1.1 International legislation and policy recognizing, protecting and promoting customary marine resource use and governance

Legal protection for customary marine resource use and governance rights in international law is derived from general human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and the Declaration on the Rights of Indigenous Peoples (2007) (UN Economic and Social Council 2010). International institutions providing guidance on governance of marine and coastal resources have urged States to recognize customary systems of law and the rights to natural resource tenure derived from these systems, their indivisibility from basic human rights, and their importance in seeking protection of biological biodiversity and sustainability for future generations (FAO 2013, UN CBD 2012). In particular, the link between a community's right to culture and their customary tenure systems has been emphasized (UNEP CBD 2010, UN Economic and Social Council 2010).

General comment 23 (1994) of the UN Human Rights Committee has interpreted the rights protected under article 27 of the ICCPR in the following manner: "That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law" (ibid). The UN Permanent Forum on Indigenous Issues notes "in *Lubicon Lake Band v Canada* (1990), the Human Rights Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong" (UN Economic and Social Council 2010).

The Declaration on the Rights of Indigenous Peoples (2007) recognises that

> *"Respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,"*
>
> *Article 26 states*

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.

Within the United Nations Convention of Biodiversity, the focus on the importance of customary systems of natural resource use and traditional knowledge in securing sustainable use and protecting biodiversity has gained renewed focus recently (UNEP CBD 2009). Article 8(j) reads: "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices". Article 10(c) reads: Each contracting party shall: "Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements" (UN CBD Article 8 j and 10c).

A range of international policy initiatives have expanded the focus on customary practices and rights to natural resources and has inspired advocacy actions by indigenous peoples and local fishing communities for the recognition of their customary governance systems. The World Parks Congress in Durban in 2003 focused on the rights of indigenous peoples and local communities and the Durban Accord and Plan of Action which emerged from this Congress heightened focus on customary rights and called for governments to conduct "reviews of conservation initiatives including innovative and traditional/customary governance types" (Colchester et al 2008:1).

In the past year international institutions providing guidance on governance of marine and coastal resources urged States to recognize customary systems of natural resource tenure, their indivisibility from basic human rights, and their importance in seeking protection of biological biodiversity and sustainability for future generations (FAO 2013, UN CBD 2012).

Most significantly, the Guidelines for Securing Sustainable Small-scale Fisheries in the context of Food Security and Poverty Eradication (FAO 2014), advise that

5.4. All parties, in accordance with their legislation, should 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.
When necessary, in order to protect various forms of legitimate tenure rights, legislation to this effect should be provided. States should take appropriate measures to identify, record and respect legitimate tenure right holders and their rights. Local norms and practices, as well as customary or otherwise preferential access to fishery resources and land by small-scale fishing communities including indigenous peoples and ethnic minorities, should be recognized, respected and protected in ways that are consistent with international human rights law. The UN DRIP and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities should be taken into account, as appropriate. Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems.

Whilst there is no universal definition of these 'customary systems', the term is used in this research to indicate the shared norms and practices, recognised by a group of people or particular community of people, whereby they give meaning to and "perceive, define, delimit, own and defend their rights" (Ruddle and Akimichi 1984:1 in Aswani 2005:289). Johannes (2002:331) notes that in Pacific Island States such community based customary systems of use and governance usually indicate the operation of customary law. Similarly in Australia "For outsiders to understand the notion of Indigenous rights associated with country, an understanding of the rights conferred to an Indigenous person or people over lands and seas through Indigenous law is essential… Indigenous rights are conferred to Indigenous people through bodies of Indigenous law" (Australian Institute of Aboriginal and Torres Islander Studies (AIATIS) 2006:49).

1.2 Recognising customary systems of marine resource use and governance in South Africa

The Constitution of South Africa (1996) recognises customary law and customary institutions of governance (Section 211), in so far as they are consistent with the Bill of Rights. Jurisprudence emerging from the Constitutional Court over the past decade has elaborated on the understanding of customary law in South Africa[1] and how it has developed in interaction with colonial and apartheid law. The Court has distinguished between 'official' customary law and 'living customary law'. The term 'living customary law' is the term used by the Constitutional Court in South Africa to refer to customary law that is "actually observed by the people who created it", as opposed to "'official' customary law that is the body of rules created by the State and legal profession" (Bennett 2008: 138 in Sunde et al 2012).

Given that more than half of the South African population live under some form of customary law (Mnisi 2009:13), and a significant number of African coastal residents continue to reside on communal land adjacent to the coast in the former Bantustan areas, the recognition of living customary law is of particular relevance to the governance of coastal and marine resources in South Africa. It raises the question how does customary law shape access to, use and governance of marine resources in South Africa and what are the implications of this constitutional recognition for legal reform and policy implementation this sector?

South Africa lags far behind its Commonwealth and other international counterparts in terms of the recognition of customary marine resource use (Sunde 2013). Despite a 1921 ruling by the High Court recognising the existence of a customary system of fishing amongst the trek netters of False Bay (*van Breda v Jacobs 1921*), there has been no official recognition of customary marine resource use and goverance systems prior to the gazetting of the new SSF policy in 2012. These systems have received very little attention from fisheries managers and marine scientists. In June 2012 the Ministry of Agriculture, Forestry and Fisheries (DAFF) gazetted a new Small-Scale Fisheries (SSF) Policy for South Africa. This

[1] *Alexkor Ltd and Another v the Richtersveld Community and Others* 2004; *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others* 2005 and *hilubana and Others v Nwamitwa* 2009.

policy aims to “provide redress and recognition to the rights of small-scale fisher communities in South Africa previously marginalised and discriminated against in terms of racially exclusionary laws and policies, individual permit-based systems of resource allocation and insensitive impositions of conservation-driven regulation” (DAFF 2012:1).

This policy is located within the context of the transformative vision of the Constitution, and the concomitant responsibility of the State to redress the injustices of the past and develop new policy in keeping with national, international and regional law. In line with the provisions in the Constitution, the policy provides the framework for the recognition of the existing rights of small-scale fishing communities in terms of customary law, common law or legislation as long as these rights are consistent with the Bill of Rights (DAFF 2012). Similarly, it confirms the recognition of rights to access and use natural resources on a communal basis that come from custom and law.

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