# **Defining Customary Land Rights**

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## CHRIS HUGGINS INDEPENDENT RESEARCHER



#### Overview of the Presentation

- What do we mean by 'Custom'?
- Characteristics of Customary Tenure
- Common Property Resources
- Custom and Conflict
- Titling & Tenure Security
- Recognition of Custom
- Dispute Resolution
- Concluding Thoughts

## What do we mean by 'Custom'?

- In the majority of countries, most of the land is held under customary tenure - 90% in Africa
- Wide variety of customary tenure regimes
- Custom is not static, it evolves
- Custom includes, but is not limited to 'tradition'
- Unsuccessful attempts to 'abolish' customary tenure
- Much customary land already alienated
- Customary lands often legally held 'in trust' by state
- Legal pluralism is the reality in most places

### **Characteristics of Customary Tenure**

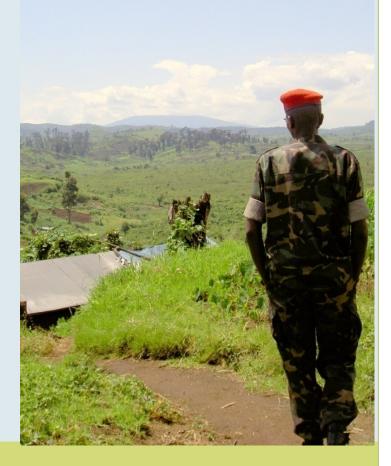
- Individual rights (residential plot, fields, etc)
- Common property resources (forests, pastures, etc)
- More investment leads to more individual security
- Fuzzy boundaries and buffer zones
- Overarching spiritual relationship to the land
- Kinship or territory-based criteria for land access
- Community leaders regulate internal management & transfers of land
- Restrictions on dealing with outsiders
- Unused land reverts to community control

#### Common Property Resources – Myth and Reality

- Multiple users: individuals, households, kinship groups, villages, communities, etc
- Users of different status: owners, co-owners, primary, secondary and tertiary users, lessors and lessees, unrecognised or 'illegal' users
- Multiple uses, multiple resources (Turkana example)
- Informal rental and sales markets exist
- 'Tragedy of the Commons' confused CPR with open access regimes
- 'Tragedy of the enclosure' may be more common, especially of key resource areas

#### **Custom and Conflict**

- Customary systems are robust but can be profoundly altered during protracted conflict
- Alienation of land
- Customary decision-makers become involved in the conflict
- Political interference (i.e. in leadership succession)
- Can 'recover' quickly (no offices to rebuild)
- Group identities change
- State or rebels may introduce parallel & competing structures



## Does Titling Provide Tenure Security?

- Titling processes have proven contentious
- Titling brings out 'latent conflicts'
- Winners & losers: difficulties of registering 'secondary rights'
- Title-holders often sell-out (potential for disaster at family and community levels)
- Where the state is predatory, titling increases risk of land-grabbing
- Titles may not provide basis for credit for smallholders, but increase inequalities
- Outcomes are highly context-specific

#### **Increasing Recognition of Customary Tenure**

- WB: Customary rights are flexible and locally-adapted; definition of rights at level of the group can offer security
- Attempts to codify customary systems e.g. W. Africa
- Minimalist approaches: legal recognition of 'custom'
- Where few internal conflicts exist, map external boundaries to protect from encroachment
- Recognition of local 'certificates of ownership'
- Group incorporation, constitution, etc
- Internal conflicts may require elected land boards & recourse to external adjudication

### **Dispute Resolution**

- Customary systems have dispute resolution mechanisms
- NGOs, religious groups often conduct mediation
- Local systems are accessible & rely on social pressure, popular participation, flexible rules of evidence
- Usually combine custom and statutory law
- Potential weaknesses: no due process, discrimination (women, youth, etc), community-specific, corruption
- Lack of legal basis of decisions
- Forum-shopping is the norm in most places
- Who is the 'shop keeper'? Not the state

### **Concluding Thoughts**

- Identities become politicised good conflict analysis essential
- Variety of software (participatory mapping) and hardware (GPS, sat photos) to assist delineation
- Major issues remain legal, political, social
- Beware idealization or demonization of custom
- Monitoring and evaluation essential
- Focus on rights of women, orphans, ethnic minorities
- Hybrid systems but what is articulation between customary and statutory?