

# Thematic Report: Rights of Communities and Indigenous People<sup>1</sup>



## I. Introduction

### *Overview*

Customary systems of land ownership are the most common type of land ownership scheme in Africa.<sup>2</sup> Often, these forms of customary title are either not recognized by governments, or are seen as having lesser status than statutory land ownership schemes. Thus, when customary land ownership is ignored by governments and firms who view non-titled land as “unoccupied,” traditional ways of life—particularly those of indigenous groups—are put at risk. Expropriations of such land may lead to mass displacement, social conflict, and loss of livelihood, each of which creates substantial TIP risks. Conversely, strong recognitions for customary rights in land may help to mitigate displacement-related risks; furthermore, they may help investors have stability with respect to their negotiating partners, and ultimately improve economic growth and development by contributing to job creation and improved local infrastructure.

However, in some of the countries listed in this Report, strong protections for customary land rights may pose their own TIP risks. When customary land tenure systems disenfranchise women from land ownership, the vulnerability of women and girls to trafficking may increase. Furthermore, where customary rights are vested in sole village chiefs who may not necessarily act with the broader community’s views in mind, risks arise with respect to displacement and social conflict; thus, it is important to ensure that communities have a voice in land use initiatives.

This Report discusses the extent to which the countries listed recognize customary land tenure rights at law, and where possible it discusses how non-statutory ownership schemes are governed. Finally, it addresses the extent to which communities are permitted to have a voice in land use development.

The statements and analysis contained herein are the work of the American Bar Association’s Rule of Law Initiative (ABA ROLI). They address, by and large, the *de jure* legal framework in Eritrea, Ethiopia, Ghana, Lesotho, Malawi, Namibia, Uganda, and Zambia. This Report is based primarily on desk review of freely and publicly-available laws and reports, supplemented in portions by the knowledge of ABA ROLI’s local affiliates. Please note that the materials discussed in this Report capture only the legislative and policy framework of the relevant countries; *de facto* implementation of these laws may be at issue in some, if not all, of these states.

---

<sup>1</sup> The statements and analysis contained within this report are the work of the American Bar Association Rule of Law Initiative, which is solely responsible for its content. The views expressed herein should not be construed as representing the policy of the ABA. This report was funded by a grant from the United States Department of State. The opinions, findings and conclusions stated herein are those of the author[s] and do not necessarily reflect those of the United States Department of State.

<sup>2</sup> JANET PRITCHARD ET. AL., SECURING COMMUNITY LAND AND RESOURCE RIGHTS IN AFRICA: A GUIDE TO LEGAL REFORM AND BEST PRACTICES 6 (2013).

## I. Recognition of Customary and Communal Land Rights

### Eritrea

Eritrea's laws do not explicitly protect the rights of indigenous or tribal peoples, including indigenous or tribal peoples who are stateless. ABA ROLI has been unable to identify any laws that explicitly protect the rights of communities.

Eritrea's laws do not recognize customary land rights. The Proclamation to Reform the System of Land Tenure in Eritrea (Land Proclamation) repealed all land tenure systems previously in application, such as Diesa, Tslmi, public domain land, Quah Mahtze, Meret worki and others together with their laws and customary procedures.<sup>3</sup>

Eritrea's laws also do not recognize group (communal) land rights, as the Land Reform Proclamation invalidated all village boundaries, which used to be the basis for community-owned land.<sup>4</sup>

### Ethiopia

Ethiopia does not recognize customary principles of land ownership.<sup>5</sup> However, Ethiopia does recognize the right of communal land holding, defining communal holdings as "rural land which is given by the government to local residents for common grazing, forestry, and other social services."<sup>6</sup> The ownership of land is "vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities, and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange."<sup>7</sup>

### Ghana

Almost 80% of Ghana's land is held under customary tenure, made up of 'stool lands' (i.e., lands held in trust for the community by a 'stool' or 'skin' "as symbol of traditional authority").<sup>8</sup> Possibly

---

<sup>3</sup> Land Reform Proclamation, Proclamation No. 58/1994, art. 39, *available at* <http://extwprlegs1.fao.org/docs/pdf/eri8227.pdf> (last visited July 22, 2017) [hereinafter Proclamation No. 58/1994].

<sup>4</sup> *Id.* at art. 40.

<sup>5</sup> A Proclamation to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia, no. 1 of 1995, art. 40, *available at* [https://www.constituteproject.org/constitution/Ethiopia\\_1994.pdf?lang=en](https://www.constituteproject.org/constitution/Ethiopia_1994.pdf?lang=en) (last visited July 21, 2017) [hereinafter ETHIOPIA CONST.]; Urban Lands Lease Holding Proclamation No. 721/2011, §§ 16-17, *available at* <http://www.ethiopianembassy.org/pdf/new-land-lease-proclamation-no-721-20111.pdf>. (last visited July 21, 2017).

<sup>6</sup> Rural Land Administration and Use Proclamation No. 456 of 2005, *available at* <http://extwprlegs1.fao.org/docs/pdf/eth95459.pdf> (last visited July 21, 2017) [hereinafter Proclamation No. 456/2005].

<sup>7</sup> DANIEL WELDEGEBRIEL AMBAYE, LAND RIGHTS IN ETHIOPIA: OWNERSHIP, EQUITY, AND LIBERTY IN LAND USE RIGHTS (2012), *available at* [https://www.fig.net/resources/proceedings/fig\\_proceedings/fig2012/papers/ts0supra2d/TS02D\\_ambaye\\_521.pdf](https://www.fig.net/resources/proceedings/fig_proceedings/fig2012/papers/ts0supra2d/TS02D_ambaye_521.pdf); ETHIOPIA CONST., *supra* note 5, at art. 40; Proclamation No. 456/2005, *supra* note 6.

<sup>8</sup> *Country Profile: Ghana*, USAID, <https://www.land-links.org/country-profile/ghana/> (last visited July 17, 2017) [hereinafter *Country Profile: Ghana*]; MINISTRY OF LANDS AND FORESTRY, NATIONAL LAND POLICY, JUNE 1999, § 2.1, *available at* <http://theredddesk.org/sites/default/files/National%20Land%20Policy.pdf> (last visited July

owing to the influence of early Ghanaian coastal chiefs, customary land ownership is based on the principle of allodial or absolute title;<sup>9</sup> stool lands are treated as a form of private property, held by chiefdoms and families who owe fiduciary duties with respect to the lands that they own.<sup>10</sup> Where land is designated stool land, no person or body may gain a freehold interest in it,<sup>11</sup> and where customary property interests are not documented, the Constitution provides that they will be considered valid.<sup>12</sup> In situations where groups do not recognize the use of a stool or skin to symbolize private communal land ownership, ownership rights are vested in clans, families, or individuals.<sup>13</sup>

The Government of Ghana has substituted its ownership rights in certain types of property for any rights that communities and indigenous groups might otherwise hold. For instance, the Water Resources Commission Act vests ownership, control, and management of all the water in the country in the government; the same is true of mineral rights.<sup>14</sup> With respect to timber, while stools and/or families have ownership interests in the timber trees themselves, the Concession Act mandates that the government administer the trees in trust for their customary owners.<sup>15</sup>

The Constitution creates the Office of the Administrator of Stool Lands,<sup>16</sup> which is tasked with establishing and collecting tariffs on such lands.<sup>17</sup> The Office of the Administrator of Stool Lands is additionally supposed to work with the Regional Lands Commission “of the region in which the land is situated” and with the stools and traditional authorities to determine the disposition and development of such land.<sup>18</sup>

---

17, 2017).

<sup>9</sup> NATIONAL LAND POLICY, *supra* note 8, at § 2.1.

<sup>10</sup> See Liz Alden Wily, *Customary Land Tenure in the Modern World: Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa* (Nov. 2011) at 11, available at <https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/7713/customary%20land%20tenure%20in%20the%20modern%20world.pdf?sequence=1> (last visited July 17, 2017); GHANA CONST. art. 36(8), available at [https://www.constituteproject.org/constitution/Ghana\\_1996.pdf?lang=en](https://www.constituteproject.org/constitution/Ghana_1996.pdf?lang=en) (last visited July 17, 2017) [hereinafter GHANA CONST.].

<sup>11</sup> GHANA CONST. art. 267(5).

<sup>12</sup> TÉODYL NKUINTCHUA, THE STATE OF COMMUNITY LAND RIGHTS IN AFRICA (Dec. 2016) 8, available at [http://rightsandresources.org/wp-content/uploads/2017/02/The-State-of-Community-Land-Rights-in-Africa\\_English\\_Africa-Community-Rights-Network\\_Dec-2016.pdf](http://rightsandresources.org/wp-content/uploads/2017/02/The-State-of-Community-Land-Rights-in-Africa_English_Africa-Community-Rights-Network_Dec-2016.pdf) (last visited July 17, 2017).

<sup>13</sup> NATIONAL LAND POLICY, *supra* note 8, at § 2.1.

<sup>14</sup> *Country Profile: Ghana*, *supra* note 8.

<sup>15</sup> *Id.*

<sup>16</sup> GHANA CONST., art. 267(2).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at arts. 267(3), (7), (8).

## Lesotho

Lesotho law stipulates that all land is vested in the Basotho Nation and is held in trust by the King.<sup>19</sup> Where customary law governing land ownership is inconsistent with the Land Act, the provisions of the Land Act control.<sup>20</sup> Beyond this, ABA ROLI has not identified any other laws that may or may not recognize communal land rights in Lesotho.

## Malawi

While the Constitution of Malawi generally vests all lands and territories in the Republic,<sup>21</sup> the Land Act of Malawi recognizes private and customary land ownership interests.<sup>22</sup>

The Land Act of 1965 and the Land Policy of 2002 recognize three categories of land rights: public, private, and customary land.<sup>23</sup> Public land is land that is used, acquired, or held by the government in the public interest, and may include parks, conservation, and historical areas.<sup>24</sup> Land used or owned by the government for public purposes would also fall into this category.<sup>25</sup> Private land includes land that is owned, held, or occupied under freehold title or lease, or is otherwise registered as private land under the terms of the Registered Land Act.<sup>26</sup>

Finally, customary land is defined as all land that is “held, occupied, or used by community members under customary law.”<sup>27</sup> Such land is held in trust by the President for the people of Malawi, and land disputes are determined under the terms of customary law.<sup>28</sup> Land held under customary tenure is generally administered by traditional leaders on behalf of communities; however, land may also be held individually, in the names of families and individuals.<sup>29</sup> The National Land Policy of 2002 seems to suggest that land held in customary tenure may not be sold outside the community;<sup>30</sup> however, as no act of Parliament has implemented the terms of the 2002 Land Policy into Malawian law,<sup>31</sup> it is unclear whether this provision currently has binding effect.

---

<sup>19</sup> Land Administration Authority Act, No. 9 of 2010, § 4 *available at* [https://www.lesotholii.org/files/node/12162/land\\_administration\\_authority\\_act\\_2010\\_pdf\\_15551.pdf](https://www.lesotholii.org/files/node/12162/land_administration_authority_act_2010_pdf_15551.pdf) (last visited Aug. 3, 2017).

<sup>20</sup> *Id.*

<sup>21</sup> Constitution of Malawi, 1994, arts. 207, *available at* [https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017) [hereinafter MALAWI CONST.].

<sup>22</sup> Land Act of 1965, Ch. 57:01, *available at* <http://extwprlegs1.fao.org/docs/pdf/mlw41845.pdf> (last visited July 23, 2017).

<sup>23</sup> USAID, COUNTRY PROFILE: PROPERTY RIGHTS AND RESOURCE GOVERNANCE: MALAWI 6 (2016), *available at* [https://www.land-links.org/wp-content/uploads/2016/09/USAID\\_Land\\_Tenure\\_Malawi\\_Profile.pdf](https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Malawi_Profile.pdf) (last visited July 23, 2017) [hereinafter USAID, COUNTRY PROFILE: MALAWI].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> MINISTRY OF LANDS, HOUSING AND SURVEYS, NATIONAL LAND POLICY §§ 9-10 (2002), *available at* [http://www.lands.gov.mw/phocadownload/land\\_policies\\_plans/national%20land%20policy%20january%202002.pdf](http://www.lands.gov.mw/phocadownload/land_policies_plans/national%20land%20policy%20january%202002.pdf) (last visited July 23, 2017) [hereinafter NATIONAL LAND POLICY].

<sup>31</sup> USAID, COUNTRY PROFILE: MALAWI, *supra* note 23, at 5-6.

## Namibia

The Constitution of Namibia prohibits discrimination on the grounds of ethnic origin,<sup>32</sup> but there is no recognition of the rights of indigenous peoples in the Constitution.<sup>33</sup> The Constitution does protect the right to property.<sup>34</sup>

Under the Communal Land Reform Act of 2002,

[A]ll communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.<sup>35</sup>

In 2007, Namibia voted for the UN Declaration on the Rights of Indigenous Peoples.

Nevertheless, the UN Human Rights Committee has noted the prevalence of *de facto* racial discrimination and discrimination against indigenous peoples. In particular, the Committee notes that:

[A]ll traditional indigenous lands remain under State ownership while traditional authorities may only administer communal lands according to the Communal Land Reform Act, and that indigenous groups are insufficiently consulted regarding the extraction of natural resources on their traditional lands (arts. 2 and 26). The State party should ensure that indigenous peoples have titles over lands and territories that they traditionally occupied or resources they owned. It should seek the free and informed consent of indigenous communities and give primary consideration to their opinions and decisions prior to granting licenses to extractive industries.<sup>36</sup>

## Uganda

The Constitution recognizes and protects the rights of communities and indigenous people to carry on and promote their customs and traditions, as long as those customs and traditions do not violate the Constitution.<sup>37</sup>

---

<sup>32</sup> Namibia, Constitution of 1990, art. 3, *available at* [https://www.constituteproject.org/constitution/Namibia\\_2010.pdf?lang=en](https://www.constituteproject.org/constitution/Namibia_2010.pdf?lang=en) (last visited July 31, 2017) [hereinafter NAMIBIA CONST.].

<sup>33</sup> *Indigenous peoples in Namibia*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, <http://www.iwgia.org/regions/africa/namibia> (last visited July 31, 2017).

<sup>34</sup> NAMIBIA CONST., *supra* note 32, at art. 16.

<sup>35</sup> Communal Land Reform Act, No. 5 of 2002, § 17, *available at* <http://www.lac.org.na/laws/pdf/communallandreformact.pdf> (last visited July 31, 2017).

<sup>36</sup> United Nations Human Rights Committee, Concluding Observations on the Second Report of Namibia §§ 43-44, U.N. Doc. CCPR/C/NAM/CO/2, *available at* [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NAM&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NAM&Lang=EN) (navigate to Reporting Cycle II, then Concluding Observations, to download a copy of the document) (last visited July 31, 2017).

<sup>37</sup> UGANDA CONST., arts. 37 & 246, *available at* [https://www.constituteproject.org/constitution/Uganda\\_2005.pdf?lang=en](https://www.constituteproject.org/constitution/Uganda_2005.pdf?lang=en) Constitution (last visited July 19, 2017) [hereinafter UGANDA CONST.].

The Constitution and the Land Act recognize four basic land tenure systems. These are freehold, leasehold, customary, and *mailo* rights.<sup>38</sup> *Mailo* landholding is a holdover from the 1900 Uganda Agreement, which converted some property held under traditional landholding systems to private property. Among other provisions, the Uganda Agreement recognized “*mailo*” estates, which were large extensions of land that the colonial government conferred to chiefs as personal property. Tenants could be permitted to live on and utilize the *mailo* owner’s estate.<sup>39</sup>

Customary tenure systems in Uganda generally permit clan heads or chiefs to allow individuals to access as much land as was needed for subsistence; in communities that subsisted on moving livestock across grazing areas, land rights were based on agreements between clans that permitted movement of households and cattle along traditional cattle corridors. However, there is no uniform set of customary tenure systems in Uganda; these “vary across ethnic groups and even clans within one group, and can change to accommodate new challenges and opportunities.”<sup>40</sup>

With regard to customary tenure, the Land Act specifies that any person, family, or community holding land under customary tenure on former public land may acquire a certificate of customary ownership for that land. These certificates may be leased, mortgaged, and pledged in those communities that permit these practices. In addition, holders of customary ownership who want to use their land as a group can establish a common land association to manage and protect their interests in the communal land. In this way, communities that wish to continue to practice customary tenure, including pastoralist communities, are given legal recognition and are provided with the legal mechanism to do so.<sup>41</sup>

While there has been some modernization of the legal system regarding land rights, and despite constitutional provisions purporting to ensure equality and non-discrimination for women, men and women are not on equal footing with respect to land ownership.<sup>42</sup>

## Zambia

The Lands Act vests ownership of all land in the President, on behalf of the people of Zambia.<sup>43</sup> Land administration may occur under both statutory and customary tenure systems, by government

---

<sup>38</sup> Peter Veit, *Brief: Women and Customary Land Rights in Uganda*, FOCUS ON LAND IN AFRICA, <http://www.focusonland.com/fola/en/countries/brief-women-and-customary-land-rights-in-uganda/> (last visited July 19, 2017).

<sup>39</sup> SUSANA LASTARRIA-CORNHIEL, UGANDA COUNTRY BRIEF: PROPERTY RIGHTS AND LAND MARKETS (March 2003), *available at* <https://minds.wisconsin.edu/bitstream/handle/1793/23090/ugandabrief.pdf.txt;jsessionid=6410C55F9FD57B93623F21BA183226BC?sequence=2> (last visited July 19, 2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Joyce Nangobi & Pamela Ransom, *The Role of Gender In Securing Land Rights For Equity, Sustainability, and Resilience: In Jinja District, Uganda*, in RESPONSIBLE LAND GOVERNANCE: TOWARDS AN EVIDENCE BASED APPROACH (2017 World Bank Conference on Land and Poverty), *available at* [https://www.confod.com/03-12-Joyce\\_RoseMary-492\\_paper.pdf](https://www.confod.com/03-12-Joyce_RoseMary-492_paper.pdf) (last visited July 19, 2017).

<sup>43</sup> Lands (Amendment) Act, No. 20 of 1995, *available at* [https://www.zambialii.org/zm/legislation/consolidated\\_act/184](https://www.zambialii.org/zm/legislation/consolidated_act/184) (last visited Aug. 5, 2017).

officials and traditional authorities, respectively.<sup>44</sup>

The Lands Act allows for the conversion of customary land to statutory leasehold land,<sup>45</sup> provided that a customary chief provides written consent to the investor.<sup>46</sup> USAID reports that since the passage of the Land Act in 1995, approximately 10% of land that had previously been held under customary tenure has been privatized through leasehold conversion; while this has reportedly resulted in much-needed rural infrastructure development, it has also “caused local people to lose access to water sources, grazing land, and forest products.”<sup>47</sup>

---

<sup>44</sup> *Land Rights and Governance*, ZAMBIA LAND ALLIANCE, <http://www.zla.org.zm/2014/06/land-resources-management/> (last visited Aug. 5, 2017).

<sup>45</sup> USAID COUNTRY PROFILE: PROPERTY RIGHTS AND RESOURCE GOVERNANCE: ZAMBIA 1 (2016), *available at* [https://www.land-links.org/wp-content/uploads/2016/09/USAID\\_Land\\_Tenure\\_Zambia\\_Profile.pdf](https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Zambia_Profile.pdf) (last visited Aug. 5, 2017) [hereinafter USAID, PROPERTY RIGHTS AND RESOURCE GOVERNANCE: ZAMBIA].

<sup>46</sup> *Zambia Country Commercial Guide – Right to Private Ownership and Establishment*, EXPORT.GOV, <https://www.export.gov/article?id=Zambia-Right-to-Private-Ownership-and-Establishment> (last visited Aug. 5, 2017).

<sup>47</sup> USAID, PROPERTY RIGHTS AND RESOURCE GOVERNANCE: ZAMBIA, *supra* note 45, at 1.

## II. Governance of Land Without Formal Title

### Eritrea

The Land Proclamation describes the formal process for land registration.<sup>48</sup> The Land Administrative Body maintains a land registry and submits a copy of the registry to the Land Commission. The registry includes information on the size and boundary of all arable and non-arable land, distributed and non-distributed land, residential areas, buildings, and sites required for conducting various social and development works, forest and pasture areas, sources of water, roads, and the name of every person to whom land has been distributed, the size and boundaries thereof, the date of distribution and change of distribution thereof, and other important information.<sup>49</sup> To prove ownership of immovable property, the law requires a title deed issued by the administrative authority.<sup>50</sup>

The Land Reform Proclamation provides for State ownership of all Eritrean land; as a result, the state retains ownership over lands without a formal title holder. Because the land is owned by the State, communities and indigenous or tribal people cannot assert ownership over lands that do not have a formal title holder.<sup>51</sup>

Eritrea's laws do not appear to protect access to state-owned or untitled lands and resources on which communities or indigenous or tribal people depend for their physical, economic, social, cultural, or spiritual well-being. The Land Reform Proclamation states that, regarding land distribution, the Land Administrative Body shall adequately classify the nonarable land for housing and buildings and areas required for various social and development activities, such as a cemetery, mosque, church, school, village assembly hall, road, forestry, pasture, and sites required by the government for governmental works.<sup>52</sup>

### Ethiopia

Although the law is unclear as to whether the State would hold land as trustee without a formal title holder, the requirement to register land, once acquired from the government, leads to this interpretation.<sup>53</sup> Although indigenous communities are not permitted to assert ownership of rural land, the Proclamation on Rural Land Administration and Land use does allow peasant farmers, pastorals, or any citizen above the age of 18, the right to use rural land for agricultural purposes.<sup>54</sup>

### Ghana

Customary and community ownership interests in land need not be registered or titled for Ghanaian law to recognize those interests.<sup>55</sup> Nonetheless, where land interests are vested in stools, skins, or family members, the Land Title Registration Act of 1986 provides that “the stool or family

---

<sup>48</sup> Proclamation No. 58/1994, *supra* note 3, at art. 17.

<sup>49</sup> *Id.*

<sup>50</sup> Civil Code of the State of Eritrea, art. 1069.

<sup>51</sup> Proclamation No. 58/1994, *supra* note 3, at art. 3.

<sup>52</sup> *Id.* at art. 9.

<sup>53</sup> AMBAYE, *supra* note 7.

<sup>54</sup> Proclamation No. 456/2005, *supra* note 6, at § 5.

<sup>55</sup> NKUINTCHUA, *supra* note 12, at 35.



shall be registered as a proprietor of the land or the interest.”<sup>56</sup> While this is not a formal title requirement, “[f]ormal adjudication, mapping of lands and registration of rights, including their conversion to a state-defined form . . . is required in order for community landholders to secure their rights.”<sup>57</sup> In spite of the requirements of the Land Title Registration Act, as of December 2016, “there [was] still no legal means through which customary rights [could] be registered in the same way that freehold or leasehold rights [could].”<sup>58</sup> These challenges to registration could pose issues for the *de facto* protection of customary and community land ownership rights in Ghana.

### Lesotho

It does not appear that land without formal title, or with customary title, may be governed under other provisions of customary law. Indeed, it appears that because land is vested in the Basotho Nation and held in trust by the King, any land that lacks formal title pursuant to the provisions of the Land Act falls into this category.<sup>59</sup>

### Malawi

While Malawi has a number of laws that regulate title registration,<sup>60</sup> ABA ROLI has been unable to determine whether these laws effectively operate to vest ownership interests in land without title to the State.

### Namibia

ABA ROLI has not identified any provisions of law that deal with the governance of land without formal title.

### Uganda

The Land Act provides that if customary law recognizes an individual’s ownership over land, they do not need to possess formal documentation of title to assert their ownership interests.<sup>61</sup> However, the Land Act does provide that under such circumstances, a landholder must obtain a certificate of customary ownership, issued by Constitutional District Land Boards.<sup>62</sup>

Additionally, it is reported that in practice, statutory rules and evidence forms overrule similar customary rules; as a result, where there are disputes over non-titled land, rights to such land are weakened.<sup>63</sup>

---

<sup>56</sup> Title Registration Act, P.N.D.C.L. 152 of 1986, § 110(1)(a), *available at* <http://extwprlegs1.fao.org/docs/pdf/gha6287.pdf> (last visited July 17, 2017).

<sup>57</sup> NKUINTCHUA, *supra* note 12, at 9.

<sup>58</sup> *Id.* at 13.

<sup>59</sup> See UN-HABITAT, LAND TENURE, HOUSING RIGHTS AND GENDER IN LESOTHO 35 (2005), *available at* [https://www.un.org/ruleoflaw/files/Law\\_Land\\_Tenure\\_and\\_Gender\\_LESOTHO.pdf](https://www.un.org/ruleoflaw/files/Law_Land_Tenure_and_Gender_LESOTHO.pdf) (last visited Aug. 3, 2017).

<sup>60</sup> See, e.g., A. T. B. Mbalanje, *Land Law and Land Policy in Malawi*, UN UNIVERSITY, <http://archive.unu.edu/unupress/unupbooks/80604e/80604E09.htm> (last visited July 23, 2017).

<sup>61</sup> Land Act of 1998, § 3(4)(c), *available at* <https://www.ulii.org/ug/legislation/consolidated-act/227> (last visited July 19, 2017).

<sup>62</sup> *Id.* at § 4.

<sup>63</sup> Veit, *supra* note 38.

## Zambia

It does not appear that the Lands Act requires that formal title exist in order for customary and communal landholders to exercise their right to land.

### III. Community Rights in Land-Based Development

#### Eritrea

Eritrea's laws generally do not provide protections for community rights in connection with land-based investment or development projects. Other than compensation, no legal remedies are available for violations of such rights.<sup>64</sup> The government has the absolute right to allocate any land for development without input from communities.<sup>65</sup>

Eritrean law does not require community development agreements before land is developed; nor does it appear to require public consultations regarding environmental impact or any other kind of assessment.<sup>66</sup>

#### Ethiopia

In Ethiopia, the Environmental Impact Assessment Proclamation provides for the requirement to undertake an environmental impact assessment for projects, which are listed in a subsequent directive.<sup>67</sup> The Environmental Impact Assessments Proclamation provides that required environmental impact assessments are to be undertaken by the proponent of a particular project. The Environmental Protection Authority or the relevant regional authority is responsible for making environmental impact assessments accessible to the public and for soliciting comments.<sup>68</sup> The Environmental Impact Assessment Proclamation provides those with grievances with the opportunity to submit their complaints to the federal government or to the relevant regional environmental agency, as appropriate.<sup>69</sup> Furthermore, the proclamation provides penalties for those who falsely present their impact assessment study reports. Persons charged with this crime may be liable for payment of 50,000 to 100,000 Ethiopian birr.<sup>70</sup>

#### Ghana

As noted, the Office of the Administrator of Stool Lands and the Regional Lands Commissions are supposed to work alongside the stools and other traditional authorities "in all matters relating to the administration and development of stool land . . . [and] in preparing a policy framework for the rational and productive development and management".<sup>71</sup> It has been reported that Ghanaian chiefs "exercise significant power over land allocation [and] alienation";<sup>72</sup> however, to the extent that administrative bodies are not easily accessible in rural areas, the ability for communities to effectively engage in consultative processes is undermined.<sup>73</sup>

Furthermore, questions arise as to whether powerful community leaders who engage in land deals

---

<sup>64</sup> Proclamation No. 58/1994, *supra* note 3, at arts. 50-52.

<sup>65</sup> *Id.* at art. 50.

<sup>66</sup> *Id.*

<sup>67</sup> Environmental Impact Assessment Proclamation No. 299 of 2002, § 7, *available at* <http://extwprlegs1.fao.org/docs/pdf/eth44281.pdf> (last visited July 21, 2017).

<sup>68</sup> *Id.* at § 15.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> GHANA CONST., arts. 267(7)-(8).

<sup>72</sup> NKUINTCHUA, *supra* note 12, at 15.

<sup>73</sup> *Id.* at 16.

truly represent the voices of their communities. It has been reported that some traditional rulers abuse their fiduciary roles with respect to communal lands to engage in large-scale land transactions; because such rulers are seen as representatives of indigenous communities, the government of Ghana may find it difficult to challenge the authority under which these transactions occur.<sup>74</sup> As a result, community leaders who engage in less-than-transparent land transactions may contribute to the overall vulnerability and insecurity of their subjects.<sup>75</sup>

The government's eminent domain power, combined with its ability to exercise dominion and control over all of Ghana's mineral deposits, arguably permits it to authorize large-scale investments, especially with respect to mining.<sup>76</sup> Despite the fact that communities have the right to "prompt payment of fair and adequate compensation" and resettlement in the case of such takings,<sup>77</sup> the possibility of displacement creates trafficking risks.

### Lesotho

Lesotho recognizes community rights in land-based development at least to the extent that it has called for greater participation in environmental decisionmaking and program design.<sup>78</sup>

However, ABA ROLI has not determined whether Lesotho has more specific provisions relating to community rights in land-based development.

### Malawi

The National Land Policy of 2002 lays out a number of provisions that require community consultation for land use initiatives. For instance, the Policy provides that land use planning in villages must be done as a consultative process, in which the community fully participates.<sup>79</sup> With respect to lakeshore development, the National Land Policy strips local chiefs of the sole right to allocate land, and calls for stricter adherence to the Development of Lakeshore Plots (Control) Amendment Order.<sup>80</sup>

Other laws that call for community involvement in land-based development include the Environment Management Act, which provides that environmental impact assessments may be subject to public comment.<sup>81</sup>

### Namibia

---

<sup>74</sup> *Id.* at 17.

<sup>75</sup> *Country Profile: Ghana*, *supra* note 8.

<sup>76</sup> *See supra* note 14 and accompanying text; *see also* NKUINTCHUA, *supra* note 12, at vii.

<sup>77</sup> GHANA CONST., art. 20.

<sup>78</sup> *See* NATIONAL ENVIRONMENTAL POLICY FOR LESOTHO (1998), § 3.3, *available at* [https://www.liportal.de/fileadmin/user\\_upload/oeffentlich/Lesotho/30\\_wirtschaft-entw/National\\_Environmental\\_Policy\\_1998.pdf](https://www.liportal.de/fileadmin/user_upload/oeffentlich/Lesotho/30_wirtschaft-entw/National_Environmental_Policy_1998.pdf) (last visited Aug. 3, 2017).

<sup>79</sup> NATIONAL LAND POLICY, *supra* note 30, at § 6.5.1.

<sup>80</sup> *Id.* at 6.7.

<sup>81</sup> Environment Management Act, No. 23 of 1996, art. 121, *available at* <http://ilo.org/dyn/natlex/docs/ELECTRONIC/45482/97715/F548493060/MWI45482.pdf> (last visited July 23, 2017).

Communal lands are administered by traditional authorities and land boards in a joint consultative process.<sup>82</sup> Land disputes in communal areas are generally governed by traditional dispute resolution mechanisms, and Communal Land Boards are empowered to hear disputes on such matters.<sup>83</sup>

A number of resource extraction policies and laws in Namibia appear to require improved stakeholder consultations, including the Minerals Policy of 2003.<sup>84</sup> It is unclear to what extent environmental impact assessments conducted under the terms of the Environmental Management Act and the Environmental Impact Assessment Regulations require community consultation processes.<sup>85</sup>

### Uganda

Uganda does not appear to have particularly strong protections for community land rights. While customary land tenure is recognized, as noted above, these customary systems appear to privilege individual ownership over community ownership of land. As noted above, *mailo* systems vest estate ownership in clan chiefs and community leaders, and although the law recognizes the existence of ‘family land rights’, these tend to be represented by heads of family.<sup>86</sup> As such, the extent to which communities can exercise a legitimate voice in land-based development decisions is unclear.

Nonetheless, certain provisions of law do require community engagement in land-based development. For instance, it is possible for communities to assert customary ownership rights over forests and woodlands, rangelands, marshlands, bodies of water, mineral rights, farmlands, and settlements;<sup>87</sup> communities are required by law to take an active interest particularly with respect to forestry and the timber industry.<sup>88</sup> Nonetheless, in circumstances where local leaders do not engage in consultative processes and advance their personal interests over the interests of the communities that they govern, the alienation of land may contribute to the overall vulnerability and insecurity of communities.<sup>89</sup>

### Zambia

As noted, community leaders have the right to alienate customary land in favor of third parties, including private investors. However, despite the fact that customary laws require traditional leaders to consult with their communities before engaging in such practices,<sup>90</sup> a lack of transparency and accountability on the part of such leaders undermines communities’ rights in

---

<sup>82</sup> USAID, COUNTRY PROFILE: PROPERTY RIGHTS AND RESOURCE GOVERNANCE: NAMIBIA 8 (2016), *available at* [https://www.land-links.org/wp-content/uploads/2016/09/USAID\\_Land\\_Tenure\\_Namibia\\_Profile.pdf](https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Namibia_Profile.pdf) (last visited July 23, 2017) [hereinafter USAID, COUNTRY PROFILE: NAMIBIA].

<sup>83</sup> *Id.* at 9.

<sup>84</sup> *Id.* at 15.

<sup>85</sup> See *Namibia, Mining Law 2017*, African Law & Business ch. 1, <https://www.africanlawbusiness.com/publications/mining-law/mining-law-2017/namibia/q-and-a> (last visited July 31, 2017).

<sup>86</sup> NKUINTCHUA, *supra* note 12, at 11.

<sup>87</sup> *Id.* at 35-36.

<sup>88</sup> National Environment Act of 1995, § 39, *available at* <http://www.wipo.int/edocs/lexdocs/laws/en/ug/ug019en.pdf> (last visited July 19, 2017).

<sup>89</sup> Veit, *supra* note 38.

<sup>90</sup> *Land Rights and Governance*, *supra* note 44.

such practices.<sup>91</sup>

---

<sup>91</sup> *Id.*