

# Communities' rights – the need for recognition

## Legal toolkit on forest conversion - Factsheet 5



This Factsheet is intended to inform law-makers about key legal issues that may arise when forest-conversion projects do not recognise the land and use rights of local communities and indigenous peoples. It also provides questions to guide law-makers through processes of law reform to improve the recognition of land and use rights of local communities and indigenous peoples within laws.

This factsheet is part of a larger toolkit on law reform to address forest conversion:

<https://www.clientearth.org/forest-conversion/>

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Clarifying and securing rights of local communities and indigenous peoples affected by forest conversion is crucial. This holds true both for the survival of these populations' cultures and livelihoods and for the protection of forests.

To help develop a legal framework that protects and ensures the rights of local communities and indigenous peoples, this Factsheet identifies two crucial areas for law-makers to consider.

1. Local communities' and indigenous peoples' rights over land and forest resources should be formally recognised and protected by national laws.
2. Local communities and indigenous peoples should be part of the decision-making process for any projects affecting the use of their land and forest resources.

Within each of these areas, we look at common legal problems and the risks that may stem from those problems. A set of key questions at the end of this Factsheet is offered as a checklist to reference during the process of law review and reform.

### Background: communities' rights

Forests are essential for local communities and indigenous peoples,<sup>1</sup> who rely on them for their homes, livelihoods and incomes. Forests also often have significance for local or indigenous cultures, traditions and religions. When a project involves the conversion of forests to another land use, this incurs the loss of not only the forest and its associated ecosystems but also the homes, livelihoods and cultures of local communities and indigenous peoples.

Recent research has demonstrated that less deforestation occurs when the land tenure rights of local communities and indigenous peoples are secured.<sup>2</sup> Strengthening communities' rights is also important to the private sector, which avoids investment in a project that could lead to land tenure disputes, for fear of delays and loss of goodwill between communities and companies.

Over the years, many non-legally-binding policies and guidelines have been developed to help secure land rights for communities.<sup>3</sup> However, these do not replace national legal frameworks that formally recognise customary rights to land and forest resources. In recent years, some developing countries have decided to pass and amend laws to secure the land tenure rights of local communities and indigenous peoples. These efforts need to be encouraged and expanded, taking into account each national context.<sup>4</sup>

## 1. Legal recognition of land tenure rights of communities

**Key legal problems:** lack of formal recognition of customary land tenure rights, incomplete or unclear legal framework, lack of implementation

**Key risks:** eviction, land tenure disputes and land scarcity

Land tenure generally encompasses all rights to land, including the rights to possess, control, exploit and sell the land. Land tenure rights should not be confused with use rights, which give communities the right to access forests and to use timber and non-timber forest products, such as for food or shelter (Section 2).

In many countries, for example Gabon and Liberia, there is still no formal legal recognition of communities' customary land tenure rights. In some tropical countries, local communities and indigenous peoples have only received legal recognition of their land tenure rights for a portion of the land they occupy. Where customary land rights are not fully recognised, the state often owns the land and the forest resources, or the state holds the land in trust for 'traditional owners' (local communities and indigenous peoples). The trust relationship requires the state to consult with and act on behalf of the traditional owners; in reality, decision-making power is taken completely by the Government.

Even when customary land tenure rights are formally recognised, establishing legal ownership can be complicated, if not impossible, for communities. There are four main reasons for this:

- **Lack of clarity about the evidence required to demonstrate customary land tenure rights:** Some legal frameworks, as in the Republic of Congo for example, require communities to demonstrate 'the active use of the land' across several years. Without a clear definition of what this means, it can be complicated for communities to demonstrate their ownership.

## Definition of customary land tenure (Africa)

“Customary land tenure refers to the systems that most rural African communities operate to express and order ownership, possession, and access, and to regulate use and transfer. Unlike introduced landholding regimes, the norms of customary tenure derive from and are sustained by the community itself rather than the state or state law (statutory land tenure). Although the rules, which a particular local community follows, are known as customary law, they are rarely binding beyond that community. Customary land tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility.”<sup>5</sup>

- **Complexity and cost of procedures to register land titles:** In Cote d'Ivoire, a law was passed in 1998 that formally recognised customary land tenure rights.<sup>6</sup> This law provides several steps (including a public investigation and issuance of a land certificate) before communities' customary land can be registered. These steps are so complex and expensive that few land titles have been registered to date, and the required timeframes for some steps have had to be extended.<sup>7</sup>
- **Inadequate legal framework:** The procedure for obtaining formal land title for communities relying on customary land tenure rights is not always sufficient. For example, frameworks may set rules that apply for individual ownership, when customary land tenure rights are often held by a community as a whole.
- **Lack of implementing provisions:** Some laws have been developed to offer better recognition of customary land rights but cannot be realised due to the absence of implementing provisions. Therefore, rights of many communities remain insecure over their land and forest resources (Case Study 1).

## Case Study 1: Laws without implementing provisions are inoperable (Congo)

In 2011, the Republic of Congo was the first country in Central Africa to adopt a law promoting the rights of indigenous peoples. This law has a full chapter dedicated to ownership rights, which provides, among other things, that indigenous peoples have a collective and individual right to own, access and use the land and resources they occupy or use traditionally for their subsistence, their medicine and their work.<sup>8</sup> However, no implementing legislation has yet been passed to recognise these rights in practice, and so indigenous Congolese peoples are still at risk of being evicted from their land.

It should also be noted that there can be gender inequality in legal frameworks regarding access to land and forest resources.<sup>9</sup> Those inequalities make women more vulnerable than men when their land is taken away, and increase their risk of being left with no resources.

The legal issues set out above lead to three main risks concerning communities and forest conversion.

- **Eviction and displacement:** Without formal recognition of the land tenure rights of local communities and indigenous peoples, forested land is often given to companies without considering the rights of the people who will be affected by forest conversion. Communities may be at high risk of eviction and displacement from their land. Furthermore, without any legal expropriation process, communities risk eviction without compensation.
- **Land tenure disputes:** Evicted communities could decide to claim back their rights over the forested land concerned. There are different ways of doing this, including 'naming and shaming' in the media, and national judicial complaints or other complaint mechanisms

(such as that of the Roundtable on Sustainable Palm Oil (RSPO)). When conflicts are not settled by formal mechanisms, they can jeopardise the lives of community members.<sup>10</sup> Conflicts can also slow down or stop commercial activities planned to follow forest clearance, such as mining or planting crops.

- **Land scarcity:** When local communities and indigenous peoples are evicted, they have to find a new place to live. Given the current demand for land, particularly by the private sector in many tropical countries, communities are at risk of serious competition for land for their relocation.

## 2. Consultation with local communities and indigenous peoples during decision-making

**Key legal problem:** lack of consultation with local communities and indigenous peoples during forest-conversion processes

**Key risks:** eviction, land tenure disputes and absence of agreements

One way to address the lack of formal recognition of customary land tenure rights of local communities and indigenous peoples, or the lack of land title registration, is to ensure community consultation. This should be done ideally during the process of land allocation, or at least before clearance of the forest is authorised.

Before a conversion project starts, consultation is also essential to identify the use rights of local communities and indigenous peoples. Even though, use rights are typically recognised in statutory forest laws, these laws do not usually protect or compensate the loss of use rights where a project leads to forest conversion. Where a forest is completely cleared, use rights are extinguished. Therefore, it is essential that consultation of local communities and indigenous peoples recognises the forested land that they use, and not just the land they occupy.

Public consultation can take various forms, including a public enquiry or a dedicated committee. A public enquiry is often a requirement of environmental impact assessments, where consultation of affected communities must be completed before an environmental permit is granted by the state. A committee can be created once a forest conversion project is planned, with a mandate to assess the project and its risk of violating any third party's land tenure and use rights. Such a committee should include members of the affected communities.

Perhaps the most powerful form of consultation is the requirement to obtain the 'free, prior and informed consent' (FPIC) of local communities and indigenous peoples affected by a forest conversion project. Increasingly, FPIC has been included in certification schemes such as those of the Forest Stewardship Council (FSC) and the Roundtable on Sustainable Palm Oil (RSPO). However, FPIC has so far rarely been included in national laws as a legally binding obligation, either when land is granted to a company or when forest clearance permits are granted.

### Definition of free, prior and informed consent (FPIC)

"FPIC is a right that belongs to the whole community. It means that communities have a right to fully participate in decision-making processes that might affect the lands, forest and resources that they customarily own, live on or use – whether the community has a deed or not. This means that communities must be able to decide for themselves whether and how a project can go ahead if they are approached by government or a company. FPIC requires that communities can negotiate for a fair and legally enforceable agreement, and to say 'no' to any project that does not properly address the community's needs, priorities and concerns."<sup>11</sup>

When FPIC is integrated into laws, it is essential to detail the circumstances in which it applies. Otherwise, the lack of clarity can create legal loopholes allowing the parties to a concession agreement to exclude communities from decision-making (Case Study 2).

### Case Study 2: Communities excluded from concession negotiations in Liberia

In Liberia, forest law specifies that the approval of communities is required in advance of any commercial timber logging.<sup>12</sup> However, it is not clear whether this same community approval applies to conversion projects. In consequence, the Government has granted concession agreements to agricultural companies, without any consultation of communities affected and without them being part of the negotiations. Many of these concession agreements also state that the area of land granted to the company is 'free of encumbrances'.<sup>13</sup> In reality, the concession areas include communities' villages and farming land.

Absence of consultation before a government allocates land to an agricultural, mining or infrastructure project, or when it grants a forest clearance permit, creates the same risks as those of lack of legal recognition (Section 1 above) – eviction, land tenure disputes and land scarcity. There is also a high risk that communities excluded from negotiations will not be entitled to claim any compensation, and that benefit-sharing mechanisms will not be established. Communities deprived of access to their land and homes, and to the forest resources providing livelihoods and food security, are left with nothing.

In contrast, by obtaining the consent of communities and negotiating and implementing a fair agreement, companies can reduce their investment risk. Greater international attention to the social impacts of forest-risk commodities has already delayed the operation of conversion projects. Several companies have been required to change their operations substantively in order to demonstrate respect for the rights of communities.<sup>14</sup>



## Key questions for law-makers on communities' rights

A review or reform of national laws may be needed to improve security of the rights of local communities and indigenous peoples. In advance of any reform process, all relevant laws across different sectors should be assessed for consistency and harmonised as necessary. The following questions are for decision-makers to consider before starting legal reform on communities' rights over land and forest resources.

### Recognition of customary land tenure rights

1. Are customary land tenure rights recognised in the law?
2. Are the requirements for obtaining a land title simple, clear and detailed enough to implement and enforce?
3. Do those requirements fit the way in which customary land tenure rights apply on the ground (for example, do they reflect communal or individual tenure rights)?
4. Is there any technical and financial assistance for local communities and indigenous peoples planning to register their land?
5. Could customary land tenure rights be recognised at a local level?
6. Is the legal framework securing and protecting customary land tenure rights complete?
7. Do local communities have access to justice to complain about any violation of their rights?
8. Is there any recognition of resolution mechanisms for customary land rights?

### Consultation with local communities and indigenous peoples during decision-making

9. Are there legal requirements to conduct consultations with local communities and indigenous peoples that may be affected by a project leading to forest conversion?
10. Are there legal requirements to establish and mandate a committee to identify third-party rights before a governmental entity grants access to land, including forested land? Does such a committee include representatives of the affected communities?
11. Is there any legal requirement to get the free, prior and informed consent (FPIC) of local communities and indigenous peoples before any decision is made regarding the land and forest resources they occupy and use? If so:
  - Is there a list of the different circumstances in which this requirement applies?
  - Has the law established specific procedures to obtain the FPIC?
  - Is there any specific requirement regarding the consultation of women and other marginalised populations?

1. "About 350 million people who live within or close to dense forests depend on them for their subsistence and income. Of those, about 60 million people are wholly dependent on forests" (<http://www.worldbank.org/en/topic/forests/overview>).
2. For example, in Brazil less than 2% of indigenous land was deforested between 2000 and 2014, while 19% of land deforested on average in the Amazon during the same period. In Bolivia, the average deforestation rate between 2000 and 2012 inside tenure-secure indigenous lands was 0.15%, while the rate outside indigenous lands was 0.43% (<http://www.wri.org/blog/2017/03/numbers-indigenous-and-community-land-rights>).
3. For example: FAO (2012) 'Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security' (<http://www.fao.org/docrep/016/i2801e/i2801e.pdf>).
4. Rights and Resources Initiative (2017) 'Securing community land rights: priorities & opportunities to advance climate & sustainable development goals' (<http://bit.ly/2EfvJt9>).
5. Alden Wily, Liz (2012) 'Customary land tenure in the modern world' Brief 1 of 5 Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa, Rights and Resources Institute (<http://bit.ly/2BW0z52>).
6. Loi n°98-750 du 23 décembre 1998 modifiée par la loi du 28 juillet 2004 et par la loi N° 2013-655 du 13 septembre 2013.
7. Loi N° 2013-655 du 13 septembre 2013 relative au délai accordé pour la constatation des droits coutumiers sur les terres du domaines coutumier et portant modification de l'article 6 de la loi n° 98-750 du 23 décembre 1998 relative au Domaine Foncier.
8. Loi 5-2011 portant promotion et protection des droits des populations autochtones au Congo.
9. Swedish International Development Cooperation Agency (SIDA) (2013) 'Quick guide to what and how: increasing women's access to land', Women's Economic Empowerment Series ([https://www.sida.se/contentassets/ea78527fda4645c380f290a0fcdf651/quick-guide-to-what-and-how-increasing-womens-access-to-land\\_3373.pdf](https://www.sida.se/contentassets/ea78527fda4645c380f290a0fcdf651/quick-guide-to-what-and-how-increasing-womens-access-to-land_3373.pdf)); FAO (2010) 'Gender and land rights understanding complexities; adjusting policies, economic and social perspectives' (<http://www.fao.org/docrep/012/a059e/a059e00.pdf>).
10. Mongabay Series (2017) "'Then they shot me": Land conflict and murder in Ucayali, Peru' (<https://news.mongabay.com/2017/10/then-they-shot-me-land-conflict-and-murder-in-ucayali-peru/>).
11. Forest Peoples Programme (2016) 'Communities in the Driving Seat' (<http://bit.ly/2E5yw4l>).
12. Forest Development Authority (FDA) Regulation 102-07.
13. See e.g. 'Concession Agreement between Golden Veroleum Liberia and the Government of the Republic of Liberia' ([http://goldenveroleumliberia.com/images/pdf/2014-09-30\\_2\\_GVL\\_Concession\\_Agreement.pdf](http://goldenveroleumliberia.com/images/pdf/2014-09-30_2_GVL_Concession_Agreement.pdf)).
14. See e.g. ClientEarth (2017) 'Addressing the risks of a weak legal framework governing forest conversion in Liberia' (<https://www.clientearth.org/risks-weak-forest-conversion-law-liberia/>).

Our vision is of a planet where all life is diverse, abundant and thriving. We want a home where people and nature flourish together.

We use law as a tool to mend the relationship between human societies and the earth.

## Contact

Clotilde Henriot  
Law and policy advisor  
chenriot@clientearth.org

Caroline Haywood  
Law and policy advisor  
chaywood@clientearth.org

Emily Unwin  
Senior lawyer  
eunwin@clientearth.org

[www.clientearth.org](http://www.clientearth.org)

### Brussels

60 Rue du Trone (3rd floor)  
Box 11, 1050 - Ixelles  
Belgium

### London

274 Richmond Road  
London E8 3QW  
United Kingdom

### Warsaw

Aleje Ujazdowskie 39/4  
00-540 Warszawa  
Poland