



Africa Community  
Rights Network



# The state of Community Land Rights in Africa

**African States can better  
protect community land rights**

December 2016

# Report prepared for the African Community Rights Network

## Written by:

Téodyl Nkuintchua

## With the participation of:

Judy Adoko

Samuel Mensah Mawutor

Mohamadou Habibou Kanoute

Ali Kaba

Alain Traore

Maixent Fortunin Agnimbat Emeka

Felicien Kabamba

Rita Uwaka

Liz Alden Wily

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# Preface

Rural communities all over Africa are deeply concerned. Millions of people do not know whether or not their land rights are secure, especially their rights to their off-farm forests and rangelands. For decades, rural communities have been told that their customary rights do not count as property rights and are therefore not protected. Their lands may be taken at will. Communities are particularly alarmed by the current surge in large-scale land allocations. Will their lands be next? What can they do to prevent their land from being taken? Will their governments support them, or will they say they no land rights because they have no documents to prove ownership?

At the same time, rural communities all over Africa are seeing more interest in their plight. They no longer feel so isolated. Many can access the internet, even in remote areas. They read about sister countries on the continent where rural populations have more legal land security than themselves. They want to get engaged in changing the situation in their own countries.

The African Community Rights Network (ACRN) comprises around 40 NGOs working on these concerns. They, and the communities they work with, want to know more. They want to be empowered by knowledge. They want facts and figures about other countries to enable them to lobby their policy and decision-makers. They do not want to be fobbed off by claims that the current situation is good for business, and that they should not complain as jobs will result if they surrender their lands to commercial interests. Nor do they want to wait and do nothing for themselves while their governments claim they have matters under control.

The African Community Land Transparency Index (ACLTI) has been developed with these needs in mind. First, it institutes a system through which accurate information on the status of the majority of rural land rights across the continent can be collected. The facts and findings will be updated every three years. These will be disseminated widely, including to rural communities. Second, the initiative will help build connections throughout Africa on community land rights through applying the Index and through this will strengthen pan-African commitment to resolved a common shared problem – the weak status of customary/community land rights.

## Why an Index, and how is it different?

This initiative entails several innovations.

**First**, ACLTI is an Africa-owned initiative with its roots in rural communities. ACRN comprises NGOs active on the ground and at the national level in their respective countries. The idea for the Index has evolved through meetings of these NGOs over a period of four years, through their shared analysis of concerns, and through grounded commitment to assist rural communities to better secure their land rights. This is not a donor-driven project. It comes from Africans working in Africa on African concerns with their rural communities.

**The second innovation** is that the Index initiative is geared to involve affected communities from the outset. Much information has been collected on land matters by academics, INGOs and others, but often the local context is weak and the views of those affected are not considered. ACLTI offers a more grounded approach. It involves local organizations with strong connections in rural communities, collecting information on the ground, and sharing with those same communities the findings of more technically complex assessments of the legal status of their rights.

**A third innovation** is that the Index adopts a comparative approach across countries. Realities and

strategies are compared from country to country. The intention to expand the network's reach to the whole of Africa is built into the approach. This will take time but the direction is clear.

**A fourth innovation** is that the Index allows participating NGOs to meet together, to learn from each other and to support each other in their advocacy for stronger protection for community-based rights to their lands. This includes speaking with one voice in the face of crises affecting one, several or all member countries.

**A fifth innovation** is that the Index plans to link various communities within countries and across countries in a knowledge-building exercise. An African Communities List, comprising communities with whom each NGO works, will be developed. This will gradually link communities within and across countries on the land issues they share. In due course, the initiative will devise ways for representatives of the communities to come together to discuss particular concerns.

**A sixth innovation** is that as well as being Africa-built and owned, the initiative engages closely with regional, continental and global initiatives. ACRN representatives have met with experts on the African Union Land and Policy Initiative, FAO Voluntary Guidelines on Lands; they have presented its intentions to global forums, and are actors in the Global Call for Action on Community Land Security. In practical terms, ACRN is also working closely with initiatives such as LandMark to ensure that its information will find a place in its global accounting. Links will be made with other complementary initiatives such as Land Matrix, the Global Land Indicators Initiative (GLII) and the Land Portal. ACLTI results will also be made available to governments and policy-making bodies to facilitate stronger policy, law and implementation for community land rights.

We (ACRN) are at the early stages of this initiative. In this report you will read about how we got together, made decisions, and tested our ideas in eight countries, regarding indications of positive or negative support for customary/community-based land rights. You will see our analysis of the current state of legal protection of community lands and realities in practice. Some findings may be questioned, as the pilot results were based on work which contributing NGOs themselves would like to improve. We look forward to your suggestions. You will also read the list of lessons we learned and see the modifications we have made as a result of this piloting. We lay out our plan of action in the hope of seeing the Index steadily applied throughout the continent.

You will read our plan for how the information will be sent by NGOs to those who matter most – the ordinary land-dependent family, which depends upon its small farm and shared ownership of local forests, rangelands and waters with other members of her community. This dependence is not limited to livelihood. Attachment to land, the feeling of belonging to a particular area, and feeling that the land is 'home', are crucial aspects of identity and the survival of a socio-cultural community. This is an attribute in which Africa excels. While individuals do more and more on their own to advance themselves and their family members, when it comes to land and resources which communities traditionally own and use in common, working together is necessary and helpful.

This report has been written for ease of reading, and without academic apparatus such as footnotes or references. At the same time, we have made every effort to ensure that it does not leave you feeling disappointed or doubtful. All the information it contains has been carefully checked. However, that does not mean that it is devoid of mistakes or misinterpretations. Therefore your input will be much appreciated, not only because of your ability to initiate and boost reforms, but also because you can help ACRN and its NGO members to increase their knowledge of issues regarding land rights, and about this initiative.

Welcome to the first report of the African Community Land Index. We are embarking on an adventure.

## Executive summary

Investment on land depends largely on land tenure security, and without secured tenure many investors will not commit to the investments in order to support the so long awaited economic development in Africa. Most African countries become so aware of this fact that they have recently initiated two major processes that are progressively transforming the land governance landscape. On the one hand, they are making massive land allocations to national and foreign investors (agribusiness, mining, infrastructures, oil, etc.). On the other hand, many countries are reviewing their land laws with the aim of creating business environment, free from factors that could lead to the hostility of local peoples. One defining feature of the African continent is that its rural communities depend heavily on land (mostly lands currently sought by investors) and claim customary ownership of up to 80% of all lands. In this context, designing land laws that are in full accordance of protecting customary land rights of those communities' is crucial.

The literature on land issues illustrates that the legal protection of community land rights varies hugely from country to another: it is deemed advanced, progressive in some countries, and very poor in others. The differences are even more marked when it comes to the enforcement of the land laws, whether or not these are protective of community land tenure arrangements. However, there is no single measurement tool that can provide effective comparisons. The ultimate purpose of ACRN's African Community Land Transparency Index is to close this gap by providing updated and comparable data to decision-makers, communities, academics, NGOs and others key stakeholders involved with the land administration and management. The Index is driven by many innovations. One of such innovation is its ability not just assessing the law, but also the extent to which the law is implemented and enforced. Another crucial innovation of the Index is the Naming and Praising approach, which is an attempt to showcase countries with good legislations and practices, and commend them as best practices to share for others to emulate. The Index therefore aims to offer a learning platform for exchange among different African countries, instead of endlessly reinventing the wheel.

This report synthesizes the results from the very first analysis conducted using the Index. The data have been collected in eight African countries – Congo Brazzaville, Democratic Republic of Congo, Uganda, Liberia, Senegal, Burkina Faso, Nigeria and Ghana – by senior NGO experts. Research consisted of qualitatively responding to 28 indicators (the Index) using personal expertise, a literature review and interviews with relevant actors in the countries. Data were then peer-reviewed by ACRN's senior advisors and experts, including through workshops. However, ACRN acknowledges that these precautions may not have eliminated all inconsistencies and discrepancies from the data presented here. Moreover, as this report is based on a pilot initiative and grounded on our analysis, there may be bias. We therefore hope to receive feedback from you, the readers.

## Results

It is striking that not even one of the eight countries can readily provide disaggregated data on the size of land under different customary arrangements, although in all countries those lands are deemed to represent more than half the national territory. Indeed, there are no reliable data even on the number of registered land titles, including individual titles. Generally, only urban titles are approximately documented. The total surface of rural lands which cover the bulk of the entire land mass is unknown.

Overall, the protection of community rights over those rural lands appears to be weak. Uganda and Ghana offer the best laws, from their Constitutions to their enabling laws. There is less variation in law enforcement across the countries, which unfortunately is very poor. Ten key features characterize the level of protection to customary rights:

1. Uganda's Constitution explicitly protects customary land arrangements with the same force as other 'modern' types of rights. Other Constitutions notably guarantee 'access' to land for those communities, though without a clear explanation of what 'access' means.
2. Three types of rights are common in all the countries: access, use and management. Exclusion and alienation rights are better protected, though not fully, in Ghana and Uganda. However, the laws do not consider the complexity of customary land arrangements which are often bundles of rights (simultaneously comprising various types of rights on the same land).
3. Forest countries provide other specific forest rights of access, use and management. Use rights in DRC and Congo Brazzaville are essential in the context of large-scale forest management, but these are limited as they poorly represent the type of rights claimed by forest populations.
4. The main holder of land rights is the Individual. While some laws (in Burkina Faso, Uganda, Ghana, Congo Brazzaville and Nigeria) explicitly provide certain rights on lands and other resources to communities as entities, mechanisms to ensure full implementation of these community rights are absent, leading de facto to the superiority of individual rights.
5. Other specific groups, however, are generally ignored in land legislations and law enforcement. Those include the youth, migrants and women. Congo Brazzaville is a positive exception, having a law that provides more security to Indigenous Peoples' land rights than the rest of the rural populations.
6. Registration is the ultimate guarantee to security even in Ghana and Uganda, where land laws provide same security to unregistered community lands. Uganda, Burkina Faso and Ghana have put mechanisms in place to facilitate the registration process, though in none of these countries are the mechanisms fully functional. In general, a variety of cultural, institutional, economic and political obstacles make it impossible to secure community land arrangements through registration, as currently provided by the most advanced laws. This ultimately leads to land insecurity even in good contexts such as Uganda and Ghana.
7. Moreover, the laws give communities only partial power to make decisions. Most notably, they have the right to claim compensation on all rights claimed (in Ghana and Uganda) or on lands with demonstrated uses (in other countries). But beyond such compensation, they have little power to oppose large-scale investments authorized by the central or ever local institutions, especially mining projects that appear to be deemed superior to all others.
8. While central institutions are generally in place and functional, local institutions – where they exist – suffer from poor capacity and resources. This is the most significant barrier to implementation of the law. In Burkina Faso, Ghana and Uganda, where the law says that it will provide local institutions to support the securing of community land tenure systems, in practice they barely exist because of the lack of enabling documentation, resources and technical capacity.

Community institutions tend to become increasingly unaccountable to their communities, and many traditional rulers in all the countries are engaged in or support land grabbing.

9. Along with the inadequacy of the institutions, all eight countries are facing growing land conflicts: within communities, against local and national elites, and against public and private large-scale investors. These conflicts emphasize the need for urgent land reforms, with rural communities playing a central driving role.
10. All the countries except Nigeria are currently (or have recently been) reviewing their land laws. These reforms have so far been conducted in a manner that offers a window of opportunity to secure and safeguard the rights of rural populations. Indeed, all have proved to be participative and inclusive of a range of relevant actors. Improvements are already perceptible: the draft land law of Liberia appears to be dramatically different from its previous land law as it better recognizes and protects community land rights.

## Analysis

Overall, the eight countries have no reason to be proud of the way that they protecting their communities' land tenure systems. Conflicts between modern land systems and those community (customary) arrangements are generally mentioned as the main drivers of such insecurity. But the imbalance between the two systems is historical and complex. The time it has taken to make land reforms, the growing number of stakeholders and the hesitation of states to even start those reforms (e.g. in Senegal and Nigeria, which have made many failed attempts in the past 40 years) demonstrate that the causes of the insecurity of community land rights, and therefore for injustice, described here are very deep-rooted. We highlight seven of these root causes here:

1. Historically, newly independent African countries considered more control over their lands as a sign of sovereignty and an intrinsic part of development.
2. This belief is still held today, as the continent is rapidly allocating large tracts of land to private investors. The uniqueness of today's context is that arguments for development arguments are competing with aspirations for sovereignty: countries are ceding large parts of their territories, including at the borders (Congo Brazzaville is a good illustration).
3. Development is primarily and almost exclusively considered to be the reserve of corporates. States are failing, and do not appear actually to want, to value their citizens' ability to drive economic growth. This misconception has led many African governments to make highly controversial decisions, such as allocating lands used for crop production to cash-crop companies (Uganda, Senegal, and Congo Brazzaville).
4. Systemic governance problems reflect on land sector. Countries with no land use plans have little chance to ensure even the security of commercial land titles, let alone those of communities. Moreover, the strategic economic agenda seems unprecise, with countries shifting from one strategic initiative on natural resources to another.
5. Lack of capacity at community level condemns those communities to suffer injustice, even when their country's laws are protective. But capacities to advocate and defend their rights are also eroding: exposed to 'modern', values including individualism, many collectively driven communities find it increasingly difficult to speak with one voice on land matters.
6. Another consequence of this modernity is contact with the market economy. The rising land market is still influenced by strong customary ties, feeding and fed by individualization. The existing one million African communities are therefore experiencing major social transformations which may affect what we currently call community land rights.

7. Various external factors are affecting the protection of community land tenure systems, most notably civil war, climate change and migration.

The results of this pilot and the ensuing analysis identify converging and diverging points between African land laws. Countries like Uganda, Ghana and to a certain extent Burkina Faso have the most advanced land laws of the eight countries. Those are the examples to follow. The situation in the continent is moving fast, and many countries are improving both their land laws and their implementing institutions. Just this year (2016), Kenya has also promulgated a long awaited improved land law. Liberia's land law is also promising. However, the difficulties that the same countries have implementing their own laws are an invitation to mobilize all necessary resources. Current land conflicts are an obvious symptom of deeper problems in Africa's land laws and law enforcement. These conflicts not only affect rural communities who are the first victims: they also constitute a barrier to investment. Various Indexes assessing the business environment, including the World Bank's Doing Business, rank the continent among the least welcoming environments. While such economic analyses should not be taken too seriously, it is certainly true that investors coming to Africa often struggle to secure land.

ACRN believes that securing community land tenure systems is the first step towards securing business on the continent. The Index can help provide up-to-date and comparable data on what works well and what does not, from country to country, with the goal of helping to improve those that are slow in coming. We do not think that the Index can answer all the questions, however, especially not the systemic ones regarding development pathways or general environment of governance. But it may provide an opportunity for open debate on those issues, and for rural communities and NGOs to join in.

ACRN has elaborated a three-level agenda

First level: ACRN-wise priorities

- Use the Index as an empowering tool for NGOs in Africa. The Index's guidelines are simple training materials on land issues
- Support Index users to guarantee best quality of information collected
- Improve the Index while keeping its key principles
- Perfect the narrative of *Naming and Praising* countries with good laws and practices

Second level: Engage more NGOs in our effort

- Validate the data collected through the Index with networks of national and regional NGOs.
- Reach out more African NGOs, and expand the network in order to be more efficient with decision-makers

Third level: Associate the communities

- Adapt our different guidelines including current our definitions of key concepts (**community, community land, statutory land law and community land rights**) into locally understandable language
- Adapt the Index for data collection from community level.

# Table of contents

Acknowledgement.....	i
Preface.....	ii
Executive summary.....	vi
Results.....	vii
Analysis.....	viii
I. Institutional context: why is assessing community land rights in Africa important and urgent?	1
II. Methodology.....	4
African Community Land Rights Transparency Index (ACLTI).....	4
Data collection and review: developing and testing the Index.....	5
III. The state of protection of community land rights: key results.....	7
IV. Root causes: why are community land rights so poorly protected?.....	22
V. Conclusion.....	27
VI. Post-face.....	29
ACRN's internal plans about the protection of community land rights .....	29
How and why to engage more NGOs in this effort.....	30
Working with land-dependent communities.....	31
Appendix: The indicators.....	32



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Stakeholder meeting on the possible land losses due to the hydro-agricultural installation of Bagré, Burkina Faso

## I. Institutional context: why is assessing community land rights in Africa important and urgent?

Securing community land rights is now firmly on the international agenda, and is seen as a matter of urgency. While the Sustainable Development Goals (SDGs) only refer to the need to guarantee control rights over lands for all the men and women, particularly the poor and vulnerable, the Voluntary Guidelines on the responsible Governance of Tenure of land, fisheries and forests in the context of national food security (VGGT) stress the importance of securing customary tenure systems.

It is not just about the lands that communities claim ownership of, but also about the rules and institutions that communities use to manage those lands. The two go together in community-based land tenure systems. This is fundamental in Africa where 95% of the continent is rural land and up to 80% is claimed as customarily owned, although these lands are often classified as public lands. While researchers vary in their calculations of how much of this is lawfully owned by communities and with what level of security, all agree that there is a huge gap between reality on the ground and legal support. This gap has been at the center of debate on the continent for the past ten years.

The Africa Union (AU) has encouraged or directly developed initiatives to enable more equitable and efficient land policies. The Framework and Guidelines on Land Policy in Africa and the Guiding Principles on large-scale land-based investments in Africa are prominent orienting documents. They essentially consider land as a potential resource for development. They assume that development will benefit all social categories including the majority poor rural populations. But is this really possible in a context where those rural populations have had their land rights, and therefore their legitimacy to benefit from their lands, squeezed to the limits and even denied?

Many African countries are undertaking land law reforms. In some cases, these reforms were instrumental in shaping laws that reconnect people to their land and protect customary tenure systems. Tanzania, Mozambique and Burkina Faso are often mentioned as good examples. While these positive cases demonstrate that it is possible to have both development ambitions and equitable land policies, and that such inclusive tenure policies constitute the best driver for land-based transformation,

the majority of land laws on the continent still do little to secure community land rights. Also, we have observed, leaders in even progressive countries periodically back-track or go slow on commitments.

This report has been prepared to inform debates and actions on community land rights. Identifying best practice is central to this. Being open about shortfalls is also important. The report endeavors to provide a comparative view of the legal protection of community land rights in eight African countries (Congo Brazzaville, Democratic Republic of Congo, Uganda, Liberia, Senegal, Burkina Faso, Nigeria and Ghana). The cases presented here also consider the implementation of the law. It is common knowledge that a good law is not enough to guarantee real and effective governance, especially on complex issues such as land management. Few comprehensive analyses of land laws have been carried out. The main initiative that has done so, LandMark, works closely with ACRN. In due course, the Index should provide a stable source of information on the legal status of rights as this changes over time, and it will be the main source for evaluating how far these legal conditions are delivered in practice to rural communities. For the purposes of testing out indicators in eight countries, we avoided reviewing their own legal analyses available at the time, in the interests of building up local member NGO capacity to do so.

In a context where states claim that civil society actors rarely provide solutions, we are not recommending reinventing the wheel, but improving on approaches and making sure policy and law makers can see useful strategies from other countries to borrow from.



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*Gathering of the Makilolo community, Nigeria*

This report is directed to decision makers. Improved protection of rural land rights is urgent. The rush for land over the last 15 years has not abated. In fact, it is growing alarmingly. Land Matrix, an online land database, reports that as of 2016, large-scale land deals in Africa since 2000 have covered more than 120 million hectares. This excluded hundreds of smaller deals that are not being tracked. Land demands exceeding 1 million hectares can be found in Congo Brazzaville, Sudan, Guinea, and Democratic Republic of Congo; in the latter case, there is a record land demand of 64 million hectares. In Liberia, reliable reports indicate that over 50% of the country's land space has been promised to foreign investors.

In addition to these largely foreign-driven and large-scale demands for land are internal demands by local elites. There are plenty of signs of accelerating concentration of land. Poorer families are suffering declining per capita access while local elites from within the community or from cities and towns

are finding it easier to secure and register rights to hundreds of hectares of lands.

Governments are also increasingly gazettement land areas in ways that often forcefully remove communities. In Liberia, the government is planning to nationalize over 30% of the country's forest land as protected areas. In DRC, the surface area under conservation is expected to amount to 15% of the national territory. The source can only be community lands. This is likely to prolong the current land conflicts that will ultimately produce the reverse effect of what is currently sought, i.e. better life conditions for everybody. Governments are therefore urged to understand the real drivers of those conflicts, and to act upon those drivers.

Another important target group for the report is rural communities. They include communities who define themselves as distinct indigenous peoples, and local communities. They all face barriers securing their land rights. These include cultural differences between their vision of land and the legal perspective, poor knowledge of the national land laws which determine their fate, poor capacities to defend themselves and to demand accountability to decision-makers. They also find it difficult to limit inward settlement on their lands, and are often forced by local circumstances to move out of their areas. This report analyses these local capacities. It urges rural communities to fully play their role as citizens, taking part in the affairs in the city. This will in turn help them defend their rural land rights. In Africa, the rural and urban communities remain very closely connected

The growing demand for land and the resulting conflicts are keeping researchers, NGOs and even companies busy. All of these actors are looking for relevant data to understand, deepen and better operationalize their respective agendas. Our main goal is to provide such data on the status of both the legal and the practical protection of community land rights in Africa.

The next section of this report explains the methodology used. It describes the Index, and explains its use for data collection and its other possible uses. Sections III and IV present the data from pilot exercises and presents key findings. We follow up by presenting opportunities for land reforms, for land law implementation and for all stakeholder mobilization for more equitable land management. A post-face provides thoughts for regional synergies.



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Working session with the traditional Chief of Bagré, Burkina Faso

## II. Methodology

The analysis presented here is the result of a long and inclusive process within the African Community Rights Network (ACRN). While the core of the report is the result of intensive consultation among 34 ACRN members, contributions have been received from national and regional experts. The tool used for the data collection process is the African Community Land Rights Transparency Index (ACLTI). This has been in eight countries through the guidelines presented below.

### *African Community Land Rights Transparency Index (ACLTI)*

The focus of ACLTI is the protection of rural community lands through securing rural community rights.

The term community lands is adopted by ACRN to cover commons or collective lands. Their nature varies widely depending upon cultural arrangements around lands. Some communities consider that the entire communal land area or domain is the shared property of community members, and that members only have rights to use the land (rights which may exist in perpetuity, however). Others consider that the only collective properties are the shared off-farm properties, and that while, homestead allocation and transfers may be regulated by the community, each family owns its own homestead, sometimes absolutely.

Features commonly encountered in African rural areas are that (i) all or some of the local community land area is owned by the community and then either assigned to personal/family use, or to collective use; (ii) individual/family and communal rights co-exist; and (iii) communities maintain rights to exclude undesirable actors from their lands. In the context of this Index, community land rights refer to the same extent to the trio of community lands, endogenous land tenure arrangements and land institutions.

Community land rights – often referred in this document as customary land rights – are a community-based system of defining, allocating and upholding rights to land which a community follows. The norms for this may be based on long-standing practices. We understand that not all community land-

based systems are rooted in custom or tradition, especially with the rapid changes that happened in Africa with colonization. Therefore 'community' is broader than 'customary'. However, most collective land tenures are essentially grounded in traditional land ownership and use norms which communities define and uphold. Recent estimates indicate that some 630 million rural people hold rights over more than 1.78 billion hectares of lands.

Obviously the nature of rights varies significantly and can include the right to access, use, manage, exclude and alienate the land. Absolute ownership, if this means the right to alienate (sell) the land is almost non-existent in traditional Africa. Land is generally considered as the gift of God, ancestors and nature, belonging to the generations of today and tomorrow.

The Index is made up of two interrelated parts: an assessment tool and its empowering material. For the purpose of the pilot study only the assessment tool was used. It comprises 28 indicators: 13 on legal provisions and 15 on the implementation of those provisions (an updated version of this Index is available in the Appendix). The *legal* indicators analyzed the provisions on customary land rights; special consideration of minority and vulnerable groups; power devolution and local governance; and participation of local communities in decision-making processes and their access to justice. The *practice* indicators assessed the land-related institutions; the local capacities to resist land-grabbing and injustices; recent progress in securing community land rights; and state decisions regarding community lands and community land rights.

The need for legal indicators. Land rights are defined by customs, sometimes by Sharia, and by national legislation, including National Constitutions. National law takes precedence over local customary law.

Our first concern has been to understand how national laws treat community land rights. This is why the Index focuses on this. The results provide us with a standard basis for comparison across countries. Over time we will keep track of changes. Most national land laws in Africa descend from colonial laws. These usually had a skewed understanding of how indigenous/customary tenure operated, or were designed to maintain such rights as subordinate to rules favoring government control over as much land as possible. As a consequence, many legal provisions seriously contradict community practices, including denying that lands may be owned collectively, or through customary systems. The Index challenges unjust national law provisions by marking these down as negative or falling short.

The need for practice indicators. Africa is notorious for having a very poor capacity to implement her own laws, not only on land but also on almost all aspects of national life. A variety of problems have been put forward to explain this poor capacity, including cultural gaps, lack of good institutions, and lack of financial and technical capacities. But these barriers can vary from one country to another. The barriers need to be fully understood before engaging more law reforms. The practice indicators also offer the possibility of a better understanding of local dynamics within a country.

### ***Data collection and review: developing and testing the Index***

The development phase of its 28 indicators consisted of a series of meetings and online consultations, driven by a technical pool in charge of compiling key contributions from across the network. Experts were also consulted. The development phase led to the Index being tested in eight African countries. While the test was mainly intended to ensure the practicability of the Index and improved the indicators, this phase also enabled preliminary data on the state of community land rights in African countries to be collected.

As recorded above, the Index was tested in Congo Brazzaville, Democratic Republic of Congo (DRC), Nigeria, Uganda, Ghana, Liberia, Senegal and Burkina Faso. Three approaches were prioritized by country experts. These comprises in-house desk research on the land-related legislations and rele-

vant documentation, interviews with key stakeholders and, in some cases, a preliminary field survey. In practice, each indicator was assessed and ranked as 'Yes', 'No', 'Partial', 'Non Applicable' or 'No data'. Data were peer-reviewed by ACRN's advisors. A workshop held in 2015 discussed and validated the key findings presented below.



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*Family photo –ACRN's 2015 annual meeting*



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Impacted women resisting against land grab by agribusiness company, Nigeria

### III. The state of protection of community land rights: key results

#### *Up-to-date inventories and registries of landholding do not exist*

A well-known feature of national contexts in Africa is the lack of adequate data regarding land. None of the eight countries has either an up-to-date land inventory or registry. As a consequence, there are no precise and reliable official data on the lands belonging or claimed by communities, the rural lands, or the number of land titles and the corresponding surface area. The latter category, however, is more documented than the others. Though no official data have been found, collecting data from press interviews, speeches, and other secondary sources, we could make estimates for Senegal (152 000 land titles), Uganda (500 000 land titles), and Congo Brazzaville (45 000 land titles).

When such data exist, it is not possible to indicate the exact surface area covered by those titles and the number of people, as in all the countries, an individual can have several titles as possible, or many people can fall under a single land title. While in Burkina Faso and Ghana, as we will see below, communities possess the land, it remains impossible to indicate the amount of land under customary arrangements.

The data collected in the eight countries of this research on the legal and practical protection of community land rights can be summarized under ten main headings:

# 1. Recognizing customary land rights in highest legislations

## *Constitutional support for customary land rights exists in most Constitutions but to different degrees*

Customary land rights are considered in some African fundamental laws, the Constitutions. In different ways, Ghana, Republic of Congo Brazzaville, DRC and Nigeria recognize or protect these rights. The best examples however come from Ghana and Uganda, where even undocumented customary rights are considered valid as property interests by the Constitution and are protected accordingly. In DRC on the other hand, while customary arrangements are recognized by the Constitution, the same law considers private property as 'sacred', as conventionally defined in its land laws as meaning registered properties. In this sense, Senegal, Congo Brazzaville and Nigeria are not very different from DRC. The Constitutions of these countries favor land claims that have been documented or registered through the state, leaving unregistered land poorly secured and vulnerable.

All Constitutions all around the world permit 'access' to land and encourage equity in access, but the issue confronting customary land-holders is not so much whether they have access to land as whether their customary rights are acknowledged as lawfully possessing or owning lands.

## *Most Constitutions equate customary rights with access rights*

Access to land is widely afforded in these eight countries. Senegal's Constitution also clearly provides equal access to men and women. The term 'access' is the one mainly used: not 'control' or 'ownership', but 'access' with no precision on its extent. Is it 'access' for an undetermined and unlimited period of time and without any possible obstruction, or just 'access' for whatever land is still unused, until 'higher' interests appear? The lack of clarity here echoes the other laws on natural resources.

# 2. Types of rights recognized, and how they are protected

## *All land laws acknowledge the existence of customary land rights but only some recognize these as property interests*

All land laws provide a certain level of recognition and protection of customary land tenure systems. Ghana, Uganda and Burkina Faso offer best protection in that their national laws admit the customary land arrangements at the same level as private property, or at least as possessions. In Ghana, customary lands can only be registered through the classic scheme of individual property (freehold title), while Burkina Faso and Uganda offer windows for customary rights to be registered through simplified procedures.

Burkina Faso's rural land law (2009) and land policy (2013) elaborate how customary arrangements are to be protected. The major innovation is the Land Charter which allows a community to set procedures for the management of their land; these procedures are inspired by customs and practices, and moreover, are based on the views expressed by the land owners.

Uganda's Constitution (1995) and Land Act (1998) provide full equity in treatment of customary tenure as equal in force and effect as freehold, leasehold and mailo tenure (a locally derived landlord/tenant system). However, our reviewer for Uganda found the law weak in that it enables customary rights to be easily converted into freehold rights, implying that customary rights are not really equal to freehold rights. Nor does Uganda law provide clear guidance on how customary land is to be governed by communities.

The case of Burkina Faso presents a discrepancy: while the Constitution does not explicitly protect community land, land law does provide such protection whereas both texts have been edited during the same period of time. The recent amendment of the Constitution (2012) did not consider the country's change of policy in land matters as reflected in the land law (2009 and 2012 laws).



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*Lands provide diverse services to Indigenous populations*

Congo Brazzaville does not provide full protection for all customary land rights-holders, only for Indigenous Peoples. The 2011 law on protection and promotion of Indigenous Peoples' rights states that their access and ownership on land is aligned with traditional arrangements and not preconditioned by land titles. While this protection is a fundamental first step and good lesson to other countries, it should be recalled that Indigenous Peoples represent just about 1.2% of Congo Brazzaville's population, and no more than 3% of the rural population. The remaining rural communities are under the regime of poor recognition of their land rights, and have almost no protection – unless they apply for non-customary title deeds to their lands. In addition, the IP law

has not yet had the benefit of a decree of application although it is already six years old.

DRC, Senegal and Liberia currently offer the poorest protection to community land rights. Senegal's land law (1964) simply removed this type of tenure system from its legal system. A period of six months was granted to customary land rights-holders before the law came into force on 17 June 1964. This was more than 50 years ago, when illiteracy rates were still very high in the country, and when people would have had to overcome cultural, linguistic and financial constraints to register their lands. However, because of the emphasis the law gives to community level governance, in practice many communities continue to distribute rights to land as if a customary regime is still in force (see below). That is, the customary system has simply been redefined as a community based system.

While Liberia is far from the best cases mentioned above, there is room for hope. Indeed, the proposed new land law, yet to be enacted, should provide strong protection for community land rights. We hope to include it as an inspiring case in the next edition of this report.

### ***Customary/community-based rights are interpreted differently***

As mentioned above, Constitutions guarantee the right to 'access' lands. In four of the countries (DRC, Congo Brazzaville except for Indigenous People, Liberia and Senegal), 'access' refers to use (de facto) and to management (under certain conditions). In the others, it goes beyond this and means either possession (Nigeria Burkina Faso, and Congo Brazzaville [for Indigenous Peoples] without any conditions), or property (Ghana and Uganda). In Ghana and Uganda, customary landholders do not need to obtain titles to be recognized as landowners. This is what their laws say. In practice, this is not the case. Formal adjudication, mapping of lands and registration of rights, including their conversion to a state-defined form (Ghana), is required in order for community landholders to secure their rights. While Uganda's Land Act does not make getting a certificate mandatory, the 'sensitization' and government support to customary landowners is all about mapping of lands and registration of land rights. The procedures are expensive and complex, and depend upon the state to be launched.

### **Often only developed lands in rural areas can be titled**

Registration is often attached to productivity of the land in Africa's laws. Forest or savannah are not to remain as such, but must be transformed for human use in order to prove one's rights over it. Traditional ways of appropriating the land, through which a community can collect useful resources without clearing, are not fully considered. A main exception among our pilot countries is Burkina Faso, where all types of rights under Land Charters can be converted to registered land through specific procedures. Another exception is Uganda. Its certificate of customary ownership is stronger than the Land Charters in that it allows communities to define the type and extent of rights claimed by communities, and accepts locally defined rights as property rights, equivalent to rights obtained under non-customary systems. Ugandan communities may also identify shared lands and establish Communal Land Associations in which to vest ownership and management.



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*Economic productivity is privileged over other land uses, Liberia*

However, while the certificate secures ownership, obtaining it is subject to the approval of a District Land Board, a remote local land administration that can approve or reject/change the application. In reality, Ugandan communities that have obtained such certificates up to now have had to work with external development partners as they were unable to complete the process on their own.

### **Registration is a main topic of land laws even where it is not compulsory**

Most land laws in our pilot countries devote a lot of space to procedures for formalization of rights. In Uganda, obtaining a certificate is not compulsory. Officials and experts who were met during this assessment argued that it is not feasible in today's world not to pursue documentation. To do so is to weaken those rights, as they will never compare equally with formal rights in the eyes of citizens and governments, no matter what the law says. Migrations, the rise of individualism, the rise of investments that are increasingly greedy for lands etc. are specific risks to customary lands, and can only be addressed by legal provisions with stronger, yet culturally adapted, modes of securing rights.

## **3. What other related rights exist ...**

The two other major laws, beside land laws, which have a bearing on community land rights are related to forest and agriculture. In all eight countries, people have rights to use forest resources under conditions set by forest-related laws. DRC and Republic of Congo Brazzaville have put in place different mechanisms to enable more community control on land: community forestry in DRC, community development area in Republic of Congo Brazzaville, along with use rights recognized in all forest areas. In Liberia, the Community Rights Law in regard to Forests provides recognition of community forest areas. But none of these mechanisms and rights is actually aligned with customary rights. These are newly invented rights that poorly reflect customary arrangements. Most African communities see themselves as the owners of local forested lands, on a collective basis. The forest laws of some other African countries not reviewed in the Index pilot provide directly for communities to be acknowledged as owners of valuable forests (e.g. Tanzania, Mozambique, Namibia and South Africa). So none of these pilot cases offer what can be considered as the model in terms of securing forest lands.

Agriculture laws better reveal the need for ‘productivity’ to demonstrate one’s rights over lands. All legal frameworks consider farmed lands as individual property for the farmer, with the condition for Senegal, Republic of Congo Brazzaville, DRC, Uganda and Liberia, that this land is properly demarcated and registered following the legal provisions.



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*Farmlands are overall better protected than other types of lands, Kasai Oriental -DRC*

Access, use and management rights are the most common ones found in different laws in favor of local communities. Often confused with customary land rights (Republic of Congo Brazzaville), these rights are actually many steps behind ownership customarily claimed by those communities. .

#### 4. ...and who are the rights-holders?

Land-related laws recognize two main rights-holders, individuals and communities, except in Uganda which considers family land rights but deems them to be represent-

ed by the ‘head of family’. Individuals have priority in five of the eight countries; the exceptions are Ghana, Uganda and Burkina Faso. Individual rights are supported by various mechanisms, including two complementary ones: primacy of private property and judicial personality to individuals. The term ‘property’ in all the countries piloted does not reflect local reality. People always have complex links and relationships to lands, and among themselves for land management. Customary arrangements therefore imply various levels of rights including holding land in trust, access, use, management, exclusion and alienation. Customary norms also provide amply for a tract of land to be owned by an individual, a family, a clan or a community or sub-groups of the community, and sometimes members of several communities sharing remoter land areas. These arrangements go beyond the protection of possession acknowledged in the laws of Burkina Faso, Ghana and Uganda. Burkina’s Land Charter, if well organized, could be the only mechanism within the eight countries to actually capture this complexity of customary land tenure systems. Uganda’s provision for communities to set up Communal Land Associations to cover shared lands by community members (e.g. forests or rangelands) is also helpful, though so far those associations are still encountering lack of national support so that few if any have actually been formally registered.

Individualized property, notably through land titling, appears to be the ideal to reach in the eight countries, including Burkina Faso. Community property is an option, rather than the main route legally promoted for land security.

Most missing is the link between individuals and the community: the family. It is obvious that the family is often the primary landowning and management unit, even in the context where communities have a strong role to play. Communities play a regulatory role while families are actors of the management. Interestingly, with the exception of Uganda, even in countries with stronger protection of community land rights, the laws make no direct reference to family lands or family land rights. In these contexts, it is assumed that by protecting communities, families are protected, although in reality changing social dynamics mean that this may not be the case. Or it is assumed as was the case in the past, that if given titles, individual heads of households would protect the interests of spouses and children.

## 5. Specific protection for specific groups

The approach which considers only individuals and communities also leaves aside specific social groups. Three major groups are virtually absent in all the laws: youth, migrants and Indigenous Peoples. Only the Republic of Congo Brazzaville has made special provisions to support this last group by adopting in 2011 a law entirely devoted to their promotion and protection, including the protection of their land rights. Not all pilot countries accept that Indigenous Peoples exist in their populations or if they exist, that they should have focused treatment (e.g. Nigeria). Indigenous Peoples exist in many forested areas of DRC but have received no formal recognition and no assistance in securing traditional land areas.

Migrants and youth are totally absent in the land laws. In a context where the number of young people is growing very fast, they already constitute a unique force. If land laws made provisions for holding land in trust, the youth would be catered for; although this is the main principle of customary land tenure, the state laws completely ignore this and through this also undermine customary traditions of ensuring there is enough land for younger generations, often sent to town to get jobs to earn money for the family in the village. All the laws contain the principle of equal rights to lands for both men and women, but there are no legal instructions designed to reverse the reality of male-dominated land management.



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*Women highly depend on land for domestic needs, Senegal*

## 6. Protecting customary land rights by registration

The key to ensuring full property in Africa, which is full protection of land rights, is still a freehold land title, which is an old form of absolute ownership in Europe, imported into Africa's land laws, and increasingly enjoyed by elites. In theory majority customary land rights can be secured by extinguishing customary rights in favour of a freehold or similar absolute land entitlement. In practice there are a range of cultural, geographic, financial and technical barriers that make obtaining such titles difficult if not impossible, and such conversions can also be counterproductive in terms of community land rights security. These include:

- Freehold or similar forms of absolute forms of ownership as imported from Europe are too simple to encompass the full variety of customary land tenure forms. It is now well established that community land rights are not simple, and are rarely considered to be property rights as perceived by governments and the law. These still tend to view 'property' as meaning only these imported forms of landholding. There is always a huge variety of types of rights, with different rights-holders and different responsibilities, often on the same land at the same time. This is what is conventionally termed the bundle of rights approach including access, use, management, exclusion and alienation rights, from the weakest to the strongest. Many people and many governments assume that property can only exist if it is saleable, vested in an individual, and exclusive. Fixed individualized land titles therefore often completely contradict customary arrangements. In Congo Brazzaville, DRC and elsewhere, there are many cases of neighboring communities with differentiated rights over the same forest

lands. Therefore a fixed land title for a single individual or even a single community over its land does not always reflect the complexity of the situation. This has been well understood in Burkina Faso where Community Land Charters have been introduced. The Land Charter is an arrangement between different rights-holders on the one side and the state on the other

side. It documents their rights and defines how these rights are exercised. While it allows alienation under certain circumstances, it can still be contested against a land title which is unassailable.



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Land Inspection exercise, Uganda

- Converting access and use and possession rights into property rights is impossible in certain contexts. The laws in Senegal, Liberia, Congo Brazzaville, DRC and Nigeria do not have such provisions. Land titles can be requested by users with demonstrated traces of their conversion of the land, from 'intact' to 'humanized' areas. This generally implies proving the existence of farmlands, houses or other goods that have denatured the land. In reality, local and indigenous communities have other modes of using, owning and interacting with land which go

far beyond housing and farming. Forest peoples of Congo Brazzaville and DRC transform only small portions of their lands, the rest being used for hunting, fishing and gathering, activities which leave almost no trace on nature. Therefore in those countries only a certain form of eroded customary land rights can be registered. In Uganda, Ghana and Burkina Faso such conversion is possible, but only after very long and complex procedures that often require communities to reduce some of their lands. Interestingly, some of the land laws like Ghana's and Uganda's have allowed conversion for decades, yet none of these countries can present a single case of community property title.

- Procedures are complex and cumbersome. Besides the cultural distance mentioned above, technical, financial and geographic obstacles considerably limit access to land registration. A paper-based system may not be practical in countries where illiteracy rates for people between 25 and 60 years old can be very high. In Nigeria, Liberia, Burkina Faso and Senegal, the illiteracy rate is above 50%, and this figure does not reflect rural areas with higher illiteracy rates. Beyond the ability to read, the problem is the technicality of the entire system and its jargon which is inaccessible to rural populations. In none of the countries have the procedures or laws been translated into local or simplified/common languages. Populations also mention the costs of the procedures for titling land which they believe they own.
- There is also the problem of decentralized administration for titling lands often being far from the villages, and the fact that local institutions play a very limited role in the registration process. Populations wanting to register their land often have to make long trips to large towns they have never been to before. In Ghana Customary Lands Secretariats provide easy means of documentation of land transactions, but are not land registries. In fact, our Ghana team reported that there is still no legal means through which customary rights can be registered in the same way that freehold or leasehold rights can be registered. The Community Land Committees that in Uganda are meant to support the registration process are poorly functional.
- However, the main structural problem in Ghana, Burkina Faso and Uganda is their non-adapted national registries which so far only allow non-customary types of titles to be registered.

In Uganda, this is not a legal problem but a failure to apply the law as instructed. Although the land law was enacted nearly 20 years ago (1998) the District Land Boards are often still not geared to issue and register customary certificates and no provision has been made for Communal Land Associations to register collective property. On the one side, the laws provide for community lands to be titled and registered, and on the other, the central registration system has not been fully developed to permit such registration. This is ultimately a central cause of the absence of a single case of registered community land in both countries. Clearly, as none of the other countries have provisions on such conversion, one cannot expect their land registries to be adapted to community land rights.

- A main development in other parts of Africa is to enable communities to secure a collective title over all their land area and then decide themselves of how rights are allocated within those areas. In addition (like Uganda) the right need not be converted into a freehold or other non-local form of entitlement in order to be registered. This is for example, how it works in Tanzania and Kenya. Only one of our pilot countries, Liberia, has a similar plan in place. This is pledged in its national land policy. The Land Rights Law was drafted several years ago to give legal force to this policy. Rural Liberians have faced great difficulty in getting this important law enacted. In the meantime, our Liberian team reported that rural land rights are under great threat from state allocations of parts of their land.

These barriers indicate how inadequate national laws are when it comes to rural land management. The root cause is the use of the same procedures in both urban and rural areas. Burkina Faso, Uganda and Ghana are the only countries with specific procedures for rural areas.

## 7. Decisions on community lands

### *Consent prior to formal land takings does not exist*

The analysis here reveals a contradictory trend: some of the countries with the poorest recognition of communities' land rights provide rights to community 'consent' prior to investments on their customary lands. Those countries are Congo Brazzaville (for Indigenous Peoples only), DRC and Senegal. In each of these, the law states that local communities should be consulted before any of their land is taken, but consent here takes different forms, and is in no way protective. In practice, it is more about informing in order to avoid conflicts, than actually seeking their approval or refusal before taking their land. More importantly, the law is not clear on the consultation process: there is no clear indication about how communities should be informed (type of information to share, language used to communicate, representativeness of communities in decision-making, how much time is provided, etc.), which leaves room for large variations between consultation processes. Moreover, it is not clear in any law whether the lack of consultation can constitute a blocking factor for a project upon community lands. The strongest provision for consent is in Congo Brazzaville. However, the law is just a piece of paper after six years, as the state has not issued any decree to bring the law into force.

Internal arrangements to protect collective lands are also weak

A different issue arises in Uganda. The law allows registration of communal land associations to be in the name of the association and the names of three to nine individuals elected as managers of the association. Those representatives then have rights to sell land on behalf of the community landowners. This is fraught with danger for the majority of community members. This arrangement seems to have been based on the Land (Group Representatives) Act of neighbouring Kenya, which has now been repealed by the Community Land Act, 2016, and which requires two thirds of all adult community members to make decisions to dispose of any of their shared lands.

In other countries, including those with stronger recognition of community land right rights, there is no

provision for informed consent prior to land taking. Here too there are various suggestions about consultation, but little precision on the consultation process. The case of Burkina Faso is also interesting as it reveals the distinction between possession rights and property rights. Just as in all other Francophone laws, this law still bears remnants of colonial land law which establishes the state as the

main land owner. Communities have physical possession and this is framed within the Land Charter; but this title is subject to state ownership of all the land. This encourages the Government to feel free to take the land. The situation is made worse by the current lack of implementing texts and institutions (see section below) for the 2009 Land Act.



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Infrastructure project on community land, Burkina Faso

### *Provisions for compulsory acquisition for public purposes are unjust*

A major instrument often used against communities' decisions on their lands is the Public Interest (or public purpose in some countries) Declaration (PID), whereby the relevant administration can temporarily or permanently suspend community rights

over land designated for projects of national interest. Like every other country in Africa, the eight countries reviewed have this mechanism, with slight variations. However, some of the key features include the fact that the purpose of the consultation process is not to request consent but rather to accompany the project; compensation is less than the losses; the project put in place does not necessarily benefit local communities (examples of hydro-electric dams that are built on community lands and provide no energy to the same communities are quite common in Africa, e.g. in Republic of Congo Brazzaville). In Uganda, the government has gone as far as trying, so far unsuccessfully, to consider any 'investment' as in the public interest. The PID is a reminder that wherever communities have the impression that their rights are protected and secured, this protection simply means: 'as far as there is no state strategic project, communities lawfully occupy their customary lands'. In reality, communities can often not even withstand purely private projects. Most notably, rights for mining projects are generally considered as surpassing all other rights, including other commercial rights. In this context, community rights are simply of no importance. This is made worse by the absence of legal provisions allowing communities to negotiate and refuse compensation in case of dispossession for these strategic projects.

### *Weak community capacity contributes to land losses*

An additional obstacle is community capacity. All the countries have specific experiences of decentralization, with the overall objective of improving democracy by transferring power, resources and capacities through central administrative units to more local levels. Decentralization in the land sector entails the state ceding some of their prerogatives in land management to local institutions, but also all necessary capacities for proper management of those lands. What, however, are 'local institutions'?

Even though community land rights are poorly recognized in Senegal, this country is often held up as one of the best examples of decentralization in Francophone Africa. Yet decentralization remains at the district level (the lowest state unit), and does not necessarily mean more land rights for communities. In Uganda, decentralization is also significant only at district council level although informal committees exist at lower levels. The decentralized institutions are mainly state institutions and not

traditional institutions which have the mandate to manage customary land. An exception is Ghana, where chiefs exercise significant power over land allocation, alienation. However Customary Land Secretariats and Land Management Committees are modern forms of customary institutions, dealing with land matters over local chiefdoms, although, as recorded above, they have no role as formal registries of customary rights. Moreover, they are not at the community level for easy access.

Decentralization could have been the best chance not only for local communities to have their customary rights recognized, but also local institutions if these were traditional institutions. However, by restricting decentralization to administrative units, it doubly deprives communities: there is lack of power and lack of capacity. In reality, local institutions are very poor in all the countries (Burkina Faso and DRC being the prominent cases), and therefore local arrangements coexist with the law. Even when the law diminishes the margin of the dualism of land tenure systems, the institutions enlarge this margin.



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*Strong Agroforestry initiatives can be locally driven, Kasai Oriental -DRC*

## 8. The existence and functioning of institutions

### *Land governance institutions are important but do not always deliver*

While some laws provide a certain protection to community land rights, implementation is another matter. The first barrier is often the existence and functioning of institutions, while the correlating barrier is clear respect of the law by institutions and officials in charge of its enforcement.

Land is such an important topic that seven of the eight countries have entire ministries devoted to its management. The exception is Burkina Faso, where responsibility for land management is under the Ministry of Agriculture. In other cases, land is either largely associated with urban development (Uganda, Nigeria), natural resources (Liberia and Ghana), or the national domain (Senegal, Congo Brazzaville and DRC).

One key institution is the land commission, which is either a permanent body for land management (in Uganda, Burkina Faso and Ghana) or temporary for land reform (Liberia, DRC and Senegal). The Land Commissions of Liberia, Burkina Faso and Ghana have driven their respective land reform processes. Liberia's Land Commission is now a permanent institution in charge of land administration. In the context of law reform, the commissions create multi-stakeholder sub-commissions in charge of the reform. While these bodies still report to the administration, their establishment still requires the government to ensure a certain level of participation (see below). In general, land commissions can be interpreted as evidence of the will to dissociate operational and technical entities (commissions) from heavier and more politicized bodies (ministries, led by cabinet ministers). However, Land Commissions can also be self-serving and do not always speed up support for devolutionary institutional developments.

### ***Devolution of land governance institutions is weak***

The existence of central institutions is not necessarily mirrored at the local level. On the one side, local community land institutions have very little power, capacities and resources, and on the other side, the recognized land authorities, decentralized administration often takes place far from community lands.

In Burkina Faso, which offers the best example of decentralization, some key land institutions provided by the 2009 law are still not in place, including the village land commission and the rural land service. Both institutions are expected to ease the link between communities and the state: yet this have been awaited for the past seven years, and in the meantime, land management is being done according to the rules of the pre-reform era, with poor connections with the local level. In other words, the good legal provisions mentioned above from Burkina Faso have no chance of being implemented at the moment, due to the lack of the relevant institutions.



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*Community land proceedings, Senegal*

### ***Gaps between law and practice in land administration are significant***

All the countries face the same gap between the law (which is still often very restrictive when it comes to community land rights) and practice. In general, commissions are expected to be more efficient than the ministries and demonstrate good governance practices. In reality, since they are managed by civil servants, they present all the usual administrative obstacles: cumbersome procedures, corruption, lack of transparency, lack of capacity, and poor efficiency overall. This partly explains the inability of all countries to provide accurate data on land dynamics: amount and surface area of lands under the management or property of respective groups including the state itself, records of land transactions, archives on the land sector, etc.

### ***Traditional institutions are not always the right path to devolved land decision-making***

It is crucial to understand the way that community land institutions work under the influence of state law, as it reveals the failure of systems where land users and customary land owners are very far from land holders according to state law. Observations from the field in the eight countries show that irregularities take place because local institutions are torn between state law and customary land tenure, selfishly choosing to use one or another according to their interests. It is difficult for communities to demand accountability in institutions empowered by the state with an authority over land that is impossible for the layman to understand. In Ghana for example, some traditional rulers are said to be among the biggest land grabbers, using their status of 'adjuncts' of the Administration to sell lands, often misconstruing their 'fiduciary role' (acting therefore against customs that prohibit the alienation of community lands), and claiming themselves to be the land owners. At the same time, the administration finds it difficult to touch them, as it considers them to be representatives of their communities, and politicians need their support particularly in elections.

This confusion is maintained because it benefits not only the traditional rulers, but also community elites, some state officials and investors. Using their good knowledge of the law, there are cases where powerful community leaders or chiefs have registered large parts of their village lands in their own names. In the north of Congo Brazzaville, for example, a case documented by local ACRN members, demonstrates the precariousness and vulnerability of the communities in the face of their elites.

Communities testified to a case where a minister used a nominee to buy lands of two villages at a very cheap price (using both financial arguments and threats). The land was later conceded by the state to an agro-industrial company. While the entire transaction respected neither traditional rules nor legal procedures, it was validated, leading to massive losses for the rural communities.

The poor application of the land law is not necessarily at the expense of local institutions. In certain cases, it simply allows them to effectively cohabit with the official land institutions, in a form of encouraged 'illegality'. Nigeria and Senegal offer the best illustrations here. In Nigeria, traditional institutions are encouraged to make decisions on internal cases. While this is common when the case is between two parties that have no land title, even cases between parties with land titles are referred at their level before reaching the court, thereby extending their power. In Senegal, where the law officially repeals any form of customary land rights, the decentralization process has seen the reconsideration of traditional institutions as part of the key actors consulted for communal land use planning.

Is this an encouraging sign, or just complacency? Experiences from the eight countries suggest the latter. State institutions are either too remote or simply not adapted to rule over customary matters. Efforts to replace customary land arrangements by imported land rules since the colonial period have proved partly elusive. They have only succeeded in creating the confusion described above. There is a mixture of customary land rights and state land arrangements. As a consequence, none of the respective land institutions can stand alone to manage community lands. Titling land is never enough, especially when done by an elite. At the same time, external threats to community lands, especially from the state, make it impossible for local institutions to withstand the pressure on their own. The new land reforms promise to better consider this win-win cohabitation between land tenure systems, including by enabling the cohabitation between different institutions (Burkina Faso, Liberia, Ghana, DRC, and Senegal). However, there is still reluctance to enact legislation that takes account of the current situation, therefore enabling the persistence of conflicts that could have otherwise easily avoided.

## 9. Land conflict resolution

The confusion between the statutory law and customary land arrangements and the poor land institutions creates a breeding ground for uncertainty and vulnerability for community land rights, as well as frustration and conflict. Over the past ten years, three major types of land conflicts have become common in the eight countries:

- Intra-family and inner-community conflicts, mainly between communities and their traditional rulers. As explained above, these are partly driven by the confusion regarding the land system. Traditional authorities use the confusion as a pretext to grab lands from communities, and strong members of families grab land from women and children. In Ghana, chiefs in the Ashanti, Brong Ahafo, Greater Accra and other regions are alleged to have sold their village land including cemeteries. In Nigeria and Congo Brazzaville, cases of traditional rulers accepting bribes to cede community lands to major investors are quite common. This creates unprecedented conflicts, going beyond just the question of land, as it affects the entire status of the chieftaincy and the existence of the community. These inner-community conflicts can be extended to inter-community conflicts. DRC and Ghana have had much experience of such conflicts. In DRC, one of the latest conflicts was between Enyele village and Monzaya village, over the control of ponds rich in fish. This conflict which escalated in 2009 and 2010 caused the death of hundreds of civilians and massive movements to Congo Brazzaville.
- Conflicts against local or external national elites, as in the case of north Congo Brazzaville, where a ministry has reportedly bought large community areas in order to be compensated for the installation of a large agro-industrial company. This is simply one example of a phenomenon common in the region. In Senegal, a community from Diokoul had their land

grabbed by political and religious elites, and people were imprisoned when they asked for their land to be returned. According to testimonies from communities in Senegal, a former President of the Republic encouraged land grabbing by elites, and he himself took a large portion of community lands. The argument was that those elites would invest better in the land. The reality is that for as long as only registered lands are regarded as lawfully owned, community lands will be considered vacant of owners and free to take. National elites mastering the procedures can therefore easily acquire those lands.

- Conflicts against public and private large-scale investors, especially in Nigeria, which has experienced major conflicts between communities and private companies in oil-rich areas, particularly around the Niger Delta. These conflicts have resulted in countless deaths, including high-profile activists. Liberia recently drew international attention for ceding 4% of its national territory to two major oil palm companies. This resulted in unprecedented conflicts as communities resisted these takings. In DRC, Ghana, Senegal and Uganda, similar conflicts have also been experienced in recent years. In Uganda, a famous case concerned the Amuru district, where the government wanted to take large chunks of disputed community land to give to the Madhvani company to grow sugar cane. Female protesters opposed this by undressing in front of the then Minister for Lands. With policies encouraging large-scale investments, it is clear that these conflicts will continue to grow.

Land conflicts are inevitable. Conflict is a constant phenomenon in society as it creates dynamics to adjust cultural and social elements of a society. Community institutions play a role in land conflict resolution, especially for within-community conflicts (including intra-family cases). But they are helpless in other forms of conflicts. In all countries, various mechanisms exist. And despite listing them all here, our priority was to check if, with all these conflicts, a single case of land conflict has been managed over the ten years in favor of communities. Of course, the types of conflict most relevant to such a question are those between communities and external actors: elites and private/public investors.

## 10. Decision-making in law design

With the exception of Nigeria – whose parliament rejected President Jonathan’s request to launch the reform of the 1978 land law – all countries are either currently conducting a land law reform or have undertaken it recently (in the past ten years):

- DRC: law reform was officially engaged in 2012, with the land reform commission being established in 2013, but it is not fully functional due to financial and political obstacles.
- Ghana: the Land Administration Project (LAP) is a reform project launched in 2003, to run for 25 years. The LAP was set to implement the National Land Policy adopted in 1999. Other major texts are still expected. A new consolidated land law is still in draft in 2016. A new Land Use and Spatial Planning law has been passed in 2016.
- Uganda: land reform began with the Constitution in 1995 and the Land Act, 1998. The new National Land Policy was adopted in February 2013.
- Senegal: after many attempts (and cancellations), the most recent land reform process started in 2012 with the creation of National Commission for Land Reform. The new land law is still awaited, with no final decision on its promulgation.
- Republic of Congo Brazzaville: the agricultural land law was adopted in 2008.
- Burkina Faso: the new land law era started in 2007 with the adoption of the National Rural Land Securing Policy, Land Law in 2009 and Agrarian and Land Reorganization in 2012.

Various implementing texts are still to be enacted.

- Liberia: law reform started in 2009, with the approval of a Land Rights Policy the same year. The Land Rights Act of 2014 is yet to be enacted.

Overall, these reform processes have witnessed significant advances compared to previous experiences. Those include:

- *Stronger participation of other stakeholders.* Civil society organizations have taken part in all these processes. Liberia has gone as far as inviting local communities to sit directly at the negotiating table, which is unique in contexts where their opinions are generally conveyed by civil society and not by themselves. In DRC, the land commission was previously chaired by a civil society veteran, making it less dependent on the ministry in charge of land affairs. This commission now has two civil society delegates, though concerns have been raised about their selection process.
- *Longer process enabling deeper analysis of complex issues.* In all countries, the timescale for the process goes from medium (five to ten years in Burkina Faso, Uganda and Republic of Congo Brazzaville) to very long (25 years in Ghana). It appears that the need for inclusion is the first explanation for those long processes. But another reason is that countries have understood the complexity of land matters, in spite of the fact that in some of those countries, the reform was to serve as a guarantee for potential investors.
- *Better consideration of community land rights and national land policies.* Significant improvements overall are observable in Burkina Faso and which adopted a fully consultative approach to land policy and law making. The pioneering Uganda Land Act, 1998, opened important ways forward in Africa for majority rural community land holders by formally recognizing customary land rights as equal to freehold and leasehold rights. The draft land bills in Liberia and Ghana also provide major changes, protecting community ownership of their customary lands. However, validation is still to occur in Ghana and parliament is yet to enact the Land Rights Bill in Liberia. Liberia's land law was initially going to be enacted in 2014. Civil society organizations are concerned that the delay may enable more unjust land allocations under the current land law, or to remove good provisions they have fought for. They remain cautious and vigilant.



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Community solution finding process on land matters, Ghana

However, those reform processes are not succeeding in solving all the issues that communities face, and many of their recommendations are yet to be fully taken into account. In Burkina Faso, for example, only possession rights have been secured, while property rights were expected. In Congo Brazzaville, only Indigenous Peoples have recognition of their ancestral land rights; other communities are mere users and have to go through complex procedures to obtain some security over their lands. The case of DRC is even more uncertain. The process is very slow, notably due to the fact that most of the process depends on external financial support. The country is too large (2.5 million square kilometers) to be able to support a viable public consultation initiative.

Popular participation in the design of the laws, and their implementation, is crucial. The small improvements described above are the product of intense negotiations. All the countries have administration-led processes, including DRC where the land commission in charge of the reform was previously chaired by a civil society member. In those cases, the full consideration of communities and their traditional leaders, and civil society's recommendations, depend heavily on pressure from state players and also from external donors (DRC).

Communities are engaged in a constant struggle to get better laws and to have those laws implemented. The core issue is to secure their most essential asset: the land. Contexts vary from country to country. Some, like Burkina Faso, Uganda and Ghana, provide some security to community land rights, while others like Senegal directly repeal the simple concept of community based land arrangements. In between, DRC, Congo Brazzaville, Nigeria and Liberia systematically recognize access and use rights, and conditionally admit certain forms of management rights, for communities. Recent reforms conducted or still underway have witnessed more openness from decision-makers, allowing CSOs and communities to engage in unprecedented negotiations. However, the scope of this participation remains very narrow, and the subsequent influence of the reforms by communities is very limited. But experience over the past ten years teaches us that this is not a surprise. A variety of root causes have led us to this situation, and reversing it will require a better understanding of those causes.



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Community land, Bagré, Burkina Faso

## IV. Root causes: why are community land rights so poorly protected?

This section draws on the perception of civil society organizations in the eight countries. One key finding is that there are many causes of the current poor protection and security provided for community lands rights. Here we list seven of the most significant ones, noting that they are not exhaustive.

### 1. Sovereignty and market: how customary land rights became the poor relation of the new Africa.

In the 60s and 70s, many newly independent African countries have maintained colonial arrangements, with the state replacing the colonial power. Land is considered to be a precious resource both for economic growth and for the income of the still fragile sovereign nation, irrespective of political orientation. Nationalization has played a role in many states in diminishing community lands and rights. The socialist state of Senegal under Senghor considered land as a tool both for national unity and for economic development. Envisaging a system closer to the negro-African traditional system where land is indivisible, non-transferable and belongs to a superior communal entity (the nation), the 1964 law considered customary land rights as incentives to division and therefore abrogated them. However, various analysts have seen the negro-African explanation as a mere pretense precisely because even during Senghor's mandate, former customary lands were used for national economic purposes without consulting local communities..

Nigeria's first post-independence land reform (1978) dealt with two major obstacles to the country's economic development. On the one hand, the traditional land tenure system that existed at the time considered land not as a financial asset (making it inalienable) but rather as a cultural and physical asset. On the other hand, incoherence between land tenure systems in the south and the north of the country enabled various irregularities (and a high level of speculation) in land transactions. This

made it impossible for the Federal Military Government to give compensation in order to achieve projects in their National Development Plan 1975–80. With regard to community land rights, a major innovation of the 1978 reform was the vesting in the local government of the authority to deliver certificates of customary land right of occupancy. In theory, traditional authorities are therefore absorbed by local government. Customary land property rights were converted into lease rights to be granted by local government. In reality, this led to many conflicts between this local government and traditional institutions.

Uganda's first post-independence land law (1975) shares similarities with Nigeria and Senegal inasmuch as it also significantly repealed traditional land rights, vesting all ownership and authority in the state. While the 1995 law came as a relief with strong recognition of customary ownership (see above), many civil society organizations have complained that the economy-centered approach, where individual land titles make land markets efficient and booming, remains central to the country's land-related policies and actions. In practice, the acquisition of a certificate of customary ownership is conditional on a demonstrated use of the land. The valid uses are notably housing and agriculture.

Burkina Faso's revolutionary regime of Thomas Sankara (1984–87) also operated according to the same idea that land is before anything an economic resource, and that – for it to best contribute to economic growth – it must be owned by or at least be under the direct control of the state, from the central to the local levels. Congo Brazzaville and DRC believe – and Ghana and Liberia believed previously – that sovereignty and economic benefits from land can only be secured through the direct and firm control of the state. It is for this reason, for example, that all naturally occurring (non-planted) timber trees in Ghana are vested in a state and managed by its institution. The bulk of revenue from such trees, when harvested, goes to State institutions while the rest goes to District Assemblies and Chiefs. These latter recipients are hardly transparent or accountable on how they use the royalties. The benefits are usually limited to these institutions rather than extended to the larger community.

## 2. Greed for development and greed for land.

The insecurity of customary land rights is not new for communities and NGOs. However, what is new and damaging to communities is the vogue for land-based investments, based on the idea that big business is necessary for development, and that large-scale investment entails using land, because large companies may pay taxes and/or create jobs. All the eight countries have concluded land deals on more than 8.7 million hectares in the past 15 years, for agricultural projects (food crops, carbon sequestration, timber and fibers, biofuels, etc.). Land demands cover approximately 78 million hectares, with a record demand of 64 million hectares in DRC. Other types of land-based investments (mining, infrastructure projects, logging and conservation) have increased over the past years, though there are no comprehensive data on those. The main concern is not just about what has happened, but about what will happen over the coming years. Indeed, using global marketing strategies, those investments are currently being encouraged in all those countries that deployed such strategies. Liberia's efforts were successful as in 2009 and 2010 the country welcomed two giants in the oil palm sector, ceding them some 4% of its national territory. Ceding these lands led to major contests from communities that saw their lands grabbed with neither proper consultation, nor compensation. The country's efforts did not stop there, since more community lands would have been ceded to another oil palm company in 2014 if there had not been strong community protests. The great majority of these land deals are concluded on rural lands where communities also hold customary rights. In this context, strong community land rights are considered as an obstacle to large-scale investments, and therefore to economic development.

### 3. There is a misconception that development is only possible through large-scale investments.

The scramble for Africa's lands has led to small-scale farmers having their lands diminishing year by year. While data are very limited on small farming, the tendencies are clear. A report by the NGO GRAIN reveals that, in Africa, smallholders have control of only about 20% of farmlands, and these lands are being squeezed by larger investments (for agro-industry, mining, infrastructure, etc.) But at the same time, they are the ones feeding the continent, producing approximately 80% of Africa's food. Two reasons are generally advanced to explain this imbalance: (1) most small farmers produce food crops while larger investors invest in cash crops (biofuels, carbon sinks, timber, rubber etc.); (2) smallholders have higher productivity rates, capable of doubling the productivity of large-scale plantations (this well-documented fact has been called the 'productivity paradox').



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*Forest areas destroyed by economic investments, Ghana*

More advantages of small-scale farming can be found: biodiversity (polyculture farming system), better employment in numbers and quality, social cohesion, maintaining of traditional knowledge and links to land. In spite of these well-known data, we are not surprised that in all eight countries in this report, small farmlands have been taken from communities and handed to larger companies, as laws that weaken community land tenure arrangements persist. Indeed, as long as land reforms are driven by the market, and as long as many African states do not take their responsibilities in supporting local initiatives, these types of damaging contradictions will persist and keep Africa in a vicious circle. Although our country teams did not provide data, it is known that investment in smallholder agriculture still falls well below what is needed.

### 4. Community land interests are being drowned in an ocean of systemic concerns.

Governance in the natural resources sector has been characterized as the Achilles heel of African states. Classic problems include lack of transparency and poor participation of key stakeholders, corruption, embezzlement of funds, weak enforcement of laws and poor policy and sectoral coordination. However, the most fundamental systemic issue is the absence of a national land use plan in all eight countries. Ghana and Congo have spatial development laws, while Uganda and Liberia have national zoning plans. But none of these can respond to the objectives of a land use plan which includes spatial balancing of the development by clear documentation of existing land uses and agreed projections for the future. In none of the countries is the surface area under community tenure system documented. Worse, the state does not have centralized data on registered lands. In this context, only very localized land use planning is conceivable. This is the case in Senegal and Ghana where a few districts are currently experimenting with land use planning initiatives. But those are not necessarily enforceable and can even contravene the law. In Senegal, for example, the district land use plan defines the community land area, whereas the land law repealed customary land rights in 1964. In any case, it is almost impossible to secure community land rights in contexts where a country has not defined clear and spatially oriented development pathways and may not even be capable of doing so.

## 5. Lack of capacity means lack of leverage to demand accountability.

Democracy, multi-party choice, freedom of expression and the right to participation are some of

the concepts trumpeted over the past 25 years. The point is to have citizens at the center of public decision and action. But how can that be achieved in the sector of land management if the citizen is not apt to claim for his/her rights and obligations? The fundamental Latin law principle of 'nemo censetur ignorare legem' ('ignorance of the law is no excuse') should not apply to rural communities, especially when it comes to land matters: not just because of their poor knowledge of the land law, but also because of their lack of understanding of the implication of the national laws on their own community-based land systems. This insufficient knowledge of the law applies equally to the few rights so far provided by those same



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Community capacity building event, Ghana

laws: access to information, access to justice, participation in public action. Indeed, some of these essential aspects are spread among different laws that are never brought to the notice of communities. In none of the eight countries have these laws been translated into local languages, explained or distributed to communities living in very remote areas and who have not access to legal expertise. The law, when some of its elements reach those areas, remains abstract.

In general we have observed some progress over the past ten years in all eight countries. However, the knowledge gap is still wide, and today it appears to be a major threat to customary land rights. Only a small percentage of the community is informed about aspects of the law while others are totally unaware of its key principles. As a consequence, even in countries such as Burkina Faso, Ghana or Uganda, where the law protects customary land tenure arrangements, implementation does not follow as communities cannot demand accountability from decision-makers.. The end result is that those communities are fragile to the same extent in all eight countries irrespective of law provisions. Facing various injustices, those communities more often rely on supporting NGOs where they could have used endogenous human resources.

Beyond the information gap, the second important gap is the inner-community organizational gap to deal with land matters. Apart from the abuses by elites and traditional rulers already described (and also briefly commented on below), this gap is related to the inability of a community to build a unique voice on land management issues. All communities are now at a crossroads between what are dismissively called the 'traditional' and the 'modern' world. These words certainly do not convey any practical reality but can serve to describe the conflicting forces within communities on different sides in all social groups. The confrontations can cover various aspects of land management: rights of respective families, women and youth land rights, rights of migrants, and projected uses of the land. The first step for many NGOs, when supporting a community to claim their rights, is therefore to facilitate a coherent dialogue to enable internal agreements on these important points. But when this agreement is found and a community has secured their land rights, another problem can emerge: they can decide to sell, cede it or not to use it at all.

## 6. Communities may need to be protected against themselves, if their actions may be detrimental to their future.

The market economy has now penetrated to the smallest and most remote community in Africa, along with its inevitable corollary, individualism. What is the meaning of 'community' in places where collective lifestyle is dwindling while the individual is becoming more powerful? People who have gone through education and have joined the elite are very often the ones insisting on obtaining their own individual freehold titled land or pushing the community to request a land title. But even without them, traditional rulers have demonstrated their capacity to dispossess the entire community from their land. Protecting communities from themselves requires working on those drivers of individualism because, while the individual is taking more and more space across the region, about 1 million rural villages continue to exist as communities with collective lands and traditional ruling institutions.

## 7. External traps can also weaken community land tenure system.

Several external drivers can also explain why community land rights are so poorly protected in Africa. We will just mention two here: civil war and climate change. Civil war is not just an impediment to economic development, but also obviously to traditional land arrangements. After the Liberia crisis, traditional arrangements partly collapsed. Some communities were no longer able to find their sacred forests that had been bombed, while others had difficulties ruling their lands because of the huge influx of migrants from other counties. In Burkina Faso, the military coup and the months of political troubles led to the suspension of the implementation of the 2009 land law, including the setting up of local institutions. DRC has also suffers because of war. In the east of the country, it is very unlikely that people are preoccupied about their customary arrangements on land. Their main interest today is to finally have a legitimate peace.

**Climate change** is also now a potential threat to customary land arrangements. In Ghana for example, areas such as the Brong Ahafo Regions which used to produce cocoa are no longer able to do so. Hence there are migrations to the forested Western Region where other communities already hold customary land rights. Flooded lands, drought lands, hungry families moving from their land: this is becoming a common picture in some African countries. While attention is generally given to human disasters, dynamic land changes that may more slowly occur from these effects of climate change are poorly documented.



## V. Conclusion

The story of community land rights Africa is very uneven, with good and less good cases. Uganda and Ghana have demonstrated that they have laws that deserve credit, as they provide a bubble of protection to community land arrangements from their Constitutions to the enabling laws. Those are the only countries that place community tenure systems, even when lands are unregistered, at the same level as freehold land titles. But when it comes to implementing those laws, as with any bubble it can easily burst. In fact in both countries the first obstacle is the lack of relevant institutions, in quantity and quality. Local-level institutions are often inactive, even where they exist. But at the national level as well, the non-alignment of the laws with the national registries and data banks is a central problem. It is good to have laws recognizing community land rights as equal to freehold land titles, but it is even better to allow those community rights to be registered as if they are individual rights, and given the same respect (as Uganda does) and then to follow through with appropriate, localized and easy to access and afford mechanisms for such registration (as Uganda has not yet succeeded in providing despite the law).

Other countries have different levels of good laws. Senegal and Liberia are certainly not examples to follow as their current land laws disregard community-based land systems. While those countries offer different avenues to securing some elements of community rights, through forest titles in Liberia and through decentralization process in Senegal, communities remain beggars over their own lands in those countries. Burkina Faso is the most advanced of the Francophone countries considered in this evaluation, as the law allows communities to possess (though not fully to own) land, and to govern these lands according to their traditional arrangements.

Enforcement of law is also problematic. In Ghana and Senegal, poor enforcement is considered the greatest enemy of community land arrangements. While this often offers loopholes through which communities can see some lands secured, more generally, it threatens land arrangements, and sometimes tramples all over their rights. Weak respect for the law and for customary arrangements, as seen in Congo or Nigeria, are of benefit neither to the state, nor to communities. But the latter are generally more vulnerable and unable to ensure accountability while confronting their own chiefs, elites, investors and the state.

Mechanisms and institutions such as the land charters (Burkina Faso), Community Land Associations (Uganda) and Customary Lands Secretariats (Ghana) are major opportunities to improve tenure security at the most local level, and including communal rights to off-farm lands such as forests and pastures. However, communities are often unaware of the existence of these opportunities or able to use them fully. It is not only the capacity to claim what is provided by the customs, but also to maximize whatever is provided by the law. In countries like Uganda and Ghana, various development projects by partners outside the communities have helped to provide security in some areas, including by facilitating the creation and running of these local institutions. These projects have helped to raise people's awareness of their own laws. Unfortunately, such projects have limited capacity and time, and can achieve very little effect on the bigger picture in the country as a whole, unless followed by governmental action.

Assessing the legal and practical protection of community land rights in Africa also involves analyzing the will and capacities of African governments to ensure such protection. Regarding capacity, it is clear that most governments face significant shortcomings, both financial and technical. Unsurprisingly, they have difficulties enforcing their own laws, even when the texts of these laws can be praised.

But poor capacities cannot explain the entire context. Lack of will certainly plays an important role as well. Many countries are so blinkered by the idea that development can only be achieved with large-scale investments on natural resources, and that such investments would be more secure if land was under state control, that they are reluctant to pass and enforce laws that would give better control to those who actually have the capacity to guarantee the security to investments. We have not found, in this research, any country where communities have resisted development beneficial to them, nor have we come across a case where well-organized communities, with strong capacities including accountability, failed to deliver development when given the means.

Our view is that development cannot be achieved without the people who will benefit from it being party to its decisions and actions. As obvious as this statement appears, it implies taking into account complex sets of principles and practices. So much has already been written on such principles. As ACRN, we have understood through this exercise the value of learning from the others: i.e. to learn from Ghana and Uganda laws regarding protection provided to community land systems, to learn from Burkina Faso regarding the local governance promoted in their law, and to learn from countries outside this assessment where they have adopted progressive paths to land justice and good governance of land affecting community lands.. The eight countries assessed during this pilot initiative cannot provide a full picture of the continent. In different ways, positive legal provisions are operating in Botswana, South Africa, Kenya, Tanzania, Mozambique and Madagascar among others. Those initiatives are translated into people's daily life by the miracle of a combination of factors that we invite other countries to learn from, as it is vital for the future of the continent that her people own what defines their identity and can secure them a future: land.



## Post-face

### Moving forward: how can we use the findings of the Index?

Any ACRN member would love to have a clear solution to all the issues described in this report, and communities even more so. The pilots in Liberia, Nigeria, Senegal, Congo Brazzaville, DRC, Ghana, Burkina Faso and Uganda confirmed our concerns that community land rights are under threat in many African countries. But it also demonstrated that there are possibilities for stronger community land rights. Examples of good practices from one country to another are a vibrant testimony that our demands are not unrealistic. Of course, solutions will vary from context to another with the principle of learning from what is working well. Unfortunately, none of the eight countries can be labeled as perfect, and none can be labeled as evil: there is rather a difference in levels of protection of community land rights. Piloting allowed us to see how important is the task of civil society organizations in accompanying if not instilling positive reforms. Therefore the question of what can be done about the protection of community land rights goes to fellow non-governmental organizations. This section is about what we think we can do, first as ACRN, second, as members of a large family of civil society organizations, and third and more importantly as community partners, collaborators and supporters.

### ACRN's internal plans about the protection of community land rights

ACRN's strategy to act upon community land issues is based on lessons we gathered from the piloting of the Index in our eight pilot countries, and from which we have derived four action points.

#### 1. To use the Index as an empowering tool for NGOs in Africa.

Some ACRN members with experience of successfully advocating for community land rights discovered aspects of their national laws for the first time during the assessment. Land-related laws are often very complex and one may need to know where to dig in order to obtain the right information. The indicators helped them focus on the key questions and to know where to look. The Index is designed to fit into the general legal framework. ACRN plans to publish it in order to allow more

organizations across the continent to use this tool. Many African NGOs are more familiar with field practice, and therefore have little confidence to deal with legal tools.

## **2. To support Index users in order to guarantee stronger data quality.**

As a result of the relatively limited experience with land-related laws, the quality of legal assessment was mixed in piloting. We had confirmation that whether one has strong legal experience or not, the Index user may need clear guidance in order to optimally use the Index and in a way that eases comparisons from one country to another possible. Two main mechanisms are now in place to strengthen the evaluation process: (1) more guidance is given for each indicator in the way of explanation and examples; and (2) there is close collaboration with national experts. Fortunately, during the pilot exercise, national assessors consulted a broad spectrum of stakeholders (see the section on Methodology, above). Future assessments will need funds to commission independent assessors under the management of ACRN members in those countries

## **3. To maintain the key principles of the Index while allowing flexibility.**

The pilot confirmed that this Index should not be one-size-fits-all. Assessors provided comments, suggestions for change, and removed or made additions to various indicators. Some of the suggested additions include more indicators on: women's right to land, the role of traditional authorities/institutions in regulating community lands, rights of migrants, rights of pastoralists, effects of large-scale investments (mining, logging, infrastructures, etc.) on family and community land rights, access to information on all land matters, economic options for community lands. Many other suggestions were made by ACRN. The new Index incorporates these suggestions as can be seen in the appendices of this report.

## **4. To name and praise.**

Discussions on the ten points presented above as the result of country analyses confirmed that our demands are not impossible to achieve. We clearly saw that countries like Ghana, Uganda and Burkina Faso have taken the lead in this. But countries not involved in this pilot have done even more with regard to recognizing and protecting community land rights. The political context in those countries is obviously very different from one to another, but communities' land-related claims have proved to be the same: they want the full recognition and protection of their customary land rights as equal to property rights. Only then can they achieve their cultural and livelihood needs on a reliable basis. Our understanding is that comparisons should not just dwell on the negatives; it is important to share experiences in order to learn what works well, to reflect on how to shape it in our respective national contexts and to strategize on how to link our efforts to achieve positive change. The Index has confirmed that need, and ACRN members are now even keener to create networks among themselves and with other groups to share positive experiences from all of our countries. We have dubbed this process '*Naming and Praising*'.

## **How and why to engage more NGOs in this effort**

The Index is a political tool, although it strongly values a scientific approach as well. It is important not just to collect good data, but also to use it to influence what we see as poor national policies. To do so, ACRN envisages two main activities.

### **1. Collaborating at the national level to validate data and carry out joint campaigns.**

Our data collection methodology has included meetings with key country land experts including communities, NGOs, state administration and researchers. Data analysis and validation

methodology include sharing and discussing the data with the same actors. Two approaches are foreseen here: (a) online consultation consisting of sharing national results and collect reviews through a list of guiding questions; and (b) workshops at national and local levels with all those actors. The expected output of this collaborative process is to position the Index at the center of public debate on land matters. This is an urgent matter as the context in many ACRN countries is currently marked by a fractious debate on land questions. For example in Cameroon, an ACRN country not part of the pilot, we have counted 16 proposals for land law reform by various groups of civil society actors. Some of these proposals significantly differ even in their analysis of the legal and practical protection. Of course this is caused by ideological differences, but more important is the lack of coherent appraisal of the context of customary land rights in the country.

## 2. Engaging African civil society.

ACRN is currently reaching out to new members. NGOs exist in every African country and there is huge potential to cover the entire region in due course. Formal contacts with non-ACRN organizations have confirmed interest in the network. The process strongly depends on our internal rigour but remains feasible. Our objective is that the Index is used for assessment in 54 African countries within the next decade. This could then help to shape a common position to engage with the African Union as well as other regional bodies active on land matters. We also aim to be directly useful to monitoring of the relevant SDG indicator on land security.

## Working with land-dependent communities

As indicated above, the Index has two distinct components: the assessment component, which has been used during the pilot stage, and the community empowerment tool, which strengthens communities' capacity to request accountability in land management. It explains key concepts such as 'community', 'community land', 'statutory land law' and 'community land rights'. It also sets out the general picture of community tenure security in Africa. This component aims at providing an African definition of land related vocabulary, to more relevantly inform an African agenda on land tenure. Guidelines are also in preparation concerning development of policy positions and specific subjects as to how different countries handle issues such as compulsory acquisition, recording of rights, legal routes for securing collective land rights, and constitutional commitments to land rights.

# Appendix I : The indicators

These indicators are an updated version of those used to conduct the analysis presented in this report. Those are part of the Index document which comprises among others, a lexicon and guidelines on each indicator with examples. Only the principal indicators are listed below.

## PART A

## Indicators of community land security in the law

### STATUS

1. Does the National Constitution protect community land rights?
2. Do laws recognize customary/community lands as a land class distinctly from public or government lands?
3. Are customary/community land rights protected without formal registration?

### FORMALIZATION

4. Does the law recognize that customary property usually includes shared ownership of local forests, rangelands and waterlands?
5. Does the law enable families, clans and communities to be registered owners without having to first register cooperatives or associations to hold the lands on their behalf?
6. Does the law provide accessible, cheap, and easy-to-follow means of formalization land rights?

### PROTECTION OF VULNERABLE SECTORS

7. Does the law include special measures to ensure hunter-gatherers and pastoralists are able to secure their lands?
8. Does the law prevent communities discriminating against those of different ethnicity, those marrying into the community, or those settling permanently in the community from acquiring lands to the same measure as original members?
9. Does the law expressly protect the land rights of women within the customary sector?

### COMMUNITY LAND AUTHORITY

10. Does the law recognize community institutions (traditional authorities or elected bodies) as lawful administrators of customary/community lands?

### PREVENTION & REMEDY OF INJUSTICES

11. How far does the law require the participation of affected communities in shaping and executing compulsory acquisition of their lands for public purposes?
12. Does the law commit to returning wrongly co-opted lands to communities where the taking was unlawful at the time, the justification unproven, or in other ways needless hardship caused?

### COMMITMENT OF THE STATE

13. Does national policy commit to facilitating customary/community land security?
14. Is the State delivering on positive policy or legal commitments?
15. Has government issued regulations, zoned lands to exclude community areas, or applied other procedures to minimise losses to community lands or rights through private sector and public-private investment projects?

### CIVIL RIGHTS

16. Does the State side-line, punish, or repress individuals, communities or civil society actors who speak out against unjust land takings or who actively advocate for stronger protection of community land rights?
17. Have any communities gone to court to protest land losses, the inferior status of customary/community land rights or related actions suppressing community land rights?

### COMMUNITY MOBILIZATION

18. Do communities meet and/or form loose alliances to strengthen solidarity against poor treatment of community land rights, and/or take steps to reinforce their claims such as demarcating community lands?

### COMPARATIVE TENURE SECURITY IN PRACTICE

19. How does the security these assets within community domains rank in practice (i.e. setting aside what policies or laws say)?
  - a. House plots
  - b. Permanent farms
  - c. Lands used for shifting cultivation
  - d. Rangelands
  - e. Forestlands
  - f. Waterlands (marshes, streams, lakes, ponds)
  - g. Protected areas
  - h. Surface mining areas for traditionally extracted minerals
  - i. Wildlife
  - j. Other (specify).

## ASSESSORS' PERCEPTIONS OF THREATS

20. How do the following external factors rank as threats to community land security?
  - a. State allocation of community lands for mining, logging or agricultural concessions
  - b. Dam construction or commercial water extraction from within community lands
  - c. Issue of leasehold rights to private persons without consent of community
  - d. Land takings for urban expansion
  - e. Other (specify).
  
21. How do the following factors internal to a community rank as threats to community land security?
  - a. Inadequate inclusion of community members in decision-making.
  - b. Wrongful allocation or 'sale' of communal lands by community leaders.
  - c. Difficulty limiting new settlement and land users.
  - d. Encroachment by neighbouring communities.
  - e. Social conflict among ethnic or other sub-sets within communities.
  - f. Generational conflicts over land allocation or uses.
  - g. Pressure to subdivide & privatise communal lands under non-customary entitlements.
  - h. Lack of leadership.
  - i. Difference of opinion between community members who live mainly in towns where they have jobs and those who remain in the community land area.
  - j. Lack of political representation of community interests.
  - k. Other (specify).

## Appendix II : Synthesis card

Index	Burkina Faso	Congo B.	DRC	Ghana	Liberia	Nigeria	Sénégal	Uganda
1. Does your national constitution state that customary rights are respected as rights of ownership?	No	Partial	Yes	Yes	No	Yes	No	Yes
2. Does the land law protect customary rights to the same degree as it protects non-customary registered entitlements as due respect as ownership rights?	Yes	Yes	No	Yes	Partial	Yes	No	Yes
3. Does the law recognize families and communities as lawful landowners, as well as individuals?	Yes	Partial	Yes	Yes	Partial	Yes	No	Yes
4. Does the law only protect customary rights which are officially certified and registered?	No	Yes	N/A	No	No	No	Yes	Partial
5. Does the law require families, communities or other traditional groups to form legal entities in order to be registered as collective owners?	No	No	N/A	No	No	No	No	Yes
6. Does the law provide a procedure for registering customary land rights in a manner that is:								
a. Voluntary	Yes	Yes	yes	Yes	N/A	No	No	Yes
b. Free or genuinely cheap	No	No	Yes	Partial	N/A	No	No	Yes
c. Accessible to all villagers	Yes	No	Yes	Partial	N/A	No	No	Yes
d. Easy to use	No	No	Yes	No	N/A	No	No	Yes
e. Equally available to communities and families as to individuals	Yes	Yes	Yes	Yes	N/A	No	No	Yes
f. Registers the right "as is" (that is, registration does not extinguish the customary right in favour of a freehold or other non-customary form of tenure)	No	No	Yes	Yes	N/A	No	No	No
7. Does the law discriminate either positively or negatively in respect of land rights of pastoralists, hunter-gatherers, or self-identified indigenous peoples? if so, add explanation	No	Yes	N/A	Yes	No	No	No	No
8. Does the law give explicit or special protection to women's customary land rights??	No	No	N/A	No	No	No	No	Yes
9. Does the law recognise these resources as owned by customary communities?-								
a. Forests & woodlands	No	Partial	Yes	Yes	Yes	Yes	No	Yes

Index	Burkina Faso	Congo B.	DRC	Ghana	Liberia	Nigeria	Sénégal	Uganda
b. Rangelands	No	Partial	Yes	N/A	No data	No	No	Yes
c. Marshlands	No	Partial	No data	Yes	No	Yes	No	Yes
d. Ponds, lakes & streams	No	No	No	No	Yes	Yes	No	Yes
e. Traditionally mined surface minerals, oils, etc.	No	No	No data	No	No	No	No	Yes
f. Beach or river foreshore	No	No	No data	No	No data	No	No	Yes
g. Farmed lands	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
h. Settlements	No		Yes	Partial	No	Partial	No	Yes
10. Does the law recognise communities as an autonomous level of local government or empower the community in other ways to legally govern customary land rights?	No	Yes	No	N/A	Partial	Yes	No	Yes
11. Does the law require traditional & elected community authorities to secure community consent for key decisions, such as leasing land to outsiders?	No	Partial	No	Yes	Yes	No	Yes	Yes
12. Is there any provision for protected areas to be returned to community ownership, (although subject to conservation regulation & limitations such as excluding right to sell the land, change use, etc.)?	No	No	No	Yes	No	No	No	Yes
13. Does the law require free, informed and prior consent of communities prior to allocation of customary lands including common properties like rangelands and forests to private persons or investors?	No	Partial	Yes	Partial	Yes	No	Yes	Yes
14. Does the law recognise communities as lawful controllers of customary rights and enable their decisions to be upheld in the courts?	No	No	No	Yes	Partial	Yes	No	Yes
15. Is there a national zoning plan or other mechanism by which customary lands are protected against government or other takings for other than genuine public needs?	No	No	No	Partial	No	Yes	No	No
Practice								
16. Has government established a land commission, observatory or land policy process since 1995?	Yes		Yes	Yes	Yes	No	Yes	Yes
17. Were recommendations delivered & acted upon within five years?	Yes		Yes	Yes	Yes	No data	No	Yes

Index	Burkina Faso	Congo B.	DRC	Ghana	Liberia	Nigeria	Sénégal	Uganda
18. Are land courts, ombudsman, or other mechanisms in place designed to make it easy and cheap for communities to appeal against land rights injustices including by government?	Yes	Yes	No	Yes	No	Yes	Yes	Partial
19. Have communities been actively included in land policy decision-making in the last ten years?	Yes	No	No	Partial	Yes	No	Partial	Yes
20. Has poor support for customary rights including to forests, rangelands & other commons been a cause of significant civil conflicts or war in your country since 1990?	No	No	Yes	N/A	Yes	Yes	No	No
21. Have there been cases where government has punished communities or others who speak out against unjust land takings and/or failed to protect them against attacks by those implicated?	No	No	No data	N/A	Yes	Yes	Yes	No
Opinion of assessors								
22. Has the number of state reallocation of customary lands to investors without informed local consent risen in the last ten years, as affecting these resources —						No data		
a. Forests & woodlands	No	Yes	No data	partial	Yes	Yes	Yes	Yes
b. Rangelands	No		No data	N/A	No data	Yes	Yes	Yes
c. Marshlands	No	Yes	No data	N/A	No data	Yes	Yes	Yes
d. Local ponds, streams, lakes	No	Yes	No data	N/A	No data	Yes	Yes	Yes
e. Traditional mining areas	No	Yes	No data	N/A	Yes	Yes	Yes	Yes
f. River or beach foreshores	No	Yes	No data	N/A	No data	No	Yes	Yes
g. Farms	No	Yes	No data	N/A	Yes/ no data	Yes	Yes	Yes
h. Settlement areas	No	Yes	No data	N/A	No data	Partial	Yes	Yes
23. Has community awareness and demands for secure customary land rights significantly increased in the last ten years?	Yes	Yes	Yes	Partial	Yes	Partial	Yes	No
24. Has land grabbing by elites within communities risen within the last ten years?	Yes	Yes	No data	No data	Yes	Yes	Yes	Yes
25. Has state resistance to recognising customary rights as ownership rights decreased since 2005?	Yes	No	Yes	N/A	Yes	No	Yes	No
26. Tick yes for an overall rank for the status of customary land rights in your country today compared to ten years ago —								

Index	Burkina Faso	Congo B.	DRC	Ghana	Liberia	Nigeria	Sénégal	Uganda
a. Less secure	No				Partial	Yes		
b. Slightly more secure	Yes		Yes	N/A	Yes			Yes
c. No change	No	Yes					Yes	
d. Improved & easier to protect	Yes							
27. Tick yes for the most <i>insecure</i> type of customary property -								
a. House plots								Yes
b. Farms	Yes		Yes				Yes	Yes
c. Shared community lands such as forests, rangelands, marshlands		Yes			Yes	Yes		
28. Rank these threats to customary land security as high, medium, or low –								
a. Increasing disparity between rich and poor	High	High	Low	Medium	High	High	High	High
b. Urban dwellers seeking rural lands	Medium	Low	Low	Medium	Medium	Low	Medium	
c. Local investors seeking lands	Medium	Low	Medium	High	Medium	Medium	High	
d. Foreign investors seeking lands	Low	High	Medium	High	High	High	High	
e. Government policy on investors	Medium	High	Low	High	High	medium	High	High
f. Low local government and/or local organization		High		Don't know	Medium	medium	High	
g. History of civil conflict & war		Low	Low	Don't know	High	low	Medium	
i. Lack of awareness of rights	High	High	High	High	Medium	High	High	High
j. Tribal or clan traditions	Low	Medium	Low	Don't know	Don't know	Medium	Low	
k. Corruptible traditional leaders		Medium	High	High	Medium	High	Medium	High
l. Inter-tribal or clan strife			High	Medium	Medium	High	Low	
m. Other (indicate)								High
n. Other (indicate)								



This report has been produced with the generous contributions of:



### Contact us

Téodyl Nkuintcha  
Coordonnateur ACRN  
[tnkuintchua@cedcameroun.org](mailto:tnkuintchua@cedcameroun.org)

Mireille Tchiako  
Chargée de la Communication  
[mtchiako@cedcameroun.org](mailto:mtchiako@cedcameroun.org)

[contact@cedcameroun.org](mailto:contact@cedcameroun.org)  
Tel: (+237) 243 52 51 51