



Governing Tenure Rights to Commons

A guide to support the implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security



The FAO Governance of Tenure Technical Guides are part of FAO's initiative to help develop capacities to improve tenure governance and thereby assist countries in applying the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. The FAO Governance of Tenure Technical Guides are prepared by technical specialists and can be used by a range of actors. They:

- translate principles of the Guidelines into practical mechanisms, processes and actions;
- give examples of good practice – what has worked, where, why and how;
- provide useful tools for activities such as the design of policy and reform processes, for the design of investment projects and for guiding interventions.

For more information on the Guidelines and FAO's activities on governance of tenure visit: www.fao.org/nr/tenure

This guide on Commons is accompanied by an animation video:



www.youtube.com/watch?v=rY2whVGkCdk

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A guide to support the implementation of the
*Voluntary Guidelines on the Responsible Governance
of Tenure of Land, Fisheries and Forests in the Context
of National Food Security*

*Prepared through a multi-stakeholder process by
the Institute for Advanced Sustainability Studies (IASS)*

This publication is intended to support the use of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. It is not intended to contradict the language of the Guidelines as endorsed by the Committee on World Food Security on 11 May 2012 nor the role of States in their implementation.

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Foreword

The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO, 2012 – referred to in this guide as ‘the Guidelines’) were unanimously adopted by the Committee on World Food Security (CFS) in 2012, with subsequent broad international recognition and support. Their strength rests on the unique inclusive and participatory process through which they were developed. They are an instrument of soft law, but they are also strongly rooted in existing international human rights law, laying out the obligations and responsibilities of state and non-state actors to govern tenure of land, fisheries and forests responsibly, including commons. They provide internationally agreed guidance on how to recognize, protect and support legitimate tenure rights, including individual and collective tenure rights, and those employed under customary systems.

Secure tenure rights to commons are crucial for women and men, indigenous peoples and local communities in various contexts, including fisherfolk, pastoralists, farmers, landless people, and other vulnerable, food insecure and marginalized groups. They depend on commons for their fundamental well-being: for access to food, for sustaining their livelihoods, and for their cultural and social identity. The Guidelines represent a historic opportunity to guide governments and hold them accountable in assuming their duties and fulfilling their obligations to implement secure tenure for the legitimate holders of rights to commons.

By following the guidance and principles of the Guidelines, governments will contribute to translating internationally agreed goals on sustainable development into national and local realities: to respond to the livelihood needs of their people; to achieve food security and eradicate poverty; to realize the right to food, self-identification and self-determination; to support the sustainable use of natural resources and equitable access to and control of the resources; to achieve sustainable social and economic development. The Guidelines acknowledge the crucial role played by participation, and call on governments to support the activities of civil society to increase the uptake of the Guidelines’ principles.

This technical guide on *Governing Tenure Rights to Commons* provides strategic guidance and suggested practices for proactively implementing the standards and recommendations of the Guidelines, with the aim of recognizing and protecting tenure rights to commons and community-based governance structures. The guide was prepared by the Institute for Advanced Sustainability Studies (IASS) whose research on sustainability and land governance is based on a transdisciplinary approach. This aims to achieve the cogeneration of knowledge by actors from civil society, government and science, in order to create viable strategies for responsible and sustainable land governance. In accordance with this approach and objective, the guide was developed through a comprehensive multi-stakeholder process: the deliberation of relevant strategy recommendations took place via an international Sounding Board of commons experts, and a series of deliberation and consultation workshops with actors from various constituencies around the world.

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This guide on *Governing Tenure Rights to Commons* has been developed through a multi-stakeholder process involving a wide range of individuals in civil society, government and science from different parts of the world. It has been prepared and written by a team from the Institute for Advanced Sustainability Studies (IASS) led by Charlotte Beckh and including Elisa Gärtner and Theo Rauch, with the guidance of Jes Weigelt and Alexander Müller. An earlier draft benefited from contributions by Isabelle Bleeser. The team wishes to express its appreciation and gratitude to all the individuals who contributed their time, energy, knowledge and experience throughout the development of this guide.

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Acronyms

CFi	Community Fisheries institutions
CFS	Committee on World Food Security
CLEP	Commission on Legal Empowerment of the Poor
CSO	Civil Society Organization
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, prior and informed consent (Principle of)
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GPS	Global Positioning System
IASS	Institute for Advanced Sustainability Studies
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFAD	International Fund for Agricultural Development
ILC	International Land Coalition
MPA	Marine Protected Area
NGO	Non-Governmental Organization
RECOFTC	The Center for People and Forests (Thailand)
RRI	Rights and Resources Initiative
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
WFP	United Nations World Food Programme

Executive Summary – The guide in a nutshell

This guide on *Governing Tenure Rights to Commons* aims to support states, community-based organizations, civil society organizations, the private sector and other relevant actors, to take proactive measures to implement the standards and recommendations of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (the Guidelines). The goal is to achieve legal recognition and protection of tenure rights to commons and community-based governance structures.

Tenure rights to commons are crucial

Millions of people worldwide depend on natural resources such as land, fisheries and forests that are used collectively as commons. Commons are essential to cultural identity and well-being. They are a source of food and income, an important safety net, and a matter of human rights – for indigenous peoples and local communities including farmers, fisherfolk, pastoralists, landless people and the most marginalized and vulnerable. Commons are subject to a diversity of multiple, flexible bundles of tenure rights, which may be held permanently or temporarily by different rights holders. They may have fixed or fluid boundaries, which may be periodically renegotiated, modified, rescinded and agreed upon by the community. Commons are viable if they are governed collectively. Secure tenure rights to commons can provide incentives for the environmentally sustainable use of natural resources and for responsible investments in the productivity of the resource systems.

How to secure legitimate tenure rights to commons

The human rights-based Guidelines call on states, as the principle duty bearer, to meet their obligations to secure legitimate tenure rights, including those to commons. This means that states need to recognize legally these legitimate tenure rights and their rights holders and respect them. States and their judicial organs need to protect these rights against threats and infringement, and they must proactively support people so that they can use and enjoy their rights. Non-state actors – including civil society organizations, community-based organizations, academic institutions, scientists, professional service providers, the private sector and donors – have the responsibility of supporting communities in obtaining their rights, protecting them in accordance with human rights principles and acting with due diligence. This responsibility of non-state actors exists independently of the ability and/or willingness of the states to fulfil their own human rights obligations: it does not diminish these obligations.

This guide offers **12 interrelated strategies with ‘how to’ recommendations in three areas of action**. While the legal recognition and protection of tenure rights to commons is fundamental (1), their effective implementation in practice by states and communities alike (2) as well as supporting communities so that they can enjoy their rights (3) are of utmost importance to achieve tenure security in people’s daily lives.

1) Strategies for legal recognition and protection (1–5)

States need to recognize legally, and protect, legitimate tenure rights to commons, their rights holders, and related customary tenure systems. Legislation should enable these rights holders to take the authority and responsibility to govern the commons at the local level collectively. This devolution comes with legal requirements for communities to strengthen or set up processes for inclusive, accountable and sustainable governance and decision-making, in accordance with the principles laid out in the Guidelines (Strategy 1). The legal framework should focus on procedural rather than substantive rules (Strategy 2), to accommodate the complexity, diversity and flexibility of tenure rights to commons and to provide for context-specific and flexible adjustment by community rules. The community needs to engage in an inclusive local process to agree on rules for the sustainable utilization of the commons, to identify and map the outer boundaries of the commons, and to register them with the support of state authorities (Strategy 3). To ensure transparency, accountability and effectiveness of legislation, the state should establish an inclusive and deliberative policy-making and law-making process that facilitates the participation of civil society and rights holders. To this end, scientists, lawyers, civil society organizations (CSOs) and the state need to innovate on new legal concepts and terms (Strategy 4). Advocacy work plays a crucial role in supporting the process of political, public and personal acceptance of tenure rights to commons and community-based governance, and the structures to ensure the implementation and enforcement of these rights (Strategy 5).

2) Strategies for implementation by states and rights holders (6–8)

To ensure the effective implementation of tenure rights to commons on the ground, Strategies 6–8 recommend that states and other actors, including civil society organizations, support communities in strengthening or progressively developing inclusive and accountable community governance structures (Strategy 6). The empowerment of vulnerable and marginalized groups within communities will support their representation and participation in the governance structures and enable and encourage them to make effective use of community institutions (Strategy 7). Commons need a strong community, involving the collective action of legitimate tenure rights holders to govern the commons in a sustainable, inclusive and accountable manner. At the same time, in order to facilitate the effective implementation and governance of tenure rights to commons, it is crucial that states strengthen or develop commons-related capacities and awareness in government authorities, parliaments and courts, and devolve human and financial resources to the subnational and community level (Strategy 8).

3) Strategies to support the enjoyment of rights (9–12)

To support communities in making full use of the legal framework and exercising and enjoying their tenure rights, Strategies 9–12 call on states to ensure that local rights holders have access to a functioning and accessible judicial and legal system at national and subnational level. This requires the recognition and strengthening of local-level mechanisms for dispute resolution, and integrating these with the judicial

system in a manner consistent with human rights standards. States should also enable and recognize legal advocacy activities by communities and CSOs (Strategy 9). To create and maintain long-lasting benefits from commons for community members, states need to support communities in building opportunities for income-generating activities through the economically viable, environmentally sustainable and socially inclusive use and management of the commons (Strategy 10). States and community representatives need to take steps to prevent any infringement of tenure rights to commons or violation of related human rights. In particular, any partnerships or contracts with investors require the state to be committed to the protection of communities and the support of their livelihoods (Strategy 11). To enhance transparency, build trust and hold the different actors accountable, states need to recognize and facilitate inclusive multi-stakeholder processes for monitoring and reviewing legislation, institutions, processes and the rule of law, at national and local level. Civil society organizations, community-based organizations and rights holders must be able to engage in these processes (Strategy 12).

Make change happen

This guide aims to inspire and guide the different actors so that they can contribute meaningfully to transformative change, by making responsible governance of tenure rights to commons real. It does so by proposing these 12 interrelated strategies, along with an examination of 7 illustrative cases of practice from around the world, and methodological steps for national and local adaptation. The responsible governance of tenure rights to commons in accordance with the Guidelines will be an important contribution to the achievement of the 2030 Agenda for Global Sustainable Development, the Paris Agreement on climate change and the progressive realization of the right to food.

1

Introduction



1. Introduction

1.1 Why this guide on commons?

Millions of people worldwide directly depend on natural resources such as land, fisheries, forests and water that are used collectively as commons. Commons are essential to cultural identity and well-being. They are of important social and spiritual value to many communities and provide essential environmental services at local and global levels. They are a source of food and income, and an important safety net in times of hardship.

Secure tenure rights to commons are crucial for indigenous peoples and local communities, including farmers, fisherfolk, pastoralists, the landless and the most vulnerable, food insecure and marginalized people. Ensuring that legitimate tenure rights to commons are real in practice is a cornerstone of achieving sustainable development and the realization of the right to food.

Yet, legitimate tenure rights to commons are often not recognized and protected by national law, and in cases where legal recognition of these tenure rights exists on paper, they are often not enforced and implemented in practice. This is often due to racial discrimination, discriminatory laws and policies, weak administrative and judicial capacities and/or ineffective community governance structures. Often, existing legal systems do not have a method for appropriately accommodating the commons. Sometimes, customary authorities can dominate community institutions to the detriment of vulnerable and marginalized members of the community who depend on the commons for their livelihoods. Moreover, tenure rights to commons are jeopardized by the increasing demand and competition for natural resources, along with processes of privatization, encroachment and large-scale land transfers for commercial or public purposes. Such conflicts and processes often result in resource degradation, overexploitation and the expulsion of marginalized and vulnerable resource users.

To support overcoming these key governance issues faced by the commons, this technical guide provides strategic guidance based on the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (the Guidelines). With the international adoption of these Guidelines in 2012, governments, civil society, the private sector and academia agreed on a human

rights-based standard for the responsible governance of tenure of land, fisheries and forests, including commons. The Guidelines provide a strong basis for the action that is needed, and guidance for states and non-state actors to secure the legitimate tenure rights to commons of women and men, indigenous peoples and diverse local communities.

This guide supports the implementation of these human rights-based Guidelines in practice by providing strategies and practices that aim to inspire the responsible governance of tenure rights to commons. It also provides an understanding of commons and arguments for why securing tenure rights to commons is important.

The knowledge in this guide was developed through a multi-stakeholder process and is based on the strategies and lessons that numerous individuals, civil society organizations, state officials, scientists and international organizations have gained in their efforts to secure tenure rights to commons. These experiences are summarized in 12 strategies with suggested methodological steps for their national and local adaptation. They aim to support the executive, legislative and judicial branches of states, community-based organizations, civil society organizations, the private sector and other actors in the legal recognition and committed implementation and protection of tenure rights to commons and community-based governance structures.

BOX 1:
Background of
the *Voluntary*
Guidelines on
the Responsible
Governance of
Tenure of Land,
Fisheries and
Forests

The Guidelines were developed through a unique inclusive multi-stakeholder process

The strength of the Guidelines lies not only in their unanimous adoption by the Committee on World Food Security (CFS) on 11 May 2012, but also in the unique and inclusive process that preceded the negotiations and created a climate of trust and a spirit of collaboration. The Guidelines seek to improve governance of tenure of land, fisheries and forests ‘for the benefit of all, with an emphasis on vulnerable and marginalized people’ (§ 1.1), in order to contribute to the goals of food security and the progressive realization of the right to adequate food, poverty eradication, sustainable livelihoods, environmental protection and sustainable social and economic development, among other goals (§ 1.1). The CFS is an inclusive international platform open to all UN members of the intergovernmental agencies concerning food and nutrition – FAO, IFAD and WFP – as well as civil society organizations and the private sector. It is the international governance body for food and nutrition security and was set up with a renewed mandate after the world food crisis in 2007/08. With the adoption of the Guidelines, there is now a broad international consensus and agreed normative standard of responsible governance of tenure of land, fisheries and forests, which is also applicable to water.

1.2 Scope, audience and structure of the guide

What is the scope of this guide?

The guide follows the approach of the Guidelines in focusing on land, fisheries and forests that may be used as commons. In line with the Guidelines, special emphasis is given to marginalized and vulnerable groups whose food security and livelihoods rely

largely on the use of these natural resources as commons. It is also important to note the inextricable link of land, fisheries and forests with water, biodiversity and other natural resources, which may also be used as commons. While this guide focuses on commons in terms of natural resources at the local level, in recent years the wider debate on commons has also included knowledge (e.g. Internet), cultural commons (e.g. public art), infrastructure (e.g. roads) and global resources such as oceans and air.

The guide adopts a global outlook that is similar to the Guidelines. This means that it seeks to provide strategies relevant to tenure rights to commons across different regions. The rather generic strategies are illustrated with actual cases in practice from different countries across the globe, and aim to serve as a source of inspiration for other contexts. They are complemented by methodological guidelines to assist the process of adapting these generic strategies to the local context.

The guide does not include an in-depth treatment of all provisions and aspects of the Guidelines, but focuses on those that are particularly important for tenure rights to commons. It is also recommended to consult other FAO technical guides, in order to learn more about strategies and methods for the responsible governance of tenure. Issues covered in these guides include: gender; indigenous peoples and the principle of free, prior and informed consent (FPIC); fisheries, forestry and pastoral lands; legal issues; agricultural investment and private sector engagement; registration.

Who is this guide for and how is it structured?

This guide provides strategic guidance and inspirational cases for achieving responsible governance of tenure rights to commons for a variety of stakeholders:

- policy-makers at all levels, such as national, regional and local governments, parliaments, and their advisers (e.g. agencies responsible for legal reform, administration, spatial planning, titling and demarcation of land, fishing grounds, forests, water bodies, mineral resources, conservation, environmental protection and rural development);
- courts, judicial authorities and lawyers;
- community-based organizations and civil society organizations;
- development organizations and consultants;
- private sector actors (including land investors) who will better understand the situation of the commons and their importance for communities, and will gain insights for investment projects;
- scientists and trainers, e.g. for research and education.

Chapter 2 of the guide provides crucial insights into commons, clarifies terms, and explains why it is important to recognize, protect and support tenure rights to commons. It also gives an overview of what the Guidelines say about the responsible governance of tenure rights to commons.

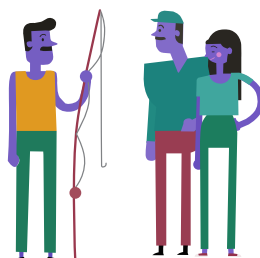
Chapter 3 provides 12 generic strategies on how to recognize, protect and support tenure rights to commons. The strategies highlight key aspects that should be

considered when securing these rights. As they are interrelated, it is advisable to read them all in context. They also provide explicit insights into the roles and responsibilities of governments and civil society. The strategies are illustrated with seven cases addressing different key issues that affect tenure security to commons. The cases provide the reader with real-life experiences, practices and strategies showing how the different issues were or are dealt with; they suggest lessons learned and are sources for inspiration.

Chapter 4 supplements the strategies, which are generalized for worldwide relevance, with methodological guidelines for the process of adaptation to national and local contexts.

2

Commons and the Guidelines



2. Commons and the Guidelines

2.1 What do we need to know when dealing with commons?

1. Complexity of tenure rights to commons

Natural resources such as land, fisheries and forests may be used as commons. This means that a group of people (often understood as ‘community’) uses and manages these resources collectively. In some cases, the group may also hold collective ownership rights to the common resource. These rights are provided in the context of the Guidelines (FAO/CFS 2012), e.g. §§ 8.2, 8.3, 8.7, 8.8, 9.2, 9.4; see also Chapter 2.3 of this guide. These collectively held natural resources can be distinguished from resources which are owned individually by one person or a family, e.g. a permanent farm plot.

The members of the group, so-called rights holders, may each hold diverse, multiple and flexible bundles of tenure rights to the common resource with fixed or fluid boundaries. These tenure rights may be held permanently or temporarily and may be periodically renegotiated, modified, rescinded and agreed upon by the group. They may overlap in time and geographical space.

For example, mobile pastoralists may have seasonal rights to use a piece of land for livestock grazing and foraging, and seasonal rights to hunt and use specific water sources. Other people may have the right to use trees on this same piece of land and collect firewood and medicinal plants under certain conditions. Yet more people may have the right to use this land for farming at certain times.

The bundle of rights may include:

- use rights such as *access* (e.g. to walk across a field or visit a sacred site), *withdrawal* (e.g. to pick wild plants) and *usufruct* (e.g. to exploit a resource for economic benefit);
- control or decision-making rights including *management* rights (e.g. to plant a crop), *exclusion* rights (e.g. to prevent others from accessing the pasture) and *alienation* rights (e.g. to rent out, transfer, or sell). Ownership is often thought of as the right to exclusively control a resource.

So that groups can secure their tenure rights to commons, the right to exclude outsiders from using the resource is crucial, but often difficult and costly. This right is important because common resources are subtractable or rivalrous in consumption: the resource units harvested by one user are not available to others. In addition to the main bundle of tenure rights to commons, it is also important to consider the right to retain rights for an unlimited duration and the right to due process and compensation (RRI, 2015/4).

Tenure rights to commons also imply responsibilities for stewardship of the common resources and collective action in order to ensure their sustainable, efficient and equitable use. Importantly, the group should be able to collectively manage and control the common resource and allocate tenure rights, i.e. jointly decide who can use what (parts of the) resource, for how long, and under what conditions, and be able to exclude non-members from using the commons. This implies also defining the boundaries of the commons in order to regulate their use and to protect them from infringement. Boundaries may be fixed or fluid and defined in a variety of ways: for example, the geographical area, utilization periods, type of gear, harvest size, group membership.

Depending on the country's legal context and degree of devolved authority and responsibility, there are different situations of commons:

- **Commons may be publicly or state-owned land, fisheries and forests that are collectively used and managed by local groups (or communities).** In many cases here, governments statutorily declare common land, water, fisheries and forests as public, because they argue that these are empty or unowned, or that commons provide 'public goods' such as environmental services. However, this neglects the fact that commons are customarily owned by a community or several communities. In this way, communities are deprived of the right to legally defend their customary rights to commons.

Where there is weak collective action by different user groups / group members or no action at all, and they all hold tenure rights to the same publicly owned but common resource, the case of '**open access**' can apply. In this situation, customary law or community institutions that govern use rights collectively, exclude outsiders, manage conflicts among users, reach agreements, promote sustainable use and prevent overexploitation and degradation, are ineffective or absent. Hence, the propensity to act according to individual self-interest increases and may lead to resource overuse, degradation and loss. This is referred to as Hardin's 'Tragedy of the Commons' (Hardin, 1968). The work of Elinor Ostrom (1990) and others¹ has shown that collective action is crucial to govern common resources.

- **Commons may be owned by indigenous peoples or other communities with customary tenure systems and this may be legally recognized.** In this situation, the common resource may be governed by a community-based or communal tenure system. The term 'communal' is often used to refer to the whole area or territory of a community including both collectively held commons and individually held resources. The commons may be situated within the area or territory owned

¹ Other scholars include, for example, Bromley *et al.* (1992), McKean (2000), Agrawal (2003), Dietz, Ostrom and Stern (2003), Meinzen-Dick, Mwangi and Dohrn (2006), Mosimane *et al.* (2012).

by the indigenous or customary community, and the different members of this community may hold multiple and overlapping bundles of tenure rights to the common resource. In another situation, different communities may negotiate and agree on allocating certain bundles of rights to parts of the resources to members of the different communities for permanent or temporary collective use.

However, in many cases, governments withhold the authority normally associated with ownership. This makes them unduly empowered to determine how the resources are used or to issue commercial use rights in the form of concessions for logging, mining, industrial agriculture and ranching on the customarily held commons. In other cases, governments retain important management rights, which often leads to over-regulation of use and high barriers and costs to legally use common resources.

- **Commons may be newly established where groups (e.g. forest user groups) come together to create rules and norms to use, manage and even own a specific natural resource collectively.** Such groups may also build a cooperative or an association to utilize the resource collectively and organize and carry out production as a collective. These commons may also be subject to the scenarios described above under the first two bullet points.

To secure tenure rights to commons and support the collective action needed to sustain common resources, it is crucial to devolve rights and responsibilities to govern the commons to local groups or communities and recognize their collective tenure rights (see Chapter 2.2 on why it is important to secure tenure rights to commons). Hence the challenge for legislation and law implementation is to account for the complexity, diversity and flexibility of the bundles of tenure rights to commons, and to recognize the rights and responsibilities of groups or communities to govern these rights.

2. Who is the 'community'?

What constitutes a group or 'community' varies by region and country, by circumstance and by the nature of the resource involved. For the purposes of this guide, a community is understood in a broad sense to be a complex social and geographical unit comprising different types of members who have something in common. For example, the members may have in common a certain profession; an affiliation with an ethnic or religious group; a shared history; a cultural identity or kinship; an authority, common norms or rules regarding access to and use of natural resources; a common residence in existing and former settlement sites; a common use or occupation of a territory or geographical area ... or combinations of these. A community may therefore be, for example, a single village or a cluster of villages, a group of persons within a village, a cluster of families, or a set of different user groups (e.g. mobile pastoralists, settled farmers). A community may be defined by tradition or kinship, or it may define itself, for example, in terms of resource uses or patterns of particular tenure rights (e.g. a fishing community). In other cases, a community may be defined by administrative law (e.g. villages as local government bodies).

The social and geographical boundaries of a community may be flexible and renegotiated and adapted over time. They may also be only vaguely defined, as for example in forested areas, where some boundaries are so remote from settlements and the current main areas of use that no clear spatial boundaries are defined. Boundaries may hence appear fuzzy to outsiders, while the rights holders themselves may be well aware of their community boundaries and members. What is more, while a community's social boundaries may be easily defined and upheld in the locality, its composition may alter with every birth, death, marriage or migration.

Communities undergo constant change. In many cases they are not always clearly defined socially homogenous entities with legitimate and responsible leadership that always regulate the commons in a sustainable and inclusive manner, **but rather are characterized by socio-economic disparities and power imbalances.** Three interrelated socio-economic trends have been speeding up processes of change: migration and translocality; a gradual shift from a subsistence economy based on community solidarity towards an individualized and commercialized economy; the formalization of governance institutions, including the replacement of customary institutions with local government bodies. **In this context, it is crucial to arrive at a realistic concept of community-based governance for commons that respects the imperative of local self-governance of natural resources, while supporting inclusive, equitable and sustainable benefits as well as participatory, transparent and inclusive processes.**

3. Diversity of legal systems

In many countries, commons are regulated through diverse customary tenure systems. Customary tenure refers to locally derived systems with norms, rules, institutions, practices and procedures that have evolved over time and use. Customary tenure systems have gained social legitimacy and are negotiated, sustained and changed by local communities. Customary systems may be traditional or indigenous, they may be democratic or hierarchical, they may be transboundary and cross international borders and there may be different systems even within one country. Customary governance systems are not always inclusive and accountable, but are sometimes highly unequal with regard to gender and corrupted by local elites. They are often flexible and evolve continuously to respond to changes in political, social and environmental circumstances. In many countries, they are the most relevant and legitimate systems. It is estimated that more than one and a half billion people around the world organize their land relations through customary systems (CLEP, 2008; Alden Wily, 2011b/7).

However, in many cases, these customary systems are not legally recognized and integrated in statutory law, or only to a certain degree. Statutory law refers to law sanctioned by the state. Even where statutory systems recognize customary rights, these systems are often inaccessible to local communities due to high access costs (e.g. to courts), elite capture, extensive bureaucratic barriers, inadequate government capacities to implement and enforce legislation, and the mere fact that local social values and practices are not reflected.

Because of this situation, statutory and customary legal systems – and in some cases religious legal systems too – may overlap and contradict each other. This puts commons under dual or plural governance systems, one of the negative effects of which is ‘forum shopping’, where powerful actors choose the legal system that best fits their own interests. **The challenge is to find appropriate ways and means to integrate customary and statutory systems, while recognizing that both may need to be reformed and improved to fulfil and realize the principles for responsible governance of tenure as laid out in the Guidelines** (see Chapter 2.3 of this guide and § 3B in the Guidelines).

2.2 Why should we secure tenure rights to commons?

1. **Commons are crucial for many people in terms of food security, livelihood, cultural identity and well-being.** They are a resource safety net during difficult times, especially for vulnerable households and marginalized groups, for women, landless people and those who do not individually own enough land to support themselves. They provide direct access to products such as fuelwood, fodder, fish, fruits and medicines, and are a framework for generating income beyond the subsistence level via small-scale commercial use of the resources. At the same time, they are highly valuable in terms of equity, justice and social stability, cultural identity and religious meaning. They provide important local and global ecosystem services: for example, contributing to climate change mitigation, aquifer recharges, watershed protection, and the prevention of soil erosion. It is not true that commons are so-called ‘empty wastelands’, relics or backward systems. They are the livelihood basis of many people around the world whose tenure rights need to be legally recognized and protected against encroachment from increasing demands for and competition for natural resources. Commons are regularly the primary target of large-scale land acquisitions and commercialization that often results in a variety of negative effects: involuntary restrictions on local livelihoods; restricted freedom of access; resource degradation and overexploitation; the expulsion and/or economic displacement of local users. Disadvantaged and less powerful resource users are the ones most easily expelled.
2. **Tenure rights to commons are inextricably linked to the realization of human rights and must therefore be upheld.** States have signed binding international human rights treaties and declarations such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), which includes, for example, the right to food and the right of self-determination. Other instruments ratified by states include, *inter alia*, the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which protect rights to equality and non-discrimination. States have legal obligations to respect, protect and fulfil these rights, which also relate to common land, fisheries and forests. The Guidelines are strongly rooted in existing international human rights law and make specific reference to the Universal Declaration of Human Rights, the International Labour

Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples, the Convention on Biological Diversity (CBD), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and related human rights instruments.

3. **Commons are viable if they are governed collectively and effectively.** Given the complexity of multiple and overlapping tenure rights to commons and the gradual shift towards an individualized society and economy, policy-makers and scientists often advocate the formalization of individual private property rights. Communities may be convinced of the higher merits of an individualized system when presented with a limited understanding of the former. However, this approach oversimplifies the complex situation of tenure rights to commons and weakens or deprives legitimate rights holders of their rights to use and manage common resources. Family and individual land titling efforts have often failed to protect the resources that were formerly managed as commons. Moreover, some resources can be managed in a more productive and viable manner if they are not subdivided into individually owned parcels but are managed collectively as a whole. This may be because the resources cannot be bounded, or because they are mobile (e.g. fisheries) or because they produce certain products and ecosystem services only if managed together in large units (e.g. corridors for pastoralists, or ecological connectivity for biological diversity). For example, forests may need to be managed in large units to maintain their value in terms of protecting water, soils, biodiversity and the local climate. A similar argument also holds for lakes and other water bodies. If managed collectively, more appropriate and sustainable use and management systems can be applied, such as the rotating use of a common forest or pasture. This especially helps in fragile environments as a risk-pooling technique for resources that are highly variable in terms of production (e.g. dryland pastures). Sharing the entire resource system area and deciding jointly on where to concentrate use at a particular time is more viable than parcelling the area into individual tracts and thereby imposing the risk of disaster on some users. The formalization of individual private property rights may also codify power differentials, e.g. between men and women, which may be embedded in customary systems and freeze the flexibility of customary tenure systems. Collective rights, moreover, can prevent the sale of land, fisheries and forests to outsiders, since the decision can only be made by the community and not by individuals.
4. **Securing tenure rights to commons can provide incentives for the environmentally sustainable use of natural resources and for investments in the productivity of the resource systems.** In principle, communities have an interest in the ongoing use of the resources. In many customary systems a historic cultural faith in intergenerational equity promotes the preservation of resources. However, legal certainty as regards tenure rights, collective action, and strong community governance systems, are needed to prevent overuse (see also Chapter 2.1 on the issue of 'open access'). With these in place, sustainable use by all those who derive benefits from the common resource will be incentivized. What is required is a clear set of rules and mechanisms for accountability and control, jointly agreed upon by all tenure rights holders. The devolution of authority and responsibility to communities in governing the full range of resource tenure rights can not only be improved, but should also include obligations regarding the sustainable, inclusive and productive utilization, effective management and protection of the commons.

2.3 What do the Guidelines say about tenure rights to commons?

The Guidelines have five important messages for the governance of tenure rights to commons.

1. All actions regarding tenure and its governance must be consistent with international human rights obligations.

Although the Guidelines are voluntary in nature, they are of important legal significance, as they are strongly rooted in existing internationally-binding human rights law. They were developed over three years in an unprecedented inclusive and participatory negotiation process between states, civil society organizations, peasant movements and the private sector, and were unanimously adopted by the Committee on World Food Security (CFS) in 2012. The Guidelines repeat throughout that “States should ensure that all actions regarding tenure and its governance must be consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments” (e.g. §§ 4.2, 4.3, 9.3). For example, the Guidelines refer to the Universal Declaration of Human Rights, the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Convention on Biological Diversity (CBD). They also include provisions on gender equity consistent with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), standards for transparency and government integrity as outlined in the United Nations Convention Against Corruption (UNCAC), and the jurisprudence of human rights tribunals supporting standards on free, prior and informed consent (FPIC).

First and foremost, the Guidelines describe the obligations of states, but also the responsibilities of non-state actors including “organizations of farmers and small-scale producers, of fishers, and of forest users; indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned with tenure governance” (§ 1.2). They provide ten human rights-based implementation principles for how state and non-state actors should set up processes for the responsible governance of tenure: human dignity, non-discrimination, equity and justice, gender equality, a holistic and sustainable approach, consultation and participation, the rule of law, transparency, accountability and continuous improvement (§ 3B).

1. Human dignity: recognizing the inherent dignity and the equal and inalienable human rights of all individuals.

2. Non-discrimination: no one should be subject to discrimination under law and policies as well as in practice.

3. Equity and justice: recognizing that equality between individuals may require acknowledging differences between individuals, and taking positive action, including empowerment, in order to promote equitable tenure rights and access to land, fisheries and forests, for all, women and men, youth and vulnerable and traditionally marginalized people, within the national context.

BOX 2:
The 10 guiding principles for the implementation of responsible tenure governance (§ 3B)

Source: FAO/CFS, 2012/4–5.

4. Gender equality: ensure the equal right of women and men to the enjoyment of all human rights, while acknowledging differences between women and men and taking specific measures aimed at accelerating de facto equality when necessary. States should ensure that women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status.

5. Holistic and sustainable approach: recognizing that natural resources and their uses are interconnected, and adopting an integrated and sustainable approach to their administration.

6. Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

7. Rule of law: adopting a rules-based approach through laws that are widely publicized in applicable languages, applicable to all, equally enforced and independently adjudicated, and that are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.

8. Transparency: clearly defining and widely publicizing policies, laws and procedures in applicable languages, and widely publicizing decisions in applicable languages and in formats accessible to all.

9. Accountability: holding individuals, public agencies and non-state actors responsible for their actions and decisions according to the principles of the rule of law.

10. Continuous improvement: States should improve mechanisms for monitoring and analysis of tenure governance in order to develop evidence-based programmes and secure on-going improvements.

2. Tenure rights to commons are legitimate.

The Guidelines clearly call upon states to provide legal recognition, respect and protection for all legitimate tenure rights, their rights holder and related tenure systems, and to promote and facilitate their enjoyment and full realization (§ 3A). This means that:

- legitimate tenure rights are not only public and private, but also communal, collective, indigenous and customary tenure rights (§§ 2.4, 8.2, 8.3, 9.2, 9.4). This includes ancestral rights (§ 9.5), traditional rights (§§ 8.7, 8.8), subsidiary tenure rights such as gathering rights (§§ 7.1, 12.9), use rights (§ 1.2/1), overlapping and periodic rights (§ 20.3), shared rights (§ 9.4), unrecorded rights (§ 7.3), customary tenure rights that are not currently protected by law (§§ 4.4, 5.3), informal rights (§ 10.1), civil, political, economic, social and cultural rights (§ 4.8), and women and men enjoying equal tenure rights (§ 7.4);
- not only individuals, but also a group (or a community) can be a rights holder (§ 8.2);
- collective use and management rights to publicly owned land, fisheries and forests need to be recognized and protected, as well as their related tenure systems, including customary systems, and the common resources themselves (§ 8.3).

These legitimate tenure rights should be safeguarded and legally protected against infringement, extinguishment, forced or arbitrary eviction (§§ 4.4, 4.5, 7.1, 7.6, 9.5, 10.6) and unauthorized use (9.8). They should also be considered in spatial planning (§ 20.3).

The Guidelines call on states to clearly define and publicize the categories of rights that are considered legitimate in the national context through a transparent, participatory and consultative process, in accordance with the Guidelines (§§ 3B, 4.4, 8.2).

3. Communities need to participate and be consulted.

One of the core procedural requirements in the Guidelines is participation and consultation: “engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes” (§ 3B.6).

This gives communities with legitimate tenure rights a far-reaching right to be consulted and to participate in decision-making that might affect them, such as participation in the formulation and implementation of policy and law, decisions on the allocation of tenure rights, and decisions on territorial development (§§ 4.10, 5.5, 9.2, 9.10, 8.6, 8.7). For indigenous peoples, the Guidelines additionally require “free, prior and informed consent” (FPIC) under the United Nations Declaration on the Rights of Indigenous Peoples (§ 9.9 of the Guidelines) and related human rights instruments, including the application of this standard for investment projects. The FPIC standard also applies to the zoning and sale of resource concessions, land acquisition, leasing of land, and state plans for resource development or extraction (see also FAO, 2014a).

Both state and non-state actors are called on to provide technical and legal assistance to communities to facilitate and ensure their participation, especially that of vulnerable and marginalized groups (§ 9.10).

4. There should be delegation of responsibility and authority for commons, recognition of self-governance, and integration of customary and statutory systems.

Overall, the Guidelines attribute to communities a key role in governing and managing common land, fisheries and forests and aim to delegate responsibility and authority for commons and collective tenure arrangements (§§ 8.7, 8.8, 9.2, 9.4). States have the power to allocate tenure rights in various forms, from limited use to full ownership (§ 8.8). They should specify in their policies the delegation of responsibilities and rights for tenure governance (§ 8.7), and determine whether they will retain for themselves any form of control over allocated land, fisheries and forests (§ 8.8). States need to make sure that their allocation policies are consistent with broader social, economic and environmental objectives (§ 8.1), that the policies take into account the social, cultural, spiritual, economic, environmental and political values of land, fisheries and forests (§ 9.7), and that they do not threaten the livelihoods of people by depriving them of their legitimate access to these resources (§ 8.7).

Furthermore, the Guidelines call on states to recognize and protect the rights of self-governance of indigenous peoples and other communities with customary tenure systems (§ 9.2). These rights of self-governance are bound to human rights standards, e.g. “where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems” (§ 9.6). They are also bound to the objective of providing equitable, secure and sustainable access, and inclusive and participatory decision-making processes (§ 9.2). At the same time, “states should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems” (§ 9.6).

5. There are numerous administrative tasks involved in implementing tenure rights to commons.

The Guidelines attach great importance to the fulfillment of the following administrative tasks to ensure that tenure rights to commons are implemented in practice:

- Provide a single system, or an integrated framework, to ensure that collective tenure rights, individual private property rights and public tenure rights are recorded together, and to allow for the identification of competing or overlapping rights (§§ 17.1, 17.2, 17.4, 9.8). Organize related information flows and publicize information in a transparent, accessible manner, and in understandable and applicable languages (§§ 8.4, 8.9, 9.4, 9.8, 11.5, 17.1). Information on the rights, the holders of those rights, and the related spatial units should be linked (§ 17.4).
- Support the mapping of tenure rights and resource use through locally appropriate approaches (§§ 7.4, 9.8, 17.3), and ensure that spatial planning considers tenure rights to commons, reconciles and supports different uses and interests, and considers customary methods of planning (§§ 20.1, 20.2, 20.3). Contribute to the understanding of transboundary tenure issues affecting communities such as rangelands, the seasonal migration routes of pastoralists, and the fishing grounds of small-scale fishers that lie across international boundaries (§ 22.2).
- Require that valuation systems account for non-market values such as social, cultural, religious, spiritual, political and environmental values (§§ 18.2, 9.1).
- Ensure that transfers of rights do not have any undesirable impacts on local communities, protect the tenure rights of small-scale producers, and ensure fair and equitable involvement of legitimate community bodies in the process (§§ 11.2, 11.3, 11.8). Ensure responsible and transparent investments, which should do no harm, should safeguard against the dispossession of legitimate tenure rights holders and against environmental damage, and should respect human rights (§§ 12.4, 21). States should consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors, and should encourage partnerships with local tenure rights holders (§ 12.6).
- Use customary and local approaches and alternative means and methods for dispute resolution that are fair, reliable, timely, affordable, gender-sensitive, accessible, non-discriminatory and effective, subject to international human rights

standards (§§ 21.1, 21.3, 25.3, 9.11). Ensure access to justice including courts, lawyers, administrative and judicial services, and provide technical and legal support and assistance for this (§§ 6.6, 4.7, 10.3, 21.6).

- Prevent corruption related to the allocation of rights and dispute resolution processes (§§ 6.9, 9.12, 10.5, 21.5).
- Ensure that there is adequate human, physical, financial and other capacity for competent bodies responsible for tenure governance, and sufficient respective training, especially in relation to delegation (§ 8.10). Provide technical and legal support for the enjoyment of rights and the fulfilment of duties (§§ 7.4, 7.5), and assistance to increase the capacity of communities to participate in decision-making and governance (§§ 9.2, 9.10).
- Ensure the long-term protection and sustainable use of land, fisheries and forests; promote diversified sustainable management, including agro-ecological approaches and sustainable intensification (§ 20.5); reflect the interrelationships of land, fisheries and forests and their uses in policy, legal and organizational frameworks, and establish an integrated approach to their administration (§ 5.3).
- Monitor and regularly review policy, legal and organizational frameworks to maintain their effectiveness (§ 5.8), and monitor the outcome of allocation programmes of tenure rights with regard to broader social, economic and environmental objectives (§ 8.11).

3

Strategies for the responsible governance of tenure rights to commons



3. Strategies for the responsible governance of tenure rights to commons

The realization of tenure rights to commons requires dedicated action from state and non-state actors. Based on the provisions of the Guidelines, this chapter offers 12 strategies derived from experiences all over the world, which serve as sources of inspiration for one's own context. They identify key aspects of responsible tenure governance that need to be strengthened or reformed in order to secure tenure rights to commons and are illustrated with cases from practice. Given their interrelated and complementary character, they should be considered as a comprehensive package.

In a nutshell, the strategies provide guidance for three areas of action:

- the legal recognition and protection of tenure rights to commons alongside the adaptation of the legal framework (strategies 1–5);
- ensuring that tenure rights to commons will be implemented effectively on the ground (strategies 6–8);
- supporting communities in making good use of the legal framework and exercising and enjoying their rights (strategies 9–12).

In terms of roles and responsibilities involved in implementing secure tenure for legitimate rights holders of commons, the Guidelines send a clear signal concerning the obligations of states and the responsibilities of non-state actors. The following strategies draw on these provisions and make explicit the obligations and responsibilities of states, communities, civil society organizations and the private sector for the implementation of tenure rights to commons. Reference is also made to other stakeholders, such as donors and academia, who are acknowledged by the Guidelines and have valuable contributions to make to the responsible governance of commons.

3.1 Strategies for legal recognition and protection

1

Legally recognize legitimate tenure rights to commons and their rights holders by devolving the authority and responsibility to govern the commons, conditioned by legal requirements for inclusive, accountable and sustainable governance.

2

Strengthen or establish a legal framework focusing on procedural rules to accommodate the complexity, diversity and flexibility of tenure rights to commons.

BOX 3:
How to govern tenure rights to commons responsibly: 12 strategies for states, communities, civil society organizations, and private sector actors

- 3 Agree on rules for the utilization of commons, map their boundaries and register them based on a negotiated and inclusive local process.
 - 4 Establish a transparent policy-making and law-making process that enables communities and civil society to participate.
 - 5 Carry out advocacy work to support tenure rights to commons.
- 3.2 Strategies for implementation by states and rights holders**
- 6 Strengthen or progressively develop inclusive and accountable community governance structures.
 - 7 Support the empowerment of marginalized and vulnerable groups within communities to make effective use of community institutions.
 - 8 Strengthen or develop the implementation capacities of state officials and devolve human and financial resources.
- 3.3 Strategies to support the enjoyment of rights**
- 9 Ensure access to justice, recognize and integrate local-level mechanisms, and enable legal advocacy.
 - 10 Strengthen the environmentally sustainable and economically viable use of commons to maintain and create long-lasting benefits for community members.
 - 11 Ensure that any partnerships or contracts with investors support local livelihoods and do not infringe on tenure rights to commons, or violate related human rights.
 - 12 Engage in the facilitation of multi-stakeholder processes for the review of legislation and monitoring of institutions, processes and the rule of law.

3.1 Strategies for legal recognition and protection

1 Strategy 1: Legally recognize legitimate tenure rights to commons and their rights holders by devolving the authority and responsibility to govern the commons, conditioned by legal requirements for inclusive, accountable and sustainable governance

Rationale

The legal recognition of legitimate tenure rights to commons and their rights holders should comply with two different requirements that need to be reconciled. On the one hand, communities need to be legally recognized as rights holders, along with the devolution of authority and responsibility to govern the commons according to their existing customs and customary law. On the other hand, legal recognition needs to ensure inclusive, transparent, accountable and sustainable management and

governance of commons, while providing for secure and equal tenure rights for all legitimate commons users that may not always be guaranteed by existing customary governance structures. Therefore, the legal framework needs to provide for the devolution of the authority and the responsibility to govern commons to community institutions, conditioned by legal requirements for legitimacy, inclusiveness, accountability and non-discrimination.

Specific recommendations

1. The national legislation should recognize and specify that communities can be rights holders with legal personality that can hold collective tenure rights to commons.

This means that it must be legally recognized that a community can be a rights holder with the authority and responsibility to collectively govern the commons, in contrast to an individual person (see p. 11, Chapter 2.1, for the meaning of a 'community' in this guide). Communities must be able to hold substantive rights, such as rights of use, management and ownership, and procedural rights to govern the allocation of substantive rights to commons (see Strategy 2 on procedural rules). It is important that the devolution of authority and responsibility to govern commons includes the full range of resource rights, i.e. that it is inclusive of rights to different interrelated resources (e.g. land, trees, wildlife, and local water bodies), in order to enable and support the sustainable, integrated management and utilization of commons.

2. The national legislation should further stipulate that tenure rights to commons are equal in legal strength, validity and enforceability to individual private property rights obtained through formal statutory systems.

Tenure rights to commons are often governed according to existing customary tenure systems with rules, norms, practices and authority systems that are locally accepted and practised by communities. The legislation must therefore legally recognize and support these legitimate customary tenure systems wherever they are practised, conditioned by legal requirements for inclusive, accountable and transparent governance (see Strategy 2). Customary tenure rights must be considered valid and upheld by governments and courts, even if they are not (yet) registered or titled.

3. The devolution of the authority and responsibility to govern commons to communities needs to be based on community applications. These applications give evidence of the social and geographical boundaries and buffer zones of commons, and of processes to establish community bylaws for the inclusive and accountable governance and sustainable management of commons, including the legitimacy of community-based organizations.

A key activity in the devolution of authority and responsibility to govern commons is to identify and legally recognize the 'tenurial shell' of the community, i.e. its social and geographical boundaries (see Strategy 3). This includes simply asserting that the customary rights and structures within these boundaries are legally recognized under the condition that they are in line with the principles of the Guidelines (see Box 2 on page 15). The state has the duty to establish and enforce the boundaries, and must respect and back the rules and mechanisms established at community level. In some communities, inclusive, accountable and transparent governance structures as outlined in the Guidelines

may already exist and be practised. Other communities may need to be supported in adapting and strengthening their institutions to overcome (for example) existing male-dominated, discriminatory and corrupt customary institutions and to realize (for example) principles of gender equity (see Strategies 6 and 7). Communities must therefore lay down processes to establish their community governance structures, procedures, and institutions including the legitimacy of their representatives, in a community bylaw, constitution or protocol, as a prerequisite for the devolution of authority and responsibility.

4. **Community governance structures may take the shape of a natural resource management committee or board, a territorial council or another type of body. This can be a tool for the legitimate, inclusive, transparent and accountable governance of commons.** Depending on the country's context, such a body may be based on existing customary community institutions, or may be part of the local government set-up, or may be a combination whereby government institutions and local communities come together, e.g. co-management. Such a body may already exist but may need to be strengthened, or it may need to be newly formed by a community: if desired, this may be carried out in collaboration with government institutions. It is important not to create parallel structures. Such bodies provide a forum to discuss community norms, rules and procedures publicly. They are a tool to improve community governance and hold rights holders and duty bearers – both customary and state authorities – accountable. In particular, they are an indispensable tool for governing and managing commons in accordance with the aims of inclusive, accountable, transparent and sustainable utilization.

The national legislation should ensure that everyone who holds legitimate tenure rights to the commons is adequately represented (at least by delegates) and able to participate in management structures, regardless of their form. This is especially important for landless people whose livelihoods rely on commons, for women, young people, the elderly and other marginalized people in the community, but also for groups such as pastoralists. For example, the management body and leadership structures could be legally required to include a proportionate number of women in their set-ups, before communities can gain legal identity.

5. **The legal framework should ensure that customary authorities are embedded in inclusive, transparent and accountable community structures in such a way that they are prevented from hijacking and dominating community institutions and misusing their powers.** There should be sufficient flexibility to allow customary authorities to continue playing a leading role in accordance with their legitimacy in the specific local context, and in a more transparent and accountable manner. However, in the case of weak and corrupt authorities, other local stakeholders and – if necessary – government representatives, could be given the possibility of delimiting their role in close consultation with the wider community, and through agreements: for example, by integrating customary authorities as non-elected members in the inclusive and transparent management body. Proceeding in this way, customary values, knowledge and leadership can still be respected and used, and the authorities can still be held accountable. This will create an opportunity for improved leadership.

How secure are community lands? A snapshot of the legal recognition of commons in Africa

By Liz Alden Wily

Nearly 80 percent of Africa is community land and 91 percent of these lands comprise off-farm rangelands, forests and marshlands, which by tradition are owned and used collectively (Alden Wily, 2016). Since 1990, 21 of 54 African states (39 percent) have improved legal recognition of community lands and another 13 states (24 percent) are presently improving their laws. Millions of rural Africans are more connected among themselves and across borders, and more wary of the consequences of tenure insecurity with each passing year. State allocation of rural lands around cities to developers, and the allocation of larger areas to local and transnational agribusiness, are prominent catalysts that are expanding popular demand for legal recognition that these lands are already owned, and under community-derived norms that the state must respect.

While this recognition is still limited for most of the 700 million rural dwellers affected, positive new legal precedents are being set. These:

- i. recognize community lands as *already owned*, and community-derived rights as property rights, and protect these as such in national law. This means that the burden of proof that community land is unowned falls on the state or on the non-community landseeker, and lands cannot be wilfully taken without legal procedures involving localized and participatory investigation being carried out.
- ii. do *not* exclude from recognition as above off-farm lands such as forests, woodlands, rangelands, or other traditionally shared lands.
- iii. establish free or genuinely affordable, locally accessible, and simple-to-follow *procedures* through which communities (or as appropriate, member families) may quite easily and formally register their rights and their lands, *if they wish*.
- iv. provide directly for *collective rights* to be as easy to register as individual rights, so that a community or a family or other group need neither partition their land nor be forced to register a legal entity in order to retain ownership.
- v. recognize *community institutions* as the lawful authority over community-derived rights and support these institutions subject to national oversight and regulation. This often includes new conditions to ensure that decision-making is more inclusive and democratic and to outlaw customary practices that abuse human rights.

Research identifies 14 states as having entrenched at least three of the above in law (Alden Wily, 2016; see also Africa country data at: <http://www.landmarkmap.org>). Several francophone states – Madagascar, Benin and especially Burkina Faso, are notable – have been active in establishing local frameworks within which community-based rights may be identified and certificated. Anglophone East Africa – namely Uganda, Tanzania, South Sudan and Kenya – has made striking advances in the unequivocal legal statement that customary land rights, including family and other collective rights, have the same legal force and effect as property rights issued under state-designed systems. Mozambique has done likewise.

Tanzania is a particularly good example of improved practices (see <http://www.landmarkmap.org/map/#x=78.42&y=-10.64&l=3>). This is because it combines recognition of customary rights with community-based institutional development to support this recognition. With the advantage that elected village governments were already in place ahead of land reforms, the Village Land Act 2002 declared these bodies as the legal administrators of all land rights within their respective village domains. Together these village areas cover 70 percent of the country, so formalizing each village land area became a priority. Each village government may

CASE 1:

**How secure are community lands?
A snapshot of the legal recognition of commons in Africa,
by Liz Alden Wily**

Please consult
Strategies 1, 2 and 11

Strategy 1

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Strategy 1

Strategies 1, 6 and 7

Strategies 1, 3, 6 and 11

establish a Village Land Register into which rights are recorded and certificates issued on request. However, no individual, family or other right may be certified until the community assembly (the quarterly meeting of all adults) has recorded the common property of all village members and drawn up rules for its use or disposition. These properties are normally shared grazing lands, woodlands, marshes and public service areas in the village. Adjacent villages may make agreements as to shared access and use. Customary access by pastoralists cannot be denied but terms may be negotiated. The law stipulates how village governments are to regulate land matters and the procedures to be followed should non-villagers, including local or central government, seek any part of community lands. Customary rules may apply, provided these do not defeat constitutional principles. Customary rights including ownership may also apply to reserved lands, such as those set aside for forest or wildlife conservation. There are no legal grounds that prevent a community from owning a nationally important forest or game reserve by agreement with conservation authorities.

There is a need now to increase the capacity of people to enjoy their rights. Many rural communities are unaware of their rights, may be misled by some leaders, or may be too ready to believe the promises of buyers and investors looking for lands. Similarly, the law itself may be contradictory on several key points. There are allegations of cases where authorities may have redrawn village boundaries to make land available to investors in sugar cane or other cash crops. The National Parks Agency has expanded parks and reserves several times, deep into adjacent village lands, for purposes that turn out to be private hotel developments or commercial hunting interests (see, for example, <https://intercontinentalcry.org/just-conservation/>). Court cases are beginning to multiply.

Strategy 9

In Tanzania and up and down the African continent, there is growing recognition among communities and advocates that while reformed law is a critical objective, raised awareness and vigilance of community land rights will always be imperative.

Further reading

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② Strategy 2: Strengthen or establish a legal framework focusing on procedural rules to accommodate the complexity, diversity and flexibility of tenure rights to commons

Rationale

Tenure rights to commons and the customary systems that govern them are complex, diverse and flexible. It is crucial to account for these flexible overlapping tenure rights to commons in order to ensure that all resource users have secure and equal rights to commons. For example, to grant exclusive ownership rights to one group of users may undermine the use rights of many other users of the commons. In addition, appropriate and sustainable rules for the management and use of commons require flexible context-specific adjustments. National legislation needs to consider this by providing sufficient legal space for such flexibility and diversity and local-level adjustments by customary community rules. As a consequence, the nature of the legal framework should be primarily that of procedural rules rather than substantive rules. This means that the law should focus less on regulating what is to be done or not done – the substance – but rather more on how and by which procedures these substantive regulations should be established at the local level.

Specific recommendations

- 1. Procedural rules should ensure that communities follow certain specified minimum requirements when making decisions about the commons and related tenure rights.** These procedural minimum requirements need to be consistent with the principles of the Guidelines to ensure, for example, that the interests of vulnerable and marginalized groups are respected, that legitimate interests of neighbouring communities are considered, that customary authorities are held accountable, that the commons are managed in a sustainable manner, and that other relevant laws such as environmental laws are respected.
- 2. Accordingly, procedural rules related to commons should comprise procedures for: the composition of decision-making bodies; participation, communication and consultation; planning and monitoring; conflict resolution mechanisms.** Such procedural rights make it possible to: obtain information about the management of commons; participate in, speak at and vote in meetings; be elected to the decision-making body; claim and enjoy one's substantive use rights to commons; complain and seek recourse in case of rights violations; negotiate and reciprocate with other tenure rights holders. Procedural rights are needed to ensure that substantive rights are not merely stated on paper, but are actually implemented and enforced in practice. Such procedural rules provide communities first with the legal space to define and agree on rules and mechanisms that will govern the process of allocation of substantive rights to use and manage commons, and second, to allocate those rights to different users thereafter.

3. **Procedural rules related to commons in the national legal framework should learn from procedures applied in customary law, and integrate them in so far as they are conducive to sustainable management practices for commons and do not contradict the rules of inclusive and accountable governance.** The integration of customary and statutory legal systems implies that both systems may need to be reformed so that they are consistent with the human rights-based standards set out in the principles of the Guidelines. Statutory law related to commons must not undermine customary law, but rather learn from and support it. At the same time, customary law must, for example, not discriminate against disadvantaged, marginalized and vulnerable groups such as women, landless people, pastoralists and other social groups. The same must hold true for legitimate customary institutions and structures, such as conflict resolution mechanisms (see Strategy 9). Integration also helps to avoid legal ‘forum shopping’, where one chooses the legal system that best fits one’s own interests.
4. **Substantive rules are necessary to ensure the consideration of basic and generally applicable principles and minimum requirements, such as environmental sustainability, gender equity, respect for the interests of minority groups, and restrictions regarding the transferability of tenure rights to commons.** Substantive rights refer to the sanctioned use of common resources – for example, grazing rights and the right to collect firewood – for different rights holders such as women, men or landless people. They can include powers to transfer rights: for example, to inheritance. They may vary in strength, security and exclusivity: for example, the exclusive use of arable land in the growing season and shared grazing in the fallow season. The allocation of substantive rights to commons influence, for example, whether women have equal access to commons.

CASE 2:
**Sámi pastoralism
 and the concept of
 the commons, by
 Ivar Bjørklund**

Sámi pastoralism and the concept of the commons

By Ivar Bjørklund
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Sámi pastoralism in northern Scandinavia implies a way of life dependent upon domesticated reindeer that people nurture and manage as their main subsistence. This adaption is traditionally realized through a flexible management system called the *siida*, which is built around a fluctuating membership based upon a bilateral kinship system. This system allowed them to establish flexible labour groups that could manage the fluctuating access to pasture and animals. Land was owned by the state/Crown while reindeer were individual property. Such a flexible organization made it possible to optimize the relations between people, reindeer and pasture according to the yearly cycle. Being relatively autonomous tenure systems, these informal pastoral regimes have existed until the present time (Bjørklund, 1990).

As for their collective tenure rights, it was intrinsic in Sámi customary law that members of a *siida* had access to certain areas throughout the year, but the resources (pasture, fish, game) could also be exploited by others depending on the circumstances and informal negotiations. In other words, Sámi jurisdiction and sense of justice was embedded in their pastoral practice (Marin & Bjørklund, 2015).

However, as nomadic reindeer herding came into conflict with the interests of the nation

states at the beginning of the 20th century, Scandinavian governments started to gain control over the pastoral practices. The crossing of national borders and conflicts with farming interests led to legal measures aimed at restricting and controlling the Sámi pastoralists and their access to pasture. This process marked the beginning of a political and economic integration into the nation states that is still going on today. This development was not identical in each of the Scandinavian countries, but what all measures had in common was a neglect of the Sámi's own traditional management forms – the *siida*. While the *siida* was instrumental in a flexible land and herd management system, the authorities introduced fixed administrative units with defined pasture land. These units were accountable to the state. In Sweden these were called *samebyar*, in Norway *reinbeitedistrikter* and in Finland *paliskunta*. In this way two management systems have existed side by side for a century or so, mainly indifferent to each other.

The reindeer husbandry laws introduced by Sweden in 1971 and Norway in 1978 marked an important paradigm shift regarding land and management rights. On the one hand, reindeer herding was made an exclusive Sámi right and the members of the administrative units were given specific rights to herding and fishing within the defined area. On the other hand, the collective or individual customary rights of the Sámi pastoralists were not recognized. All their pastoral practices had now become dependent upon the legislative decisions of the nation state.

Furthermore, in Norway their winter pasture land (owned by the state at the time) was now defined by law as a so-called 'common pasture' ('*fellesbeite*'). However, this 'common pasture' was conceptualized as an open access area, rather than being subject to the customary-based collective management practices and their informal distribution of land between the different *siida* groups. Consequently, a growing number of conflicts arose as some herders started to occupy pasture areas used by others, referring to the letter of the law.

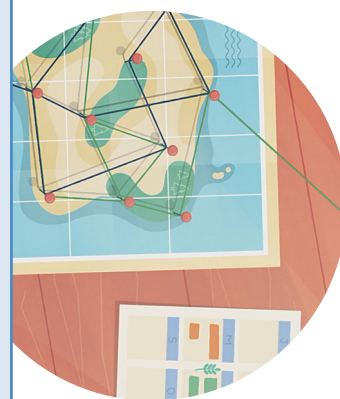
In addition, the legal understanding of the winter pastures as a so-called 'common' led to forced reductions of the number of reindeer, in order to avoid what the authorities defined as 'the tragedy of the commons'. The consequences of these regulations were a further eroding of the traditional Sámi management system and its principles of customary law, as well as political conflicts between the pastoralists and the authorities.

As infringements grew on pastoral land, cases were taken to court and the issue of indigenous customary Sámi rights has become more prominent in the last two decades, especially with reference to the international human rights conventions to which Norway is party. The outcome of the few cases resolved so far acknowledges the customary practices and rights of the pastoralists, but it remains to be seen if this legal clarification will trigger political and legal change.

On account of the state's disputed ownership of land in Finnmark, the northernmost region of Norway, and the obligations following from international human rights conventions (e.g. ILO Convention No. 169), a new law in 2005 defined Finnmark as being under the ownership of its inhabitants. All pasture land is now administrated by a board on which the Sámi Parliament and the Norwegian regional board (*Fylkestinget*) each have three representatives. However, due to competing and vested interests in the same area from industrial interests such as mining, windmills, and recreational needs, the decisions of the board do not always serve the interests the Sámi pastoralists.

Some lessons to be learned from the Sámi situation are:

1. In the last century, the governmental efforts to integrate the pastoralists into a national bureaucracy created profound problems. Their flexible herding units did not fit into the administrative system of the nation state.



Please consult
Strategy 9

Strategy 1

Strategies 1, 2 and 3

Strategies 1, 5 and 8

Strategies 1 and 9

2. By legally defining Sámi winter pastures as 'common', i.e. allowing open access to all pastoral Sámi, conflicts between the herders were created, because the new definition did not recognize customary pastoral practices regarding land use.

3. In order to resolve existing conflicts and prevent new ones, it is advisable to recognize Sámi land rights and customary management practices by law.

Further reading

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3 Strategy 3: Agree on rules for the utilization of commons, map their boundaries and register them based on a negotiated and inclusive local process

Rationale

The appropriate implementation of legislation to secure tenure rights to commons relies on two interrelated prerequisites. First, the legal recognition of commons requires mapping the boundaries of commons and registering the legitimate tenure rights of the different user groups, such as pastoralists, fishing communities and farmers. Second, implementation requires agreement on clear and respected rules for using the common lands, fisheries and forests. Such negotiated agreements are usually the basis for the legal registration. At the same time, legal registration may be an important prerequisite for making sure that agreements are generally respected. Both prerequisites – the mapping and registration as well as the identification of collective governance rules – can be best established through a local participatory and negotiated spatial planning process that involves all legitimate tenure rights holders. The integration of spatial plans, natural resource management plans and maps of boundaries, can support legitimate tenure rights holders in managing the commons sustainably and protecting their rights against infringement.

Specific recommendations

1. The communities, supported by state authorities, should engage in a participatory and locally-based spatial and natural resource management

planning process to define the areas of commons, to map the social and geographical boundaries, and to agree on rules for using the common areas in a sustainable, inclusive and effective manner. This planning process should result in a negotiated agreement between all legitimate tenure rights holders of the commons and neighbouring resource users, taking into account pre-existing rules. The mapping of the commons should evolve from a locally-based and inclusive process, including an analysis of and an agreement on:

- the social and geographical boundaries of the community, including all the different social and interest groups who hold legitimate tenure rights to the commons area, and who collectively govern the tenure rights to the commons resources. Boundaries may be fixed or fluid, and may be defined in a variety of ways: for example, the geographical area, utilization periods, type of gear, harvest size, group membership;
- the multiple and flexible patterns of resource use, buffer zones and future needs, as well as associated tenure rights;
- the cultural and social sites that are relevant for the legitimate tenure rights holders.

Defining the areas of commons normally implies also defining the areas for individual use, including specific rules for individually used areas where some collective rights may be claimed: for example, the passages used by pastoralists or access to water points.

Maps and associated tenure records then document the boundaries of commons, different tenure rights, rights holders and resource use. The mapping and planning process could be managed by a community-based natural resource management committee or other collective body (see Strategy 1). State authorities, if necessary in collaboration with CSOs, may need to be involved so that they can provide technical information and guidance, and to ensure that the services necessary for the implementation of the plan will be provided. The state also needs to ensure the compliance of local procedures with laws and higher-level spatial plans and objectives, as well as with the principles of inclusiveness, transparency and sustainability (see Strategy 1). The involvement of CSOs may be required to facilitate planning processes: CSOs may help to ensure that all relevant stakeholders and legitimate tenure rights holders are involved, can represent their interests and record their tenure rights, and are not discriminated against in negotiations on the boundaries. This is particularly important for people who are discriminated or vulnerable, including women, landless people, and temporary resource users, among others.

State authorities should recognize all kinds of locally legitimate evidence (e.g. maps, historical records, oral evidence) and assist with locally suitable and affordable technology such as GPS, mobile device mapping, tenure recording software applications, orthophotographs, and the necessary financial resources. In case of conflict, state authorities should assume a mediating role and, in case of persisting disputes, provide legal services.

2. Some points that could be discussed and agreed upon in the course of natural resource management planning, and documented in the community protocol or bylaw, are as follows.

- Documentation of all legitimate tenure rights holders of the commons resources, their tenure rights, and the respective uses of the commons resources (including type of resource, use, point in time and duration) and a consensus on equitable access and use. A documentation of the legitimate rights of neighbouring users should also be included.
- Plans, provisions and minimum environmental standards for the sustainable use and management of commons by all resource users. To this end, it is advisable to identify, document and consider customary management practices that have proven to be sustainable over time.
- Principles and tools of negotiation, including reciprocity, fee-based systems, and the frequency of future negotiations.
- Benefit-sharing arrangements, in particular with landless members of the community, e.g. on using community forests for firewood collection and non-timber forest products.
- A plan on how to generate income from commons in the long run – including, for example, consensus on the commercial use of commons and desired investments in processing facilities – in order to tap into local value chains (see Strategy 10).
- Standards for the community-led monitoring of the implementation of a natural resource management plan, a territorial plan, a land-use plan, or another type of sustainable use plan; similarly, standards for the conditions of the natural resources involved in production processes, and sanctions for violations of rules and agreements.

3. The legitimate tenure rights holders of commons are encouraged to initiate the registration of the commons areas and the respective collective tenure rights.

The commons area and related collective tenure rights should be registered in an official registry in order to obtain legal protection against rights infringement. Commons should be registered in the name of a legal entity (e.g. the natural resource management committee or other collective body) representing all legitimate tenure rights holders of the commons area, and not in the name of an individual person like a traditional leader (see also Strategy 1). Buffer zones can also be registered in the name of neighbouring legal entities, accompanied by procedural rules to establish the governance structures of the buffer zones. Agreements on the different tenure rights and resource uses of the legitimate rights holders of the commons (the members of the community) should not be recorded in the official registry, but documented in the community protocols or bylaws (see point 2). If collective tenure rights are nested within areas for individual use, it should be explicitly recognized that these collective tenure rights should not be extinguished when individual rights are registered.

Cambodia's community fisheries: Overcoming challenges of contested boundaries in riparian commons

By John Kurien
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"The current fishery rights system in Cambodia is the most extensive and well-developed system of community fisheries in the world." (EU Representative to Cambodia at the FAO/UN User Rights 2015 Conference held in Siem Reap. see: http://www.icsf.net/images/samudra/pdf/english/issue_70/252_Sam70_E_ALL.pdf pp. 34–41)

Defining tenure boundaries in an aquatic context is a daunting task. This is made even more difficult when dealing with a dynamic land–water interface marked by significant seasonal fluctuations. Nevertheless and taking advantage of its overriding control of tenure in all such terrains, the state reserves the right to grant 'common tenure' with differential bundles of rights to riparian communities to access and manage such fuzzy interfaces. A bold experiment in Cambodia in Southeast Asia is a trailblazer in this regard.

Cambodia's vast aquatic resources are part of the larger Mekong River Basin and one of the most extraordinary ecosystems on Earth. At the heart of this area is the Tonle Sap – the largest freshwater lake in Southeast Asia and the most productive and biodiverse freshwater zone in the world. During the peak flooding season from June to September, the seasonal monsoon causes the Mekong and its tributaries to spill out of their channels. When this happens, the Tonle Sap – now designated a UNESCO Biosphere Reserve – grows from about 2500 km² to cover more than 16 000 km² of land, or about 7 percent of Cambodia's total land area. Defining microboundaries in such a context can be difficult, though not impossible.

Tonle Sap teems with fish that nourish Cambodia's population, making Cambodia the world's largest consumer of inland fish. In 1863, the French Protectorate introduced tenure rights to the most productive parts of the lake by auctioning licenses for control of vast areas of the lake to individuals. The royalties generated sizeable revenues for the state, but the direct benefits accrued to a small coterie of individuals. Conflict between the owners of the lots and the poorer rural folk over access to fish became endemic around the lake. The time-honoured status quo was eventually altered and dramatically so, in 2000. Cambodia's Prime Minister made an unexpected announcement cancelling half of all fishing lot licenses belonging to a few hundred powerful individuals and granted rights of access to thousands of poor rural families. This action immediately began to empower the local riparian communities.

This was a state-sponsored aquarian reform. The first step taken was to establish a Community Fisheries Development Office within the Fisheries Administration. This office quickly set out to frame a special subdecree for creating Community Fisheries institutions (CFI) under the Fisheries Law, in consultation with civil society, international development partners and the communities. Meanwhile, spurred on by their new freedom to access the resources, many communities initiated the process of creating new CFIs, sometimes with support from NGOs. To do this, they submit a 'petition of interest' signed by interested members to the local Fisheries Administration, enclosing a hand-drawn map of the proposed area of their commons, which is usually composed of a dynamic land–water terrain. The Administration investigates the claim, conducts a needs assessment with the petitioners, arranges for a rough check of the boundaries, and gives a tentative approval or rejection notice within 30 days. If approval is obtained, the Fisheries Administration sets out to disseminate to the interested members their rights and responsibilities as spelled out in the subdecree. To obtain formal recognition of their CFI from the Ministry of Agriculture, Forestry and Fisheries, the CFI must do the following.

CASE 3:
Cambodia's
community
fisheries:
Overcoming
challenges
of contested
boundaries
in riparian
commons, by
John Kurien

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Strategies 1 and 4

Strategies 1, 3 and 6

Strategies 1 and 3

With the assistance of the Fisheries Administration, the members form a general assembly. This assembly initiates a democratic process to decide on a name for their CFI, to frame its objectives, its internal rules and its regulations, and also to elect a managing CFI Committee from among the members. A list of the names of all members and the Committee is prepared. To produce an accredited map, the CFI area is physically mapped, in cooperation with the Fisheries Administration and neighbouring communities, to hedge against potential future boundary disputes. The local authorities, competent NGOs and technical agencies often help with financial support and mapping skills. The use of orthophoto mapping technology, again with assistance from international development agencies, has been widely reported. Large cement boundary markers are placed at points that are perennially under water.

Once formally registered with the Ministry, a CFI holds the exclusive use and management rights to the fishery domain within its mapped jurisdiction for an officially recognized time period of three years, which is renewable. Fishing in the CFI is meant strictly for subsistence and only very small-scale nets and traps are permitted legally. Consequently, the risk of overfishing is minimal in this salubrious and highly productive ecosystem. Each CFI is required to prepare its own management plan to chart how it will utilize and conserve its common domain and resources. This plan includes a careful inventory of the different ecosystems in the area, listing the diversity of fish species and seasonal patterns, clarifying the total fishing assets available to the members, and providing a rough assessment of the sustainable resource yields that can be harvested. All the CFI's commoners are duty-bound to protect their commons from harm. Formal patrol groups, composed of members, are active in all CFIs.

Strategy 10

Recent assessments show that there are many small but significant 'blessings of the commons', including greater employment and income opportunities for women, as well as numerous and widespread successful conservation initiatives for flora and fauna. Self-help credit and saving groups have provided a fillip to the fulfilment of important household needs. The governance of their commons has thrown up new leaders among the rural population that has reinforced the merits of collective action, and has made a significant dent in the 'trust deficit' which prevailed in periods of conflict and war. But there are also many challenges to overcome, such as the bane of illegal fishing and the conflicts arising from it. There are procedures for settling disputes and graded sanctions in place, yet the will of the commoners often pales in comparison to the might of the powerful. Another issue of concern is the 'restrictive' definition of the organization as a 'fishery' institution, when the vast majority of commoners only fish for consumption but depend on agriculture and other service-sector activities for their main livelihood.

In 2012, noting the nutritional, economic and social benefits which widely accrued to the communities from his earlier policy pronouncements, the Prime Minister completed his reforms by taking over the remaining half of the fishing lots and converting them into conservation zones in the lake. In his words, the aim was "to protect the lake's pressured wild fisheries on which tens of thousands of subsistence fishermen rely." Today, there are over 500 CFIs in Cambodia. But not all of these yet function as 'lively commons': many remain 'empty shells' for lack of leadership and timely support from civil society and development partners. Yet these commons cover over 850 000 hectares spread across 19 of the country's 25 provinces. There are 188 000 participant commoners of which more than 61 000 are women. This framework for a modern commons, and the rich experience of thousands of commoners collaborating over the last 15 years, is already a huge corpus of social capital that can be tapped in the future, with the right facilitation and support.

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4 Strategy 4: Establish a transparent policy-making and law-making process that enables communities and civil society to participate

Rationale

Policy-making and law-making are often highly conflictive processes in which powerful actors such as national or local elites try to influence the process to guard their vested interests. It is therefore crucial to establish a transparent, inclusive and deliberative legislative process that ensures the voices of all stakeholders and rights holders to commons, including women, men, youth and the elderly, are considered. Such a process improves the quality of policy and law, and tailors these to local contexts. It ensures greater equity and promotes collective action, reduces the potential for corruption and minimizes the undue influence of privileged groups. It also increases legitimacy and a sense of ownership, and ultimately the effectiveness of the legislation (FAO and ITTO, 2005/xiv). To this end, a specific law needs to ensure that this policy- and law-making process is transparent, inclusive and deliberative, and that participation in the process is supported by state and non-state actors.

Specific recommendations

1. **To ensure effective participation and enable integrative approaches in the drafting and adoption of any law, policy, regulation, procedure or contract, the legislation needs to include legal requirements and regulations that open up space for meaningful participation and deliberation.** Through its legislation the state should ensure that:
 - legitimate rights holders and stakeholders, especially affected populations and civil society organizations, are informed and enabled to participate in the deliberations in a language and a manner that is accessible to them and culturally appropriate;
 - legitimate rights holders and stakeholders, at the very least through duly appointed representatives, are enabled to be involved from the beginning through a multi-stakeholder process, and agree on core principles that should function as an agreed framework to guide the drafting or reforming of legislation;
 - legitimate rights holders and stakeholders have prior knowledge of when to give feedback both before a draft is produced and after publication for review. The

options for how and where to formulate objections and make contributions are communicated clearly;

- legitimate rights holders and stakeholders receive technical and legal support, including financial resources and enough time to be enabled to develop their inputs. The state provides all the necessary means to reach the local level;
- where marginal groups are unable to freely engage and speak up in a multi-stakeholder process, consideration may be given to setting up specific focus groups to ensure that their views and priorities are addressed in legal and policy development.

2. Even where legislative procedures include participatory structures, rights holders and stakeholders may find it difficult to access them and need support to make successful use of their right to participate. State actors, community institutions, international organizations and civil society can do the following to support participation:

- civil society organizations can raise awareness among communities and mobilize and support them to call for legislative reforms to secure tenure rights to commons, as this can provide an electoral incentive that will encourage the government and legislators to listen. Communities themselves need to form part of the demand for policy changes from the outset. To this end, communities should be empowered to articulate their interests and share their knowledge and experiences;
- support and facilitate deliberative processes to assess current legislative frameworks and build technical capacity to draft adequate legislative frameworks. Civil society organizations can introduce a middle ground whereby government and communities can work together on an equal footing to review and draft laws, policies and guidelines for the registration, management, and utilization of commons;
- support the organization of rights holder and stakeholder groups, and the formation of networks, coalitions and fora, that will introduce platforms and processes for deliberating laws and policies, and that will discuss and select their sectoral representation to the national law- and policy-making processes.

5 Strategy 5: Carry out advocacy work to support tenure rights to commons

Rationale

Advocacy work is crucial to support the recognition and implementation of legitimate tenure rights to commons. Advocacy work can help to advance the awareness and understanding of tenure rights to commons and to gain acceptance of these rights at the public and political level, as well as the cultural, social and personal level, which includes addressing values and attitudes. It supports political decision-makers to

create or reform powerful and well-tailored legislation for commons via an inclusive and transparent process, and to improve enforcement structures to ensure effective implementation of the law.

Specific recommendations

A desired change in the legislation to recognize and protect tenure rights to commons must be approached from various angles. While advocacy work will ultimately be directed towards political decision-makers, awareness raising should happen through various channels. Advocacy work can be carried out by different stakeholders, from civil society organizations to government advisers, donors and lobbyists. Civil society organizations, and especially initiatives led by women, will have a special role to play in arguing favourably for the commons, thereby demonstrating their value and importance in supporting secure livelihoods. Scientists will be crucial to providing credible and reliable information and facts. Reporting by local, national and international media should be considered a critical tool for the dissemination of arguments and evidence that may impact on the legislative text.

1. Messages for decision-makers and the broader public may include (see also Chapter 2.2):

- the **economic value** of commons in: sustaining agricultural, fish-, forest- and livestock-based production systems; providing a resource safety net in harsh times; strengthening rural livelihoods, contributing to poverty alleviation and supporting food security, particularly in the context of climate change. The community may provide evidence for this value by, for example, calculating the cost of buying all the products and services that they currently derive from the commons (Knight, 2015);
- the important contribution of **collective action** in conflict resolution, to help reinforce legal contracts through exemplary 'social contracts', and for the cost-effective local governance of natural resources;
- the **social value** of commons in terms of equity, justice and social stability, cultural identity and religious meaning, livelihood and well-being;
- the **ecological value** of commons in terms of providing local and global ecosystem services, contributing (for example) to water production, wildlife habitats, soil protection and climate change mitigation;
- countering and dispelling the widespread misconception of commons as 'wastelands', idle or under-utilized lands, 'backward systems', 'tragedy', and instead emphasizing community governance of tenure as a viable alternative to individual and state-controlled tenure;
- the principles, provisions and recommendations of the Guidelines themselves;
- reference to the human rights framework, asserting the right to food and other related rights.

2. Instruments to reach out to political decision-makers and communicate brief and targeted messages, for example:

- policy briefs referring to concrete government objectives (or the policy

guidelines of the relevant political party) and their impact on commons, rather than lengthy papers;

- examples showing how recognizing and utilizing commons can work, demonstrating which benefits commons provide and which disadvantages accrue if they are not recognized, for example by using texts and audiovisual materials;
- inputs on specific characteristics of tenure rights to commons and their importance to local realities, for example through short videos and animations;
- dissemination of information on the country's international human rights obligations and treaties.

3. Journalists in particular can contribute, for example, through researching and writing:

- engaging stories on good practices;
- information on conflicts and scandals related to the misappropriation of commons;
- facts and figures based on credible research results.

4. Advocacy work by civil society organizations is directed towards both the broader public and decision-makers. Activities may include:

- making use of legally provided forms of participation such as: public consultation fora and public hearings; invitations for comments on draft policies and laws; membership on boards and multi-stakeholder platforms; utilization of complaint channels and monitoring mechanisms. In cases where there are no opportunities to participate in a formalized way, civil society organizations can try to gain timely access to information on draft legislation so that they can respond, mobilize public opinion and the engagement of concerned stakeholders, stimulate public debates on critical issues, and build alliances;
- public resolutions, petitions and information campaigns launched in the traditional media or via social media;
- field trips for exchanging experiences, preferably to the constituencies of politicians;
- focused consultation meetings with key persons in politics and administration;
- press releases, radio shows and other mass media;
- networking among decision-makers from policy bodies, civil society, science and media, thereby enhancing the exchange of knowledge and the sharing of different perspectives;
- networks involving lawyers, members of the legal and justice sectors and human rights organizations, to build strong arguments and provide an overview of statutory and case law;
- legal advocacy to support communities and rights holders in asserting their tenure rights to commons. This may take time, but can result in progressive judgements that can lead to the reform of national legal frameworks (see also Strategy 9).

- supporting legitimate rights holders and their representative organizations to undertake advocacy, seeking the recognition and protection of tenure rights to commons in bilateral and multilateral agreements and programmes on development, environment and trade (e.g. FLEGT Voluntary Partnership Agreements, REDD+ and other emission reduction agreements, Payments for Ecosystem Services, regional integration initiatives, protected area programmes).

Note that lengthy legislative processes often require the continuous engagement of delegates with profound legal knowledge, familiarity with the legal aspects of commons, and grassroots experience.

3.2 Strategies for implementation by states and rights holders

⑥ Strategy 6: Strengthen or progressively develop inclusive and accountable community governance structures

Rationale

The recognition of the community as a collective rights holder with the authority and responsibility to govern its commons requires legitimate, inclusive and accountable community governance structures in accordance with the principles of the Guidelines (see Strategy 1). This will help to avoid elite capture, to enable customary authorities to assert and adjust their roles, and to ensure that all legitimate tenure rights holders are included and represented in the community institutions. Depending on the context, such community governance structures may already exist or they may need to be strengthened and progressively developed. However, this may challenge power relations that are often entrenched within the community, and an inclusive representation of all stakeholders and legitimate tenure rights holders may not be sufficient to avoid elite capture of community institutions. The integration of governance structures and adaptation to international standards of human rights as outlined in the Guidelines may therefore require new capacities from community institutions. In addition, community solidarity and rules for dealing with commons are often challenged by processes such as individualization, commercialization, migration and related policies that are introduced. Therefore, the process of strengthening community institutions and self-governance needs to be supported through capacity development, facilitation and awareness raising.

Specific recommendations

1. Ongoing support, capacity development, facilitation and mediation by external stakeholders may be required until inclusive and accountable community

governance structures are strengthened, internalized and implemented in practice, and the rights of vulnerable and marginalized groups are respected. Representatives from local governments or technical line ministries (e.g. land-use planning officers) should offer and invest in technical advisory services, capacity development and facilitation (see also Strategy 8). The training of officially recognized paralegals, for example, can support the integration of customary and statutory governance structures, provide legal aid and advice, and contribute to the resolution of conflicts within communities, as well as between communities and government bodies. In countries where governance is weak, it may be necessary for civil society organizations to support the process through facilitation and mediation, as well as capacity development. Community members' capacities to strengthen community governance structures effectively can be supported through: learning opportunities, including leadership skills development; sustainable natural resource management planning, implementing and monitoring; enabling representation that voices the interests of the community; and networking.

2. **Awareness raising in communities on the value of commons, tenure rights to commons, and collective action, has an important complementary and supporting role to play.** Community members themselves or civil society organizations can raise awareness, e.g. through workshops, public festivals, radio, and the use of photography and story-telling in the respective local language, with the aim of addressing deeply rooted values, attitudes and customs. This approach may well reach more people than any written material, especially mobile groups and those living in remote areas, as well as those who are illiterate or semi-literate.
3. **Developing a community protocol or bylaw may be a vital way for communities to set out, in a participatory manner, their internal community rules for the governance of the commons.** This may include procedural and substantive rights, rules for the sustainable management of commons and the equitable sharing of benefits, locally determined visions and priorities, as well as how to engage with different stakeholders. It is important to ensure that the process of developing such a community protocol or bylaw is community driven in an inclusive manner, and that local contexts are taken into consideration when determining whether to engage in such a process. State authorities need to support and ensure that the local rules, laid down in the community protocol or bylaw, are in accordance with the national constitution and the principles of the Guidelines. Community protocols and bylaws need to be reviewed periodically, and can help communities to advocate and defend their tenure rights to commons and negotiate with others on an equal footing.
4. **Network formation can strengthen the communities' commitment to govern the commons in an inclusive, accountable and sustainable manner.** Network formation, both at national and global level, can help highlight unified community voices in national and global discourses on the recognition and protection of tenure rights to commons. Lessons learned and successful practices can be exchanged effectively between communities through such networks. Knowing that their efforts are recognized and supported throughout the world, communities may be encouraged to strengthen their commitment to the commons and engage in joint problem-solving.

Alleviating intra-community injustices on commons management by associating Traditional Rulers to the debate on land?

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This case presents a process that was led by Traditional Rulers* to better shape their role in land management in Cameroon. The process is unique for Africa: for the first time, Traditional Rulers elaborated for themselves strong ideas for a political reform, with safeguards to protect and delimit their current power and to limit risks of land grabbing.

Recent years have demonstrated that the starting point of injustices in management of the commons often lies with the Traditional Rulers' responsibilities as commons managers, including the exclusion of women and other vulnerable groups, unfair judgements in land matters, and the selling of community lands. In Cameroon, purchase of land by elites from local land managers such as Traditional Rulers, is often conducted without respecting legal procedures nor customary tenure rules, such as those on the indivisibility of the commons. As a result, traditional institutions all over the country are losing their credibility and face progressive crumbling of their authority.

This situation prompted Traditional Rulers in Cameroon to begin, in 2012, a reflection on their own management of rural commons and related risks. They asked a national NGO, the Centre for Environment and Development (CED), to facilitate with them a process to develop a proposal on land tenure reforms. The Traditional Rulers further agreed among themselves that this proposal would be a first step, to be followed by further steps including a clear documentation of the very diverse ethnic land tenure systems existing in Cameroon.

Traditional Rulers were initially resistant to discussing this in public, on account of three concerns:

- i. Ideas about land management are deeply ingrained in the culture of the country, including endogenous perceptions of land, religious ideas, political dynamics and other aspects, some of which are hidden and therefore implicit.
- ii. The Traditional Rulers feared that any discussion among themselves would fail, due to the high diversity of cultures in Cameroon.
- iii. The remaining essence and strength of customary power has been eroded significantly over the last 100 years, because of colonization and its effects.

To address such complex issues, the Traditional Rulers wanted the proposal to be general enough that it would capture diversity, and specific enough to reflect their own peoples' realities. Seizing the opportunity offered to them by the ongoing land reform in Cameroon, the Traditional Rulers therefore developed a proposal outlining important matters that the new legislation should provide for, as follows.

1. Recognize the village as a full administrative unit to reinforce the current decentralization mechanism whereby the Commune is considered as the lowest decision-making level.
2. Recognize the right of a village to collectively own the land where it is settled. The ownership, without any particular formalities, is grounded on the principle that the village exists and is recognized by neighbouring villages. While collective ownership does not oppose individual ownership, it is necessary to delimit a maximum surface area that can be owned by a single individual.

CASE 4:

Alleviating intra-community injustices on commons management by associating Traditional Rulers to the debate on land? by Téodyl Nkuintchua, His Majesty Bruno Mvondo, Samuel Nguiffo

Please consult
Strategy 1

Strategy 1



3. Recognize the validity of customary law in the management of rural/village lands with respect to vulnerable groups.
4. Delink community property rights from the demands of resource exploitation, while recognizing those rights based on customary laws. Cameroonian land law, as with many other laws in Africa, disposes that land can only be owned upon proving its development (*mise en valeur*) for agriculture, housing, and other visible uses. This is detrimental to the environment and automatically disqualifies indigenous peoples who have been managing forests for centuries with very little impact.
5. Clearly define the place and role of Traditional Rulers in the management and administration of lands and other resources. As representatives of their communities, Traditional Rulers should be involved in land transactions and investment monitoring, but they should not be able to take decisions only by themselves.
6. Recognize women's rights to land ownership. This requires dialogue between Traditional Rulers and women's groups across the country as discussions have revealed that many violations resulted from the wrongful application of customary land tenure and the law.

This proposal makes a number of pleas: to differentiate rural lands from urban lands and consider the former as commons; to ensure that land management takes into account human rights; to ensure that rural land management can only contribute to achieving Cameroon's development goals if rights holders are part of the decision-making process concerning the use of the land.

Strategy 7

The Traditional Rulers' initiative received a positive political response, enabling them to become more involved in the debate on the management of land and other resources. In January 2015, the Prime Minister created a high-level commission to reflect on their proposals in order to inform the ongoing mining, forest and land law reforms. This is a unique process in Cameroon. Importantly, the proposal of the Traditional Rulers' initiative inspired another 16 proposals for land reform by other societal groups, including women, indigenous peoples, members of parliament and civil society networks. Common features of these proposals include, for example: the need to consider rural land as commons; the need to create safeguards for the recognition of women's tenure rights; the need for an evolution and update of customs and usages according to current national and international laws that protect human rights; the need to strengthen the power of other local groups such as women, young people and indigenous peoples.

Strategies 1 and 12

Strategies 6 and 7

To use these positive dynamics to overcome the issues of elite capture and intracommunity injustices, there must be further steps. First, the proposals for land law reforms from different societal groups need to be harmonized to build a stronger advocacy agenda that will influence new laws on natural resources. This will not only help to secure commons, but will also help to secure intracommunity justice by limiting the power of traditional institutions. Second, all Traditional Rulers need to be convinced of the need to remove injustices from their respective customs. The next step envisaged by the network of Traditional Rulers is to follow-up on the discussion of their proposal with other societal groups, to document injustices they are accused of perpetrating, and to start negotiating with specific Traditional Rulers who are reluctant to change their practices. Only at the end of these internal and external negotiations can their proposal be considered finalized and ready to be enacted fully in land law.

Strategies 1, 2, 5, 6, 7 and 12

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accused of perpetrating, and to start negotiating with specific Traditional Rulers who are reluctant to change their practices. Only at the end of these internal and external negotiations can their proposal be considered finalized and ready to be enacted fully in land law.

** Traditional rulers in Cameroon are custodians of the tradition designated by their communities. At the same time, they are linked to the administrative set-up of the state and positioned at its lowest level. Their authority and legitimacy therefore derives from both the state and the customary political systems and tradition.*

Further reading

CED, ReCTrad and CNCTC. 2013. *A proposal by Traditional Rulers on land tenure reforms in the rural areas of Cameroon*. Ratified during the brainstorming workshop on Rural Land Tenure by Traditional Rulers and leaders of indigenous Communities. Yaoundé, 11–12 December 2013. (available at http://www.cedcameroun.org/wp-content/uploads/2015/01/122013_Proposition-des-chefs_EN.pdf)

7 Strategy 7: Support the empowerment of marginalized and vulnerable groups within communities to make effective use of community institutions

Rationale

Taking the often entrenched power relations within communities into account, the less powerful sections within the community need to be supported and empowered to participate fully in community institutions, and make adequate use of their procedural rights under the newly developed or strengthened community structures, which will be inclusive and participatory. This is particularly relevant for women, youth, the elderly, landless people, and others whose livelihoods and food security strongly depend on commons.

Specific recommendations

1. **To empower marginalized and vulnerable people within a community, government agencies must provide support. In case these challenges are not adequately addressed by governments, civil society organizations are often the best actor to support empowerment.** Capacity development and empowerment are usually time-intensive processes and therefore require long-term engagement and support. They may also require the provision of **external financial support**, given that the costs of participating (e.g. time, transportation) are usually felt most by vulnerable groups.
2. **Tasks to be carried out include conducting a participatory assessment of capacity development needs, and a power analysis to identify specific support measures.** The assessment must cover knowledge, skills, power relations and attitudes related to substantive tenure rights to commons and procedural rights. It is important to consider know-how regarding institutional procedures, roles and responsibilities,

knowledge of relevant policies, laws and legal mechanisms, as well as technical know-how regarding resource management. Having the capacity to make use of legal mechanisms and timely access to justice are crucial for vulnerable and marginalized people, to ensure that their rights to commons are upheld by law (see Strategies 8 and 9). Capacity development initiatives and training must then be developed and implemented to address these needs and power imbalances. It is also important to build up these people's self-esteem so that they can confidently articulate their interests and assume roles beyond customary patterns.

3. Supporting the formation of stakeholder groups and networks is also important.

These include women's clubs, youth groups and pastoralist associations. Disadvantaged groups – most often those who depend on commons – usually need to organize themselves to represent their interests competently and confidently through their legitimate representatives. These representatives may need special training to fulfil their leadership functions. The exchange of experiences among commoners from different regions or even different countries is often a very empowering experience, and these networks and associations can support this.

4. These efforts can be supplemented by engaging the more powerful members of the community in the discussions.

For example, discussions about solutions for strengthening women's tenure rights are likely to require the involvement of men. Another step is to begin dialogues with customary authorities on ways and means of adapting customary laws so that these laws ensure justice for women. To this end, customary authorities and women should be involved in distinguishing between customary practices that are discriminatory and those that support women's rights.

For further discussions in this regard, also consult technical guide No. 1, *Governing land for women and men* (FAO, 2013a).

8 Strategy 8: Strengthen or develop the implementation capacities of state officials and devolve human and financial resources

Rationale

Legal reforms such as land, fishery or forest reforms that aim for the recognition of tenure rights to commons are not automatically made effective on the ground. The executive and judicial branches of the state may not be well prepared for the change in administrative routines or altered jurisdictions required by the new or reformed law. In the case of commons, these branches may be prejudiced or hold discriminatory attitudes towards customary rights holders. They may lack a proper understanding of commons and the complexities around them. They may lack the necessary technical know-how for new tasks resulting from the law, and may not be properly equipped with the necessary human, material and financial resources required for these tasks. They may not be convinced of the relevance and appropriateness of the legal reform aimed at protecting the commons, and therefore may be reluctant to make efforts to implement that law.

Nevertheless, government administrations and the judiciary have important roles to play on different administrative levels to ensure that tenure rights to commons are implemented effectively. These include administrative, judicial, planning and support tasks. The state officials in charge of these tasks at national and subnational level must therefore be capacitated to implement them effectively, enforcing the legal framework for the governance of commons and supporting the devolution of authority and responsibility to communities. This requires the proper interpretation of national and international law, technical know-how, specific judicial competence, awareness raising among the officials in charge, and the appropriate allocation of resources.

Specific recommendations

The realization of tenure rights to commons requires a process of developing and increasing commons-specific capacity and awareness in governmental, parliamentary and judicial authorities. This includes the following elements:

1. **Governments need to provide all necessary information and guidance on the reformed or new legislation and policy, in order to ensure that all government officials, parliamentarians, judges, prosecutors and judicial staff in charge of land, forest and fishery issues know and understand the law, know its implications for their own roles and responsibilities, are aware of its intentions, and are convinced of its relevance.** This needs to be done for all new aspects of the legislation, but in particular with regard to the commons and their importance and complexities, including knowledge about customary tenure systems and their diversity. Proper interpretation and understanding of the law requires targeted training courses and workshops, practical implementation guidelines and manuals, as well as platforms for knowledge exchange. For the proper understanding of the governance and management of commons and respective sections of the law, site visits to communities that have well-managed commons might be helpful.
2. **Governments need to build up the technical know-how and the legal capacity of state officials – in particular land/fishery/forest administrations – and of judges, prosecutors and judicial staff at national and local levels, to manage adequately the new tasks arising from the law and to comply with new mechanisms and procedures.** The capacity development requirements may be very different and should be defined on the basis of an assessment of the gaps between existing and required capacities. Specific fields in which innovative procedures and related skills are usually required include:
 - development of new legal terms and concepts to capture the complexity of commons;
 - participatory mapping and recording of tenure rights;
 - administrative processes for registration;
 - managing planning processes for participatory land-use/natural resource management, giving special consideration to the planning requirements for sustainable management of commons;

- adaptation of administrative processes and forms to the needs of collective tenure;
 - legal training regarding the specific legal implications of disputes related to commons;
 - establishing procedures and mechanisms that facilitate access to justice;
 - establishing participatory monitoring mechanisms and procedures.
3. **Besides these tasks states will, with the assistance of other actors such as CSOs, need to play a role in supporting communities to fulfil their new role in governing and managing the commons. This requires a type of interaction between state officials and communities that is often unfamiliar to state administration. Consequently, the skills of government officials, parliamentarians, judges, prosecutors and judicial staff to support community-level governance of commons, and to ensure compliance of communities with laws, needs to be strengthened. This refers to:**
- legal training to enable these actors to understand legal terms and ensure adherence to national laws, the principles of the Guidelines and related international law and obligations;
 - **to establish standards for the recognition of locally legitimate evidence before courts and in the registration; to hear and deciding on disputes at national level in a timely manner;**
 - training agents to offer affordable legal support for vulnerable and marginalized groups, i.e. legal clinics, mobile offices, paralegals;
 - guidance on how to set up and facilitate inclusive multi-stakeholder processes. Training enables state officials to conduct participatory law-making and policy-making processes, and facilitate inclusive and participatory mapping of commons. Training can be offered by CSOs, donors or governmental institutions, but it should be initiated and financially supported by government;
 - guidance with regard to the establishment of appropriate transparency and accountability mechanisms that are sensitive to community cultural and spiritual values, so as to reduce and avoid unsustainable and inequitable use of and exploitation of natural resources on commons. Such mechanisms include: grievance mechanisms such as an ombudsman who has an official duty to investigate rights infringements and report to the government and society; public access to records and maps, to information online and through channels adapted to the local circumstances; training to create independent multi-stakeholder monitoring and evaluation teams that must include representatives from community institutions.
4. **To be prepared for their new role of interacting with communities in a participatory, accessible and culturally-sensitive manner, the capacity development of government officials, parliamentarians, judges, prosecutors and judicial staff should also address their attitudes and behavioural patterns. This might be accomplished through:**

- mentoring programmes by community networks/institutions, CSOs, and international organizations or donors. From their work at grassroots levels, these stakeholders have vast experience of commons and are usually able to frame their knowledge in a way that is relevant to state officials;
- promoting and facilitating mutual learning and knowledge exchange through cross-field visits, study programmes and the facilitation of networks for state officials and community-based organizations and CSOs.

5. Governments need to increase their enforcement capacity. This includes:

- the identification of budget items that are governed at national and subnational level, and appropriate allocation of financial and human resources at national, district and local level;
- training and financing of relevant staff, such as registrars, judges and police officers specialized in tenure rights to commons, at national and subnational level;
- building the capacity of the police to provide adequate evidence on tenure rights cases, thereby enabling courts to properly judge these cases;
- building the capacity of courts to judge cases quickly and to avoid cases being dropped under statutes of limitations;
- development of police services with adequate human and financial resources and a transparent and accountable structure for timely prosecution and timely collection of fines once judgements have been passed;
- provision of adequate technical equipment and financial resources for participatory monitoring of tenure rights and to reach remote areas;
- in case of prevailing corruption, the rotation of enforcement staff and regularly changing the officers responsible for the implementation of tenure rights, or operating with federal police forces from a different region of the country.

CASE 5:

Overcoming the implementation gap of tenure rights to commons through a multi-tiered and holistic capacity development approach for community-based forest management, by Reymondo Caraan, Ronnakorn Triraganon, Chheng Channy, MaungMuang Than, Sokchea Tol, Bounyadeth Phoungmala, Warangkana Rattanasarat, and Kuntum Melati

Please consult
Strategies 1, 3 and 8

Strategy 8



Strategy 8

Overcoming the implementation gap of tenure rights to commons through a multi-tiered and holistic capacity development approach for community-based forest management

By Reymondo Caraan, Ronnakorn Triraganon, Chheng Channy, MaungMuang Than, Sokchea Tol, Bounyadeth Phoungmala, Warangkana Rattanasarat and Kuntum Melati RECOFTC – The Center for People and Forests

In the Asia-Pacific region, communities hold statutory tenure rights to one third (34 percent) of the region's forests (RECOFTC, 2013). This 182 million hectare land area is officially managed under locally-based community forestry agreements. The state owns and manages 57 percent of the forests – an area that is potentially available for allocation to community forestry (CF), given suitable changes in law and policy support. The trend of distributing forest land rights to local communities continues in favour of more than 450 million people who are living in proximity to these forest lands and whose lives are deeply integrated with the forests.

In the wake of degrading natural resources and increasing pressures with regard to local benefit-sharing from natural resources, ASEAN governments have set a collective target of 15.9 million hectares (6 percent) of the region's forest lands to be transferred to local communities by 2030 (RECOFTC, 2014). While this joint commitment is only a start, pioneers already exist: the governments of Vietnam and the Philippines have recognized the positive effects of local schemes to govern natural resources. They have created legal frameworks in support of community-based forest management and have addressed the complex and time-consuming nature of land allocation processes through active policy support and supportive means for implementation.

In this process of change, the capacity development of stakeholders in government, communities and civil society organizations is essential to make the establishment, implementation and enforcement of new tenure arrangements work at the national and subnational level.

A Capacity Development Needs Assessment (CDNA), conducted in the region by RECOFTC from 2009 to 2013, revealed widespread institutional, organizational and individual capacity gaps for community forestry development in several areas: the assessment of biophysical and socioeconomic situations; planning for sustainable forest management; research into participatory action; conflict resolution and mediation; policy advocacy and reform; forestry extension services.

In the promotion and implementation of community forestry arrangements in Asia and the Pacific, the capacity development centre *RECOFTC – The Center for People and Forests* has been a crucial actor throughout the last decades. The organization was formed in 1987 under the auspices of Thailand's Kasetsart University as a research and training hub for community forestry. Its recognition as an autonomous international non-governmental organization followed in 2009. Today, RECOFTC works with states and civil society in Cambodia, China, Indonesia, the Lao People's Democratic Republic, Myanmar, Nepal, Thailand, Viet Nam and beyond.

The main strategy of RECOFTC is to build formal partnerships with governments and engage them and their partners – including CSOs and local communities – in a participatory, multi-tiered and holistic capacity development approach. A popular programme is the *Community Forestry Champions Network*, whereby government officials from the forest sector in Asia come together to engage in field-based learning, so that they can experience and identify the best and replicable strategies and interventions around the region to support community forestry. This allows them to champion innovative changes in CF policy and practice in their respective countries.

Grassroots-based capacity development initiatives aim to strengthen the capacity of community forestry networks in securing stronger rights for local people, providing support and services to rights holders, and deliberating their community forestry issues and aspirations with duty bearers. For example, local and national community forest user group networks in the region benefit from their affiliation with the international network Global Alliance on Community Forestry (GACF), as well as through joint workshops and study tours on CF run by RECOFTC. Through these activities, they exchange lessons and strategies on the implementation of community forestry, rights-based approaches and the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests* (the Guidelines), among others. In northern Thailand, for example, a regional platform for networking among communities engaged in community-based fish sanctuary management and community forestry has been created. This platform, the Watershed People Assembly, serves as a forum to voice local concerns so that local people can secure their rights over the watershed. The collective voice of the assembly also helps to shield the watershed from external investments and policy decisions that favour conversion of their wetland community forests to a special economic zone for industrial development purposes.

Strategies 6 and 7

In addition, through the introduction of multi-stakeholder policy platforms at subnational and national levels in Cambodia, the Lao People's Democratic Republic and Myanmar, rights holders and duty bearers converge and deliberate about CF policies and practices on an equal footing. Such multi-stakeholder platforms, in combination with other capacity development initiatives, have created a cadre of change agents who have been influential in the development of CF policy and institutions in the region.

Strategies 4 and 12

The popularity of such a participatory, multi-tiered and holistic capacity development approach conducted by a regional organization in close cooperation with governments and communities, exemplifies the increasing interest of states in building up national RECOFTC centres in the Asia-Pacific region and beyond.

Further reading

RECOFTC. 2013. *Capacity Needs for Community Forestry. Findings from assessments in Cambodia, China, Indonesia, Lao PDR, Myanmar, Thailand and Vietnam*. Bangkok. <http://www.recoftc.org/>

RECOFTC. 2014. *Current Status of Social Forestry in Climate Change Mitigation and Adaptation in the ASEAN region*. Bangkok. <http://www.recoftc.org/>

3.3 Strategies to support the enjoyment of rights

9 Strategy 9: Ensure access to justice, recognize and integrate local-level mechanisms, and enable legal advocacy

Rationale

While it is always desirable to prevent tenure disputes, local communities and human rights defenders observe a high prevalence of conflicts related to commons. The increasing demand and competition for natural resources, as well as processes of individualization, often lead to conflicts over commons with the government, with

investors, with other communities and within communities. These conflicts regularly result in the infringement of the tenure rights of communities and especially those of less powerful community members. Even the mapping of boundaries and overlapping rights in the course of legal recognition has the potential for conflict, because it brings to light conflicting interests. In this complex setting of multiple conflict layers, courts are often overburdened by the large number of cases, and the complexity that arises from the practical distance of courts from local realities and the wide variety of customary practices. At the same time, communities often suffer from the inaccessibility of justice due to high levels of bureaucracy, the costs of filing a case, corruption, lack of transparency, distance to offices, language issues and long waiting times. Local-level mechanisms such as non-state justice systems and alternative dispute resolution mechanisms have proven successful, but may be abused by the more powerful. It is therefore crucial that the state ensures a functioning and accessible judicial and legal system at the national, district and local level, consistent with human rights standards, while recognizing and integrating local-level mechanisms. States should also enable and recognize legal advocacy activities by communities and CSOs.

Specific recommendations

1. **Local-level mechanisms for dispute resolution can provide a successful avenue to resolve conflicts, but should be consistent with human rights standards. Many communities around the world already have non-state justice systems and alternative dispute resolution mechanisms in place, with roots in customary, indigenous or religious institutions.** These institutions are often more affordable, speedy, context-specific, open to local evidence and culture, available in the local language, and often take holistic decisions while striving towards honourable compromises to solve conflicts. However, experiences show that in order to be accountable, local-level mechanisms for dispute resolution must be strongly linked to national legislation and human rights standards, and be consistent with the principles of the Guidelines. To this end, existing local-level mechanisms may need to be reformed and adapted and those responsible for implementing and enforcing them may require training and capacity development.
2. **The integration of local-level mechanisms with the formal judicial system, and the distribution of roles between the local and national courts, should be organized in line with the principle of subsidiarity. With their integration at the lowest level in the formal judicial system, local-level mechanisms retain the mandate to handle most of the disputes that arise in communities.** Cases are referred to higher courts if they cannot be resolved at the local level, or if the scale of the conflict goes beyond the area covered by the mandate of the local-level mechanisms. The sharing of responsibilities between the local-level mechanisms and higher state courts must be provided for by legislation. While legally binding court decisions are enforceable, alternative dispute resolution mechanisms offer mediation services for dispute settlement out of court. A complaints mechanism should be established for communities and CSOs to report rights violations, for example through an ombudsperson that is locally available.

3. **To ensure that tenure rights to commons are recognized and upheld effectively in case of a conflict, it is crucial that the judicial system includes a strong appeal mechanism.** The state should ensure that the local-level mechanisms are closely linked to higher courts through an appeal mechanism. The right to appeal ensures that a claim can be taken to a higher level by the complainant or the defendant if they feel they have been treated unjustly. This appeal mechanism should show flexibility with regard to the recognition of locally legitimate evidence and legal proof before the court, e.g. historical maps of tenure rights and social sites, as a reference point for tenure rights or non-violable custodianship.
4. **States must provide access to the judicial system and legal services for communities.** To ensure access to justice, governments must ensure that filing a claim is affordable and that decisions are being taken in a timely, effective and transparent manner. This is especially important to ensure equal access to justice for marginalized people in vulnerable conditions. Governments must also ensure the accessibility of legal aid and of information on how to take a case to court at local and higher levels, e.g. through paralegals and mobile clinics. They should also provide and guarantee effective and accessible remedies, including accountability mechanisms, appeal mechanisms, restitution, indemnity, compensation and reparation (e.g. when rights are taken for public purposes). The implementation of effective access to justice requires the training and capacity development of judges, legal staff and paralegals in the area of human rights, especially tenure rights to commons (see also Strategy 8). Where the cost of mainstreaming relevant knowledge on local complexities or corruption is an issue in the judicial system, states might consider setting up a special panel to rule on conflicts over land and other natural resources. This institution should consist of representatives from all stakeholder groups and legitimate rights holders. State authorities must ensure that all the criteria discussed above regarding the independence and duties of the institution are enforced.
5. **States should enable communities and rights holders to exercise their rights and make use of the legal system.** This includes supporting awareness raising and capacity development in communities, groups, CSOs and human rights defenders to claim and enforce tenure rights to commons, for example, through litigation. The facilitation and support of local and international CSOs is crucial for the identification and implementation of legal advocacy strategies, and to empower communities and rights holders to undertake legal action on their own behalf. Legal advocacy strategies include, for example, catalysing and intervening in legal cases, building arguments concerning national obligations under international human rights frameworks, and constructing progressive jurisprudence and interpretations of law. Linking legitimate tenure rights and their role in local livelihoods to other aspects of human rights – e.g. the right to food, the right to means of subsistence, the right to self-determination, the right to culture, the right to equality – can result in progressive court rulings creating precedence cases. This can have far-reaching effects, enabling transformative change in national frameworks on tenure governance: for example, with regard to clarifying legal claims to restitution.

For further discussions in this regard, see also *Responsible governance of tenure and the law: A guide for lawyers and other legal service providers* (FAO, 2016b).

CASE 6:
**Conservation, conflict
 and claiming collective
 rights to marine commons
 in Dwesa-Cwebe, South
 Africa by Jackie Sunde**

Conservation, conflict and claiming collective rights to marine commons in Dwesa-Cwebe, South Africa

By Jackie Sunde
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Dwesa-Cwebe is a coastal forest reserve and a marine protected area (MPA) situated on the Eastern Cape coast of South Africa. The land that comprises the reserve was settled by the ancestors of current residents several centuries ago. The seven communities who live here regard the land, the forest, the coastline and associated natural resources as their common property, upon which they depend for their livelihoods. Their relationship with this land and the sea, derived through their relationship with their ancestors, is reflected in their culture and their customary tenure system.

Over the course of the past century these communities were dispossessed of their land and their forest and marine resources in the name of nature conservation, with devastating consequences for their basic food security and livelihoods.

Please consult
 Strategies 5 and 9

In 1994, post-Apartheid, the communities embarked on an advocacy campaign to reclaim their tenure rights. They established a partnership with a local non-governmental organization that supported them in submitting a claim for collective tenure rights to their land, the forest and marine resources. But a very powerful conservation lobby argued that the area should be retained under conservation status in the interests of the country at large. The communities were forced to accept a compromise settlement: their land ownership was recognized, but the reserve was to remain under conservation status. Importantly, the settlement agreement made a provision for their sustainable use of resources, for them to comanage the reserve as equal partners with the state, and for them to benefit from tourism within the reserve.

Strategies 1, 10 and 11

However, despite the legal recognition of their tenure rights in 2001, the rights of the communities and the provisions of the settlement agreement were not put into practice. The state declared that the area would be a 'no-take MPA' and resource use was prohibited. The communities adopted a multipronged strategy to reclaim their tenure rights. Together with their customary authorities and the new local governance institutions, they sent a series of petitions to the provincial and national conservation authorities. They sought support from NGOs as well as academic researchers working on issues of human rights and natural resource governance. This enabled them to interact strategically with a larger network of support, including an NGO providing human rights litigation services.

Strategy 5

Strategies 5, 9 and 12

The Legal Resources Centre (LRC) supported the communities in adopting a legal advocacy and empowerment approach. They held workshops with the communities to raise awareness of their customary rights. They used a criminal case in which three fishers were charged with fishing illegally in the MPA to defend the communities' customary rights to resources. They launched legal action to call for a review of the declaration of the MPA, in light of the fact that the communities' constitutional rights to consultation were violated. In their court papers, the communities cited a range of national, constitutional and international human rights-based instruments in support of their claims to customary tenure rights. This had a powerful impact on the judiciary in the case.

In his judgement, the magistrate noted that "South Africa's new constitutional dispensation began not only a political but also a legal revolution. With the inclusion of a justiciable Bill of Rights in the Constitution, the validity of a wide range of laws, whether public or private, could now be tested against the standards of fundamental human rights". He expressed strong

criticism of the conservation authorities for their failure to recognize the livelihood needs of these communities.

The communities used national and international NGO networks to ensure that this case became known in the public domain. The litigation is ongoing. However, in the face of further court action, the authorities agreed to review complete prohibition on the use of marine resources. The MPA has now been rezoned in order to create controlled areas where the communities may harvest resources. For the communities, this is an important step in their campaign to regain their rights to use and govern their collective commons, in the interests of both their own local people and the nation as a whole.

Further reading

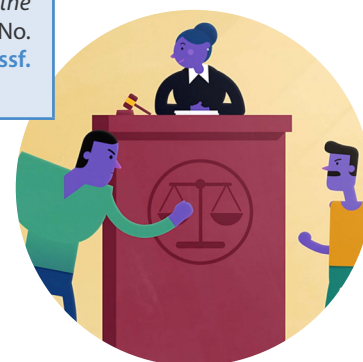
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Strategies 5 and 12

10 Strategy 10: Strengthen the environmentally sustainable and economically viable use of commons to maintain and create long-lasting benefits for community members

Rationale

All over the world, people depend on commons for both tangible benefits such as food, fodder, wood, fish, domestic and irrigation water and traditional medicines, and intangible benefits such as cultural identity, social networks, spiritual sources and environmental services. Commons will be sustained by communities as long as they provide these benefits to the users and hence contribute to better living conditions, income generation, food security and cultural identity. If many individual users no longer receive any benefits from the commons and therefore opt out, the commons as a whole might be put at risk. Importantly, commons need to be managed collectively and used sustainably, and with the participation of all legitimate tenure rights holders, in order to provide benefits in the long term. More sustainable and effective resource utilization may require investments linked with technical innovation (e.g. terracing, pasture upgrading, improved fishing gear) and access to markets and value chains. It is local small-scale producers who themselves are usually the largest investors in local agriculture, forest-related activities, fishing and animal husbandry (FAO, 2012). To sustain their livelihoods, they need access to reliable services (e.g. knowledge, finance, transport) and improved public infrastructure (e.g. roads, water supply, health and educational facilities) that facilitate investment in effective and sustainable resource utilization techniques.



Specific recommendations

1. **In order to provide long-lasting benefits, successful innovations for income-generating activities must be economically viable, environmentally sustainable and socially inclusive.** The activities must ensure that an inclusive benefit-sharing approach is in place that ensures accessibility for all needy members of the community. Environmentally sustainable use and management practices must be at the centre of any intensification and income-generating activity, to maintain a healthy natural resource base for future generations.
2. **Taking jointly-managed utilization systems of commons into account, innovative strategies to generate income from commons must build on shared vision, commitment and ownership by the entire community that collectively uses and manages (and may actually own) the land, fishing grounds and forests.** Communities might consider trying a visioning exercise to determine the areas where innovation is needed, in order to maintain or enhance subsistence resources and increase income generation from commons. Strategies should be developed that provide guidance and principles with regard to community-based investment strategies and interaction with external service providers, such as the state, donors, development agencies, businesses and others. Innovations need to ensure equal and equitable access to resources and increased income security, especially for the poor. The vision should also include provisions for the sustainable management of the commons and a system for monitoring compliance with the jointly developed rules. Differentiation may be necessary with regard to investment strategies that provide short payoff times and long-term strategies that, considering the degradation of many natural resources today, may depend on the proactive restoration of natural resources. The vision could be documented in a community protocol or similar document (see also Strategies 3 and 6) in the presence of a witness, such as governmental and/or civil society groups. To back up community protocols and to support compliance, states need to put policy measures in place that support these processes and the recognition of community protocols in negotiations.

A prescriptive package of income-generating activities may not be desirable because resource availability, skills and supportive partners are likely to vary depending on the context. **Some approaches to increasing the economic benefit from commons while maintaining the resource base and respecting the cultural and social value of commons, are as follows.**

3. **Successful innovations should, as far as possible, build on the customary and local knowledge of communities and make use of the vast scientific knowledge available concerning the sustainable management of land, fishing grounds and forests.** Innovative resource management practices and associated technologies may be needed to increase the productivity of natural resources, while still maintaining or rehabilitating them. Building on local wisdom, knowledge and climatic conditions, innovations should be integrated with scientific rigour and ensure ongoing access to knowledge, inputs and technologies for local users. Inclusive and collaborative knowledge generation, exchange and dissemination services are therefore needed to ensure an economically beneficial and environmentally sustainable utilization of commons.

4. **The creation of organizations to support resource users.** Resource user groups, cooperatives, community 'enterprises' or economic initiatives can a) support joint access to inputs and markets; b) provide a consultation partner for technical assistance and extension services for resource users; c) become a knowledge hub for sustainable management practices and businesses; d) offer a social network for exchange with other resource users. These organizations could raise awareness of and advocate for much needed public investments in natural resource restoration and other similar measures.
5. **The diversification of income sources.** It is worth considering options for diversifying food and income sources, for example, through investment in the further processing of harvested products. While the goal may be commodification for local as well as distant markets, it is important to focus on locally adapted and diversified value creation. The creation of marketable products often comes with a requirement of new logistical approaches to marketing.
6. **Marketing strategies for products from commons.** Reliable market access is key to achieving income from commons. This requires efforts to establish or make use of local, regional or global value chains and enable communities to be full participants in the value chains of their choice. These efforts must be accompanied by appropriate policy measures that avoid exploitation and protect the interests of local communities, and especially enable women and vulnerable groups to benefit from the marketing of products. In some prominent cases, improved access to non-timber forest products for the landless is linked to their access to relevant value chains. In these cases, local elites enable the landless to invest successfully in local processing units for those forest products.

Securing local livelihoods depending on forest commons: The case of the 'Forest Government' of the State of Acre in the Western Brazilian Amazon

By Benno Pokorny
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In Latin America, indigenous peoples and local communities legally own or control 23 percent of the region's land area, of which 44 percent is located in Brazil (RRI, 2015). This comparatively high percentage of legally recognized lands reflects a certain effort on the part of the Brazilian Government to recognize customary rights. In practice, most of these territories suffer from strong and even violent conflicts quite regularly, given that other economic actors are interested in their lands and resources. However, it is estimated that a much bigger area is managed through indigenous and community-based systems (RRI, 2015).

The present situation provides insights into the remarkable attempts made by the Brazilian state of Acre to put institutional and economic mechanisms in place, to secure the livelihoods of traditional forest communities in accordance with their interests and capacities.

Fully 87 percent of Acre (INPE/PRODES, 2016) – a state located in the western Brazilian Amazon – is still covered with forests on account of its remoteness, but also because of the spirit of resistance of its traditional population. Historically, Acre was known for being a prosperous extractive rubber economy (*Hevea brasiliensis*) during the first half of the 20th century.

CASE 7:
**Securing local livelihoods
depending on forest
commons: The case of the
'Forest Government' of
the State of Acre in the
Western Brazilian Amazon
by Benno Pokorny**

Please consult
strategies 1 and 5



Strategy 10

Strategies 10 and 8

Under the aegis of powerful rubber barons, the indigenous population declined seriously at the same time as thousands of migrants entered the region in search of employment. After the collapse of the rubber economy at the end of the Second World War, these migrant families remained in the forest areas and formed small forest communities. In a second wave of migration in the 1980s, loggers and cattle ranchers entered the region en masse in search of agricultural lands. This migration wave was part of a larger public policy process that promoted the rural colonization of the Amazon.

In response to this new threat the forest communities, supported by environmental NGOs, became politically organized to fight for their land and forests. The ensuing violent conflicts culminated in 1988 with the murder of the movement's leader, Chico Mendes. The killing of this much respected forest defender mobilized social movements at the local, national and global levels in support of legal reforms to protect collective land and resource rights. In response to these movements as well as growing scientific evidence about the sustainability of collective forest management systems, the federal Brazilian Government introduced legal measures to recognize collective tenure rights, such as Communal Extractive Reserves (RESEX). A new political agenda also emerged for economic and social development initiatives compatible with the tenure systems, local knowledge, needs and capacities of forest communities.

In 2001, a new Forest Law decentralized governance competences, and established the legal context for a bundle of measures to develop the economic potential of forests in a strategic manner. In Acre, a participatory process began aiming at an Economic–Ecological Zoning (ZEE) of Acre into strategic land use categories. This participatory process involved representatives from indigenous groups, traditional communities, farmers, social and environmental NGOs, universities, and agriculture and forest industries. It was successfully completed in 2006. The ZEE became a federally-ratified state law and thus the legal basis for environmental law enforcement in Acre. As a result, about 50 percent of Acre has been designated under different legal categories as protected forest areas, mostly allowing for collective local access and user rights, and some being assigned for sustainable economic uses.

The Brazilian Forest Service legally recognized tenure of common forest resources and provided training, technical assistance and extension services for sustainable forest management. It also implemented new economic instruments to support the commercial use of forests. Special efforts were dedicated to revalue traditional non-timber forest products such as natural rubber through the implementation of a system for standardization and quality control, the payment of minimum prices, and the construction of the condom factory Natex.

Technical assistance for the integration of local forest users into commercial forest value chains was further professionalized by the establishment of non-profit cooperatives, such as the *Cooperativa dos Produtores Florestais Comunitários* (COOPERFLORESTA) and the *Cooperativa Central de Comercialização Extrativista do Acre* (COOPERACRE). These cooperatives brought together community associations and communities in Acre engaged in the commercialization of forest products. They concentrated efforts for the effective delivery of services, logistics and machinery to poor forest communities. Information exchange between forest communities, advice on emerging technical and legal problems, and concerted action to influence public policies, were also part of the cooperative's portfolio. Over time, the cooperative's main task became setting up vertical value chains, as well as networking with private enterprises, traders and other relevant organizations to foster the commercialization of the local timber and non-timber forest products. Technicians from the communities were trained systematically, to enable more independent action by the forest communities throughout the different phases of forest value chains.

The case of Acre demonstrates that communities need support to secure their livelihoods when these are grounded in the use of the commons. The simple recognition of tenure rights is necessary, but may be insufficient by itself. Specific, consistent and continuous legal, economic and social efforts are needed to ensure that rights to the commons are respected

and guaranteed in the long run. The case also shows the complexity of realizing in practice a development agenda grounded in the interests and capacities of local rights holders.

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11 Strategy 11: Ensure that any partnerships or contracts with investors support local livelihoods and do not infringe on tenure rights to commons nor violate related human rights

Rationale

Investments in agriculture, land, forests and fisheries by domestic and international investors within areas used, managed and sometimes owned by local small-scale producers, may infringe the access of local resource users to their resources. Consequently, the process of initiating, negotiating and agreeing on investments needs to follow certain rules in accordance with all applicable standards in the Guidelines, including, *inter alia*, the components on safeguards (Section 3.7 of the Guidelines), public land, fisheries and forests (Section 3.8), indigenous peoples and other communities with customary tenure systems (Section 3.9) and the principles of responsible investment (Section 4.12). While this applies in general, it is of particular importance for the protection of commons. Commons are frequently targeted

by investors (often encouraged by governments), and especially so if they are extensively used (e.g. grazing land, forests, shifting cultivation areas, artisanal fishing) by marginalized or minority groups that lack a strong voice. This applies in particular to cases where community land, fisheries or forests are formally owned by the state. But it even tends to happen in those cases where the land, fisheries or forests are legally owned by communities through new legislation. Local leaders and the elites within a community may easily feel tempted to sell out the commons against monetary gains. As a consequence, all parties concerned need to make sure not only that fair and transparent procedures are applied, and that sustainable and socially acceptable outcomes are achieved in general, but that special consideration is given to the protection of tenure rights to commons.

Specific recommendations

Innovative investment partnerships have the potential to create or support sustainable pathways for increased income generation, as long as they adhere to the following principles and take on board lessons learned:

1. **States and community representatives need to ensure that investments do not harm the environment, do not infringe on legitimate tenure rights to commons, and respect the social and cultural values and practices of communities. To this end, states and communities should ensure that any investment takes place in the interest of communities and install safeguards against the infringement of legitimate tenure rights to commons by businesses, donors, development agencies, the state itself and others.** Such safeguards can include, for example, the establishment of ceilings on permissible land transactions, and regulations on how transfers exceeding a certain scale should be approved, such as by parliamentary approval (§12.6 of the Guidelines). According to the Guidelines, any large-scale transfer of tenure rights should be avoided. Specific efforts should be made to restrict indiscriminate diversion of commons both physically and through actions preventing the commons from being used for the purposes originally intended. In the case of a diversion of commons for alternate uses, the 'consent' (instead of consultation) of the communities, including all users of the commons, should be made mandatory. Because of the complexity of the livelihood strategies of local communities, and possible discriminative transactions against disadvantaged groups within a community (especially users of commons), and intergenerational costs, it is not desirable to regard compensation packages as appropriate. Any such compensation for communities foregoing their rights would have to include the value of the natural and social capital, as well as the future value, of the natural resources that change hands. All of these factors are hard to capture in economic calculations, in particular for the value of commons.
2. **Especially where state-owned land is targeted by investors, state authorities have the obligation to ensure that communities are recognized as counterparts in investment projects and that all processes are fair, transparent and responsible, according to the principles of the Guidelines.** This includes the principle of free, prior and informed consent (FPIC) for indigenous peoples, which can be

recommended as good practice, in addition to the principle of participation and consultation for other communities (§3B6 and §9 of the Guidelines). This obligation of the state is especially important where investors target state-owned land, fisheries or forests to which communities have legitimate tenure rights that are not currently protected by formal law. States should also provide for support mechanisms in situations where communities hold ownership rights, but may be vulnerable due to their limited experience and knowledge and therefore are in a weak position for negotiation. The state must ensure that communities are an equal partner in negotiations and are able to refuse investments that they consider a threat to the commons and their livelihoods. This supports an approach in which the benefits and risks of an investment are equally shared between the community and its investment partner. In doing so, communities can ensure local ownership and avoid the unintended breakdown of local activities due to external project cycles. In both cases, where the transaction of tenure rights takes place through the state or through community representatives, civil society organizations have a particularly important role to play in monitoring and supporting vulnerable members of communities.

3. **Civil society organizations may play a pivotal role in supporting communities to ensure the application of appropriate procedures and to find an agreement with investors on a sustainable investment project that generates income for the community and supports ongoing activities.** CSOs should facilitate or support an inclusive and transparent dialogue and decision-making process with all legitimate rights holders and relevant stakeholders (e.g. spatial planners). The process should be based on the joint vision and investment requirements developed by the community. To ensure that an investment really benefits the community, pays due respect to the commons, and supports local livelihoods and food security, the investor should prove that it submitted a human rights impact assessment and a social and environmental impact assessment to an independent party. The community must have enough time to reflect and act on the content of this document before any investment project is decided upon. Government authorities are responsible for recommending to the investor an independent party who is familiar with the local context and can provide a realistic overview of benefits and risks. Communities must be free to choose their own independent advisers separate from, and/or in addition to, risk assessors or specialists recommended or commissioned by the government or investor. The results of these impact assessments must be publicly disclosed and considered in the contract negotiations in a transparent way.
4. **As the process of negotiating investment partnerships must be transparent and fair in order to avoid conflicts at a later point in time, state authorities or community representatives (depending on who leads the negotiations) must ensure the timely public disclosure of information related to the planned investment,** including the investment project, the investor, impact assessments, and the envisaged contract. This includes the establishment of information focal points that facilitate contact with communities and ensure the transparency and availability of all relevant information before an investment contract is concluded. Transparency is also required with regard to the termination of contracts so that

communities can follow up. The services of the focal points must be provided free of charge and in a local and suitable language. Civil society organizations have an important role to play in demanding and monitoring public information disclosure.

5. **To hold government authorities, the investor and community institutions accountable, investment contracts should be in alignment with the Guidelines and related international standards and obligations.** The contract should also set out a monitoring mechanism, a complaint mechanism and name the court that will be responsible if a case is filed in relation to the investment. To enable the monitoring of contracts and attached provisions, such as environmental and social management plans, the processes related to monitoring, complaint and litigation should be communicated widely at local level.

For further discussions in this regard, see technical guide No. 4 on *Safeguarding land tenure rights in the context of agricultural investment* (FAO, 2015), technical guide No. 3 on *Respecting free, prior and informed consent* (FAO, 2014) and *Principles for Responsible Investment in Agriculture and Food Systems* (CFS, 2014).

12 Strategy 12: Engage in the facilitation of multi-stakeholder processes for the review of legislation and monitoring of institutions, processes and rule of law

Rationale

To increase accountability and prevent corruption, public participation and the right to information are crucial. Stakeholder monitoring is a powerful instrument to enhance transparency, build trust and hold policy-makers, administrations, community leaders, donors, development organizations and the private sector accountable. To supplement the institutional checks and balances in tenure governance, monitoring and review must take place as an iterative process, from the drafting of laws and policies to implementation and enforcement, and throughout all stages of development and investment projects. The review of existing legislation is especially important to harmonize and coordinate laws and policies and decision-making at the administrative level, and hence increase the effectiveness of tenure rights to commons. Civil society, academia and non-governmental organizations have a particular role to play in monitoring accountability and must be given grievance mechanisms to raise awareness on shortcomings.

Specific recommendations

1. **The legal framework needs to include procedures for the inclusive monitoring and review of institutions, processes and legislation by government agencies and civil society. This means that governments need to recognize and facilitate inclusive monitoring and review processes in which stakeholders such as civil society organizations, communities and rights holders can participate and are heard.** To this end, governments need to establish and facilitate multi-stakeholder and

rights holder fora that are regularly held and that establish grievance mechanisms. Governments also need to appoint an independent ombudsman who can monitor the judiciary to ensure rule of law, legal justice and adherence to national law and international human rights standards, identifying breaches of people's tenure rights to commons and investigating and addressing complaints. Additionally, it needs to be clear that accountability must work both ways, upwards and downwards. Local communities should be recognized as legitimate rights holders who make decisions about the governance of natural resources. At the same time, there should be mechanisms through which local authorities can engage with the communities and take legal redress where commons are being appropriated to the advantage of a few.

2. At the same time, civil society and academia will need to play an important role in monitoring and awareness raising. For example, they can target lawyers and judges as well as the broader public with legally-relevant background information on customary tenure systems and commons, and with reports on legally-controversial judgements. CSOs and researchers can play a crucial role in producing monitoring reports for the public, that point to constraints and deficiencies in the implementation and enforcement process. They could also produce concept papers on appropriate ways and means of implementing legislation, translated and popularized versions of the legislation with added interpretations, and analyses of implementation accomplishments versus national targets for recognizing commons.

3. Responsibility for the review and harmonization of sectorial legislation and administration lies with the government and can be supported by civil society organizations. In order to arrive at a comprehensive solution, the process of review and harmonization should include the activities of government authorities at national and subnational levels, natural resource management bodies including community institutions, and civil society. There are different ways to do this:

- Review and reform all sectorial laws to align them, and cross-reference important provisions in other relevant sectorial laws, as appropriate. For example, ensure that the economic benefits derived from commons by communities that manage the resources are not unduly eroded by laws governing the trade and taxation of products accruing from community management. It is important to consider the different sectorial laws and policies in areas such as land, conservation, climate, forestry, fishery, mining, agriculture, conservation and tourism, and to harmonize them to make sure that they do not contradict or undermine each other. Furthermore, laws on investment, public procurement and concession allocation need to be examined and harmonized. In all cases, harmonization should ensure full alignment with relevant international laws and standards concerning human rights and the environment (§3B of the Guidelines).
- Establish a multi-stakeholder overseeing body that reviews different laws and policies, proposes harmonization of laws and policies, and manages decision-making among the (often competing) ministries of the different sectors.

4

**The process of adapting the generic
strategies to the local context**





4. The process of adapting the generic strategies to the local context

There is no ‘one size fits all’ approach. The strategies proposed in the previous chapter are generic guidelines of global relevance. Consequently, they need to be translated and adapted to different local conditions in different countries – and even within one and the same country – as required by § 13.5 of the Guidelines. The big challenge, therefore, is to strike a balance between strict orientation towards the fundamental principles of the Guidelines and generic strategies on the one hand, and a high degree of context-specific flexibility and space for local creativity and innovation on the other hand. Context-specific solutions will come about as a result of a matching process between generic strategies and specific local conditions, needs and knowledge. At the end of this process, every specific solution should be consistent with the principles of the Guidelines and not contrary to them. This requires a local process of analysis, deliberation, participation, piloting, and demonstrating, disseminating and re-adjusting successful practices.

This section deals with the process of translating the generic strategies of this technical guide into context-specific strategies and outlines and explains the methodological steps for this process. It aims to provide guidance for the state officials who are responsible for the implementation process at national and local level, and for those who support it. States are the principle duty bearer to secure legitimate tenure rights to commons for indigenous peoples and local communities, including farmers, fisherfolk, pastoralists and others, as well as landless people and the most marginalized and vulnerable. The recommended methodological approaches are as follows.

- 1. Providing space for community creativity and for continuous adaptation.** The identification of context-specific strategies, tools and practices is important to support and guide communities in an appropriate way, based on learning from local experience. Such context-specific strategies – such as any guidelines and tools produced – should never be deterministic or prevent communities from doing better on their own and in their own manner, as long as they are in line with the principles of the Guidelines. Consequently, even local context-specific strategies should be wide enough to encompass individual local dynamics and learning processes.

2. **Analysing the local context before starting.** A sound local analysis is a prerequisite to being able to design or reform legislation, support systems and institutions in a way that corresponds to the variety of local conditions. This may include the assessment of existing customary systems (including existing procedures and power relations), of land and natural resource management practices (with special focus on user rights for commons), and of related problems, bottlenecks and conflicts. Such analyses need to be carried out in a representative spectrum of communities. They should include participatory methods in order to adequately consider local knowledge and perceptions.
3. **Prioritizing.** Given that resources and capacities for action will always to some extent be limited, the process of registration of tenure rights cannot be carried out in all places at the same time. The Guidelines suggest that this process should progress area by area in accordance with national priorities (§ 7.4). The prioritization of areas may be actioned in accordance with the urgency of the task, or the interest and preparedness of communities, or a combination of both. Urgency for the protection of commons is usually found in places where commons are actually threatened by ongoing land allocation and transfer dynamics. These are usually areas with interested investors or with ongoing conflicts over land and natural resources. Working with interested and well-prepared communities as partners will help to speed up the process. Experience will be quickly acquired and progress quickly made in finding examples of good practice for demonstration, thereby giving momentum to the process. Having interested and well-organized partners at community level will also help to demonstrate that the process can work, how it works, and what the benefits for the people are.
4. **Differentiate according to types of communities.** Even within a certain country, conditions differ greatly. At some level, each community is unique and might need its specific tailor-made approach. But usually there are considerable similarities between certain communities that can justify a common approach for one type, and a different approach for another type. Communities may be differentiated according to population density, according to their position on a rural–urban continuum (e.g. semi-urban to remote rural), according to major categories of land use (e.g. small-scale farmers, fisherfolk, pastoralists, forest users), according to the level of stratification, according to their level of poverty, according to the strengths/weaknesses of the commons, and according to cultural characteristics and related customary land governance systems. Certain combinations of these criteria may justify a specific approach. Consequently, such clustering of communities within different categories can serve as a basis for designing strategies that are sufficiently context-specific, without the need for tremendous efforts to search for a specific approach for each single community.
5. **Piloting.** Appropriate concepts, successful strategies, and innovative practices need to be based on practical experiences. This applies to technical innovations as much as it does to institutional change processes. They need to be tested in selected communities. Piloting means learning by doing. It means testing a certain approach in a specific environment and observing, discussing and systematically analysing the experiences and the results throughout the piloting initiative. It is about a systematic learning process that not only helps the community involved,

but also other communities and their support or service agencies. These tests should be accompanied by participatory dialogues and participatory action research involving all the stakeholders (e.g. communities, service providers, government agencies). On the basis of the experiences gained in a representative selection of pilot communities, lessons can be discussed in workshops and context-specific strategies can be designed. When piloting innovations, it should be noted that pilots provide insights that support future activities in different locations, but they do not offer concrete blueprints.

6. **Using good practices.** Lessons from individual communities may serve as examples of good practice. They can help to convince political decision-makers and they may motivate and inspire other communities. But they may also depend on specific circumstances, such as the leadership qualities of individual persons. As such, only a systematic comparison between different communities that share certain key characteristics can serve as a solid basis for the definition of concepts, strategies or tools that can apply to other communities exhibiting similar characteristics (see point 4). In order to learn quickly about 'best fit' approaches, community-level experiences of the governance and management of the commons should therefore be analysed systematically and compared, with lessons being drawn from local empirical evidence. This process may include rounds of workshops at different levels for presentation and discussion of the findings. Such events can, at the same time, help to popularize the issue of commons and community-based management. A systematic, experience-based, participatory process of identifying context-specific practices is crucial to designing adequate laws, implementation guidelines and training manuals for the governance and management of commons. The development of comparative databases where information can be gathered, systematized, compared and analysed can contribute to this aim.

These methodological steps can be seen as part of a matching process aimed at interlinking the necessity of local adaptation with that of an acceptable degree of uniformity and efficiency of the overall policy implementation process. It can help to arrive at 'best fit' approaches consistent with the principles of the Guidelines, in a timely manner.

5

Annexes





5. Annexes

5.1 Annex 1: Glossary

Bundle of rights

A bundle of rights may include use rights such as access, withdrawal and usufruct rights, as well as control or decision-making rights such as management, exclusion and alienation rights. Ownership is often thought of as the right to control a resource exclusively. A bundle of rights may be held permanently or temporarily and may be renegotiated periodically and agreed upon by the group. Tenure rights to commons may overlap in time and geographical space. So that groups can secure their tenure rights to commons, the right to exclude outsiders from using the resource is crucial, as common resources are rivalrous in consumption.

Collective rights

Commons may be collectively held or owned by a group or community. These collectively held natural resources can be distinguished from resources that are owned individually by one person or a family. The term 'communal' is often used to refer to the whole area or territory of a community, including both collectively used commons and individually held resources.

Commons

Commons means that a group of people (often understood as a 'community') uses and manages natural resources such as land, fisheries, forests and water bodies collectively as commons. The members of the group, so-called rights holders, may hold diverse, multiple and flexible bundles of tenure rights to the common resource. They may also hold collective ownership rights to the common resource.

Community

A community is understood in a broad sense as a complex social and geographical unit comprising different types of members who have something in common, e.g.

a shared history, cultural identity, kinship, a profession, common rules of access and use of natural resources, common occupation of a territory or geographical area. The social and geographical boundaries of a community may be flexible and renegotiated and adapted over time.

Customary tenure systems

In many countries, commons are regulated through diverse customary tenure systems. Customary tenure refers to locally derived systems with norms, rules, institutions, practices and procedures that have evolved over time and use. Customary tenure systems have gained social legitimacy and are negotiated, sustained and changed by local communities.

Legitimate

The Guidelines explicitly state that ‘legitimate’ rights are not only those tenure rights that are formally recognized by national law, but also those that are legitimate through broad social acceptance at the local level while not (yet) being legally recognized and protected by law.

5.2 Annex 2: How was this guide developed?

Following the approach of the Guidelines negotiations, this guide was developed in an inclusive multi-stakeholder process that encompassed a Sounding Board as well as several international deliberation and consultation workshops. The process was complemented by a review of the literature and a broad range of examples provided by stakeholders, to ensure that the strategies suggested are grounded in empirical findings and experiences.

The Sounding Board comprised 21 international experts on commons from civil society, science and government, all of whom work in the land, fisheries and forest sectors. From the outset it supported the development of the guide in terms of content and methodology, through participation in international workshops and in the form of written feedback on drafts.

The following international deliberation and consultation workshops and meetings took place:

2 July 2014, Berlin, Germany

International workshop in the context of the annual conference ‘Policies Against Hunger’ of the German Federal Ministry of Food and Agriculture (BMEL), in cooperation with the German Institute for Human Rights. Twenty international stakeholders took part, mainly from civil society organizations but also from government and science, from the following countries: Bolivia, Burkina Faso,

Ecuador, Ethiopia, Germany, Ghana, Iran, Kenya, Nicaragua, Philippines, Senegal, Sierra Leone, Uruguay, Vietnam. They discussed the initial concept and outline of the guide; challenges and strategies to recognize, protect and support tenure rights to commons were collected and exchanged.

29–30 July 2014, Potsdam, Germany

International workshop on 'Strategic guidance to strengthen the commons' to discuss strategies and exchange

experiences and cases for the recognition, protection and support of tenure rights to commons, and to discuss how the Guidelines can support this.

10–11 November 2014, Addis Ababa, Ethiopia

African regional workshop in the context of the inaugural 'Conference on Land Policy

in Africa' of the Land Policy Initiative and with the kind support of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). Over 30 representatives from African civil society and research organizations, government and international financial institutions discussed and exchanged strategies, practices and experiences for the recognition, protection and support of tenure rights to commons in the African context, where commons play a crucial role. In addition, individual interviews were conducted during the conference and afterwards to follow up on specific aspects that were raised by the stakeholders.

12 November 2014, Addis Ababa, Ethiopia

Side event at the 'Conference on Land Policy in Africa', where five participants of the workshop

shared their recommended strategies and engaged intensively with about 60 African and international experts from politics, research and practice on how to support tenure rights to commons by means of the Guidelines and the 'Framework and Guidelines on Land Policy in Africa' (F&G).

23–24 April 2015, Berlin, Germany

International workshop in the context of the Global Soil Week 2015 to review and discuss the first draft of this technical guide.

2 October 2015, Bern, Switzerland

International meeting to finalize the guide and discuss strategies for outreach, held in the context of the conference organized

by the Rights and Resources Initiative (RRI), Oxfam, the International Land Coalition (ILC) and Helvetas on 'From Rhetoric to Action: Scaling Up Community and Indigenous Peoples' Land and Resource Rights'.

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The valuable inputs and discussions that took place at the following workshops also contributed to this technical guide:

IASS. 2014a. *Using the Voluntary Guidelines to Secure the Commons*. Report of the IASS/ DIMR Workshop, Berlin, 2 July 2014. Potsdam (Germany), Institute for Advanced Sustainability Studies.

IASS. 2014b. *Strategic Guidance to Strengthen the Commons*. Report of the IASS Workshop, Potsdam, 29–30 July 2014. Potsdam (Germany), Institute for Advanced Sustainability Studies.

IASS. 2014c. *Sharing Practices to Recognize and Support Commons and Collective Tenure Rights*. Report of the IASS Workshop, Addis Ababa, 10–11 November 2014. Potsdam (Germany), Institute for Advanced Sustainability Studies.

IASS. 2014d. *A commons conversation*. Film, available at <https://vimeo.com/109114444>. Potsdam (Germany), Institute for Advanced Sustainability Studies.

International instruments in support of tenure rights to commons

- African Charter on Human and Peoples' Rights
- American Convention on Human Rights
- Convention on Biological Diversity (CBD) and the Akwé: Kon Guidelines
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- FAO Principles for Responsible Investment in Agriculture and Food Systems
- FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication
- FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security
- Framework and Guidelines on Land Policy in Africa
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Labour Organization Indigenous and Tribal Peoples Convention, 1989, No.169
- United Nations Convention Against Corruption (UNCAC)
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
- United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- Universal Declaration of Human Rights

Governance of tenure **technical guides**

FAO. 2013. *Governing land for women and men: a technical guide to support the achievement of responsible gender-equitable governance of land tenure.* Governance of tenure technical guide No. 1. Rome.

FAO. 2013. *Improving governance of forest tenure: a practical guide.* Governance of tenure technical guide No. 2. Rome.

FAO. 2014. *Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition.* Governance of tenure technical guide No. 3. Rome.

FAO. 2015. *Safeguarding land tenure rights in the context of agricultural investment: a technical guide on safeguarding land tenure rights in line with the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, for government authorities involved in the promotion, approval and monitoring of agricultural investments.* Governance of tenure technical guide No. 4. Rome.

FAO. 2016. *Responsible governance of tenure and the law: a guide for lawyers and other legal service providers.* Governance of tenure technical guide No. 5. Rome.

FAO. 2016. *Improving governance of pastoral lands: implementing the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.* Governance of tenure technical guide No. 6. Rome.

FAO. 2016. *Responsible governance of tenure: a technical guide for investors.* Governance of tenure technical guide No. 7. Rome.

Millions of people worldwide depend on natural resources such as land, fisheries and forests that are used collectively as commons. Commons are essential to culture, identity and well-being. As a source of food and income, they are an important safety-net, especially for the most marginalized and vulnerable people. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security provide a historic opportunity to recognize and secure tenure rights to commons. This guide offers 12 strategies in three areas of action: the legal recognition and

protection of tenure rights to commons, their effective implementation by states and rights holders alike, and the support of communities to enjoy their rights. With these interrelated strategies, 7 illustrative cases of practice from around the world, and methodological steps for national and local adaptation, the guide aims to inspire and support states, community-based organizations and civil society organizations, the private sector and other relevant actors to make a difference and contribute to transformative change by making responsible governance of tenure rights to commons real.



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