



# Securing community land and resource rights in Africa:

## A guide to legal reform and best practices

Janet Pritchard, Feja Lesniewska, Tom Lomax,  
Saskia Ozinga and Cynthia Morel



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The data and materials for this Guide were collected through a desk-based literature review. Country examples were selected based on available studies of Africa conducted by law and land tenure experts. One study in particular informed this Guide: Rachel Knight’s *Statutory recognition of customary land rights in Africa: An investigation into best practices for law making and implementation* (FAO, 2010). The Guide also benefitted from the field experience of the SSAT project partners in their efforts to support civil society organisations in Central and West African countries engaged in VPA-related law reforms. The Guide was peer reviewed by an editorial committee of experts who are directly engaged in land tenure reform processes in Central and West Africa.

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# Foreword

This Guide explains key aspects of law and land rights that are important for securing **community ownership and control of land and resources** – also referred to as secure land and resource tenure. It explains how to identify and create opportunities for law reform and offers examples of reforms that have taken place in several African countries.

This Guide is not exhaustive but aims to:

- support an understanding of key aspects of a ‘good’ law and law reform process. By ‘good’ we mean laws and reforms that both respect human rights and are implemented, enforceable and participatory.
- give guidance on how to critically analyse an existing law or a proposed draft law;
- provide ideas on how to make the best use of law reform opportunities that arise.

The Guide includes text boxes explaining key concepts, as well as case studies and tips at the end of sections that summarise the key points. A glossary explains key terms and information for further reading is provided in Annexes 1 and 2.

The Guide is set out in six parts:

- Part 1 offers **political and economic arguments** in favour of reforming land tenure and natural resource laws to clarify and secure community land and resource rights.
- Part 2 explains the **elements of good laws**, different **sources and systems of law**, and the living reality of **legal pluralism**.
- Part 3 outlines how **international and regional human rights law** can be used to support a reform process and address a lack of coherence between national laws and international/regional laws.

- Part 4 discusses what makes a **good law reform process**.
- Part 5 explains what **good land tenure and natural resource laws should accomplish** and provides **best practice case studies** drawing lessons from recent law reform efforts in Africa.
- Part 6 shows how to make the most of existing **law reform opportunities**, notably opportunities available under **Voluntary Partnership Agreements (VPAs)** agreed with timber producing countries further to the European Union's **Forest Law Enforcement, Governance and Trade (FLEGT)** initiative to reduce illegal logging and promote good forest governance.

Reforming laws and ensuring their effective implementation and enforcement is an ongoing process that requires courage, stamina and the ability to stand up against those maintaining the often unjust status quo. We hope this Guide provides some tools to start or inform that process. This Guide is dedicated to the communities, indigenous peoples and civil society groups in Africa pursuing the defence of their rights, lands and environments, and the rule of law.

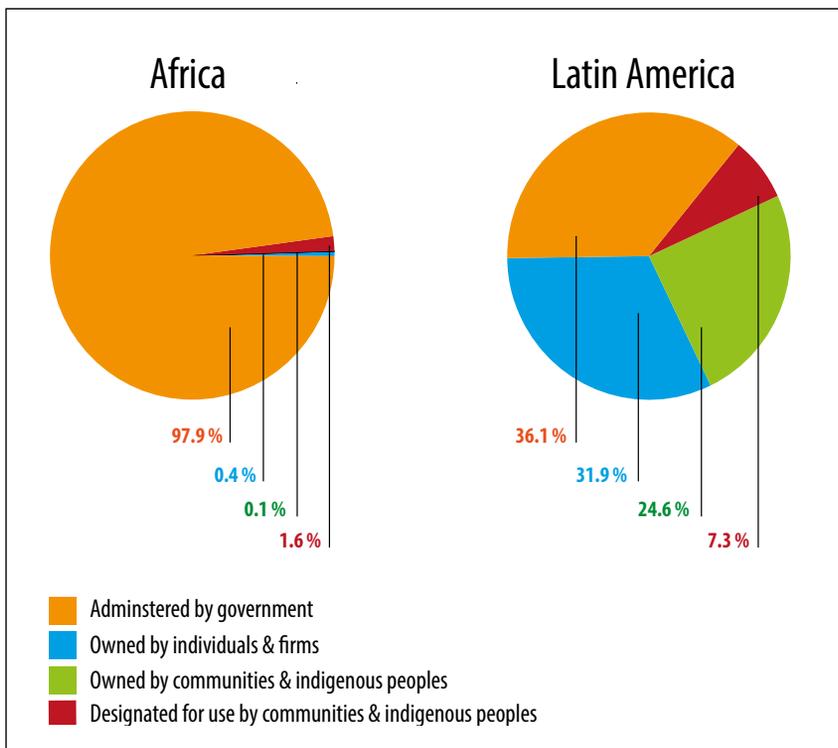


## Introduction

Land that is possessed, occupied and used by communities according to ‘customary law’ is the most common system of land and resource ownership in Africa. Customary law is the framework of rights, rules and responsibilities based on community customs and practices, governing ownership and management of a community’s lands, territories and resources. Customary land includes all land areas used and managed by communities in this way, including farms, forests, rangelands and wetlands. Despite the prevalence of customary law, the land and resource rights of most communities are not adequately recognised or protected by national laws – they lack security of tenure. This insecurity was exploited by colonial administrations, and has yet to be properly addressed by many post-independence governments in Africa.



Encouragingly, some African countries have taken strong steps towards recognising community land and resource rights. However in many other countries the reality is that most communities remain vulnerable to eviction or having their land and resources taken away from them, with little or no say or compensation. This is particularly the case in Africa where nearly 98 per cent of forest lands are claimed as State property. See the diagram below.



### Forest tenure by region, 2010.

Adapted from <http://www.rightsandresources.org/pages.php?id=444>

As expressed by the Chief Justice of Tanzania in 1994, such a situation creates ‘the absurdity of transforming the inhabitants of this country, who have been in occupation of land under customary law from time immemorial, into mass squatters in their own country’.

This Guide advocates law reforms that ‘elevate’ customary land and resource tenure law into the national law. This means that law reforms should recognise the customary land and resource ownership, control and management rights of communities as equal in strength to documented or registered land ownership.

## 1

## Why is land tenure security fundamental?

“*Laws should be like clothes. They should be made to fit the people they serve.*”

Clarence Darrow  
Lawyer  
(1857 – 1938)

How people own and manage land and natural resources is defined and regulated by **land and resource tenure systems**. Land tenure systems may be based on written policies and laws, unwritten customs and practices or a mixture of both. Land tenure systems determine who can own, use and manage which land areas and resources, for how long and under what conditions. A number of individuals or groups can hold different overlapping tenure claims and rights to the same land. These claims can include **use rights** as well as **ownership rights**.

**Land tenure security** guarantees the existence of your land rights, provides certainty that others will recognise your rights and ensures protection of your rights through legal remedies when those rights are challenged or abused. Tenure security provides landowners and users with confidence that they will not be arbitrarily deprived of their rights over particular lands and resources.

Clear and secure land tenure is fundamental for improving livelihoods and sustainable management of natural resources, including forests. Inadequate or insecure community tenure rights can lead to conflict and environmental degradation when competing users fight for control over these resources. Conversely, clear and secure tenure rights, and the responsible governance of tenure rights, promote development that can help to eradicate poverty and food insecurity and protect biodiversity. Clear and secure tenure rights also encourage responsible investment. For example, an investor seeking to use land for a particular purpose can know with certainty *whose* consent is needed for the use of that land (whether it is an individual or a community) and therefore can identify who it needs to negotiate with. The growing demand for land and natural resources makes the need to strengthen communities’ tenure rights over forest lands even more urgent.

If you are reading this Guide, you probably already think that securing community tenure is a good idea. There are signs that governments, international organisations and financial institutions (such as the World Bank) are also realising that old models of large-scale development are not working for governments, communities or the environment. In May 2012, for example,

82 countries endorsed the UN's Voluntary Guidelines for the Responsible Governance of Tenure of Lands, Fisheries and Forests.

- ▶ <http://www.fao.org/news/story/en/item/142587/icode/>

The UN Guidelines spell out the recognition and protection of tenure rights, identify best practices for registration and transfer of tenure rights, make sure that tenure administrative systems are accessible and affordable, ensure that investment in agricultural lands occurs responsibly and transparently and include mechanisms for resolving disputes over tenure rights. This indicates that many governments accept – at least in theory – that upholding community tenure rights is part of the solution for sustainable development.

However, changes towards making secure community tenure rights a reality are not occurring fast enough. Increasing global demands for food and biofuels are resulting in foreign governments and big companies buying or leasing millions of hectares of land in Africa, Asia and Latin America in 'land grabs', so-called because of the human rights abuses that often occur when such land is acquired. The reason for these land grabs is clear: there is a global demand for more minerals, energy and food, governments need revenues and many local people want jobs. But governments are giving away land that belongs to communities who live on the land, thereby determining their future without their consent and risking severe social conflict in the process. This is in the context where around two thirds of the world's civil wars and conflicts in progress have been estimated to be related to contested land claims.<sup>1</sup>

- ▶ International Land Coalition  
<http://www.landcoalition.org>

Insecure tenure rights also put investors at risk and thus provide an unattractive context for investment. Case studies analysing the real financial consequences of investing in land with disputed tenure rights show that companies that ignore the issue of land tenure expose themselves to substantial and, in some cases, extreme risks.

- ▶ See the Munden report (2012) *The financial risks of insecure land tenure: an investment view*.  
[http://www.rightsandresources.org/documents/files/doc\\_5715.pdf](http://www.rightsandresources.org/documents/files/doc_5715.pdf)

The African Commission on Human and Peoples' Rights issued a landmark 2010 decision in the case of the Endorois people against Kenya, demonstrating a clear understanding that denying community land tenure security not only violates human and indigenous peoples' rights but also runs counter to economic development goals.<sup>2</sup> The African Commission found in the Endorois' favour that

<sup>1</sup> Alden Wiley L. (2008) *Whose land is it? Commons and conflict states. Why the ownership of the commons matters in making and keeping peace*. Rights and Resources Initiative. Available at [http://www.rightsandresources.org/documents/files/doc\\_853.pdf](http://www.rightsandresources.org/documents/files/doc_853.pdf)

<sup>2</sup> The decision is available at [http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf)

**Case study** ▶**Respect for community land tenure in Kenya is key to development**

In 1973, the Endorois community was dispossessed of its ancestral lands. Lake Bogoria, located in the heart of Kenya's Rift Valley, was to become a wildlife preserve. The failure to consult the community or to compensate the community with adequate grazing land following their eviction severely depleted the livestock of the herding community. This, coupled with the failure to subsequently involve the Endorois in the management and benefit-sharing of the reserve, forced them into poverty. The loss of livestock severely undermined their food security as well as causing a sharp decline in income, so families could not afford school fees in the decades to follow. Moreover, severing the Endorois' ties with their ancestral land not only threatened their socio-economic well-being, but also their spiritual and cultural survival as an indigenous people.

The decision is available at [http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46_276_03_eng.pdf) ◀

In the *Endorois* case, the African Commission on Human and Peoples' Rights (which implements the African Charter on Human and Peoples' Rights) emphasised that communities should not be viewed as passive beneficiaries of development processes, but rather as active stakeholders in development policies. The Commission noted that communities that had been self-sufficient prior to external investments in land often became reliant on assistance following their dispossession. It also observed that the sustainability of economic investments should be measured not just in terms of Gross Domestic Product (GDP), but rather by whether the capabilities of communities had increased and the choices available to communities had improved. This requires, in turn, that community land tenure rights are secured and protected.

Although the Endorois' ownership over their ancestral land was recognised by the African Commission along with the right to return, the community does not want to close the existing wildlife reserve. Instead, it seeks a greater stake in its management as well as the opportunity to improve the caretaking of Lake Bogoria's ecosystems in accordance with the community's traditional knowledge. Meeting ecosystem conservation objectives and maintaining an associated tourism industry that is dependent on the reserve are therefore perfectly compatible with this legal victory and securing the land rights of the Endorois. In fact, the reinstatement of the community's ownership over its ancestral land for religious and cultural purposes, as well as for grazing during the dry season, arguably enhances Lake Bogoria's appeal to visitors. And, finally, although the community seeks to draw economic profit from the reserve's proceeds, such proceeds would be subject to taxes, thus benefiting the State.

there had been a violation of Articles 8 (right to practice religion), 14 (right to property), 17 (right to culture), 21 (right to free disposition of natural resources, and restitution and compensation for dispossessed peoples) and 22 (right to development) of the African Charter on Human and Peoples' Rights. See the case study opposite.

The Africa Commission's ruling in the *Endorois* case underscores the central importance of securing community land tenure rights as the foundation of a more promising, sustainable and rights-based approach to development.

Emphasise that, by securing community land tenure rights, countries can:

- ✓ reduce conflict and the risk of conflict;
- ✓ improve resource security including for food, water and land;
- ✓ secure and maintain natural resource wealth and biodiversity for future generations through sustainable resource management;
- ✓ attract investment that benefits communities and the country at the same time;
- ✓ fulfil rule of law and international legal commitments;
- ✓ improve international reputation with trading partners, donors, potential tourists and multinational agencies such as the World Bank, UN etc.

◀ *Tips*

# 2

## Legal systems and key legal concepts

This section provides a brief introduction to law, different legal systems that exist, and how these different systems could work together to develop more secure land tenure rights for communities. It also introduces key legal concepts that are referred to later in the Guide.

### 2.1 The building blocks of law

The three key elements necessary for any legal system to work well are:

- the right to do or have something – a **substantive right**;
- a process that supports the claim to a right – **procedural rights**;
- **detailed institutional responsibilities** to provide effective, transparent and accountable implementation and enforcement of substantive and procedural rights.

See table of elements of legal systems opposite.



 **Key concept**

Elements of legal systems		
Legal Element	Purpose	Examples
<b>Substantive rights</b>	<i>Clarifies what your rights are, whether they are political, civil, economic, social or cultural rights.</i>	<ul style="list-style-type: none"> <li>the right to own or use a particular parcel of land</li> <li>the right to access a parcel of land</li> <li>the right to exclude someone from your land</li> <li>the right to not be discriminated against</li> </ul>
<b>Procedural rights</b>	<i>Enables you to exercise your substantive rights – in other words, enables you to actually claim, use and obtain the benefit of your land rights or other substantive rights.</i>	<ul style="list-style-type: none"> <li>the <i>right to obtain information</i> about decisions of the government or others that might impact on your land or your land rights</li> <li>the <i>right to participate</i> in a process to determine the land that is yours</li> <li>the <i>right to be consulted</i> and to give or withhold your free, prior and informed consent before the government or other authority takes action that will affect your land or your land rights</li> <li>the <i>right to complain</i> when someone is interfering with your right to your land <i>and to have that complaint heard and resolved</i> through a fair and just procedure</li> </ul>
<b>Institutional responsibilities</b>	<i>Clearly allocates responsibility for implementing and enforcing substantive and procedural rights set out in the law.</i> Sets out in detail the institutions and the processes and procedures through which the rights will be implemented and enforced.	<ul style="list-style-type: none"> <li>authority to allocate land use rights (for example through concessions)</li> <li>responsibility to ensure resources are managed for the benefit of the community</li> <li>institutions and procedures to settle land disputes, such as a court or customary law tribunal</li> </ul>

The objectives of the law will only be achieved when these three elements are working effectively and in an integrated manner. Too often, law reforms address only substantive rights. For example, the law might state that communities' customary land rights should be respected. However, if procedural rights and institutional responsibilities needed to implement and enforce those rights are not considered, such law reforms are likely to remain 'on paper' only and so of no benefit to communities in their day-to-day life.

**Key concept** ▶**Implementation of law**

Government officials or other authorities must take steps to *implement* the law – that is, to make the law work in practice. For land tenure laws, this may include putting in place procedures through which communities can demarcate and register their land rights, have access to information about concession decisions or anything else that might affect their land rights, and be consulted about decisions affecting their land. This equally applies where traditional authorities have control over allocation of tenure rights.

It is important to note that the *existence* of a right does not depend on its implementation by government or traditional authority. However rights holders may not be able to fully enjoy their right if implementation steps are not carried out.

For good implementation, it is important that:

- those responsible for implementing the laws, and other stakeholders (in particular rights-holders such as communities) are familiar with and able to access and use the implementation process;
- roles and responsibilities for implementing the laws are clearly allocated and defined;
- there are adequate resources, including staff and know-how, to support implementation processes and procedures.

**Key concept** ▶**Enforcement of law**

Where someone violates someone else's rights, the law should authorise a competent authority to interpret the law, to clarify the rights at stake and take action to protect rights that have been violated. Law enforcement is most often thought of as police enforcing the law against criminals. But in the context of land tenure security, *law enforcement* can also refer to decisions taken by a court or a traditional institution like a village council, to require the government or other authority to ensure that those granted land rights under the law can use and enjoy the benefits of their land and resources. Enforcement of land tenure means that, where a community or individual rights-holder feels that the government or anyone else interferes with the ownership, use and enjoyment of their land, the rights holder can file a complaint through a well-defined and accessible complaints mechanism and the complaint will be fairly dealt by a law enforcement authority.

## 2.2 Different legal systems

There are different types or systems of law in the world, including customary law, statutory law, religious law, international law and regional law. These exist and function alongside each other. When developing legal reforms it is important to recognise the systems of law already operating, so that the reforms will make sense to the people affected by the law and fit with the lives they lead. For example, if my community owns and manages its lands and resources collectively (like many other communities in Africa and throughout the world) it makes no sense to me for a new law to dictate that only individuals can own and manage land and resources.

For the purpose of this Guide, we focus on three systems of law<sup>3</sup>:

- customary law
- statutory law
- international and regional law

### 2.2.1 Customary law

Customary law consists of established community rules and processes governing the actions of community members and third parties or ‘strangers’. The community develops and implements these according to generally accepted decision-making processes and institutions. Customary law determines how communities own, use and manage their land and natural resources. Customary law may or may not be recognised by statutory law. However, it is not accurate to regard customary rules as ‘informal’ (as opposed to formal statutory law), because customary rules have deep cultural resonance and are developed and owned by the community governed by them, according to their own decision-making processes and institutions.

Customary law systems are diverse and varied; each depends on its history and setting. Most African States include numerous distinct ethnic communities, each with its own customary laws. Customary law is rarely rigid, static or fixed and will generally adapt to meet new needs and challenges. A key strength of customary law is that each community’s customs are rooted in and respond to the particular history, cultural values and economic needs of that community.

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<sup>3</sup> Other legal systems, such as religious law, are beyond the scope of this study, but their role in community land tenure reform should also be considered.

**Case study** ►**The customary law of the Vai people of north-western Liberia**

The Vai are one of around 16 ethnic identities in Liberia, and live in the north-west of Liberia. As with many other rural groups, Vai communities have well established customary law governing where their customary lands are, and rules governing use and management, including relations with outsiders ('strangers'). Although these rules may vary even within the Vai people and will change over time, this summary draws out some of the rules highlighted by Vai communities in Grand Cape Mount county.

Vai communities own their community land *collectively*, which means that it is generally not parcelled up into plots owned by individuals or families. Some of the collective customary land areas (e.g. forests) are 'common' lands, i.e. areas that can be used by anyone from the community, e.g. for hunting and gathering. Strangers may use those common lands only with the prior permission of the community.

Farming areas are organised by 'quarters', with sub-sections of the community restricting their use of crop lands to their own recognised quarters. The quarter where my grandfather farmed his crops will be the quarter where I farm mine. Land is left fallow for an agreed number of years – reportedly between 7 and 10 years. During this period the original user has the right to return. As an example of customary law evolving, these fallow periods may be shortening in Liberia due to land shortage caused by population increase and encroachment on community land by third parties. If land is not used after the fallow time, other community members from that quarter may use the land instead, to bring it back into use.

If a stranger wishes to use community land for farming and perhaps build a house, customary rules require him to find a 'stranger father' in the community who is willing to introduce him to the community and the customary 'institutions' (including the chief, chair lady and the community at large). This is a process of community adoption, rather than a property transaction. The customary rules are explained to the stranger. If he is respectful and agrees to abide by those rules the community may decide to allow him to use some of the community's land.

Initially, the stranger may be allowed to build a house and grow non-permanent crops like cassava, but not permanent crops such as fruit or rubber trees. This process allows the stranger and the community to develop trust and acceptance over time and test whether the relationship is going to work. If the stranger leaves, the house and any crops he has farmed will remain and belong to the community, emphasising the point that customary land remains in the *collective* ownership of the community at all times. If the stranger stays

and earns the mutual respect of the community, he may over time become accepted as a member of the community and the Vai people, learning the Vai language along the way.

The community chooses key community roles, such as chief or chair lady, according to the effort shown by that person in stepping up and taking responsibility and thereby gaining the general acceptance and respect of the community.

Sacred forest areas are very important to the Vai, who have separate areas for women/girls and men/boys. These areas are managed by *zoes*, who are respected by the community on spiritual, health, education and other matters. Sacred forest areas are used for childbirth, other medicinal or ritual use, training, developing the skills needed for living off the land and learning the Vai script. Communities that have lost their sacred forest areas experience loss of community identity, as their youth no longer have the shared experience of the sacred forest and the respect and awareness for the community at large that this creates. Women report that loss of their sacred forest harms their mental health and well-being. These consequences show how important sacred forests are in sustaining the cultural integrity of the Vai people.

Customary systems continue to evolve. Key influences include State intervention, market development (including integration into global markets) and demographic changes such as population growth and fragmentation of the extended family due to increased urbanisation. Over the past century, these influences have not led to the collapse of customary systems, but rather to their evolution.

Because customary rights are best understood as rules that are continuously evolving in response to new political and social relations, government interventions aimed at ‘freezing’ the content of customary law in a statutory format are unlikely to achieve the desired result of integrating customary into statutory law. Indeed, this approach could hardly secure customary rights since it would sacrifice the very essence of customary law – its flexibility to respond to changes in circumstances.

### 2.2.2 National law

By ‘national law’ we mean the law of the State, which is generally the written (statutory) law found in a country’s constitution, legislation, codes, regulations, edicts and decrees, as well as the judgments of a country’s courts. National law emerged over generations with the formation of sovereign States across Europe. It evolved out of European customary laws.

Although national law originated in Europe, through colonialism it became the legal model for most nation States in the world as colonial rulers applied their national law to their colonies. Most African countries only adopted an independent legislation-based legal system after the 1950s, when they became independent, but in many cases they perpetuated the imposition of national laws over diverse customary law systems.

### 2.2.3 International and regional law

Part 3 gives more information on how international law can help to support claims for community tenure rights. Annex 1 provides an overview of relevant international and regional human rights laws and a table of ratifications by country.

- ◀ There are different specialised areas of international and regional law including human rights, economic and environmental law. International and regional law includes principles that are fundamental to how nation States manage their lands and resources. Most international law is agreed through the United Nations, whereas regional law is agreed through a regional organisation such as the African Union. This Guide refers to both sources of law as ‘international law’, except for issues specific to regional law.

International laws or agreements, whether they are called treaties, charters, conventions, protocols or covenants, are legally binding on the States that are parties to those international laws. This means that when a country becomes a State party to such agreements, it commits to implement the rights set out in the agreement within its own national laws and to abide by the international rules and procedures agreed. The implementation and enforcement of international laws depends largely upon the continued political will and capacity of countries to implement and enforce the principles set out in such international agreements.

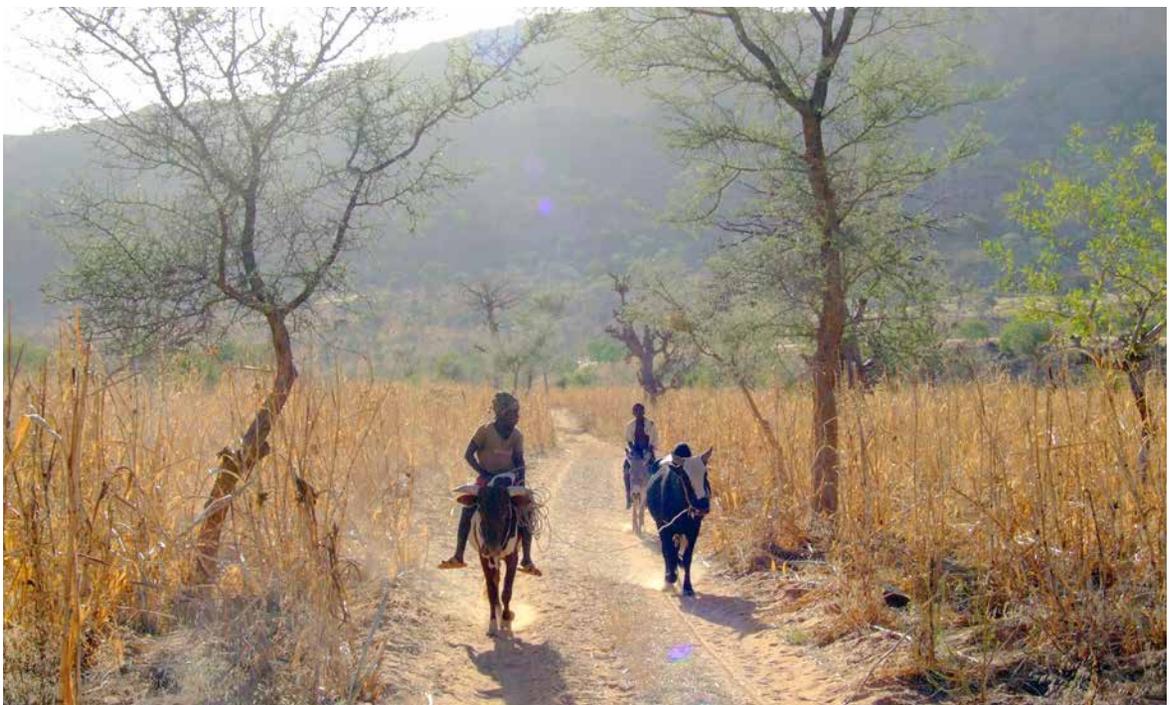
Some agreements, such as international **declarations**, are referred to as ‘soft law’. This means that such agreements are not legally binding. They are nonetheless a strong declaration of intent by a country to respect the principles in the declaration. This is a complex area of discussion that divides many lawyers and scholars. In most work by civil society and grass roots organisations it is best to assume that all international and regional agreements have some kind of legal power. Since

even ‘legally binding’ international laws depend upon continuing political will to implement them if they are to have practical effect, it is arguably not so important if an international agreement is ‘law’ *per se*, but rather whether it provides standards and norms that can be used to advance the cause of community land tenure rights. Some declarations, such as the United Nations Declaration on Indigenous Peoples (UNDRIP), are considered as a summary of rights that are *already* legally binding due to the rights and principles contained in *pre-existing* international laws and the legal decisions of legal bodies such as the African Commission on Human And Peoples’ Rights and United Nations treaty committees. The collection of decisions made by such bodies is sometimes called jurisprudence.

### 2.3 Legal pluralism: how different systems of law can co-exist

Given that many African nations will legitimately have all three systems of law operating at the same time in the same place – customary, national and international/regional – how can these different systems co-exist without conflict and uncertainty? The different legal systems in force often have quite different rules on who owns land and resources and how that land and its resources is governed and used.

In the light of such contradictions, some individuals or institutions may want to adopt a ‘selective approach’ to the law by promoting the system of law that would benefit them most. A party seeking to defend or assert rights to land may therefore engage in ‘legal forum shopping’ – shopping for the set of rules



**Case study** ▶**Customary, national and international law in Cameroon**

Under Cameroon's national land tenure laws, lands whose ownership is not registered will automatically be considered 'national land' under government control. 'National land' that is undeveloped (not occupied with houses, farms or grazing) is considered free of any effective occupation and can be allocated to other uses e.g. to companies for logging, agricultural or mining concessions, as national parks and reserves, or as areas for infrastructure development. National law provides communities with rights to hunt and gather from land that is considered free of occupation, but only if it has not yet been allocated for another purpose.

Under customary law, many communities in Cameroon claim collective customary rights over lands and natural resources they have used for as long as they can remember, regardless of whether the land is registered or considered developed or unoccupied by national law. The customary lands of rural communities with houses and farms will often also include areas of forests used as sacred areas or for hunting and medicinal use. Most if not all the traditional lands and territories of Baka and Bagyéli hunter-gatherer peoples will not be developed with houses, farms or grazing and will therefore be considered undeveloped and suitable for allocation to other uses. Only customary land owners who have developed their land can obtain registered property rights – and only if they have been able to access the national law's technical and costly registration procedure. This is beyond the reach of most rural communities and indigenous peoples.

Cameroon is legally bound by international and regional human rights laws that support the right of communities to own land, territory and resources that they have traditionally owned, used or occupied, including land owned under customary law. Furthermore, the constitution of Cameroon recognises the legal priority of international law over national law.

***What does this mean?***

Legally, this means that Cameroon's national law is currently in conflict with the constitution, as well as with customary and international and regional law. For communities, this means that Cameroon has huge areas of land considered as community-owned land by customary, international and regional law, but that is considered unoccupied national land by the State and available for allocation to other parties. This is a recipe for conflict and confusion. In practice, it leads to large-scale dispossession and impoverishment of communities through the destruction of their resources, sacred sites, livelihoods and food security, and undermines the cultural and physical survival of communities and whole peoples.

and laws that best suits their own interests. For example, if an investor – or a community leader – finds that national laws are useful for securing their own individual rights and power over land and resources, they may choose to base their claims on only national laws and disregard customary laws that contradict their claims, even though these customary laws are recognised by the people who have lived on the land for generations. Lack of clarity about which law decides who actually has rights to the land creates an obvious danger of conflict and potential dispossession. See the case study opposite on Cameroon, a situation that is by no means unique.

A more ‘inclusive’ approach recognises that, in reality, multiple legal systems and sources of law exist in the same place, over the same community, at the same time. This **‘legal pluralism’** approach seeks to integrate different systems of law – that is, find a way for them to work together – to achieve legal clarity. National law reforms based on legal pluralism can provide a stable foundation for communities to thrive, for the sustainable management of land and other natural resources, and for investments that support sustainable economic development.

Instead of suppressing legal pluralism by absorbing or dominating one legal system by another, the adaptive, inclusive approach to community tenure reform aims to retain the most dynamic aspects of each legal system and, in particular, to draw upon the richness of the existing legal systems. This allows for more effective rules and policies, responding flexibly to the differing customs, circumstances and evolving needs of different communities while enforcing national and international principles of equity, human rights and good governance.

- ✓ Make sure the law not only defines communities’ **substantive rights** to land and natural resource ownership, control and management, but also includes **procedural rights** (such as rights to information, participation and consent) to enable rights holders to claim and enjoy their substantive rights to community land and resources.
- ✓ Make sure the law clearly allocates and defines **regulatory responsibilities** for the government officials or other authorities responsible for **implementing** and **enforcing** the substantive and procedural rights set out in the law.
- ✓ Insist on an approach to land tenure reform based on an understanding and acceptance of **legal pluralism** that will **integrate customary law, national (statutory) law and international human rights law.**

#### ◀ *Tips*

## 3

## Using international and regional human rights laws to secure community land rights

‘The will of the people shall be the basis of the authority of government.’  
The Universal Declaration of Human Rights, 1948.  
<http://www.un.org/en/documents/udhr>

◀ **Human rights law** has greatly expanded and developed since its origins with the Universal Declaration of Human Rights in 1948. Numerous covenants, treaties and declarations have followed. These range from political, economic and cultural rights to rights for children, women, human rights defenders and rights against discrimination.

The institutions supporting the interpretation and enforcement of these human rights instruments have been used in a number of important landmark cases to defend the land rights of peoples. A key human rights case on community land rights in Africa is the *Endorois* case discussed in Part 1.

**Reform processes relevant to land and natural resources** provide an opportunity to embed human rights principles and laws into both national and customary laws. In fact international laws must be integrated into national (‘domestic’) law so they can be properly implemented, a process called ‘domestication’. The Forest Law Enforcement, Governance and Trade Voluntary Partnership Agreements (FLEGT-VPA) signed by several African States, including Cameroon and Liberia, also require that international law be integrated into national law. In practice, this means that existing national laws which violate international law should be amended or repealed and new laws should be enacted which guarantee protection for rights enshrined in international law. In this way, international law can be used to achieve stronger protection and respect for community land and resource rights in national law.

Even where international laws are not yet integrated into national laws, the constitutions of some countries (such as Cameroon and Kenya) give primacy to international law over national law. Civil society organisations and communities defending threats to community land and resource rights in the courts (e.g. by challenging the allocation of private sector concessions on community land by governments) can therefore rely on international law, even where they cannot get support for their case from national law. Bringing such cases can be a strategic way of highlighting flaws in the national law, promoting rights-based reform and setting important legal precedents that other communities can use. These kinds of court case are sometimes called ‘public interest’ cases.

### 3.1 Key internationally-protected human rights on community land and resource tenure

Protection for communities' rights over land and natural resources is well established in international and regional law. This protection is based on a number of interrelated human rights protected by international law including the right to property, food, culture, housing, self-determination, non-discrimination and development. International laws also require national legal and policy reform processes to be participatory where community rights may be affected.

Annex 1 includes a table showing which African countries are party to international and regional legal instruments relevant to community rights to land and natural resources and summarises key aspects of the legal instruments. Annex 2 includes more information on how international human rights and indigenous peoples law can support law reforms to secure community land tenure as well as information about institutions, technical guidance and comparative studies.

In your campaigns, it can be useful to reference agreements that your country has *not* ratified to urge the State to make changes in line with improving standards elsewhere. Such campaigns may also aim to make a State become a party to a treaty that it has not currently ratified. Likewise, it can be helpful to reference cases of good implementation of international law standards in other countries.



## 3.2 Key human rights concepts for securing community land and resource tenure

### 3.2.1 Does a community have a right to own its land, even though it does not have a written proof of ownership?

Rural and forest communities in Africa, including indigenous peoples, often do not have a written deed or similar document ‘proving’ the ownership of their community/ancestral lands. Yet they may have collectively occupied and used that land for centuries in accordance with customary laws, justifying a legitimate ‘customary’ ownership right. Historically, the lack of written proof has translated into a denial of community property rights, making their lands vulnerable to being taken by companies, government or private individuals. **However under international law, customary ownership of community lands and resources must be recognised, respected and protected by States. International law is therefore a key tool in seeking secure community rights.**

Communities in Africa vary widely in their respective social and cultural contexts but this need not preclude them from gaining appropriate protection for their land and resource rights under international human rights law where circumstances demand such protection. Although the paragraph above refers to mainly rural communities with long-standing ties to land under customary law, other communities may have developed rights over land even where their occupation is comparatively recent and where the land is in a more urban setting. For example, the Nubians, whose ancestral lands are in the Nuba Mountains in what is now South Sudan, have arguably acquired land rights deserving of legal protection in Kenya due to their historical association with the Kibera slums in Nairobi, even though very long-standing occupation and customary ties are not present.<sup>4</sup>

Rights to property, food, culture, housing, self-determination, non-discrimination and development are some key rights from international law that commonly justify protection for the rights of communities to own, access and use the land and resources that they rely on for their day-to-day physical and/or cultural survival. The exact nature and extent of the legal protection that a

<sup>4</sup> See *The Nubian Community in Kenya v. The State of Kenya*, Communication 317/06, African Commission on Human and Peoples’ Rights. While the Nubian legal struggle currently before the African Commission chiefly turns on the issue of statelessness, the case nevertheless raises collective land claims over the Kibera slums in Nairobi in view of the Nuba’s historical association to that land, and the issue of citizenship and ‘belonging’ in the Kenyan context. See <http://www.ihrrda.org/2012/09/nubian-community-in-kenya-nubian-adults-v-kenya-communication-31706/>

community needs for its land and resource rights will depend on their particular circumstances. In general terms, the strength of a communities' right to land and resources will normally be proportionate to the *harm* that would be experienced if some or all of that land and resources were taken away from them. The greater the harm, the stronger the legal protection required. **In summary, international law therefore provides that the ownership rights of communities over lands and resources on which their physical or even cultural survival depends, and that they have acquired, or traditionally owned, used and occupied (regardless of whether they hold a deed or not) *must* be protected for a great many communities in Africa who currently do not have their land and resource rights recognised by national laws.**

Peoples identifying as indigenous are often the most discriminated and marginalised communities. Their entire culture – language, traditional knowledge and identity – can be put at risk when their lands, territories and resources are lost or damaged, such is the strength of their connection to land and place. Discussions about the land rights of indigenous peoples in Africa deserve careful attention. This is because the issue can be a contentious one, with some African states denying indigenous peoples exist at all, or claiming that all Africans are indigenous. In either case, the reality on the ground is that these communities' cultural and physical survival is at stake and policy and law reforms must therefore take special measures to address the discrimination they face.



Most African communities will of course legitimately claim to be ‘indigenous’ to Africa, in the sense that they come from there, and from nowhere else. Many African communities will also identify with a particular ethnic identity – whether it is a dominant or minority ethnic group in that country. In international law, the legal meaning of ‘indigenous’ or ‘tribal’ peoples refers to peoples who have an all-encompassing relationships to land and place, who self-identify as indigenous, and who have experienced marginalisation and discrimination at the hands of more dominant ethnic groups within a particular State. Since the very cultural and physical *survival* of such peoples depends on not breaking this connection to their lands and resources, and given the need to therefore address the historical injustices caused by encroachment and discrimination, the African Commission on Human and Peoples’ Rights and the Inter-American Court of Human Rights have both recognised the legal principles outlined below. These principles must therefore be integrated into any national policy or legal reform affecting land and natural resource use, management and ownership:

- traditional possession of lands by indigenous and tribal peoples has equivalent legal effects to those of a State-granted property title<sup>5</sup>;
- traditional possession entitles indigenous and tribal peoples to demand official recognition, demarcation and registration of their ownership right;
- members of indigenous and tribal peoples who have unwillingly left or lost possession of their traditional lands maintain property rights to their lands, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and
- members of indigenous and tribal peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to get their lands back (restitution) or to obtain other lands of equal size and quality.

### 3.2.2 Does a community own the natural resources on its land?

African national laws and constitutions frequently define sub-soil mineral resources as the property of the State. For other resources like forests and wetlands the situation is more variable. In Ghana, for example, national laws give the State the right to harvest naturally-occurring timber regardless of who owns the land. In Cameroon, forests are State-owned unless they are on

<sup>5</sup> See also the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention 169 which both assert indigenous and tribal peoples’ rights to lands, territories and resources that they have ‘traditionally owned, occupied or otherwise used’. See [Annex 1](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf); [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf); <http://www.ilo.org/indigenous/conventions/no169/lang--en/index.htm>

private registered land. Forest communities in Cameroon retain user rights in forests (though these can be restricted by the government) and can acquire forest management rights if they are able to navigate the complex procedures for establishing a community forest. None have so far done so without NGO support.

International human rights law protects resources traditionally used and necessary for the survival, development and continuation of a people's way of life. While the extraction of minerals not traditionally used by communities may not be protected in this way, international law still raises the obligation to consult and seek communities' free, prior and informed consent if the *effects* of such activities may negatively affect the land and resources upon which the survival of a people depends.

### 3.2.3 Can the government simply take a community's land using powers of 'eminent domain'?

Eminent domain provisions included in the national laws of some countries give the State the power to seize private property for public purposes, even without the owner's consent. While 'public use or purpose' can be broadly defined, eminent domain is typically exercised for the construction of infrastructure such as roads, power plants, utilities and public buildings.

However, the notion that a State can exercise its power of eminent domain according to its own will is out of step with emerging legal standards across national, regional and international human rights law. This is particularly so when concessions to companies have been found to serve private interests, to the disadvantage of vulnerable communities affected by the development process.

The numerous violations caused by forced eviction are recognised as a gross violation of human rights. International law therefore requires that evictions only occur under exceptional circumstances. Based on several regional human rights cases it is now understood that State restrictions on the use and enjoyment of community land rights must be

- previously established by the law;
- necessary;
- proportionate;
- aim to achieve a legitimate objective in a democratic society.

► For further information see the United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement. [http://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf)

Where such conditions are met, States must then additionally abide by three key safeguards to guarantee that restrictions imposed by the granting of concessions within indigenous or tribal territories do not amount to a denial of their survival as a people:

1. The State must ensure the **effective participation** of the members of the affected community regarding any development, investment, exploration or extraction plan within their territory. It must be possible for the communities to participate in a manner that is consistent with their customs and traditions, for example, holding local community meetings rather than formal meetings in city centres. It also means that communities should be actively involved in determining the pace of the process and related timelines.
2. The State must guarantee that the community will receive a **reasonable benefit** from any concession granted within their territory.
3. The State must ensure that no concession will be issued within a people's lands and territories unless and until *independent* and technically capable organisations perform a *prior* **environmental and social impact assessment**, supervised by the State.

See [Part 5.3.4](#) for further discussion of how environmental and social impact assessment requirements might be incorporated into law reforms. For international law best practice on environmental and social impact assessments see the *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*, adopted in 2004 by the 7th Conference of the Parties to the UN Convention on Biological Diversity. <http://www.cbd.int/traditional/guidelines.shtml>



### 3.2.4 Do decisions on land and natural resources require the Free, Prior and Informed Consent (FPIC) of communities?

Free, prior and informed consent (FPIC) provides that a community may give or withhold consent to any proposed project that may have an effect on the land and natural resources that a community possesses, occupies or otherwise uses. FPIC is not a privilege that is sometimes given to communities: it is a right with which governments and project proponents are required to comply. It is a collective right, that is to say, a right that belongs to a community as a whole.

Although the right to FPIC was developed in the context of indigenous and tribal peoples' rights to self-determination, it tends more and more to apply to the contexts of other communities whose customary lands are sought by outsiders for investment, conservation, or development projects.<sup>6</sup>

FPIC is also increasingly recognised in international voluntary industry standards, which are rules that companies voluntarily agree to comply with so that their activities meet consumer expectations on human rights and sustainability. Voluntary industry standards are particularly important where a country's laws are weak or poorly implemented, leading to a high risk of social and environmental harm from industry operations. One example is the Round Table on Sustainable Palm Oil (RSPO). If a palm oil company decides to become a member of the RSPO, it must comply with the standards contained in the RSPO Principles and Criteria. These voluntary initiatives reflect industries' increasing recognition that compliance with FPIC enhances the success and sustainability of their projects. They also represent growing public expectations that private companies have a responsibility to ensure that their actions are not harmful to people and the environment.

► [http://www.rspo.org/file/PnC\\_RSPO\\_Rev1.pdf](http://www.rspo.org/file/PnC_RSPO_Rev1.pdf)

FPIC involves a negotiation process between project proponents and communities whose rights may be affected. The process aims to ensure the active

<sup>6</sup> See for example Resolution 224 by the African Commission on Human & Peoples Rights, stating that 'all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance' (51st ordinary session, May 2012) available at <http://www.achpr.org/sessions/51st/resolutions/224/>. See also Recommendation 6(d) of the Pan-African Parliament urging for rules on foreign direct investment in land including rules 'Ensuring effective consultations with local communities and various people affected by investment projects and ensuring that any investment is approved through free, prior and informed consent of affected communities' (6th ordinary session, January 2012). Available at <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDgQFjAC&curl=http%3A%2F%2Fwww.pan-africanparliament.org%2FControls%2FDocuments.aspx%3FDID%3D1263&ci=yQB9UrySL8-shQfV8oGoDg&usg=AFQjC-NGIMyS94D5sYnU8pPmQQLAllQd6Ng&cbvm=bv.56146854,d.ZG4>

participation of affected communities so that they can ultimately decide, on a fair and equitable basis, whether to give their approval to the project. The process by which communities will give their consent or not is an ongoing process and cannot be satisfied through a mere one-off meeting or gathering of community observations and opinions. Accordingly, FPIC requires significant investments of time and resources from all the parties. These investments should include studies to determine social and environmental impacts and the development of benefit-sharing agreements that truly benefit communities.



## FPIC: CONSENT that is FREE, PRIOR and INFORMED

### ◀ Key concept

**FREE:** There has been no coercion, intimidation or manipulation.

**PRIOR:** Consent must be sought and obtained *before* any activities to implement the project begin. Also, sufficient time must be provided for the community to research and understand the development proposal and its implications for the community and to consult internally within the community in accordance with their customary procedures for internal consultation and decision-making.

**INFORMED:** The community must have adequate information, provided in their own language and in a manner accessible to community members, that covers (at least) the following aspects:

- the nature, size, pace, reversibility and scope of the proposed project;
- the reasons for or objectives of the project;
- the duration of the project;
- the location of the areas concerned;
- a preliminary assessment of the likely economic, cultural, environmental and social impacts, including potential risks (taking into account the precautionary principle, which requires that where impacts are uncertain policies must err on the side of caution);
- the economic profits and other benefits likely to be generated by the project for the project developers, investors, government and other beneficiaries;
- staff that may contribute to the implementation of the proposed project (including community members, private sector staff, research institutes, civil servants).

**CONSENT:** Provision of information, consultation and participation are essential elements of consent. However, it is very important to stress that these are not equivalent to consent. Rather, they are the necessary means to obtaining consent.

Consultation requires the parties to establish a dialogue allowing them to reach solutions in a climate of mutual respect and good faith and on the basis of full and equal participation. Consultation requires time and an effective system of communication between the parties. The community should be able to participate through their own freely-chosen representatives or other decision-making processes or institutions.

Consent should be representative of the whole community; the full and informed participation of women and other voices that might traditionally be suppressed are essential. Communities have the right to seek independent advice, for example from NGOs or lawyers.

It is important that all parties recognise the option of withholding consent. The community can say ‘no’ at any time during the negotiations. Decisions on whether or not consent has been given should be based on what the community thinks has happened.

The FPIC process is sometimes called a ‘living agreement’ because FPIC must be provided, maintained and reaffirmed throughout the project’s development and implementation. Accordingly, systems for monitoring the implementation of the agreement and a grievance procedure should be central parts of any FPIC agreement.

### *Tips* ▶

- ✓ Check to see which international and regional laws your country has committed to (see Annex 1).
- ✓ Where laws are being reformed, make sure you are aware of the key rights and principles contained in those international laws to which your country is a party, so that you can identify inconsistencies in existing laws or in revised draft laws. You can then base your advocacy on seeking new laws that do comply with international law.
- ✓ You may still want to base campaign arguments on international and regional agreements your country has not yet agreed to, to urge your country to rise to the standards adopted by others.
- ✓ When engaging with government or project developers about projects affecting a community’s land rights, make sure that you fully understand and insist on FPIC.
- ✓ The real value and power of international and regional human rights law is realised when these principles are embedded in national and customary laws and implemented and enforced in communities’ day-to-day lives.



## 4

## How to approach law and policy reform processes

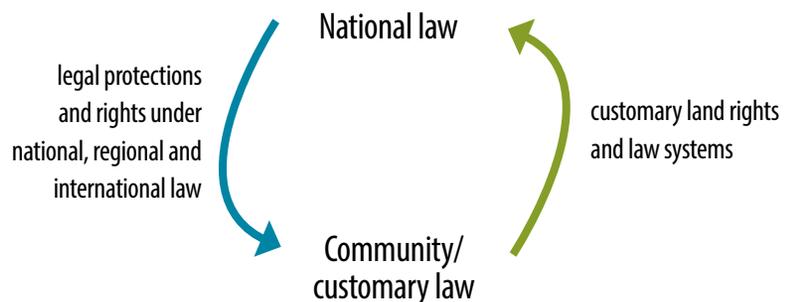
As explained in Part 2, the reality in African countries is legal pluralism, in which customary laws co-exist with national law and international law, all with implications for community rights to own, use and access land and resources. Land tenure systems should therefore be based on the realities of communities on the ground. This Guide proposes the following general approach to land tenure reforms:

*“In its proper meaning equality before the law means the right to participate in the making of the laws by which one is governed.”*

Nelson Mandela  
(1962)

- rather than inventing theoretical new legal frameworks or borrowing legal models from western nations, lawmakers should elevate existing customary land claims up into countries’ formal legal frameworks and make customary land ownership rights equal in weight and validity to documented land ownership claims;
- land tenure law should comply with and implement overarching principles and norms, as expressed in the national constitution as well as regional and international conventions.

Implementing law reforms based upon these two principles requires a two-way dynamic. It involves validating, in national law, the customary land rights and customary law systems that are already being recognised and practiced by communities. It also entails extending to customary communities all the protections, rights and responsibilities inherent in the national legal system, as well as regional and international agreements to which the country has committed.



Clarifying key objectives and core principles at the beginning of a law reform process makes it easier to develop a framework for the detail of the law reforms. If these key objectives and core principles can be agreed by all rights holders and stakeholders at the beginning, then the reform process can proceed much more smoothly. This is the underlying benefit of completing a new national **policy** that frames these key objectives and core principles *before* developing the **law** needed to implement the policy.

It is not possible to identify and illustrate within this Guide everything that you should consider when embarking on land tenure reforms in a ‘check list’ format. Rather, the aim of this Guide is to help you to approach reforms (of both policy and law) regarding land and natural resources in a systematic way by:

**1. Deciding what you want the reforms to accomplish.** One way of doing this is by asking yourself two simple questions:

- what *problems* exist for communities that the new law would need to solve?
- what *good* aspects of current law and practice need to be preserved and continued? For example, positive aspects of customary law and practice that should be protected and facilitated.

**2. Identifying and advocating core principles that reforms should comply with.**

The fundamental rights, duties and freedoms expected of a new law could include respect and protection by national law for customary land and resource rights and making them equal in weight and validity to documented land ownership claims (as outlined above). Other key concepts to consider are protecting the cultures and livelihoods of indigenous peoples and minorities, preventing corruption and discrimination, transparency, accountability, monitoring and access to justice, self-determination, increasing food security and so on.

**3. Defining and fostering a ‘good’ reform process.** By this we mean a law reform process that ensures effective participation of rights holders and stakeholders, *especially* affected communities (including groups who are commonly marginalised in such processes such as indigenous peoples and women) as well as civil society organisations. This means that these groups must have *all* the information they need to participate in the reform process in a language and form that is accessible to them. This should include prior knowledge of a well-defined and publicly accessible reform *timetable* – so that they know *when* there are opportunities to give feedback both *before* a draft is produced and *after* a draft has been made public for further review. They also need technical and legal support (which needs allocation of financial resources) and a reasonable amount of time to consider their ideas, especially

as many communities are far from the capital cities where reform processes are normally concentrated. Having the opportunity to give comments on a proposed draft law is crucial, as only then can communities and civil society see whether their original comments and feedback have been adequately considered by the drafters of the new law.

#### 4. Developing and scrutinising draft reform proposals to ensure that they will perform the five functions explained in Part 5.

It is also strongly recommended that you test any proposed draft law using the two questions outlined in point 1 above, asking yourself a further two questions:

- Would the current *problems* that exist for communities be improved, made worse, or be left untouched, if the draft new law was in force? Clearly, if the draft new law would make problems worse, or simply leave the problems untouched, then important changes need to be suggested before the law is adopted.
- Would the *good* aspects of current law and practice be preserved and continued, or prevented or restricted, if the draft new law was in force? Again, if the draft new law would prevent or restrict good practice and law, then further important changes need to be suggested before the law is adopted.

#### Case study ►

##### Key objectives for land tenure reform in Southern Sudan

Southern Sudan's 2009 Land Act (Chapter 1, Article 5) sets out several key objectives relating to land tenure.\* This is an example of the kinds of objectives that could be included in a law or policy. It is not intended as a template or model for every country, since the desired objectives of a law or policy depend on the context. For example, the reference below to the recent civil war is more applicable to a post-conflict country.

*In the application of this Act, the following objectives shall be observed and pursued:*

##### ***Resolution of land disputes in line with customary practices and community interests:***

*(a) resolving land disputes, taking due consideration of the customary practices and interest of the people of Southern Sudan*

##### ***Equal recognition under the law:***

*(b) ensuring equal rights to acquire or own land for the people of Southern Sudan, legal entities [such as businesses], communities, and the Government of Southern Sudan as regulated by law*

##### ***Integration of customary law into national statutory law:***

*(c) recognizing customary law and practices related to land owned by communities*

*as part of the normative system of land regulation as long as they are consistent with the provisions of the Constitution, this Act and other laws*

***Decentralised, participatory regulation over land to communities:***

*(d) establishing a land administrative system efficient and close to issues related to land based on participation of different communities and individuals in Southern Sudan*

***Incentivizing investment and economic growth:***

*(e) promoting a land regime favorable to investment opportunities and the development of Southern Sudan as an incentive for investment and economic growth*

***Restitution for and reintegration of those displaced from their land by civil war:***

*(f) facilitating the reintegration and resettlement of internally displaced persons, returnees and other categories of persons whose rights to land were or are affected by civil war*

***Sustainable Development:***

*(g) promoting a land management system to protect and preserve the environment and ecology for the sustainable development of Southern Sudan*

***Compensation:***

*(h) guaranteeing a fair and prompt compensation to any person whose right of occupancy, ownership or recognised long standing occupancy of customary use of land is revoked or otherwise interfered with by the Government under this Act or any other law*

\* bold headings and bracketed text added.

- ✓ At the start of a policy or law reform process, clarify principles that should guide a good law reform process – one that is participatory, transparent and accountable – and communicate these to Government to make sure that a clear reform timetable is made public that adequately reflects these principles.
- ✓ Agree and clarify key objectives and core principles at the beginning of the reform process.
- ✓ Adopt core principles that reflect the highest values of human rights and good governance.
- ✓ Use agreed objectives as the framework for developing more detailed proposals for the content of policy and law reforms.
- ✓ If it is possible to gain a consensus among a range of civil society groups and communities (e.g. via existing or ad hoc ‘platforms’) on important aspects of reform process, or of the content for the reformed law or policy, then collective action can be an effective tool in promoting legal reform.

◀ *Tips*

## 5

## Five key ingredients for land and resource tenure reform

In this section, we identify five key functions that good land and resource tenure reforms must accomplish to achieve the goal of strengthening community rights to land and natural resources:

- 1. Ensure compliance with core principles:** What are the core principles with which land and resource laws must comply as described in Part 4? How can the law make sure these principles are complied with and that key objectives are reached?
- 2. Clarify who has rights to land:** To whom are land and resource rights allocated? What do those rights include?
- 3. Enable rights holders to secure and to use their land and resource rights in relations with others:** How does the law make sure that parties *outside* of the customary community, such as external investors, also understand and respect communities' land and resource rights? How does the law enable a rights holder to positively engage in business arrangements with parties external to the community, if the rights holder decides that this would be advantageous?
- 4. Clarify roles, responsibilities and procedures for implementing and enforcing community land and resource rights:** Does the law clearly define the steps that government and community institutions need to take to implement land and resource rights? Are the institutions, and the individuals within them, legitimate, accessible and accountable to the communities and individuals affected by their actions and decisions?
- 5. Enable rights holders to claim, monitor, enforce and enjoy their land rights:** How does the law ensure that communities and individuals are in fact able to use and enjoy their land and resource rights on the ground, in their day-to-day lives?

Land and resource tenure reforms usually address, at least to some extent, functions 1 and 2. But unless they also perform functions 3, 4 and 5, the law

reforms' key objectives and core principles risk remaining 'on paper only' and not being fully implemented or enforced on the ground, as illustrated in the case study below.

### **Community voices from the Democratic Republic of Congo and Liberia**

Highlighting the point that there was no way for rural communities to *enforce* their rights in the Democratic Republic of Congo (DRC), a community member from a remote community in Equateur Province asked one of the authors of this Guide what use international human rights law are, when the government had guns and batons? Similarly, in Liberia, when asked who owned the land they used, a community member responded by saying: god, guns and government, and then community. These comments reflect the disempowerment created by many years of encroachment by government-sanctioned rubber, logging, protected areas and palm oil developments on community land and resources, regardless of communities' customary laws and the human rights protected by international and regional law. Legal reforms that contain well-defined institutional and procedural processes, and that are enforceable by communities through clear and accessible participation, monitoring and grievance procedures, are more likely to be properly implemented and therefore make enjoyment of rights a reality.

### ◀ *Case study*

For each function, we set out key questions that need to be addressed by the law to fulfil the function as well as examples of how existing law reforms have addressed these questions.

## **5.1 Ensure compliance with core principles**

### **Key questions**

- How can the laws be written to ensure that core principles will be complied with?
- Where customary traditions are in tension with core principles, how can these be reconciled in practice?
- What safeguards are needed to protect against discrimination between groups within communities and between communities?

Law reforms in Tanzania and Southern Sudan have sought to comply with the principle of ensuring equal rights for women. Of course, this is but one of the concerns that might be identified as a core principle. Others may include respecting human rights for 'strangers', and non-discrimination. This

section does not aim to exhaustively list all the core principles that might be considered important, but rather how a core principle can be expressed in the law to promote compliance. Such measures also show how national law can help address tensions between customary practices and core principles – for example where customary laws discriminate against vulnerable groups within the community (e.g. women) or vulnerable groups in neighbouring communities (e.g. indigenous peoples).

**Case study** ►

**Ensuring compliance with the principle of equal land rights for women in Tanzania**

Under Tanzania's Village Land Act, women's land rights are protected not only in processes of application for land, divorce and widowhood, but also in the sale, transfer or surrender of land. Importantly, the burden is not on the woman, widow or orphan to raise an objection in the event of a transgression against her land claim, but on the village council. If a man has surrendered his land the village council must offer that right first to the individual's wife and then to all dependents. Finally, to ensure against intra-community discrimination in land administration, management and dispute resolution, the act provides for gender balance on land administration and management bodies and allows the village assembly to seek the support of district officials when they feel that the village council is acting unjustly.<sup>7</sup>

<sup>7</sup> Knight R. (2010) *Statutory recognition of customary land rights in Africa. An investigation into best practices for lawmaking and implementation*. FAO Legislative Study 105: 151-213. Available at <http://www.fao.org/docrep/013/i1945e/i1945e00.htm>

**Case study** ►

**Taking special legal measures to address the marginalisation and discrimination of indigenous peoples in the Republic of Congo**

The Republic of Congo's 2011 Law Concerning the Promotion and Protection of the Rights of Indigenous Populations takes steps to address indigenous peoples' rights issues through a stand-alone law. The law forbids discrimination against indigenous peoples and underlines their right to equality. It gives a definition of indigenous populations based on their distinct cultural identity and way of life, and their extreme vulnerability, and states that the use of the derogatory term 'pygmy' is a criminal offence. It also contains provisions on civil, political and cultural rights and provisions relating to health, education, labour and environmental rights. Importantly, the law

places a duty on the State to consult indigenous populations in a culturally-appropriate manner and through their own representative institutions or self-chosen representatives, in all decision-making about legislative and administrative measures and development projects that may have a direct or indirect effect on indigenous populations.

Consultation must include the participation of indigenous women and men, take account of indigenous decision-making processes, use a language understood by indigenous populations and provide all relevant information to them in terms that they can understand. Consultation must be done in good faith, without pressure and threats, with a view to obtaining indigenous populations' free, prior and informed consent.

Another key provision is that the law guarantees rights of property, possession, access and use over lands *and* natural resources that indigenous populations have traditionally occupied and used. As a step towards implementing this right, the State is to facilitate delimitation on the basis of customary land law and preserve customary land law even where indigenous populations do not have documented land titles.

The law arguably lacks practical procedures for ensuring its enforcement and implementation. Successful implementation will therefore depend on the quality of planned implementing decrees and whether other State laws and practices (e.g. sector laws on forests, mines, agriculture and environmental impact) are made consistent with the rights and principles protected by the indigenous populations law. The definition of indigenous populations falls short of international law, as it does not specifically refer to the right to self-definition as indigenous, or attachment to particular lands, territories and their natural resources, which are both widely regarded as key aspects of what it means to be indigenous. International and regional law may therefore be needed to interpret and supplement the definition in practice. However on the whole, the law is a huge step forward for indigenous rights in the Republic of Congo and provides a valuable example of good practice that could be considered and adapted by other African law reform processes.

Other African countries are also developing laws on indigenous peoples' rights, for example Democratic Republic of Congo has developed a draft bill on indigenous peoples, Central African Republic is in the process of implementing ILO 169 on the rights of indigenous peoples and Cameroon has taken initial steps towards developing a national policy or law on indigenous peoples.

**Tips** ▶

For more information about such multi-stakeholder processes see FERN (2006) *Provoking change: A tool kit for African NGOs*. <http://www.fern.org/publications/toolkits-reports/provoking-change-toolkit-african-ngos>

- ✓ At the beginning of the reform process, develop a multi-stakeholder process including commonly marginalised groups such as women and indigenous peoples, to agree on the core principles to which the law reforms should adhere. These can be in a separate policy and/or in the law itself. This avoids risk of divisions between the parties due to continued debate about the core principles throughout the process. Rather, the agreed principles will provide an agreed framework for the law reform.
- ✓ Explicitly protect the land and resource rights of minority communities and indigenous peoples who have suffered long-standing marginalisation and discrimination from State policies and practices, as well as from more dominant ethnic groups. A national and local 'culture' of discrimination is likely to require special protective measures to achieve real change. These measures should reflect the urgency and importance of securing land and resource rights for indigenous peoples, whose very survival as a people is put at risk by poor or insecure rights to their lands, territories and resources.



## 5.2 Clarify who has rights to land and resources and what these rights include

### Key questions

- What is the best process for identifying existing community land and resource tenure rights?
- Should land registration and titling be compulsory for communities?
- What kinds of evidence should be accepted as proof of land claims?
- How are land and resource rights of individuals or groups (for example, families) within communities clarified and allocated?

### 5.2.1 Recognise and validate existing land and resource tenure rights

Customary community land and resource rights in Africa are often based on the concept of collective rights – meaning that the land is owned and managed by the community as a whole. In such communities, individuals or families often have user rights over particular areas (e.g. to make farms), whereas other areas will be common land, used by the whole community (e.g. forest, pasture, wetlands and swamps). This differs from the dominant focus on individual land title typical of European-style national law systems.

This Guide suggests a two-step process for clarifying land and resource tenure rights. The first step is to recognise existing customary tenure rights in national land and resource tenure laws. In keeping with rules of customary law, community land rights are identified as the basis for land tenure systems. In the second step, allocation of tenure rights to groups (for example, villages, family groups, or clans) and individuals within those communities is determined by the customary law system, in accordance with its rules and procedures. As explained above, customary rules and procedures may need to be adapted to comply with the core principles with which all land tenure laws must comply. Beyond this, however, national law should not dictate how rights within the community are allocated.

#### **Step one: confirm existing, collective community land and resource rights**

It is important to identify existing *community* tenure rights. National laws should not only formally recognise customary land rights but also make clear that these land rights are equal in strength and validity to documented land claims.

Mozambique undertook such an approach in 1997. The way Mozambique developed the national law meant that once the government had passed the law, all the customary land systems throughout the country became part of the national legal system.

**Case study** ▶**Recognising existing community land tenure rights in Mozambique**

When three decades of civil war in Mozambique ended in 1992, millions of people returned to their plundered fields. The government did not have the resources to resolve disputes caused by this massive demographic shift. Land reform was an urgent priority. The government decided that customary systems were best situated to direct the delimitation and subsequent management of the land.

Mozambique's Land Law *Lei de Terras* (1997) made it possible for customary land rights to be automatically recognised within statutory law. It decrees that: 'Local communities who occupy the land according to customary practices which do not contradict the constitution' automatically 'acquire the right of land use and benefit' (Regulation, Article 9 § 1).

The decree also applies to anyone living or working on the land for ten years in good faith before the land law was passed (Regulation, Article 12 (b)).

It is important to emphasise that, while communities in Mozambique have the option of formally surveying and registering their land tenure, it is not the act of registration that gives these rights legal force. Mozambique's land law expressly provides that 'The absence of registration does not prejudice the right of land use and benefit acquired through occupancy [in accordance with customary norms and practices].' Once the law was passed, local communities and other long term occupants automatically held a formal (*de jure/legal*) right to use and benefit from the land, as strong as any paper title granted to an investor.

**Step two: authorise customary law and procedures for administering land tenure rights within communities**

Rather than create new local land administration institutions and procedures, national reforms should allow land and resource administration to take place through existing community land and resource management practices and institutions, subject of course to their compliance with core principles. This should ensure that the community perceives the structures as legitimate and functioning well. As explained in [Part 5.4.3](#), such an approach makes local land administration authorities and procedures more accessible due to their familiarity, language and location. It is also less costly to implement, both for communities and for the State.

### **Accommodating diverse local management systems under one national law in Mozambique**

To provide enough flexibility to allow each customary group to continue to follow its own local land allocation and management traditions and, at the same time, be fully consistent with the national legal system, the Land Law in Mozambique simply states that:

- land rights are acquired by customary norms and practices (Article 12 (a)), and
- for the purpose of managing resources, resolving conflicts, and allocation of land rights between community members, the ‘local communities use, amongst other things, customary norms and practices’ (Article 24).

Exactly what those customary norms and practices are or should be is left undefined. This way, the law created parameters that could comfortably encompass many different customary systems under one national law.

### ◀ *Case study*

The Mozambique example seamlessly integrates customary law into the formal legal framework of the modern State without the need for long and complex codifications, which would be near impossible given the variety of customary law practices. Instead, the law simply recognises the legitimacy of what goes on inside any given community, as long as this complies with the core principles of the national Constitution and any other rules set out in the Land Law itself. Attention can then focus instead on the relationship between the community and the outside world.

## **5.2.2 Allow customary forms of evidence as proof of customary land claims**

Identifying community rules on resource access and use can be challenging for national legal systems that typically rely upon written sources of evidence. Sources of customary law may often be held orally. This can make clarifying the boundaries of community land tenure difficult, especially for outsiders. Yet this does not need to be an obstacle to having community land and resource tenure rights recognised by national law.

Just as space can be made for customary laws to continue to operate within the national legal framework, communities can be allowed to continue to use oral testimony, or other forms of evidence they have traditionally relied on, to clarify and allocate land rights to groups, families or individuals.

The same kinds of evidence should be allowed to support the determination of the areas of land recognised as owned by communities under national law. By these means, the processes for proving land claims can be made more accessible to rural communities and their members.

**Case study** ► **Use of customary forms of proof to validate customary land claims in Mozambique**

Mozambique's Land Law (1997) allows customary forms of proof for land claims, including the oral testimony of community members:

Article 15

*Proof*

*The right of land use and benefit can be proved by means of:*

...

*(b) Testimonial proof presented by members, men and women of local communities.*

...

It will nonetheless often be advantageous for communities to formally register their land rights. This might be prioritised, for example, if there are conflicts over land or natural resources, if the State or investors are planning new economic activities or development projects, or if a community wants to share some of its lands and enter into partnership with outside investors.

It is important to emphasise in the legislation that **the titling and registration process does not create the right; it only provides documentary evidence of the pre-existing right**. The automatic recognition of existing customary rights – regardless of registration – allows the community to formally register its lands at a pace and through a process that suits the community's needs.



### Delimitation, registration and titling

Delimitation, registration and titling are three different steps in a process of defining and clarifying who has rights to what lands.

**Delimitation** (also referred to as **demarcation**) is the process of describing where community lands and resources are. This is typically done through drawings or maps, boundary drawing and descriptions of key landmarks and other customary means of identification.

**Registration** is a procedure describing a parcel of land and identifying its owner and form of ownership and other tenure rights (for example, user rights, rights of access, concessions) relating to the same parcel. The **land register** (or **cadastre**) is a public record that others can check to determine who has tenure rights or claims to a parcel of land.

A **title** is a certificate of ownership or tenure issued on the basis of details in the land register describing the parcel and the owner or other tenure rights held by the title holder. It is a document that a tenure holder can keep and use as a form of proof of their land rights.

### ◀ Key concept

### Mozambique's approach to community land delimitation, registration and titling

Regulations detailing how Mozambique's land law will be implemented state:

*Areas over which a right of land use and benefit has been acquired by occupancy according to customary practices may, when necessary or at the request of the local communities, be identified and recorded in the National Land Cadastre.*

(Land Law Regulations, Art. 9§3)

The technical annex to the land law sets out the procedures a community must complete before receiving an official delimitation certificate (technical annex, art. 5§1).

**First, an advisory 'working group' must be established** to coordinate and lead the community through each step of the delimitation process. The working group should 'include a technician with basic knowledge of topography and who shall have the information contained in the Cadastral Atlas' (technical annex, art. 11(2)). Also, to ensure that the results of the delimitation process

### ◀ Case study

are equitable, just and representative of the community as a whole, the working group must ‘work with men and women and with different socio-economic and age groups within local communities’ and ensure that they arrive at decisions ‘through consensus’ (technical annex, art. 5§2).

***Second, the working group convenes meetings to educate the community and raise awareness*** about the delimitation process, including information on:

- the reason for and objectives of the delimitation process;
- relevant provisions of the law and regulations;
- the methodology of the delimitation process; and
- the advantages and implications of community delimitation.

(technical annex, art. 8§1). These meetings culminate in the ***election of community representatives*** who will be directly involved in the delimitation process. The minutes of all delimitation-related community meetings must be signed by these representatives.

***Third, the community undertakes participatory appraisal and map-making processes.*** A participatory appraisal is defined in the technical annex as ‘information given by a local community’ regarding:

- its history, culture and social organisation;
- the use of the land and other natural resources and the mechanisms for its management;
- spatial occupation;
- population dynamics; and
- possible conflicts and the mechanisms for their resolution.

(technical annex, arts. 2§6 and 10§1)

The participatory phase of community delimitation is designed to foster community dialogue and often involves discussion of community history, social organisation, current use of land and natural resources and management practices. From the appraisal and accompanying discussion, ‘participatory maps’ of the community are drawn. At least two participatory maps must be made by separate community sub-groups, with at least one made by men and one by women, so as to create a space in which women can feel free to make their voices and opinions heard. Participatory maps are defined in the law as:

*Drawings designed by an interest group of the community, namely men, women, young people, elders and others, which shows in an initial and relative way, not to scale, the permanent natural or man-made landmarks used as boundaries, the identification and location of natural resources, reference points*

*where conflicts regarding natural resources take place or any other boundaries or relevant features.*

(technical annex, art. 2§8)

By allowing natural markers to help define the boundaries of community lands, the law allows for the formalisation of customary markers. Neighbouring communities must verify the accuracy of the maps and contribute to a descriptive report of neighbouring lands (technical annex, art. 5 §3).

***Fourth, the boundaries are agreed by all stakeholders***, marked on the participatory maps and defined physically on the ground.

***Fifth***, State technical staff then ***compile the two (or more) maps*** into one computer-generated cartogram, to which a 'sketch plan' and accompanying 'descriptive report' are attached. The sketch plan is a transcription of the community-generated maps into terms that enable it to be located on the cadastral maps, including geo-referencing points and boundary lines. The 'descriptive report' is derived from the community's participatory appraisal exercises and may include the community's structure and history, specification of the community's natural resources, communal areas, sacred spaces and important community infrastructure, and elaboration of any relevant community land and natural resource management practices, among other information.

***Finally, the sketch map and descriptive report are presented to the community and leaders of neighbouring communities for verification and approval*** (technical annex, art. 12§1). Once approved, the documents are ***entered into the national cadastre***. The cadastral service must issue a ***Certificate of Delimitation*** in the name of the community within 60 days. It is up to the community to determine what it wants to name itself (art. 13§4) for the purposes of this document. This certificate provides formal evidence that a delimitation exercise was carried out in accordance with the law and certifies the existence and boundaries of a community.

Once registered formally the community holds a single right of land use and benefit and, as a title holder, it also acquires legal 'personhood' and can thereafter enter into contracts with investors and undertake other legal actions. The process also establishes a clear map that can guide investors and local people alike when it comes to determining where resources are available for investor use and clarify which community or communities have rights to those lands.

### 5.2.3 Resolve inconsistencies between reformed land laws and laws governing different land-use sectors

In addition to 'land laws' clarifying land tenure rights and processes, most countries will have sectoral laws governing different land-use sectors such as mining, forestry, agriculture and conservation. These laws regulate activities in different sectors including the granting of concessions to logging companies, planning permission to convert lands to large-scale agricultural use, mining extraction rights and the creation of protected areas for conservation. Problems arise if the rights and processes for exploiting land and its resources under sectoral laws conflict with land tenure processes and rights set out in the land laws.

Stakeholders should be aware of and keep in mind potential conflicts with sectoral laws from the onset. Consistency across land laws and relevant sectoral laws should be clarified as an objective for the law reforms.

One way to resolve such conflicts is for land law statutes to make explicit that the provisions of the land law, especially the rights of community tenure holders,



overrule all other laws relating to land and land use, including sectoral laws. An alternative approach is to survey sectoral laws, identify conflicts and reform sectoral laws to bring them in line with the reformed land laws, cross-referencing relevant provisions of the land law within the sectoral laws as appropriate. The former is a simpler and cheaper option that will result in necessary reforms of the natural resource sectors over time, but it requires political commitment to achieve such significant changes.

- ✔ Define ‘custom’ very flexibly so as to accommodate the variety of different customary legal systems that may co-exist within a country and to allow for evolution and flexibility over time.
- ✔ Make customary community land and resource rights equal in strength and stature to ‘formal’ titled land rights, regardless of whether they are registered or not in a national land register or cadastre.
- ✔ Establish long-term security of community tenure by recognising the authority of existing local customary institutions and processes for managing customary lands and resources, including allocation of lands to families and individuals within the community, subject only to compliance with core principles.
- ✔ Allow customary forms of evidence (e.g. community testimony) as proof of customary land claims.
- ✔ Ensure that titling and registration processes are optional, for communities who wish to document their customary land claim. However registration should not create the right; it only provides documentary evidence of the pre-existing customary right.
- ✔ Optional demarcation, registration and titling processes should be accessible and participatory.
- ✔ Make consistency between land law and sectoral laws an explicit objective of the law reforms – either by ensuring that the land law overrides inconsistent sectoral laws, or by amending those sectoral laws to make them consistent with the land tenure law.
- ✔ Explicitly protect communal areas (such as forests, wetlands, rangelands and sacred or cultural areas), customary rights of way and shared land use and access rights.
- ◀ *Tips*

### 5.3 Enable rights holders to secure and to use their land rights in relations with others

#### Key questions

- How does the law make sure that parties *outside* of the customary community, such as external investors, understand and respect communities' land and resource rights?
- How does the law enable a community to positively engage in business arrangements with parties external to the community, if the community decides that this would be of benefit to them?

Often, one of the main goals of land tenure reform cited in Government land policies is to create a stable investment environment, including for outside or foreign investors who can contribute to national economic development and community prosperity. This means that, in addition to clarifying and allocating land and resource rights within and between communities, the law must explain how a community can engage with investors in a manner that provides security and benefits for both the community and the investor. So far, this Guide has discussed the integration of customary and national law systems governing land and resource tenure. Where outside investors are involved the task becomes more complicated, requiring the integration also of capitalist commercial systems.

As discussed in Part 2, one of the problems that can arise from legal pluralism is a lack of certainty about which system of law applies to the land. Such situations prevent communities from enjoying the full benefit of their land and are a disincentive to responsible investment. Even where a community decides that allowing an investor to exploit its land resources and share the benefits with the community would be beneficial, they may have difficulty attracting investors, or ensuring that the investor will honour the benefit-sharing agreements and other conditions if land and resource tenure rights are not clear.

Even where customary land rights are well understood and respected within a local community, international investors and other outsiders will generally look to national laws to say who holds rights to which lands. Therefore, it is essential that the national legal framework clearly indicates that customary land and resource ownership is valid and will be protected by national law.

### 5.3.1 Clarify community rights to keep the land intact, including community rights over apparently 'unused' land

In customary land use, it is common for some lands to lie fallow at times, or be used only seasonally or as common land for hunting, gathering and sacred areas. In the case of forest lands for example, the food, medicine, cultural resources and other environmental services that they provide are often only sustainable if significant areas are left intact. They may appear unused, and some areas may not be accessed at all. Areas exempt from hunting act as 'nurseries', replenishing sustainable animal populations that are then hunted elsewhere. Some portions of community land may also be kept in reserve for allocation to future generations. This does not mean that such lands are unused by the community; they are part of a customary practice of sustainable land management and use. Yet there is a risk that outsiders might view land without visible marks of being actively managed as 'unused' and therefore available for exploitation.

Making the community the 'legal owner' of *all* customary land areas and allowing it to allocate land for use by groups, families and individuals in accordance with customary rules and procedures (see [Part 5.2.1](#)) is one way to guard against this. The community then becomes the legal entity with which outsiders must engage if they want to invest in, develop, or in any way exploit the community's lands.

#### Making the community a formal legal entity in Mozambique

In Mozambique, lawmakers sought to make the community the foremost legal entity, whose borders are clearly protected from infringement by outsiders and within which traditional mechanisms of land use and management prevail. As such, one of the most important components of the land law is its legal definition and recognition of 'local community' as a formal legal entity. The law defines a local community as: 'a grouping of families and individuals, living in a territorial area that is at the level of a locality or smaller, which seeks to safeguard their common interests' (Art. 1 § 1). This definition is grounded in community occupation and use of land (based on prevailing use, kinship and internal management systems of each community) and is designed for use in the wide variety of cultural and ecological contexts of Mozambique. The law then specifically details that community interests may include land for a wide range of uses, including '**areas for habitation or agriculture, whether cultivated or lying fallow, forests, places of cultural importance, pastures, water sources and areas for expansion.**' (Art. 1 § 1, emphasis added).

#### ◀ Case study

### 5.3.2 Ensure that community-investor agreements are considered formal contracts

The integration of customary and national laws requires a two-way dynamic: (1) validating the customary land rights in national law and (2) extending to customary communities the rights inherent in the national legal system. Treating community-investor agreements as formal contracts subject to national contract laws is a good example of this two-way dynamic in practice.

For a further discussion of the rationale for advocating integration of customary and statutory dispute resolution and law enforcement mechanisms, the challenges such integration poses, and the capacities that need to be developed for such integration, see [Part 5.4](#).

- ◀ The law should provide that claims for the enforcement or voiding of contracts between community and investor, including compliance with benefit-sharing agreements, are first heard through customary courts, tribunals, or other customary dispute mechanisms. However it should be possible to appeal the decisions of these customary tribunals through the State court system, up to the country's highest court.

Under Mozambique's reformed land laws, when outside investors want access to community lands or natural resources, the investors must ask the community's permission and may negotiate the terms and conditions of a lease with the community. Even where the law provides such protections and opportunities, communities may be at a disadvantage because they lack information or power compared to the investor. Communities may have little idea of the market value of their land or the financial profits to be derived from local natural resources by outside investors in foreign markets. The process may also be co-opted by local leaders – either customary or State – who may demand bribes as a condition of granting permission to investors, thereby enriching themselves to the detriment of the larger community and the sustainable management of community land. For these and other reasons, law reforms should provide that community agreements made with investors without the benefit of independent, knowledgeable, conflict-free legal representation can be easily voided.

### 5.3.3 Ensure that rental and benefit-sharing agreements are negotiated and agreed to by communities

Where investors are allowed to exploit community lands, a key concern is for communities to share equitably in the economic benefits of developing or otherwise utilising the land and its resources and retain community ownership of the land. Law reforms should ensure that rental payments and other benefit-sharing agreements are agreed through effective consultation and consent complying with all the requirements for FPIC.

See [Part 3.2.4](#) for FPIC requirements.

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### Ensuring benefit sharing in Southern Sudan

Southern Sudan's Land Act (2009) allows traditional authorities, in consultation with the County Land Authority and the Payam Land Council, to 'grant to a person or a company, whether national or foreigner, a right of leasehold in respect of a portion of community land' for a period of up to 99 years (Chapter VI, Section 27). However the Government Ministry concerned shall, in consultation with the Investment Authority, approve the leasehold *only* where the Ministry has ensured that, among other things, 'the activity planned complies with the rules governing land use and environmental regulations', 'that the members of the community are duly consulted' and that 'the project for which the land has been leased contributes to the social and economic development of the community, the County, or/and the State.' (Chapter VI, Section 27(4)). The Ministry must also ensure that the lease contract is otherwise 'in compliance with the provisions of this Act' and the Act, in turn, requires among other things an environmental, economic and social impact assessment prior to any decision to lease the land for investment purposes (see [Part 5.3.4](#)).

### ◀ Case study



### 5.3.4 Ensure Environmental Impact Assessments are available and conducted in a participatory manner

See Part 3.2.4 for FPIC requirements. ◀

Before investors are allowed concessions over community lands, the social and environmental impacts should be fully and independently assessed. Any community likely to be affected by a proposed concession or development project must be fully aware of and understand these impacts and participate fully in identifying them. The concession or project should only go ahead with the affected community's consent, in accordance with all of the provisions of FPIC.

Effective public participation in environmental and social impact assessments (ESIAs) depends on legislation and political will. At present, the legal basis for participation in ESIA systems in many African countries is weak, non-mandatory or non-existent. Nevertheless, legislation on environmental and social protection that requires a consultative impact assessment does exist. Examples include Liberia's Environmental Protection Agency Act and Environmental Protection Act of 2002, Senegal's Environmental Code 2001 (art. 48), Mozambique's Environment Act 1997 (art. 16) as well as Kenya's Environmental Management and Co-ordination Act, 1999 and Southern Sudan's Land Act.

An Environmental and Social Impact Assessment (ESIA) has three major aims:

- systematic examination of the environmental and social consequences of a proposed development;
- ensuring that adequate consideration is given to any such effects;
- planning to avoid, reduce or offset any significant adverse impacts.

The ESIA process typically comprises the following steps:

- screening: to decide if and at what level an ESIA should be completed;
- scoping: to identify the important issues and prepare terms of reference;
- impact analysis: to predict the effects of a proposal and evaluate their significance;
- mitigation: to establish measures to prevent, reduce or compensate for adverse impacts;
- reporting: to prepare the information necessary for decision making;
- review: to check the quality of the ESIA report;
- decision-making: to approve or reject the proposal and set conditions;
- follow up: to monitor, manage and audit impacts of project implementation.

Public involvement usually occurs during the scoping and review phases. Public consultation may also occur at any other stage of the ESIA Process, depending on the enabling legislation.

**Environmental, Economic & Social Impact Assessment in Southern Sudan**  
Under Chapter XI, section 70 of Southern Sudan's new Land Act (2009), an assessment of the environmental, economic and social impact must be taken into account before land is allocated for investment purposes.

***Environmental, Economic and Social Impact Assessment***

1. Any allocation of land for investment purposes shall be subject to a social, economic and environmental impact assessment to ensure that the social, economic and environmental implications of the activities on the land are taken into account before any decision is made thereon.
2. The process shall involve an analysis of the possible effects on the environment, biodiversity, people and assets.
3. A social, economic and environmental impact assessment shall be undertaken by both public and private sectors prior to any activities that may have impact on the environment and the people as determined by this Act or any other law or regulations.

Furthermore, as explained in the case study in [Part 5.3.3](#), Southern Sudan's Land Act provides that the Ministry is authorised to approve development projects only where an impact assessment has been done in accordance with Section 70 and where the Ministry has ensured that the community was consulted and the project contributes to social and economic development of the community, the county and/or the State.

◀ **Case study**

- ✓ Ensure that the protection of community land claims is not limited to lands currently under cultivation or otherwise bearing obvious signs of active exploitation. This would expose apparently 'unused' community land to risk of encroachment, when in fact that land is a fundamental part of the community's land area, relied on for food, medicines and culture.
- ✓ Require community-investor agreements to be considered formal contracts, enforceable and voidable according to national contract law.
- ✓ Recognise communities as legal entities, able to enter into transactions with outsiders in relation to their lands.
- ✓ Make independent legal representation for communities mandatory during negotiation of agreements with investors.
- ✓ Include provisions to ensure adequate rental agreements and benefit-sharing mechanisms, so that exploitation of natural resources fairly benefits communities whose lands and resources are being used.
- ✓ Require environmental and social impact assessments before allowing concessions or development projects on community land and guarantee effective participation of communities in their design, execution and validation.

◀ **Tips**

## 5.4 Clarify roles, responsibilities and procedures for implementing and enforcing community land and resource rights

Even where African law reform efforts make progress in clarifying communities' land tenure rights, they generally don't specify what the institutions responsible for implementation and enforcement must do to ensure that these rights are actually secured and enjoyed by communities. Where implementation and enforcement steps *are* clearly set out, the law should provide procedural rights that enable communities, individuals and NGOs to monitor the implementation and enforcement of the laws by government and customary institutions, and bring their own effective enforcement actions where the responsible institutions are failing to deliver.

This section focuses on defining institutional responsibilities in the law and ensuring that the institutions – and the individuals within those institutions – that are responsible for implementing and enforcing community land tenure are accessible, accountable, incentivised and competent.

### Key questions

- What institutional responsibilities need to be defined for implementation and enforcement of community tenure rights?
- Are the institutions to which responsibilities are assigned legitimate? That is, are they recognised by the communities and community members who will be affected by their decisions?
- Are State and customary institutions – and the government officials and customary authorities within those institutions – accessible to the communities and individuals affected by their decisions?
- Does the law clearly define the steps that government officials and/or customary authorities must take to fully implement community tenure rights?
- Does the law clearly define the processes and procedures through which land tenure rights will be clarified, implemented and enforced?

For land tenure reform to achieve its objectives, it is not enough to simply define rights and core principles in legislation. It is crucial that the reformed law is written in a way that ensures the long-term effective implementation and enforcement of these rights and principles. More specifically, the law needs to:

See Part 2.1 for information on procedural rights. The incorporation of procedural rights into law reforms is explained in Part 5.5.

- include clearly defined **procedural rights** for communities and community members to claim, monitor, enforce and enjoy the benefits of their land tenure rights;
- clearly **define the responsibilities of the State and customary institutions** for implementing and enforcing community land tenure laws;

- ensure that the institutions and individuals responsible for implementing and enforcing the laws, as well as implementation and enforcement processes and procedures, are **accessible, accountable and contain incentives** to uphold community tenure rights.

### 5.4.1 Making sure customary and State institutions work well at the same time

In a context where both customary and national law apply, national (State) and customary institutions must be aligned to work in a mutually supportive fashion.

**Legal institutions:** All legal systems need institutions that are responsible for implementing and enforcing the laws. In a national law system, this typically includes government departments such as Ministries, specialised agencies such as Land or Forestry Commissions, government services such as the Land Registry and courts responsible for interpreting the laws and resolving legal disputes. These bodies may be represented at national, regional and local levels.

Customary legal systems will typically exercise authority and enforce customary laws through institutions such as councils, chiefs and other customary leadership roles (e.g. chair lady, youth leader, elder) and customary tribunals. Some customary systems have various levels of authority and responsibility from the local (family or village level) to the regional level encompassing a network of customary communities, with the possibility to appeal decisions through higher levels. Alternatively, different levels of authority may make decisions about different issues depending upon whether the impacts of the decision will be community-wide or limited to a more local context.

In some places there is a lack of understanding and respect between customary and national/government institutions. Law reforms that shift the balance of power between customary and statutory institutions can increase tensions if some parties risk losing power or privilege. Government (local, regional or national) and customary elites may collaborate to reinforce each other's powers, maximising their personal benefit to the detriment of community welfare and the rule of law. This problem is sometimes referred to as 'elite capture' and is basically a kind of corruption.

To overcome such challenges, land tenure reforms should reinforce the rule of law, reduce opportunities for elite capture and corruption, require training of both the statutory and customary institutions about each other's role and responsibilities (including areas of overlap where they may need to work

- ▶ The 'downward' accountability of customary authorities to community members is explained in [Part 5.4.4](#).

together) and incentivise individuals within both government and customary institutions to maintain political will to implement the reforms in the best interest of communities. These points are explained further below.

#### 5.4.2 Defining institutional responsibilities and procedures

Responsibilities for the implementation and enforcement of rights must be clearly defined in the law. Those responsible must actively set up the procedures and carry out the steps necessary to implement and enforce land rights. It is also vital, of course, that they have sufficient resources to do so. The kinds of responsibilities that land tenure laws must define include:

- **Definition of implementing measures or other rules:** Often, more detailed rules are needed to implement the law in practice than can be set out in detail within the main national law or statute. These are sometimes referred to as ‘secondary law’, ‘implementing measures’ or ‘implementing decrees’. These must always be consistent with the statutes (‘primary law’) and aim to implement the ‘parent’ law.
- **Application of rules:** Relevant rules need to be applied to individual cases to implement tenure rights, and the individuals within the institutions responsible for implementation and enforcement need to make judgements about how to apply the laws in individual cases. It is very important that the main laws, or alternatively the formal implementing measures or decrees, include clear criteria to guide the individuals making these judgements and set parameters for the scope of their judgement. When a judgement is inconsistent with these criteria, or with the way the criteria were applied in other similar cases, parties objecting to the way the law was applied should refer to the criteria to frame their complaint.<sup>8</sup>
- **Appeal procedures:** The law should provide clearly defined and accessible appeal procedures in the event that a land tenure claim (e.g. a community’s claim to own their customary land and resources) is rejected by authorities. The first stage of appeal may simply be an opportunity to have the decision reconsidered by the decision maker, or by another, more senior decision maker from the same institution, and for the decision maker to clearly set

<sup>8</sup> The requirement, that an individual responsible for making judgements applying the law in specific cases must clearly state the reasons for his or her decision, is referred to as a requirement for ‘**reasoned decision making**’. Where a requirement for reasoned decision-making is clearly set out in the law, it is much easier to bring an effective complaint through appeal procedures or other available grievance mechanisms.

the reasons and rationale for his or her decision in writing. If this outcome is unsatisfactory, this decision should be appealable to higher levels of the government administration or customary authorities and eventually to the highest court in the country for consideration by a judge. Alternatively, where the court system itself is deemed to be corrupt, a special review panel could be established instead. Such a review panel should include representatives from all key stakeholder groups.

- **Conflict resolution mechanisms:** Where different parties claim conflicting rights over the same land (e.g. two communities in a boundary dispute), conflict resolution mechanisms are required. As above, conflict resolution decisions should be appealable through the court system or, alternatively, to a special review panel representative of all key stakeholders.
- **Consultation and consent processes:** Where community consultation or consent is required by law, consultation and consent processes need to be clearly defined and implemented. These should, in general, be designed to comply with the principles for consultation and consent defined by FPIC.



### 5.4.3 Accessible institutions and procedures

If the formal legal system recognises customary land claims yet poor, rural or marginalised communities cannot access or successfully use the formal legal system, their land rights will have little ‘real’ protection. It is essential, therefore, that people can access, understand and use land administration systems.

Ensuring **accessibility** includes consideration of:

- **location:** Communities must be able to travel easily to where the institutions are located and where procedures will take place.
- **language:** Information and procedures must be in the language of all communities, expressed in a way that they can readily understand.
- **cost:** Communities must be able to access the mechanisms and procedures necessary to implement and enforce their rights at no cost or at a minimal cost that is affordable to all.
- **familiarity:** Communities are best able to understand processes, procedures and formats with which they are already familiar, rather than new kinds of procedures or processes imported from foreign systems.

One way to ensure familiarity is to create local land administration and management structures that come out of – and look much like – existing local and customary land management structures. People are more likely to understand their rights and how to secure them if laws are kept simple, clear, short and local. Laws should be easy for rural communities to use to claim, prove and protect their land and resource rights, based upon concepts and systems that are already familiar to them. Such systems are likely to cost less for the State as well as for users.

### 5.4.4 Accountable institutions and procedures

Those authorised to implement and enforce the laws are in a powerful position. Therefore, it is very important that these institutions – and the individuals within them – are **accountable**.

#### *Key concept* ►

**Accountability** means that those responsible for implementing and enforcing the laws act in accordance with the rule of law and in the interests of those whose rights are at stake. To ensure accountability, the laws should set out procedural rights (see [Part 2.1](#)) that enable rights holders to monitor the implementation and enforcement of their rights, and appeal decisions and actions that they believe violate the security or enjoyment of their rights. This includes the failure of government officials or customary authorities to act where their action is necessary to implement or enforce tenure rights.

Poorly designed or corrupt institutions that do not represent the needs of communities can lead to **elite capture** of resources at a loss to the community (see [Part 5.4.1](#)). Many communities are keen to see changes to customary and government institutions that have been abused by community or government elites who have profited at the expense of communities. This is discussed below.

**Transparency** is an important precondition for accountability. Transparent institutions and procedures are ones in which the processes as well as the reasons for decisions and actions to implement and enforce land and resource rights are open and available to the general public, and especially to those whose rights are affected.

- For a further discussion of how laws can provide for access to information, see [Part 5.5.1](#).

Law reformers can build accountability into the laws by establishing systems of checks and balances between rights holders, State land administrators and local or customary leaders. It is important to develop checks that ensure **downward accountability to community members** as well as checks that ensure **upward accountability to the State**.

#### *Accountability from customary authorities to community members ('downward accountability')*

Many customary systems for owning and managing land and resources involve decision-making processes that are centred on traditional authorities, such as leaders (e.g. chiefs) or other institutions and groups of leaders (e.g. community councils). But some customary systems don't have this type of traditional authority, or don't have a traditional authority at all. Their decision-making is more consensus-based, involving some or all of the community depending on the decision being made. Most customary systems are likely to have a mixture of these approaches, with traditional authorities arriving at decisions on behalf of all the community (often on the basis of consultation and discussion) and other decisions requiring the involvement of some or all of the community.

Where communities do involve a customary authority of some kind, those authorities are best described in legal language as 'trustees' of land and resources. Usually, customary authorities do not (or should not) own the land and resources for their own private benefit – the community owns the land and resources, and the use and management of community lands and resources is for the benefit of the whole community. In legal terms, customary authorities have a duty to act only in the interests of the community as a whole. In legal terms, the duty owed by a customary authority to the community is a **'fiduciary duty'**. A fiduciary duty is therefore an obligation to manage the community's property according to the highest standard of care and the principle of good faith. A breach or abuse of

fiduciary duty by a customary authority is the opposite – i.e. acting carelessly, in bad faith, or by serving private interests or otherwise not acting exclusively in the community interest. Trustees are expected to be wholly loyal to the beneficiaries (i.e. the community as a whole) to whom they owe a fiduciary duty. They must not put their personal interests before the interests of the beneficiaries and may not profit from their position as trustee unless the beneficiaries consent. This duty means that traditional leaders must act in the best interests of the community when dealing with land and natural resources matters.

Law reforms should emphasise the nature of this fiduciary relationship by clarifying that the actual rights to the land are *vested in (i.e. belong to) the community* and that customary authorities should have an explicit duty to manage community land according to the fiduciary duties that a trustee owes to the beneficiaries.



◀ *Case study***Getting Ghana's traditional chiefs to honour their fiduciary duties to communities<sup>9</sup>**

Ghana is a country characterised by legal and institutional pluralism. The Constitution recognises customary law as a source of law (Article 11) and explicitly states that both the selection of chiefs and the management of 'stool' (customary) land are to be 'in accordance with the relevant customary law and usage' (articles 267 (i) and 270 (2)). The position of traditional authorities (referred to as stools and skins) is guaranteed by the 1992 Constitution (article 270 (2) (a)). Traditional Councils and the House of Chiefs are charged with resolving chiefly succession and status disputes.

In Ghana the fiduciary duty of customary leaders to their communities is recognised in the country's Constitution. The Constitution resolved to establish an Office of the Administrator of Stool Land (OASL) which was responsible for the 'rents, duties, royalties, revenue or other payments whether in the nature of income or capital from stool lands' to be paid to the stool account (article 267 (2)). Of the 90% of income (10% is paid to the OASL) 25% is for 'stool maintenance' and 20% for the traditional authority.

However, there is substantial evidence of traditional leaders exploiting their positions of power at the expense of their communities by leasing or selling land to migrant farmers, companies and developers. There is no legal requirement for chiefs to reinvest the 25% in the community. Rather, the provisions encourage the chiefs to retain revenue 'for the maintenance of the stool in keeping with its status'. Chiefs tend to increasingly interpret this to benefit themselves with financial gain and consumer goods. The use of the 20% for the traditional authority – the Traditional Council – is not specified. This has led to a situation where the government has endorsed the chiefs' perception of themselves as owners rather than merely trustees acting on behalf of the real owner, the community at large. As the value of land increases, especially near urban centres such as Kumasi and Accra, the situation of chiefs profiting at the expense of community members worsens.

But groups representing communities are finding ways to persuade chiefs to act instead in the long-term interest of the community. The Centre for Indigenous Knowledge and Development (CIKOD) in Ghana works with traditional authorities to develop 'community protocols'. These agreements, decided upon by the community together, have demonstrated to some chiefs that their own survival is linked to the survival of the community in the long-term. Efforts are now being made to have these protocols recognised by national law. This initiative has taken some steps to getting effective accountability and transparency mechanisms built into both national and customary laws to help prevent abuse of fiduciary duty.

<sup>9</sup> Ubink J. (2008) *In the land of the chiefs: Customary law, land and conflicts and the role of the State in per-urban Ghana*. Leiden University Press. Available at: [openaccess.leidenuniv.nl/bitstream/handle/1887/12630/Thesis.pdf?sequence=1](https://openaccess.leidenuniv.nl/bitstream/handle/1887/12630/Thesis.pdf?sequence=1) ; CIKOD <http://www.cikod.org/Services.html>

A key lesson from the Ghana case study is that communities should be encouraged and supported to create community by-laws and land and natural resource management plans. These provide an opportunity for the community to take stock and address deficiencies in the customary framework, strengthen the accountability of customary authorities to their communities and ensure that they meet their fiduciary duties. It also allows communities faced with new challenges (e.g. large-scale multinational companies looking for new land to grow agricultural commodities such as oil palm) to assess what parts of the customary system need to change, for instance, to ensure that rights to free, prior and informed consent are respected.

These steps also enable communities who are often accused of being unable to manage their land and natural resources ‘well’ (from productivity, sustainability and biodiversity perspectives) to show that customary practices are capable of meeting high standards. This provides a foundation for rural development that is home-grown, self-determined and consistent with local customs and practices. In fact, agriculture at smaller scales has been shown to be more productive per given area than larger scale agriculture and has the benefit of meeting food security and rural development needs by producing both food and cash crops.<sup>10</sup> Mounting evidence also shows that secure community forest land and resource tenure help promote environmental objectives, including environmental services, and can have better results than the increasingly out-dated and conflict-prone protected area conservation model where community rights are excluded.<sup>11</sup>

### *Accountability to the State (‘upward accountability’)*

Upward accountability to the State can be accomplished by creating a clear system of judicial appeal leading from the lowest level of local community conflict resolution all the way to the highest court in the country. State courts have a particular role in ensuring that customary decision makers comply with core principles. For example, it is important to include accessible, pragmatic

<sup>10</sup> See for example, Report of the Special Rapporteur on the right to food, Oliver De Schutter, Mission to Cameroon, 18 December 2012, UN Doc. A/HRC/22/50/Add.2, at para 48. Available at [www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC2250\\_English.PDF](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC2250_English.PDF)

<sup>11</sup> See for example research by: Chhatre A. and Agrawal A. (2009) *Trade-offs and synergies between carbon storage and livelihood benefits from forest commons*, PNAS vol. 106 no. 42, pp.17667-17670. Available at [www.pnas.org/content/early/2009/10/05/0905308106.full.pdf](http://www.pnas.org/content/early/2009/10/05/0905308106.full.pdf); Nelson A. and Chomitz K.M. (2011) *Effectiveness of strict vs. multiple use protected areas in reducing tropical forest fires: A global analysis using matching methods*. Available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0022722> ; Porter-Bolland L. et al. (2011) *Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics*. *Forest Ecology and Management*. Available at [www.cifor.org/publications/pdf\\_files/articles/AGuariguata1101.pdf](http://www.cifor.org/publications/pdf_files/articles/AGuariguata1101.pdf)

and appropriate mechanisms to safeguard against discrimination against women, widows and minority groups both within communities and between communities.

In some countries, the court system itself is corrupt. Where this is the case, it may be worth establishing a special review panel with authority to review and adjudicate land tenure issues and decisions. Such a panel should comprise representatives of all key stakeholders, including civil society and customary communities as well as the State, to help ensure that decisions are balanced and fair.

The successful integration of customary and national land law systems requires customary authorities to become familiar with national laws, the national legal system and, in particular, the core principles with which land tenure laws are expected to comply. Government officials, in turn, need to become familiar with customary laws and systems. This is particularly true of State judges who may be called upon to review land tenure decisions that are based on customary laws and which originated in customary administration and adjudication systems. Therefore, for such integration of systems to be successful, customary authorities and government officials both need to be given training about each other's system, including their roles, responsibilities and processes. This should be a priority for implementing integrated land tenure systems.



A system for recording and sharing ‘**case law**’ would also assist the training of customary and State judges working across these systems. The key facts, outcomes and rationale of decided cases that rise to a certain level in appeal processes would be documented and made available to judges. To assure accountability, the rule of law, and justice, similar cases must be treated in a similar fashion, whether the same or a different decision maker is involved. Developing a case law system would help ensure equity and justice and also provide those monitoring the implementation and enforcement of land tenure laws with a tool to examine how the laws are being applied in practice.

#### **5.4.5 Ensure political will to implement and enforce community tenure by making sure that State officials have adequate incentives to do so**

It is of prime importance to devise ways to foster political will to successfully develop, implement and enforce community land tenure rights. When land laws devolve power and control over land *away* from the central State by recognising community-level land administration and management and *decreasing* the State’s control over land and resources, such laws are unlikely to have the support of State officials. Rather than implement and enforce the new laws as they are officially charged to do, they may undermine the laws’ successful implementation, as has happened in Tanzania and Mozambique. Whereas in Botswana, when land laws elevated power and control over customarily-held lands away from local leaders and into the hands of central officials, those officials are implementing the laws with zeal and commitment.<sup>12</sup>

One way to foster political will by State officials is to recognise their stakeholder interests by emphasising that they still have a role of importance and influence, and that they need to be financially rewarded for their interventions. This may be done by establishing *new* roles for State and public officials. These roles could include capacity building of local authorities and customary communities to understand how the reformed laws protect and secure their land claims. State and public officials can also play a ‘regulatory’ role in monitoring and enforcing core principles for the purposes of guaranteeing upward accountability, such as ensuring that the application of customary laws does not discriminate against women or minority ethnic groups. Systems could also be developed whereby financial rewards for State officials are linked to the successful completion of implementation steps, such as the demarcation and registration of community

<sup>12</sup> Knight R. (2010) *Statutory recognition of customary land rights in Africa An investigation into best practices for lawmaking and implementation*. FAO Legislative Study 105: 213-241. Available at <http://www.fao.org/docrep/013/i1945e/i1945e00.htm>

tenure, rather than financially rewarding officials for corrupt actions that interfere with communities' enjoyment of their tenure rights.

At the same time, legislation should include safeguards to hinder State officials' efforts to subvert the law's intent, including specification of penalties for State officials who contravene the law.

### ◀ *Tips*

- ✓ Devolve land and natural resource administration to communities and allow each community to define its rules and governance structures through fully participatory processes.
- ✓ Train statutory and customary institutions about each other's role and responsibilities, including areas of overlap where they may need to work together.
- ✓ Provide for and encourage the creation of community by-laws and land and natural resource management plans.
- ✓ Include accessible, pragmatic and appropriate mechanisms to safeguard against discrimination against women, widows and minority groups.
- ✓ Clearly define the steps government officials and customary authorities need to take to effectively implement and enforce community land tenure and establish penalties for State officials who contravene the law's mandates.
- ✓ Incentivise government officials to implement and enforce law reforms and protect community land tenure.
- ✓ Define the relationship between customary authorities and communities as a fiduciary duty and provide for the legal enforcement of this duty.
- ✓ Create a clear system of judicial appeal leading straight from the lowest level of local customary conflict resolution all the way to the highest court of the nation. Where the court system is deemed to be corrupt, a special appeal panel to review land tenure decisions, representative of key stakeholders, might be established and used instead.
- ✓ Develop case law – at all levels of the judicial system, from the lowest level of local customary conflict resolution all the way to the highest court of the nation – to foster and ensure consistent application of the laws.

## 5.5 Enable rights holders to claim, monitor, enforce and enjoy their land and resource rights

### Key questions

- How can the law ensure that communities and community members have meaningful access to information about actions of government or investors that might affect their land and resource rights?
- How can the law ensure that community members are able to participate in decisions taken by the government or customary authorities that affect their land and resource rights?
- Where a community or community member feels that their land and resource rights have been violated (whether by the government, by investors, or by another community or community member), how can the law ensure that they can bring a complaint through an accessible (in terms of both location and procedure) and legitimate complaint mechanism?
- How can the law ensure that complaints of land and resource rights violations are fully heard and promptly and fairly resolved?
- How can the law ensure that core principles (e.g. equal treatment for women, protection of marginalised communities) are upheld by those implementing and enforcing the law?

As outlined in [Part 5.4.4](#), it is essential that the institutions and individuals responsible for implementing and enforcing land tenure rights are **accountable** to the people whose rights are at stake. To ensure accountability, it is not enough to set out the steps which government officials and customary authorities must take. Rights holders must have ways of claiming their rights, monitoring the implementation and enforcement of their rights and holding responsible officials and authorities to account when they fail to properly implement and enforce land rights or core principles.

The main tools for communities to do so are:

- community and civil society access to information (**transparency**);
- community **participation** in decisions that impact on their land rights;
- **access to justice** – processes that communities can use to enforce their rights.

See [Part 2.1](#) for information on procedural rights.

For a law to be implemented, and implemented well, it should contain wording that creates opportunities or ‘hooks’ that can then be used to ensure proper implementation. Aspects of the law that provide these tools are collectively referred to as **‘procedural rights’** because they provide procedures through which rights holders can claim, monitor and enforce their rights.

Here we summarise some of the tools for participation in decision making and access to justice presented in previous sections of this Guide. We also outline factors to keep in mind when drafting laws to ensure access to information. We then scrutinise a hypothetical draft law to consider how it might be amended to define and secure procedural rights.

### 5.5.1 Participation in decisions that affect community land and resource rights

Processes that enable communities to participate in decisions affecting their land rights include FPIC (see [Part 3.2.4](#)), processes to demarcate community land rights (see [Part 5.2.3](#)), environmental impact assessments (ESIAs) (see [Part 5.3.4](#)) and community development and clarification of community by-laws for allocating land rights within the community (see [Part 5.4.3](#)).

### 5.5.2 Access to justice

[Part 5.4.3](#) emphasised that community members should be able to access a complaint dispute mechanism that is accessible in terms of language and location and that is otherwise familiar to them. Therefore, the first point of access for bringing and resolving complaints about violations of land rights should be provided at the local level and adapted from familiar customary dispute mechanisms, preferably based on existing customary dispute mechanisms where they exist and are fair and functional. It is important that these decisions can be appealed all the way up to the highest court in the country to ensure ‘upward accountability’ of customary authorities, particularly in relation to their compliance with core principles. For such integration of customary and State dispute resolution mechanisms to work, two-way training between customary authorities and State courts to familiarise each other with their respective norms and procedures is necessary (see [Part 5.4.4](#)).

‘Downward accountability’ from customary leaders to communities could be fostered if the responsibility of customary leaders towards communities were defined in national law as an enforceable fiduciary duty (see [Part 5.4.4](#)).

### 5.5.3 Access to Information

Legislation can ensure access to information relevant to community land and resource rights in two ways. If there is general access to information through ‘Freedom of Information’ law this should cover information held

by the government that is relevant to land and resource rights, and land and natural resource use planning. If adequate general laws don't exist, the right of communities to access relevant information could be secured within specific national laws on land and resource rights.

In either case, well-designed laws or provisions on access and use of information must establish (1) the types of information that must be made publicly available and (2) a '*right-to-know*' process by which information must be provided ('disclosed'), barring justifiable exceptions such as disclosures that would conflict with protected rights to privacy or national security. Such exceptions should always be interpreted very narrowly in favour of a presumption of disclosure. Where such legislation is in place, governments are legally bound to publish and disclose information accordingly.

The effectiveness of such legislation depends in part on the scope of the legislation in terms of the type of information and which bodies are bound to disclose information. For example, where access to information rules are provided within the land tenure laws, they should state that land rights holders should have access to information relating to the application for, granting of, or terms of any concessions awarded to investors under mining, forestry, agriculture, or any other sectoral laws by the agencies responsible for granting such concessions. In other words, the information made available should encompass everything relevant to land use and land use planning, not just land titles.

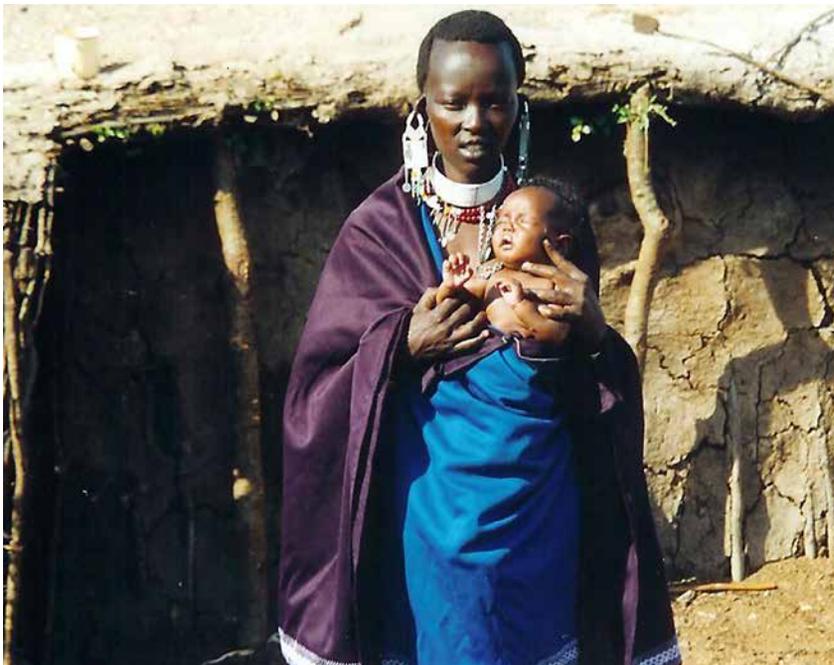
Clarity about the legal process for the disclosure of information is also essential. This might include procedures by which entities must routinely publish or otherwise make available certain information as a matter of course, as well as procedures by which an individual can request and obtain access to information that is not automatically disclosed to the general public. The individual requesting information should not need to prove that they have a specific and direct interest in the information requested. Rather the law should clarify the broad right of any individual (or organisation) to request any information held by the government (subject to narrow, very limited exceptions).

'Information' should be defined and interpreted broadly. It should include all records held by a public body, regardless of its storage form (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and its date of production.

### 5.5.4 Scrutinising laws and making them effective

Civil society and community based organisations wanting to fully engage in national law reforms will need to do so at the various stages of the reform process. For example, they will want to look at *existing* laws and analyse them for problems that they want the new law to address. Based on consultations with stakeholders (most crucially, with the communities themselves) they will want to develop *proposals for new laws* to address problems that they have identified in existing law and practice. They will also want to examine a *draft* new law, perhaps created by government, analyse it for defects and problems and then prepare comments for how those defects can be remedied in a new draft. The ability to scrutinise existing laws or new draft laws is therefore a key skill in ensuring that civil society can participate fully. It also allows them to open up discussions with communities and stakeholders, communicate effectively with them about existing laws and draft new laws and prepare concrete proposals for reform. An important aim of scrutinising a law is ensuring that it contains effective tools or hooks for the implementation of procedural rights. As outlined above, procedural rights are essential to ensure that the substantive rights to land and resources achieved on paper do not remain paper laws, but have a practical effect on communities' day-to-day lives.

The following worked example starts by giving an example ('Section X') from a draft new forest law. The same analysis could be done if this was instead a section from an existing forest law. The worked example below first asks what *problems* are evident from the law from the perspective of the procedural tools needed to make it effective and then asks what *solutions* might be suggested to improve it.



**Worked example** ►**Section X of a draft new Forest Law**

*'Communities with the right to use non-timber forest products may sell those products, however the ministry in charge of forests may prohibit the sale of products, where appropriate, and community members found selling such products, in breach of any such prohibition, will be subject to fines of \$100USD. The conditions under which communities can apply for such a prohibition to be lifted will be fixed by decree.'*

***What are the problems with this law? Think about this before looking at the list of problems below.***

- The ministry could prohibit the sale of the forest products:
  - without consulting the community;
  - without any maximum time limit;
  - without any compensation;
  - without telling the community that it had done so;
  - for any reason at all (perhaps the minister has a friend in the local town who has a business *growing* that product and does not want competition from villagers who are gathering the product in the forest – a corrupt abuse of power).
- The ministry could prohibit the sale of forest products without ever writing the decree, so that there are no mechanisms for lifting the prohibition.
- There's nothing the community can do if it disagrees with the prohibition.
- There's nothing the community can do if the government fails to enact the decree.

***What procedural tools or 'hooks' could be put in the law to correct these problems? Think about this before looking at the mechanisms below.***

The law could provide for a notification and consultation process with procedural safeguards, as set out below:

***Section X, Subsection (1)***

- An obligation on the ministry to notify the community of its intentions.
- Notice to be given 6 months before the prohibition takes effect.
- Notice to be in a language and form understood by all members of the community.
- Notice to include details of fair compensation to be granted to the community, according to a predetermined criteria fixed by the law.

- Notice must include justification(s) for the quota and compensation, on the basis of pre-determined criteria fixed by the law (limits the justification available to the ministry only to legitimate grounds contained in the criteria).

***Section X, Subsection (2)***

- The community should have a reasonable time to consider the notice and to submit representations expressing their agreement or disagreement.
- The ministry should be obliged to take into account the representations of the community.
- If the community disagrees but the ministry chooses to proceed with the proposals, the ministry must provide a further notice, with its reasons for disregarding the community's representations.
- The community must be given a right of appeal according to a grievance procedure, to an independent third party adjudicator free of charge.
- If this right of appeal is exercised, implementation of the prohibition is delayed until the independent third party adjudicator has made their decision, which is binding on the community and the ministry.

***Section X, Subsection (3)***

- If the ministry fails to comply with subsections (1) and (2), any decision made by the ministry under this section X is null and void.
- Any prohibition will be limited to a maximum period of 5 years, after which the prohibition will automatically expire.
- To continue the prohibition for a further 5 years, the ministry must repeat the process set out in subsections (1) and (2) before the 5-year time limit has expired.

***Section X, Subsection (4)***

- The decree under which communities can apply to lift the prohibition will be enacted within 6 months of the coming into force of this law, on the basis of meaningful participation and consultation all stakeholders, including communities and civil society groups.
- If the decree is not enacted within 6 months, the powers granted by Section X will be suspended until the decree is so enacted.

# 6

## Opportunities for legal change and how to use them

Land and resource tenure reforms are often associated with post-conflict eras when political change has brought about a change in government. Systematic review and reform of land and resource tenure can be a very important part of re-ordering and stabilisation, creating community and national governance systems to foster and ensure a new peace. This has been the case, for example, in Mozambique and Liberia.

Even without such great upheaval, the need for land and resource tenure reform to clarify and secure customary land and resource tenure in the context of a legal pluralism is important in many African countries. Such reform may be brought about by other events or reform agendas (e.g. peasant movements) or simply by the need to update laws that are too old and no longer fit for purpose (e.g. laws that are a hangover from colonial rule). International processes including the European Union's Forest Law Enforcement, Governance and Trade (FLEGT) action plan and Voluntary Partnership Agreements (VPAs), the UN's programme for Reducing Emissions from Deforestation and Forest Degradation (REDD+), voluntary certification schemes such as the Roundtable on Sustainable Palm Oil (RSPO) and the recently approved Food and Agriculture Organisation's Voluntary Guidelines on responsible governance of tenure of land, fisheries and forests can potentially be used to further land reform – both by providing opportunities for reform, as well as inspiration for the content of new laws and procedures. We look below at the VPA process as a key mechanism for securing tenure reform in countries where it is being implemented.

### 6.1 Opportunities presented by VPAs

**Voluntary Partnership Agreements (VPAs)** are legally binding, bilateral trade agreements which set out the commitments and action that the European Union (EU) and timber exporting countries will take to tackle illegal logging and related trade of timber products. Since the EU adopted its **FLEGT** Action Plan in 2003, VPA negotiations have been concluded in six timber producing countries (in chronological order): Ghana, the Republic of Congo, Cameroon, the Central African Republic, Indonesia and Liberia. Six more VPAs are currently being negotiated, including Gabon and the Democratic Republic of Congo.

While the specific focus of VPAs is on **legality** of timber, VPAs are not limited by a narrow technical focus on legality. In endorsing VPAs as the central plank of the EU's FLEGT Action Plan, the EU seeks to bring about reforms to forest governance that reduce illegal logging. In particular, the EU Council Conclusions on FLEGT<sup>13</sup> note that VPAs should:

- **strengthen land tenure and access rights**, especially for marginalised, rural communities and indigenous peoples;
- **strengthen effective participation** of all stakeholders, notably of non-State actors and indigenous peoples, in policymaking and implementation;
- **increase transparency** in association with forest exploitation and operations, including through the introduction of independent monitoring;
- **reduce corruption** in association with the award of forest sector concessions and the harvesting of, and trade in, timber.

These governance reforms are understood as essential to achieve the FLEGT Action Plan's specific aim of reducing illegal logging. At the same time, accomplishing these objectives can yield wider benefits for community land tenure.

Significantly, **VPAs are required to have the engagement and buy-in of national stakeholders**, including NGOs, local communities, indigenous peoples and the timber industry.

VPA processes include four main elements:

- **defining legality**, or deciding which laws will be enforced for the purpose of the agreement;
- developing a **Legality Assurance System (LAS)** (including timber tracking, government legality controls and systems to verify the legality of timber). Timber products that comply with the LAS are granted a VPA license which provides assurance to the EU market that the timber was legally harvested.
- undertaking **law reforms** responsive to the weakness and injustices in the laws identified and agreed by stakeholders to ensure the integrity and legitimacy of the LAS;
- **independent audits** of the whole system, to ensure credibility of the VPA licenses.

<sup>13</sup> Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2003:268:0001:0002:EN:PDF>

For more information about the EU's FLEGT Action Plan, VPAs, and civil society engagement in VPA processes, see [www.loggingoff.info](http://www.loggingoff.info) and other resources listed in Annex 2.

- ◀ This Guide focuses on the law reform element. In this section, we discuss not only how VPAs can directly compel law reforms to clarify and secure community land tenure, but also how successful engagement in VPA multi-stakeholder processes and general improvement in governance, such as increased transparency and accountability, can contribute to good land tenure reforms.

### 6.1.1 VPAs and tenure reform

Each VPA must agree a legality definition through a multi-stakeholder process including NGOs, local communities and indigenous peoples as well as the government and the timber industry. 'Legality' is based on the laws and procedures of the timber producing country in question and must include laws addressing social, environmental and economic issues. There are several ways in which VPAs draw in community land tenure rights and land tenure reform issues:

- Issues raised in negotiations can provide an **explicit mandate in the VPA text for land tenure reforms**. This becomes part of the broader implementation of the VPA agreement and subject to accountability to VPA stakeholders including the EU. It is also an opportunity for promoting the legal reforms necessary to implement a country's international human rights' law commitments. The Ghana VPA included a review of relevant laws, which provided an opportunity to address the fact that communities lacked secure 'tree tenure' as they owned forest land but not the naturally occurring trees growing on the land. For forest communities and civil society, this was central to achieving equitable ownership rights. Tree tenure security was also central to implementing international human rights law in Ghana, to ensure that communities could have secure tenure rights to both their customary lands *and* the forest resources on which they rely.
- Specific elements of the LAS and related legislation can be crafted in a manner to **enable civil society monitoring of forest land use**. The information gained through such an exercise can, in turn, be used by communities to develop persuasive arguments that land and resource tenure reform is a national priority, and otherwise lay the groundwork for such reforms – including through the integration of international human rights law into national laws. For example, Liberia's VPA allows for civil society monitoring of the impact of the agreement in general, and on forest-dependent communities in particular (see case study below).

- Most VPAs take considerable steps towards **advancing transparency**. Experience gained **through efforts to improve transparency and monitor** law enforcement in the forest sector through VPA processes can be leveraged towards improving transparency regarding land use more generally. The importance of improved transparency for monitoring land use and securing community tenure cannot be overstated. For example: all six signed VPAs include independent monitoring of the agreement and five out of six, Ghana being the exception, allow for the possibility of civil society monitoring.<sup>14</sup>



<sup>14</sup> Brack, D. and Léger C. (2013) *Exploring credibility gaps in Voluntary Partnership Agreements: A review of independent monitoring initiatives and lessons to learn*. Available at <http://www.fern.org/credibility>

## Case study ► Civil society monitoring in Liberia's VPA

*Voluntary Partnership Agreement between the European Union and Republic of Liberia on forest law enforcement, governance and trade in timber products to the European Union<sup>15</sup>*

### *Article 16*

#### *Stakeholder involvement in implementation of this Agreement*

1. Pursuant to the National Forestry Reform Law of Liberia related to participatory management of forest resources, Liberia shall ensure that the implementation and monitoring of this Agreement are done in consultation with relevant stakeholders, including industry, civil society, local communities and other people dependent on forests. Stakeholders shall participate via existing forest governance structures and by membership of a national body to be established pursuant to paragraph 2 of this Article.
2. Liberia shall establish a national committee to monitor implementation of this Agreement, made up of representatives of relevant Government agencies and other relevant stake holders.
3. The Union shall hold regular consultations with stake holders on implementation of this Agreement, taking into account its obligations under the 1998 Aarhus Convention on access to information, public participation in decision- making and access to justice in environmental matters.

### *VPA Annex V*

#### 6. Sources of Information

##### 6.2 Civil society and communities

- a. Local, national, regional and international civil society organisations involved in monitoring forestry activities in Liberia.
- b. Communities and individuals involved in monitoring forestry activities.
- c. Community Forestry Management Bodies and Community Forestry Development Committees involved in various aspects of the commercial forestry sector.

<sup>15</sup> Available at <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8985>

More generally, the VPAs' focus on legality necessarily raises questions of forest land and resource use and control. Where tenure is in dispute, claims of legality cannot be secure. Therefore, although most VPAs do not include an explicit mandate to undertake systematic land tenure reform, land tenure insecurity will continue to undermine the credibility of LAs and VPAs, thus increasing pressure for land tenure reform.

The tendency in many VPA negotiation and implementation processes has been to focus on national law to develop and implement the legality definition and LAS. This is not surprising, since a preference for national law is consistent with the trade context of VPAs and national law is a more familiar framework for VPA stakeholders such as EU negotiators, industry stakeholders and the governments of timber-producing countries. But basing the legality definition and LAS on national laws alone, while ignoring customary laws and international human rights and environmental laws, fails the VPA requirement to reflect all existing relevant laws. Moreover, failure to factor in the reality of customary law systems and the valid customary claims of communities will not provide the certainty as to legality, which is the purpose of the LAS. Legal logging must be based on the right of a land rights holder to authorise logging on the land. So long as land rights remain in dispute, i.e. so long as customary, national and international laws are not well integrated, the VPA will not be sound, even if an operative LAS is put in place. The claims of land rights underlying the LAS must be legitimate for VPA licenses to have integrity.

VPAs should also incorporate the relevant requirements of the international and regional human rights and environmental agreements ratified by the country; not doing so would be a missed opportunity and would further undermine the assurance of legality.

Given that the EU, government negotiators from timber-producing countries and industry stakeholders are more familiar with – and therefore will tend to prefer – national legal systems, communities and local NGOs will need to be proactive to ensure that relevant elements of international and regional law and customary law are integrated in the legality definition, the LAS and in national legal reforms.

### *Case study* ► **Understanding opportunities presented by VPA processes in the Republic of Congo**

The Republic of Congo signed a VPA with the EU in May 2010, after less than one year of negotiations. This VPA came into force in March 2013, is being implemented and will become effective once the LAS is fully operational. For civil society and local communities to take advantage of opportunities arising through VPA implementation processes they must first understand what the VPA is, what their country's VPA says, what it requires and the processes for its implementation. To assist civil society and community stakeholders, NGOs have developed a booklet explaining the Congolese VPA which includes fact sheets on the following topics:

- general rules on the implementation of the VPA
- key players in the VPA
- the legality assurance system (LAS)
- legality matrices contained in the VPA
- the national wood tracking system
- FLEGT licensing scheme
- transparency measures
- additional measures provided in the agreement
- the timeline for implementation

The booklet is available at <http://loggingoff.info> and at <http://www.clientearth.org/climate-and-forests/climate-forests-publications/>

Land and resource tenure reform is a central objective of many NGOs and community stakeholders engaged in law reform. As explained above, VPA processes can be used in several ways to advance a law reform agenda but advocates should guard against being so focussed on land tenure reform that they do not also engage in the many smaller issues that form the nuts and bolts of VPAs. Successful development and implementation of these smaller issues can also bring about improvements for communities. Moreover, constructive engagement and collaboration between local NGOs and local communities on these issues can help to lay the groundwork for successful collaboration and engagement on larger, more controversial and more challenging issues such as land tenure reform.

### Stakeholder participation in policy development through VPA processes in Liberia

Liberia's forestry regulation 101-07 provides that meaningful public participation in decisions related to forests is essential to the long-term success of forestry reforms and that clear procedures are necessary to guarantee a high level of fully informed public participation. On this premise, the same regulation establishes that local Community Forest Development Committees (CFDC) created at the local level by regulation 105-07 have to be notified to participate in forest-related policy and decision making processes. These provisions allowed communities to play a key role in the negotiation of the VPA right from the start, supported by local NGOs.

This resulted in communities and local NGOs having seven and four representatives respectively. The VPA process then created space for local NGOs and communities to influence the process through the creation of Working Groups. NGO and community representatives were part of all these Working Groups and even chaired two of these, the Domestic Market Regulation working group and the Legal Standards working group. They were also represented on the Policy Sub Committee, which gave them further opportunity to ensure that decisions taken at the working group level did not change at the policy level.

### ◀ Case study

- ▶ This is a major step towards the full implementation of the provisions of Article 7 of the Liberian Constitution, which mandates the maximum feasible participation of the public in natural resource management. For further discussion see <http://www.foresttransparency.info/liberia/2010/themes/4/20>

- ✓ Vigilantly identify and follow up opportunities to raise and address land and resource tenure reform at every stage of the VPA processes – especially by reference to the legal duty on States to integrate customary, international and regional human rights laws into their national legal frameworks. Such opportunities can easily be overlooked as other policy, law and setting up operative LAS systems get greater attention.
- ✓ At the same time, do not focus exclusively on the need for land tenure reform such that you cannot engage constructively with the various specific issues and processes happening under the VPA. Being a credible, reliable and constructive partner on small, piece-meal issues can create a foundation for constructive engagement with other stakeholders on wider issues such as land reform.
- ✓ Use the VPA processes, and the resources available through them, to build relationships, skills, organisational competencies, confidence and trust and to learn lessons that can be applied to broader land tenure reform efforts.
- ✓ Use improvements in transparency and accountability gained through the VPA context to develop your case for land and resource tenure reform.

### ◀ Tips



# **Glossary & Annexes**



# Glossary

**access to justice:** Access to justice refers to ways that you can get your rights enforced when steps necessary to implement your rights have not been taken or your rights are otherwise violated. Access to justice includes appeals procedures, conflict resolution mechanisms and other ways to ensure accountability.

**accessibility:** Accessibility of laws and **legal institutions** refers to whether the institutions responsible for **implementing** and **enforcing** laws are accessible to those affected by the laws. Accessibility of location, language, cost and familiarity are all factors that should be considered when assessing accessibility.

**accountability:** Accountability means that those responsible for implementing and enforcing the laws act in accordance with the rule of law and in the interests of those whose rights are at stake. To ensure accountability, the laws should set out **procedural rights** that enable rights holders to monitor the **implementation** and **enforcement** of their rights and **appeal** against decisions and actions that they believe violate the security or enjoyment of their rights.

**appeal procedures:** Where land claims are rejected by **legal institutions**, the law should provide clearly defined and accessible appeal procedures. There should also be a possibility to appeal when you are unable to enjoy your land rights because an institution responsible for taking steps to **implement** or **enforce** the laws has failed to take the actions necessary to enable you to use or secure your land rights.

**cadastre:** The cadastre (or **land register**) is a public record that others can check to find out who has tenure rights or claims to a parcel of land.

**concession:** Where a party grants temporary rights to its land to another party (often in the form of a lease) this is called a concession. A concession to land typically allows the party holding the concession to exploit specified natural resources on the land. For example, a logging concession grants the concession holder the right to log timber from the land, in accordance with any limitations specified in the concession. A mining concession would likewise grant the holder rights to exploit specified mineral resources.

**conflict resolution mechanisms:** Where different parties claim conflicting rights over the same land, conflict resolution mechanisms will be required. Like appeal procedures, decisions should be appealable through the court system or, alternatively, to a special review panel representative of all key stakeholders.

**consultation:** Where community consultation or consent is required by law, consultation processes need to be clearly defined and implemented. These should, in general, be designed to comply with the principles for consultation and consent defined by FPIC.

**customary law:** A customary **legal system** is one where rules are developed and enforced by a traditional, sub-State community that governs the actions of community members and third parties/(‘strangers’). Customary law may or may not be recognised by **national (statutory) law**, depending on the country. However, it is not accurate to regard customary rules as ‘informal’ (as opposed to formal statutory law), because customary rules have deep cultural resonance, are sanctioned by the community governed by them and have their own administrative institutions and authorities. Each customary system depends on its history and setting and continues to evolve in response to the changing context in which the customary community lives.

**delimitation of land:** Delimitation (also referred to as **demarcation**) is the process of describing community lands, typically through drawings or maps, boundary drawing and descriptions of key landmarks and other customary means of identification.

**eminent domain:** Eminent domain is the power of the State to seize private property for public purposes, even without the owner’s consent, which is subject to procedural safeguards to avoid abuse of this power that may lead to unlawful eviction or dispossession.

**enforcement of law:** Where someone violates someone else’s rights, the law should authorise a competent authority to interpret the law, to clarify the rights at stake and take action to protect rights that have been violated. Law enforcement is most often thought of as police enforcing the law against criminals. But law enforcement can also refer to decisions taken by a court or other enforcement body, such as traditional institutions like village councils, to require the government or other authority to clarify and protect **substantive rights** and to provide remedies that enable rights holders to enjoy the benefits of their rights. Enforcement of land tenure means that, where a community or individual rights holder feels that the government or anyone else interferes with the ownership, use and enjoyment of their land, the rights holder can file a complaint through a well-defined and accessible complaints mechanism and the complaint will be fairly dealt with by a law enforcement authority.

**environmental and social impact assessment (ESIA):** Environmental and social impact assessment requires the review and assessment of any environmental and social impacts that a proposed concession, development project, or other change in status or use might have on the land, the ecosystems it supports and the communities dependent on the land. Where significant adverse impacts are likely, ESIA requires the development and implementation of plans to avoid, reduce, or offset adverse impacts. ESIA should be done in a consultative process and be completed (including any complaints or appeals) prior to going forward with the project or other change in status or use.

**fiduciary duty:** A fiduciary duty is an obligation to manage the property according to the highest standard of care and the principle of good faith. Trustees are expected to be extremely loyal to the beneficiaries to whom they owe a fiduciary duty; they must not put their personal interests before the interests of the beneficiaries and may not profit from their position as trustee unless the beneficiaries consent.

**FLEGT:** FLEGT stands for Forest Law Enforcement, Governance and Trade and refers to the FLEGT Action Plan adopted by the European Union (EU) in 2003, through which the EU seeks to promote the reform of forest sector governance to reduce illegal logging.

**FPIC:** Free, prior and informed consent (FPIC) provides that a community may give or withhold consent to any proposed project that may have an impact on the land and natural resources it possesses, occupies, or otherwise uses. FPIC is a right of communities with which governments and project proponents are required to comply.

**grievance procedure:** A grievance procedure is a clear step-by-step process that a person can follow if they have a complaint, for example if they believe a decision, action or omission is wrong or has otherwise harmed their interests. Sometimes also called a 'complaints procedure', such a process should allow a person to submit a complaint and have that complaint considered, preferably by an impartial adjudicator such as a complaints panel, and preferably by someone independent of the original decision/problem being complained about. If the complaint is upheld, there should be a mechanism for ensuring that the person who made the complaint receives a remedy of some kind to resolve the complaint. This could be an apology, the return and rehabilitation of property that has been damaged or lost, compensation and so on.

**human rights law:** Human rights law has expanded and developed exponentially since its origins with the Universal Declaration of Human Rights in 1948 to become a significant universal legal system. Numerous covenants, treaties and declarations have followed. These range from political, economic and cultural rights to rights for children and women, and rights against discrimination.

**implementation of law:** Government officials or other authorities (including **traditional authorities**) must take steps to implement the law – that is, to make the law work in practice. In the context of land tenure laws, this may include putting in place procedures through which communities can demarcate and register their land rights, have access to information about concession decisions or anything else that might affect their land rights and be consulted about decisions affecting their land. While it is important to note that the *existence* of a right is not dependent on its implementation by government/traditional authority, rights holders may not be able to fully enjoy their right if implementation steps are not carried out.

**implementing measures:** Often, more detailed rules are needed to implement the law in practice than can be set out in detail within the main statutes. These are sometimes referred to as '**secondary law**' or '**implementing decrees**'. These must always be consistent with the statutes ('primary law') and aim to implement the intention of the statutes.

**international law:** Most international law is agreed through the United Nations. International law defines universal norms and principles regarding how societies should be governed and how States should relate to each other, as well as rules and procedures for implementing and upholding these principles. Specialised areas of international law include human rights, economic and environmental law, all of which include principles that are fundamental to how nation States manage their lands and resources. International laws or agreements (whether they are called treaties, charters, conventions, protocols or covenants) are legally binding on the signatory countries. This means that, by ratifying these agreements, a country commits to implement the rights set out in the agreement within its own national laws and to abide by the international rules and procedures agreed. Thus, the implementation and enforcement of these agreements, depends largely upon the continued political will and capacity of countries to implement and enforce the principles set out in international agreements.

**land grabs:** Land grabs are transfers of land which are one or more of the following: (1) in violation of human rights; (2) not based on free, prior and informed consent of the affected land-users; (3) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (4) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and (5) not based on effective democratic planning, independent oversight and meaningful participation.

**land tenure:** Land tenure rights define who can own, use and manage which land areas and resources, for how long and under what conditions. Land tenure rights can include **use rights** as well as **ownership rights**. A number of individuals or groups can hold different overlapping tenure rights to the same land. Land tenure systems may be based on written policies and laws, unwritten customs and practices or a mixture of both.

**land tenure security:** Land tenure security guarantees the existence of your land rights, provides certainty that others will recognise your rights and ensures protection through legal remedies when your rights are challenged or abused. Tenure security provides landowners and users with confidence that they will not be arbitrarily deprived of their rights over particular lands and resources.

**land register:** see **cadastre**.

**legal framework:** A legal framework is a set of laws governing a particular area of concern, for example land tenure, forests, water rights and use, business transactions, etc.

**legal institutions:** All legal systems need institutions to be responsible for implementing and enforcing the laws. In a national (statutory) law system, this will typically include government departments such as the Forestry Commission, government services such as the Land Registry and courts responsible for interpreting the laws and resolving legal disputes. Customary legal systems will typically vest authority in institutions such as tribal leaders, customary tribunals and elder councils to implement and enforce customary laws.

**legal pluralism:** Legal pluralism is where multiple legal systems and sources of law exist in reality and can be valid in the same place, over the same community, at the same time – for example, **national (statutory law)**, **customary law** and **international law**. An inclusive approach to law reform seeks to integrate existing systems of law – that is, draw on the strengths of each and find a way for them to work together – in order to achieve legal clarity.

**legal system:** A legal system is comprised of the norms, principles, rules, institutions and procedures used to define rights and govern behaviour in a society. Examples of legal systems include **national (statutory) law**, **customary law systems** and **international law systems**. There can be different legal systems operating in the same place, over the same people and things, at the same time - this is called **legal pluralism**.

**procedural rights:** Procedural rights enable you to claim, use and obtain the benefit of your land rights or other **substantive rights**. For example: the right to obtain information about decisions of the government or others that might affect your land or your land rights; the right to participate in a process to determine the land that is yours; the right to be consulted and to give or withhold your consent before government or another authority takes action that will impact your land or your land rights; the right to complain when someone is interfering with your right to your land and to have that complaint heard and resolved through a fair and just procedure; the right to receive a remedy when your rights are being or have been violated.

**reasoned decision making:** The requirement that an individual responsible for making judgments applying the law in specific cases must clearly state the reasons for his or her decision, is referred to as a requirement for ‘reasoned decision making’. Where a requirement for reasoned decision-making is clearly set out in the law, it is much easier for those who feel that the laws are not being correctly applied to bring effective complaints through appeal procedures or other grievance mechanisms.

**regional law:** Regional law is a kind of **international law** that is agreed through a regional organisation, such as the African Union or the Organisation of American States and applies only within the region.

**registration of land rights:** Registration is a procedure describing a parcel of land and identifying its owner and form of ownership held, and other tenure rights (for example, user rights, rights of access, concessions) pertaining to the same parcel.

**statutory law** (largely referred to as ‘national law’ in this Guide): Statutory law is the law of the State. It is written law found in the constitution, legislation, codes, regulations, edicts, decrees and the judgments of courts. Statutory law emerged with the formation of sovereign States. The movement towards statutory law emerged over generations across Europe and evolved out of European customary laws.

**substantive rights:** Substantive rights are the legal right to do or have something – whether political, economic, social, or cultural rights. For example: the right to own or use a particular parcel of land; the right to access a parcel or land; the right to exclude someone from your land; the freedom not to be discriminated against.

**title:** A land title is a certificate of ownership or tenure issued on the basis of details in the land register describing the parcel and the owner or other tenure rights held by the title holder. It is a document that a tenure holder can hold in possession and use as a form of proof of their land rights. Note that, under many customary law systems, such documents or other written proofs of tenure have not been required or customarily relied upon. Therefore, the absence of a deed or other documentary proof of a customary claim to land does not necessarily mean that the claim is not valid.

**traditional authorities:** Traditional authorities are individuals or groups of individuals empowered to make decisions and/or implement rules and procedures under customary law systems, for example, chiefs or village councils. See also **legal institutions**.

**transparency:** Transparency is an important precondition for accountability. Transparent institutions and procedures are ones in which the processes as well as the reasons for decisions and actions to implement and enforce land rights are open and available to the general public and especially to those whose rights are affected.

**sustainable management of natural resources:** Sustainable management of natural resources (such as water, forest, soil and biodiversity) means that the resources are managed in a manner that will ensure that these resources will still be available, sufficient and in good condition for future generations.

**VPAs:** Voluntary Partnership Agreements (VPAs) are legally binding, bilateral trade agreements which set out the commitments and action that the European Union and timber exporting countries will take to tackle illegal logging and related trade of timber products.

# Annex 1: International and regional human rights law

**Table 1: African nations and the major international and regional laws to which they are a party, as relevant to community land and resource rights**

- ratification
- signature not yet followed by ratification

It should be noted that although signature is an important indication of a State's support for the rights set out in the instrument, it is not a legally binding commitment of the State until ratification.

	UN Convention on the Elimination of all Forms of Racial Discrimination, 1965	UN Covenant on Civil and Political Rights, 1966	UN Covenant on Economic, Social and Cultural Rights, 1966	UN Convention on the Elimination of All Forms of Discrimination against Women, 1979	African Charter on Human and Peoples' Rights (ACHPR), 1981	UN Convention on the Rights of the Child, 1989	ILO 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989	African Charter on the Rights and Welfare of the Child, 1990	UN Convention on Biological Diversity, 1992	Protocol to ACHPR on the Rights of Women in Africa, 2003
Algeria	●	●	●	●	●	●		●	●	
Angola		●	●	●	●	●		●	●	●
Benin	●	●	●	●	●	●		●	●	●
Botswana	●	●		●	●	●		●	●	
Burkina Faso	●	●	●	●	●	●		●	●	●
Burundi	●	●	●	●	●	●		●	●	
Cameroon	●	●	●	●	●	●		●	●	
Cape Verde	●	●	●	●	●	●		●	●	●
Central African Republic	●	●	●	●	●	●	●	○	●	
Chad	●	●	●	●	●	●		●	●	
Comoros	●	○	○	●	●	●		●	●	●

	UN Convention on the Elimination of all Forms of Racial Discrimination, 1965	UN Covenant on Civil and Political Rights, 1966	UN Covenant on Economic, Social and Cultural Rights, 1966	UN Convention on the Elimination of All Forms of Discrimination against Women, 1979	African Charter on Human and Peoples' Rights (ACHPR), 1981	UN Convention on the Rights of the Child, 1989	ILO 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989	African Charter on the Rights and Welfare of the Child, 1990	UN Convention on Biological Diversity, 1992	Protocol to ACHPR on the Rights of Women in Africa, 2003
Congo	●	●	●	●	●	●		●	●	
Côte d'Ivoire	●	●	●	●	●	●		●	●	
Democratic Republic of the Congo	●	●	●	●	●	●		○	●	●
Djibouti	●	●	●	●	●	●		○	●	●
Egypt	●	●	●	●	●	●		●	●	
Equatorial Guinea	●	●	●	●	●	●		●	●	
Eritrea	●	●	●	●	●	●		●	●	
Ethiopia	●	●	●	●	●	●		●	●	
Gabon	●	●	●	●	●	●		●	●	
Gambia	●	●	●	●	●	●		●	●	●
Ghana	●	●	●	●	●	●		●	●	●
Guinea	●	●	●	●	●	●		●	●	
Guinea Bissau	●	●	●	●	●	●		●	●	●
Kenya	●	●	●	●	●	●		●	●	●
Lesotho	●	●	●	●	●	●		●	●	●
Liberia	●	●	●	●	●	●		●	●	●
Libya	●	●	●	●	●	●		●	●	●
Madagascar	●	●	●	●	●	●		●	●	
Malawi	●	●	●	●	●	●		●	●	●
Mali	●	●	●	●	●	●		●	●	●
Mauritania	●	●	●	●	●	●		●	●	●
Mauritius	●	●	●	●	●	●		●	●	
Morocco	●	●	●	●	●	●			●	
Mozambique	●	●		●	●	●		●	●	●
Namibia	●	●	●	●	●	●		●	●	●
Niger	●	●	●	●	●	●		●	●	

	UN Convention on the Elimination of all Forms of Racial Discrimination, 1965	UN Covenant on Civil and Political Rights, 1966	UN Covenant on Economic, Social and Cultural Rights, 1966	UN Convention on the Elimination of All Forms of Discrimination against Women, 1979	African Charter on Human and Peoples' Rights (ACHPR), 1981	UN Convention on the Rights of the Child, 1989	ILO 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989	African Charter on the Rights and Welfare of the Child, 1990	UN Convention on Biological Diversity, 1992	Protocol to ACHPR on the Rights of Women in Africa, 2003
Nigeria	●	●	●	●	●	●		●	●	●
Rwanda	●	●	●	●	●	●		●	●	●
Sahrawi Arab Democratic Republic					●			○		
São Tomé and Príncipe	○	○	○	●	●	●		○	●	
Senegal	●	●	●	●	●	●		●	●	●
Seychelles	●	●	●	●	●	●		●	●	●
Sierra Leone	●	●	●	●	●	●		●	●	
Somalia	●	●	●		●	○		○	●	
South Africa	●	●	○	●	●	●		●	●	●
Sudan	●	●	●		●	●		●	●	
South Sudan*										
Swaziland	●	●	●	●	●	●		○	●	
Tanzania	●	●	●	●	●	●		●	●	●
Togo	●	●	●	●	●	●		●	●	●
Tunisia	●	●	●	●	●	●		○	●	
Uganda	●	●	●	●	●	●		●	●	●
Zambia	●	●	●	●	●	●		●	●	●
Zimbabwe	●	●	●	●	●	●		●	●	●

\*South Sudan (formerly Southern Sudan) is both a United Nations and African Union member state, but on the information available it appears that it has not yet taken all the steps necessary to succeed or otherwise become a party to the above treaty instruments.

## Table 2: International & regional law resources including case law

The treaty articles listed below are a sample of articles considered by the authors as particularly relevant to the issue of community rights to land and resources, but are not an exhaustive list. Please note that some of the titles given to the various articles below have been written by the authors of this Guide to help the reader identify articles that are most relevant to them. For the original text (and original titles, where they exist) please follow the links provided so that these articles can be read in the context of the whole treaty. Likewise, the case law included below is not exhaustive, but is merely intended to include a sample of some of the key cases relevant to the issues discussed in this Guide.

### International law

#### Article 2 (concerning measures necessary to combat discrimination, including legislation)

(1.) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

- (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
- (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
- (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
- (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

(2.) States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

#### Article 5 (concerning state undertakings to prohibit and eliminate racial discrimination, including in the exercise of civil rights such as the right to own property alone as well as in association with others, as well as in the exercise of economic, social and cultural rights, such as the right to housing)

In compliance with the fundamental obligations laid down in article 2 of this Convention,

#### ◀ International Convention on the Elimination of All Forms of Racial Discrimination (1965)

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
  - (i) The right to freedom of movement and residence within the border of the State;
  - (ii) The right to leave any country, including one's own, and to return to one's country;
  - (iii) The right to nationality;
  - (iv) The right to marriage and choice of spouse;
  - (v) The right to own property alone as well as in association with others;
  - (vi) The right to inherit;
  - (vii) The right to freedom of thought, conscience and religion;
  - (viii) The right to freedom of opinion and expression;
  - (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
  - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
  - (ii) The right to form and join trade unions;
  - (iii) The right to housing;
  - (iv) The right to public health, medical care, social security and social services;
  - (v) The right to education and training;
  - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/73984290d-fea022b-802565160056fe1c?OpenDocument>

#### ◀ **General Recommendation 23 – Rights of Indigenous Peoples**

5. The Committee especially calls upon States parties to recognize the rights of indigenous peoples to their lands and resources, and to return the land they have been deprived of without their consent or, if this is not possible, to provide them with adequate compensation.

#### **International Covenant on Civil and Political Rights (1966)**

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

#### ▶ **Article 1 (concerning the right of peoples to self-determination)**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the

administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

**Article 27 (concerning the right to culture)**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

**Article 1 (concerning the right to self-determination)**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

◀ **International Covenant on Economic, Social and Cultural Rights (1966)**

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

**Article 11 (concerning the rights to an adequate standard of living, to food and to adequate housing)**

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
  - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

**Article 12 (concerning the right to health)**

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

**Article 15(1)(a) (concerning the right to participate in cultural life)**

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

**Convention on the Elimination of all forms of Discrimination Against Women (1979)**

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

► **Article 7 (concerning taking all appropriate measures to eliminate discrimination against women in public life, including ensuring their right to participate in the formulation of policy)**

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

**Article 14 (concerning non-discrimination of rural women, including ensuring their right to participate in development planning, equal treatment in land and agrarian reform, and their right to adequate living conditions including in relation to housing)**

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
- (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

**Convention on the Rights of the Child (1989)**

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

► **Article 30 (concerning the right of children to culture)**

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

### General Comment 11 – Indigenous Children and their rights under the Convention

35. The Committee reiterates its understanding of development of the child as set out in its general comment No. 5, as a “holistic concept embracing the child’s physical, mental, spiritual, moral, psychological and social development”. The Preamble of the Convention stresses the importance of the traditions and cultural values of each person, particularly with reference to the protection and harmonious development of the child. In the case of indigenous children whose communities retain a traditional lifestyle, the use of traditional land is of significant importance to their development and enjoyment of culture. States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children’s right to life, survival and development to the maximum extent possible.

► <http://www2.ohchr.org/english/bodies/crc/docs/CRC.GC.C.11.pdf>

### Article 8 (j) (protecting the knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles as relevant for the conservation and sustainable use of biodiversity)

◀ **Convention on Biological Diversity (1992)**

<http://www.cbd.int>

Each Contracting Party shall, as far as possible and as appropriate:

(j) 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) (urging States to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use of these resources)

Each Contracting Party shall, as far as possible and as appropriate:

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

### Article 8 (protecting indigenous peoples against forced assimilation or effective dispossession of their lands)

◀ **The United Nations Declaration on the Rights of Indigenous Peoples (2007)**

[http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf)

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

### Article 10 (requiring that indigenous peoples not be forcibly removed from their lands without their free, prior, and informed consent (FPIC))

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous

peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

**Article 25 (recognizing the ‘distinctive spiritual relationship’ of indigenous peoples to their lands)**

Indigenous peoples have the right 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.

**Article 26 (protecting the territories indigenous peoples have traditionally owned, occupied, or otherwise used or acquired)**

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.

**Article 28 (providing for the right to redress or to fair, equitable compensation where the lands of indigenous peoples have been confiscated, taken, occupied, used or damaged without their free, prior, and informed consent)**

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

**Article 32 (providing for the right to determine and develop priorities and strategies for the development and use of their lands, territories and other resources)**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

## African law

### Article 8 (freedom of conscience and religion)

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

### Article 9 (right of information and freedom of expression)

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

### Article 13 (participation in public life and access to public services)

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

### Article 14 (protecting the right to property)

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

### Article 16 (right to health)

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

### Article 17 (right to education and culture)

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

### Article 19 (equality of peoples)

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

### Article 20 (providing for the right of peoples to self-determination)

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

### ◀ African Charter on Human and Peoples' Rights (1981)

<http://www.achpr.org/instruments/achpr/>

**Article 21 (providing for the right of peoples to freely dispose of their natural wealth and resources and to recover their property or compensation in the event of dispossession)**

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

**Article 22 (providing for the right of peoples to development)**

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

**Article 24 (providing for a satisfactory environment)**

All peoples shall have the right to a general satisfactory environment favorable to their development.

**African Charter on the Rights and Welfare of the Child (1990)**

<http://www.au.int/en/content/african-charter-rights-and-welfare-child>

► **Article 3 (Non-Discrimination)**

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

**Article 9(1) (Freedom of Thought, Conscience and Religion)**

1. Every child shall have the right to freedom of thought conscience and religion.

**Article 10 (Protection of Privacy)**

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

**Article 12 (Leisure, Recreation and Cultural Activities)**

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

**Article 14 (Health and Health Services)**

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:

...

(c) to ensure the provision of adequate nutrition and safe drinking water;

...

**Article 2 (on the obligation of States to eliminate discrimination against women)**

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

**Article 15 (on the right to food security)**

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;

b) establish adequate systems of supply and storage to ensure food security.

**Article 16 (on the right to adequate housing)**

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.

**Article 17 (on the right to positive cultural context)**

1. Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.

2. States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

◀ **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)**

<http://www.achpr.org/instruments/women-protocol/>

**Article 18 (on the right to a healthy and sustainable environment)**

1. Women shall have the right to live in a healthy and sustainable environment.
2. States Parties shall take all appropriate measures to:
  - a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels;
  - b) promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control;
  - c) protect and enable the development of women's indigenous knowledge systems;
  - d) regulate the management, processing, storage and disposal of domestic waste;
  - e) ensure that proper standards are followed for the storage, transportation and disposal of toxic waste.

**Article 19 (on the right to sustainable development which includes access to and control by women over productive resources such as land)**

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

- a) introduce the gender perspective in the national development planning procedures;
- b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- c) promote women's access to and control over productive resources such as land and guarantee their right to property;
- d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
- e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- f) ensure that the negative effects of globalisation and an adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

**Article 24 (on the right of women in distress, including women from marginal populations, to special protection)**

The States Parties undertake to:

- a) ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs;
- b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

## Regional case law

Most of the following materials are sourced from the user-friendly case law database of the International Network for Economic, Social and Cultural Rights. Available at <http://www.escr-net.org/caselaw>

Concerning the Ogoni people of Nigeria affected by the oil industry in the Niger Delta. Communication alleging violation of Articles 2, 4 (right to life), 14 (right to property), 16 (right to health), 18(1) (equality of peoples), 21 (freedom to dispose of natural wealth and resources, and restitution and compensation for dispossession), 24 (right to a satisfactory environment), and the rights to food and shelter/housing implicit in the African Charter on Human and Peoples' Rights; obligations imposed by economic, social and cultural rights under the African Charter; State obligations in relation to State actors; content of implicit rights to food and shelter/housing; and violation of rights of 'peoples.'

Communication summary: <http://www.escr-net.org/sites/default/files/serac.pdf>

◀ **African Commission on Human and Peoples' Rights, Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria. Cited as: Communication No. 155/96. (May 27, 2002)**

Complaint against Kenyan government alleging violations under the African Charter on Human and Peoples' Rights, the Constitution of Kenya and international law, for the forced removal of the Endorois peoples from their ancestral lands, including violation of: land and natural resource rights, indigenous rights, freedom of religious and cultural practices and right to development

Decision summary: [http://www.escr-net.org/sites/default/files/Endorois\\_Decision.pdf](http://www.escr-net.org/sites/default/files/Endorois_Decision.pdf)

◀ **African Commission, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003**

Communication brought against Peru on the basis that economic development activities of the government (mainly concerned with diverting and extracting water sources) harmed the traditional agricultural activities of the complainant and her family. These were practiced in accordance with the complainants' culture as members of the Aymara people. The HRC found that there had been violation of the complainant's right as a member of a minority community, to enjoy her culture in community with others (as protected by Article 27 of the International Covenant on Civil & Political Rights). This was on the basis that there had been no effective participation in the decision making behind measures that would 'substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community'. The HRC also confirmed that effective participation 'requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.' See in particular para 7.6.

Decision summary: [http://www.bayefsky.com/pdf/peru\\_t5\\_iccpr\\_1457\\_2006.pdf](http://www.bayefsky.com/pdf/peru_t5_iccpr_1457_2006.pdf)

◀ **Ángela Poma Poma v. Peru, Decision of the Human Rights Committee (HRC), Communication No. 1457/2006**

Complaint alleging the State's failure to acknowledge indigenous communities' property rights over ancestral land. The case addressed the following issues: the protection of territory through a collective right to private property; the violation of the right to life by depriving communities of traditional means of livelihood; the State obligation to adopt positive measures to fulfill a dignified life standard; and priority treatment of vulnerable groups.

Decision summary: <http://www.escr-net.org/sites/default/files/Judgment%2C%20Case%20of%20the%20Sawhoyamaxa%20Indigenous%20Community%20v.%20Paraguay.pdf>

◀ **Inter-American Court of Human Rights, Sawhoyamaxa Indigenous Community v. Paraguay (March 29, 2006)**

***Saramaka People v. Suriname*, Inter-American Court of Human Rights, Judgment of November 28, 2007, Series C No. 172**

- Case brought by the Saramaka People against Suriname for violations of rights protected by the American Convention on Human Rights, including the right to property (Article 21). The judgment of the court included a finding that as a tribal people international law protects their *'right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory'* and in order to *'to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people'*. The special measures specified by the Court included a duty on the state to ensure:
- effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter "development or investment plan") within their territory. For large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent according to their customs and traditions;
  - that the Saramaka derive a reasonable benefit from any such plan within their territory; and
  - that no concession will be issued within Saramaka territory without a proper independent prior environmental and social impact assessment.
- (See for example paras 96, 129 and 134)

Full court judgment: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf)

**Inter-American Court of Human Rights, Pueblo Indígena Kichwa de Sarayaku vs. Ecuador (June 27, 2012)**

- Complaint against Ecuador for having granted a concession for oil exploration and exploitation and allowing an Argentinian company to begin seismic exploration within the Sarayaku people's territory without having consulted with the Sarayaku or obtaining their consent. The case addressed violations of the right to prior consultation, prior consent, community indigenous land, cultural identity, life and personal integrity.

Decision summary: [http://www.escri-net.org/sites/default/files/Court%20Decision%20\\_English\\_.pdf](http://www.escri-net.org/sites/default/files/Court%20Decision%20_English_.pdf)

### Table 3: Further selected international and regional human rights source materials

All international Human Rights Instruments are available via the UN Office of the High Commissioner for Human Rights (UN OHCHR), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>

Each international legal instrument has its own committee (referred to generally as treaty bodies) which are responsible for overseeing the implementation of that particular law. This includes responsibilities for the following key implementation steps:

- **receiving complaints** under the law's communication procedure (if it has one). The following website provides details for how to submit complaints on specific human rights agreements: <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>
- **examining a State party on its periodic state report.** This is a procedure by which the progress (or lack of it) in implementing the treaty can be assessed by the treaty body, and specific recommendations can be made. State parties are obliged to submit periodic state reports at regular intervals. Civil society organisations and other bodies may submit alternative reports at the same time. All these will be considered by the treaty body, which will ask questions of state party representatives in a live session at the UN. The principal outcome of state party examination are the Concluding Observations and Recommendations of the treaty body, which give directions to a particular state party on how to manage the human rights challenges specific to that country. They also note both issues of concern that the state party may not have raised in its periodic report.
- **developing General Comments and Recommendations**, which are in-depth summaries of the legal implications of an international law on a particular subject, e.g. gender or indigenous peoples.

**The outputs of the treaty bodies, including the country-specific Concluding Observations and Recommendations, and the General Comments, are authoritative interpretations of the corresponding international law.** They are therefore a useful resource for civil society organisations who can refer to the findings in those documents to make legal arguments whether in advocacy materials or in making complaints or bringing court cases.

**To find Concluding Recommendations and Observations for a particular country, or to find other documents developed under the UN human rights law system** see <http://tb.ohchr.org/default.aspx>

The Human Rights Committee (HRC) is responsible for overseeing the implementation of the International Covenant on Civil and Political Rights (ICCPR). The General Comments and Recommendations, and other documents relating to ICCPR are available at: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>. General Comments of the HRC relevant to this Guide include:

- Committee on Human Rights, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established

◀ **Human Rights Committee (HRC)**

by law (Art. 14(1984). Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bb722416a295f264c12563ed0049dfbd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument)

- Committee of Human Rights, General Comment 23, Article 27: Protection of Minorities (1994) UN Doc. HRI/GEN/1/Rev.1. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument)

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**Committee on Economic, Social and Cultural Rights (CESCR)**

- ▶ Responsible for overseeing the implementation of the International Covenant on Economic, Social and Cultural Rights. The General Comments and Recommendations, and other documents relating to CESCR are available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx>. General Comments of the CESCR relevant to this Guide include:
  - General Comment 4, Article 11: The right to adequate housing (1991) UN Doc. HRI/GEN/1/Rev.7 (2004). Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument)
  - General Comment 7, Article 11: The right to adequate housing - forced evictions (1997) UN Doc. HRI/GEN/1/Rev.7 (2004). Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/959f71e476284596802564c3005d8d50?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/959f71e476284596802564c3005d8d50?Opendocument)
  - General comment No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) 2009. Available at [www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc](http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc)
  - General Recommendation 12: The right to adequate food (Art.11) Available at <http://www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9>

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**Committee on the Elimination of Racial Discrimination (CERD)**

- ▶ Responsible for overseeing the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. The General Comments and Recommendations, and other documents relating to CERD are available at <http://www2.ohchr.org/english/bodies/cerd/index.htm>. General Comments of CERD relevant to this Guide include:
  - General Recommendation no. 23 - The Rights of Indigenous Peoples (1997) UN Doc. A/52/18, annex V. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument)

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**Committee on Rights of the Child (CRC)**

- ▶ Responsible for overseeing the implementation of the Convention on the Rights of the Child. The General Comments and Recommendations, and other documents relating to CRC are available at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>
  - General Comment no. 11 – Indigenous children. Available at: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.GC.C.11.pdf>

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**Committee on the Elimination of Discrimination against Women (CEDAW)**

- ▶ Responsible for overseeing the implementation of the Convention on the Elimination of All Forms of Discrimination against Women. The General Comments and Recommendations, and other documents relating to CEDAW are available at <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

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**UN Special Procedures**

- ▶ The UN human rights system also includes a system of special procedures, which includes the various Special Rapporteurs, Independent Experts and Working Groups with country or thematic mandates. Depending on their mandates, these bodies commonly issue authoritative reports on aspects of their mandates, complete mission reports on particular countries and sometimes accept complaints (communications) which they can act on by writing to the state party concerned.

See special procedures webpage at <http://www.ohchr.org/en/HRBodies/SP/Pages/Welcomepage.aspx>

The various thematic mandate holders can be seen at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx>

Of particular relevance for the subject of this Guide are the following:

- **Special Rapporteur on Food** (see <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx>)
- **Special Rapporteur on the rights of indigenous peoples** (see <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIpeoplesIndex.aspx>)
- **Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment** (see <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEenvironmentIndex.aspx>)
- **Independent Expert on minority issues** (see <http://www.ohchr.org/EN/Issues/Minorities/IEexpert/Pages/IEminorityissuesIndex.aspx>)
- **Special Rapporteur on adequate housing** (see <http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>)

A number of international legal instruments have been concluded under the International Labour Organisation, a specialised agency of the UN. For example, see the ILO 169 Indigenous and Tribal Peoples Convention (see [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO)). Although widely ratified outside of Africa, the Central African Republic (CAR) is the only African country to have ratified ILO 169 to date.

◀ **International Labour Organisation (ILO)**

A number of other ILO conventions (such as the ILO 29 forced labour convention) do have widespread ratification by Africa states. To see which ILO conventions your country is a party to: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11001:0::NO::>

The African Commission on Human and Peoples' Rights (ACHPR) is the treaty body responsible for overseeing implementation of the African Charter on Human and Peoples' Rights. The main website includes all documents, legal instruments and communications. Available at <http://www.achpr.org>. The website of the **African Court on Human and Peoples' Rights** is available at [www.african-court.org/en](http://www.african-court.org/en)

◀ **African Commission on Human and Peoples' Rights (ACHPR)**

**Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights** (2004). Available at <http://www.achpr.org/instruments/court-establishment/>

### Special Procedures

The ACHPR also has a number of special procedures who, like their UN counterparts, and subject to their individual mandates, will issue occasional thematic or country-specific reports, and who may act in response to complaints relating to the subjects of their mandates. Examples of mandate holders relevant to the subject of this Guide include:

- **Working Group on Extractive Industries, Environment and Human Rights Violations** (see <http://www.achpr.org/mechanisms/extractive-industries/>)
- **Working Group on Indigenous Populations/Communities in Africa** (see <http://www.achpr.org/mechanisms/indigenous-populations/>)

- **Special Rapporteur on Freedom of Information Communications** (see <http://www.achpr.org/mechanisms/freedom-of-expression/>. For country and civil society submissions see <http://www.achpr.org/search/?h=2>)

**Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** (2011) <http://www.achpr.org/instruments/fair-trial/>

**ACHPR Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and People's Rights** are available at <http://www.achpr.org/instruments/economic-social-cultural/>

The ACHPR's **Model Law for African States on Access to Information** is available at <http://www.achpr.org/instruments/access-information/>

## Annex 2: Other useful reading

### Africa & general

Alden Wiley L. (2007) *So who owns the forest? An investigation into forest ownership and customary land rights in Liberia*. Rights and Resources Initiative  
[http://www.rightsandresources.org/publication\\_details.php?publicationID=102](http://www.rightsandresources.org/publication_details.php?publicationID=102)

Alden Wiley L. (2007) *Whose land is it? The status of customary land tenure in Cameroon*. Rights and Resources Initiative  
[http://www.rightsandresources.org/publication\\_details.php?publicationID=5335](http://www.rightsandresources.org/publication_details.php?publicationID=5335)

Alden Wiley L. (2008) *Whose land is it? Commons and conflict states. Why the ownership of the commons matters in making and keeping peace*. Rights and Resources Initiative  
[http://www.rightsandresources.org/documents/files/doc\\_853.pdf](http://www.rightsandresources.org/documents/files/doc_853.pdf)

Alden Wiley L. (2010) *Fodder for war: Getting to the crux of the natural resources crisis*. Rights and Resources Initiative  
[http://www.rightsandresources.org/publication\\_details.php?publicationID=1405](http://www.rightsandresources.org/publication_details.php?publicationID=1405)

Alden Wiley L. (2011) *The tragedy of public lands. The fate of the commons under global commercial pressure*. CIRAD & International Land Coalition  
[http://www.landcoalition.org/sites/default/files/publication/901/WILY\\_Commons\\_web\\_11.03.11.pdf](http://www.landcoalition.org/sites/default/files/publication/901/WILY_Commons_web_11.03.11.pdf)

Alden Wiley L. (2012) *Rights to resources in crisis: Reviewing the fate of customary tenure in Africa*. Rights and Resources Initiative  
[http://www.rightsandresources.org/publication\\_details.php?publicationID=4699](http://www.rightsandresources.org/publication_details.php?publicationID=4699)

Alden Wiley L. (2012) *Land rights in Gabon, facing up to the past - and present*. Rights and Resources Initiative  
[http://www.rightsandresources.org/publication\\_details.php?publicationID=5317](http://www.rightsandresources.org/publication_details.php?publicationID=5317)

Cotula L. (ed.) (2007) *Changes in 'customary' land tenure systems in Africa*. IIED  
<http://pubs.iied.org/pdfs/12537IIED.pdf>

Cotula L. (2007) *Legal empowerment for local resource control: securing local resource rights within foreign investment projects in Africa*. IIED  
<http://pubs.iied.org/pdfs/12542IIED.pdf>

Cotula L. and Mathieu P. (eds.) (2008) *Legal empowerment in practice: using legal tools to secure land tenure rights in Africa*. IIED  
<http://pubs.iied.org/pdfs/12552IIED.pdf>

Decker K. et al. (2005) *Law or justice: building equitable legal institutions*. World Bank  
[http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Law\\_or\\_Justice\\_Building\\_Equitable\\_Legal\\_Institutions.pdf](http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Law_or_Justice_Building_Equitable_Legal_Institutions.pdf)

FAO (2010) *Reforming forest tenure, issues, principles and processes*.  
<http://www.fao.org/docrep/014/i2185e/i2185e00.pdf>

FAO (2012) *Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security*.  
<http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

FAO (2013) *Governing land for women and men: a technical guide to support the achievement of responsible gender-equitable governance of land tenure*.  
<http://www.fao.org/docrep/017/i3114e/i3114e.pdf>

Forest Peoples Programme (2009) *Land rights and the forest peoples of Africa*.  
<http://www.forestpeoples.org/tags/fpp-series-land-rights-and-forest-peoples-africa>

Forest Peoples Programme (2011) *Toolkit on indigenous women's rights in Africa*.  
<http://www.forestpeoples.org/topics/african-human-rights-system/publication/2011/toolkit-indigenous-women-s-rights-africa>

International Land Coalition (2008) *Securing common property regimes in a globalizing world*.  
[http://www.landcoalition.org/sites/default/files/publication/24/ilc\\_securing\\_common\\_property\\_regimes\\_e.pdf](http://www.landcoalition.org/sites/default/files/publication/24/ilc_securing_common_property_regimes_e.pdf)

International Land Coalition and UNDP (2005) *Land rights for African development: from knowledge to action*.  
[http://www.undp.org/content/undp/en/home/librarypage/environment-energy/sustainable\\_land\\_management/land-rights-for-african-development-from-knowledge-to-action/](http://www.undp.org/content/undp/en/home/librarypage/environment-energy/sustainable_land_management/land-rights-for-african-development-from-knowledge-to-action/)

Knight R. (2012) *Statutory recognition of customary land rights in Africa: an investigation into best practices for law making and implementation*. FAO  
<http://www.fao.org/docrep/013/i1945e/i1945e00.htm>

Mayers J. et al. (2013) *Improving governance of forest tenure: a practical guide*.  
 Governance of Tenure Technical Guide No.2. IIED & FAO  
[http://www.rightsandresources.org/publication\\_details.php?publicationID=6299](http://www.rightsandresources.org/publication_details.php?publicationID=6299)

Open Society Justice Initiative/ Namati (2010) *Community based paralegals: a practitioner's guide*.  
<http://www.namati.org/publications/community-based-paralegal-programs-a-practitioners-guide/>

Rights and Resources Initiative (2012) *Land and forest tenure reforms in West and Central Africa*.  
<http://allafrica.com/download/resource/main/main/idats/00060532:5e72db4e5efe0fc6da24d6ede3203c1e.pdf>

SDI/IDLO *Community land titling and natural resources.*

<http://www.idlo.int/english/WhatWeDo/Research/LegalEmpowerment/Pages/TheCommunityLandTitlingInitiative-ProjectDocuments.aspx>

UNDP (2008) *Making the law work for everyone – report of the commission on legal empowerment of the poor.*

[http://www.unrol.org/files/Making\\_the\\_Law\\_Work\\_for\\_Everyone.pdf](http://www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf)

## Specific issues

Anderson P. (2011) *The free, prior and informed consent in the context of REDD + consent principles and approaches for the development of policies and projects.* RECOFTC

[http://www.recoftc.org/site/uploads/content/pdf/FPICinREDDManual\\_127.pdf](http://www.recoftc.org/site/uploads/content/pdf/FPICinREDDManual_127.pdf)

Chao S. (2010) *The Roundtable on Sustainable Palm Oil and complaint resolution: guidance on submitting a complaint for civil society organisations and local communities.* FPP/RRI

[http://www.rightsandresources.org/documents/files/doc\\_5791.pdf](http://www.rightsandresources.org/documents/files/doc_5791.pdf)

Edwards K. et al. (eds.) (2011) *Putting free, prior, and Informed consent into practice in REDD+ initiatives.* RECOFTC

<http://www.recoftc.org/site/resources/Putting-Free-Prior-and-Informed-Consent-into-Practice-in-REDD-Initiatives.php>

FERN (2007) *Provoking change: A toolkit for African NGOs.*

<http://www.fern.org/publications/toolkits-reports/provoking-change-toolkit-african-ngos>

FERN (2013) *Improving forest governance: A comparison of FLEGT VPAs and their impact.*

<http://www.fern.org/improvingforestgovernance>

Forest Peoples Programme (2013) *Free Prior and Informed Consent posters.*

<http://www.forestpeoples.org/topics/legal-human-rights/publication/2013/free-prior-and-informed-consent-posters>

International Centre for Research on Women (2010) *Property rights and gender – a training toolkit.*

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