



Key points

01

The return of Protected Areas (PAs) to indigenous communities who are the rightful owners of these lands is common practice in some states and expanding in others

02

Land can be environmentally protected without having to be owned by Government

03

Returning PAs to communities leads to fuller, cheaper and more effective environmental protection

04

Communities may choose to involve (and even to lease out a PA to) a relevant state or approved private conservation agency

05

Systems of protection and governance of returned PAs are still in evolution in all the country cases reviewed.

Critical Next Step in the Decolonisation of Land Relations: Restitution of Protected Areas to Indigenous Communities

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Indigenous communities in Africa are increasingly assertive about the need to have their customary ownership and custodianship of forests recognised by the state. This includes their forests currently under government ownership and management. This briefing looks at 20 countries around the world where restitution to communities has already taken place or is proactively demanded. African indigenous peoples and governments may wish to take inspiration from these examples to adapt and apply them to their own contexts.

Context

This brief arises from research into restitution of state PAs undertaken in collaboration with FPP. An international law firm contributed significantly with pro bono reviews of relevant legislation in ten of the 20 countries sampled.

Country selection was purposive, drawing from states known to be pro-actively returning PAs to community ownership. Many more countries than the 20 selected could have been researched, had more time and resources been available. The total number of countries which legally provide for restitution of PAs to customary community claimants is not known.

A main prompt for the research was the **Rulings of the African Court of Human and Peoples' Rights**

in May 2017 and especially in June 2022 ordering the Government of Kenya to reconstitute Mau Forest Complex to the Mau Ogiek people under registered community land title.² This sets an encouraging precedent for other indigenous forest peoples in Africa who are making similar demands.³

A further prompt is **the important role which intact forest plays in climate change mitigation**. The global community is in the process of finalising pledges to raise Protected Areas to 30% of the earth's area.⁴ PAs cover 17% of global lands.⁵ Globally, more than 90% of the 625,000 PAs declared are owned and/or controlled by governments.⁶ New PAs are declared annually, almost always resulting in community dispossession and displacement.

About this briefing series: In 2003, at the 5th World Parks Congress in Durban, the conservation world made commitments to return lands to indigenous peoples that had been turned into protected areas without their consent, and to only establish new protected areas with their full consent and involvement. Those commitments have not been realised. This paper is one in a series of briefing papers that offers case studies, testimony, research, and analysis from FPP and from our partners that examine the current state of play of the relationship between conservation and indigenous peoples, and local communities with collective ties to their lands. It will expose challenges and injustices linked to conservation operations, showcase practical, positive ways forward for the care of lands and ecosystems, led by indigenous peoples and local communities themselves, and reflect on pathways to just and equitable conservation more broadly.



Image credit:
Conservation and Mapping.
Credit: Lewis Davies.

In 2020, the Rights and Resources Initiative counted 136 million rural land dependents as displaced from PAs and another 363 million living lawfully or unlawfully within PAs.⁷ This has always been reprehensible to indigenous and other land dependent communities, and it is increasingly unacceptable to the rest of the world.

Given almost all PAs were originally the customary property of communities taken from them during colonial and post-colonial eras, and given the continuing impacts of their displacement, **communities are concerned that increases in the numbers and area of PAs should not occur through further involuntary takings of community lands.** Instead, governments should look to communities as the most logical owner-custodians and channel investment to assist them to bring residual and potential forests within their domains under protection. In Africa, these messages were powerfully put across by several hundred community representatives at the first African Protected Areas Congress held in Kigali in July 2022.⁸

Scientific study strongly endorses transition towards formal empowerment of land dependent communities as the main way to provide the much-needed increase in forest lands under protection, and to ensure that existing PAs are effective and rights-based. Major international agencies are in accord that this is the way forward for lasting resource protection.⁹

Restitution as an element in the decolonisation of customary land rights

Restitution of PAs does not come out of the blue. As shown in the **Findings** section below, this was part of the early decolonisation of customary land rights wherein indigenous peoples were target groups. That is, these communities regained ownership of state-owned Protected Areas and some privately titled lands as well as recognition of public lands as their property.

In other countries, restitution of PAs is evolving as, in effect, a second phase in the global decolonisation of customary land rights. That is, PA within customary lands were automatically returned to Indigenous Peoples in Canada, Panama, Nicaragua and some other sample states in the process of acknowledging their territories as their own property, wherein such PA had been established. In other countries communities first secure legal recognition of customary territories and then negotiate return of the PA. In still others, such as South Africa, claims for PA are handled separately from other community land claims.

In no instance can restitution occur without a government removing colonial-inherited subordination of customary land tenure, which has widely affected more than 150 of today's 196 independent states. In practice, reform around this has been widespread over the last half century. One driver of this reform has been the reality that, far from disappearing, customary tenure still remains vibrant and widespread as a logical means for communities to govern their traditional lands. This extends to at least 2.5 billion rural land dependents around the world. Moreover, customary tenure resonates positively with modern trends towards both devolving governance to the grassroots and shifting away from governments as the majority landlords of country lands. These modern systems instead designate governments to technically and financially assist communities and maintain ultimate regulatory oversight. These models are consistent with global trends of recognising customary land tenure as lawful and producing registrable property interest. Around 70% of all countries have established this system in new laws.

Critically, in recognition that much of a community's land is not private farms or settlements but communal forests, rangelands and swamps, legal provision for collective land title is widespread.¹⁰ This enables a community to bring its entire community domain under shared ownership or to limit collective title to its communal resources.

However, especially in Asian and African states, recognition of customary ownership is limited to those lands on which communities currently live. This excludes recognition of rights to PAs as state lands. While this is not problematic for all customary communities, it has proven highly restrictive for indigenous forest peoples in particular where such PAs represent the only lands left to the community since they have not yet been converted into farms, towns and cities allocated to other people or buyers. As a result, there has been a growing demand for restitution of PAs.

The Study

The principal research question was: how is restitution legally undertaken and how far does it extend to PAs? The countries selected included: Vanuatu and Fiji in Oceania; Australia and New Zealand in Australasia; Canada in North America; Guyana, Colombia, Panama and Nicaragua in Latin America; The Philippines, India, Cambodia and Laos in Asia; Romania, Portugal and Norway in Europe; and Ghana, Liberia, Tanzania and South Africa in sub-Saharan Africa. The findings listed below first detail the terms upon which customary rights are recognised as legally protected properties. These are followed by findings as to whether and how these same states extend this recognition to PAs.



Image credit:

Conservation and Mapping.
Credit: Lewis Davies.

Findings

01 Recognising community land rights as lawful ownership

1.1. All 20 states provide in law for community ownership. Only Ghana does not refer to this directly but is uniquely a country in this sample where customary lands have always been recognised as owned but until recently not registrable as community properties. The new land law of 2020 now provides for a family, clan, or chiefdom to secure a title deed for this property.

1.2 Registration is not compulsory in most states. This is significant as it shows the government acknowledges that lawful ownership already exists. It is also practical, as titling takes a great deal of time.

Registration is nonetheless an important instrument for communities to double lock the security of their ownership. Each law strongly advises communities to take up survey and titling opportunities and lays out the steps. Some limit the requirement for titling altogether; for example, in Oceania, more than 90% of land in all but two of the 14 island states is community properties, and titles are neither required nor sought unless the community seeks to lease some of its land, at which point the community must first register its property.

1.3 Fifteen of the 20 states vest title directly in the community or in local band, tribal or elected councils (e.g., Portugal, Guyana, and for First Nations in Canada). In contrast, trusts or other corporate entities are created to hold the property on behalf of the community in Australia, New Zealand, South Africa, and for Sami in Norway and Inuit in Canada. Corporate entities have proved costly and bureaucratic to sustain, especially in Australia. Most African states (Tanzania, Liberia, Ghana in this sample) directly vest land in the community, by recognising the community as a legal person. This involves minimal cost and removes onerous reporting required by corporate entities. This also results in stronger inclusion and empowerment of members as they are the direct co-owners in common. South Africa has failed so far to provide an acceptable framework for its 15 million residents to hold collective title in the former homelands; this is due to the refusal by hereditary chiefs to cede claimed personal ownership over the concerned lands.¹¹ Hundreds of Community Property Associations and Trusts serve as frameworks for vesting collective title and governance outside the former homelands and are afflicted by bureaucratic demands as corporate entities.

1.4 Nineteen of the 20 countries studied recognise forests and rangelands as collective property. This is clearly important for how the state then considers PAs on those lands or those which were taken from the community in the past. This is reviewed in Section 2 below.

1.5 Twelve of the studied countries explicitly include waters, swamps, and foreshores as within the community property (Romania, Portugal, Nicaragua, Australia, Canada, New Zealand, Philippines, Norway, Liberia, Colombia, Panama, India). Canada is alone among the 20 states in including subterranean resources under community land as integral to the property of Inuit and First Nation communities.

1.6 In 14 of 20 cases, community land title is inalienable. No part of the land may be sold. Sale is permitted in special instances in the six other states. For example, in New Zealand, sale of existing Māori freehold land is permitted, but only with the consent of family and/or clan members and state approval. In Colombia, family lands within the Collective Territories of Black Communities (Afro-descendants) may be sold, but not family lands within indigenous peoples' lands. In Tanzania and Canada, communal lands may not be sold but may be transferred to the government. In Liberia, no sale of community land may take place for 50 years after the passage of the Land Rights Law in 2018. In Ghana, only house and farm parcels may be sold.

1.8 Laws in all 20 states provide for families to be given exclusive occupation and use rights to homesteads and farms. These rights are perpetual, inheritable, and transferable under community consent conditions. Where land is abandoned or where there is a lack of heir, the land reverts to the community.

1.9 Laws in more than half the 20 states either state or imply that community lands cannot be acquired for public purposes. This is especially so where these are described as unmortgageable, unseizable and imprescriptible (i.e., cannot be revoked or taken away).¹² However, governments generally retain rights to authorise mining and oil



Image credit:

Chepterit cave, on Elgon Ogiek community lands, Chepkitale, Mount Elgon, Kenya.
Credit: Justin Kenrick, FPP.

1.7 Laws permit leasing of community property in 11 of 20 states, but usually only to the state. For example, in South Africa, commercial forest plantations restituted to communities outside PAs are normally leased to the parastatal Forestry Company to manage and harvest for pre-agreed rent and income share to the community. In Ghana, the Forestry Commission has the sole authority to manage and harvest the 317 customarily owned natural forests, and similarly pays rent to and shares income with the customary owners. Leases of plantations to the Forest Service also occur in Portugal. In Guyana, a community may lease out up to 10% of its total land. Direct leasing of lands in Tanzania and the Philippines is limited to farm and homestead parcels.

and gas exploration. Consultation with the affected community owners is required in all 20 states, including where FPIC is not legally entrenched, or extended only to indigenous communities.¹³ Conditions for exploitation, and agreements as to the income and benefits which will accrue to the community, are defined in all countries reviewed. In practice, it is rare in the sample countries for a community to be able to entirely halt mining or hydrocarbon developments on their land. Among the study countries, this is presently a major source of contention between communities and the government in Nicaragua.

2 Protected Areas within Community Lands

2.1 Laws in all 20 study countries stipulate that PAs may be owned either by governments, private persons/entities, or by communities.¹⁴

In other words, the status of lands as environmentally protected is distinct from who owns the property; old assumptions that only governments can own a PA are fast diminishing.

2.2 Only four of the 20 states in this sample do not have a proactive legal commitment on restitution inclusive of PAs. Delivery among the other 16 countries is semi-automatic in the course of formal recognition of community land ownership within which a PA exists, as is the case in The Philippines, Guyana, Colombia, Nicaragua, Panama, Australia, New Zealand, Vanuatu, Fiji, Canada, Romania and Norway. It is occurring in more specific case-by-case claims in India, South Africa and Cambodia.

already legally exists but has not been taken up by communities which officially co-manage or manage 5.5 million hectares of National Catchment Forests for the Forest Service which adjoin their village lands. This stems from a combination of local ignorance of the law and tangible reluctance by the Forestry Service to surrender timber or tourism revenue from national level assets to communities. However, few if any new national forests have been established since the Forest Act 2022, which requires the government to investigate and show that there is no local community to serve as owner-conservator before it can declare a new national forest reserve. As a consequence, growth in numbers of forest PA since 2002 has derived entirely from the customary community land sector ('village lands'). Village Land Forest Reserves number around 1,500 and cover 2.2 million hectares.¹⁵

2.3 Indigenous peoples are not the only target beneficiaries of PA restitution. All land dependent customary communities are beneficiaries in nine of the 20 states. Indigenous peoples are the target in six other states. Three other states are legally inclusive of Afro-descendants.

2.4 Restituted PAs retain status as protected irrespective of change of owner. The name, and source and mode of protection and management do change. A National Park may become a Community Park, a National Reserve a Community Reserve. A PA may occasionally be declassified during restitution, where it is concluded that the resource has been irrecoverably degraded, settled, or too depleted by excisions under state management.

2.5 Where restitution of PAs is well established, millions of hectares are involved. The majority of National Parks and Reserves in the four Latin American countries studied now formally belong to communities. Forty-six percent of all PAs in Australia are owned by Aborigine communities; this rises annually as each land claim is systematically determined. In The Philippines, 62 PAs overlap titled cultural or indigenous community properties. This will expand as 92 proposed new national parks are finalised, as most fall within the domains of cultural or indigenous communities, to which the law gives priority. All but two of the 58 community claims to PAs in South Africa that were settled by 2012 resulted in restitution. A further 80 claims were listed as awaiting decision, but their status in 2022 is unclear.¹⁶



Image credit:

Ogiek women Nkareta, Narok, Kenya. 2021.

Credit: Lucy Claridge, FPP.

Situations vary in the four remaining study countries. As noted above, all 317 Forest Reserves in **Ghana** have always been owned by customary chiefdoms but were brought under the control of the Forestry Commission in 1962, which pays annual rent and income shares to the chiefdoms. In **Liberia**, the new Land Rights Act 2018 makes it difficult for the government to declare new PA without the consent of community owners, and is provoking claims against some existing PA, including in the courts. While restitution of PA is not provided for in the laws of **Laos**, all land is owned by the nation and resource governance routinely devolved to community councils. In **Tanzania**, the potential for restitution

2.6 Restitution is not always based on historical claims. Failure of government authorities to sufficiently protect PAs has been a factor for restitution in 70% of all PAs returned to Portuguese communities and 40% of all PAs returned to Romanian communities, all of which had lost significant cover under state ownership.

2.7 No community may sell any part of a PA returned to its ownership. As concluded at 1.7 above, this is not strictly the case in reference to family farms and settlements within community land outside the defined area of the returned PA.

2.8 No part of a PA owned by a community may be leased in 10 of the 20 country cases. In six others, a PA may be leased back to a state protection agency. No legal information was found on the remaining four cases.

2.9 Restitution of a PA to community ownership does not necessarily include restitution of management authority. A role for the former state agency is always sustained. Several models exist. *Co-management* is the dominant paradigm in 13 states. Contractual management by which full management authority is retained by the state dominates in South Africa, Vanuatu, and New Zealand. *Autonomous community management* dominates in only three states (Guyana, Panama, Romania).

2.10 Nevertheless a trend towards community-based management with state assistance and oversight is noted. This is clearest in India, Australia, New Zealand, Colombia, South Africa, Vanuatu and The Philippines. Important lessons are also being learned about *scale* – that several smaller domains are much easier for communities to protect than a single vast domain. *De-bureaucratisation* is also on the agenda, especially in Australia where vesting community lands in cumbersome trusts and corporations has been found to disempower rather than empower communities as active conservators.

2.11 Laws in all 20 states enable a community to declare new PA on their lands, which is separate from cases where a state PA is specifically restored to community ownership. The preference indicated in most of these laws is that the community define the area to be protected and the rules and regime it will apply, and to make its decision official either by declaration, registration or gazette. This links to the equally entrenched position in most of the country laws reviewed that secure community ownership is a prerequisite for such decisions. This echoes positions strongly rising among communities themselves and within the international forest and climate mitigation sector: communities cannot be expected to fulfil their enormous potential as the frontline of forest conservation unless there are guarantees that their protected lands will not be taken from them.

Image credit:

Looking out over elephant territories, Mount Elgon, Kenya.
Credit: Justin Kenrick, FPP



Conclusion

Restitution of PA to customary communities is gradually expanding to more countries as a legal obligation. However, it is least widely adopted in Asia and Africa, where the majority of land and resource dependent communities reside. Historical distinctions between the property of the state and the customary property of rural communities are usually retained in these regions, and PAs fall firmly within the former class.

In Africa, recognition of customary tenure as a legal system of land ownership has surged since the 1990s, now provided for in 32 of 55 states, most recently in Sierra Leone (2022). Nevertheless, the dominant strategy thus far has been to limit recognition of community property to lands which are outside the private and public land sectors – that is, prominently excluding existing PAs.

Property Associations and Trusts are proving costly and bureaucratic and simpler solutions are required; and the vast scale of some returned PAs makes it impossible for the effective participation of owners, hinting at the need for considering sub-PA governance.

Meanwhile, community demands are forcing Liberia, Uganda and DRC to re-examine their rigid approach to the ownership status of PAs by governments. Communities elsewhere are also raising their heads above the parapet on this issue (Gabon, Namibia, Botswana among others).

The rapid uptake across the world of legal recognition of customary lands as lawfully owned properties is breaking down barriers. Two findings from this study can encourage governments to adopt restitution of PAs on a case-by-case basis; first the evidence that restitution of PAs does not end protection of the area and often enhances it; and second, the fear that the communities will sell off the PAs once returned to their ownership is relieved by not treating PAs as private property and saleable. Communities also welcome this, partly as it delivers on their claims to own lands in perpetuity, and partly as it provides an added barrier to compulsory acquisition by governments of the returned land for other claimed public purposes.

These findings are especially useful for African governments and communities, since most African governments have structured customary lands as a form of private property automatically including the right to sell the land, which is clearly an impediment for including a PA in such recognition. Specifying the types of community lands which are registrable without alienability will be a useful development in African land laws over the next decade.

In conclusion, legal recognition of community lands cannot be viably or justly limited to lands which are outside the public land sector where so many viable customary lands remain under the PA. The need for complementary measures which cease to prioritise declarations of new state PAs over those of communities in respect of their own lands is as pressing. Communities would be wise not to dismiss the importance of declaring and gazetting their lands as community owned PA; every means to double-lock their land and resource security is to be welcomed in contested times.



Image credit:

Thanksgiving day at Laboot, Chepkitale, Mount Elgon, Kenya. November 2022. Credit: Justin Kenrick, FPP.

Only four African countries provide legally for restitution of public or private lands to living customary communities: South Africa, Namibia (only in respect of private commercial ranches), Zimbabwe, and Kenya. Determination is always based on submitted claims and the official investigation of each. Only South Africa is returning PAs to community ownership. Community claims for PA number 138. South Africa's experiences offer helpful lessons for other African governments and communities. The most important are that many communities are dissatisfied with the wholesale retention of state management authority over their returned PA; state agencies are finding this regime too expensive to sustain; Communal

Endnotes

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- 2 For a summary of the African Court's Orders see: <https://minorityrights.org/wp-content/uploads/2022/06/Ogiek-judgment-summary-June-2022.pdf>, and commentary at: https://www.forestpeoples.org/en/press-release/06-2022/ogiek-kenya-celebrate-reparations-judgement#:~:text=In%20a%20judgment* and at: <https://news.mongabay.com/2022/06/african-court-rules-in-favor-of-indigenous-land-titles-reparations-from-the-kenyan-govt/>
- 3 For example, in Uganda, ongoing court cases concern the historical land rights of the Pygmy indigenous to Bwindi Impenetrable Forest Park and the Benet/Mosopisyek indigenous to Mt Elgon National Park.
- 4 See: <https://www.campaignfornature.org/more-than-100-countries-commit-to-protect-at-least-30-of-land-and-oceans-by-2030>;
- 5 IUCN et al 2022 at: <https://www.protectedplanet.net/en/resources/august-2022-update-of-the-wdpa-and-wd-oecm>
- 6 Ibidem.
- 7 Rights and Resources 2020 at: <https://rightsandresources.org/publication/rights-based-conservation/>
- 8 See: <https://news.mongabay.com/2022/07/iplc-leaders-in-africa-demand-a-reckoning-over-protected-areas-they-get-a-call-to-action/>; and <https://www.youtube.com/watch?v=IoTC41UaSZ0&t=7347s>
- 9 The World Bank 2019 at: https://www.profor.info/sites/profor.info/files/PROFOR_SecuringForestTenureRights_0.pdf
- Rights and Resources 2020 at: <https://www.fao.org/americas/publicaciones-audio-video/forest-gov-by-indigenous/en/>; FAO 2022 at: <https://www.fao.org/americas/publicaciones-audio-video/forest-gov-by-indigenous/en/>
- World Resources Institute 2021 at: <https://www.wri.org/insights/4-ways-indigenous-and-community-lands-can-reduce-emissions>
- 10 See Alden Wily 2018 at: <https://www.mdpi.com/2073-445X/7/2/68>
- 11 Jensen and Zenker 2015 at: <https://www.tandfonline.com/doi/full/10.1080/03057070.2015.1068089>
- 12 As in Nicaragua's Law 28 and Law 445; Colombia's Decree 2164 of 1994, which confirms constitutional provision that indigenous lands are designed to exist intact in perpetuity, and in Panama's Law of 1998.
- 13 See: <https://www.unep.org/news-and-stories/story/south-african-indigenous-community-win-environmental-rights-case-over-mining>
- 14 In countries like Laos and Tanzania where all land is owned by the nation in common, ownership refers to exclusive rights to the land, not ownership of the land itself.
- 15 Government of Tanzania 2022 at: http://tfs.go.tz/uploads/PFM_Facts_and_Figures.pdf
- 16 Chief Land Commissioner 2012 at: <https://pmg.org.za/committee-meeting/13904/>. The Commission had settled more than 79,600 other land claims by 2012 related to private or public lands outside the PA sector. While the Commission issues an annual report, and for example, decided 385 claims in FY 2020-2021, its reports do not disaggregate claims in a way which tells us how many of these relate to PA.

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