

AN ANALYSIS OF INTERNATIONAL LAW, NATIONAL LEGISLATION, JUDGEMENTS, AND INSTITUTIONS AS THEY INTERRELATE WITH TERRITORIES AND AREAS CONSERVED BY INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

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KALPAVRIKSH



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NATURAL JUSTICE


MALIASILI INITIATIVES
INVESTING IN PEOPLE FOR NATURE

“Land is the foundation of the lives and cultures of Indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples’ particular distinct cultures is threatened.”

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Cover Photo (clockwise, from left): Khwe community representatives from Namibia and Botswana participate in a workshop in the Bwabwata National Park, Namibia. © Natural Justice

Artisanal fishing, Shimoni. © Richard Lamprey/Fauna & Flora International

A centuries-old shell mound at *Petit Kasse*, Casamance, Senegal. © Christian Chatelain

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TABLE OF CONTENTS

ACRONYMS	3
ACKNOWLEDGEMENTS	4
EXECUTIVE SUMMARY	5
1. ICCAS IN AFRICA: AN OVERVIEW	6
1.1 CASE STUDY COUNTRIES: KENYA, NAMIBIA, SENEGAL	7
2. LEGAL RECOGNITION AND GOVERNANCE OF ICCAS	14
2.1 LAND, NATURAL RESOURCES, AND LOCAL GOVERNMENT LAW	14
2.2 FRESHWATER AND MARINE LAWS AND GOVERNANCE	18
2.3 PROTECTED AREAS, ICCAs AND SNSs	20
2.4 HUMAN RIGHTS	23
2.5 JUDGMENTS	24
3. IMPLEMENTATION	26
4. COMMUNITY EXPERIENCES	31
5. CONCLUSIONS AND RECOMMENDATIONS	36

ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
BMU	Beach Management Unit
CAMPFIRE	Communal Areas Management Programme for Indigenous Resources
CBD	Convention on Biological Diversity
CKGR	Central Kalahari Game Reserve
CNR	Communal Natural Reserve
DRC	Democratic Republic of Congo
ICCA	Indigenous People's and Local Community Conserved Territories and Areas
ICCN	Congolese Institute for the Conservation of Nature
LMMA	Locally Managed Marine Area
MET	Ministry of Environment and Tourism (Namibia)
NGO	Non-government organization
NRT	Northern Rangelands Trust
PA	Protected Area
REDD	Reduced Emissions from Deforestation and Forest Degradation
RRI	Rights and Resources Initiative
SNS	Sacred Natural Site
TURF	Territorial User Right in Marine Fisheries
USAID	United States Agency for International Development
VLFR	Village Land Forest Reserve

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This report presents a synthesis of the Africa case study material prepared on legal aspects of Indigenous People's and Local Community Conserved Territories and Areas (ICCAs). Those studies comprise reviews of Senegal (Dieng Ndiawar and Ndiaye Soulèye), Namibia (Brian Jones) and Kenya (Fred Nelson). Numerous individuals who provided information used in the completion of those studies are acknowledged as appropriate in the national case study reviews.

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EXECUTIVE SUMMARY

This report provides a synthesis of three country level case studies (Namibia, Senegal, Kenya) carried out in African countries as a part of the overall legal review of Indigenous People's and Community Conserved Territories and Areas (ICCAs). This regional synthesis report also incorporates information and material from other African countries' experiences with ICCAs, as documented in a range of other studies and publications.

African countries possess a tremendous diversity of biophysical landscapes and human communities, with strong interconnections between the two in rural areas. ICCAs encompass a wide range of livelihoods and ecosystems, including marine fisheries, community forests, pastoralists' grazing areas, and wildlife conservation areas which are now often connected to more modern enterprises such as tourism.

All three countries reviewed possess large and growing areas of formally established ICCAs, including large areas of Namibia and Kenya established as wildlife conservancies; Namibia is the leader in Africa in community wildlife management, with over 70 Communal Conservancies, now covering nearly 15 million ha, or more than 16% of the country's total area.

Senegal and Kenya have a wide range of traditionally conserved areas, such as numerous Sacred Natural Sites, such as the *Kaya* forests of Kenya. Both Kenya and Senegal also possess some important emerging coastal marine ICCAs, which in Kenya has been provided legal underpinning through the mechanisms of Beach Management Units.

In all three countries, and even more so in other African nations, the ability of local communities to secure communal land rights over their territories is a fundamental issue in communities being able to secure and effectively govern their land areas and the resources therein. Community land rights in Africa lag far behind other regions such as Latin America and this is an urgent area for reform efforts, and given the surge of land acquisition and commodity values of the past five years, will likely be crucial in the fate of many ICCAs in the future.

Some recent developments in African jurisprudence have strengthened local communities' legal claims, as well as the recognition of indigenous people's rights (and indeed the very definition of 'indigenous peoples' in the African context). Most significant amongst these is the Endorois ruling of the African Commission of Human and Peoples' Rights, issued in February 2010. At the national level, the litigation pursued by the San communities in the Central Kalahari Game Reserve of Botswana has also bolstered community rights in relation to exclusive protected area management practices.

1. ICCAs IN AFRICA: AN OVERVIEW

Sub-Saharan Africa (hereafter 'Africa') is home to a tremendous diversity in human cultures and ecological systems, resulting in a correspondingly wide range of traditional natural resource management regimes and practices. Such traditions, combined with contemporary efforts to better link natural resource conservation and rural economies in the interests of sustainable development, underpin a vast array of Indigenous People's and Local Community Conserved Territories and Areas (ICCAs) across Africa, many of which have still not been adequately documented.

In addition to being a region of great cultural and biological diversity, Africa today is also characterized by rapid social, economic and technological transformation, continuing political and civil conflict, and widespread material poverty. Processes revolving around political and social struggles for economic empowerment and political representation, war and peace, and technological change all shape the status and evolution of ICCAs in the region.

Several overarching social and institutional realities frame the ability of local communities throughout Africa to secure rights over their lands and resources and manage those as ICCAs.

First, local communities throughout Africa face pervasive threats to their land rights and tenure security. As Alden Wily (2011a) details, the vast majority of rural communities living in African countries remain without formal legal recognition of their customary land rights. States claim ownership over untitled land in most African countries, effectively rendering rural communities as tenants of the state. Recent research by RRI (2012) reinforces this point, demonstrating that in Africa's most-forested countries, only about 3-5% of forests are recognized as being owned or securely allocated to rural communities, compared to more than 30% in Latin America. The processes of land and forest tenure reform that have led to the recognition of extensive indigenous and local communities' territorial rights in Latin America and parts of Asia have by and large not taken place in sub-Saharan Africa over the course of the past two decades. Thus when one approaches, from a legal perspective, the issue of formal statutory recognition of local communities' rights to conserve their traditional territories and resources, the fundamental reality across most of Africa is that customary land rights remain formally unrecognized, and as a result community lands are widely vulnerable to expropriation, under the law.

A second key contextual reality in Africa is that this status of land and natural resource tenure is fundamentally linked to wider political circumstances in African countries. Local communities' and civil society organizations' ability to penetrate political processes to advocate for and secure land and resource rights generally remain more constrained in sub-Saharan Africa than other developing regions. Heavily centralized

executive power, with its antecedents in the colonial era and the post-colonial state-building periods, remains pervasive across Africa, circumscribing the influence of representative legislative bodies, independent judiciaries, civil society organizations, and individual citizens in general.

The constraints of Africa's political realities on natural resource governance reform has been readily apparent over the past two decades, as numerous attempts have spread across the region promoting decentralization and devolution of rights over forests, wildlife and fisheries. Such community-based reform movements have struggled to gain traction in many African countries, in whole or in part, and some of the more promising local reform efforts that occurred in the 1990s have subsequently been reversed and recentralized (Nelson, 2010; Poteete and Ribot, 2011). Decentralization, often touted in policy statements and development narratives, has rarely been institutionalized in a meaningful way (Ribot, 2004).

These wider institutional realities and tensions around land rights and use are also evident in the fact that Africa is presently the primary target of the surge in global land acquisition or 'land grabbing' that has come to the fore of the global development and human rights agenda during the past several years. Recent compilations report that Africa has had 134 million ha of land reportedly acquired for agribusiness investments since 2001, out of a global total of 203 million ha (Anseeuw et al., 2011). A prominent World Bank study on global farmland acquisition highlights the fact that investors are targeting Africa for land because of the weak protections afforded residents of rural areas in terms of recognition of their land rights, making it easier, and cheaper, for governments to appropriate land and allocate it to investors (Deininger et al., 2010; see also Alden Wily, 2011a).

This is the social and political context within which ICCAs in Africa must be considered and assessed. Local communities' territorial and jurisdictional rights over natural resources are inherently a part and parcel of the struggle by citizens across Africa to obtain recognition of their customary territories and natural resource governance practices, and to gain new privileges over historically centralized resources such as wildlife, forests, and fisheries. Such struggles, intensifying as human populations grow, resource consumption increases, and the market value of African lands and natural resources also rises, are also a critical element in wider contests surrounding citizenship and democracy (Nelson, 2010).

1.1 Case Study Countries: Kenya, Namibia, Senegal

This legal review of ICCAs in Africa, undertaken as a component of the wider global study, draws on country-level analyses undertaken for Kenya, Namibia and Senegal. Those three countries, representing West, East and Southern African regions, provide a cross-section of divergent socioeconomic and ecological profiles, yet all in their own way provide leading examples of African ICCAs. In all three countries, ICCAs have evolved in a

context of historical struggles for land and natural resource rights and wider political and institutional reforms that have granted local communities new opportunities to secure rights over land and natural resources.

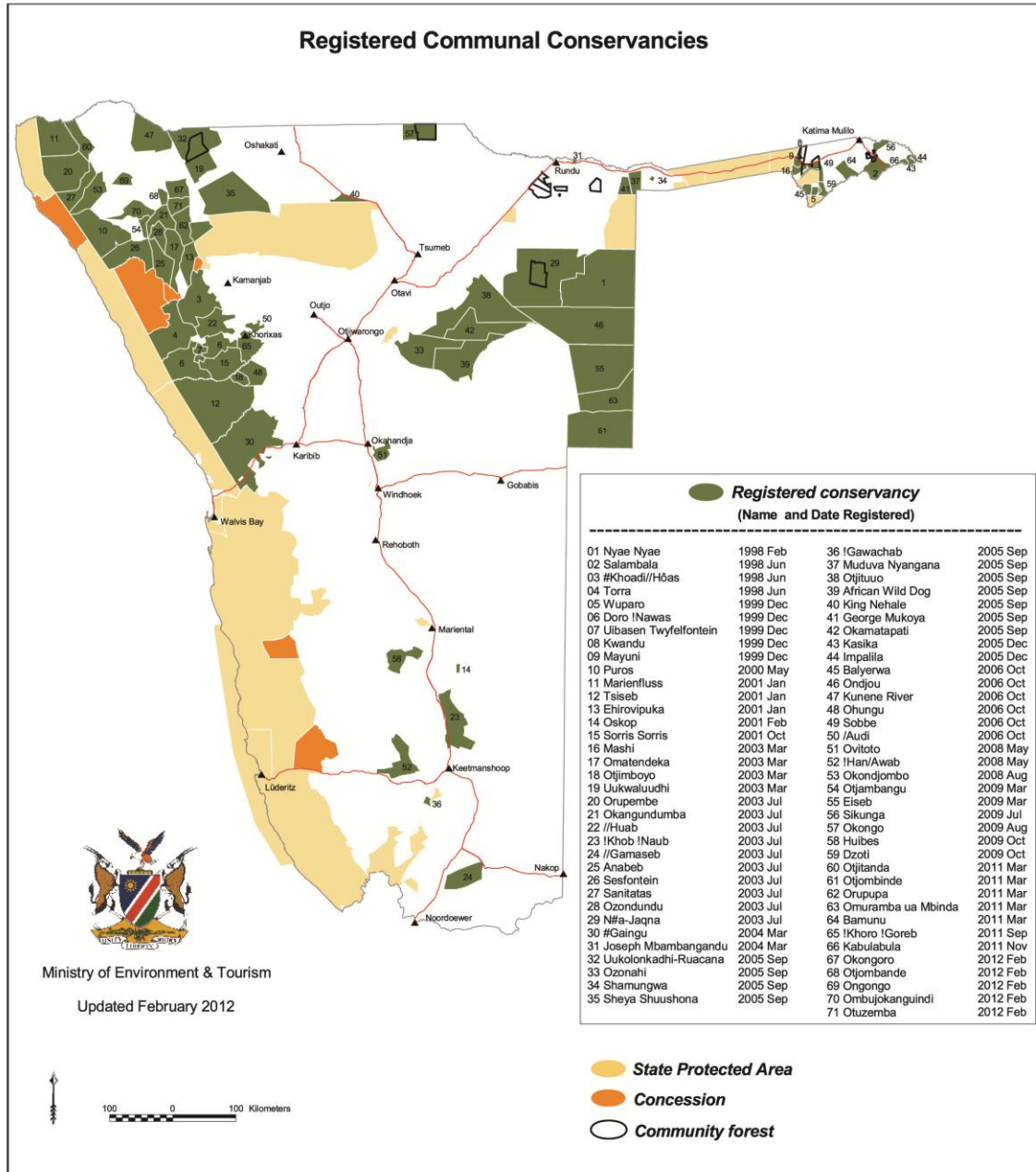


Figure 1: Communal Conservancies, Community Forests, and State Protected Areas of Namibia.

Namibia provides Africa's leading example of a formalized, government-crafted process of devolving clearly delineated rights over wildlife to rural communities. Through

Communal Conservancies, adopted in policy reforms shortly after Namibia became independent from South Africa in 1990, local communities can apply for and receive broad user rights over wildlife and both commercial and subsistence uses. Since the first of these conservancies were created in 1998, over 70 Communal Conservancies have been created, now covering nearly 15 million ha, more than 16% of the country's total area and roughly the same amount of land contained in Namibia's formal protected area network (Figure 1).

The success of these conservancies in prompting improved wildlife management and the conservation of many species - including endangered wildlife such as black rhinos, elephants and cheetah - as well as generating revenue from tourism and hunting for local communities, has also been extended to the forestry sector through similar provisions for the creation of Community Forests. The main weakness of these conservancies in a legal and jurisdictional sense is that the conservancies do not have clear and exclusive group tenure over the land contained within their demarcated conservancies; land in communal areas remains formally owned by the state and conservancies have at times struggled to exclude outsiders involved in livestock grazing, farming, and tourism.

In Kenya, local conservancies and sanctuaries have also spread throughout the country's extensive wildlife-rich pastoralist landscapes, covering around 2 million hectares, although unlike in Namibia these have not been formally recognized as conservation areas by government and up until the present the term 'conservancy' has had no legal meaning. In contrast to Namibia, most communities in Kenya are able to establish their ICCAs based entirely on title to land, in pastoralist areas most frequently vested in communal Group Ranches, which hold land on behalf of their members. Outside of these Group Ranches, which cover a relatively small area of Kenya's pastoralist communities, local communities in Kenya have weak and vulnerable land rights, with land held as 'Trust Lands' at the district level where it is often subject to alienation and encroachment. Many traditionally-protected ICCAs, such as the Loita Forest in Narok District and other forests that serve as grazing reserves and watering sites for livestock in northern Kenya, fall within such Trust Lands and have been vulnerable for decades to such encroachment or appropriation. Importantly, Kenya's new (2010) constitution abolishes Trust Lands and replaces them with Community Lands as a new tenure category, which has the potential to be one of the most important reforms for community natural resource governance that has taken place in the region in recent years.

Kenya also has recently propagated a framework for the development of coastal marine ICCAs, through regulations providing for Beach Management Units under fisheries legislation, that allows coastal communities to establish and enforce territorial rights over in-shore waters and reef fisheries. These coastal ICCAs as of yet are limited to a few pilot areas on Kenya's Indian Ocean coast, but have recorded some initial successes and, given their legal basis, have the potential to spread along the coast in coming years.

Box 1: ICCAs in Pastoralist Landscapes of Kenya

About 80% of Kenya consists of arid or semi-arid rangelands, grasslands or semi-desert in the far north. These drylands are the territories of a range of pastoralist ethnic groups such as the Turkana, Borana, Somali, Maasai and Samburu, who typically have managed their lands for transhumant pastoralist livestock production. A central element of such traditional management systems is the annual rotational movement between different pastures used for wet and dry season grazing, and the conservation of key water sources and drought refuges, such as forests. For example, Maasai communities in southern Kenya have conserved the Loita Forest, a 33,000 ha tract that is one of the country's largest remaining areas of formally unprotected highland forests.

As in many parts of Africa, traditional pastoralist management systems have eroded over the years in Kenya due to problems related to securing and exercising collective land tenure and the performance of local communal governance institutions (e.g. Mwangi, 2007).

During the past twenty years, a combination of interests related to wildlife conservation, tourism development, and pastoralist land tenure and security concerns has led to the emergence of numerous new ICCAs in pastoralist areas. Some of these initiatives have now reached a considerable scale and are reaching transformative impacts on pastoralist landscapes in certain parts of Kenya.

The most notable and large-scale set of conservancies are those situated in central/northern Kenya, mainly in Laikipia and Samburu Districts, which fall under the auspices of the Northern Rangelands Trust (NRT). NRT was established as an umbrella organization to support emerging conservancies in this region in 2004, following on some initial successful pilot conservancies established with the support of the Lewa Wildlife Conservancy, a private ranch and tourism operation (Honey, 2008). NRT now supports about 20 conservancies covering a total of 16,000 km², and is beginning to expand into other areas to the north and towards the coast as well. Conservancies in northern Kenya are critical to the survival of endangered species such as the Grevy's zebra, which numbers less than 3,000 animals, the vast majority of which live in central and northern Kenya, as well as species such as wild dog and elephant.

Each conservancy supported by NRT consists of a core conservation area in which grazing by domestic livestock is prohibited, surrounded by larger buffer zone which acts as a dry season grazing reserve for livestock. Glew et al. (2010) analysed the condition of vegetation in these conservancy land use zones and found significant improvements in green vegetation in conservancies in comparison to control areas.

Conservancies provide a range of services, ranging from improved security in relation to both wildlife poaching and livestock theft, to tourism joint ventures, to micro-business and livestock trading operations overseen and facilitated by NRT.

The conservancies are run by management teams and governed by trustees elected by the communities, and a conservancy board that oversees the conservancy. Grazing committees have also been established to govern grazing access and land use zones. Land tenure in the conservancies is generally held under the Group Ranch framework, although some conservancies are entirely or partially on trust land, which means that the conservancies do not actually hold adjudicated rights over their land.

In Senegal, communities' ICCAs take the form of Communal Natural Reserves (CNRs) established based on the 1996 decentralization reforms which granted rural communities and their elected local governments authority over natural resources within their jurisdiction. Since then, about 33 CNRs, covering 759,000 ha, have been established and recognized on the basis of the decentralization laws, although wildlife and forestry laws and policies do not include provisions for CNRs or recognize them as part of the country's protected area network. Senegal, like many other countries in Africa, also has numerous and often undocumented Sacred Natural Sites (SNS), although these do not have any formal legal recognition or protection and are reliant on local norms and traditions for their continuing stewardship.

Across the three case study countries, and other African nations from which examples are also drawn throughout this report, the roots of ICCAs vary considerably, as do their legal underpinnings. In Namibia a combination of central government and national and international NGOs, supported by foreign donors such as USAID, has been key to driving the development of Communal Conservancies since their initial formulation in the early 1990s. Namibia has also drawn extensively on other experiments with community-based natural resource management elsewhere in southern Africa, particularly Zimbabwe's CAMPFIRE² Programme. In Kenya, by contrast, the wildlife and tourism conservancies formed in pastoralist areas have primarily been facilitated by various NGOs and tourism investors, with little government leadership, at least since the initial formative period in the mid-1990s. Similarly, Kenya features a relatively vibrant and active civil society and private media, which has been key in influencing recent constitutional reforms and linking those to land tenure and natural resource governance issues. In Kenya's coastal areas, the government has played a more pro-active role in facilitating new coastal marine ICCAs, although facilitation remains heavily dependent on NGO and donor support.

Ultimately the deepening and expansion of ICCAs in Africa will be closely linked to the ability of rural communities to address long-standing inequities and exclusions in land tenure and natural resource governance regimes. Kenya's recent constitutional reforms provide a useful reference point for how sweeping reform may emerge from a context of intense and even violent democratic competition, although the implementation of this constitution remains a challenge and is likely to be the central issue in natural resource governance in the country for the next decade at least.

² Communal Areas Programme for Indigenous Resources.



Figure 2: Grevy's zebra are a restricted- range species that today are heavily dependent on ICCAs and adjacent private and government protected lands in central and northern Kenya. Photo credit: Kenneth Coe.

The body of this report provides a summary of key legal provisions and issues relating to the recognition and governance of ICCAs in Africa. The three case study countries provide the main reference points,³ but additional information from relevant documented national experiences elsewhere is also incorporated to enrich and broaden the findings in a more regionally representative manner.

Table 1: Summary of ICCAs and their extent in the three case-study countries.

	MAIN TYPES OF ICCAs	APPROXIMATE EXTENT OF ICCAs
NAMIBIA	Communal Conservancies	In early 2012 there were 71 Communal Conservancies managing 149,829 km ² of communal land
	Community Forests	13 Community Forests covered 4,652 km ² although this includes some overlap with conservancies.
		Conservancies and Community Forests

³ Unless otherwise noted, information presented in this report on ICCAs in the three case study countries comes from the country-level reports prepared as part of this study, which are found in the references as Jones (2012), Nelson (2012) and Ndiawar and Soulèye (2012).

		combined cover about 18% of Namibia's land surface
KENYA	Community Conservancies or 'Sanctuaries'	About 20,000 km ² in formal community conservancies or sanctuaries, sometimes established as tourism concessions between pastoralist communities and investors.
	Locally Managed Marine Areas based on legally-formed Beach Management Units	Initial pilot LMMAs involve about 8 communities and cover approximately 12,600 ha of coastal in-shore waters.
	<i>Kaya</i> sacred coastal forests	About 70 <i>Kayas</i> covering a total of approximately 6,000 ha
	Traditionally managed ICCAs in pastoralist landscapes, mainly rangeland, water, and forest resources	Traditional pastoralist landscapes are not documented but probably cover at least an additional 1 million ha of forest and rangeland.
SENEGAL	Communal Natural Reserves	33 Communal Natural Reserves totaling 759,000 ha
	Traditional Sacred Natural Sites, often small patches of forest	SNS generally mostly of a few ha, but numerous and spread around the country.
	One or two pilot marine ICCAs, notably Kawawana	Kawawana coastal ICCA, the most noted initial marine area, covers 9,665 ha.

2. LEGAL RECOGNITION AND GOVERNANCE OF ICCAs

2.1 Land, Natural Resources, and Local Government Law

The ability of local communities to secure clear rights over their traditional territories, and the natural resources therein, is fundamental to the effective functioning and maintenance of ICCAs. Equally, it is critical for local communities to possess, or to be able to create, local governance organs that are democratically constituted and accountable, and have the formal status required to effectively engage with external parties. The single greatest barrier to ICCAs in Africa lies in this interconnected realm of land tenure, local governance, and natural resource law. Across most of Africa, for reasons that relate to the region's political history and governance patterns (see Section 3 below), local communities continue to lack either recognition of customary land rights, or legally recognized collective governance institutions, or rights over natural resources found on their lands, or in some cases all three.

The realities with respect to land tenure at the regional scale in Africa are stark; Alden Wily (2011a) estimates that around 90% of Africa's land area is the *de jure* or *de facto* property of the state, and furthermore points out that this situation is a fundamental source of insecurity and actual or potential dispossession for up to half a billion people across the region. RRI (2012), building on past analyses of forest tenure and governance across Latin America, Asia and Africa (e.g. Sunderlin et al., 2008), estimate that only about 5% of the forest lands in Africa's most forested countries is held under local community forms of tenure.

Box 2 provides the example of Cameroon, which is typical of unreformed African land and natural resource governance regimes in that most of the land in the country is formally 'unregistered' and thus considered state land, with no meaningful large-scale recognition of local communities' customary rights.

Box 2: Land and Forest Tenure in Central Africa: The Case of Cameroon

Cameroon is emblematic of the challenges facing local communities in securing legal recognition of their traditional lands and resources in Africa, and particularly in the forested landscape of the Congo Basin where statutory tenure regimes are almost uniformly centralized. The reality in Cameroon, as in many African countries, is that the state claims ownership over all unregistered (i.e. not formally titled) lands, including all lands claimed according to customary rights and held through common property regimes. Thus while local communities throughout Cameroon depend on the forested landscapes in which they live for a range of products, their customary rights are not recognized or delineated by the law as real property interests.

In a recent in-depth review of local customary land rights over forested lands in Cameroon, Alden Wily (2011b) puts the situation quite plainly:

The core issue is the de jure reality that most Cameroonians are little more than squatters on their own land, with regard to the forests and other land assets which by custom they have logically held in undivided shares ('common properties').

The situation with respect to land and forest tenure in Cameroon is, again as with land rights across much of Africa, derived from colonial practices that placed ownership of all land in the hands of the colonial state, driven by motives that included making land available for European settlers and to free up rural African labor for commercial agriculture and other forms of economic activity organized by colonial regimes. These provisions were reinforced following independence; in Cameroon the 1974 land law removed the opportunity that had existed under colonial statute for communities to register their customary land holdings.

Cameroon does have some recognized ICCAs through its community forestry initiatives (R. Blomley et al., 2008). These consist of forests where communities obtain a lease from the state to manage forests for commercial or other uses. These forests are however limited to 5,000 ha in size, which is far less than the areas that many communities would claim as their customary territories. The existence of these ICCAs represents less progress in advancing local forest land tenure claims, than a somewhat superficial measure to grant communities *some* opportunity to manage and benefit from the forests they have been dispossessed of through historic practice and enduring legal arrangements.

Underlying existing forest and land tenure relations in Cameroon and the rest of the Congo Basin is the reality that forests are the region's major economic asset and states earn hundreds of millions of dollars annually from leasing forest lands out to private logging companies. Thus any tenure reform efforts in the region run into the political economic logic of maintaining natural resource governance regimes that benefit the state and those who control its high offices.

Source: Based on Alden Wily, 2011b

Box 3 provides the contrasting example of Tanzania, which has developed one of Africa's strongest systems of community-based land tenure and local governance, with roots back in the country's collectivist agrarian experiments of the 1970s, and more recently a national land reform movement during the 1990s.

Box 3: Land Tenure and Local Government Reform in Tanzania

Tanzania has perhaps the most progressive legal and institutional framework for ICCAs in sub-Saharan Africa, at least in a formal sense. Nearly all of Tanzania's rural areas fall within the boundaries of one of 10,000+ villages. Villages comprise the Village Assembly, made up of all the adults in the community, and the governing Village Council, made up of about 25 individuals elected by the Village Assembly and headed by the Village

Chairman. Village Councils are corporate bodies under the 1982 Local Government Act and thus can own property and enter into legally binding third-party contracts.

Village Councils are also designated by the 1999 Land Act and Village Land Act as the management authority for 'village land', which comprises all the land within the village's boundaries and tends to consist of around 10,000 to 50,000 ha, depending on the social and ecological context of a given village. Tanzania's Forest Act (2002) also builds on these existing local governance and land tenure arrangements by allowing for the creation of Village Land Forest Reserves (VLFRs), which are areas of village land that the community can declare for purposes of forest management. Villages then obtain broad rights over their forest, subject to a management plan and local by-laws for enforcement, including retaining 100% of any revenue generated by the VLFR from timber or other forest product harvesting and sale. There are now more than 2 million ha of forests and woodlands contained within VLFRs in Tanzania, involving over 1,000 communities.

The origins of Tanzania's relatively devolved and democratic system of local governance lie in the country's socialist history, coupled with more recent reform efforts. In the 1970s, villages were initially conceived and established as mechanisms for the state and ruling party to organize local rural agrarian production and social development interventions. Villages remain subject to these top-down efforts at control and coercion, but they have nevertheless evolved into the main forum for local communities to collectively organize, mobilize, and develop local governance institutions. Often, as in the case of pastoralists' land use planning and zoning efforts, these formal local governance bodies incorporate pre-existing traditional land management practices, for example by integrating them with formal village by-laws.

Source: Nelson and Blomley, 2010.

Among the three case study countries included in this review, land and local governance laws and policies play a key role in the governance and development of ICCAs.

In Kenya, there are three land tenure categories: freehold land, state land, and trust land. Freehold land consists of privately owned land, which is predominantly individually held but may also comprise land titled to communities through designated trustees or representatives. This is the framework created for ownership of pastoralist rangelands under the Group Ranches legislation propagated in 1968.⁴ Group Ranches are vested in trustees on behalf of the Group Ranch membership- its residents- and managed by an elected Group Ranch committee. The idea underlying the Group Ranches was to adapt freehold property rights to collective land management contexts in pastoralist areas. Group Ranches were established mainly in the more productive rangelands in southern Kenya, predominantly in Maasai areas in districts such as Kajiado and Narok. These

⁴ The Land (Group Representatives) Act (Cap. 287) of 1968.

rangelands are the most productive in the country for livestock as well as wildlife, containing the country's most famous protected areas such as Amboseli National Park and the Maasai Mara National Reserve.

Since the 1990s, many pastoralist communities in these wildlife-rich regions have established local conservancies or sanctuaries within their Group Ranches (see Box 1). In general, though, the Group Ranches have had a mixed record as land holding and collective natural resource governance bodies. Maasai communities have increasingly decided to subdivide Group Ranches into individual holdings, despite the reality that livestock production is not viable on most properties in these semi-arid regions at the scale of smaller individual properties. The problem that has motivated this shift is the local, internal governance of the Group Ranches, and particularly the problem of elites in the Group Ranch committees allocating lands and key resources to themselves or other applicants, without sufficient recourse or accountability to the Group Ranch membership (Mwangi, 2007). The original statutory design and operation of the Group Ranches has been such that the membership has not been able to enforce accountability in land management on the part of the leadership.

In central and northern Kenya, where many new conservancies are now emerging (see Box 1; NRT, 2012), these formal ICCAs are situated on both Group Ranches and trust lands. Trust lands are basically unadjudicated lands which local district-level governments hold and manage on behalf of the resident communities. This form of tenure renders these lands subject to mismanagement or misallocation by district government and prevents local communities from securing rights over their lands. For example, traditionally managed forests such as the Loita Forest in Narok District, because it is formally trust land, has been the subject of conflicts over jurisdictional control and use between local communities and district government for many years.

A major development in Kenya has been the new 2010 constitution's provisions for land reform, which are being further developed in a range of policy reforms and draft legislation. The constitution effectively replaces trust lands with a new land tenure category titled 'community lands', essentially devolving trust lands- which comprise the majority of Kenya's land area- from the district to the community scale. If effectively implemented, this has the potential to greatly strengthen the tenorial basis of ICCAs across Kenya, including both formally constituted areas such as conservancies as well as traditionally protected areas such as pastoralist communities' customary grazing reserves.

In Namibia, communal land is considered state land, and managed by Traditional Authorities and Communal Land Boards. There is no basis for adjudicating group land rights to a community, such as the membership of a Communal Conservancy, and this is the most significant shortcoming of Namibia's well-developed community-based natural resource management framework for both wildlife and forests. The practical challenge this tenorial shortcoming creates is that it is difficult for conservancies or Community Forests to exclude other land users or land uses from their ICCAs. For example,

conservancies have no control over livestock grazing, which may conflict with their tourism and wildlife management activities. For example, government departments have made their own plans for small-scale commercial livestock production, and in at least one instance, a large-scale agricultural project, in communal lands where conservancies are situated and without consultation with those conservancies or the Ministry of Environment and Tourism.

In Senegal, the key reform that has enabled the establishment of CNRs is the decentralization reforms of 1996, which shifted a broad range of powers to elected local government institutions. This 'third phase of decentralization' created three types of local authorities: the Region, Municipality and Rural Municipality, and specifically granted these local governance organs with authority over lands and natural resources within their jurisdiction.⁵

Rural Municipalities are governed by Rural Councils, which are elected from the populations of the villages within those municipalities. These bodies may form CNRs, which become legal entities when approved by the State representative at the regional level. These local governance bodies constitute the key arena for the creation and development of ICCAs in Senegal.

2.2 Freshwater and Marine Laws and Governance

There are no known and documented cases of ICCAs in freshwater bodies within the three case study countries. There are some co-management institutions enabling local rule-making and participation with regards to fishery management, notably in Kenya and Uganda in Lake Victoria, but these measures do not involve establishment of local territorial control over freshwater bodies.

In the marine realm, ICCAs are much less widespread in Africa than in other regions such as Micronesia, the South Pacific, or even Madagascar. Relatively few countries have established legal regimes that enable local communities to establish territorial rights over in-shore fisheries and coastal waters (known as Territorial User Rights in Marine Fisheries or TURFs). In Namibia, where the coastline is arid and rocky and the main fisheries are pelagic, there are no traditional in-shore fisheries. In most countries, though, fisheries, like forests and wildlife, were historically placed under centralized control, rendering most local utilization de facto open access, as local users were not empowered to make and enforce their own regulations to govern the resource.

With the growing global recognition of the importance of Locally Managed Marine Areas (LMMAs) in terms of both conserving marine biodiversity and supporting local food security and sustainable development, there have been increasing efforts to encourage

⁵ The key statutes being Law 96-06 (the Local Government Code) and Law 96-07, both of 22 March, 1996.

greater local participation in coastal fisheries, often through some form of co-management. While many of these efforts over the past twenty years in Africa remain poorly documented and analysed, it is generally the case that there are generally few TURF-based ICCAs along Africa's Indian Ocean or Atlantic coasts.

Kenya has only recently developed a number of pilot coastal ICCAs on its southern coast. These areas operate through the mechanism of Beach Management Units (BMUs), which consist of all the users of a fishery and are established according to the provisions of regulations issued in 2007 under the authority of the Fisheries Act.

In Senegal, the marine realm is excluded from the ambit of the 1996 decentralization reforms, which has impeded local communities from establishing coastal ICCAs. Nevertheless, some pioneering communities have been able to negotiate extension of the accepted purview of the decentralization laws and establish the country's first formally recognized ICCAs. Foremost amongst these is Kawawana, in Casamance Province, which was able to obtain the approval of the Provincial Governor and Regional Council for its coastal ICCA (Box 4). Despite this important local example, coastal ICCAs remain on questionable legal ground and will require additional reforms to fisheries or to decentralization statute to provide coastal communities with clearer and more secure jurisdictional rights.

Box 4: Kawawana ICCA, Senegal

Kawawana ICCA comprises eight villages, with about 12,000 inhabitants, located in coastal Senegal in the Rural Municipality of Mangagoulack. The ICCA was established in 2008 by these fishing communities, covering 9,665 ha of coastal waters and mangroves. The area is rich in fish and other marine life such as dolphins, crocodiles and numerous species of birds.

The main challenge the community encountered is that the decentralization law does not legally apply to coastal resources in Senegal. Nevertheless, after the Rural Municipality had approved the Kawawana proposal, after several years of lobbying and activism, the communities succeeded in obtaining the approval of the Regional Council and Governor of Casamance in 2010.

The ICCA includes no-take zones with strict protection of marine resources, as well as other areas zoned for sustainable use. The community patrols and polices these zones in collaboration with the government fishery authorities. Among the benefits realized from this ICCA include improved fish yields and nutrition for the local communities, as well as the organizational benefits of improved solidarity and capacity for collective action on natural resource management issues.

Source: Ndiawar and Souleye, 2012; see also Borini-Feyerabend, 2012.

2.3 Protected Areas, ICCAs and SNSs

The connections between formal Protected Area (PA) legislation and related administrative categories, and ICCAs in African countries varies, as exemplified by the three country case studies. In Senegal, ICCAs are based entirely on decentralization statutes and are not recognized as PAs by wildlife or forestry authorities or governing legislation. In Kenya, terrestrial ICCAs are also not recognized as PAs, and have been only semi-formal entities, based mainly on land tenure statute and various forms of institutional organization (e.g. societies, cooperatives, trusts) and related statutes. Marine ICCAs are based on the Fisheries Act but are also not formally considered PAs but rather as co-managed areas. Kenya is however currently revising its wildlife policy and legislation, partly to bring the wildlife sector's institutional framework in line with the new constitution, and this is looking to provide a formal basis for registering conservancies with the Kenya Wildlife Service, the main government PA authority in the country.

Namibia is the one country, amongst those reviewed, which has the strongest legal framework, and the clearest statutory procedures, for establishing ICCAs. Namibia does include ICCAs within the PA network; as shown in Figure 1, the Minister of Environment and Tourism generally presents both state protected areas and Communal Conservancies, and now Community Forests as well, as part of the overall PA estate of the country.

Namibia's Communal Conservancies are based on the Policy on Wildlife, Management, Utilisation and Tourism in Communal Areas (1995) and the subsequently enacted Nature Conservation Amendment Act (1996). The Act provides for rural communities to form conservancies and gain user rights over wildlife and tourism within the conservancies. The Act enables the Minister to register a conservancy if it has met the following prerequisite conditions:

- It has a representative governing committee
- It has a legal constitution, which provides for the sustainable management and utilisation of game in the conservancy
- It can demonstrate the ability to manage funds
- It has developed an approved method for the equitable distribution of benefits to members of the community
- It has defined boundaries

This legislation enables communities to define themselves; the conservancies are not based on government political or administrative delimitations. Communities have to agree on their borders with neighbours in order for a conservancy to be registered, enabling people who want to work together to cooperate to manage wildlife.

Once established, the conservancies gain the following use rights over wildlife within their boundaries:

- ✓ The conservancy can use huntable game (oryx, springbok, kudu, warthog, buffalo and bushpig), as it wishes for its own use.
- ✓ The conservancy can enter into a contract for a trophy hunting company to buy the conservancy's trophy hunting quota, or a contract for a tourism company to develop a lodge or lodges and other tourism facilities.
- ✓ The conservancy can suggest trophy hunting and other quotas to MET, but MET must approve the quota. In order to make quota proposals, the conservancy needs to monitor its wildlife and be aware of numbers and population trends.
- ✓ The conservancy (or at least individuals within the conservancy) can shoot most problem animals if necessary without a permit, except for elephants and hippo.
- ✓ The conservancy can apply to MET for a permit to carry out other forms of game utilisation, such as live capture and sale of wildlife or the use of protected species.
- ✓ The conservancy receives all income directly from its tourism and wildlife activities and does not receive this income from the state or have to share benefits with the state.

Developed subsequent to the Communal Conservancies in Namibia, and now in some cases overlapping with and complementing them, are Community Forests established under the Forestry Act, No. 12 of 2001. Community Forests have similar rights over resources as Communal Conservancies, although they can also explicitly exclude grazing. Community Forests, like the conservancies, can retain 100% of income generated from forest products such as timber.

Namibia also has a range of interesting cases where local communities live within state PAs and are involved in management of these areas to some degree, or have been granted some form of concession within the PA. Although not specifically provided for in legislation, Namibia has established mechanisms for sharing costs and benefits of PA management. The Policy on Tourism and Wildlife Concessions on State Land (2007) enables the Minister of Environment and Tourism to allocate concessions in PAs directly to local communities.

With regard to state-run PAs, in two cases, the Bwabwata National Park and the Namib Naukluft Park, people continue to live inside the protected area. The Bwabwata National Park has around 4,000 people living within its boundaries, most of whom are Khwe San. The Khwe have lived in the area since the late 19th Century living from hunting, gathering, small-scale cultivation and some livestock. The Khwe view the land and its natural resources as theirs despite it being proclaimed as a National Park in 2007. They still hunt, and gather for food and as part of their culture. MET accepts their presence in the park and has allocated hunting and tourism concessions to the association that represents the residents.

The Kwando and Mayuni Conservancies operate camp sites in the Bwabwata National Park under government concessions and these are expected to be upgraded to lodges in the future. The Kyaramacan Association (KA), representing mainly the Khwe San living in

the park, have been granted a camp site and lodge concession along the Okavango River inside the park. The KA also shares a hunting concession in the park with the MET. Similarly, the Ehirovipuka Conservancy in Kunene Region has been awarded a concession in the Etosha National Park. The concession rights allow tourists to be taken into part of the park closed to the general public from a lodge to be built on a former government tourism concession neighbouring the park that was also awarded to the conservancy. Two other former government tourism concessions on communal land have also been awarded to conservancies in Kunene Region.

Despite these measures, neither policy nor legislation recognises the land rights or basic human rights of residents of Namibian PAs. There are no legal provisions for involving park residents or neighbours in park planning, governance or management. Policies focus on provision of benefits, but avoid issues of rights and governance.

In 2006 the MET embarked on a process of consultation and negotiation regarding the establishment of a People's Park in the Kunene Region, led by the Permanent Secretary and Minister at the time. This was based on the prior informed consent of the communities concerned after initial resistance to the proposed proclamation of a state-run National Park. Cabinet had resolved in 2004 that the three government tourism concession areas in Kunene Region, Hobatere, Etendeka and Palmwag and an area of communal land linking Hobatere and Palmwag should be proclaimed as a national park. The aim was to create a link between the Etosha National Park and the Skeleton Coast National Park. The Cabinet called on MET to initiate an intensive consultative management and development planning process for the park.

Ultimately, though, the Namibian government's position appears to be that communities may benefit from parks but should not be involved in management. This was made clear in September 2009 when the Minister of Environment and Tourism provided new policy guidelines regarding co-management in the context of the negotiations for the establishment of the Kunene People's Park. The Minister made it clear to the Kunene Park Technical Committee that joint management was not possible. Namibia thus exhibits a somewhat perverse track record whereby the government has recently demonstrated its resistance to co-management of state PAs, even while it continues to promote more fully devolved natural resource management in Communal Conservancies and Community Forests.

In Kenya, the sacred *Kaya* forests, traditionally protected by the coastal Mijikenda people, are a key form of ICCA along the coast, and are recognized as a World Heritage Site and protected under National Monuments legislation. This legislation essentially places these forests under the National Museums of Kenya as the management authority, which serves to protect them but removes them from local jurisdiction. This may not be a problem for local communities, as the *Kayas* are mainly sacred sites and not used in a utilitarian manner, but it may also mean that strictly speaking they are no longer ICCAs.

Senegal, like many countries in sub-Saharan Africa, has numerous small sacred forests and other SNS, but these are not given any formal status under PA legislation or other statutes, and are entirely dependent on local norms and customs for their protection.

2.4 Human rights

As noted in previous sections, there are a range of statutes well beyond the scope of natural resource or PA law and policy that are relevant to the governance and form of ICCAs in the case study countries. For example, the laws governing social organizations such as trusts and societies has been the organizational foundation for many community conservancies in Kenya, and the importance of such laws governing the formation of community-based organizations or associations are relevant to ICCAs across Africa.

The wider human rights context shapes ICCAs in fundamental ways throughout Africa, as discussed more in Section 3, since ICCAs in Africa tend to comprise contested lands and resources, particularly as land-grabbing and extractive resource uses intensifies. ICCAs also often are rooted in processes that relate to these wider political and human rights. An example of this is Namibia's conservancies, the evolution of which in the early 1990s can only be understood set against the context of Namibian independence and majority rule following decades of control by apartheid South Africa and a long liberation struggle. The conservancies were largely justified as a way of addressing historic inequalities in rights over wildlife between white freehold lands (where landholders had possessed rights to use wildlife since the 1960s) and the majority of the rural population living in communal lands. Similarly, the decentralization reforms that took place in Senegal in the 1990s, which enabled the formal ICCAs that exist in that country, are rooted in wider struggles around democratization in West Africa and the continent as a whole during the 1990s.

Struggles over ICCAs often constitute some of the more prominent human rights conflicts taking place in African countries. One example of this is the conflict over pastoralist land rights (to land that has been managed as customary grazing reserve, effectively constituting an ICCA) in relation to government PA management and a foreign hunting concession located in Loliondo, northern Tanzania (TNRF and Maliasili Initiatives, 2011). This conflict has existed since the early 1990s but exploded into a more severe episode in 2009 when at least 300 Maasai households were evicted from their own village land, and a range of other alleged abuses and property losses took place. The root of the conflict is the government desire to control and lease out the communities' lands, which border Serengeti National Park and are home to abundant wildlife and outstanding scenery, ideal for tourism or in this case high-paying recreational hunting activities. The communities have effectively resisted this effort at dispossession and built networks with a wide range of human rights organizations and international networks, including the UN Special Rapporteur on the Rights of Indigenous

People.⁶

2.5 Judgments

As a region, Africa has generally not experienced the development of national and regional jurisprudence that has substantially strengthened indigenous peoples' rights to land and resources over the past 30 years in other regions such as Latin America, Canada, Australia, and parts of Asia (Lynch, 2011). A major reason for this is the lack of any consensus, and considerable resistance from states, about indigenous identity based on ethnicity and the general stance that all non-European Africans are 'indigenous'. There has thus been essentially no large-scale recognition in Africa of indigenous peoples' territorial and political rights that has reshaped the governance of large areas in other regions such as Latin America. This is without question a major reason why Africa trails so far behind Latin America and Asia in, for example, the area of forest land held securely by local communities (RRI, 2012).

Despite these fundamental differences and constraints, there have been some significant developments in Africa during the past 5-10 years that have created some important opportunities and precedents for using courts at various levels to pursue local communities' territorial rights.

At the scale of Africa-wide institutions, the most significant development is the landmark 'Endorois case'⁷ ruling issued by the African Commission on Human and Peoples' Rights (ACHPR) in February 2010. In this case, the Endorois community, a subgroup within the Kalenjin ethnic group of Kenya's Rift Valley region, were evicted in by the Kenyan government in the 1970s to make way for Lake Bogoria Game Reserve's establishment. Following many years of legal action to challenge their eviction and reclaim their land, the ACHPR found in favor of the community, declaring their expulsion illegal. Minority Rights Group International, which assisted the community in the long pursuit of justice, notes that the ruling "represents the first time that an African indigenous people's rights over traditionally owned land have been legally recognized...the Commission's decision has not only awarded a full remedy to the Endorois community but has also significantly contributed to a better understanding and greater acceptance of indigenous rights in Africa" (Claridge, 2010). Morel (2010) further notes that the case is a landmark not only in terms of communities' ancestral land rights, but also in the recognition of an African form of indigenous identity comparable to that which has emerged in other regions.

The Endorois case also highlights the role of the ACHPR in advancing human rights more generally and community land and resource rights, including that based on self-defined

⁶ See: <http://unsr.jamesanaya.org/cases-2010/32-united-republic-of-tanzania-alleged-forced-removal-of-pastoralists>

⁷ *The Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*

indigenous identity, at the regional scale. The ACHPR, which was established in 1987 as the Organization of African Unity's (now African Union) mechanism for promoting adherence to the 1981 African Charter on Human and Peoples' Rights, is the region's leading human rights monitoring and adjudicative body. The ACHPR is open to applications from a wide range of parties, whether or not they were directly affected by the alleged human rights violations, although its rulings are non-binding and implementation remains a challenge (as it may in the Endorois ruling). In 1998, in order to provide a stronger regional enforcement framework, the African Court on Human and Peoples' Rights was established, but as of 2008 it had not yet heard or ruled on any cases. The ACHPR also notably has a Working Group of Experts on the Situation of Indigenous People/Communities in Africa; Wachira (2008) argues that this body has been influential, particularly in providing an advisory opinion and legal justification for African states to endorse the UN Declaration on the Rights of Indigenous People.

At the level of national jurisprudence in Africa, the most notable set of judgments has been the litigation successfully pursued by the San hunter-gatherers against the Government of Botswana over access to the Central Kalahari Game Reserve (CKGR). This has been the most high-profile court case in Africa in recent years concerning the rights of local or indigenous communities vis-à-vis a state PA, and is particularly notable in that the court found in favor of the San plaintiffs. In 2006 the High Court of Botswana found that the government's eviction of the San from CKGR was illegal and unconstitutional. Subsequently, the government announced that it would abide by the court's decision but that it would not provide water to the communities should they choose to reside in the CKGR. Prevented from re-commissioning or drilling new boreholes in the absence of the necessary permits under the Water Act, representatives of the San community again brought suit and were victorious in 2011 in the Court of Appeal, which found that the community did possess rights to sink boreholes to obtain water in line with their lawful occupation of their customary land in the CKGR (Survival, 2011).

3. IMPLEMENTATION

There are two fundamental aspects to the legal barriers facing local communities across Africa in their attempts to manage and conserve their lands, marine environments and natural resources. The first barrier is the content of the law itself; as noted in previous sections of this report, the widespread arrogation by the post-colonial African state of ownership and control over the majority of lands and natural resources within their territories persists to this day and is a major source of insecurity, marginalization, and impoverishment for rural communities in many countries. Thus with respect to recognition of local communities' customary land rights, and their rights over natural resources such as wildlife, forests, and fisheries within those territories, the current state of the law is a major barrier which must be addressed.

Beyond this, however, is the nature of formal written law itself in the political and institutional context of contemporary African nation-states. For the law to have a strong bearing on the way rights are exercised and resources are governed, there must be mechanisms for the law to be enforced and accountability to be exercised. Simply put, the rule of law is at best partial and fragmentary across much of contemporary Africa, functioning in ways that are very different from developed nations or, increasingly, large parts of Latin America and Asia. This is a fundamental issue in the ability of communities to pursue and exercise their rights over land and natural resources, to implement the law, or to exercise their basic rights of citizenship.

There is a vast literature on African political economy that describes and analyses the governance patterns typical of the sub-continent's states. A central theme in this scholarship is the relative strength of informal institutions vis-à-vis formal institutions (Hyden, 2006). The prominence of informal institutions and relationships gives African states a distinctly 'personalized' pattern of governance; by contrast, most developed countries have more 'impersonal' systems of governance that depend on formal institutions and the rule of law, rather than personal relationships and decisions (North et al., 2009). Some scholars depict African states as almost entirely personalized, suggesting that formal institutions are or at least have been largely meaningless, with governance largely dependent on personal relations based on religious, ethnic, or economic relations between individuals (e.g. Chabal and Daloz, 1999). Where governance is largely personalized and informally conducted, the state may be effectively 'criminalized', i.e. dominated by activities that are nominally and formally illegal, even if informally such activities are central to governance (Bayart et al., 1999). Other scholars, perhaps better reflecting the complex interplay between informal personalized relations and formal state institutions as they exist across Africa's variety of states and societies, frame African governance in terms of 'hybrid institutions', where the formal and informal are constantly interacting and shaping each other (van de

Walle, 2001).

This political-economic context is essential to understanding the way the rule of law does, or does not, operate in contemporary African nations, and why laws, even where they provide strong rights to citizens, may not be implemented or are easily circumvented. In short, the influence of the law itself on determining citizens' abilities to secure and defend their rights in African states is generally less significant than in other parts of the world where institutions are much more formal/impersonal, and the rule of law consequently stronger.

Figure 3 illustrates that this disparity between Africa and other parts of the world is not simply a contrast between Africa and northern states, but increasingly between African states and regions such as Latin America, or nations such as India.

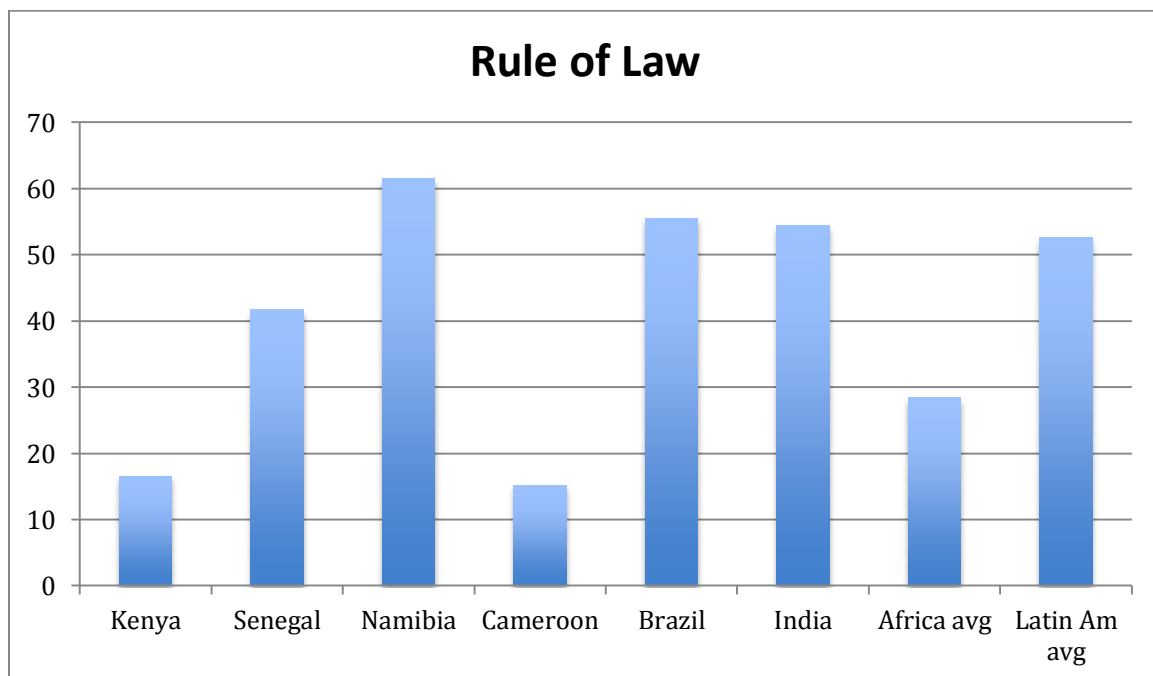


Figure 3: 'Rule of law' rankings for select African counties and Africa-wide average, with Brazil, India and Latin America-wide average for comparison. Rankings are given in percentile figures, with zero being the lowest and 100 the highest possible score. Source: World Bank, 2011.

An additional point that needs to be made, though, and which Figure 3 also highlights, is that there are some notable differences within Africa in terms of the strength of the rule of law and patterns of governance. Specifically, the southern African trio of South Africa, Botswana, and Namibia all have markedly superior records, as measured by mainstream governance metrics such as Transparency International's Corruption Perception Index and the World Bank's Governance Indicators, than the rest of sub-Saharan Africa (e.g.

see Namibia 'rule of law' ranking in Figure 3).⁸ It is notable that these southern African states have, to varying degrees, been leaders in land and natural resource governance reforms, as exemplified by Namibia's community-based natural resource management initiatives (see Nelson, 2010).

This wider institutional context shapes ICCAs across Africa in fundamental ways. For example, Tanzania (Box 3) has one of Africa's most well-developed systems of community-based forest management, which has led to extensive forest-based ICCAs being established at the village level. Despite this success, the sustainability of these ICCAs is imperiled because, a decade or more after many of them were created, most Village Land Forest Reserves (VLFRs) are not yet able to generate revenue from sustainably harvesting the valuable timber stocks they possess, despite the strong desire of many communities to capture greater economic benefits from their VLFRs and extensive local investments in protecting these areas. This has emerged as a central issue in participatory forest management in Tanzania in recent years (Blomley and Ramadhani, 2006). The underlying reasons for this shortcoming cannot be found in the governance legislation or forest policy in Tanzania; both are strongly supportive of devolved forest management and the Forest Act of 2002 clearly gives communities rights to harvest timber based on a management plan and right to retain 100% of the revenue. The core problem rather lies in the realm of informal processes and governance relations. Both district and national officials often benefit directly from the areas established as VLFRs and the timber therein, through either formal (issuance of harvesting licenses) or informal means (bribes, shares in timber companies, etc), and nearly all logging that is carried out is nominally illegal (Milledge et al., 2007). This creates incentives for higher-level government officials to work to create additional administrative and bureaucratic barriers to prevent communities from effectively implementing their VLFRs in ways defined by legislation. And in Tanzania, where the rule of law is weak, local communities have limited knowledge of their rights and few functional judicial means of pursuing them, administrative officials' self-interested interpretations of the law make the distinction between *de jure* and *de facto* reality of limited meaning.

A more extreme case is South Sudan, which, newly independent from Sudan as of July 2011, has adopted some of Africa's strongest protections of customary and communal land rights in both its founding constitution and in its land legislation⁹ (Alden Wily, 2011a). These include particularly strong protections of pastoralist communities' rights

⁸ Some island states which are nominally considered a part of Africa, notably Mauritius, also have superior governance indicators compared to the rest of sub-Saharan Africa, but in this case these states are, in a geopolitical and social-historical sense, not really a part of Africa as such.

⁹ Land Act of 2009. Although South Sudan only obtained full political independence in 2011, since the Comprehensive Peace Agreement that ended the civil war between North and South in 2005, the South has been effectively a self-governing polity with full authority over its internal affairs, and has passed many new laws since then in order to reform the extant 'northern' legal regime.

to grazing lands and water sources, which is perhaps understandable in that South Sudan's population is largely pastoralist or agro-pastoralist, pastoralist ethnic groups comprised much of the leadership of the liberation movement,¹⁰ and a major driver of the decades of civil strife was local and regional rights over lands and natural resources. Despite such progressive reforms, the reality in South Sudan is that the population has almost no knowledge of such formal statutes and little or no juridical infrastructure for enforcing them. No implementation of the Land Act's provisions defining community lands has taken place, while at the same time, the government has already handed out huge areas of land for private agricultural and other investments, with no clear mechanism for reconciliation with existing customary rights in those lands as defined constitutionally and legislatively (see Oakland Institute, 2011).

Even in Kenya, with a vastly more sophisticated and developed governance context than South Sudan, the ultimate impact of the reforms provided for in the 2010 constitution is widely viewed as uncertain. While the land reforms in the constitution, specifically the devolution of greater powers to local governments and the replacement of trust land with community land, are of enormous significance, there is broad concern that legislators and ministerial officials will subvert or dilute the critical reforms and, ultimately refuse to implement the new constitution that Kenyan civil society has worked so hard to achieve.

Such implementation challenges are the norm rather than the exception across the spectrum of African natural resource governance and point to the underlying depth of the challenge facing ICCAs and related community-based reform efforts. African communities are for the most part deprived, in a legal sense, of their customary land rights and rights to use and manage natural resources, and even where they are granted such rights constitutionally or legislatively, they are still often dispossessed through informal or administrative means.

In Senegal, a wide range of government and private actors often work to undermine or resist the tenets of the decentralization statutes. Ribot (2009) and Poteete and Ribot (2011) provide detailed descriptions of how officials, as in the case of Tanzanian community forestry, resist and subvert statutory provisions that should give local governments authority over forests and utilization for charcoal and other products. Some regional officials have refused to approve Rural Councils' resolutions creating CNRs, although in at least some cases local communities have overcome such resistance (Box 6).

Even in Namibia, where devolution to the conservancies is considerable and governance is relatively formal and corruption lower, there are anomalies in the rights granted to conservancies in law and in practice. While the legislation clearly provides for conservancies to use 'hunnable' game species for their own use, without government imposed quotas or permits, the Ministry insists that conservancies must have quotas

¹⁰ The Sudan People's Liberation Movement- SPLM.

and permits for monitoring and control purposes.

If African patterns of governance impede the implementation and enforcement of nations' own laws, they also provide an even greater barrier to the application of international law. As throughout much of the world, but perhaps in a more pronounced manner (RRI, 2012), the principles of the United Nations Declaration on the Rights of Indigenous People are not reflected in the current state of land law in Africa. Even where notable victories are obtained through international law, such as the Endorois case in Kenya, it is not clear how such decisions will be enforced.

4. COMMUNITY EXPERIENCES

Despite what is generally, at a regional scale, the most challenging legal and governance context for community management of land and natural resources, there are, as the three case study countries and some of the additional examples provided in this report demonstrate, a wide range of vibrant and often growing ICCAs across different parts of Africa.

Communities face a wide range of challenging external and internal circumstances in managing their ICCAs. Even in Namibia, with its advanced framework for communal conservancies and exceptional level of support from government, foreign donors, and a variety of national and international NGOs, communities encounter challenges. Externally, conservancies generally wish to have more rights over wildlife than currently provided by legislation, particularly more control over human wildlife conflict management. They also wish to have clearer and stronger rights over tourism on their land. However, as yet they are not well organised to carry out their own advocacy.

For example, communities in the north-west of Namibia successfully opposed plans by MET to establish a National Park on three tourism concessions on communal land. This resistance led to the start of a process of negotiation and compromise begun by the then Minister and Permanent Secretary. This process in turn led to considerable progress being made on the establishment of a contractual park to be known as the Kunene People's Park. However, a new Minister and Permanent Secretary refused to accept the recommendations of the technical committee for a contractual park. So far MET has not revived its attempt to establish a National Park on the three concession areas.

In addition to such external negotiations around land and resource use and PA status, Namibian communities, as with any communities working to collectively govern shared resources, must confront internal challenges related to transparency, accountability, and shared resource allocation. Box 5 provides a recap of the history and evolution of one of Namibia's leading conservancies, Torra, including some of the internal governance issues that the conservancy has worked to address at various points in time.

Box 5: The Evolution of Torra Conservancy, Namibia

Torra Conservancy was one of the first four Communal Conservancies registered by the by government in June 1998. It covers an area of 3,522 km² in the arid west of Kunene Region in northwestern Namibia. It has about 1,200 residents of which the vast majority are Riemvasmakers, the rest Damara, Owambo and Herero. The Riemvasmakers were forcibly removed from near Upington in South Africa in the 1970s under the South African *apartheid* system. The Damara people are from the area or were also forcibly resettled under *apartheid* in Namibia when the Damaraland homeland was created.

Prior to Independence in 1990 the Torra community was one of the first to appoint their own game guards who were drawn mostly from former poachers and local hunters. The game guards reported to the local headmen, looked out for signs of poaching and kept a count of all the wildlife or signs of wildlife they saw while they were out herding their livestock. The game guard system, increased patrols by government conservators, monitoring of species such as black rhino by NGOs and better rainfall, meant that by the early 1990s game numbers were beginning to recover. Wildlife in the conservancy includes elephant, black rhino, lion, leopard, cheetah, hyena, giraffe, Hartmann's mountain zebra, springbok, oryx, and kudu. Since its early beginnings most ungulates have considerably increased in number as have the populations of elephant, black rhino and lion. Torra obtains an annual trophy hunting quota from the Ministry of Environment and Tourism and is able to use certain species for own use (i.e. meat and sale of skins) without permits throughout the year.

In the mid-1990s a prominent southern African tourism company, Wilderness Safaris expressed interest in developing a lodge in the Torra area because of the increased wildlife and the spectacular scenery. The result was the formation of Namibia's first joint-venture agreement between a community and a private tourism company and the development of a lodge called Damaraland Camp. Under a new contract with Wilderness Safaris, Torra has gained equity in the Damaraland Camp. The community will gain a share in the profits from the operation in addition to a continued annual income based on turnover.

Torra has regularly been one of the highest earning Communal Conservancies in Namibia, with income of more than N\$2 million (approx. US\$260,000) annually. The conservancy uses this income to cover its own running costs, including staff salaries, various wildlife management activities (e.g. the annual game count) and to provide benefits to community members. In 2003 the conservancy used part of its income to provide each member with a cash payment of N\$630. Although this amount might seem modest, at the time it would have bought groceries for the average household for a period of three months, was almost equivalent to the annual average raised by a household by the sale of goats, and was equivalent to 14% of the annual average individual income in the region at the time (N\$4,500). Subsequently the conservancy has opted to invest in social projects such as support to the community hall at the main village; support to a local school in the form of office equipment and supplies and wood for cooking; support for various community celebrations; emergency transport and an emergency fund to assist members in times of drought or wildlife-related deaths.

Over the years Torra has faced a number of governance challenges. Initially there was good consultation between the management committee and the members. However the conservancy went through a period when the committee lost touch with its members and there was financial mismanagement. There were complaints from members about the lack of transparency in conservancy decision-making regarding spending of the conservancy income and allegations that 'local elites' were being created who appropriated vehicles and other conservancy benefits for their own use.

During 2011 and 2012 a new conservancy committee has tried to address these issues. The NGO IRDNC assisted the committee in improving its financial management procedures and the committee embarked on a survey and consultation with as many members as possible before holding the 2011 Annual General Meeting, with the aim of increasing transparency in decision-making (Davis, A. *pers. comm.* May 30, 2012).

Source: Jones 2012

In Senegal, communities such as the Kawawana marine ICCA (Box 4) and Dindefello CNR (Box 6) in the southeastern part of the country, near the Niokolo-Koba National Park, have only been able to establish their ICCAs following initial struggles and political organization that achieved the recognition of their rights.

Box 6: The Community Natural Reserve of Dindefello, Senegal

Dindefello is a CNR located in far southeastern Senegal, near the Niokolo-Koba National Park. The CNR is in the territory of the Rural Municipality of Dindefello, situated in the last foothills of the Fouta Jallon in Senegal, covering an area of 13,200 ha. The CNR contains the Dindefello waterfall, the only one of its kind in Senegal, as well as broadleaf forests galleries. A small population of West African chimpanzees (*Pan troglodytes verus*) is regularly observed by the researchers of the Jane Goodall Institute who conduct field studies on the species in the area.

The first attempt to create a conservation area in the Dindefello Territory goes back to 1984, at the time as an initiative of the Directorate of National Parks of Senegal. This attempt to establish a new national park was categorically rejected by local people due to the previous approach in the creation of the Niokolo-Koba National Park, which resulted in the eviction of local people and entrenched hostile relations between the personnel of the protected area and the local populations. The CNR was thus later created by a decision of the Rural Council of Dindefello, cancelling a previous deliberation on the creation of a hunting area to be leased out in the same space.

Rural Council played a key leadership and organizational role in establishing a forum and bringing together all stakeholders and partners, to try and convince the more sceptical local residents to recognise the usefulness of the creation of a CNR in their territory. Despite sustained efforts and rounds of explanatory visits, two villages who did not want to include their village lands in the CNR kept turning down the proposal by the Rural Council. This continued for over a year. The two villages agreed to join the initiative when they began to feel the benefits of the CNR because of the management plan and early tourism activities.

An obstacle to establishment of this ICCA was encountered when the decision by the Rural Council to create the CNR was initially not approved by the Sub-Prefect of the Bandafassi District. Fortunately, the law of Local Government has predicted this kind of scenario and the deliberation became directly enforceable after 15 days as the administrative authority did not offer any valid reasons for refusing approval.

The Dindefello CNR has received technical support from the USAID/ Wula Nafa programme for studies on its development and management plans. The government of Senegal has repaired the road to the village of Dindefello to allow a significant improvement of transport conditions for the revival of tourism activities of the CNR. The main attractions include visiting the Dindefello waterfall, observing chimpanzees, visiting to sacred sites in the reserve, and the organisation of cultural dances and ecotourism walks in the area.

Source: Ndiawar and Soulèye 2012

In Kenya, communities have employed a wide array of strategies in their struggles over natural resource rights. A key in Kenya to the development of ICCAs has been partnerships between local communities, NGOs, and private tourism investors; this has also been a feature of struggles over wildlife and tourism revenues, and land tenure, amongst pastoralist communities in northern Tanzania, in their confrontations with the state over wildlife policy (Nelson et al., 2009). Kenyan communities have engaged at the national policy level more than is typical in most African countries, assisted by organizations such as the Northern Rangelands Trust, East African Wildlife Society and African Conservation Centre. Working with these NGOs as well as private freehold ranchers and tourism operators, communities participated in the Kenya Wildlife Working Group, which became an influential group from about 2000-2005. At that time, it led a reform movement that very nearly brought about a total overhaul of Kenya's wildlife legislation by collaborating with Members of Parliament on a private reform bill (Kabiri, 2010). Although that effort ultimately was vetoed by the President, communities, including those from pastoralist areas, continue to be actively engaged in reform processes around wildlife, land, and the implementation of the new constitution. Kenya has one of the strongest civil society communities in eastern and southern Africa, and this has been critical to recent reforms such as the new constitution, as well as the evolution of ICCAs in pastoralist rangelands and along the coast, all of which have been largely led by local and national NGOs.

Box 7: Creating ICCAs in the Democratic Republic of Congo

The Democratic Republic of Congo (DRC) provides a number of infesting cases of ICCAs where local communities have, over the past decade, collaborated with outside conservation groups, local NGOs, and government agencies to establish some fairly large-scale ICCAs, or at least co-managed protected areas. Little published information on most of these areas exists or is at least highly fragmentary, and the governance

context of DRC is sufficiently opaque and in flux that it is difficult to clearly analyse the legal basis and institutional framework of these areas. Nevertheless, there is some documentation, and what is most notable of the described ICCAs in DRC in relation to wider African experiences is that a) these ICCAs are exceptionally large-scale and potentially high-impact from a conservation and land use perspective; b) some of these ICCAs have emerged in a context where the ability of the state to exert administrative and even military control over its territory is or has been contested or non-existent. Local communities and their traditional leadership has thus had considerable scope for advancing their own locally-generated conservation initiatives and being granted broad discretionary authority over management of the areas created.

The Tayna Community-managed Nature Reserve was initiated in 1998 through collaboration between local paramount chiefs of the Batangi and Bamate people in North Kivu Province in eastern DRC, with support from the Dian Fossey Gorilla Fund International and other external parties including Conservation International and USAID. Plans developed from 1998 to 2002 for the protection of wildlife-rich forests in the area under the authority of these chiefdoms, and seven other communities that banded together under the auspices of the Federation UGADEC (Union of Associations for Gorilla Conservation and Development in Eastern DRC), resulted in a proposed network of community-managed reserves spanning 12,000 km², linking the Maiko National Park and Kahuzi-Biega National Park.

In 2006, the ICCN (Congolese Institute for the Conservation of Nature- the DRC parks and wildlife authority) approved creation of the Tayna and Kisimba-Ikoba Nature Reserves, with core zones of 900 km² and 970 km² respectively. These areas are, legally, state PAs established under the DRC Forest Code, but upon their formal establishment the ICCA also entered into co-management agreements with their respective community associations that subcontracted management to these communities in perpetuity.

The model for community-managed nature reserves developed by communities and conservation groups in the eastern DRC has since been adapted to additional sites, including the Kokolopori Bonobo Reserve (4,875 km²) and Sankuru Nature Reserve, both of which have been established as projects of the Bonobo Conservation Initiative, working closely with a range of community-based organizations and local communities, to protect large-scale forested landscapes home to bonobo, okapi, and other rare species in the Congo Basin.

Sources: Mehlman, 2010

5. CONCLUSIONS AND RECOMMENDATIONS

Several important findings emerge from this review with respect to supporting the emergence and strengthening of ICCAs in Africa.

a. Land tenure reform is the fundamental issue

The fundamental challenge to strengthening local communities' abilities to conserve natural resources lies in the realm of land tenure. Although there have been widespread land tenure reform efforts since the early 1990s across much of Africa (Alden Wily and Mbaya, 2001), many of these reforms have not been implemented or deepened. The reality in Africa remains one whereby 90% of land is owned by the state and hundreds of millions of rural Africans remain insecure in their land rights, with no formal recognition of customary tenure. Communal properties such as forests and rangelands—many of which are or could be ICCAs—remain particularly vulnerable, usually considered unoccupied and unregistered and considered available for allocation by the state.

The surge in land acquisition globally, and particularly in sub-Saharan Africa because of the weakness of local land rights, is rapidly intensifying pressure on the traditional territories of pastoralists, forest-dependent communities, and other rural residents. Even in countries such as Namibia, with its exceptionally mainstreamed system of ICCAs, the lack of secure communal land tenure remains the greatest weakness of the country's institutional framework.

Recommendations: ICCA advocates need to engage seriously with land tenure and reform issues, including the current discourse and advocacy around land grabbing, commodity values, and agricultural investment. Land reform and tenure issues should receive much greater prominence in CBD processes as a critical issue to the future of natural resource management, as has been the case in debates thus far around the design of REDD. This issue will, more than any other single concern, determine the opportunities for ICCAs in Africa's communal lands to contribute effectively to conservation and rural livelihoods.

b. Protected areas legislation and international conservation processes in Africa still provide ambiguous support to ICCAs and often do not recognize the scale or impact of community conservation measures

The role of PA authorities and other conservation agencies in supporting and enabling the establishment of ICCAs is ambiguous at best. In some cases, government PA authorities, and related PA, wildlife or forestry statutes, have played a central role in supporting ICCAs, notably in Namibia where the Ministry of Environment and Tourism has been the key agency in the original adoption of reforms and overseeing the development of conservancies. Namibia is also one of the few countries in Africa that includes ICCAs in its PA network.

In general, though, PA policy in Africa tends towards conservatism, with considerable resistance to co-management or devolved governance of PAs, even in countries such as Namibia which are otherwise so progressive with regards to areas outside the PA network. In some instances, as in Kenya, robust networks of ICCAs have been developed, with clear and substantial contributions to national conservation objectives, but they have received little by way of additional statutory support from government. There are some possible exceptions to this, such as in the DRC where the limited reach of central government may have actually given local communities greater leeway to establish genuinely community-managed PAs, although these emerging experiences require further investigation.

The reality is that, even today, relations between local communities and PA management authorities in Africa are often characterized by conflict over land and resource use and control, and PA authorities have a very checkered record of supporting ICCAs. Other government agencies, such as those responsible for rural development, land tenure, and local government, may be more supportive in relation to the core concerns of ICCAs in relation to resource tenure and access.

Recommendations: Continued engagement with PA authorities and officials is needed to document the contributions of ICCAs to national and global conservation targets and objectives. Legislative and policy initiatives that formally recognize ICCAs, where the benefits to communities of such recognition is clear and is developed in a participatory manner, should be encouraged, although recognition should always be an option for communities and not a requirement. Encouraging governments to quantify the contributions of ICCAs to national conservation targets, in relation to the CBD and other obligations, should be given greater attention.

c. Supportive legal regimes are helpful but are insufficient to secure local land and resource rights; the wider governance context is critical

A key finding with regards to the legal context for ICCAs in Africa is that legal reforms are a necessary but insufficient condition for securing local rights and interests. The law itself is only one component of a complex matrix of both formal and informal institutions that determine governance outcomes in Africa's generally more personalized and patrimonial regimes. In some contexts, where governance is particularly weak, formal law may verge on meaningless in terms of how rights are actually exercised and meaningless. This is not invariably a negative for ICCAs, as it may given local communities and customary leadership, operating through traditional norms and personal networks, greater influence at least at the local scale. But it does highlight the way that natural resource governance outcomes are contingent on a wide range of factors that go well beyond the purview of formal law and policy, and this may be more profoundly characteristic of African governance dynamics than those in other parts of the world today.

Recommendations: ICCA advocates and support networks should continue to develop

an understanding of ICCAs, and conservation more generally, as embedded within wider governance and political processes, and to document the interrelationship between governance and conservation outcomes. ICCA advocates at national scale should be encouraged to form strategic partnerships and collaborations with wider civil society networks engaging on key processes of political and economic reform, as for example is common amongst indigenous organizations in Latin America and elsewhere.

d. Securing local land and resource rights requires not merely legal reforms but constitutional transformations of African states

The kinds of reforms required to create a more enabling institutional context for ICCAs in many African states will require higher-order transformation of power relations, governing structures, and citizens' rights; such transformation requires fundamental constitutional reform. It was Namibia's transformation starting in 1990 from an effective colony of apartheid South Africa to majority rule and self-governance that enabled reforms creating communal conservancies to be promoted successfully. Senegal's decentralization reforms of the 1990s can only be understood in the context of the democratic 'second-wave' transformations that took place across sub-Saharan Africa during that decade. More recently, Kenya's constitutional reform presents great opportunities for ICCAs and the wider deepening of local governance in the country, for example. It is highly unlikely that the critical land tenure reforms, replacing trust lands with 'community lands', could have been achieved in the absence of constitutional reforms, although the challenge of implementing the new constitution remains. South Sudan, which has also established strong protections of communal land rights at the constitutional level, is also an extreme example of the kind of profound transformation that may be necessary for citizens to begin claiming their rights- in this case, secession from a unified state that had long ignored customary land rights and local economic interests.

Recommendations: As with the previous item, ICCA advocates and networks should encourage wider thinking and understanding of the importance of constitutional reforms and reform movements to local communities' land and resource rights and wherever possible engage directly with such processes. For example, lessons from Latin America in earlier periods, or constitutional reform in Kenya more recently, provide important lessons for reform of natural resource governance regimes in ways that have proven critical to the emergence of ICCAs. Greater understanding of the opportunities provided by constitutional reform processes, and the types of reforms that are most critical to ICCAs, should be encouraged through knowledge generation and transmission.

e. African regional institutions are gradually presenting more opportunity for engagement on natural resource governance and land rights issues critical to ICCAs.

African regional institutions are gradually becoming more active and more receptive in ways that create greater opportunities to pursue justice and secure land and resource rights at that scale. The Endorois ruling by the ACHPR is a landmark in community land law and the development of legally accepted African definitions of Indigenous People, and may facilitate the pursuit of justice by other local communities with similar grievances and land claims. In the future, the African Court on Human and Peoples' Rights, which has not yet become meaningfully operational, may also evolve into a more significant judicial institution. The African Peer Review Mechanism under NEPAD is another significant regional initiative which is at least encouraging more open dialogue around critical governance issues.

Recommendations: ICCA advocates should strengthen links with organizations with experience in litigation and other policy and judicial processes linked to the ACHPR and other African Union institutions. These include NGOs such as the International Work Group on Indigenous Affairs (IWGIA) and Minority Rights Group International, among others. Such collaborations can help to link local communities struggling for recognition of rights over their land and natural resources to explore opportunities for regional/international redress. ICCA advocates can also work to raise awareness of the Endorois case's implications and follow up actions and outcomes; at present the legal significance of this case is not widely understood amongst community conservation and natural resource networks.

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