UNDP-International Land Coalition Workshop: *Land Rights for African Development: From Knowledge to Action*
Nairobi, October 31 – November 3, 2005 (Proceedings: http://www.undp.org/drylands/lt-workshop-11-05.htm)

The Commons and Customary Law in Modern Times: Rethinking the Orthodoxies

Liz Alden Wily
Independent Consultant Land Tenure Adviser
lizaldenwily@clara.co.uk

INTRODUCTION

Let me first lay out my position from the outset -

1. Conceptual confusion still blights ideas of the commons. It is necessary to draw a distinction between territories over which communities customarily exercise domain (*Communal Domain*) and tangible real estate, those properties within those domains which are the private group-owned property of all members of a community of persons, and which are held (for good reasons) in undivided shares. These are *Common Properties*.

2. It is my view that individually-held properties have been and still are - despite the last decade of reforms - the wrong target for rural tenure registration and collateralization in agrarian conditions.

3. Priority focus should be upon the rural commons. It is these estates, *not* the family farm or house, which always have been, and remain today *at most risk* from involuntary loss. It is these community-owned properties to which governments throughout the continent have so consistently helped themselves and/or reallocate to others and which still bear the status in over half of African States as de facto un-owned or public land. These losses continue right up until the present.[1] Moreover these losses directly affect the poor. For even the poorest members of rural communities, those without land or too little land to live on (the *'land poor'*) share the customary ownership of these estates with other, richer members of the community. This may be their only real property. Securing common rights is critical.

4. Commons also possess significant untapped income-generating potential. This extends far beyond the recognised substantial product use of the commons. Given that even the poorest members of rural society are shareholders in the commons, these income and investment potentials can directly include and benefit the poor.

5. Collateralization and rights recordation need to be de-linked. Longstanding justification of titling as for the main purpose of mortgaging (and the conversion of customary interests in European individual-centric forms) has

[1] With for example, around a million hectares in one State in Sudan slated for upcoming conversion into commercial farms under Government issued leasehold to non-customary owners (see Alden Wily forthcoming (b). Even considering forest/woodland alone, losses in SSA run at 5 million ha annually, at least half of which may be considered common properties (as compared to Government-owned or private forests) (FAO 2005). Most of this attrition is due to urban expansion and clearance for non-local commercial agriculture enterprise.

over-focused the procedure upon classically-centred individual enterprise and muddied clarity as to what remains the outstanding reason for recording and entrenching customary rights – simply to secure that tenure.

6. Collateralization in the agrarian context may in any event be a red herring. It is yet to be demonstrated that it may occur at mass scale in Africa, although we are informed that there is potential for this in Thailand, Vietnam, Paraguay, China and Honduras. The reasons are several and will doubtless be covered in this meeting.[2] My points here are that –

   - *first* assuming it remains a viable option, collateralization would work in a simpler and much less risky way in respect of rural commons; owning communities could mortgage one part of their often substantial common property to raise loans for income-generating activities and without loss of family livelihood on foreclosure;

   - *second* the risks of excluding the poor from opportunity and benefit would still exist but more easily obviated;[3]

   - *third* the income-generating potential of rural commons *without collateralization* is enormous and need first to be exploited – this prominently includes the lucrative rental capacity of these estates to investors and others who have the means to use these potential; the benefits of which currently accrue to Governments in the absence of clarified and entrenched ownership of these lands by communities;

   - but *fourth* and most important, any attention to such collateralization or even income-generation without mortgaging is academic and time-wasting without first entrenching the rightful ownership of the commons and to which owners current and future benefits should accrue.

7. Whilst the focus of this presentation is upon the commons, it should be recorded that a second and rising pool of insecurity lies at the urban-rural interface, in those farmlands which are converted into building plots, generally on terms entirely unfavourable to customary owners. Remedy for both this and involuntary loss of the commons can only lie in clarification and legal entrenchment of customary rights.

8. Whether we like it or not, this means registration. We cannot escape the reality that each and every common property estate must be defined, its customary owners known and institutional representation established in order for the owners to hold onto that property and reap future benefits from it. If this is not undertaken we are merely sustaining the past and present in which some

[2] And among which include the irrelevance of mortgaging in circumstances where real rise in peasant farming productivity is limited in the absence of better markets and technological advances; the availability of less risky sources of small credit and the reluctance of banks to lend in circumstances where foreclosure will render the family homeless and landless. Refer Migot-Adholla & Bruce (eds) 1984; Platteau 2000, The World Bank 2003, Alden Wily forthcoming (a).

[3] There is no reason for example why a community could not raise of a loan on *one part* of its woodlands to develop a maize grinding mill or borehole for the community, the loan repaid through user fees, proportionately paid mainly by wealthier families as larger users.

millions of hectares of invaluable property on this continent are annually lost to the majority rural poor. Just how that formalization takes place is the question that should preoccupy us – and I hope I can give you a practical example of a simple way forward.

9. The answer lies, I believe, in reordering our priorities, in first defining customary domains if this has not already been done, and wherein customary law thereafter definitively and legally applies, thus providing better but not foolproof blanket protection to the diverse range of individual and shared rights that exist within that domain. Integral to this process must be the establishment of the institutional basis for the regulation of customary rights within those domains, ideally in the form of elected or at least partially elected community land councils charged by the community with the oversight and regulation of customary rights within those domains. This will also allow root title to be vested in these bodies as trustees on behalf of the owning community membership. With these critical foundations in place, attention should then turn to the common properties within those domains and which remain at most risk of loss to their shareholders. Only then, and possibly not necessarily ever, need the less vulnerable individually-held estates – farms and houses – be registered. It goes without saying that these procedures should occur by and at the local level, backed up however by supportive statute.

10. We need to be clear as the relationship of statutory and customary law and remind ourselves that the land security of the majority customary land owning body depends upon statutory support – i.e. parliamentary enacted laws. That is, we need to avoid referring to statutory land tenure as inseparable from the European-derived tenure systems that have indeed, historically, been the main subject of colonial and post-colonial enactments until the recent past. The outstanding requirement now is to give statutory (i.e. parliamentary approved) status to customary tenure. As to what is required it is obviously less to entrench customary rules or laws themselves, than the transparent and accountable mechanisms through which community derived rights are identified, secured, sustained, regulated and managed. Statutory provision is needed for example to establish county/district level Registers of Customary Domains, to recognise customary land interests as private property rights and to recognise community-derived/elected land administration bodies as the legal local land authorities. How and when this support is provided is a critical development process issue which should concern us.

11. Finally, we need to unpack the confusions surrounding the nature of customary tenure and law, and which I will address below in more detail. In summary, customary rules of tenure can, do - and must – change to meet the demands of changing circumstances. The way in which rules are made, and by whom, can, do - and must – change to meet the demands of changing circumstances. What cannot change is this: that customary land tenure is no more and no less than shorthand for ‘community based land tenure and management’ – that it is a system devised and sustained at and by the community level. It is this foundation that we have to work with, and which is so attuned to modern demands for devolved and democratic land governance.

I Thinking Clearly About the Commons

1. THE COMMONS IN AFRICA TODAY – WHAT ARE THEY?

Around one quarter of the total land area of Africa is probably common property or around 700 to 1,000 million hectares. How do we arrive at this massive figure? By taking one half of the total existing woodland, forest, pasture and swampland of Africa, roughly the other half having already been drawn under Government control as Forest and Wildlife Reserves or as other Government Lands of one ilk or another.

Forests and woodlands currently represent nearly 22 percent of the total land area of Africa, or around 650 million ha (FAO 2005). This may be doubled to include unknown hectarage of pastures, swamplands and wildlife range, to 1.2 billion hectares or 40 percent of the total land area (this excludes common pool water and off-shore fishery resources). What proportion of these resources are **commons**? That is, properties which fall in a legal or de facto sense under the jurisdiction of communities, not forestry, wildlife, or livestock departments or private individuals or companies? Taking the forestry sector alone, we do know that only 43 percent of the forests and woodlands of the three East African States of Kenya, Uganda and Tanzania have so far been drawn under Government or private ownership and protection (such as it is) (Alden Wily & Mbaya 2001). This suggests that well over half of all forests (57 percent) and woodlands are under some form of local, community tenure. If we roughly extrapolate this proportion to the total non-farmed rural estate of Africa we come to a rough figure of nearly 700 million hectares (678,074,516 ha, or around 23.5% of the total land area of Africa). This is likely inaccurate – in reality it could be only 500 million hectares or could be 1,000 million hectares.

2. WHAT IS THE VALUE OF THE COMMONS AND WHY ARE THEY SO VALUABLE TO THE POOR?

The Poor

(i) First, the poor: despite continuing urbanisation, 75 percent of people in Sub-Saharan Africa live in rural areas (Population Reference Bureau 2005). The vast majority of Africans (75%) are classified as poor, living below $2 a day (ibid). Today the rural poor number around 564 million. They will number 1.3 billion in 2050 (ibid).

(ii) ALL rural households depend to a significant extent upon the commons; for wood and non-wood products, pasture, wildlife and fish and so on. We have a plethora of documentation that demonstrates this coming particularly from the active forestry sector (Emerton 1999, Mogaka et al. 2001). We know for example that in Zambia 35% of total household income derives from commons – and that excludes pasture (Mogaka et al. op cit.).

(iii) We also know that the poorer the household, the greater the proportion of dependency upon the commons; in the same Zambia case study this rose to 75% of total livelihood (ibid). We also know that women and

unemployed show higher than average dependence upon common property resources (ibid).

(iv) No matter how poor a household it has an equal share of rights in the commons. They are co-owners of this shared property held in undivided shares. This is particularly important for farm-less households who fortunately do not yet number the proportions found in Asia (mean of 40% of all rural households in Asia are entirely landless) (Lastarria-Cornhiel & Melmed-Sanjak 1999). In Africa this shared ownership right is critical for the multitude of *landed poor*, those with farms that are too small to survive upon (Bruce 2004. For such people – and they are many – their ownership right in the commons is possibly their only significant asset.

The Value

What is the value of the commons? Enormous.

(i) We know that this exists not just as ***product use values*** as touched upon above –

(ii) or even in the ***inherent environmental values,*** where calculated replacement values of especially wooded commons now run in the billions, not millions (Emerton op cit.). And should the next Kyoto period agree (as is being suggested) to pay carbon credits for the sustained existence value of forest cover, not just reafforestation of denuded areas, then the benefits from this logically accrues as much to the owners as to their governments (Santilli et al. 2005).

(iii) But more immediately we can see the high value in the commons in their ***real estate value.*** (It must be because governments keep taking them). The conversion value of commons into farms, commercial enterprise and housing land is obviously extremely high, as chiefs are finding to their advantage in Ghana (Alden Wily & Hammond 2001). Even at the modest rate of $100 per acre, communities have a resource on their hands worth at least 70 billion dollars – not much of course in the bigger budget picture but of immense value to the majority poor.

(iv) Even without sale, the ***rental value*** of these properties is enormous. We can see this in the likely extraordinary amounts Governments are earning to lease out such lands as mineral concessions, logging concessions or as commercial farms. Cases in Zambia, Botswana, Cameroon and Sudan come quickly to mind, although there are many others. It is for example the Sudanese Government which has for some time now been reaping the returns of leasing out some five million hectares of common properties in one State alone to commercial farmers, some of them Middle Eastern Companies (Alden Wily forthcoming (b)).

(v) Product ***Licensing values*** can also be lucrative as again the case Gum Arabic and Doum Palm Leaf collection in both Sudan and Eritrea testify (Mogaka et al. op cit).

In short, our problem is not whether the commons have value or not, but to whom the values accrue. For as long as commons remain in a tenure limbo land, are

de jure or de facto public lands or Government Lands, the majority rural poor are deprived of those benefits, their rightful heritage and this critical capital base and stepping stone out of poverty. And this, I need to remind you, is even before we get into issues of mortgaging those properties.

What is needed to make this happen?

a. (Secure customary tenure obviously, but also -
b. Knowing exactly which tract of land belongs to which community or group, for without this, who is to say to whom benefits should accrue? This suggests boundaries are important.
c. There is also clear need for a *functioning institutional entity* through which the common property owners, the community may control, regulate, receive, deliver and use and distribute benefits.

Before we turn to how this can happen, let us look more closely at the question of ownership.

3. WHO REALLY DO THE COMMONS BELONG TO?

The Statutory Reality

First, **legally and customarily the answer is different**. Even despite the reformism of the last decade, most of Africa's 56 mainland and island states still do NOT acknowledge the commons as the private, group-owned property of rural communities or groups (Alden Wily 2003). In law and practice they hold this land to be –

(i) Either un-owned land, generally named public land or in some states like Eritrea and Sudan, definitively deemed to be Government Land;
(ii) Or the commons remain in legal limbo-land, being neither recognised as private property because they are unregistered and only tangentially held to be customary property, being held by government or local governments as trustees with powers that clearly exceed those required to implement trust (the case of Kenya comes to mind);
(iii) Or they acknowledge customary rights as private rights but do not extend this acknowledgement beyond those rights which are held individually such as affecting farms and house plots; the commons remain in an uneasy limbo-land, accepted as under some form of community jurisdiction but not amounting to private group-owned property or registrable as such (Botswana, Namibia and Zambia are examples);
(iv) Or, in a fewer number of cases, the commons are recognised as potential private customary properties but in the absence of representative institutions of these owners (either village, tribe or group) new institutions such as common property associations must be laboriously formed and at significant cost in order for the ownership of the estate and its area to be formally recognised (South Africa and Uganda are examples);
(v) And finally, and more rarely, there are cases of current best practice where a genuine effort in law and policy is made to acknowledge commons as the private property of a community but with perhaps still

> insufficient elaboration to enable easy distinction to be drawn between sphere of communal jurisdiction and real estate – a distinction I will come to shortly. A prime example of this best practice is Tanzania.

It is not difficult to find the origins of this inattention to the commons. Anglophone, Lusophone and Francophone colonisers were equally guilty in their failure to understand customary land tenure and which has been equally convenient to post-colonial governments to sustain (Alden Wily & Mbaya 2001).

In general there was a refusal to acknowledge any customary land rights as amounting to European understanding of private property rights, and with a requirement that these could only attain this status through conversion into those European tenure norms. At most Africans held user rights. It logically followed that lands like pastures and woodlands which were seasonally or erratically used were un-owned land. Linked to this was inability to recognise that by custom properties are own-able not just by individuals and families but by whole tribes or villages or interest groups within them. The common result was that permissive occupancy and use of land for farms and residence were widely accepted but the remainder variously fell to the new central State.

The Customary Reality

Second, it is true that customary land tenure is complex – and significantly more nuanced than First World norms. There is a particular need to clarify longstanding confusion between **communal *jurisdiction*** and **communal property resources**.

For this it is helpful to conceptualise **Customary Domains** and **Common Properties** as distinct paradigms. Both are critical to tenure security.

Customary Domains are territories over which the community possesses jurisdiction and often root title. This provides the natural arena for customary jurisdiction for it is within this space that customary rules and arrangements apply. It is from this domain that traditional and modern customary land authority is logically drawn.

Within the domain, a range of tenure arrangements typically apply. These include estates owned by individuals or families, and estates owned by special interest groups in the community (e.g. ritual societies, women's groups). There may also be properties customarily acknowledged as belonging only to the members of a particular hamlet or village within the greater domain. There may also be properties which are owned by all members of that community in undivided shares, often the larger or remoter pastures, forests, woodlands, swampland and hilltops. All these are **Common Properties**, defined by virtue of membership to the group, and a group whose composition may change over time.

Sometimes, there can be an area, often a pasture, which is owned jointly by several communities. Or there may be a water point or river in one Customary Domain that customarily belongs to three neighbouring communities.

There may also be secondary rights – rights that do not amount to private property rights. For example, one community may be acknowledged customarily as the owner

of a forest or pasture but to which members of two neighbouring communities have regular access. Member of five neighbouring communities may share rights to access and cut thatching and basket grass in the one community domain where the species grow. Mobile pastoralists from quite remote areas may have seasonal access to those commons; they do not own them but have strong customary rights to visit and use those areas.

Once we understand the distinction between Customary Domain and Common Property the essential tasks become clearer. Both need definition on the ground, but most urgently the former, in order to establish zones where customary tenure definitively applies and within which customary authority is accordingly acknowledged legally as *the* regulatory authority. This alone can provide a significant degree of protection to customary rights, and necessarily, to those most at threat of loss, to common properties. In due course, common properties also need delineation, to enable them to withstand the constant attrition at the hand of local elites or external forces like local and central governments and investors, and much aided by unclarity as to boundaries and owners.

Before we examine practical ways for achieving this, we need to look briefly at the matter of 'customary law'.

4. WHAT IS CUSTOMARY LAW IN THE 21ST CENTURY?

The nature of customary law as largely unwritten rules and regulations is known to all of us. Some of these are remarkably stable: we see this most clearly in the rules of ownership such as determining which domain is owned by which community. We also see this stability in customary acknowledgement of access rights of non-owners to certain parts of the domain.

Stability does not mean lack of conflict. Often the inherent vagueness of some rules and slippage over time means that contestation can arise very sharply. This is invariably seen when two villages or two tribal communities attempt to delineate the boundary between them; each will expectedly fight to the last inch to secure as much as they can for themselves, and history tends to manipulated in the process. Working through boundary demarcation however towards mutually agreed results and being able to record the results is, to my mind, perhaps the only essential element of customary law which requires codification – a codification which nonetheless must be done on the ground and with the parties involved.

More generally, codification of customary law can be a dangerous exercise, particularly if it uses the past or tradition as its reference point. It is common knowledge that custom changes over time, but let us examine what happens when traditional is entrenched as immobile law. In many aspects, what was customary 100 or even 50 years ago is not, or should not be the norm today, for those paradigms are simply insufficient to meet the demands of the present. Should, for example, the quite common customary sanction against women owning land be upheld today? Should the right of every member of the community to help himself or herself to any virgin land on demand be entrenched in these times of land shortage and the need to protect the community's forests for other purposes? Is the permission of the local headman or chief in the area sufficient guarantee of good practice? Are traditional leaders able to

safely make land decisions on their own? And are the traditional routes for accountability sufficient in an untrustworthy world and where characteristic dominance of elites in society need clear circumscription? Should outsiders expect to be relatively freely granted land on request? Should new criteria and conditions of allocation apply?

Community Based Land Tenure Administration

Why then, it may be asked, if the traditional rules are often so weak and out-dated, should customary tenure be upheld at all? The reason is this: that there is a key foundation to customary tenure law that never changes and which holds, if anything, more validity and urgency today than in the past. **This is simply that community based jurisdiction lies at the heart of customary land tenure**.

The actual rules may change or need to change over time. The way in which decisions are made may change including the actors involved, widening from chiefs to more inclusive and democratically elected bodies. The fact that the decisions are made locally, at and by the community, rather than remote governments or agencies, does not alter (although as we have seen repeatedly, that it does weaken and wither with every undermining challenge of authority by the centre). The community based foundation of customary land administration also applies to dispute resolution.

In sum, the heartland of customary land law is simply that it is community-based law, devised and upheld by the community – and accountable less to the central State than to the clients – the members of the community, rich or poor, male or female. Prime among decisions that are upheld are those that define which property in the domain belongs to which person, family, group or indeed the whole community. That is, customary land rights are inseparable from customary land jurisdiction, and for one to work, the other must also work.

Thus, it is less *the rules* that need entrenchment in statute than entrenchment that customary jurisdiction legally applies and as first-line law in x areas and through x described mechanisms. It goes without saying that the law (statutory) has a duty to ensure that the performance of customary tenure and its regulation and administration accords with the modern demands of human rights, fairness, transparency and accountability.

II Which Way Forward?

Getting There

First, significant progress has been made over the last decade or so, both in the international legal sphere in terms of treatment of customary land interests and in Africa itself. As Professor Patrick McAuslan may have time to outline, the law courts of Canada, Australia and New Zealand among others have been busy revisiting the nature of customary land rights quite broadly and with particular good effect upon customary domain and the commons. Some African states have been quite busy also. We have important legal rulings from Tanzania and South Africa.

Meanwhile, we have seen a gathering wave of reform in the tenure sector, now involving around half of Africa's nations. I and others have written extensively on the changes that have been occurring to both the status of customary land rights in general and as applied to the commons and to not unrelated decentralization of rural land administration.[4] I have also written (quite stridently) on the failures of policy formulation and lack of practical implementation, due, I have argued, less to much proclaimed lack of political will than to unsound development approach, simply failing to begin at the right end and scale needed to safely arrive at and entrench new norms (Alden Wily 2002). Still, certain notable exceptions continue to command attention: the new legal paradigms of both Uganda and Tanzania; the practical implementation efforts of Mozambique, at least to attempt to delineate communal domains, if not entirely protect them from external incursion and without the essential corollary creation of community based land administrations and initiatives in Niger and some other West African States. Broadly however, it is mainly the forestry sector as I have frequently observed that is making the most running in bringing forest commons closer to legal entrenchment as community owned properties, mainly through the construct of Community Forest Reserves.

These developments aside, far too much is still to be done. I have observed above that we have the makings of strong ways forward but with still too inchoate or bureaucratic formulations. Thinking about the constitution of communal rights has been destructively muddled. The marriage of registration and collateralization has also been unhelpful, now necessarily divorced, to focus more practically on the primary task of securing majority rights, important in its own right, irrespective of whether or not it leads to mortgaging. I have also argued that we need to re-focus our efforts away from the family farm to the customary properties at most risk – the commons.

A Practical Approach

There is an implementation model for this which I have developed (and shared with FAO among others) and which is in fact underway in two pilot areas in central Sudan, backed up by a detail manual of procedures to achieve objectives. Unfortunately having not secured the requisite permission from the supporting donor to speak on this real case, I must confine my comments to a general outline of the approach. I believe I can go so far as to say that the initiative is proving successful and highly

[4] For example among many other books -Toulmin & Quan (eds) 2000, Alden Wily 2003, The World Bank 2003b.

attuned to demand and workability, and despite operating in possibly the least conducive political circumstances on the continent at this time.[5]

In the broadest of outlines, this is the simple model (and which indisputably borrows mostly from the Tanzania case) [6] -

STAGE 1: COMMITTING TO THE APPROACH

First, a technical facilitator invites representatives of local communities in a region or district to a meeting to propose the approach and determine their interest in following this through. Assuming this is achieved, the same representatives determine the basis upon which they will identify their customary domains: will this be by village or by tribe? [7]

STAGE 2: DELIMITING THE COMMUNITY DOMAIN

Each community is then assisted to form a representative Boundary Committee charged with responsibility of working with neighbouring Boundary Committees to identify and agree exactly where boundaries between their respective domains lie.[8] This must be accomplished on site and therefore can involve between three and 20 days walking by the Committees to cover the entire perimeter. No matter how insistent that communities are that they 'know their boundaries', this process is always contested in practice and sometimes takes external facilitation and mediation (arrangements for which are made at the outset by the Facilitator and assisting field Team). Generally the larger the area (e.g. tribal area rather than village area), the longer the history of undermined customary authority by Government and Statute including affecting administrative boundaries, and the greater the extent of unregulated new settlement, the stronger and more numerous the conflicts.[9] With expert facilitation, compromises are arrived at. Despite contention or because of it, the act of clarifying and agreeing boundaries is a deeply empowering experience for communities, clarifying and entrenching general and specific notions of customary land rights.

Either during the boundary agreeing process or subsequent to it, dependent upon manpower, the Facilitation Team drafts a detailed description of the boundary with Boundary Committee representatives and approved and signed by both. GPS readings of the boundary with key Way Points named and described are also taken at the same time. The areas are subsequently mapped.

---

[5] See Alden Wily forthcoming (b) for details.

[6] Both in respect of the policy and legal developments provided for in the Village Land Act, 1999 and from more specifically my own practical work mobilising the establishment of community owned and managed forest reserves between 1994 and 2002, directly relevant to redefinition of overriding village-based customary domains.

[7] The village has obvious advantages of more easily by-stepping charges of tribalism and more practically, of offering a scale of land area over which a community can effectively regulate entry and manage land disposition. There are occasions however where a tribal framework is inescapable, such as where significant commons continue to be owned at tribal level, not by individual village communities within the tribal area. Terrain, rather than social norms, will often dictate this. Where the terrain is more consistent, it is more often the case that each village (usually arising out of clan identity) controls today its own discrete area, containing inter alia, its own common properties.

[8] These may be variously named Community Land Area, Customary Domain or Community Domain.

[9] Experience with assisting communities to define discrete Community Forests (e.g. in Tanzania where this is most advanced) suggests that one in five communities will enter into a significant dispute as to boundaries. A similar ratio is being experienced in the Sudan pilot.

A final step is for each Boundary Committee to report fully back to the entire community to secure their approval (and understanding of) the agreed boundary. Designated community leaders from each neighbouring community must also be present at this minuted meeting.

STAGE 3: SECURING SUPPORT FROM SEASONAL RIGHT HOLDERS

Where the proposed Customary Domain is routinely accessed by outsiders who hold acknowledged customary access rights to products or areas within the domain, they too need to consulted and their support secured. Normally this is the opportunity for the community to lay out draft agreements as to how those rights will be respected and their exercise managed. This stage is especially important in pastoral zones or where pastoralists seasonally access pastures which lie within domains otherwise owned by settled communities. Compromises generally arise in such circumstances. It may be the case for example, that part of a proposed domain is separated off from and brought under shared dominion by two or more communities.

STAGE 4: ESTABLISHING MODERN CUSTOMARY LAND MANAGEMENT

This stage sees each community assisted to form a Community Land Council. This will serve as both trustee owner on behalf of the community membership and as formal Land Administrator, formally responsible for land use planning and regulation of access and use of land within the Customary Domain.

The composition of the Council will depend upon popular demand but will minimally include elected representatives alongside certain ex officio members such as several traditional chiefs and elders as appropriate. The Secretary of the Council must be literate. Annual training of Councils is generally essential.

STAGE 5: SECURING POLICY AND LEGAL SUPPORT

This of course begins long ahead of Stage 1 but is ideally refined during the above stages and not finalised until at least several pilot developments have demonstrated what statutory support is essential and workable. Depending upon the circumstances, key new legislation will lay out the parameters as to how customary land authorities will operate and be accountable to the land owners on whose behalf they act, and provide for both regional or district based registration of Community Domains and for each Community Land Council to establish registers of especially Common Properties within their respective domains and in due course, if needed, individually held properties, or certification thereof on demand.

Where restitution of parts or whole of the Community Domain is demanded and viable, then other legislation has to be put in place to provide the procedures through which this can occur. Normally this is only possible where political commitment to effect restitution has been made. More often than not the instrument is a specially establishment Commission.

STAGE 6: FINAL REGISTRATION OF COMMUNITY DOMAINS

Final registration of Community Domains cannot take place until the above-mentioned local land institution for the holding and administration of customary rights in a specific domain is established.

STAGE 7: SIMPLE LAND USE PLANNING & REGULATION

An early task of the Council is to carry out simple land use planning to zone the greater domain, for example into Current Farming Zone, Reserved Land for Future Farming; Potential Investment Zone (e.g. for allocation of customary leases to investors on specified conditions and term); Public Service Area(s); Community Pastures or Grasslands for community member access (and as appropriate with outsider access provided for); and Protected Areas (e.g. to enable Community Forest Reserves to be established).

It is also the responsibility of the Council to devise and put into effect Customary Land Regulations for each zone as necessary and appropriate.

STAGE 8: RESTORING WRONGLY APPROPRIATED PROPERTIES

This applies in cases (such as central Sudan) where sometimes over half the areas of Customary Domains are subject to overlapping rights, in that instance held by Government, or its lessees and licensees, overriding and for all intents and practical purposes, dispossessing the customary owners of those lands. It is at this stage that one of the key purposes of customary land delimitation comes into play: it is essential for communities to be fully clear among themselves as to into which respective domain does the appropriated land fall and therefore to which community it should be restored. A function of facilitation is to assist each Council to clearly identify the affected areas of their domains and to make relevant claims for restitution, compensation, or the transfer of rental income from lessees from State to community to the Land Commission.

STAGE 9: FORMALIZING COMMON PROPERTIES

This adds a further nail in the coffin of the past facility with which governments or agent investors have been able to help themselves to important customary estates. Where successful, the formalization of Community Domains and the related establishment of the Land Council as the Land Authority over that Domain, will go a long way to protecting the common properties within the Domain. This is rarely sufficient in conditions of acute land shortage and demand for land for commercial farming or other investment developments. Nor is it even sufficient in benign political circumstances such as in Uganda and Tanzania where Governments nonetheless make bountiful use of their powers of eminent domain and/or limit local powers of customary landholders to deal directly themselves with investors. It may be predicted that payment of compensation for common properties that are not visibly under intensive use will be at low rates. Registration of these estates as indisputably the private group owned property of either community or sub-group within the community can further protect those lands from wilful expropriation or claim, or indeed from corrupt behaviour on the part of community authorities. A highly useful holding technique is to declare a relevant common property as a Community Forest

Reserve, thereby bringing the area under the double protection offered by conservation status – and double the potential compensation value should Government or other party persist in co-opting this.

Obviously such registration also opens up opportunities for formal income generating opportunities and even collateralization as described earlier.

STAGE 10: ESTABLISHING COMMUNITY-BASED LAND DISPUTE RESOLUTION MACHINERY

A final stage in this first phase of customary land securitization is to put in place reworked and modernised regimes for resolving intra-community and inter-community disputes. For reasons of relevance, cost and speed, it is increasingly common for these to be community based with appeal to higher level formal courts.

In summary, positive potentials from this approach are that it –

(i) Refocuses attention away from the homestead to those customary properties which are most at risk from loss by fair means of foul, the commons;

(ii) Provides a tangible process for the clarification of customary rights at levels that do not involve costly registration of every property within an area;

(iii) Clarifies much muddled founding distinctions between spheres of communal jurisdiction and tangible real estate as properties owned in common by groups within the community or even including persons or groups that do not reside within the community;

(iv) Makes the demarcation of discrete Customary Domains the cornerstone, as the socio-spatial construct through which customary land rights and their administration may be practically protected, ordered and administered;

(v) Interlinks the twin developments of securing customary rights and providing the essential local institutional basis for their modern administration;

(vi) Begins at the local level, thus inducing the critical mass of popular ownership and demand (not least through quite extraordinary investment of community time) required to mobilise political will and launch and sustain implementation where appropriate legal paradigms have already been put in place;

(vii) Enables highly conflicting land interests to be unpacked by the parties themselves through the process of delimitation and agreement and accordingly holds out more chance of resulting compromises and agreements being adhered to;

(viii) Provides a clear route through which important distinctions between customary ownership and access rights may be unpacked, and which have often been deliberately blurred in Government policies of the past and manipulation of boundaries and norms; and

(ix) Provides an important opportunity for customary land rights and customary land administration to be acknowledged and managed in modern ways – and restoring and developing the lynchpin of customary tenure; the right and practice of communities to create and control their own tenure norms.

Cited References

Alden Wily, L. 2003. 'Governance and Land Relations'. A Review of Decentralization of Land Administration and Management in Africa. London: IIED.

------ Forthcoming (a). 'Formalizing the Informal: Is There a Way to Unlock the Human Potential Through Land Entitlement?' Chapter in Unlocking Human Potential: Formality and Informality in Developing Countries. B. Guha-Khasnobis, R. Kanbur & E. Ostrom (eds). OUP.

------ Forthcoming (b). 'The Role of Customary Property Rights in the Legal Disempowerment and Empowerment of the Poor A Case Study from Sudan'. Paper proposed for presentation to an International Symposium: At The Frontier of Land Issues: Social Embeddedness of Rights and Public Policy ENSAM-INRA Campus, Montpelier, May 17-19 2006.

Alden Wily, L. and D. Hammond, 2001. 'Land Security and the Poor in Ghana. Is There a Way Forward?' A Land Sector Scoping Study. London: DFID.

Alden Wily, L. and S. Mbaya, 2001. 'Land, People and Forests in Eastern and Southern Africa at the Beginning of the 21st Century. The Impact of Land Relations of the Role of Communities in Forest Future'. Nairobi: The World Conservation Union.

Bruce, J. 2004. Collection Action and Property Rights for Sustainable Development. Strenghthening Property Rights for the Poor. Focus 11 Brief 16, CAPRI.

Bruce, J. and S. Migot-Adholla (eds), 2004. *Searching for Land Tenure Security in Africa*. Iowa.

Emerton, L. 1999. Economic Tools for Environmental Planning and Management in Eastern Africa. IUCN, Nairobi.

FAO, 2005. The World Survey of Forests. Rome.

Hunt, D. (forthcoming). *Some Outstanding Issues in the Debate on External Promotion on Land Privatisation. Development and Change*. London: Sage.

Lastarria-Cornhiel, S. & Melmed-Sanjak, J. 1999. *Land Tenure in Asia, Africa and Latin America: A Look at the Past and a View to the Future*. Working Paper No. 27 University of Wisconsin-Madison: Land Tenure Center.

Mogaka, H., Simons, G., Turpie, J., Emerton, L., Karanja, F. 2001. *Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa*. IUCN, Nairobi.

Platteau, J-P. 2000. 'Does Africa Need Land Reform?' Chapter 3 in Toulmin and Quan (eds).

Population Reference Bureau, 2005. 2005 *World Population Data Sheet*.

Santilli, M, Moutinho, P. Schwatzman, S. Nepstad, D. Curran, L. and Nobre C. 2005. 'Tropical Deforestation and the Kyoto Protocol, an Editorial Essay'. *Climate Change*, 71: 267-76.

The World Bank, 2003a. 'Agricultural Investment Source Book', Draft September 2 2003.

The World Bank, 2003b. *Land Policies for Growth and Poverty Reduction* (Klaus Deininger /World Bank Policy Research Report). New York: Oxford University Press for the World Bank.

Toulmin, C. and J. Quan (eds), 2000. *Evolving Land Rights, Policy and Tenure in Africa*. London: DFID/IIED/NRI.