Africa's history of legal pluralism extends back to the first days of the Dutch colonial occupation of the country in 1652 when the Dutch arrived at the Cape. Historically, South African waters and shores have been a rich source of marine resources upon which its earliest indigenous coastal communities have depended for their food (Sowman, 2006). Many of these indigenous peoples had their own set of customs and practices that constituted their local systems of customary law that governed their societies (Rautenbach, 2018). Their customary law was unwritten and orally handed down from one generation to the next generation (Sunde, 2014). As in many other places in the world, the impact of colonialism by the Dutch and British Settlers invariably affected the indigenous communities of South Africa (*Alexkor Ltd and*

*Another v Richtersveld Community and Others* 2003. Hereinafter the *Richtersveld Community* judgment).[xix] South Africa's common law is thus comprised of both Roman-Dutch law and English law (Rautenbach, 2010).

The colonial regimes sought to regulate customary law by means of legislation as a way of controlling the indigenous communities. This codification of customary law rules did not appreciate the fluid nature of customs, thus rendering it fixed. Further, the customary law rules could only be applied to disputes amongst members of customary communities and on condition that it did not offend public policy or the principles of natural justice (Hamukuaya & Christoffels-Du Plessis, 2018).[xx]

### *4.2.1 Development of the Law in South Africa since 1994*

The marginalisation of and discrimination against traditional fishing communities in South Africa persisted pre-constitutional era, as result of racial segregation and the treatment of customary law as inferior to statutory law by the Apartheid government (Sunde, 2014). At the time of the first democratic elections in 1994, it was estimated that 50% of African residents lived according to some form of customary law (Mnisi 2009). Many of the coastal communities on the eastern seaboard of the country, particularly those living in areas designated by the apartheid regime as 'bantustan homelands', lived according to an African customary system of law. The systems of marine tenure differed considerably from region to region, on account of the different histories of the peoples of the coast and the distinctive ways in which their customary systems and practices have interfaced with colonial and apartheid governance (Sunde 2014).

The legal reforms post 1994 provided important recognition for customary law, as an independent source of law, in terms of a quartet of provisions in the Constitution,1996 (*Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others 2018*, para. 22). Section 211(3) empowers 'the courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. The right to participate in a chosen cultural life is also protected in section 30. Section 31 ensures that indigenous communities have the right to enjoy their culture and to form cultural associations. Furthermore, courts are obliged to promote the spirit, purport and objects of the Bill of Rights when developing customary law in terms of section 39(2) of the Constitution. Under section 39(3) the Bill of Rights does not deny the existence of any rights and freedoms arising from customary law provided they are consistent with the Bill of Rights. The South African legal system is indeed a plural system of law; and customary law is a defining and independent feature thereof (*Bhe and others v Khayelitsha Magistrate & Others* 2005 para. 235; *Gumede v President of the Republic of South Africa* 2009, para. 22). The Constitution, as the supreme[xxi] law of the land, recognises both customary law and common law as equal and independent sources of law in the South African legal system and both should be equally applied and developed in a manner consistent with the Constitution and its values.[xxii]

### *4.2.2 The recognition of customary law through the constitutional lens*

In order to understand the evolution of the recognition of customary rights in South Africa, it is necessary to have regard to the landmark rulings by the Constitutional Court, which set the stage for the recognition of customary fishing rights discussed in the following subsections.

The constitutional protection and recognition of customary law includes both living and official customary law (Section 211 of the 1996 Constitution). Although there is no express hierarchy between the two forms of customary law, the Constitutional Court expressed its preference to living customary law due to its authenticity as it is the law which is practiced by the communities to whom it applies. In the *Richtersveld*[xxiii] judgment, the Constitutional Court found that the customary law does not comprise of a fixed set of rules that are easily ascertainable. Instead its evolving nature makes it subject to change, as the lives of the people who live by customary norms change and this evolution now continues within the context of the Constitution and its values (paras. 52-53). The court determined that the content of the land rights claimed by the community had to be ascertained by taking into account the community's history and usage of the land and its natural resources (para. 60).

In *Bhe*[xxiv] judgment *(Bhe and Others v Khayelitsha Magistrate & Others* 2005), the Constitutional Court added that customary law should be interpreted in its own setting and not through the prism of the common law or other system of law (para. 43). In this case, the court acknowledged the importance of adopting a flexible approach in developing customary law owing to its fluidity and adapting to the needs of community practicing (paras.110–113).

In *Shilubana* judgment *(Shilubana and Others v Nwamitwa* 2008),[xxv] the Constitutional Court outlined that customary laws norms must be determined with reference to certain factors: the traditions of the community concerned in order to establish the position under customary law by enquiring into the past practices of the community; the community's right to be able to develop its own customary laws; the fact that customary law regulates the lives of people, so the court must carefully balance the flexibility required to recognize customary law against the need for legal certainty and respect for vested rights, as well the protection of constitutional

rights (para 44-47); the need to promote the spirit, purport and objects of the Bill of Rights in order to give effect to its duties under Constitution section 39(2) (paras. 44-48).

On the whole, the journey of customary law in South Africa has been truly remarkable: its historically relegated position could no longer subsist in the new constitutional order and the Constitutional Court has breathed life into customary law as an indispensable and integral part of the South African plural legal order. The Constitutional Court has also offered important words of caution in this connection: official customary law found in legislation, case law and academic writings may not necessarily reflect the contemporary practices of the customary law of its people and is often susceptible to distortion (*Richtersveld Community* judgment, para 54; *Shilubana* judgment, para. 44). What the aforementioned cases illustrate is that the South African courts have provided guidance on a procedural approach to recognizing customary law in a given dispute, while giving deference to the living practices in a culturally conscious manner.

### *4.2.3 Legal reforms in the marine and coastal governance sector*

The Marine Living Resources Act, 1998 as amended (MLRA)[xxvi] was the first legislative instrument by which the new government sought to address the inadequacies inherited from its predecessors in order to achieve *inter alia* equality in the fishing industry while maintaining and sustaining marine resources use (Witbooi, 2005). It included three categories of fishing – namely commercial, recreational and subsistence fishing. Although the above-cited constitutional provisions recognised customary law and rights arising in terms of this law, the MLRA did not recognise *customary* fishing rights.

Traditional fishers in the Western Cape, where the commercially orientated fishing industry was located, argued that the definition of subsistence was too restrictive and did not recognize their occupation as traditional, small-scale, artisanal fishers (Jaffer and Sunde 2006). They also argued that the individual, property rights-orientated regime introduced in South Africa did not accommodate their collective, community-based rights system. In 2005, these traditional fishers, represented by the Legal Resources Centre, a public interest legal organization, brought a challenge in the Cape Town High Court and simultaneously in the Equality Court (*George And Others V Minister of Environmental Affairs and Tourism (EqC)* 2005). The Ministry responsible for the regulation of the fishing industry and under whom the authority to execute the mandate of the MLRA sits, unsuccessfully attempted to resist the legal action (*Minister of Environmental Affairs and Tourism v George* 2007 (SCA)). An out-of-court settlement was then reached between the erstwhile Department of Environmental Affairs and Tourism and the fishing communities, which required the government to properly and effectively make provision for the socio-economic rights of traditional fishing communities in legislation and rights allocation process by creating a special policy fit for this purpose (Equality Court order issued under File No: Ec 1 on 2 May 2007, paras. 8–10).

Following an extensive nation-wide public participation process, which included the small-scale fishers requesting a community-based rights allocation, and recognition of customary fishing rights, the Policy for the Small-Scale Fisheries Sector was gazetted in 2012. The Policy was welcomed for adopting a human-rights based approach (Coastal Links-Masifundise 2013), which was based on Constitution Section 39(3) recognizing rights arising from common law, customary law or legislation, at the request of traditional fishing communities' legal experts.[xxvii] This is a significant development as during the negotiation

phase, the Fisheries Department and its legal team had initially denied that communities had placed evidence of customary rights before the policy task team (DAFF 2011).[xxviii]

In 2014, an amendment to the MLRA inserted a new category of fishing rights namely, small-scale fishing rights into the statute. The section mentions that the Minister, in trying to achieve the objectives of Constitution Sections 39(3),[xxix] makes provision for communities who "have a history of shared small-scale fishing and who are, but for the impact of forced removals, tied to particular waters or geographic area, and were or still are operating where they previously enjoyed access to fish, or continue to exercise their rights in a communal manner in terms of an agreement, custom or law" (Section 1 of 2014 Marine Living Resources Amendment Act). This broad definition of small-scale fishing communities appears apt to include customary fishing communities and the term is used interchangeably here.

In addition, the Regulations relating to Small-scale Fishing were gazetted in 2016 (Government Notice 227, Government Gazette No. 39790), to operationalise the Policy. But unlike the Policy, these regulations do not refer to customary fishing rights, despite activists' detailed submissions (Legal Resources Centre 2015; Sunde 2015), and this has created legal uncertainty.

### *4.2.4 Small-scale fisheries and multiple legal currents: the case of David Gongqose and the communities of Dwesa-Cwebe*

As the Policy developed through the national policy process, a subsequent articulation of customary fishing rights was taking place along the Eastern Cape coastline. Dwesa-Cwebe is a coastal forest reserve and a marine protected area. The land comprising the reserve was settled

by the ancestors of the current residents several centuries ago. The seven communities who lived on this land regard the land and associated natural resources as their common property, upon which they depend for their livelihoods. Their relationship with this land and the coast, derived through their relationship with their ancestors, is reflected in their culture and their customary governance system. Authority to access marine resources is vested amongst elders in the community and the sub-headman, not with the Chief or Traditional Authority (Sunde 2014).

Over the course of the past century, commencing in the 1890s, these communities faced widespread and continuous loss of their land, their forest and marine resources in the name of nature conservation, with devastating consequences for their basic food security and livelihoods (Sunde 2014). In 1994, the communities embarked on an advocacy campaign to reclaim their tenure rights. Ultimately the communities accepted a compromise settlement: their land ownership was recognized, but the reserve was to remain under conservation status owing to the involvement of a powerful conservation lobby. Importantly, the Settlement Agreement made provision for their sustainable use of resources, for them to co-manage the reserve as equal partners with the State and to benefit from tourism within the reserve. Yet despite *de jure* recognition of their tenure rights in 2001, implementation of the obligations to recognize their rights to resources and to co-manage their territories was not honoured and no co-management or beneficiation was implemented (Sunde 2014). Instead, the department responsible for fisheries management and marine conservation declared that the area would be a 'no-take marine protected area and all use of resources was prohibited (Government Gazette No. 21948 of 2000). On 29 December 2000 the then Minister of Environmental Affairs and Tourism, acting under section 43 of the MLRA, effectively prohibited surrounding communities from exercising any form of access to the marine resources, making it an offence

for anyone to fish or attempt to fish in a marine protected area without the permission of the Minister responsible.

Despite this prohibition, the communities continued to access marine resources as this was the only source of protein for many households and they considered it their customary right (Sunde 2014). Considerable conflict with the conservation authorities ensued and many residents were arrested, prosecuted and imprisoned as a result (Sunde 2014). In 2010, three members of this community were arrested and criminally charged for contravening MLRA section 43, read with the Criminal Procedure Act, 1977. The resulting *Gongqose* case (*Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others; Gongqose and Others v State* 2018) is the first judicial decision on a criminal defence of customary fishing rights in South Africa. During the case, the State Prosecutor repeatedly asserted that there was only one law, "the right law" of the State. In response, the accused fisherman, David Gongqose, repeatedly attempted to inform the court that whilst he respected "the government's law", he wished the government to also take notice of "our law", the "community's law" (Gongqose 2014 in Sunde 2014). David Gongqose testified that he learnt about these rules from his father, and a traditional healer (*sangoma)* testified that she is called to the sea by her ancestors, thereby providing evidence of how access to these natural resources and on-going relationship to ancestors is the material basis of their culture (Sunde 2014) and of how knowledge of local resources, coupled with local laws about how to use these resources, including rules about fishing, are passed down from elders to children.

Having regard to the numerous constitutional and international human rights instruments and jurisprudence cited by the communities' legal representatives and witnesses in their defence, the Magistrate, in his judgment, noted that 'South Africa's new constitutional

dispensation began not only a political but also a legal revolution. With the inclusion of a justiciable Bill of Rights in the Constitution, the validity of a wide range of laws, whether public or private, could now be tested against the standards of fundamental human rights' (*State versus Gongqose and others* E382/10). He expressed strong criticism of the conservation authorities for their failure to recognize the livelihood needs of this community. He confirmed that this community had a customary system of law, however he did not have the authority to find a national statute (i.e., the MLRA) unconstitutional. But he indicated that it was doubtful that the MLRA would survive constitutional scrutiny, urging the parties to appeal this matter in a higher court.

The Supreme Court of Appeal found that the law as it stood at the time the fishermen were arrested, neither recognised nor extinguished their customary right to fish (*Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others 2018*, para. 59). It held that the existence of this customary right negated the unlawfulness required to hold the small-scale fishers criminally liable in terms of the now defunct provision of the MLRA read with the Criminal Procedure Act.[xxx] The court held that the fishermen had demonstrated and exercised their customary right to fish and that their customary right was duly recognised and protected under the provisions of section 211 of the Constitution, 1996 (*ibid* paras. 56–57). The court emphasised this constitutional interpretation to customary law and customary fishing rights and found that:

> An interpretation that the appellants' customary rights survived the enactment of the MLRA not only grants them the fullest protection of their customary system guaranteed by s 211 of the Constitution, but also accords with the position in international law – which a court is enjoined to consider when interpreting the Bill of Rights – that indigenous peoples have the right to their lands and resources traditionally owned (*ibid* para. 57).

Further, in the absence of laws dealing with customary fishing rights in South Africa, the Court, in line with section 39(1)(c) of the Constitution identified foreign authorities as guidance to determine whether the customary rights of the accused members of the fishing community had been extinguished under the Constitutional dispensation (*ibid* para. 41). In consideration of the suitability of the Canadian test of extinguishment and applying it in the South African context, the Court held that the customary rights are equally protected in terms of both the Constitution first and second any legislation specifically dealing with the particular customary rights. Therefore, the Court held that customary rights could only be extinguished if done so expressly by specific legislation dealing with customary rights (*ibid* para. 50). The court determined that the MLRA prior to its amendment did not constitute such legislation as it did not deal with customary fishing rights and held: 'Applying these principles, there is nothing in the language of the MLRA that specifically deals with customary rights. At most, it provided a right of access to marine resources by 'subsistence fishers…' (*ibid* para. 52).

Additionally, the court, in endorsing this constitutional interpretation, found that it accorded with both the African Charter on Human and People's Rights Charter and the United Nations Declaration on Indigenous People's Rights, which recognises the rights of indigenous people to, *inter alia*, access their natural resources in manner that promotes economic, social and cultural development and to be granted legal recognition to land, territories and resources with due respect to their customs, traditions and land tenure systems (*ibid* para. 58).

### *4.2.5 The implementation of Gongqose decision*

Despite extensive correspondence initiated by the Legal Resource Centre and offers to assist authorities in understanding the substance of the *Gongqose* judgment and in developing a procedural approach in order to give effect to it (LRC 2021a and 2021b), there has been no public acknowledgement of customary fishing rights by the government and arrests have continued, which are considered unlawful (LRC 2020). The DEFF is treating communities holding customary fishing rights in the same manner as other small-scale fishing communities. When challenged about their failure to institute a process to understand local customary fishing system pertaining to particular communities, the state merely says that it has 'recognised and provided for the exercise of these communities' customary fishing rights' (DFFE 2021).[xxxi]

The evidence from the response of the fisheries and conservation authorities since the 2018 Supreme Court Judgment suggests that, unless fisheries governance is transformed so as to truly 'engage with customary law in its own setting' and 'on its own terms', as required by the Constitutional Court (*Shilubana* 2009 in Sunde 2014), real recognition of customary fishing rights will not be possible. There remains the need to develop "procedural mechanisms, institutional designs and discursive practices" "to "manage" hybridity" in the fisheries sector (Berman in Jentoft and Bavinck 2019, pp. 283-284).

## 5. Conclusions

As a consequence of colonialism and its legacies that linger in post-colonial governance of marine and coastal resources, many fishing communities in Africa operate in a sea of both state and customary laws, with complex expressions of this pluralism at different scales of governance (Sunde 2014, Wilson 2020). Despite recognition of customary law in many constitutions and national legislation on the continent, the experiences of Ghana and South

Africa illustrate the difficulties that small-scale fishing communities experience as a result of the way in which the recognition of customary law at national level translates into day-to-day governance of fisheries at local level.

In both countries, mainstream fisheries reforms have tended to ignore critical texture and specific context underpinning customary systems of tenure and customary fishing rights. More specifically, although fisheries reforms happened earlier in South Africa than in Ghana, in both countries they have been focused on promoting sustainability and equity without adequately integrating and ensuring respect for customary fishing rights.

In Ghana, state fisheries governance reforms are or propose to engage with traditional authorities, with a focus on the Chieftaincy and an aspiration that Chiefs will play a central role in directing and enforcing change. Evidence thus far suggests that these proposals are mismatched with the realities of customary governance structures. There is also a problematic gap between the aspiration to refer to customary law and the availability of records and systems to refer to that law. In addition, courts have not yet engaged with customary fisheries rights although they have recognized customary rights generally.

In South Africa the judiciary has moved away from the approach focused on chiefs and in all events chiefs have not played a significant role in customary governance of marine and coastal resources (Sunde 2014). Courts have been increasingly called upon to recognize customary laws as living sources of law in their own setting, through a procedural approach that echoes international law and policy instruments. However, so far administrative implementation of judicial decisions is severely lacking. Further developing a procedural

approach at the administrative level has been supported by human rights lawyers and activists in South Africa in their interactions with fisheries and conservation authorities.

Implementation issues in both cases points to the need to develop more detailed procedural approaches to match the changing reality of customary laws, customary fishing rights and the broader cultural relationships of indigenous and other communities with the ocean and its resources. While international law and guidance provide a series of steps to be followed to that end, our case studies show that tackling complexity at the local level requires understanding and skills that go beyond traditional legal education and rather rely on insights from anthropology. Story-telling and other arts-based approaches (link to Dylan's and Kira's chapter?) could be usefully embedded in the needed procedures for recognizing customary fishing rights as part of genuine efforts to protect the internationally recognized human rights of those engaging in customary fishing activities and supporting their sustainable practices that contribute to the global goals of biodiversity conservation and food security. Fundamentally, recogniton of customary law also requires the recognition of multiple sources of law and law making as part of living, daily practices and rituals of fishing; stories that represent these daily rhythms and customs are indeed the law laying the foundation of what is legal and illegal.

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Case Law

*Andakwei ((Subsituted By Kow Atteh) and Others. Vrs ABaka and Others* (J2/03/2017) (2018) GHASC 47 (18 July 2018)

*Akwufio & Ors v Mensah & Ors* (1898) Availble at: <https://ghalii.org/gh/judgment/supreme-court/2019/6> Last accessed on 1 September 2021.

*Alexkor Ltd and Another v Richtersveld Community and Others* (2003) ZACC 18; 2004 (5) SA 460

*Bhe and others v Khayelitsha Magistrate & others* 2005 (1) SA 580 (CC); (2004) ZACC 17

*George And Others V Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (Equality Court).

*Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others* (1340/16, 287/17) (2018) ZASCA 87; (2018) 3 All SA 307 (SCA); 2018 (5) SA 104 (SCA); 2018 (2) SACR 367 (SCA) (1 June 2018)

*Gongqose and Others v State* 2018 (5) SA 104 (SCA), 2018 (2) SACR 367 (SCA), 2018 (3) All SA 307 (SCA) 39

*Gumede (born Shange) v President of the Republic of South Africa and Others* (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008)

*Minister of Environmental Affairs and Tourism v George and Others* (437/05, 437/05) (2006) ZASCA 57; 2007 (3) SA 62 (SCA) (18 May 2006)

*Republic VRS National house of chiefs And Others* (J4/32/2018) (2019) GHASC 6 (30 January 2019)

*Shilubana and Others v Nwamitwa* (CCT 03/07) (2008) ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008)

*State v Gongqose and Others* Willowvale Magistrates' Court, held at Elliotdale (Eastern Cape) Case no. E382/10 (date of judgment unknown)

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[i] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP): resolution adopted by the General Assembly, 2 October 2007, A/RES/61/295.
[ii] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, c169*, 27 June 1989, C169.
[iii] Convention on Biological Diversity (CBD), Rio de Janeiro, 5 June 1993, in force 29 December 1993.
[iv] CBD Art. 8(j) and 10(c), as interpreted in Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity, paras. 18 and 20; and Mo'otz Kuxtal Voluntary Guidelines.
[v] CBD Mo'otz Kuxtal Voluntary Guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the 'prior and informed consent', 'free, prior and informed consent' or 'approval and involvement', depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge. Available at: <https://www.cbd.int/doc/publications/8j-cbd-mootz-kuxtal-en.pdf>
[vi] Food and Agriculture Organization of the United Nations (FAO), Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines) (FAO: Rome, 2015). Available at: <http://www.fao.org/documents/card/en/c/I4356EN>
[vii] FAO, Voluntary Guidelines on Tenure (VGGT) (FAO: Rome, 2012).
[viii] For a detailed discussion of the legal value of CBD guidelines from an international human rights law perspective, see E Morgera (2020), 'Biodiversity as a Human Right and its Implications for the EU's External Action', Report to the European Parliament, available at<www.europarl.europa.eu/RegData/etudes/STUD/2020/603491/EXPO_STU(2020)603491_EN.pdf>; and for a discussion of the legal strength of international human rights instruments, see 'Under the radar: fair and equitable benefit-sharing and the human rights of indigenous peoples and local communities connected to natural resources' (2019) 23 *International Journal of Human Rights* 1098-1139.
[ix] The Ghanaian Fisheries Commission classifies actors in the industry as :small scale/artisanal fishers who operate in canoes (made of wood, motorised and non-motorised); semi-industrial fishers (mainly wooden); and industrial vessels which are generally over 25 m Length Overall (LOA) made of steel hull and with capacity to operate in areas beyond national jurisdiction (Government of Ghana, Fisheries Commission 2015, p.12)
[x] In terrestrial natural resource management, for example, customary law and customary practice has been cited in efforts to negotiate equitable access and benefits for communities amidst natural resource extraction efforts, indigenous knowledge systems, particularly with reference to the association between land, natural entities, and the sacred, have been referenced in efforts to ensure that local communities are able to practice traditional stewardship of natural resources.
[xi] See for example Andakwei ((Substituted by Kow Atteh) & Ors. v Abaka & Ors (2018).
[xii] A new plan is due to be launched in 2021.
[xiii] It would be interesting to look into this gender categorization further, but it seems beyond the scope of this paper.
[xiv] Chief Fishermen have often been criticised, either because they did not want to be involved in enforcing regulation, or because fisherfolk reported that Chief Fishermen were sometimes themselves involved in IUU fishing, and illegal transhipment known as saiko fishing. See <http://www.graphic.com.gh/news/general-news/chief-fishermen-indicted-for-illegal-fishing.html>.
[xv] For instance, between artisanal/small-scale canoe fishers and those engaging in the 'saiko' trade.
[xvi] For example, the Volta Estuary Clam Fisheries Management Unit which does employ VGGT principles to secure tenure, culture, and access. Available at <https://henmpoano.org/wp-content/uploads/2021/01/Tranversal_Issue-Brief_VGGT_HM.pdf>.

[xvii] As the co-management policy states: 'entrust control and access to the fisheries resources to both central government and local communities as well as associations for various management units' (Government of Ghana, MOFAD, 2021, Section 1.2).
[xviii] At present, the only attempt towards a marine spatial plan is the Abidjan Convention funded pilot project based on an ecosystem-based approach to integrated marine and coastal management which commenced in 2020. Stakeholder consultations are currently ongoing on a plan for a section of the coast along the western region of Ghana. The pilot is part of the larger marine spatial plan for the West African coast, a regional plan which can potentially co-ordinating holistically benefit marine biodiversity. See Sagoe et al., 2021 for one of the first reports of activities towards setting-up the MPA.
[xix] *Alexkor Ltd and Another v Richtersveld Community and Others* (2003) ZACC 18; 2004 (5) SA 460 (CC) (Hereinafter the *Richtersveld* Community judgment*)* (53); South African Law Commission Project 90 Report on Conflicts of Law (1999) 6 (The role of customary law and the claim of customary rights to land and natural resources by an indigenous community was considered for the first time in this case by the Constitutional Court of South Africa. The indigenous Richtersveld community successfully instituted a claim for the restoration of land and the rights of access to the natural resources produced on the land.) See further Feris 'A customary right to fish when fish are sparse: Managing conflicting claims between customary rights and environmental rights' (2013) 16(5) *Potchefstroom Electronic Law Journal* 555 565.
[xx] Peart 'Section 11(1) of the Black Administration Act No. 38 of 1927: The Application of the Repugnancy Clause'1982 *Acta Juridica*, 99-116.
[xxi] Section 2 of the Constitution, 1996.
[xxii] Section 1 of the Constitution, 1996.
[xxiii] In this case the role of customary law and the claim of customary rights to land and natural resources by an indigenous community was considered for the first time in this case by the Constitutional Court of South Africa. The indigenous Richtersveld community successfully instituted a claim for the restoration of land and the rights of access to the natural resources produced on the land.
[xxiv] The *Bhe* case considered the rules of intestate succession in the context of customary law in particular the constitutional validity of the principle of primogeniture in the context of the customary law of succession.
[xxv] The *Shilubana* case dealt with the issue of whether a woman could succeed as the Chief of a traditional community and whether that community could develop their customs and traditions in order to promote gender equality in the succession of traditional leadership, as envisaged in the Constitution.)
[xxvi] Act 18 of 1998.
[xxvii] Community response to DEAT response to community submission to NEDLAC dated 23/11/2011.
[xxviii] At the time of the Equality Court Ruling, responsibility for fisheries management fell under the Department of Environmental Affairs and Tourism (DEAT). In 2009, fisheries management was moved to the Department of Agriculture, Forestry and Fisheries (DAFF). In June 2019, the Department of Environment, Forestry and Fisheries (DEFF) was established, and forestry and fisheries management functions were incorporated into the Department of Environmental
[xxix] The provision holds that: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."
[xxx] Act 51 of 1977.
[xxxi] DFFE 21 June 2021 Letter from Minister Barbara Creecy to Ms W. Wicomb, Legal Resources Centre.