The tragedy of public lands: The fate of the commons under global commercial pressure

cirad

INTERNATIONAL LAND COALITION

Our Mission

A global alliance of civil society and intergovernmental organisations working together to promote secure and equitable access to and control over land for poor women and men through advocacy, dialogue, knowledge sharing and capacity building.

Our Vision

Secure and equitable access to and control over land reduces poverty and contributes to identity, dignity and inclusion.

CIRAD works with the whole range of developing countries to generate and pass on new knowledge, support agricultural development and fuel the debate on the main global issues concerning agriculture.

CIRAD is a targeted research organization, and bases its operations on development needs, from field to laboratory and from a local to a global scale.

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Foreword

The International Land Coalition (ILC) was established by civil society and multilateral organisations who were convinced that secure access to land and natural resources is central to the ability of women and men to get out of, and stay out of, hunger and poverty.

In 2008, at the same time as the food price crisis pushed the number of hungry over the one billion mark, members of ILC launched a global research project to better understand the implications of the growing wave of international large-scale investments in land. Small-scale producers have always faced competition for the land on which their livelihoods depend. It is evident, however, that changes in demand for food, energy and natural resources, alongside liberalisation of trade regimes, are making the competition for land increasingly global and increasingly unequal.

Starting with a scoping study by ILC member Agter, the Commercial Pressures on Land research project has brought together more than 30 partners, ranging from NGOs in affected regions whose perspectives and voices are closest to most affected land users, to international research institutes whose contribution provides a global analysis on selected key themes. The study process enabled organisations with little previous experience in undertaking such research projects, but with much to contribute, to participate in the global study and have their voices heard. Support to the planning and writing of each study was provided by ILC member CIRAD.

ILC believes that in an era of increasingly globalised land use and governance, it is more important than ever that the voices and interests of all stakeholders – and in particular local land users - are represented in the search for solutions to achieve equitable and secure access to land.

This report is one of the 28 being published as a part of the global study. The full list of studies, and information on other initiatives by ILC relating to Commercial Pressures on Land, is available for download on the International Land Coalition website at www.landcoalition.org/cplstudies.

I extend my thanks to all organisations that have been a part of this unique research project. We will continue to work for opportunities for these studies, and the diverse perspectives they represent, to contribute to informed decision-making. The implications of choices on how land and natural resources should be used, and for whom, are stark. In an increasingly resource-constrained and polarised world, choices made today on land tenure and ownership will shape the economies, societies and opportunities of tomorrow's generations, and thus need to be carefully considered.

Madiodio Niasse

Director, International Land Coalition Secretariat

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Executive summary

This paper looks at the impact of commercial pressures upon common lands. Its main task is to identify the factors which make local possession of the commons vulnerable to involuntary loss in the face of such pressures. As preface, it elaborates what constitutes the commons.

A sharply accelerating rise is currently being seen in large-scale land acquisitions for the purposes of commercial food and biofuels production. With exceptions, these acquisitions are being made in developing economies where the majority of the local populations depend upon land use for their livelihoods, signalling likely competition for resources. The prominence of foreign buyers, including governments, has been internationally observed, although local host country investors are also active land buyers. Sub-Saharan Africa is the main location for acquisitions, with around 20 million hectares already formally acquired since 2007. For this reason among others, including the striking poverty of the sub-continent and the immensity of its commons resources, sub-Saharan Africa is the paper's principal focus of analysis.

The main findings are summarised below.

The commons

Commons are defined as lands which rural communities possess and use collectively in accordance with community-derived norms. These norms are variously referred to as customary or indigenous tenure regimes. Two distinctions are drawn to help clarify their nature. First, a distinction is drawn between open access common pool resources and commons, the former being better defined as unowned and unbounded resources available for public use. In contrast, commons are discrete land areas of which a known community is acknowledged locally as the owner. Second, a distinction is drawn between communal lands and commons. The former refers to whole customary domains and may include both parcels over which individual and family possession is established and lands within the domain that are collectively owned, and are usually referred to as "the commons".

In area, commons represent an immense resource of up to 8.54 billion hectares, or 65% of the global land area. The largest area of commons falls within sub-Saharan Africa, with 1.78 billion hectares. However, this yields a per rural capita land area of only three hectares, much less than is available to rural people in Oceania and Latin America (respectively 78 hectares and 19.4 hectares per rural capita).

This extent of commons is arrived at by excluding lands most likely to be privately owned, in the sense of being locally or legally acknowledged as being the property of individuals, families, companies, or other individual legal entities. Permanently cultivated lands, urban areas, planted forests, and extreme snow, ice, and desert areas are excluded. This leaves a vast residual area of forests and rangelands, the latter in the form of grasslands, savannas, and shrublands. Although cultivation also occurs in these areas, it is rarely permanent or is

conducted on the basis of acknowledgement that the community, not the farmer, is the land-owner.

Commons tenure

While all 8.54 billion hectares of commons around the world may be presumed to be the property of rural communities under customary norms, this is not endorsed in national statutory laws. The most tangible example of this is where 1.7 billion hectares of commons have been formally withdrawn from the customary sector as now state-owned Terrestrial Protected Areas. This leaves a maximum of 6.8 billion hectares as definably people's commons.

By far the greater proportion of these commons is also subject to overlapping and contradictory statutory and customary rights. In national law, these lands are vested in the state, or even defined as the private property of government. In either circumstance, government is the lawful authority over these lands and may dispose of them at will.

Exceptions are highlighted. In Latin America, these are mainly found in the formal setting aside of mainly forested lands, such as in the Amazon Basin for the permanent use of native communities. Several hundred million hectares of commons are so vested. However, the tenure arrangements are such that the state in each case retains the right of disposal of these lands for purposes of commercial ranching, mining and oil developments, and issue of timber concessions.

Important exceptions also exist in sub-Saharan Africa. Among 30 national land laws surveyed in this paper, such exceptions are found mainly in six countries (Tanzania, Ghana, Uganda, South Africa, Southern Sudan,[1] and Mozambique) where new national laws make customary land tenure a fully legal and equivalent route through which land rights may be owned and transacted, and explicitly inclusive of properties which communities own and use in common. Just as importantly, even when these rights have not been entrenched in formal certificates of title, this legal support is by law bound to be upheld. For example, up to 61 million hectares of the total land area in Tanzania are subject to customary norms as acknowledged Village Lands; the major proportion of these are not individual or family-owned farmlands or house plots, but common properties owned and used by some 10,400 discrete village communities. Nevertheless, it is found in all these countries, and especially in Mozambique, that loopholes in law, combined with poor or unjust procedures for application, still leave the commons more vulnerable to appropriation by governments than house and farm lands.

Ten other countries in sub-Saharan Africa (Benin, Côte d'Ivoire, Namibia, Botswana, Angola, Burkina Faso, Niger, Madagascar, Ethiopia, and Nigeria) make some – but less com-

[1] Although Southern Sudan is not a distinct country as of 2010, it has its own legislature and is empowered to make its own land and natural resource policy and legislation, and so for the purposes of this paper is treated as a distinct state. Residents of Southern Sudan will vote in a referendum in January 2011 to determine if it will formally secede from Sudan.

plete – provision for security of local tenure of common properties. Shortfalls arise in two main respects: (i) limiting real protection to cultivated lands, excluding commons; or (ii) protecting all forms of customary ownership in principle but laying down laborious, survey-bound, and expensive routes through which these rights may be entrenched to equal degree as state-granted rights. In Ethiopia, for example, commons are registrable but legally able to be reallocated by government for farming as needed (and now especially for commercial farming). In Madagascar, forested lands and grasslands, important for the 10 million-strong cattle herds of peasant farmers, have been retained as de facto unowned or state property.

The remaining 14 country land laws surveyed leave customarily owned common properties most vulnerable to reallocation by governments to non-traditional holders and investors. This is generally because all customarily held lands are considered to have no more than permissive occupancy and use rights on national or government lands. On these grounds, government may lawfully appropriate these lands for purposes it considers more important.

Factors enabling involuntary loss of common property rights

It is concluded that the outstanding driver of involuntary loss of commons by rural communities is therefore a matter of law; or more exactly, the fact that so many developing country land laws do not deem lands held under community-based norms to amount to real property interests. Therefore they are unprotected.

Within this condition, commons are most vulnerable, as customary lands under settlement and cultivation are generally given at least some protection of occupancy. In contrast, people's common lands are frequently deemed to be unowned or unownable, vacant, or unutilised, and therefore available for reallocation.

Two main effects are seen as a consequence of the above. In law:

- Many rural communities are little better than permissive occupants and users of their traditional domains and in extreme cases are mere tenants at the will of the state. This applies particularly to common lands;
- While unjust and even illegal in accordance with international human rights and tribal/indigenous people's law, the lease of large areas of community lands to foreign and local investors without the consent of the customary owners is perfectly legal under many national land laws.

Important contributing enablers to involuntary loss of commons by communities are identified as:

- Limited political will to change the law to be more equitable in the treatment of the customary land rights of the majority of rural populations, most of whom are poor; and

- Insufficient institutional strength at the local community level to defend customary land rights, in particular as relating to weakly developed devolutionary land administrations empowering ordinary communities to formally regulate land-holding within their domains.

The impact of current commercial pressures on common property rights

There is evidence that commons are an easy target for, and are proving in practice most vulnerable to, losses to commercial estates, because of:

- Their nature as usually uncultivated resources, which leads to them being generically defined as unutilised and even "wastelands";
- The fact that compensation for loss of such lands need be minor or not paid at all, in conditions where compensation due for losses is based upon the value of land improvements;
- The policy of most lessor host governments that only such "unutilised" and "vacant" lands should be allocated to investors, in order to limit evictions, conflicts, costs, and time;
- Usual host country objectives to add to the area of land under food and biofuel production, not to transform existing smallholder areas;
- Only commons providing the scale of intact land areas sought by large-scale investors; and
- The reluctance of investors to be bound to negotiate access, rights, and benefits with local populations, this being most unavoidable where smallholdings and settlements are involved.

There is substantial correlation between those countries which offer the least legal protection to customary land rights and the extent of large-scale leasing. The two largest lessees in Africa, the Democratic Republic of Congo (DRC) and Northern Sudan, maintain laws which deny that customary rights are any more than permissive occupancy and use rights on state or unowned public land and particularly on (unfarmed) commons. Ethiopia and Madagascar, two other large lessee states, protect cultivated lands more substantially, but not land that is communally owned and used by custom. Mozambique is also leasing large areas of its people's lands to investors; while it acknowledges customary rights as real property interests, the mechanisms through which communities may protect their common lands are especially weak and easily manipulated by local elites and/or investors. In contrast, Tanzania's land legislation (1999) makes it least easy for government to wilfully expropriate individual, family, or common properties without reasonable cause.

Despite limited development thus far of recently acquired lands at scale, there have been instances of eviction of communities, but much more usually of curtailment of their communal land assets. While in Asia this is mainly affecting forest commons, in Africa pastoral commons are being most reduced. There is evidence of constrained livelihoods

through these losses, such as families being forced to sell their livestock when losing rangeland to investors.

In light of the fact that most allocations to investors are in the form of renewable medium-term leases of up to 99 years, it may be expected that loss of common properties will remove these lands from meaningful access, use, and livelihood benefit for at least one generation and potentially up to four generations.

There is a lack of evidence thus far that employment opportunities through commercial schemes will be significantly comprehensive or lasting to compensate for losses to livelihoods, and even less to compensate for the loss of natural capital through the taking of community lands. In light of the known higher dependence on commons by families without farmlands of their own or farms which are too small to provide full subsistence, it is predicted that land losses will proportionately affect very poor people the most.

There are signs that losses of common property resources will multiply; oil palm developments are already appropriating significant areas of forested community lands, and this will increase with the growth of carbon trading schemes.

New large-scale land acquisitions and investments are making a bad situation, in terms of fair and equitable land relations, worse. While it is by no means the first wave of foreign land acquisition geared to non-local benefit, the current wave is interfering with the better spirit of land reformism; this is affecting majority rural land rights advanced over recent decades, including in sub-Saharan Africa in the 1990s. While current pressures directly subordinate standing redistributive farmland reforms in countries such as Nepal and Pakistan, where ceilings on individual landholdings have been effectively removed for commercial purposes, they interfere even more widely with the new respect for collectively owned estates generated by reformism. This had begun to be put into effect to a significant degree in both sub-Saharan Africa and Latin America.

Government support for commercial timber exploitation, ranching, and especially mining and oil developments (of which the case of Peru is a good example) has seen subtle but discriminatory brakes placed upon the establishment of territorial tenure by indigenous and *campesino* communities and a restructuring of terms by which protected areas are created. In Africa, there has been a widespread halt to land reforms addressing the inferior status of customary land rights in general and rights to common resources in particular, and a reassertion of state claims to lands deemed to be unutilised or even "wastelands" and thereby unowned and unownable. Even "best practice" countries such as Tanzania and Mozambique are finding ways to renege on commitments to ensure that rural communities may hold onto their precious communal resources, while staying within the boundaries of new policy and legal paradigms.

Benefit-sharing is being reinforced in new leasing arrangements as a means of avoiding addressing the more fundamental issues of rightful tenure. Benefit-sharing techniques were actively developed in the wildlife and forestry sectors during the 1980s and 1990s for the same purpose – to prevent evicted or otherwise affected local populations from

making land claims where conservation (parks, reserves) or commercial enterprises were established on their customary lands. Revenue shares agreed or actually delivered, access or use rights granted, and other supposed benefits are rarely equitable. They do have the intended effect, however, of undermining land claims.

The way in which current large-scale land leasing is being conducted represents a new tipping-point in capitalist transformation affecting agrarian economies, in a manner which firmly subordinates the rights and interests of millions of poor rural people. The trend is most marked by a leap in the global commoditisation of land in the favour of state and aligned private sector growth, but in circumstances where compensatory investment in industry and off-farm enterprise shows no signs of being undertaken to the level needed to assuage losses of precious natural resources by the rural populations affected. The weak status of community-derived ownership over collective lands is contributing to the resulting sharp rise in the concentration of agrarian property, aided by shifts in host government policies.

While the longer-term implications for society are unclear, threats to social stability and the risk of open conflict are immediately visible. Signs of this are seen in environments as diverse as Mozambique, Madagascar, Indonesia, Sudan, India, the Philippines, and Peru. It seems that evidence that past wrongful, albeit legal, land acquisitions have helped trigger civil war in Sudan, Liberia, and Sierra Leone, among other places, is being ignored, at great risk.

More positively, there is also evidence that current large-scale leasing is triggering heightened awareness and demand around majority rural land rights, aided by greater popular empowerment and challenges to undemocratic or unjust political norms. This could give impetus to much-needed legal and policy reforms, new demands associated with uncertain rule of law, and new ways of handling much-needed investment in the rural and resource sectors. Such shifts have already begun to be seen in Tanzania and Mozambique, including giving more encouragement to investors to work through existing farming systems and populations, in ways which do not immediately seek to co-opt their natural land capital but to work with and through them to better maximise returns.

Recommendations

- *Promote legal change affecting customary land rights, and those held collectively in particular.* Nothing short of reforming unjust law can redress the injustice of depriving already poor rural communities of their natural resources. Aside from immediate livelihood and socio-cultural deprivations, these lands represent the very kind of capital assets that poor people need to help themselves to clamber out of poverty.
- *Recognise that the global commoditisation of land will not cease, and act to reconstruct the conditions through which this involves poor rural communities.* The current surge in large-scale land investments has the potential to provide a platform for shareholding approaches to much-needed agricultural sector investment. Where schemes are vetted as having a good chance of a positive outcome economically, investors could be directed to negotiate directly with rural communities, and to reach fair and account-

able contracts by which they pay rent and other agreed benefits to these landowners. The terms by which communities are assisted to lease out their customary lands for investment purposes need rigorous monitoring, as salutary experiences with early schemes of this type, such as in Sarawak, demonstrate.

- *Mobilise focused land tenure reform*. For such developments to evolve in fair and workable ways, land laws must be amended to recognise that unfarmed common lands belong to rural communities in the first instance. Changes must endow these lands with all the attributes of statutorily recognised private property. Without this, wrongful, although "legal", dispossession of rural communities will continue apace. It is no coincidence that in countries where some of the most active leasing is occurring, such as in Northern Sudan, the DRC, Ethiopia, and Madagascar, laws do not accord unfarmed lands status as owned property.

Accordingly, the key recommendation is to focus on land tenure reforms which recognise customary rights as private property interests. Such reformism made good progress in the 1990s, with some significant successes, but now it is flagging in the face of globalised demand for rural lands and the opportunism in host countries that this inspires.

Advised routes to kickstart and promote the further evolution of reforms include:

- Putting both international trading and human rights law more effectively to work in support of the majority of rural poor who own and depend upon land through community-based regimes;
- Promoting the restructuring of international aid priorities and conditionality towards heavy investment in land tenure and administration reform. As necessary, this may be justified on security grounds, with wrongful land takings at scale being recognised as bound to generate instability;
- Speeding up concrete entitlement at the local level, with a focus on the most vulnerable estates – the commons. Delimitation of overall community land areas inclusive of farms and commons is a practical first-line step to focus upon. This can remove large areas from immediate vulnerability. Procedures for this can be adapted from the existing experiences of such delimitation in Tanzania, Mozambique, central Sudan, Benin, and Liberia; and
- Integral to the above, focusing investment in developing community-based land administration systems, to empower ordinary poor rural communities to be better aware of and in control of land disposition matters.

Key indicators of success that should be aimed for within a decade include:

- A sharp reduction in the area of designated state/public land in favour of legal community tenure, especially in those Asian and African countries where involuntary land loss is most pronounced;
- A sharp rise in arrangements whereby rural communities, not governments, are the legal lessors of lands to investors, able to receive the rents and additional legally

agreed benefits under those leases, and without losing root ownership of their important natural capital, the land and its resources; and

- Significant evidence that issue of concessions for timber and contracts relating to carbon trading are also beginning to be reconstructed to reflect the above principles of respecting the land rights of rural populations.

1 Introduction

Context

This paper is a contribution to the collaborative research project by the International Land Coalition (ILC) on the impact of Commercial Pressures on Land (CPL) upon insecure land users.

Discussion is contextualised by a currently topical set of pressures in the form of large-scale land acquisition (LSLA) for commercial production of biofuels, food, or livestock, and with lesser focus upon lands lost as a result of timber, mining, and oil concessions. Foreign direct investment (FDI) is an important element of this trend. Acquisitions are sufficiently numerous at this time and the size of landholdings being acquired is often so large that it may safely be concluded that lands which rural communities hold and use in common will be significantly affected. Expansion of acquisition for purposes of obtaining carbon credits will increase this further. This paper does not address cases where investors are not acquiring lands of their own but working directly with smallholders.[2]

The orientation of this paper and of the collaborative project overall is pro-poor. While in principle commercial pressures on land need not be an added constraint upon already vulnerable rural livelihoods, in practice they normally are. Lands which rural populations by custom own and use through community-based systems rather than state-derived entitlements are most at risk. Depending upon the context, these systems are known as indigenous, autochthonous, or informal tenure regimes, or as referred to in this paper, "customary regimes". Nested within these systems are norms which generally draw a distinction between lands held by individuals and families for purposes of settlement and farming, and lands which the community retains as explicitly owned and used on a communal basis – the commons.

While all untitled customary or "native" or "communal" lands (as they are often administratively designated) are at risk of involuntary loss, including family farms, the commons are the focal concern of this paper. As will be argued, these commons are principally unfarmed natural resources, retained by communities for their immense non-farm values as forest/woodland, rangeland, and marshlands.

[2] There are examples of this in almost all countries subject to land leasing, with broad consensus that working with existing smallholders without interfering with their land rights is preferable to direct investor leasing. However, even these developments present problems and constraints, as outlined by Sulle and Nelson (2009) for cases in Tanzania, and Gumbo (2010) for Zambia.

Objective

The objective of this paper is to throw light on if, and how, the current topical wave of large-scale land allocations to local and national investors is impacting upon local rights to the commons, and how it may be expected to do so in the future. Two findings must be presented from the outset, as they frame the direction the paper takes:

- First, the current wave of often internationally driven large-scale land acquisitions is still too new to know the precise socio-economic impacts upon poor rural families and communities (or indeed on host economies as a whole); and
- Second, what is already known is that large-scale land acquisitions build upon and will further exacerbate the weak legal status of communities' rights to lands that they hold and use in common in particular, unless the mode of such acquisitions is swiftly and significantly altered.

Accordingly, the paper focuses on this legal matter as the founding source of vulnerability to involuntary loss of resources by poor rural communities where large-scale acquisition is focused.

A focus on sub-Saharan Africa

A relevant third finding is that most of the pressure is being felt in sub-Saharan Africa, with over half of all lessor states being African, and most of the area already confirmed for lease being on that sub-continent (now in the range of 16–20 million hectares). The focus of this paper is therefore on this region.

Other factors contributing to this focus are that:

- Sub-Saharan Africa has a very significant area of commons, proportionate to other continents;
- The region ranks highly as a sub-continent with continuing and in places worsening food security (World Bank 2010a);
- Along with South Central Asia, the sub-continent nonetheless has the highest proportion of its population directly dependent on land resources for livelihoods and the highest proportion of those deemed poor (with purchasing parity of less than USD 2 a day) within rural populations (PRB 2005, 2009);
- While urbanisation will continue, the decline in the proportion of Africans who live in rural areas will be less marked than elsewhere, given significantly higher rural than urban fertility rates in the region (Shapiro 2009); and
- Transparency and good governance are generally understood as being particularly weak over a large number of countries within the region, raising concerns as to how far protection of majority rural land interests may be guaranteed and supported.[3] A feature of relevance to large-scale commercial pressures under way is the historically close alliance that exists between commercial and political sectors in most African

[3] For example, see: http://www.transparency.org/policy_research/surveys_indices/cpi/2009

states, which may be predicted to favour investors over poor citizens (Alden Wily 2010a).

Presentation

This study is presented in three parts, focused on answering seven questions:

1. Background: understanding the commons

What are the commons?

How expansive are the commons?

Who owns the commons?

2. Discussion: getting to the source of vulnerability

How are commons being affected by the current land rush?

Why are commons so vulnerable to commercial pressures? A matter of ownership

What other factors facilitate involuntary loss of commons? The governance factor

3. Recommendations: making the playing field more equal for the poor

What can be done to limit involuntary loss of people's common lands?

2 Background: understanding the commons

What are the commons?

The meaning of "commons" and "common property" has expanded over the past decade. In its most extended treatment, "commons" may include the Internet, outer space, and knowledge (Hess 2008). The focus here, however, is more modest, upon local landed commons.

Landed commons are also simpler to address, for they are sufficiently tangible and finite to indicate that they may be more than common pool resources to which everyone has access, and instead may exist as real and discrete properties, with owners. It is useful to draw a distinction between common pool resources and "common properties" precisely for this attribute.

Landed commons may be defined from two perspectives:

i. As resources or areas which by their nature and use may be regarded as more naturally communal than individually possessed. Forests and woodlands, pastures and wildlife rangelands, deserts, wetlands, streams, lakes and mountain tops, and surface minerals are examples, although this definition does not define ownership;
ii. Alternatively, commons may be defined by the fact of their communal ownership; that they are acknowledged (at least in customary or common law) as being the shared property of a definable group of persons. Shared property in this instance means property held in undivided shares (common property, or commonhold), whether or not so recognised in statutory law.

A focus on people's commons

As will be explored below, commons are not necessarily legally owned by communities. In fact, many governments claim ownership not only of non-landed resources, such as all water bodies and subterranean oils and minerals, but also of more obviously landed commons. This may be so even though local communities by custom regard local forests, woodlands, and the like to be their private, group-owned property. This routinely places the commons under dual, contradictory, and overlapping tenure. Unravelling the distinctions between state and people's commons is a crucial task of this paper. People's commons are the focus, with particular emphasis on the rights and needs of the rural poor.

The community as owner

In agrarian societies,[4] the social owner of common land is uniformly a community. What constitutes this community is much more various: it may alter by country, circumstance, and the nature of resources involved. For example, in Kenya, by custom the top half of Mount Kenya is held to belong to the entire Kikuyu tribe, a community of millions of people, while foothills on the slopes of the mountain are firmly held to belong to certain settled communities on its periphery. Generally, the larger a river, the less localised the claim upon it. Lakes and ponds within the territory of a village may by custom be held to belong to that village, and this may be expressed through limited fishing and use rights to them. As a rule, forest, pasture, marshland, and rangeland falling within the domain of a particular group, village, or village cluster, are considered the property of that community.

This is not to say that non-members of the community necessarily have no rights to such private common properties. On the contrary, customary regimes around the world are generous in providing for layers of what are broadly classifiable as access and use rights. It is quite normal for neighbouring communities to possess certain such rights, such as being permitted to hunt certain species, use certain water sources in specific conditions, pasture certain areas, and collect certain grasses not found in their own domains. Over decades if not centuries, nomadic pastoralists also establish seasonal access and use rights to pasturage and water in the territories of others. As pressure in their own home domains rises and their use of these wider areas extends and may change with the uptake of farming, tensions characteristically grow as to distinctions between ownership and access rights. This is a routine cause of strife and, eventually, adjustment in the definitions of local domains, use norms, and rights. Underlying such shifts over time, and involving all expanding and modernising rural communities, lie two consistent norms, across countries and regions: (i) retention of the norm of discrete community land territories or areas, and (ii) retention of a founding distinction between access and use rights and founding rights of possessory control over a definable and bounded area. In the modern day, most communities define the latter as "ownership".

Can a community be a real property owner?

Communities are distinctive entities in that they have continuity. Their composition alters with every birth, death, incoming marriage partner, and immigrant family. As membership of the community expands with population growth, the community may divide into two, each new community then being defined as possessing its own distinct domain. Or the two parts may agree that certain of the communal resources remain shared, such as ritual sites of importance to both new communities.

[4] Meaning those economies where most citizens survive by land-based production rather than by off-farm wage employment.

Such complexities have historically led many a policy-maker, planner, and legislator to doubt that a community is able to be a satisfactory land-owner, or may even be held to be a legal person. This is especially so within the precepts of Western and industrialised property norms. These have seen ideas of what constitutes real property narrow down to an idea that only an individual or an individual registered legal body such as a company may be regarded as a viable land-owner.

Are commons ownable?

Historically, doubts abounded that the commons could be "owned". These were most famously crystallised in Garrett Hardin's influential thesis of the tragedy of the commons (1968), which expressed views still quite commonly held today. These are that local communal ownership is tantamount to no ownership, and should be done away with in order to safeguard the resource, or to lay the foundation for investment in the land.

However, it is the continuity yet flexibility of the community as land-owner which keeps customary norms, including those relating to commons ownership, alive and appropriate to the current generation's interpretation of circumstances. Thus, an evolution in principle which may be observed globally is in the hardening definition of common land assets as private, group-owned property. The context is of a significant increase in land shortages on the one hand and in commoditisation of land resources on the other. Shifts in meaning do not come out of nothing, however, instead building incrementally upon longstanding if inchoate norms as to the nature of ownership in the customary context. The idea of a community as a land-owner is historically well-known to customary law among indigenous populations on all continents.

Moving beyond the tragedy of the commons to the tragedy of public lands

Law, officialdom, and perceptions do not necessarily interpret realities in similar ways. To look back at Hardin's thesis, for example, it was unfortunate but telling that he chose a village pasture to illustrate his claim that the integrity and condition of shared resources may be sustained only by either private tenure (and he meant individual tenure) or by the state (he meant government). Hardin appears not to have grasped that his example English village commonage was almost certainly not an open access resource at all but, rather, limited to members of that village. Nor did he divine that it was almost as certainly the failure to acknowledge that possession and right of control that was generating the destructive free-for-all behaviour he outlined.

This very scenario is described in place after place around the world, where society or governments fail to acknowledge that collective tenure can exist and fail to support it. Often it has simply not been convenient for administrations to acknowledge that timber-rich forests, wildlife-rich rangelands, or mineral-rich domains are or could be owned by local communities. At other times, there has been serious conviction that the only way

forward for resource conservation on the one hand, or for agricultural investment on the other, is on the basis of individually defined and recognised private property.

Fortunately, there is now greater appreciation (and legal provision) for acknowledgement of commons as discretely owned land parcels, and for a named and identifiable community to be regarded as a viable corporate legal person. However, as examined later, this provision remains unevenly adopted into modern land laws in developing agrarian economies, where it most matters, affecting the rights of millions of poor people in rural areas.

Commons can exist only in community-based tenure regimes

If commons are generically linked to communities, then they are also inextricably linked to community-based land tenure and administration regimes. More than 1.5 billion people around the world continue to regulate their land relations through such customary or indigenous systems (CLEP 2008).

In the case of sub-Saharan Africa, we know that even where rural titling has been most expansive in land area (specifically, South Africa, Namibia, Zimbabwe, and Kenya) the majority of rural populations still govern their land relations by customary norms. In some countries this extends to 98% of the population. Today it is estimated that at least 66% of the total population of sub-Saharan Africa, or 552 million people, live in rural areas, and this will rise to 650 million people by 2025. If it is assumed that 90% are customary rather than statutory land-holders, then currently there are some 500 million people in the customary sector in sub-Saharan Africa. With exceptions, most of these people have been affected by negative legal and policy treatment of customary land rights, especially as it relates to common resources. As a common resource, the fate of the commons is a concern of the majority.

Commons exist in different patterns

It is not always the case that all land within a community is considered to belong to all members of the community. In fact, it is quite common today for a tiered arrangement to exist, in which the community sees itself by custom to be the owner of the soil, but then allocates property rights to some of that land in virtual perpetuity to individuals and families: this is usually for the purpose of building homes (increasingly permanent) and to establish farms. These parcels become in effect individual or family property. Overall, there is a continuum which extends from cases where no common property at all exists within the community land area (all parts having been sub-divided into family or individual properties) to situations where the entire area is considered community property. This is most common among hunter-gatherer and pastoral groups, where no permanent houses or cultivation are established.

The way in which the term "communal land" has been used over the past century also needs to be taken into account. Often this is an administrative designation for all lands

existing in the non-titled or customary sector (the case, for example, in Namibia, Botswana, and Zimbabwe, among others). Such communal lands may embrace both family/individual and collectively owned areas. For our purposes here, commons may be finitely understood as excluding house and permanent farm plots or other lands which have been allocated on a long-term basis to an individual or family. These are more correctly private individual or family properties, even though the root title to the soil may remain by custom with the community as a whole.

The logic behind retaining common properties

The conversion of collective land and rights into individual or family lands and rights is not the uniform or even the intended fate of all commons within the customary sector. While doubling populations every 20–40 years make it impossible for many rural communities to retain common properties intact, there are many conditions in which this is achieved. Valuable forest, wetlands, or pasturelands, specific surface mining areas for iron, gold, and stone quarries, small lakes and ponds, and riverbeds may all be subject to resilient collective ownership, and their conversion to private farm or housing may be resisted.

This may be because sub-division is not viable, producing unusable tiny plots of forest, rangeland, or marshland, or because privatisation in the sense of individualisation would defeat tried and tested rotating use of a common forest or pasture and the communal supervision of extraction needed to keep the resource sustainable. Or it may be that privatisation into the hands of only some community members is intolerable to the majority.

Such logic is actively demonstrated in present-day treatment of the commons and is particularly tangible in the forest sector, where there is clear institutional support in many cases for retention of forests as shared community assets (FAO 2003b; Pierce Colfer and Capistrano 2009; Alden Wily and Mbaya 2001). An example is the determination with which both Nepalese and Tanzanians now bring local forests under designation as community reserves, aiming to keep these valuable, daily-needed resources out of the hands of governments and elites within the community. It is also seen in the fact that so few Mexican communities have taken up the legal opportunity to sub-divide their commons among families: for a number of reasons, they find these more useful and viable as retained common properties (Barton Bray et al. 2005). Such integrated conservation, management, and social reasons are also widely seen in the handling of community pastures in otherwise industrial economies where individualised tenure firmly dominates, such as in Italy, Spain, and Norway (Brouwer 1995; Merlo 1995; Berg et al. 2002).

Common properties are always used

Finally, people's commons are always used, no matter how light or seasonal this may be, or manifesting in virtually invisible extraction – often the case where land use is solely for hunting and gathering. The fact that commons are always used is important for, as will be

shown later, official presumption of commons as vacant, unoccupied, or unused lands has dogged their history.

How expansive are the commons?

A usual way to describe (landed) commons is to describe them as resources which are not privately owned. Although a negative definition, this is mainly useable. The problem arises in then defining what constitutes private property and in assessing how extensive this is. There is also a problem in that non-private lands are not themselves necessarily all the common lands of rural communities. Non-private lands (for which "public lands" is a telling definition) include both state lands and lands customarily held and used by communities. There is also a strong overlap between these two classes.

Below, in this and the following section, three routes are pursued through which the extent of the commons resource and its ownership may be gauged: the first by excluding areas under land uses which are unlikely to be subject to communal ownership; the second using likely resource types under common property; and the third by returning to land tenure categorisations.

Defining the commons on the basis of land use

Urban areas are unlikely to be commons

Urban areas may be most immediately excluded. The greatest area which geographers have calculated as urban is 352.4 million hectares, or 2.4% of the global land area. Using state-of-the-art remote sensing and criteria, Schneider et al. (2009) convincingly argue that the urban domain is in fact no greater than 65.876 million hectares, or 0.51% of the global land area. Either way, the urban domain is a minor element of land use.[5]

Cultivated lands are unlikely to be common properties

Cultivated lands are also likely to be private or individual property (registered or not), not common property. This is so even within the context of "communal lands".

As explained above, a clear distinction needs to be drawn between communal lands and more definitively owned common properties within that context. "Communal land" tends to be a cover-all designation for situations wherein (i) a whole community land area is referred to, within which there is frequently a mix of individual, family, and community-owned estates (commons); and (ii) where, although private individual and family rights to the land are clear, the land itself is owned by the community in general.

The following caveats must also be considered:

[5] The global land area excluding water bodies is 13.066 billion hectares.

- Data on cultivated land are highly various, reflecting some difficulties in distinguishing between actively cultivated and potentially cultivated land. FAO (2000) suggests that only 38% of the world's cultivable land is actually farmed. At the same time, it acknowledges that over half the world's potential farmland is in fact occupied by forest or woodlands, which serve critical non-arable functions in their own right.
- There are many farming areas that are too small or fragmented to easily recognise or to calculate by remote sensing.
- It is not clear how temporary much of the cultivation identified actually is; it could be on lands that are considered to be community property. A main case in point is where shifting cultivation is practised. While permanent farms have a good chance of being exclusive of common properties, lands under shifting cultivation could well be on community lands, and impermanent farms may be deliberately located within communal lands, including even forests (for example, the case in Liberia, for reasons of soil fertility).

With these reservations in mind, it may be noted that FAO (2000) finds that actually cultivated land amounts to 1.463 billion hectares globally, while WRI (2002) calculates the area as 1.568 billion hectares. These estimates are respectively only 11% or 12% of the global land area. Taking this hectarage along with an urban area of 65.876 million hectares (to use the data of Schneider et al. (2009)), this leaves a global land area of 11.432 billion hectares. By no means all of this area can be collectively owned estates.

Defining commons on the basis of characteristic resources

Another route to calculation is to identify the types of resource that are likely to be communal assets. This includes forests (hereafter inclusive of woodlands and mangroves), wetlands, and rangelands (including pasturelands). Table 1 identifies these areas by region, with a total area globally of 8.5 billion hectares.

The region with the greatest proportion of such resources is sub-Saharan Africa, followed by Europe (which in this table includes Russia with its vast expanse of tundra). However, on a rural per capita basis, four regions have significantly more commonage than sub-Saharan Africa, which is the main site of FDI (see Table 4).

Table 1: Maximum area of commons using likely resource types (hectares)

Region	Natural forest area (2000)	Permanent wetland (1992–1993)	Shrublands, savannas, and grasslands (1992–1993)	Sparsely vegetated and barren lands (1992–1993)	Total hectares	% of all land area
Middle East/ North Africa	20,448,000	31,500	312,925,600	81,247,700	414,652,800	4.85
Sub-Saharan Africa	478,576,000	6,525,900	856,748,600	443,265,300	1,785,115,800	20.89
Central America/Caribbean	76,556,000	2,041,600	81,473,700	1,598,800	161,670,100	1.89
South America	875,163,000	5,836,900	405,563,000	55,681,000	1,342,243,700	15.71
Asia	375,824,000	1,647,500	795,344,200	232,768,000	1,405,583,700	16.45
North America	209,755,000	23,184,400	589,483,200	203,814,800	1,026,237,400	12.01
Europe	1,007,236,000	590,482	438,745,400	75,531,600	1,580,561,200	18.50
Oceania	194,718,000	112,000	629,281,600	1,987,500	826,099,100	9.67
World	**3,238,276,000**	**98,432,800**	**4,109,565,300**	**1,095,894,700**	**8,542,164,000**	**100.00**

Source of base data: WRI Earth Trends Data (2010). http://www.earthtrends.wri.org

The figure of 8.5 billion hectares, based on using likely land resource types, can be taken as a rough guide to the immensity of the commons resource – but without considering whether it is owned by communities or by governments or other entities. As will be shown below, a great deal of forest is legally the property of governments, not the communities who live near or within them.

To recap, this figure excludes urban and actually cultivated land, and in addition snow and ice areas and planted forests (by using only natural forests). It includes natural forests, grasslands, shrublands, and savannas, as well as wetlands and sparsely vegetated lands known to be frequently used for wet season grazing and therefore potentially within the domain of one or other community. Water bodies throughout have been excluded.

Who owns the commons?

Four paths are pursued here to throw light on how much of the estimated 8.5 billion hectares of commons are owned by local communities or owned by the state and other entities. These paths are:

- Determining how far community-owned land is provided for as a land class;
- Distinguishing between titled and untitled lands, on the basis that most titled land may be presumed to be individually owned rather than communal estates;
- Identifying the scope of protected areas, in the knowledge that the most valuable commons attract this designation and may usually be considered national or government property; and
- Ascertaining whether key commons assets (forests, wetlands, and rangelands) are generically declared to belong to the state and therefore can be fully removed from the area of people's commons.

Using land classes as indicator

Helpfully, some countries do provide for a class of community lands. However, these indicate the scope of the customary sector in general, without defining how much of the lands therein belong to individuals, families, or to communities as their collective property. Box 1 gives examples from Africa.

Box 1: "Community lands" as customary domain, not necessarily all common properties

Botswana divides land into Tribal, State, and Freehold Land, but Tribal Land includes private, public, and collective ownership possibilities.

In **Tanzania**, *all* land is referred to as public land, but is divisible into Village, General, and Reserved Lands. Village Land means lands held under customary tenure; this allows for individual, family, or collective ownership to be defined internally by community members. General Land means that the government is the landlord, but does not preclude a grant or long leasehold allocation to a community. Reserved Land means areas set aside for protection. Government, communities, or even individuals can own protected areas.

In **Burkina Faso**, legal distinction is drawn between State, Local Authority, and Traditional Lands. The last includes estates that are variously owned by individuals, communities, and especially families.

In **South Africa**, land is divided into State, Freehold, and Communal Land. The last covers the private customary landholdings of some 14 million citizens, as well as commons which they may share.

In **Swaziland**, two-thirds of the land area is Swazi National Land, or is more exactly owned by the King but available for individual and village communal use, with the remainder held under freehold and leasehold.

In **Kenya**, the new Constitution (August 2010) establishes Public, Private, and Community Lands. The last comprises up to 70% of the total land area. Community Lands do not mean that these lands are all owned on a communal basis, rather that they are untitled and governed by customary norms. These norms include both parcels which are individually owned or family property (farms, houses, etc.) and parcels owned by all members of the community jointly (forests, pastures, etc. – i.e. common properties).

Globally, the most common distinction is simply between private and public lands. In many cases "private land" is equated exclusively with titled land. "Public land" also usually means de jure or de facto government property.

This public land may conceal, however, a host of situations in which common properties exist, whether or not they are legally recognised. In Nepal, for example, the country is classified into public, private, and religious property, with public land containing millions of hectares of forests which by custom were owned, and today are at least acknowledged in law as managed and used, by local communities (as Community Forest Reserves). In Afghanistan, land is similarly divided into public, private, and religious land, but Islamic law and customary law pertain; both of these make it possible for common property to

exist but are overridden by state policy, which declares all pasture resources (the key commons asset) to be government property (Alden Wily 2008). New national policy now aims to reclassify land as private, public, government, and community land, but civil war and weak political will have prevented this.

Some Latin American states have detailed land classes. In Brazil, distinctions are drawn between federal property, frontier property belonging to the local state but under federal jurisdiction, indigenous lands, federal protected areas, state protected areas, rural settlement areas, state property, and military areas (Benatti and Fischer 2010). It is necessary to turn to legislation to discover the real tenure conditions of each class. For indigenous lands, for example, Brazil's constitutional laws (1988) endow only perpetual usufruct to native communities, not ownership of the land, which remains state property.

In conclusion, land classes are not entirely helpful for identifying owners, being neither consistent across countries nor without internal complexities. The meanings of "private" and "public" lands are especially diverse. Even where indigenous or communal lands are designated, these themselves contain a mixture of individual and collective rights.

Testing the distinction between titled and untitled land

All around the world, formal registration of a land parcel is an act of privatisation, irrespective of the procedure adopted.[6] Therefore, by exclusion, land titling should be a guide to non-private and potentially community-owned lands. In practice there are many constraints:

- Accurate information on the extent and nature of titled land is difficult to access in most agrarian economies, the main sites where commercial pressures are being felt.
- A large part of untitled lands are government lands (*de jure* or *de facto*), not community properties. Few governments bother to issue title deeds for lands which they own as their private property or which fall under their controlling authority. In Cameroon, for example, like most other Francophone states in Africa, declaration of a forest reserve serves as legal evidence of a private state entitlement (Alden Wily 2010d).
- Lands such as forests and rangelands, which are generically most likely to be commons, are least well covered by titling. Most title deeds in developing countries are urban entitlements.
- Some titled lands may be owned by communities. The orthodoxy that private land equals individual property is giving way to more flexible norms allowing communities to be registered land-owners. The main incidence of this is in Latin America, where indigenous communities in Bolivia, Brazil, Colombia, Costa Rica, Panama, Paraguay, and Peru, and in seven other countries where such norms are less well developed, have already established communal title over large areas. This includes, for example, 12 million hectares titled to 1,300 native communities in the Peruvian Amazon and 350 million hectares of forestlands titled to 200 discrete native peoples in Brazil, Peru,

[6] Such as either through registration of deeds, which records purchases, grants, or inheritance, or through comprehensive title registration, which links the owner to a specific, mapped, and traceable parcel of land.

and Mexico (Ortiga 2004; Barry and Leigh Taylor 2008). There are also (many fewer) cases of collective titles being issued in Africa (see below).

- It is not necessarily the case that rights endowed to communities are equivalent to rights registered to individuals or companies. Where collective titles to indigenous peoples are issued, such as in many of the Latin American cases above, these are often delivered as usufruct in perpetuity on lands which nonetheless remain state property. Governments also retain strong rights of reversion, enabling them to reallocate these same lands to oil, mining, ranching, biofuels, and agri-business investor interests, or to establish protected areas out of these lands. Case studies under the ILC commercial pressures programme in Nicaragua, Brazil, and Peru show very clearly the uncertainty of tenure in the state/people relationship both in respect of indigenous territories and, in the case of Brazil, in respect of settlement schemes (Dos Santos et al. 2011; Monachon and Gonda 2011; Burneo and Chaparro 2011; Durand 2011).
- While individual private properties are also subject to limitations, compulsory acquisition with compensation is generally a prerequisite, which is not always the case when the rights-holder is an indigenous community. An African example of this concerns nearly 1 million hectares of common properties formally registered as the shared private property of communities in Liberia, under legislation first developed in the 1920s to enable hinterland chiefdoms to secure their lands in commonhold in registered deeds. Through purposive shifts in legal interpretation from the 1950s, it was possible for the Liberian government to redesignate much of this land as National Forests, in the process extinguishing customary rights, although the community rights-holders were neither informed nor compensated (Alden Wily 2007).
- Although still uncommon, legal arrangements do exist whereby customary or indigenous land rights in particular do not require formal titling to be upheld, and are inclusive of common properties. The constitutions or land laws of Uganda (1995, 1998), Tanzania (1999), South Africa (1996), Mozambique (1997), and Southern Sudan (2009) are examples.

While private land titling has seen revitalisation, most notably in India and Brazil, it remains limited overall in agrarian economies. In sub-Saharan Africa, now the main target for large-scale allocation of untitled lands to investors, few rural families enjoy the security of title deeds, except in Kenya, where some 30% of the total land area is subject to mainly smallholder entitlement. Of the estimated maximum of 10% of the total area of the subcontinent subject to formal entitlement, most lies in formerly white-owned farms in South Africa, Namibia, and Zimbabwe and as private company lands in Liberia (e.g. Firestone) and other West African coastal states (Alden Wily, forthcomimg (b)). Mass titling of smallholdings is now under way, especially in Ethiopia and more recently in Madagascar and Rwanda. By 2009 Ethiopia had issued 20 million rural titles, Rwanda 15,000 titles, and Madagascar 50,000 titles (Rahmato 2009; National Land Centre 2010; Teyssier et al. 2008). Only a few thousand titles had been issued in customary land areas in Namibia by the end of 2008, out of an anticipated 230,000 (Mendelsohn 2008). Tanzania, which is also piloting voluntary rural titling, had issued 14,017 Certificates of Customary Occupancy, but was making much better progress in urban titling (Burns 2009).

However, in all these cases rural land titling has historically been, and continues to be, geared to titling homesteads (houses and/or farms) belonging to families or individuals. With the exception of Amhara Regional State in Ethiopia, where a handful of local commonages have been recorded as belonging to the community, programmes consistently fail to register commons, leaving thousands of hectares vulnerable to designation as potential private investment areas.

More holistic titling initiatives are emerging in several West African countries under the Plan Rural Foncier approach (Lavigne-Delville 2005, 2010). In Liberia, Uganda, and Mozambique, a handful of communities are also enjoying pilot titling under a research project (Knight 2010). During 2005–2008 there was a substantial but uncompleted communal area titling project in central Sudan (Alden Wily 2006a). The most advanced titling programmes affecting common properties are found in Tanzania and Mozambique.

In Tanzania collective titling, especially of community-owned forests, is advanced, as later outlined. This is nested within new land law provisions (1999), which enable each of the 10,397 villages in the country to establish full authority over lands within their respective village land areas. These domains are fully inclusive of village common properties. Elected village governments are bound to record the scope of collectively owned property in their new Village Land Registers, prior to issuing titles to private or family lands within the village area domain. No village land may be alienated or even leased to investors, without first being formally purchased by government (Alden Wily 2003b, forthcoming (a)). This is a costly procedure, given the overriding protection of customary rights in the 1999 law, which recognises even unregistered customary rights as being due respect as property interests and bound to be compensated for in full. This does not mean that the Government of Tanzania does not find ways to persuade rural communities to voluntarily surrender substantial parts of their unfarmed common properties (see below).

In Mozambique, the stimulus to community area titling has been pressure from foreign investors, initially from Zimbabwe and South Africa, looking for commercial farming areas or to launch wildlife-related tourism businesses. Interest in commercial land development by local, regional, and international investors has soared recently, along with a sharp rise in the issue of forest concessions (over 156 concessions had been issued by 2008) (De Wit and Norfolk 2010). Largely through efforts by NGOs, 231 community land areas have been delimited, covering 6.7 million hectares. While not representing communal entitlement (this needs to be followed by issue of deeds, even fewer of which have been finalised), delimitation gives significant protection against allocation of these same lands to private investors.[7]

[7] A similar single form of formalised tenure is available in Tanzania and Mozambique. This is known as a DUAT in Mozambique (*Direito de Uso e Aproveitamento da Terra* in Portuguese, or 'right of use and benefit') and a Right of Occupancy in Tanzania. In both cases, distinctive forms exist for customary and non-customary holders. In Mozambique investors receive a DUAT of limited term, in effect a 50-year leasehold renewable for a further 50 years. Granted Rights of Occupancy in Tanzania may extend to 99 years. In contrast, in both states, formal customary entitlement is in DUATS or Customary Rights of Occupancy of unfixed term, which are inheritable and transmissible.

In conclusion, with exceptions, titling remains primarily an instrument for individuals rather than for families, groups, or communities to formally secure their properties. Were titling comprehensive, the exclusion of the titled land area would point to a residual area that was owned either by governments or communities. Titling itself is, however, changing to better provide for registration of communal properties. Such cases amount to 12 million hectares in sub-Saharan Africa, a mere 0.5% of the total land area. This prominently includes old (and now disputed) entitlements in Liberia, and new entitlements in Tanzania and Mozambique. More significant are the legal changes that are slowly beginning to appear, which recognise customary landholdings (both individual and collective) as real property, even without titling, as most explicitly entrenched in land laws in Ghana, Uganda, and Tanzania. From any of these perspectives, titled lands are not a safe path to identifying common properties.

Assessing the ownership of protected areas (PAs)

We may begin with the assumption that if forests, rangelands, and wetlands are naturally local communal resources, their rich biodiversity logically makes them targets for designation as protected areas. Table 2 shows that terrestrial protected areas (TPAs) account for 13% of the world's land area. It also shows that they absorb 20% of the 8.5 billion hectares previously identified as the reasonable upper limit within which common properties could fall, having excluded urban, cultivated, and snow and ice areas. Because this area cannot be distinguished sufficiently between state and people's commons, it is referred to as "potential commons area".

Table 2: Terrestrial protected areas (TPAs) as percentage of total area and of people's commons

Region	Total regional land area (ha)	Potential commons area (ha)	Number of TPAs	Area of TPAs (ha)	TPAs as % all land	TPAs as % commons area	Commons excluding TPAs (ha)
Middle East/ North Africa	1,291,988,000	414,652,800	828	121,336,180	9.39	29.26	293,316,620
Sub-Saharan Africa	2,362,209,000	1,785,115,800	5,952	297,987,641	12.61	16.69	1,487,128,159
Central America/ Caribbean	264,826,000	161,670,100	1,163	32,361,934	12.22	20.01	129,308,166
South America	1,752,020,000	1,342,243,700	2,633	432,876,590	24.70	32.25	909,367,110
Asia	2,406,300,000	1,405,583,700	5,331	281,535,635	11.69	20.02	1,124,048,065
North America	1,879,066,000	1,026,237,400	18,999	217,920,483	11.59	21.23	808,316,917
Europe	2,260,099,000	1,580,561,200	74,152	234,836,716	10.39	14.85	1,345,724,484
Oceania	849,088,000	826,099,100	10,732	90,370,466	10.64	10.93	735,728,634
World	**13,066,880,000**	**8,542,164,000**	**119,790**	**1,709,225,645**	**13.08**	**20.00**	**6,832,938,355**

Source of base data: WDPA (2010) at: www.wdpa.org

We then need to examine the reliability of assuming that all protected areas belong to the nation, state, or government, rather than to local communities. To a large extent, that assumption is correct. Historically, the declaration of protected areas in the form of parks and reserves tends to extinguish local tenure. Payment of compensation, especially to untitled customary owners, is virtually unknown. As this is against international law in the form of the ILO Convention on the Rights of Indigenous and Tribal Peoples (ILO 169), to which most states are signatory, some communities have begun to take their governments to court.[8] A topical case in Africa is the ruling of the African Commission on Human and Peoples' Rights that the Kenyan Government should revisit the uncompensated eviction of a pastoral community, the Enderois, 30 years ago to make way for a government wildlife reserve.[9] Other notable cases have concerned San hunter-gatherers in Botswana and South Africa.[10]

There are instances where creation of a protected area does not in itself alter the ownership of the land; this is mainly the case in the Amazon Basin, where PAs overlap with up to 86% of indigenous territories, many of which have been formalised. In practice, eviction is common. Sunderlin et al. (2008) refer to 130 million "conservation refugees" globally, evicted to make way for the creation of state-owned and/or controlled protected areas. Nelson (2005) describes such situations in Tanzania, and the FPP (2009) gives examples of the same trend in parks and reserves in the DRC, Burundi, Rwanda, Uganda, and Cameroon.

Nor does "protected area" necessarily mean that commercial exploitation is excluded: most are only protected against clearing and cultivation. The complexities are well illustrated in Peru. When a community seeks a collective title, the state classifies the land into sections for agriculture and ranching, forestry, and permanent protection. The actual title is granted only for the agricultural and ranching land, while the forestry extraction and protection forests are given to the community under a revisable and revocable usufruct contract. This leaves the tenure of such lands in uncertain territory. Large-scale mining activity, for example, which covers over half the Peruvian Amazon, adds to commercial pressures, as outlined below in Box 3. ILC case studies by Durand (2010) and Burneo and Chapparo (2010) describe situations of just this kind in the Peruvian Amazon.

Community-owned protected areas in sub-Saharan Africa

There are cases in Africa where communities are definitively acknowledged as owners of wildlife reserves. The largest are the Richtersveld (162,000 hectares) and Makuleke (20,000

[8] Most cases are in Latin America and refer mainly to involuntary land losses to dams, ranches, and especially mining, not to the creation of TPAs. The first landmark case was in Nicaragua in 2001, involving the Awas Tingni community. See: http://hrlibrary.ngo.ru/iachr/E/tingni9-6-02.html

[9] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya*, Communication 276/2003 (2010).

[10] For example, as involving the Richtersveld National Park; *Richtersveld Community and Others v Alexkor Ltd and Another*, 2001 (3) SA 1293 (LCC).

hectares) National Parks in South Africa. Both are so-called "contracted parks", which means that the local community leases the land back to South Africa National Parks (SANParks) to manage.[11] In Kenya, an estimated 130,000 hectares of collectively owned lands known as Group Ranches host tourism/wildlife conservancies.

Less certain ownership of conservancies exists in Namibia, as the land is vested in regional Communal Land Boards, not in the affected communities. Nonetheless, these encompass no less than 14% of the country's total land area. Even less certain tenure is granted under some 500 Community Development Trusts in Zimbabwe and Botswana; the objective of these is to enable communities to gain quotas for hunting and safaris (Roe et al. 2009).

In respect of forest reserves, the default is again state ownership (variously meaning either national property under the control of the government, or government private property). However, new forest laws in some 30 African states provide for Community Forests. These numbered around 1,000 in 2002, although with an aggregate land area of less than 5 million hectares (Alden Wily 2002). This does not subtract significantly from the 280 million hectares of protected areas.

Other constraints need to be considered. First, not all governments include Community Forests within their identification of protected areas, locating them as "off-reserve" activities. Second, declaration of a Community Forest usually endows only management and use rights to the community, not ownership of the land; this is the case in Zambia, Senegal, Namibia, Zimbabwe, the DRC, Cameroon, Namibia,[12] and in some cases in South Africa.[13] There are also a host of cases where local communities partner the state or a private sector partner in managing a Forest Reserve, but without security of tenure, and mainly gaining only a limited share of revenue where the reserve produces this.

There are positive exceptions. Steps were taken early on in community forestry in the Gambia to enable each community to secure ownership of its (albeit tiny) forest resources. Entitlement is in the form of a long lease granted to community-elected Community Forest Committees. The issue of titles is slow, but firmly intended. Around 550 communities now own or will formally own Community Forests. However, the total area is less than 45,000 hectares (FAO 2008).

Building upon the changing status of customary land tenure in Tanzania, the country's Forest Act (2002) confirmed that it is possible for a village to formalise Community Forests

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[11] Other, much smaller reserves in South Africa include Makhasa Community Game Reserve, Botshabelo Game Reserve, and Somkhanda Game Reserve, the first community-owned wetland protected area. The Mlawula Community Nature Reserve is a tiny reserve "owned" by a community in Swaziland, on Swazi National Land vested in the King.

[12] Eight Community Forests in Namibia have been created, covering 349,000 hectares (FAO 2010), but wherein the land is firmly vested in the state.

[13] Although communities failed to regain ownership of Dwesa and Cwebe Forest Nature Reserves through restitution claims, the South African Government awarded them a contractual interest in their revenues (Alden Wily and Mbaya 2001; Roe et al. 2009).

out of its communal lands. By 2008 there were 1,600 community-owned and community-managed forests in the country, covering 2.345 million hectares (MNRT 2008). A main incentive is indisputably the double-locking of tenure security over community lands afforded through this instrument.

A more ambiguous situation exists in Ghana, where most natural forest falls within legally acknowledged customary lands, but also now within declared reserves. Technically, all but two Forest Reserves (amounting to 2.2 million hectares) are the property of rural communities. Administrations have found ways to proscribe this, first by making it possible for only government to declare a reserve (1927), then by vesting reserves in the state, although on behalf of the owners and pledging that "all rights, customary or otherwise, in such lands shall continue", thus establishing a complex and uncertain paradigm. A constitutional obligation (1992) that the Forestry Commission share revenue with the customary owners is undermined by the distribution formula, which gives the designated 45% share to chiefs, not communities, and with no obligation to pass this on (Alden Wily and Hammond 2001).

Finally, there are individual cases of forest protected area ownership by communities in Mozambique. The most notable is the 650,000-hectare Chipanje Chetu Community-Based Conservation Area (Anstey 2009). The five participating communities secured co-title to the defined area in 2003. However, as this class of protected area does not exist in Mozambique's laws, the Provincial Governor is signatory to tourism and hunting deals on the communities' behalf.

In conclusion, known community-owned protected areas absorb no more than 5 million hectares, a tiny proportion of the 280 million hectares of protected areas in sub-Saharan Africa. The state is the effective owner of the remainder. At the same time, the door has been opened to community-owned protected areas, and this should increasingly prove a useful route for communities to secure their (forested) commons.

Ownership of commons by resource type

It was stated earlier that some countries claim all forests, wetlands, and rangelands, as well as water and minerals, as state property. Usually this is established in constitutional law. Box 2 summarises the findings from the national constitutions of 20 countries where FDI is active. These suggest that the majority (13 countries) do leave some scope for communities to potentially be recognised as owners of at least unreserved forests, rangelands, and wetlands. However, sector legislation is the final arbiter of rights to a resource. Forestry law is examined below as the most accessible example.

Box 2: Provisions on natural resource tenure in 20 national constitutions

Six countries (Angola, Ethiopia, Mozambique, Cambodia, Vietnam, and Peru) establish that all natural resources are property of the state.

Three countries (Liberia, Pakistan, and Brazil) share a position in which all but minerals, seas, and waterways have the potential to be privately or communally owned assets.

One country (Uganda) omits minerals from listed resources that are owned by the state in trust for the nation (lakes, rivers, wetlands, game reserves, and national parks).

One country (Brazil) mentions only the ownership of minerals, and vests these in the state.

One country (Kenya) omits rangelands from the list of public property administered by the state (minerals, mineral oils, government forests, game reserves, water catchment areas, and all water bodies). The Constitution also establishes that "forests and grazing areas which are lawfully held, managed or used by communities shall belong to them as Community Land".

Six countries (Sudan, the DRC, Madagascar, Tanzania, Mali, and PDR Lao) keep their options open by being silent or opaque on the subject of natural resource tenure.

Two countries (Lithuania and Ukraine) make it clear that both the state and citizens can own all natural resources.

Forest ownership

Most of the world's natural forests are owned by governments, whether they are designated as protected areas or not. FAO shows, for example, that 85% of Europe's forests are owned by the state (99.5% in Turkey), that 92% of forests in 17 South and South-East Asian countries are under the state, and that 95% of forests in 17 sub-Saharan African countries are central government- or local government-owned (Romano and Reeb 2006; FAO 2008). Comparing data from 2002 and 2008, RRI and ITTO (2009) find only a slight increase in the devolution of forest ownership, and this is principally to private entities rather than to communities. Most of the increase in forest ownership by communities and indigenous peoples has been in China and Latin America.

Differences among regions are marked, with sub-Saharan Africa performing poorly with only 0.5% owned by communities, compared with 25% of forests in eight Latin American states sampled. RRI and ITTO find that forest ownership by communities and indigenous groups exists in only three of 18 African states sampled – Tanzania, the Gambia, and Mozambique, which deliver respectively 2.05 (now 2.345), 0.03, and 2.0 million hectares of community-owned forests. The comparison between Africa's most forest-rich region, the Congo Basin – comprising the DRC, Congo, Cameroon, Gabon, and the Central African Republic – and the Amazon Basin is stark, generating the observation that at the current pace of recognition of community forest ownership, it will take sub-Saharan Africa more than 250 years to catch up with the situation in the Amazon. However, if Africa begins to

move at the speed that Amazonian countries have done over the past decade, the same goal may be achieved within 16 years.

Looking more closely at community forest tenure

The situation in sub-Saharan Africa is not always as dire as FAO and RRI/ITTO paint. This is, firstly, because their sampling excludes some countries in Africa where forests are fully owned (if not controlled) by communities. This includes, for example, the 2.2 million hectares of non-state-owned forests in Ghana and smaller community-owned forests in South Africa and other countries. Secondly, their focus upon formally designated Community Forests fails to take into account situations where millions of hectares of unreserved forest are accepted as legally belonging to communities.

In Tanzania, for example, there are an estimated 19 million hectares of unreserved forest within Village Lands, and thereby subject to customary jurisdiction and norms. Through the institution of Community Forests cited above, 2.3 million hectares have been drawn into the class of Reserved Lands. This leaves 16.7 million hectares of unreserved but community-owned forest property. This is because the Village Land Act (1999) is explicit that, even without registration, a customary right of occupancy is to be upheld as a property interest. Therefore the more correct area of community-owned forests in Tanzania is in the region of 19 million hectares, not 2.05 (or the updated figure of 2.345) million hectares. The result is that 56.7% of Tanzania's total forest resource is community property.

This area again could be similarly claimed to be community property in Mozambique, although the lack of precedence given in law and especially practice to proclaimed respect for customary rights makes this a good deal less secure. In principle, Mozambique's Land Law (1997) gives the same degree of legal protection afforded to customary landholders in Tanzania, i.e. even without registration, customary rights are to be upheld. In practice, communities have to actively compete with investors to secure these lands and can only do so through a procedure for delimitation and titling which is proving to be slow, expensive, and lacking in state commitment. Fewer than 250 of 3,000 rural communities have had their lands delimited and even fewer have received the final entitlements. Millions of hectares of unreserved forest exist within community domains.

Meanwhile local and foreign investors are actively securing leasehold entitlements, and while consultative procedures are in place, forested and other common properties are vulnerable to loss. Commentators attribute this to traditional authorities or other actors failing to represent the best interests of the community in dealings with investors, to the fact that the land registration service devotes most of its funds and energy to helping private investors obtain DUATs, to the costs of delimitation to local communities, and now to recent administrative modifications to the land law which imply that communities may delimit relatively small zones. Nonetheless, beyond private sector holdings,[14] and

[14] Routinely, a figure of "several thousand" DUATs to investors is indicated in the relevant literature, but without specification of the hectares involved. Akesson et al. (2009) list 318,000 hectares as the area of five investors in one province only (Niassa). Also see CEPAGRI 2010.

beyond the definitively state-owned forest reserves and other classified or protected areas, it may be presumed that most of the land area of Mozambique has significant legal support as community property, unless on a case-by-case basis it is shown to be otherwise.

Conclusion

To recap on Part 1, commons have been defined as lands which communities possess and use communally, in accordance with community-based ("customary" or "indigenous") norms. Especially where land use is for hunting and gathering or involves no permanent settlement or permanent farming, the entire community land area may correctly be referred to as "commons". However, in the majority of cases clear distinctions exist within a community land area or "communal lands" between parcels considered within the system as effectively the property of an individual or a family (mainly farms, houses, shops, etc.) and lands which all members of the community see themselves as owning and using jointly. These are defined here as more distinctly "the commons".

In this and the preceding section, six routes have been pursued to identify the scale and legal tenure of such lands:

- *Identification by land use, excluding urban and cultivated lands:* While this is helpful in bringing the potential area of commons globally down to a maximum of 11 billion hectares, clearly not all 11 billion hectares can be local common properties.
- *Identification by resource type:* This is also useful, but again does not say who the owner is.
- *Identification of land-holding classes:* This contributes significantly, but only in countries where a class of native or community lands is provided for. Nor may all land within such classes be presumed to be common properties, rather than individual/family estates.
- *Identification of titled lands as a means of excluding non-common properties:* This should be a good deal more helpful than it actually is, being constrained by (i) limited titling coverage; (ii) the changing nature of titling where commons may be titled as discrete, private, group-owned properties; and (iii) the fact that in some countries titling is not required to assure legal ownership of commons or other customarily held properties, such as, for example, in Tanzania, Ghana, and Uganda.
- *Identification of terrestrial protected areas:* This is useful in excluding these as mainly government- rather than community-owned, although there are a growing number of exceptions.
- *Identification of state ownership of specific commons resources:* This works best in respect of subterranean resources (oils and minerals), coastal assets, and water bodies. Ownership of forests, rangelands, and marshlands is much more erratically defined as belonging to state or people, with a multitude of caveats making both usually possible in one or other circumstance.

Accordingly, while each of the above routes provides insights on the commons, none works on its own to indicate either the real extent of the commons area or its owners. Moreover, there are confusing overlaps: protected areas are, for example, clearly not entirely state-owned but are inclusive of some significant collectively-titled territories, especially in Latin America. Titled lands clearly overlap with urban and cultivated lands. Nevertheless, a broadly indicative picture has been obtained. Table 3 settles upon land type as being the most viable indicator but removes TPAs, on the grounds that the majority of these remain state commons rather than people's commons. The residual gross possible area of people's commons, therefore, is 6.8 million hectares globally. While this seems to be a massive resource, Table 4 reminds us of the limitations of the commons resource on a per rural capita basis.

This is particularly so in respect of the many millions of poor and extremely poor people, including the landless, whose only access to resources may be the local commons. Most of the rural poor are located in sub-Saharan Africa and South Central Asia: 75% of the populations (rural and urban) in these regions lived on the equivalent of less than USD 2 a day in 2005, and respectively 66% and 70% of these populations were rural. In contrast, in Latin America and the Caribbean only 24% of the population are rural and 26% of the total population are definably poor (PRB 2005). The least commonage per capita is available in the two poorest regions of the world, sub-Saharan Africa and Asia.

Table 3: Estimated area of people's commons by region

Region	Total regional land area (ha)	Total potential commons area, excluding urban, actually cultivated, plantations, snow and ice lands (ha)[15]	Terrestrial protected areas (TPAs) (ha)	Maximum area of community-owned commons (ha)
Middle East/ North Africa	1,291,988,000	414,652,800	121,336,180	293,316,620
Sub-Saharan Africa	2,362,209,000	1,785,115,800	297,987,641	1,487,128,159
Central America/ Caribbean	264,826,000	161,670,100	32,361,934	129,308,166
South America	1,752,020,000	1,342,243,700	432,876,590	909,367,110
Asia	2,406,300,000	1,405,583,700	281,535,635	1,124,048,065
North America	1,879,066,000	1,026,237,400	217,920,483	808,316,917
Europe	2,260,099,000	1,580,561,200	234,836,716	1,345,724,484
Oceania	849,088,000	826,099,100	90,370,466	735,728,634
World	**13,066,880,000**	**8,542,164,000**	**1,709,225,645**	**6,832,938,355**

Sources of base data: WDPA 2010 at: www.wdpa.org

Table 4: Rural per capita availability of people's commons by region

Region	Maximum area of community-owned commons (ha)	Rural population 2009 (millions)	Per capita local commons area (ha)
Middle East/North Africa	293,316,620	99.63 / 87.62	1.567
Sub-Saharan Africa	1,487,128,159	551.76	2.695
Central America/Caribbean	129,308,166	68.704 / 14.76	1.549
South America	909,367,110	69.094	13.161
Asia	1,124,048,065	2,469.820	0.45
North America	808,316,917	71.61	11.287
Europe	1,345,724,484	204.426	6.582
Oceania	735,728,634	10.548	69.75 (includes Australia)
World	**6,832,938,355**	**3,473.100**	**1.967**

Sources of base data: WRI, http://earthtrends.wri.org (area); PRB 2005, 2009 (population); and FAO 2007 (% rural population)

[15] To recap, this selected midway figure has been arrived at through removing from the total land area of each region lands that are urban, actually cultivated, snow and ice areas, and planted forests (by using only natural forests), but including all natural forests, grasslands, shrublands, and savannas, as well as wetlands and sparsely vegetated lands (often used for wet season grazing). Water bodies throughout have been excluded.

3 Discussion: getting to the source of vulnerability

How are commons being affected by the current land rush?

The rush

Of course, neither foreign-driven nor more locally driven land acquisition at scale is new. Millions of hectares of customary domains around the world have already been involuntarily lost to large-scale commercial land pressures, such as through (i) allocation to settler communities during colonial times; (ii) the creation of 1.7 billion hectares of forest and wildlife reserves, as described earlier; (iii) the issue of concessions amounting to millions of hectares for oil, mining, and timber extraction; and (iv) establishment of large-scale farming schemes involving limited numbers of local farmers, such as seen most typically in recent years in Brazil, in the mechanised farming schemes of central Sudan of the 1970s and 1980s, in the groundnut scheme in Tanzania in the 1950s, in the rubber plantation developments by Firestone in Liberia since the 1920s, or indeed, going much further back, in the initial oil palm plantation developments, especially along the western coast of Africa, in the late 19th century.[16]

Nevertheless, the current wave of large-scale land acquisition (LSLA) in poor agrarian economies is deservedly referred to as a "land rush", given its scale and short timeframe (since 2007). "The demand for land has been enormous. Compared to an average annual expansion of global agricultural land of less than 4 million hectares before 2008, 45 million worth of large scale farmland deals were announced even before the end of 2009," according to the World Bank (2010b). Confirmed leases issued from 2007 to the end of 2009 were in the region of 20 million hectares in the lands of some 33 host lessor states, all but one or two of which are developing countries.[17]

The sheer scale of this globalised land acquisition at scale is indicative of a tipping-point in the globalisation of the land market. It signals the opening up of virtually all economies

[16] See, for example, *The Economist*, 26 August 2010 and Mongabay.com, 15 September 2010 on the controversial conversion of the wildlife-rich Brazilian Cerrado savanna into vast farms, and see Amanor (2009b) for 19th century oil plantation development in West Africa.

[17] See data in Alden Wily (2010a), using data compiled by GTZ, FAO/IIED/IFAD sources, and specific country studies.

and land classes to externally derived land purchases or leases. This is unlikely to be reversible. The implications for polarisation in the ownership of natural resources are immense. They are also alarming, considering that they occur in environments where industrialisation has not taken off and where opportunities for alternative wage employment for those deprived of their land are scarce.

The fact that there is proving to be a strongly speculative element in the acquisitions, involving banks, hedge funds, and private and public investment agencies, local or international, looking for a medium- to long-term return on the land, suggests that the trend of LSLA is likely to be sustained and to grow. This will be so even if acquired lands are not in the event used in the ways committed to when acquired, or indeed used at all. Although it is early days, a consistent finding of reviews in African cases at least is that leased lands are not being put down to commercial production, and indeed often not being developed at all (GTZ 2009a; Cotula et al. 2009; World Bank 2010b).

Foreign interest and investment are indeed immense, including in the form of inter-state agreements, usually delivered in practice by the issue of leases to parastatals, sovereign wealth funds, or private sector companies. There is also rising awareness that this is complemented by an equally sharp rise in LSLA by local investors. It may safely be assumed that the two are linked, with many local investors either fronting for or joining up with international investors, or riding the wave of a more open land investment climate in their countries, or simply taking speculative advantage of the anticipated rise in land values.

Sub-Saharan Africa is indisputably the main target of large-scale land acquisitions. Three-quarters of applications reported in 2009 were for a total of 32 million hectares in the region, and 20 of the 33 countries confirmed as having issued tangible leases since 2007 are also in the region. A handful of African states lead the way as lessors to international or local investors: the DRC, Sudan, Ethiopia, Liberia, and Mozambique are together confirmed as having transferred more than 9 million hectares between 2004 and 2008. Madagascar, Ghana, and Zambia are other prominent lessors.

While proportionally most acquisitions are in the form of leases, these are usually of 33-year or longer duration up to 99 years, signalling that at least one to three or even four generations of traditional occupants and users of those same lands could lose access and livelihoods. Just as significant is the fact that by far the majority of lessors of large areas are not private citizens or companies, but governments. This firmly points us in the direction as to who in law is considered to be the owner of these lands.

Are local commons being affected?

Despite encouragement from international agencies and expressions of willingness by some host governments, there is not yet much sign that they or beneficiary investors are publishing the terms of agreements. Development of leased lands is also slow and incremental. These facts make it difficult to be precise as to exactly which communities and which lands are being, or will be, affected by current large-scale leasing. Nonetheless, the

following factors do suggest that common properties are the major resource being leased:

- The sheer scale of areas pledged to lease – thousands of hectares in most cases – suggests that smallholdings are not being targeted, although they may be casualties in the process.
- The purpose of most of the leases is for oil crop development (jatropha, oil palm), and they mostly target virgin or forested lands. There are also a number of leases for producing tree plantations (e.g. in Madagascar and the DRC). While not yet expansive, livestock ranching developments, as in Sudan, Madagascar, and Uganda, directly target rangelands, most of which are by custom already owned under customary tenure.
- Host governments naturally prefer to minimise direct displacement, conflict, and the costs of compensating farmers for lost homes and crops as a result of large-scale developments. Accordingly, they direct investors to land that is unfarmed and hence considered "vacant, idle, and available". Madagascar and Ethiopia, among others, actually make it formal policy to allocate only "idle" lands.
- Only commons provide the scale of intact estates sought by large-scale investors; existing farmed areas are too fragmented.
- Large-scale investors do not want the constraints of having to negotiate with local populations, other than as employees. To do so is necessary when leases impinge on occupied farmed lands or when investments are to be channelled through existing smallholdings, still a minority route for current investment.
- While local tenure over all untitled lands is insecure (with exceptions), rights to unfarmed lands – as is characteristic of the commons – are least secure and most easily manipulated, and compensation to people evicted or whose interests have been interfered with is least likely to be legally required.
- The focus on commons may be expected to increase. This may be through the expansion of leases to acquire woodlands or forests for carbon trading purposes or shrublands and grasslands to plant trees for the same purpose. Moves in this direction are well developed in some Latin American states and in Papua New Guinea, and are on the drawing board in Liberia.[18]

How are commons being affected?

Tangible evidence of commons being affected through the new wave of leasing is coming to light. Examples are collated in Box 3 below. Indications abound that communities are not being properly consulted, that they are being promised benefits by investors that are not materialising, and that their livelihoods are being jeopardised. This is quite aside from obvious uncertainties and inconveniences caused to local populations, ranging from air pollution to closure or diversion of livestock corridor routes to pastoralists. However, underlying these effects most starkly are displacement and dispossession. Although

[18] http://www.globalwitness.org/media_library.php; http://www.rightsandresources.org/; http://www.forestpeoples.org/templates/publications_and_reports.shtml#forest_issues; http://www.cifor.cgiar.org/Knowledge/Publications/Carbon/

proportionately few schemes are actually under implementation (World Bank 2010b finds, for example, that only 20% of ventures have started production), these are already occurring and threaten to become a large-scale phenomenon. It is occurring in the form of complete removal of communities from their lands (as shown in the example of the DRC) or, more usually thus far, in co-option or curtailment of their commons. In Africa, lands set aside for and used for grazing appear to be most affected to date (as exemplified in the case of Ethiopia), along with forested lands in Asia (as in the cases of Indonesia and Malaysia).

Losing land, losing capital

The immediate livelihood effects are grave. Already, for example, communities in Ethiopia have been forced to dramatically reduce their livestock numbers in the case of the Bechera Agricultural Development Project, having lost key grazing lands (see Box 3).

Two more ominous effects are apparent. First, through deprivation of part of their lands, communities are already losing some of their principal and scarce natural capital. As the implementation of schemes unfolds, a multitude of poor rural communities face this kind of loss. Their land is after all their principal asset, which they can in the right conditions use to clamber out of poverty, through developing it more productively and/or leasing or selling it to those who are better placed to do so. However, this opportunity is rarely being given to communities; instead, these very assets are taken away from them. In theory, opportunities for employment should compensate for such losses but, for this to be effective, employment opportunities need to be comprehensive, explicitly inclusive of very poor people, and sustained. There is no evidence thus far that such compensation is emerging.

The threats to peace

Second, the implications of this for social and political stability are also grave. History is clear that deprivation of land can be a major trigger to conflict and outright civil war. This was demonstrated in a review of significant civil conflicts since 1990 (Alden Wily 2009c). All but 15 were in agrarian economies where the majority of populations are directly dependent upon land to survive, and nearly half were in Africa. In 73% of cases, a key trigger to conflict was disputed land rights, particularly between governments and their people; these included cases as diverse as Guatemala, Aceh, Sudan, and Afghanistan (Van Hemert 2004; Fan 2006; Alden Wily 2008; Robson 2006). It was also observed that, even where this had not been the case, precisely such questions of land became major policy and peace issues after war had ended (Timor-Leste and Liberia are examples). Commons, in the sense of how unfarmed lands are treated by governments and disposed of, were particular sources of dispute. In this respect, the re-launching of leases by the Government of Sudan over large areas of communal lands (see Box 3) may be regarded as dangerously cavalier.

Box 3: Examples of new land acquisitions affecting people's commons

DRC

GTZ (2009a) cites three large leases, to ZTE International (China), Eni (Italy), and MagIndustries (Canada) for oil palm and eucalyptus plantations totalling over 3 million hectares. Mpoyi (2010) cites six leases amounting to 3.23 million hectares, again with the Chinese allocation prominent, of which 100,000 hectares are under active palm oil cultivation and another 250,000 hectares have been selected in forested areas. Mpoyi (2010) illustrates how communities who have lost their village domains through state concession to a private company called TERRA are now squatting in the adjacent Kundelungu National Park.

Commons can be seen to be affected on three counts: (i) the scale of land allocations, which must interfere with more than relatively small farms; (ii) the nature of the lands being sought – naturally forested land is preferred for oil palm plantations; (iii) village domains typically include both household and common properties and, should only household farms be taken, villagers would extend farming into their local commons, unless these were also taken, making them look elsewhere.

Ethiopia

Ethiopia has been leasing land to foreign investors since 2005. Until recently this was undertaken by regional governments, but now must be cleared through a central agency if the land in question is greater than 5,000 hectares. No applications for less than 300 hectares are accepted. Cotula et al. (2009) report 148 leases being issued via the agency, but also found 22 other leases in one sample Regional State, nine of which were for more than 1,000 hectares. They identify 602,760 hectares as already being formally leased to 157 projects, with the largest holding being 150,000 hectares. GTZ (2009a) lists 16 major investments which alone cover 695,000 hectares confirmed as leased, or up to 1,095,000 hectares including land under negotiation. The World Bank (2010) cites registration records indicating transfers of 1.19 million hectares from 2004 to 2009. A total of 3.36 million hectares have been earmarked for commercial development, with the objective that 1.7 million hectares will be leased to foreign investors by the end of 2010. A total 900,000 hectares have been earmarked in one state alone (Benshangul-Gumuz). Guidelines followed by government are that main forests, village grazing, and existing farms are to be excluded, leaving land that is presumed to be unowned, vacant, and idle. Local communities in Benshangul-Gumuz contest this, fearing that their seasonal grazing and lands earmarked for future farming and livestock-keeping have been taken (Finnish Aid 2010).

The ILC case study (2011) on the Bechera Agricultural Development Project in Oromiya State reports a 30-year lease of 10,700 hectares to an Indian company, Karuturi Agro Products Plc, for multi-crop production. Most of the local plains/wetlands, crucial for livestock fodder collection and seasonal grazing, have been incorporated

into the leased area, forcing families to sell their stock. Livestock prices have plummeted. Around 300,000 hectares have been leased to the same Indian investor in Gambela Regional State for rice and banana cultivation, with similar land loss effects to the grazing lands of many communities (Fisseha 2011).

Kenya

In November 2008 the President of Kenya leased 40,000 hectares of high-potential land in the Tana River Delta to the Government of Qatar for horticultural production. The reported agreement was that in return Qatar would fund a new £2.4 billion port on Lamu Island. The justification given by State House for the Ksh 180 billion deal was that the land was idle and could be put to better use, despite this being land of crucial importance for local use and environmental importance (The Guardian, 2 December 2008; Daily Nation, 22 December 2008, 12 January 2009). Little is known about the deal and as of May 2010 there had been no development on the land (FIAN 2010). Mat International Sugar Ltd, with headquarters in the USA, reportedly also plans to apply for land to produce sugarcane in the Tana River Delta but this is unconfirmed, as are deals involving several other international biofuel agribusiness companies.

This lease follows upon older leases. The Government gave the parastatal Tana River Development Authority (TARDA) 200,000 hectares for rice farming in the 1990s. The local Mumias Sugar Company Ltd plans to cooperate with TARDA to convert 6,000 hectares for sugarcane production. In early 2008 Kenyan conservationists secured a stay order against Mumias Sugar Company, but this was lifted in June 2008 with the support of Kenya's National Environment Management Authority, raising queries as to the agency's autonomy. TARDA has since identified another 40,000 hectares for the production of rice and maize.[19]

Although the precise location of these projects had not been released as of May 2010, the area is used for local farm-based production, mainly under shifting cultivation, and for dry season grazing by pastoralists. Some 20,000 Orma and Wardei pastoralists have specific customary rights to seasonal grazing for 350,000 head of cattle, which are expected to be lost to these developments. More than 25,000 mainly Pokomo tribespeople settled in 30 villages will be evicted from the land leased to TARDA. The Tana Delta is also famously critical for wildlife sustenance through the dry season.

The tenure status of the land is mixed. The Government owns 500,000 hectares in the Tana Delta, deriving from an historical agreement between local sultans and the British Government in the 1900s and entrenched in the 1908 Land Titles Act. Challenges to its status have been active for decades and the land, which is owned customarily

[19] http://www.biodiversityinfo.org/casestudy.php?r=pressure&id=121

by several settled and pastoral tribes, should have been reclassified in 1932 and since as Trust Land (1962). Other parts of the Delta, inclusive of the lands leased to TARDA/Mumias, are believed to be Trust Land, and therefore now Community Land under the new National Constitution.

The Yala Swamps on the shores of Lake Victoria cover 17,500 hectares. In 2003–2004 Dominion Farms Ltd., a subsidiary of a US company, was granted access to 6,900 hectares of the wetland for rice production, under a 25-year, extendable agreement with the Siaya and Bondo County Councils. Some of this land actually consists of privately titled farms. FIAN (2010) reports that when one farmer refused to sell his land to Dominion for the one-third of the market price being offered, his land was mysteriously flooded. Most of the Yala Swamps is Trust Land and is retained as uncultivated marshland for community use (grazing, reed cutting, fishing, etc.).

The designation of Trust Land means that the land is held by County Councils in trust for the residents and that the Councils are bound to act in the residents' interest. However, both the current Constitution (1963, Articles 116 and 117 (1) (c)) and the Trust Land Act, Cap. 288 (1962, Section 13 (1) (c)) permit the Council and the Ministry of Lands (Commissioner of Lands), designated as the legal administrator on behalf of the Council, to make decisions, including the issue of leases and even alienation ("setting apart") in the presumed interest of the customary owners. The new Constitution (2010) alters these arrangements and converts trust lands into directly community-owned lands over which communities will have jurisdiction via local land boards, in accordance with the new National Land Policy (2009).

Both the Tana River Delta and Yala Swamps are clearly used both individually and communally, and in some parts even under current legal arrangements which suggest that the Government of Kenya is bound to uphold communal title.

Madagascar

A new law introduced in 2008 (Loi No. 2007-036) has simplified land access for foreign investors, requiring them to establish local companies to purchase land directly. Applications and agreements have risen to 3 million hectares (mainly for biofuel production), around the same area already being used for family farming. Following the suspension of two major allocations, to Daewoo (1.3 million hectares) and to VARUN (370,000 hectares), the issue of lands to foreign investors has sharply declined. Research by Andrianirina-Ratsalonana et al. (2010) shows that one-third of the 52 projects announced have either stopped or have not passed the prospecting stage. Projects actually under way cover only 150,000 hectares.

One main reason for the slowdown is that there is less available land than the government promised (variously cited as 8–20 million hectares). Policy limits non-local leasing to state lands or unutilised land. Most useable land is occupied, farmed, or used for grazing and other purposes. Definition of what constitutes "unutilised" land

is opaque, but it is generally based on availability of a private title or certificate for the land.

Madagascar has an estimated 37.3 million hectares of meadow and pastureland, which may be presumed to be common property in accordance with custom. This excludes another 12.7 million hectares of forestland, considered to be government property. Only 176,000 hectares of cultivated land were titled by 2009, with 45,000 new titles issued between 2006 and 2009 under new land laws (Acts No. 2005-019, 2006-031, and No. 6820/2005). These laws do away with the notion of unowned vacant lands and protect occupancy and use until mass titling is complete. However, in practice titling in the 300 or so local land offices is directed to issuing deeds for homesteads and cultivated lands, not for commons (Teyssier et al. 2009). It does not appear that the Government is sticking to its new land policy and legal principles, because renewable 50-year leases are being issued over collectively used lands. GTZ (2009c) illustrates the case, with ten companies leasing several hundred thousand hectares from the Government for agrofuel production. An exceptional arrangement is noted for GEM, a UK company, which has entered agreements with 18 communes to use 452,500 hectares of such lands known to be owned by farmers for jatropha production.

Mali

GTZ (2009b) has identified five land acquisitions involving foreign-derived investment, totalling 130,105 hectares. Two of these investors plan to work with local farmers. Among the other investments is a 100,000-hectare deal with Libya for production of export rice under a bilateral treaty signed in June 2009, which leases the land at no cost to Libya for up to 99 years. This land was declared to be "free from any juridical constraints or individual or collective property that hinders the exploitation of the land", having been registered as the property of the Niger Basin Authority some decades previously. At the same time these lands are fully owned, occupied, and used on a customary law basis, and in fact the area represents the most important rice-producing zone for Malian farmers. It is also an area seasonally accessed by pastoralists. Cession agreements with local communities were not obtained prior to the lease to Libya. According to GTZ, the following impacts have already been reported: displacement of local farming families, loss of farmlands, flooding of villages, felling of forests, blockage of transhumance routes, diversion of water from Malian farmers' fields to leased fields, and dust pollution from the Libyan road and canal construction works. Mainly contracted Chinese labour is being used, limiting local employment benefits. Rice production is scheduled for repatriation to Libya. No compensation for loss of access or land use rights has been promised or paid to affected citizens. Local resistance is being mobilised.

Mozambique

The Mozambican Government confirmed in April 2010 that large-scale leases have been granted to 22 different international companies to produce agrofuels, in accordance with its new Policy and Strategy for Bio-fuels, May 2009 (CEPAGRI 2010). This was facilitated by the World Bank, with the aims of reducing petroleum imports and creating 150,000 jobs. Nearly all leases affect communal lands, including existing farms but especially unfarmed commons (FIAN 2010). Case studies of three biofuel projects show that, even though local land rights are by law to be protected, allocations have been made without observance of these laws or procedures, and a lack of institutional coordination leaves plenty of room for manoeuvring against local communities. Fertile and forested lands are directly affected, including loss of local wildlife resources (Nhantumbo and Salomao 2010).

Liberia

From the 1920s, Liberia enabled rural communities to secure commonhold tenure over their largely forested territories if they wished, resulting in nearly 30% of the country being so titled (Alden Wily 2007). These titles were undermined from the 1960s, being effectively reinterpreted as no more than setting aside of tribal lands. The creation of National Forests in the 1960s extinguished customary rights to 1.3 million hectares, and these and most of the remaining forested areas (around 3 million hectares) were leased out to timber companies from the 1960s and 1970s. Following the civil war (1989–2003), concessions were cancelled in 2005. A Community Rights Law with Respect to Forest Land was enacted in 2009, acknowledging customary ownership and requiring community consent for the issue of new concessions. Despite this, the Forest Development Authority has continued to allocate timber sales contracts and concessions to land owned by communities. During 2008–2009 seven major concessions were awarded in other illegal ways, defying terms of both forest and public procurement and concessions law, and amounting to 1.6 million hectares (World Bank 2010b). Following investigations by Global Witness, a deal that was being negotiated between the Forest Authority and a private carbon credit agency in the UK, affecting 400,000 hectares of forest, has been halted by corruption investigations in both the UK and Liberia (Global Witness 2010a, 2010b). The fate is unclear of another deal for 240,000 hectares involving community lands that was being negotiated by an Indonesian oil palm giant.

Sudan

In order to legalise appropriation of customary commons and reallocate these for parastatal and private mechanised farming, Sudan enacted the Unregistered Land Act in 1970, which declared all unregistered land to be government property (Alden Wily 2010c). By 1990, 5.5 million hectares of commons had been allocated to commercial farmers and investors, including from Egypt and other Middle Eastern states, and another estimated 10 million hectares self-acquired by local elites and investors

(ibid., and World Bank 2010b). Following the Civil War (1983–2002), the final Peace Agreement (2005) pledged to consider restitution to communities and additionally to incorporate customary norms into national land law. Southern Sudan, permitted to establish its own land laws as a semi-autonomous regime, has enacted an appropriate new Land Law (2009), but Northern Sudan has failed to do so. Instead, Khartoum re-launched allocation of customary commons to investors, transferring 3.9 million hectares between 2004 and 2008 (World Bank 2010b). There is evidence of mounting resistance by local communities (Alden Wily 2010c).

Zambia

By the end of 2009, Zambia had leased 45,000 hectares to a US company, and was considering a request for 2 million hectares from China to produce agrofuels (GTZ 2009a); the current status of this project is unconfirmed. Many other smaller leases have been issued, including by private landowners with large estates. Milimo et al. (2011) for ILC examine one of the latter cases, which illustrates how even formally registered private lands are frequently underwritten by overlapping claims of tenure, the original owners having not been compensated when colonial or post-colonial governments alienate or lease their lands to private persons. The case concerns 3,003 hectares of local chiefdom land allocated a century ago to a church. Most of this lay undeveloped and continued to be allocated by chiefs to settler families. The church's decision to lease some of this land to a private agrofuel developer has resulted in the eviction of 222 families, with the loss of homesteads, farms, grazing land, and thence livestock and livelihoods, and to hunger. The investor has employed some of the dispossessed people to produce jatropha, but at low wages that do not nearly compensate for losses or provide a basic livelihood. Tensions are rising. Gumbo (2010) finds that outgrower schemes in Zambia involving existing smallholders improve local infrastructure and the income and land security of those involved in the scheme, but also increase distinctions and conflict between better-off and poorer farmers, including reducing their land security.

Ghana

Schoneveld et al. (2010) identify 17 commercial biofuel developments since 2007, 15 of them foreign-owned, collectively with access to 1.075 million hectares. Their study illustrates chiefly how the capture of peoples' land rights can be as detrimental to majority rights as cases where governments claim ownership of unregistered customary lands. Most of Ghana is customary estate and nearly all leases for biofuel production are made by chiefs, with the support of the Ghana Investment Promotion Centre. Leases are for 25–50 years, and rent is payable to chiefs. Only one company thus far has also paid compensation to farmers directly affected, but at the poor rate of USD 1 per hectare per year. Leases also cover communal forested lands within the chiefdoms, which are now being deforested, sharply reducing local livelihoods based

on forest product use. In one in-depth study site, affected families have lost 60% of their landholdings, subsistence, and income and have turned to petty trading and some to jobs elsewhere to survive. Locally, fallow periods on sharply reduced lands have been eliminated or shortened, promising low fertility for crops. The study found that few affected families, including those evicted, were consulted prior to the appropriation of their lands, although some were optimistic that some jobs and useful services might emerge.

Rwanda

Over 10% of Rwanda is covered by marshes, by tradition used for transhumant cultivation and considered either private farmlands or communal lands in accordance with customary norms. As untitled land, these areas have always been vulnerable to designation as state-owned lands, and government has periodically leased marshlands to private investors, such as the allocation of key marshes around the capital Kigali to a private sugar enterprise, the Madhvani sugar mill group, in 1997. New land law in 2005 formalised state ownership of marshlands and forests, and formal lease of these areas to private investors has increased. Veldman and Lankhorst (2011) for ILC examine the impact of the 50-year lease of 3,100 hectares to the Ugandan-owned Madhvani Group. Most of the 1,000 families affected consider themselves to be wrongfully dispossessed and uncompensated, and are angry that the company is not even using all the land. A small group of better-off families which had means to invest were able to establish themselves as outgrowers on their remaining lands. The majority have seen a plunge in their livelihoods over the past 13 years, with insufficient returns as low-paid labourers for the company. Loss of the marshes has also placed pressure on hill lands, with steep slopes on residual common land now cultivated and fallow periods dramatically shortened.

Laos

GTZ (2009e) estimates that 2–3 million hectares of land are already under concession in Laos, including for mining. The main foreign investors are from China (rubber and rice), Vietnam, and Thailand (rice, rubber, cassava, sugar, and wood pulp). While the Land Law (2003) recognises private property, titling towards this is limited to settlement areas and the majority of individual, and especially collectively used, lands are untitled. The latter are most directly affected by long leases ("concessions") granted to investors, and there has been a sharp rise in land insecurity.

Cambodia

GTZ (2009d) details the explosion of state concessions to private persons and investors in Cambodia, for terms of up to 99 years. Minimal legal provision exists in the Land Law (2001) to register indigenous or communal lands, both of which are vulnerable to out-leasing by government, along with defined "private state lands" from

which concessions are supposed to be allocated. These are also lands originally owned by communities, often forested and upon which there is high dependence. A total of 656,047 hectares were allocated for farm and forest production to 58 concessionaires (lessees) between 1998 and 2006. While local employment has increased, migration to towns by affected rural poor people is marked, and a clear rise in landlessness is being seen.

Philippines

The Government plans to develop 2 million hectares of "idle, underutilized marginal lands" – which are in fact, by community norms, already owned and utilised, although not cultivated. Most of these lands is commonage. As of 2009, 403,000 hectares were leased, mainly for bioethanol but also for food crops and rubber production (Ravanera and Gorra 2011, for ILC). Gulf States are becoming notable lessees. Calvan et al. (2011) for ILC detail the impact on fisherfolks' rights and livelihoods caused by state-driven privatisation of rights to foreshores and near waters for tourism and large-scale acquaculture. This is considered an abuse of the status of these areas as public open access realms, but where additionally local fishing communities have longstanding customary use rights. Many fishing families have also lost their homes, despite longstanding plans to provide settlement areas. De la Cruz (2011) lists seven foreign agri-business leases on 1.345 million hectares of public lands. China made 18 agri-business deals in early 2007 but its main deal for 1 million hectares was suspended following public outrage and a legal appeal, on the grounds that the Constitution does not permit lease of public land to non-citizens. There are renewed moves to amend the Constitution. Poor beneficiaries of land reform (who were allotted lands under reform schemes) are now being approached to rent out those lands for a decade to investors, but for petty sums (De la Cruz 2011).

Indonesia

Faryadi (forthcoming) critiques the intention by the Government of Indonesia to establish oil palm enterprises along the country's 850km border with Malaysia on the island of Kalimantan, the territory of 1.14 million Dayak indigenous people. Chinese, Singaporean, and Malaysian companies are involved, along with Indonesian state and private enterprises. Eighteen plantations are proposed, each of around 100,000 hectares. Faryadi explains how the Dayak have already lost land to organised immigrant settlers from Java. Employment so far has not compensated for the loss of lands handed over under duress to oil palm companies, with many of those employed fired after a couple of years. At the basis of the problem lies the weak status of customary land rights in Indonesia.

Colchester (2011) for ILC adds information. Up to 110 million rural Indonesians are customary land-holders. The Basic Agrarian Law of 1998 defined customary rights as usufruct on state lands, and has failed to implement a 1999 plan to title customary

lands. The Forestry Law prioritises allocation of forests to concessionaires for logging and plantations and defines customary forests as State Forests. Less than 0.2% of forests (which cover 70% of the country) have been directly allocated to communities, as provided for in the forestry law. The Constitution gives the state controlling power over the allocation of natural resources. Nor has governance reform endowed communities with legal personality or routes through which to formally delimit their territories, with village institutions remaining largely arms of central government. Legal commitment in 2000 to further legal reforms has not been delivered, and this has clearly been put on the back-burner in order to enhance large-scale investments.

Colchester cites field studies in four provinces, which show that communities are never informed that, by being persuaded to relinquish their lands for government-backed palm oil schemes, they are permanently surrendering rights to those lands, as the lands revert back to the State on expiry of the lease and not to the communities. Smallholders who do retain rights to land in landholding schemes for oil palm also complain of entering "an endless cycle of debt". Conflict is rife, as is clear even from government statistics (the National Land Bureau lists 3,500 land disputes related to palm oil development). Shootings, injuries, and deaths routinely occur where farmers have demanded the return of their lands. If the claim of an oil palm monitoring NGO that 26.7 million hectares have been issued for palm oil development is correct – a marked rise on the area already developed (7.5 million hectares) – then much more conflict can be expected.

A partnership model has been experimented with since 2005, under which indigenous peoples surrender their lands to concessionaires in exchange for signing a promissory note which assures them a profit share. However, the agreements are not left with the owners but are used by the investor to raise loans. There is a worrying lack of clarity as to assurances of returns of land, especially as the areas concerned are not written into the agreement.

Malaysia

Colchester (2011) for ILC describes similar constraints in Malaysia, where 4 million hectares are already under commercial oil palm development. Customary land rights are somewhat better upheld, especially in the Borneo states of Sabah and Sarawak, affecting over 2 million indigenous people. Through different mechanisms, these states treat customary rights as use rights on State Lands, and have made no attempt to formalise them. Land law gives customary rights precedence on unalienated country land but the law is not followed, and procedures for demonstrating customary title are cumbersome. Some courts receiving claims have ruled in favour of customary rights as property interests in recent years, but the laws remain unamended.

Colchester describes the "New Concept" scheme of Sarawak State (similar to Indonesia's partnership model above) which recognises native land ownership but which is

surrendered for 60 years to the state as the trustee, for development in joint venture with private companies. Communities are allocated a 30% stake in the venture. There is a lack of clarity as to how the benefits are secured for as long as the state is the trustee of those interests and benefits, and it is unclear whether the owners will in fact get their land back after 60 years of lease.

Pakistan

The Government keeps leases secret, but press reports and researchers indicate that at least 1 million hectares were leased to mainly Saudi Arabian and UAE investors in 2008 alone (Daniel and Mittal 2009; SCOPE 2011 for ILC). Leases of up to 6 million hectares are to be pursued. A formal policy of supporting foreign investors is in place, along with pledges that the Government will lease only state and barren lands. However, much of these lands is used for grazing and seasonal cultivation by families with too little private land to feed themselves or who are fully landless – an estimated 50% of the rural population. Many have been cultivating these "government lands" for generations. Press reports in 2008 predicted that 25,000 villages in Punjab Province would be displaced by one proposed deal alone, being made at the time with UAE investors, as cited by Daniel and Mittal 2009. As non-owners, villagers cannot expect compensation.

Shifts in the meaning of public and government lands have never been part of land reforms in Pakistan (1959, 1972–1973, 1977), which focused rather on the private landholding sector. Reforms have failed, and this remains one of the most skewed patterns of ownership in the world today. Large landlords are usually absentees, living in cities and overseas, and now see that they can make more money leasing their farms to wealthy investors than through sustained tenanted farming, despite the fact that they pay tenants only one-half or less of the value of their crops. The Government is supporting this development alongside its own plans to lease state lands, with mass evictions anticipated. Unjust land law is again the tangible source of problems, through which undue state ownership of peoples' land is sustained, on the one hand, and mass landlessness is sustained in the private sector on the other. SCOPE (2011) reports that the Government is planning to provide a 100,000-strong security force to protect investors' allocations. Farmer-based movements are few and resistance so far has been slight, but it takes little imagination to see that, should the Pakistan-based Taliban take on the social land agenda, it would garner immense popular support (Alden Wily 2009a, 2010a).

India

A study by Rawat (2011) for ILC illustrates how compulsory acquisition of private land works directly against poor people in India. Rawat uses the example of acquisitions for creating Special Economic Zones (SEZs). By February 2010, 571 SEZs had been approved in India, serving as tax-free, quasi-foreign enclaves. Many of the areas are

either common lands used by communities, or are settled and farmed lands used by poor families holding no title deeds. Accordingly, they receive minimal compensation or assistance with resettlement and employment alternatives. Even schemes providing land to landless Dalits ("untouchables") have been revoked to provide SEZs. Private and community wells, boreholes, cattle sheds, and trees have been lost, for which no compensation at all is paid. Wages in the new SEZs replace only a minor portion of the land losses incurred, and food insecurity has soared. Rawat indicates that resistance to the creation of SEZs is rising.

Peru

Commercial pressures on rural lands in Peru have grown dramatically since the Fujimoro era in the 1990s. Commercial interests are now sustained by President Garcia and supported by modified state policies and laws as to land rights of indigenous and *campesino* communities, including a weakening of requirements for local consent to developments or the need to protect local majority interests. Burneo and Chaparro (2011) for ILC focus upon the impact on internal community land relations of a sharp increase in mining activity in the *campesino* community of Michiquillay. Elite land grabbing is exacerbated, and community members living in cities return to claim their share of compensation, changing the composition of the community and its interests; the use and status of commons and their administration are profoundly altered. This study illustrates how commons are commoditised by external pressure, being valued more for their financial capital than their natural capital as a sustainable livelihood resource, and exposing poorer members of the community to acute disadvantages.

Durand (2011) for ILC reports on the Cenepa River case as an instance of how certain types of land (in this instance "sand bars" in the river) are claimed by the state, whereas locally they are considered to be common properties within the community land area. Again, the background to this is the sharp increase of mining in the Peruvian Amazon, where 70% is now covered by oil and mining concessions, including protected areas, territories reserved for uncontacted indigenous peoples, and territories titled to native communities. In the Cenepa River case, having failed to limit mining activity in its territory, the community adopted two strategies – formal collective titling and then promoting the creation of a national park. Both strategies failed, however, with titling delayed due to the area's mining potential and only 40% of the area to be ceded as a protected area in the event being gazetted. Durand describes the resulting frustration and conflict with the state. This included community members joining the Amazonian strike of May/June 2009 and the confrontation in Bagua, which received global press attention, but there has been no shift in the Government's prioritisation of mining and other commercial activity over majority rural land rights to commons resources.

Nicaragua

Monachon and Gonda (2011) for ILC detail a case of acute pressure on common land resources held by Chorotegas communities in the face of outsider commercial pressures for land to grow coffee, harvest timber, and extract water. Battle has been joined primarily over the right of communities to establish their own local land registers of family and group ownership, as opposed to a national land register being imposed on these lands and providing centralised decision-making, with an emphasis upon privatising the commons.

Why are commons so vulnerable to commercial pressures? A matter of ownership

In broad terms, the drivers of involuntary loss of commons by poor rural communities may be satisfactorily encompassed by the general force of steadily expanding capitalist transformation and associated commoditisation of land and polarisation in land-owning classes. The examples in Box 3 also point directly to a main founding enabler of involuntary loss, i.e. rural communities are simply not regarded as the legal owners of these lands.

This section explores the issue of ownership. It also explores associated gaps in the apparent absence of sufficiently strong local-level institutional foundations through which affected rural communities may fairly control how their lands are held and allocated, and to whom. The less tangible factor of weak political will to alter such circumstances is also clearly at play.

Local pressures

Non-privately-owned land assets such as commons are vulnerable to a host of pressures, including from within the rural community itself. Within local communities, unfarmed lands see steady attrition as growing populations expand cultivation for food production. One of the functions of commons is, after all, the scope they provide for expanding populations to farm. Those with power or authority and wealthier families also routinely find means to secure undue shares of collective lands for more commercial than subsistence needs (Alden Wily et al. 2008). Just as routinely, they take inequitable advantage of rent-seeking opportunities when externally driven commercial opportunities arise. A common example in Africa is where chiefs claim ultimate ownership of customary lands and especially common properties in order to capture the lion's share of payments made by developers for housing estates on the edges of towns (Ubink 2008; Gumbo 2010).

Poor people are the main losers, given the high values which common properties may yield, and which they thereby lose access to. As shown earlier, the poor make up the majority in Asia and sub-Saharan Africa. They are also known to be disproportionately dependent upon common properties for their livelihoods, such as through use of small wildlife or the sale of dry wood and non-forest timber products (Mogaka et al. 2001; Colchester 2006; Barrow et al. 2009; ANGOC and ILC 2006), or as in India and Nepal for farming in the absence of farmlands of their own (Alden Wily et al. 2008). Forest sector literature abounds with local evidence of the dependence of poor people on forest resources and of continuing forest/woodland loss in agrarian economies, whether in Latin America, Asia, or Africa (FAO 2005, 2007, 2009).

Competition for land affecting the commons is also keenly felt among communities. Pastoralists are frequently identified as losers, squeezed with rising losses of rangeland to expanding settled cultivation (including by sections of their own communities (Nori 2007; Ikeya and Fratkin 2005). Differences in religion or ethnicity frequently overlay such competition for resources among different land users, heightening conflict, as is well illustrated in Afghanistan and Sudan.[20] Cutting across land use and socio-ethnic distinctions, women tend to be disadvantaged both in retaining land when they are widowed and in their need to acquire new land from the community's common assets when widowed or divorced (Adoko and Levine 2009; CLEP 2008; ActionAid 2005; World Bank 2005).

External pressures

And yet, pressures on and losses to the poor deriving from within or among rural communities pale in comparison with the scale of losses of the commons experienced through the withdrawal of such areas for designation as state-owned protected areas or the issue of concessions for timber extraction, mining or oil developments, construction of dams and canals servicing cities, road developments, and agri-business. The last includes the current spate of land leases for biofuels, ranching, and food production. While poor people may welcome the employment, health, and other benefits promised and may even be consulted, the power and authority to appropriate these lands rests firmly with the state.

This leads us to the underlying source of vulnerability to involuntary loss of local lands at scale: the official status of the land rights of the majority rural poor people to assets such as commons. More precisely, local rights to commons are vulnerable for these basic reasons:

- Commons are simply not considered to be the property of rural communities;
- This is because of both (i) political and legal attitudes towards uncultivated lands, which are presumed to be unused or under-used, unowned, vacant, and available,

[20] Alden Wily (2004, 2008), and see FPP (2009) for the impact upon 'Pygmy' populations in the DRC, Cameroon, Uganda, Rwanda, and Burundi.

and (ii) the legal status of rights held through customary and other community-based rather than state-defined land tenure regimes.

A direct review of land legislation in 30 African countries is instructive as to how customary land tenure in general and collective rights in particular are regarded in formal state law. Cases of positive support exist for common property rights within the customary sectors, as outlined below. On balance, however, it cannot but be concluded that the major legal owner of people's commons throughout the sub-continent is the state. This is so, for example, even where legislation is supportive of customary rights to cultivated lands, to the extent of making these readily registrable and without conversion into other tenure forms. However, it then fails to provide equivalent support to common land assets, which it prefers to retain as legally unowned and by default state property. For ease of reference, the 30 cases examined are clustered below in four different classes.

Class A: countries where common property rights have most support

At least in law, Tanzania (1999), Uganda (1998), Ghana (1986, 1994), and Mozambique (1997) fall into this category, coming closest to overriding dispossessory norms, although not in a foolproof manner.

In Mozambique, for example, while both the National Constitution and the Land Act (1997) demand that customary rights be upheld, the mechanisms for doing so fall seriously short of meeting this objective. The key instrument is consultation. While investors seeking land must consult with local communities, the procedure is ill-structured and undemocratic: it does not require the organised participation and consent of the majority of the community, only that of a handful of potentially self-selected representatives. The absence of locally elected village government is sorely felt in such situations, as is the absence of a comprehensively assisted programme through which each rural community in the country delimits its community land area. Investors therefore enter into situations where local communities are unorganised and thence unable to negotiate on an equal footing with the investor. In Ghana, shortfalls derive from the status as owners of community lands that many chiefs have established for themselves and for which they have gained legal support, with decreasing emphasis upon their customary fiduciary function as trustees of lands more rightfully owned by the community as a whole.

South Africa may also be included in this "best protection" category, having laid down support for customary rights in its constitution (1996) and demonstrated good faith in its (still limited) restitution initiatives.[21] This includes in respect of forest commons, where 82,000 hectares of State Forests within the former homelands are in due course to be

[21] Three million hectares of the pledged redistribution of 26 million hectares of white-owned lands have been restituted to African owners. See GoSA (2006) for hard data and van den Brink et al. (2009) for an up-to-date review of land reform in South Africa.

restituted to communities (as laid out in the National Forests Act, 1998). However, South Africa has done poorly in delivering improved tenure relations generally in the former homelands, where some 21 million customary landholders reside on 15.758 million hectares of land. Although the Communal Land Rights Act (2004) provided the route forward, this was not applied and has recently been ruled unconstitutional (11 May 2010). The main reason for this is the Act's implication that chiefs could secure root ownership of communal land areas, within which their manipulation of unfarmed commons may have proved detrimental to the rights of community members. However, with the earlier powerful Interim Protection of Informal Land Rights Act (1996) still in place along with the constitutional pledge to restitution, and given the quality of rule of law in South Africa, protection of common property rights against wilful reallocation for private commercial purposes may be anticipated.

Although not yet a fully independent country, Southern Sudan is the most recent dominion to lay down a legal basis of full support for customary land rights, with active attention paid to the ownership of common lands within the sector.[22] In many key respects the Southern Sudan Land Act (2009) demonstrates best practice, drawing significantly on provisions in the land laws of Uganda and Tanzania and on new constitutional provisions in Kenya (Alden Wily 2010c). It makes the holding of lands collectively under customary norms a fully legal way to hold property rights, and restricts the definition of public land to lands for which no customary or other ownership may be established. These common properties may also be registered in the same way as individually held assets if wished, and a certificate of title issued if requested by the registered owner. However, the community-level institutions through which customary rights may be defined, ordered, and administered have not yet begun to be put in place.

Additionally, the law leaves a worrying loophole through which communities may in practice lose quite substantial common lands. It provides that any citizen or non-citizen may access land for investment purposes, on the condition that the ministries concerned consult with the communities and "[take] their views duly into consideration" (section 63) – i.e. the formal consent of the communities is not required, although compensation to those losing land is required (section 64). Land may also be compulsorily acquired for public purpose, a routine provision, but one which defines public purpose in extremely generous terms (see below).

Still, in law all six of these countries at least recognise customary tenure as a legal source of property and do not require formalisation in registered entitlements for this to be upheld administratively or in the courts. They also make customary holdings equivalent in legal force and effect to property rights that have been acquired through non-customary routes (e.g. freeholds, leaseholds). Families and communities, as well as individuals, are recognised as natural legal persons lawfully owning property, and no restrictions are

[22] Independence is to be determined by referendum in January 2011, in accordance with the terms of the North–South Peace Agreement of 2005 and the Interim National Constitution (2005).

placed upon collective ownership of forests, woodlands, pastures, etc., unless these lands are withdrawn for protection reasons. Generally, this refers to existing gazetted national forest and wildlife reserves and parks. At compulsory acquisition for public purpose, compensation is to be paid on the same grounds and at the same level as for an equivalent statutorily owned property.

With the main exception of Mozambique, these countries also acknowledge or institutionally provide for customary and/or community-based land administration, as corollary to recognising indigenous tenure. These bodies are empowered to administer customary rights, both individual and collective, and to issue evidential titles and/or to provide the basis for which county or district bodies do so. Establishment of Customary Land Secretariats in Ghana is slow, but is tangibly underway. Tanzania's elected village governments, legally mandated as land managers, have been in place for some decades and already administer land matters, although few have yet developed the requisite Village Land Registers or procedures for formally issuing titles to families or for earmarking commons against private entitlement in these registers.[23]

Among this cluster, Tanzania is advanced in terms of practical paradigms for delivering customary land rights upheld in law. This is not least due to the system of elected village governments, upon whose shoulders customary/community-based land administration now falls. Tanzanian law also opens the way for reserved lands to be retained (or restituted to) customary property while being held to conservation regulation. This has been best carried through in the new Forest Act (2002), and least well carried through in matters of wildlife conservation and park creation and the establishment of hunting zones on customary lands (Nelson 2005). Despite legal provision for pastoral domains to be secured, more recent livestock policy also puts these in jeopardy (Mattee and Shem 2006).

Under Tanzania's Forest Act, the creation of new government-controlled reserves is dependent upon evidence that the local community cannot itself properly conserve the forest as a Community Forest. Some 12 million hectares of existing National Forest Reserves may not only be managed by the local community on request and by agreement, but the Act enables some of these Reserves to be restored as local community property, subject to sustained conservation regulation. This opportunity is imprecise, and no community has been encouraged to use the windows of legal opportunity. Nonetheless, several million hectares of National Forest Reserves are now under local community management (apart from the 2.3 million hectares of community-owned forests), and this should prove a tangible basis for restitution claims to be made in the future (Alden Wily, forthcoming (a)).

[23] See Quan et al. (2008) for Ghana and Alden Wily (2003b), Kironde (2009), and Burns (2009) for Tanzania.

Class B: countries where there is significant support for local common property rights

The land laws of Botswana (1968), Namibia (2002), and Madagascar (2005) also legally respect customary interests as real and voluntarily registrable property in important ways. These countries would be included in the "best protection" category above were it not for the fact that they limit practical realisation of this to house and farm plots, leaving valuable local common properties significantly open for non-customary lease, and without the consent of those communities to whom they historically fall. In the first two cases, the issue of customary title is also not equivalent to rights acquired through leasehold or freehold.

Nevertheless, Botswana deserves special note as being one of the earliest countries to legally acknowledge customary rights as amounting to registrable property rights. Its 1968 law vested root title to tribal lands in (originally chief-led) Tribal Land Boards. This was a model that was adopted in Namibia and in Malawi's Land Policy, if not yet made law. However, the registrable rights that may be issued do not apply to commons. In practice, since the advent of the Tribal Grazing Lands Policy in 1975, increasingly large parts of community commons have been leased out to wealthy individuals for commercial ranching (Cullis and Watson 2005). The Boards themselves are dubiously autonomous given their composition, and their legal accountability is upwards to central government, not to local community members (Alden Wily 2003c).

A similar situation exists in Namibia, where the Communal Land Reform Act (2002) excludes valuable commons from being recognised as the registrable property of villages and enables these to be leased for commercial use for terms of up to 99 years. Both the Nature Conservation Amendment Act (1996) and the Forestry Act (1994) provide for allocations for revenue-generating purposes, and in ways that enable the exclusion of local customary owners/users. Much more serious has been the widespread issuing of borehole permits and fencing rights to elites. This has led to the enclosure and lease of at least 700 distinct estates within rangelands that are community properties by custom, ranging in size from 2,500 hectares to 10,000 hectares. Rural Namibians speak openly of a land grab by the wealthy and elite (Mendelsohn 2008).[24] Problems of jurisdiction have also arisen with the overlap of authority over commons between Traditional Authorities (of which there are 46 in the country) and the Communal Land Boards, which issue certificates and leases.

Madagascar provides a more recent (2005) and somewhat improved treatment of customary land interests, but again it is limited to settled and farmed areas. Customary occupancy is to be upheld even without a title and the issue of certificates is much more devolved, to some 1,500 rural communes. However, these procedures fail to extend this service to the commons. Although vast grasslands and forested areas are acknowledged

[24] There has also been a failure to resolve the status of state farms instituted within the lands under Traditional Authorities and Communal Land Boards.

as actively used by rural communities, for all intents and purposes their ownership remains vested in the state. As shown in Box 3, this has left these areas directly exposed to appropriation and reallocation by government to large-scale private enterprise.

In contrast, Angola's new land law (2004) does at least provide for some recognition of "customarily useful domains", which are inclusive of common lands. Their perimeter is to be delimited, but there are two constraints on this. First, the law is clear that "valuable resources" may be excluded from such delimitation. Second, there is no evidence in the law that designation of these domains makes them equivalent to holdings defined under state grants, concessions, or leases outside the customary sector.

Benin (2007), Côte d'Ivoire (1998), Burkina Faso (2009), Niger (1993, 2000), Zambia (1995), and, in distinctive ways, Nigeria (1978), Lesotho (1979), and Senegal (1964, 1996) also acknowledge customary interests as somewhat more than occupation and use rights. In each case this includes common lands, not just house or farm plots. However, none of these laws endow these rights with the same legal force as statutory entitlements. Compulsory registration, in force in Angola, Côte d'Ivoire, and Namibia, is also not proving helpful, with the cut-off dates inevitably having to be extended in each case. The effect is to leave unregistered properties in unclear territory.

The best practice among this group is Benin's new land legislation, arrived at through a long process of village-level consultation and piloting. The law recognises customary rights as real property interests, inclusive of collectively owned lands. This explicitly includes forests. Fishing rights and pastoral rights are also protected as secondary access rights and are not alienable. The main strength of the law is its provision for formulation of village Rural Land Plans. These represent a form of community land area delimitation, along with an identification exercise that defines every land right within that domain. This specifically includes definition of areas under collective ownership and secondary rights, as well as parcels of land owned by custom by families and individuals, formulated into a Rural Land Plan. The rights themselves can be sold, inherited, or transferred, as long as this is done in accordance with established rules under the plan. Commune, arrondissement, and village sections provide a hierarchy of devolved land administration, including the capacity to issue Rural Land Certificates for land rights on request, at the owner's own cost. By law, these are to be acceptable as collateral for securing credit. The main limitation of the law is that these certificates do not represent a full title in land. This requires formal registration under relatively unchanged procedures, dating back to colonial times.[25]

Class C: countries where there is limited protection of local common property rights

[25] New laws in Congo (2004, 2006) and in the Central African Republic (2009) are believed to make all forms of customary rights to land registrable, but not enough is known about these cases to more than tentatively include them here.

There is much less security of customary ownership in the remaining countries examined. This is not to say that positive new land policies are not in place (for example, in the cases of Malawi and Kenya) or anticipated through new land commission deliberations and eventual legal drafting. Such land commissions are currently instituted and operating in Liberia, Sierra Leone, Senegal, Somaliland, and Nigeria.

For example, Kenya's new Constitution (2010) establishes a new category of Community Lands, enabling untitled customary land areas to be directly vested in county populations or sub-divisions of the population, including villages (Alden Wily 2010b). These lands currently include vast rangelands, customarily owned by pastoral groups. Community Lands may also include forests which have not already been withdrawn into demarcated State Forests. Just as important is constitutional redefinition of public lands; this now includes a new limitation that these do not include lands over which individual or community ownership can be excluded by any legal process. However, a number of contradictions plague these and other land provisions, and the promulgation of new land laws must be awaited for clarification. In the interim, rural Kenyans live with massive loss of public lands through irregular but often technically legal disposal by the Government, including quite recently to foreign investors (RoK 2004).

Liberia has an unusual history in its treatment of customary land rights, which were fully recognised during early colonial times but systematically limited from the 1960s. Customarily owned forests cover two-thirds of the country, and agitation over their loss to concessionaires has resulted in the introduction of a Community Rights Law with Respect to Forest Lands (2009) (Alden Wily 2007). This acknowledges community ownership, but lays out awkward routes for this to be acknowledged. The status of forests drawn under the National Forest category is also ambivalent. The Land Commission established in 2009 is charged, inter alia, with clarifying customary land rights and their administration.

There are other reasons for exclusion from Classes A and B above. Some countries have done away with customary or community-derived rights altogether, replacing these with state-granted rights. This is the case in Ethiopia (1975, 1997, 2005), Eritrea (1994, 1997), Somalia (1975), Rwanda (2005), Burundi (1986), and Mauritania (2004).

This does not necessarily spell the loss of all rights. In Ethiopia, for example, the major farm titling programme referred to earlier aims to stabilise the occupation of millions of families who have secured plots under various settlement and redistribution programmes since 1975 (Rahmato 2009; Tamrat 2010). While the fact that these rights are hardly customary (with main exceptions in Tigray) is not the major concern, given that many allocatees were in fact landless tenants previously, what is cause for concern is that most of the rural areas and virtually all traditionally communally owned and used lands have been excluded in these titling exercises. This is not entirely because of the law. The Federal Land Law, Article 5 (3) and land laws enacted in four Federal States make provision for groups to be registrable owners, as well as individuals and families. However, non-farmed commons (or commonhold, when registered) are not given the same protection as rights over cultivated lands. Since 1975 these have been lands from which new

farming parcels have been drawn, and current law continues to make commons available for this purpose. Since the policy push for large-scale foreign investment has been in place, the main recipients have been local or foreign investors. As shown in Box 3, these already absorb over 1 million hectares of pastoral commons and threaten to absorb another 2 or more million hectares.

For all intents and purposes, a similar legal position exists in Rwanda, which has also seen significant redistribution and reallocation of farmlands following its civil war in the 1990s. Under the Organic Land Law of 2005, households seeking farmland are more or less guaranteed access, to be entrenched in mandatory registration in the form of renewable leases on national land. As noted in Box 3, marshlands and other such traditionally collective assets have been firmly vested directly in the state, opening the way for government to reallocate these to individuals or investors of its choice.

Class D: countries where common property rights are entirely unprotected

Nevertheless, the conditions described above are less likely to lead to dispossession than where customary rights are still regarded as no more than permissive occupation and use rights in law on national or public lands and where no provision at all is made for these areas to be acknowledged as owned, let alone double-locked through the formalisation of rights.

Although each case is different, this is broadly the legal situation for millions of rural landholders in Northern Sudan (1984), Cameroon (1974), Mali (1993, 1996, 1997), Zimbabwe (1982), Chad (1967, 2002), the DRC (1973, 1980), Gabon (1967), and Somalia (1975).

In Cameroon, for example, two land laws of 1974 established that only occupation and use of land for housing or farming purposes were grounds for acquiring a title deed. Untitled land was vested in the state (Alden Wily, 2010d). This constitutes the majority of the country's area; over half of Cameroon is forested and important pastoral zones are found in the north. Forest law in 1994 confirmed that forests are national property and reserved forests were made the private property of the Government. Already 2,500 communities have been dispossessed through the issue of concessions to such "permanent forest estates" for industrial timber harvesting. It is not difficult to conclude that rural Cameroonians are largely squatters on their own lands, vulnerable to being evicted with legal ease.

The situation is no better in Northern Sudan, where a 1970 law formally vested all untitled land in the state and proceeded to wilfully reallocate community land areas at scale to investors for large-scale mechanised agriculture. The Civil Transactions Act of 1984 modified this in pledging protection of existing occupancy to lands under cultivation. Despite legal obligation under the Interim Constitution to incorporate customary law into state legislation, this has failed to occur, leaving commons as legally vulnerable to reallocation by the state as they were prior to the civil war.

The situation in Senegal is better, in that land laws of 1964, 1976, and 1996 provide for nearly 60% of the total land area to be administered locally as local community territories

(*zones de terroir*), although ownership has remained throughout with the state. Over the years, the emphasis upon demonstrated use as grounds for retaining rights to holdings has narrowed, leaving communal lands vulnerable. The size of the *zones de terroir* has declined as these lands are brought under state control and reallocated to investors. Mainly rangelands have been affected, although there have been at least two cases of locally managed forests being removed from local jurisdiction. In Rwanda, as noted in Box 3, marshlands are directly affected. Over the past decades, both marshlands and grazing lands have been treated as unowned government property and this was formally entrenched by new land law in 2005.

The links between commons status and current large-scale leasing

To recap, it is apparent that the formal legal status of customary land rights in general and those relating to collectively owned resources in particular provide the grounds by which governments have been able to remove these lands from customary community tenure. Through their designation as unowned and/or only permissively used state, government, or public lands, this dispossession is rendered legal. It is therefore not surprising that there is a broad correlation between levels of legal vulnerability to involuntary loss of local commons and levels of current foreign-led land acquisition for agribusiness. This is illustrated in Table 5.

The extreme cases are Northern Sudan and the DRC, where domestic legislation offers no protection to communal rights and treats customary rights in general as permissive occupation and use of land belonging to the state. This also applies to other Congo Basin countries which, although not covered above, may be seen in the representative case of Cameroon, and where local common land rights to forests in particular have been sharply curtailed through massive allocations for industrial timber and mining exploitation. The situation in the other African states that are major land lessors – Ethiopia, Madagascar, Mali, and Zambia – is less seriously abusive of community-derived common rights. However, each affords perfectly legal routes through which customarily owned lands, including common properties, may be legally reallocated by the central state. In the case of Zambia, while the consent of local chiefs is required, this permission has proved to be quite readily achieved without reference to the will of community members.

Table 5: Legal vulnerability of commons in sub-Saharan Africa

Current known lessor states in sub-Saharan Africa	Level of legal vulnerability to involuntary loss of commons to non-local agribusiness acquisitions	Known area leased or pledged to be leased, as of early 2010 (ha)[26]
Madagascar	Medium to high	3,3559,600
DRC	Extreme vulnerability	3,048,000
Sudan	Extreme vulnerability	2,243,000
Zambia	Medium to high	2,045,000
Ethiopia	High	>1,095,000
Ghana	High in forested zones	1,075,000
Uganda	Low	880,500
Mali	High	>410,000
Mozambique	Medium to low	390,835
Tanzania	Medium to low	311,500
Burkina Faso	Medium to low	213,000
Congo	High	200,000
Liberia	High	186,000
Malawi	High	175,000
Kenya	High	139,900
Zimbabwe	High	101,000
Cameroon	Extreme vulnerability	68,000
Angola	High	25,000
Nigeria	Medium to high	20,000
Niger	High	16,000
Senegal	High	12,000

[26] Sources: Alden Wily (2010a) after GTZ (2009b, 2009c); Cotula et al. (2009); FIAN (2010); Sulle and Nelson (2009); CEPAGRI (2010); and Schoenveld et al. (2010). See also World Bank (2010b).

What other factors facilitate involuntary loss of commons? The governance factor

At one extreme lack of political will and, at the other, lack of institutional empowerment at community level have been mentioned as contributing factors to pressure upon the commons. This section elaborates upon these factors, within the context of land policy development.

Limiting the scope of land reform

Many of the more positive laws on land referred to above are new, enacted within the past 15 or so years. There is no doubt that reformism affecting land relations and administration is occurring widely in sub-Saharan Africa, beginning in the 1990s (Alden Wily 2006b; AU and ECA 2008). This is linked to wider socio-political change, such as is being seen in the rise of multi-party and decentralising governance in the name of democratisation. Civil conflicts have also been a prompt to governance change (Pantuliano 2009). Concern at resource degradation, reaching a first tipping-point with the Rio Declaration in 1992, also set in train a clutch of new natural resource policies and laws (FAO 2002). While primarily geared to devolving authority over these resources to more local levels to enhance sustainable conservation, the question of "who owns the commons?" came firmly to the fore (Alden Wily and Mbaya 2001; Larson et al. 2010). In Africa, Tanzania led the way in the forestry sector in delivering policies and laws which make it possible for rural communities not only to manage but to own their local forest resources.

The period from the 1990s may also more broadly be seen to be a watershed era, following a salutary three decades of independence during which less development and progress for the majority poor was achieved than had been hoped for.

Finally, and not unrelated, there was marked pressure from the 1980s from the World Bank and other international lending agencies for economic structural adjustment programmes; usually, these specifically made land reform measures part of the required package of reforms. The main objective was to make more land directly available to investors. As Alden Wily and Mbaya (2001) document in the case of Eastern and Southern Africa, this triggered a wave of relaxation on foreign land acquisitions, generally enabling foreigners to acquire substantial leaseholds from states. It also activated a new wave of farm titling. It is ironic that almost everywhere on the continent the land strategy reviews undertaken by policy units or more formal commissions of land inquiry prompted a whole new set of demands. These centred upon pressure that customary land rights should be better respected as real property interests and better protected, even prior to titling. Tenure reform thereby became a central plank of reforms initially designed to be no more than land administration reforms to support mass titling of farms. In practice, as shown above, countries have ultimately taken up reform of tenure to a mixed degree.

Retaining a focus on the farm at the expense of commons

Limitations prominently affect the scope of customary holdings, which may be acknowledged as owned and/or formally registered as such. In short, it has ultimately proved one thing to assure rural families security of tenure to their homesteads and cultivated lands, but another matter indeed to hand over ownership of the commons to rural communities. Many policy-makers have clearly hesitated at the brink on this issue. It is not difficult to conclude that the commons are simply too valuable to governments to allow their citizens to formally possess them.

Even where improved legal recognition of collective land assets as real property has been advanced, there has been a striking lack of development of institutional mechanisms to process this in satisfactory ways. Communal Land Associations in Uganda and South Africa are good examples of this – awkward, and expensive and bureaucratic for poor rural communities to take up. Alternatively, delimitation of communal land areas in general remains largely circumscribed. This is either by the type of resources that may be included (Angola), their extent (such as in Mozambique's intention to sharply limit the area which each community may claim), or the status that recorded common properties may obtain (which is prominently the case in Francophone African reforms and in the inferior status of even recorded commons in Ethiopia). In other cases, the procedure of certification may be too expensive in terms of time and cost for poor rural people to engineer themselves. Vesting such lands in chiefs or boards also has significant limitations, as it is obviously more advantageous to the individuals and governments concerned than to the real owners, ordinary communities.

The most obvious solution – simply assuring local ownership of common property through blanket legal provision and/or acknowledging communities as legal persons in their own right, as is well known to customary law – seems difficult to achieve. Most prominently, Tanzania does so by enabling each elected village government to record the location and boundaries of collectively held lands within the village land area in the Village Land Register. In fact, this has to be undertaken before the village government may adjudicate and issue title deeds over any individual or family property. However, even this recording of commons is more in the vein of setting lands aside against individual allocation than giving common properties equivalent status as real property entitlements, such as is amply provided for in respect of farm and house entitlements.[27]

Keeping old constructs in service to limit common property rights

Linked in most cases to the above has been pervasive retention of the notion of "*terres san maître*" or "vacant and unoccupied lands". Many African states have retained this idea in new land laws. As illustrated earlier, this is delivered mainly through the convenient

[27] While other parts of the Village Land Act (1999) make award of a Customary Right of Occupancy to the community possible, this is not made explicit in articles addressing common lands.

construct of public lands, whereby all unregistered property is deemed to be public land, and public land is handed over to governments to administer. The lock against commons being available for local ownership is reinforced by declaring that only developed or utilised lands, meaning those demonstrated by clearance, houses, and cultivation, may be subject to registration.

The origins of this strategy have been explored elsewhere (Alden Wily 2010a, 2010d). In brief, it has colonial origins and was profoundly reinforced by independent governments from the 1960s. It has close links with the associated colonial-derived strategy of declaring the root ownership of all land to be the state. By 1990, half of all sub-Saharan African states had promulgated the legal position that the state was the ultimate owner of all lands and, additionally, that property rights could not be established over unfarmed or unsettled lands. More would do so in following years (e.g. Eritrea in 1994, Rwanda in 2005).

The rationale has been consistent throughout: to capture and retain the greater part of the land area of each dominion in the hands of governments, inclusive of its valuable associated resources (timber, wildlife, minerals, etc.). This has been considered the due of government as the only competent authority to determine how "unoccupied" (unfarmed) lands should be used and disposed of. The mid-century conviction that ordinary communities could not be trusted to look after natural resources such as forests added justification to this. How trustworthy governments would prove to be has been another matter; with hindsight, state landlordism reached new heights during the 1960–1990 period. Even by governments' own rules of administration of public lands, a litany of wrongful sales followed in many states.[28] Extinction of even customary access rights to "public lands" was rife, as more protected areas were created, hunting zones were designated, parastatal agricultural developments were declared over large areas of commons,[29] and the issue of concessions for oil, mining, and timber extraction soared (Sunderlin et al. 2008; FPP 2009; Nelson 2005). Attempts were even made to remove the need for governments to pay for lost houses and crops at eviction, with a number of modern governments in Africa still owing millions of dollars of unpaid compensation, as documented in Ghana by Kasanga and Kotey in 2001. The upshot overall was that by 1990 customary landholders were in less secure possession of their customary properties than ever before.

Large-scale land acquisition makes a bad situation worse

When viewed in this light, the achievements of the land reforms made since 1990 have been substantial, yet still limited. Uganda, for example, remains the only country to have

[28] Although most formally documented in Kenya (RoK 2004), this was the case around the continent.

[29] For example, populations in nine areas of northern Tanzania lost their rights in one year alone (1973) to make way for private and government mechanised farms (Alden Wily, forthcoming (a)). Some 5 million hectares of customary commons were lost in central Sudan to mechanised agriculture, as noted in Box 3.

done away with the separation of ownership of the soil and ownership of rights to the soil (1995), which greatly strengthens the controlling rights of governments over their people's lands. The majority of governments retain a more direct stranglehold over unfarmed lands in the customary sector, as illustrated above. If anything, the interpretation of due public purpose has quite widely been extended to enable private land acquisitions to be considered to be in the public interest.[30] Even promulgation of new national constitutions has not brought with it expected terms by which it is obligatory for governments to pay compensation either to title-holders for the land they lose due to compulsory acquisition or to customary tenants on public lands for loss of houses and crops before they are evicted.[31]

Finally, a slowdown in reformism may be detected. Early pledges to reform the status of customary land rights in Lesotho, Swaziland, Malawi, Zambia, the DRC, the Gambia, Angola, Senegal, Eritrea, Northern Sudan, Guinea Bissau, and Cameroon have been seen to dwindle recently. Promising signs in Namibia and South Africa in 2008–2009 that the slow progress in restoring white-owned farms to local community ownership would be revitalised do not seem to have come to anything. Nor is the recent establishment of Land Commissions in Nigeria, the Gambia, Sierra Leone, and Liberia necessarily reassuring, given that commissions of the past have taken up to a decade to deliver recommendations into law.

It may be concluded that land reformism in Africa since the 1990s has simply failed to give precedence to majority customary land rights over and above state and investor claims for these same lands. It could be argued that the earliest driver to reform, identified above as World Bank-led pressure to make as much rural land as possible freely available in the market place, has proved more persuasive to policy-makers than a modernist drive to protect existing rights to land. The battle between these two perhaps irreconcilable objectives has been played out most clearly in regard to the commons. With the exceptions observed earlier, these remain public lands upon which customary rights remain defined as access and use rights only.

In light of this, it is difficult to see the current wave of large-scale land acquisitions by local and foreign investors as other than a reflection of already weak political will to fully reform land tenure relations in favour of the majority poor. However, it is also the case that the commercial land rush in Africa, focused upon the commons, adds more force to this weakness of political will. Signs that this is so are apparent in the slowdown of reformism. This extends to the three countries which went the extra mile in the 1990s in assuring rural citizens that their customary rights to common assets were as safe as their huts and

[30] In Cameroon, for example, an individual or company with capital and with a development plan in hand may acquire a temporary and then permanent grant of unlimited hectarage, while an ordinary rural family or community must do all of the above and in addition demonstrate local occupancy and use of the land by clearing it ready for cultivation (Alden Wily 2010d). See also Tanzania's Village Land Act (1999), section 4(2).

[31] For example, this was most recently eschewed in Kenya's new Constitution. There are exceptions, such as provisions in the constitutions of Eritrea and Rwanda.

farms (Mozambique Land Law (1997), Uganda Land Act (1998), Tanzania Village Land Act (1999)). During 2008–2009 there were striking moves to secure some northern communal land areas as government lands in Tanzania (Alden Wily, forthcoming (a)). In Mozambique, new regulations are being interpreted as attempting to restrict each community to 1,000-hectare allocations (Akesson et al. 2009; De Wit and Norfolk 2010). In Tanzania, no attempt has been made to remove a useful inconsistency between the Land Act (1999) and Village Land Act (1999), which enables government to lawfully claim unoccupied and unfarmed village lands as its own property. There, too, placement of a limitation upon how much common land each village may possess is believed to have been discussed (Sulle and Nelson 2009).

Weak governance at the local level: a route to disempowerment

The puzzling failure of land administration reform to seriously devolve the control of land administration may also be seen in this light – as another route through which governments hang on to their powers of disposition over significant parts of their peoples' lands. In the 1990s there was a hopeful wave of decentralisation of land authority, but for the most part this has not been delivered in terms of genuine devolution of controlling administration to the community level. A 2003 review of local land bodies in 22 African states found that, while 13 new land policies (and laws, where these were enacted) provided for or planned village-level land administration, in most cases these were mandated as no more than advisory bodies to higher-level institutions, and in six cases remained vested in the hands of unelected chiefs (Alden Wily 2003c). Review of these countries in 2010 shows that virtually no action has been taken to deliver democratically elected and empowered community-level land institutions where planned (e.g. Uganda, Malawi, Lesotho, Swaziland, South Africa, Zambia, Zimbabwe, Mozambique) or new plans made to do so where community-level land administration did not exist in plans or policies in 2003 (e.g. Angola, Eritrea, Senegal, Rwanda). In contrast, development towards this goal in Burkina Faso and Benin has been significant. These two countries, along with Tanzania, are arguably the only African countries where community-level land bodies are both democratically elected and endowed with significant powers, including the regulation of land disposition within the local area and issuing certificates of title to landholders.

Among other capacities, lands cannot be removed by government or other actors from these areas without the consent of these bodies. This does not mean that compulsory acquisition for public purpose cannot be adopted by governments seeking lands for private investors, but it brings such procedures into an organised public arena at the local level. This is legally most fully developed in Tanzania. As the lawfully mandated land managers, elected village governments in that country also have the advantage of longevity, having first been instituted in 1975. Although diversely effective and practically

accountable to village members, these institutions are sufficiently embedded in the governance landscape of the country to make it extremely difficult for lands to be wilfully withdrawn by district or central governments. It is no coincidence that allocation of local commons for large-scale commercial investment has been more constrained in Tanzania than elsewhere. The contrasting failure of Mozambique to ever follow through on the pledged development of devolved institutions of governance at community level has a lot to do with the rapid disposal of commons to large-scale investments in recent years.

4 Recommendations: making the playing field more equal for the poor

What can be done to limit involuntary loss of people's common lands?

The main conclusions of this study are that:

- Common properties are the local land assets most vulnerable to loss due to externally driven commercial pressures.
- The main factor in this vulnerability is the legal status of such common properties in many, if not all, countries where large-scale commercial land acquisitions are most prevalent as lands over which customary holders have only access and use rights.
- Even in the best of legal protection circumstances, local common properties remain most vulnerable to wrongful – if legal – appropriation from longstanding owners, without their consent. As lands not already under cultivation, this also makes them most attractive and vulnerable to state acquisition and/or reallocation to investors.
- Therefore the current land rush for large-scale lands for commercial food and biofuel production is not the cause of this insecurity: rather, it brings existing insecurity of tenure to the fore.
- Accordingly, the main protective factor against involuntary loss is laws which endow rural communities with ownership rights over their commons. For these to be truly effective, they need to be complemented with (i) administrative actions which directly and comprehensively enable communities to define and secure their commons as being formally under their jurisdiction (village land areas, delimited domains, etc.) and (ii) fully empowered local land administration at the community level.
- While laws are not a panacea, getting in place the legal norms which support and protect customary land rights, inclusive of common property rights, is a prerequisite.

1. Getting the target right: host governments need to reform their tenure norms

Codes of conduct and firmer international regulation of inter-state investment are important levers for change and are validly pursued as part of the active agendas of FAO, IFAD, and the World Bank, among other international actors. However, this is unlikely to be

enough to assuage what appears to be a hardening in the separation between governments and people's rights and interests. This is particularly so where parties on both sides of the land deal take current tenure conditions as a given, setting aside distinctions as to what is legal and what is just and, if not the latter, then what is morally repugnant to pursue.

However, it is the dubious legal status quo which deserves the boldest and most precise challenge. The immediate question may be posed in this context as simply "who is the rightful lessor of rural lands?". The answer suggests that a basic objective must be to promote and require legal recognition of longstanding occupancy and rights of use as private property, irrespective of whether or not these are formally registered or whether or not the properties are possessed individually, by families, or by communities.

To fail to attend to this is to fix upon the wrong target. Business, whether inter-state driven or private, will continue to do what it does best – make money – and deservedly needs regulation. But it cannot be the responsibility of the private sector to change the legal conditions under which host countries define land rights. To ensure justice is the duty of host governments, and of those international agencies which purport to support equitable development in these economies. Failure to do this leaves host governments as tolerated land-grabbers. Acting to demand that these governments re-examine the legal norms under which land leasing at scale occurs, and to assist them to do so, is logically a responsibility of international agencies and actors concerned that existing injustices are not compounded through commercial out-leasing of peoples' lands at scale.

It might also be observed that the current focus upon regulating investors by means of codes of conduct, and presentations by host governments of their intentions to enhance regulation in statute rather than focus upon reforming their own treatment of their people's land rights, have eerie echoes with objectives of a century ago.[32] Then, as now, the primary target of regulation was foreign investors, operating as trading companies, cowboy-like entrepreneurs, and settlers, all wont to make their own land deals with chiefs and sweeping up in their paths thousands of hectares of valuable resources. Regulation of this behaviour was a primary function of the first colonial land laws in the areas of present-day Angola, Mozambique, Tanzania, and Ghana, and in the Congo Free State in 1885–1906.

Now, as then, regulation is not in itself harmful, but it cannot be legitimately pursued at the cost of priority attention upon the outstanding requirement: to promote and demand that host governments reassess the legal bases upon which they are presuming to lease (or even alienate) lands which more legitimately belong to their citizens.

Even when regulation of investors is directly designed to reduce the negative impact of commercial pressures on rural communities, without tenure reform being on the agenda, there is a tendency to concentrate upon securing local employment and other benefits and, at best, a share in any revenue generated. This too is worthy, but can divert attention

[32] See, for example, CEPAGRI (2010) for Mozambique, Mpoyi (2010) for the DRC, and Ahwoi (2010) for Ghana.

from more fundamental concentration upon tenure rights that helps communities secure due recognition as owners of those local lands in the first instance.

2. Advance land tenure reform and revitalise reform where it is flagging

Entrenching more just and justiciable land rights requires policy and legal changes to one degree or another. Given that some nations have already made significant progress in such reforms, but that reformism is flagging overall at this point, land tenure reform needs to be backed by concerned national and international actors and made conditional to bilateral and international support in other areas.

Changes of most importance to rural community rights to commons include:

- *Better late than never: promoting recognition that customary estates are owned, not borrowed from national governments:* There need to be alteration in the legal relationship between governments and their people as to how landed property is acknowledged at scale and protected in the courts; clear definition of what constitutes landed property in the first instance; and definition of what the role and powers of government over land resources should fairly be. Legal acknowledgement is long overdue that commons, like family farms and houses, are real properties, which in this instance are for good reasons owned collectively in undivided shares and are subject to community jurisdiction. To continue to deny this tenure position is to ignore the adoption of capitalist notions of property into community norms, to limit the benefits of commoditisation (such as in potential rental values) to state and private investors, to ignore the persisting poverty of most rural landholders, and to wrongly deprive them of obviously rising values in their longstanding natural capital assets. This is quite aside from increasing local poverty through physical deprivation of these resources without compensation, on the grounds that peoples' commons do not amount to property or are confined to patches of land amongst their main residential settlements.
- *Abandonment of the colonial-engendered legal pretence that cultivation and housing are alone indicative of effective occupation and use, directly contributing to denial of commons as property.*
- *Abandonment of the equally outdated notion that large areas of unfarmed land are unowned, despite easily ascertainable evidence at the local level that this is extremely rarely the case.*
- *Understanding community-derived rights as a matter of modern not historical justice:* This has been inherent in the constant reminder in this paper that what is indigenous or customary in land relations is less distinguishable by traditionalism than by the fact of it being a regime that is community-derived and sustained. That is, existing informal rights to land are important not because they may or may not have a long history as traditional mechanisms (such as the term "customary" suggests), but because they derive from and are sustained by *living* groups of citizens (communities). A focus on the present is needed: millions of the world's poor rural people live, farm, pasture animals, and hunt and gather on lands upon which their livelihoods and rights to development depend, and which have a history of occupation and use that suggests that it is not only unjust but irrational to not treat these lands today as their rightful

private property. In sub-Saharan Africa alone, at least 500 million rural people are directly affected by outdated or inapplicable notions of property in modern agrarian economies, which unduly maintain majority land rights in subservience to industrial society norms (Alden Wily, forthcoming (b)). This is aside from the fact that the past century has in any event seen significant adoption of Western property norms into indigenous systems, making claims that land cannot be held by individuals and cannot be sold – and on these grounds therefore cannot be deemed to be real property – simply archaic.

- *Adoption of more just interpretation of public purpose* to render this necessarily of beneficial purpose to those directly affected by the acquisition or decision for public purpose, as well as to government and/or private persons or entities.
- *Move off the farm: a shift in focus to those untitled lands which are most vulnerable to involuntary loss by rural communities, the commons:* Even where customary or other community-derived property rights are attended to, there remains an overwhelming focus upon smallholdings (houses and farms). Yet historically and presently, the properties most directly affected and still most vulnerable to wrongful reallocation to investors are unfarmed lands, the commons. Mechanisms for securing these are also the least well developed. This needs much more policy focus and also much more practical socio-legal development assistance.
- *End the practice of the past half-century of confusing the need for conservation with resource ownership:* This means helping agrarian administrations to see that precious lands can be protected as well by local owners as by the central state (for which there is now bountiful tangible evidence). This means encouraging agrarian governments to recognise that an area of important natural biodiversity in need of protection does not have to be brought under state ownership; it only needs to be brought under conservation regulation, to which local owners, in most instances a local community, are legally bound to adhere. This is important in light of the gross dispossession of resources that has occurred through this route.

3. Promote the quick-fix remedy to communal insecurity

Uganda, Tanzania, and Southern Sudan have taken the lead in Africa in assuring rural communities that their customary interests in land, whether held individually or communally, have equivalent legal force with statutory entitlements, even should these customary interests not be expressed in formally recorded deeds or cadastral entitlements. They have done so through simply declaring this to be the case, in the Uganda Constitution (1995), the Tanzania Land Act (1999), and most recently in Southern Sudan's Land Act (2009). Benin, South Africa, Mozambique, Ghana, and Burkina Faso have done almost similarly, although with more awkwardness or opacity. There is no question that follow-up with demarcation and formalised entitlement, especially of common properties, is a practical necessity to double-lock common properties in particular against involuntary appropriation. Nonetheless, this remedy is a model that should be actively encouraged in all states where community-derived rights are under threat from legal but questionably just or fair reallocation of commons.

Another useful first-line route of action to protect majority rural rights to common properties is the delimitation of whole community land areas, irrespective of whether or not these include individual and family properties in accordance with community norms, as well as expansive common properties. The primary advantage of this is that it enables large areas of lands to be set aside, theoretically quite quickly, as the only adjudication that is required at this point is between communities. In practice, however, experience shows that the procedure can be quite slow and expensive for communities.

Delimitation is most effective when it results in a formal entitlement of the land area to the community, out of which it will in due course be able to parcel individual customary freeholds or similar entitlements to individuals and families as appropriate. Delimitation is least useful when it indeed sets areas aside for community use but, by not entrenching this as a real property right, exposes the land to future reallocation by the state. Requirements for formal survey and mapping also prove obstructive and should be abandoned in favour of inter-community agreement and witnessed recording of precise boundaries.

4. Invest in capacity-building of local land administration at the community level

Systems for rural land administration are slowly but surely being decentralised to more local levels, in some cases with fully devolved powers. Thus far, most of this reaches down only to county, district, or equivalent *cercle* or *communes* in Francophone states, all of which are remote from village communities where land relations are in practice framed, organised, and sustained, including delineation of common properties. For as long as formal survey and mapping, official supervision of adjudication, computerisation of records, and state-like bureaucratic procedures are required, costs and user fees become too high to encourage genuine devolution of land administration to the grassroots. Of necessity, this must include democratisation of traditional authority to the extent that if traditional leaders become the designated legal land authorities, their decision-making is circumscribed by requirements for majority approval. Once simple models of community-based land administration are developed, tested, and adapted, they can be relatively easy to replicate at scale. Madagascar, Ethiopia, Benin, and Tanzania offer useful lessons.

5. Focus on local consent mechanisms, even where commons are not recognised as the private property of communities

The measures listed above all take time to implement. In the interim, large-scale commercial land acquisitions are growing apace. An important duty of those developing regulation of investment from the international standpoint is to promote the adoption of local standards of consent. That is, even though investors cannot be expected to challenge the legal rights of host governments or local leaders to lease community properties where the law provides for this, they can – for their own security – make this conditional upon community-wide consultation and negotiated conditions. This should, of course,

not take the place of initiatives towards more fundamental change as to who is the rightful lessor of lands, as in the above reforms.

6. Put international law to work

An advantage in current FDI is that its dependence on inter-state treaty support and WTO, GAT, and GATT regulation means that international law itself should be more easily brought into play as providing at least standards to work from. However, international law as relating to land-owners who possess land in accordance with traditional community-derived norms is less effective than desirable. First is the fact that, while referred to as international law, relevant protocols, covenants, charters, and declarations are only advisory. Accordingly, countries are only "encouraged", "invited", and "urged" to adopt their terms.

There are also limitations associated with the scope of the two instruments which are most pertinent on this matter: the International Labour Organization's Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries and the more recent UN Declaration on the Rights of Indigenous Peoples (2007). These focus on the land rights of marginalised indigenous peoples, and have been quite widely used by UN bodies and regional commissions of inquiry and courts to advise recalcitrant governments to remedy abuses.[33] It is up to national governments to act or not act upon their recommendations. In general, there is little chance of a successful ruling in favour of communities unless clear supporting provisions are identified in domestic law. Several well-known cases of restitution in South Africa, for example, have been successful because of the clear constitutional and land law commitment to restitution. As referred to earlier, a recent ruling of the African Commission concerning the land rights of a minority pastoral group in Kenya, the Enderois, who were seeking unpaid compensation for their eviction to make way for a wildlife reserve some 30 years ago, is also likely to see this compensation paid in due course, on the basis that the recently adopted draft Constitution provides specifically for such concerns to be addressed.

Theoretically more enforceable would be decisions of the African Human Rights Court in Tanzania. In practice, the Court's performance has been weak, with not a single decision issued since its establishment in 1998 and only two or three cases even on its caseload. Nor have more than a handful of African states formally submitted to its jurisdiction.

The definition of indigenous peoples has proved problematic in Africa, with a characteristic focus upon hunter-gatherer and pastoral societies. In Africa, these groups account for fewer than 5% of all Africans who acquire and regulate their land rights through customary regimes (or some 25 million of a current rural population in sub-Saharan Africa of 551 million). While there is no question that these marginalised groups deserve special assistance, it is regrettable that the opportunity afforded the African Union's Working Group

[33] A useful record of cases can be found at:
http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_vol3_07_08_eng.pdf

on Human and People's Rights in 2003 to clarify the issue was not taken up. Instead, while acknowledging that the rights of all peoples need to be respected, this advisory group, comprising mainly advocates or representatives of such minorities, retained a description of indigenous people as if limited to hunter-gatherer and pastoral societies on the continent (ACHPR 2003). For as long as Africans as a whole are not deemed to fall into this category, or to self-declare themselves as indigenous peoples, there remains awkwardness in bringing customary interests to the attention of courts and commissions via this route. Gaps in the definition of indigenous peoples, as it applies to Africa, need to be directly addressed.

7. Facilitate systematic field investigation of large-scale commercial land acquisitions

An important item which is being considered in the development of investor codes of conduct, and which also needs to be applied in working with host governments as they develop their own codes, is to strongly advise that proposals be open to public review. This would open the way for expert commissions of inquiry to visit affected areas and to determine independently the viability of proposals in the local area, with special reference to land and livelihood rights. Where there is no willingness towards this, international institutions such as the International Land Coalition should be in a position to offer host governments confidential assessments. These should involve ILC country partners. The capacity of country partners to investigate and monitor large-scale land acquisitions also needs substantial investment and support to be able to meet these demands on a sustainable basis.

8. Expand attention to local land rights beyond the current wave of leasing for agrofuel and food production

It is evident that land acquisitions for carbon trading purposes are also rising, again mainly in agrarian economies where large areas of forest/woodland already exist or where new plantations may be developed. There is no sign currently that investor land leasing to produce agrofuels and foodstuffs will decline.

The implications are, however, not limited to these developments. The way in which local lands are leased for timber harvesting, hunting, and tourism also need to be taken into account. The issue of concessions for mining, oil, and gas exploration and extraction needs specific treatment, given the special tenacity of legislation which fairly uniformly in Africa treats these natural resources as national property and the fact that communities themselves have been less wont to claim them as their own where these are subterranean rather than surface assets which they have themselves mined in the past (in contrast with riverbed gold and iron workings, for example). In regard to oil, minerals, and gas, work needs to be focused upon developing binding procedures for full and fair compensation on eviction or loss of access due to exploration and mining.

9. Promote a shareholding approach to large-scale commercial investment

As noted above, more than benefit-sharing or employment opportunities are required to offset the loss of resources and capital values when commercial investment involves large-scale land acquisition. The ideal is that local land rights are sufficiently upgraded in law to enable communities to directly lease part or all of their common properties themselves to entrepreneurs – presuming that communities are assisted to thoroughly vet such proposals and that these are found to be worth the loss of current access and use, and also presuming that the conditions are equitable and that the term of the lease is viable and favourable to their medium- and longer-term interests.

An enterprise shareholding model would be a more sophisticated development than rent from such leases. Cases where rural farmers are being contracted to farm in accordance with investment plans are a step towards this. However, these too seem insufficient, as studies in Zambia and Tanzania suggest (Gumbo 2010; Sulle and Nelson 2009), and they are in any event focused upon already relatively secure land areas – peasant farms – and do not address the more fundamental need for unfarmed commons to be protected and, as appropriate and sustainable, more lucratively used.

In their regard a more reliable arrangement would be to develop and test arrangements wherein affected communities are more than contracted parties or beneficiaries of social or other pay-offs, and instead directly partner new enterprise wherever their communal lands are involved. Forms and levels of shareholding can be developed which limit communities' risks and liabilities in these enterprise developments. Properly constructed, a win-win situation for investor and community should emerge, and a great deal of resentment and many potential risks of conflict could be assuaged. For the moment, little of this is occurring, and the investment interest of Wall Street and the City of London in the cheap lands of Africa as a hedge against rising food and land prices, or to procure carbon credits to sell or against which to offset the industries of developed countries, seems set to continue.

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This report is part of a wider initiative on Commercial Pressures on Land (CPL). If you would like further information on the initiative and on the collaborating partners, please contact the Secretariat of the International Land Coalition or visit ***www.landcoalition.org/cpl***

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