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Participation of local communities and civil society in the Forest sector

A briefing prepared by ClientEarth

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Introd

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Introduction

Purpose of this document

This document aims to give an overview of the rights of local communities and civil society to participate in forest and wildlife governance. We will also look whether there are any gaps in the legal protection of this right to participate. To do so we have analyzed how the right to participate is protected in national Ghanaian law (including the Constitution, acts and regulations). Subsequently we analyzed international treaties and conventions ratified by Ghana to see how they protect the right to participate.

This legal briefing is a part of a series of five legal briefings. Each of them focusing on the legal protection of a key right that can support civil society and local community representatives in their work relating to natural resources and community rights.

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Methodology

This legal briefing is based on extensive legal research into the Ghanaian national legal framework and related policy documents as well as into the international legal framework applicable to Ghana. A first draft has been developed as a reference document for a participatory training planned in November 2013. The goal of that training will be to support the sharing of legal knowledge on which it is based. The November workshop will also provide an opportunity to further improve the content of the briefing. We hope the legal analysis contained in this series of briefings will be the basis for developing strategies in support of law reform processes in the forest sector.

Law vs practice

In this document we will primarily focus on how participation is provided for in the law. We are aware that practice often differs from this. However we hope this briefing to be a tool to understand the legal framework. Starting from a thorough understanding of the legal framework, feedback from practice (whether positive or negative) can then inspire recommendations and strategies for legal change, improved implementation and enforcement.

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Link with access to information

The right to participate is intimately linked with the right to access information. Without timely, accurate and accessible information the right to participate is hollow. In some instances access to information is considered to be a part of participation. For our legal research we will however treat access to information in a separate briefing.

1 Our understanding of ‘the Right to Participate’

1.1 Different levels of participation

When researching the legal protection of participation we will look at how civil society organisations (CSO) and local communities can weigh into the decision-making processes which concern the use of the forest resources in their environment. Generally we can distinguish between three different levels of participation:

- **Consultation** as in collecting peoples’ views or an information flow between the parties before and after decisions are made. The flow of information does not, however, necessarily mean these opinions will be taken into account.
- **Participation in decision-making** is essentially a right to vote. The vote of CSO or local community representatives will have a certain weight within a decision making process but is not necessarily able to block these decisions.
- **Consent** is the right to veto or block decisions and is therefore much stronger than consultation or participation in decision making.

In addition, when some actors have more influence in a decision making process than others without there being a reasonable justification for this difference, the principle of non-discrimination can sometimes be relied upon to enforce equal participation rights.

1.2 Questions that have guided our research

The following questions have guided our research into the legal protection of local communities’ and civil society’s right to participate in decision making processes:

1. Where are consultation, participation in decision making and consent recognised in international and national law?
2. Is the provision general or does it relate to a specific sphere or subject matter?
3. Who has the right to participate?
4. What is the forum and procedure within which people participate?
5. Is the participation shaped and guaranteed effectiveness by the legal provision?

2 Participation in Ghanaian National Law

2.1 The 1992 Constitution

Citizens have the right to participate in public and development processes

The Constitution does not mention participation of local communities or civil society in decision making processes linked to forest governance. It does however include a number of more general provisions that apply to forestry as well as to other sectors. Ghanaians have the constitutional right to participate in politics, national life, government and development processes.

- ✓ Participation is a fundamental right: every person has the right to participate in political activities¹.
- ✓ Participation is a directive principle of state policy: the state is obliged to actively promote the integration of the peoples of Ghana and to prohibit discrimination. The state has to make democracy a reality by affording all possible opportunities to the people to participate in decision making at every level in national life and in government². In addition the state will enact appropriate laws to ensure effective participation in development processes and to enable access to agencies and officials to realize effective participation³. Finally, the state will encourage participation in decision making of workers in their workplace⁴.
- ✓ Participation is a feature of decentralized and local government: A decentralized and local governance system has to ensure maximal participation of people in their local governance⁵.

The Constitution is currently under review

In January 2010 the Constitutional Review Commission (CRC) was set up to consult with the people of Ghana on the operation of the 1992 Constitution and any changes that may need to be made to it. This resulted in the publication of a comprehensive (960 pages) report of the

¹ The Constitution, 1992, Article 21 (3)

² The Constitution, 1992, Article 35 (5) and (6) (d)

³ The Constitution, 1992, Article 37 (2)

⁴ The constitution, 1992, Article 36 (11)

⁵ The Constitution, 1992, Article 240 (2) and 242 (d)

Constitutional Review Commission titled 'From a Political to a Developmental Constitution'⁶. In July 2012 the Ghanaian government released a white paper⁷ in which it accepts a number of the recommendations made by the constitutional review commission and explains the rejection of others⁸. Currently the Constitutional Review Implementation Committee is working to complete the process of constitutional reforms by proposing bills for amendment and preparing Ghanaians for a referendum on the changes to some entrenched provisions.

The process adopted for proposing amendments to the Constitution set an example for participatory legal reform

One of the core guiding principles the Constitution review process was low participants cost, Inclusive and extensive participation⁹. A consultation strategy that targeted the whole of the Ghanaian population was employed. This included two rounds of Community and District level consultations followed by Regional and National Mini consultations. Ghanaians living abroad and key personalities were also consulted. Finally a National Constitution Review Conference was held to process and discuss submissions, bring together experts, compare national and international experiences and build national consensus around the issues tabled.

The CRC recommends increased participation

In addition to providing an outstanding example of a broad and national participatory process of legal reform, the report of the Constitutional Review Commission provides for a number of specific areas where participation should be improved. Forest and wildlife related examples of such areas are:

- ✓ Farmers should have the right to be consulted on issues affecting their land, and their consent should be subject to the overriding consent of the community¹⁰;
- ✓ The land and land administration act should detail conditions and processes for the compulsory acquisition of land, including prior consultations with persons who have any interest in that land¹¹;

⁶ <http://www.ghana.gov.gh/index.php/information/reports/2573-report-of-the-constitution-review-commission>

⁷ A white paper is a type of document presenting government policy preferences

⁸ <http://www.ghana.gov.gh/index.php/information/reports/2572-white-paper-on-the-report-of-the-constitution-review-commission-presented-to-the-president>

⁹ Report of the Constitutional Review Commission, 'From a political to a Developmental Constitution', 1.2.6. values and principles for the Constitutional Review Process

¹⁰ Ibid, Chapter 12, n° 109

¹¹ Ibid, Chapter 12, n° 113

- ✓ The extraction and utilization of natural resources and the equitable distribution of burdens and benefits thereof must be done in an absolutely participatory fashion involving all stakeholders¹².

2.2 Civil society's and local community's right to participate in Forest Governance

Civil society representation within the Forestry Commission?

The Forestry Commission Act provides for the inclusion of a representative of non-governmental organizations involved in Forest and Wildlife management in the Forestry Commission (FC)¹³. One could however question to which extent this person effectively represents civil society as (s)he is appointed by the President in consultation with the Council of State (without official input from civil society). In addition no procedures for feedback and accountability are mentioned in the act for civil society to be able to monitor and ensure the representative actually represents their interests within the FC.

Forestry Commission's promises in its Service Charter

Even if the Service Charter of the FC¹⁴ is more of a promise than a legally enforceable text, it's worth noticing the FC mentions participation on a number of occasions within it. The FC promises to:

- ✓ develop forest and wildlife management plans, Social Responsibility Agreements and Timber Utilisation Contracts in consultation with land owners and local communities¹⁵;
- ✓ conduct an annual survey of the public to measure FC's overall progress in meeting the needs and aspirations of clients and citizens and put in place a customer feedback mechanism¹⁶.

¹² Ibid, Chapter 12, n° 150 (c)

¹³ Forestry Commission Act, 1999, (Act 571), Section 4

¹⁴ <http://www.fcghana.org/page.php?page=199§ion=22&typ=1>

¹⁵ FC Service Charter, Service Standards, Management and Operational Standards

¹⁶ FC Service Charter, Core Functions, Information transparency and convenience

The Resource Management Support Centre cooperates with stakeholders to implement forest and wildlife management systems

The Forestry Commission harbors the Resource Management Support Centre (RMSC) within its structure. The RMSC has as mission to develop integrated forest and wildlife management systems and to facilitate and monitor their implementation through active cooperation with stakeholders for the benefit of all segments of society. The Collaborative Resource Management Unit is the unit within the RMSC which has the main responsibility to ensure forest management is participatory and that community issues are incorporated into the forestry programs.

Local communities, landowners and farmers have some rights to participate in forest management

The Timber Resources Management Acts¹⁷ and their implementing regulations¹⁸ contain the basic principles of commercial timber exploitation. From the identification of lands over contract attribution to harvesting operations, all are contained in these legal texts. Rights that are created by these texts can be enforced in court. The acts and regulations are complemented by the Manuals of Procedure. These manuals are built up out of information sheets explaining more in detail the various aspects of forest management. They are written to guide forest officers in their work and can be used to clarify some of the provisions found in the acts and regulations. These manuals are however not legally binding. This means a breach of procedures included in the manuals (as far as it is not a breach of the acts or regulations at the same time) cannot be brought in front of a court.

Farmers and landowners have the right be involved and when identifying lands suitable for timber exploitation, off-reserve they need to consent

The Timber Resources Management Act sums up the lands that can be subject to timber rights and provides that written authorization of the individual, group or owners concerned is a prerequisite before subjecting lands with farms or alienation holdings to timber rights¹⁹.

Both in off and on reserve areas an inspection team has to conduct field inspection based on the initial inventory of timber. This inspection team needs to include landowners and farmers to

¹⁷ Timber Resource Management Act, 1998 (Act 547) as amended by the Timber Resource Management (Amendment) Act, 2002 (Act 617)

¹⁸ Timber Resource Management Regulation, 1998 (LI 1649), Timber Resource Management (Amendment) Regulation, 2003 (LI 1721), Timber Resource Management (legality Licensing) Regulation, 2012 (LI 2184)

¹⁹ Timber Resource Management Act 1998 (Act 547) as amended by Act 619, Section 4

determine suitability and estimate the quality, quantity and value of the timber on the land²⁰. Where granting of timber rights is subsequently proposed in on reserve areas, the district chief executive needs to notify the people of the area²¹. In off reserve areas owners and others holding interests in the land have to consent in writing to the possible allocation of timber rights. To obtain this consent the district forest officer has to post notices asking people to inform him of claims of ownership or any other right²². Conflicting claims and/or objections are referred to a special committee whose proceedings shall be guided by natural justice²³.

Farmers and landowners should participate in the elaboration of forest reserve management plans and district (and regional) forestry development plans.

As mentioned above the manuals of procedure contain more detail on how forest resources should be managed. It is however not clear to which extent all of the details included in these manuals still apply as they have not been updated after the latest amendments of the Timber Resource Management Act and regulations.

In section A of the manual of procedures is titled 'strategic planning'. Participation of local community members, farmers and landowners are mentioned on a number of occasions in this section of the manuals. A specific Instruction Sheet consultation process is included at the end of the section. Below is a summary of the basic steps of this consultation process²⁴:

- 1) A representative from landowners and the District Assembly has to be part of the planning team²⁵;
- 2) Early discussions with community leaders and the District Assemblies to inform them of the intention of carrying out the plan preparation and explain its scope and to collect basic information on the reserve including community rights²⁶;
- 3) Detailed consultations with forest user groups as part of the field reconnaissance process²⁷ and supportive field investigation²⁸;
- 4) Distribution of the draft management plan to community leaders²⁹;
- 5) Reserve Planning Workshop to explain the zonation [sic] and management prescription being recommended³⁰;

²⁰ Timber Resource Management Regulation, 1998 (LI 1649), regulation 2 (1) (d)

²¹ Ibid, regulation 2 (6)

²² Ibid, regulation 3

²³ Ibid, regulation 5

²⁴ Based on the list included in Manuals of procedure Instruction Sheet A2.12 paragraph 2.1

²⁵ Manuals Of Procedure, Section A, Instruction Sheet A2.2, paragraph 2.3

²⁶ Ibid, Instruction Sheet A2.2, paragraph 3.1 and 4

²⁷ Ibid, Instruction Sheet 2.4 paragraph 4.4 – 4.5

²⁸ Ibid, Instruction Sheet 2.5 paragraph 2

²⁹ Ibid, Instruction Sheet 2.12 paragraph 2

- 6) Revision of the plan on the basis of suggestions received³¹;
- 7) Distribution of the amended plan and second workshop if considered necessary;
- 8) Endorsement by representative of the land owners and District Assemblies.

Similarly, the District (and Regional) forestry development plans need to be approved through a process of district workshops including traditional and local government authorities, government agencies, farmers groups and TUC holders³².

The development of forest management plans in consultation with landowners and fringe communities is further confirmed if the Forestry Commission's service charter³³.

Landowners and local community representatives should be involved in the preparation of Operational Specifications and Social Responsibility Agreements ahead of TUC allocation

The manuals of procedure foresee a number of consultations with landowners and local communities to fix some key provisions of social responsibility agreements and the timber operational specifications ahead of the TUC allocation process³⁴. This right to participate in the elaboration of the OS and SRA is also confirmed in the service charter of the Forestry Commission³⁵.

The manuals continue by mentioning SRAs should mention the right of landowning communities to be consulted concerning the location of logging roads etc. on reserve and to be consulted during the planning of operations off-reserve³⁶.

Landowners have the right to be present to calculate stumpage fees

The timber resource regulations provide for procedures governing the harvesting stage (logging manuals, harvesting plan, approved periods, inspection officers and markings). Participation of local community members during the harvesting stage is however only mentioned in relation to the calculation of the stumpage fee. No timber can be lifted from its stump unless its

³⁰ Ibid, Instruction Sheet 2.12 paragraph 3

³¹ Ibid, Instruction Sheet 2.12 paragraph 4

³² Ibid, Instruction Sheet 3.1 paragraph 4.6

³³ FC Service Charter, Service Standards, Management and Operational Standards

³⁴ Manuals of Procedure, Section C, Instruction sheets C3.2 and C3.3

³⁵ FC Service Charter, Service Standards, Management and Operational Standards

³⁶ Manuals of Procedure, Section C, Instruction Sheet C.3.2. paragraph 3.2 and 3.4

measurements have been taken and stumpage fee has been calculated in presence of the landowner, contractor and District Forest Officer³⁷.

Some other examples of specific forms of collaborative management exist but have no legal ground

Some forms of collaborative resource management systems have been created over the years but have not been legally recognized. The modified Taungya Systems is an example of these. This system has been included in the National Forest Plantation Development Plan (2010) but lacks legal basis in forest legislation.

So called CREMAs are another example. In Ghana, the national authority for wildlife, the Wildlife Division implemented the establishment of Community Resource Management Areas (CREMAs). The CREMA concept is based on the establishment of areas where wildlife management is incorporated into existing land use. The concept was based on the “community” as the management unit. The responsibility for establishing the CREMAs will fall to the Collaborative Resource Management Unit within the Wildlife Division. This unit was to have a network of Community Wildlife Officers based in the field with locally selected Field Walkers in each community. Currently the Forestry Commission has discontinued the operation of the CREMA concept.

2.3 Civil society can participate through Parliament

Ghana’s parliament is made up of representatives of the Ghanaian people elected from Two hundred and Seventy Five (275) Constituencies. They are elected every four (4) years. Although they are elected to generally represent voters they may be sensitive to opinions of civil society and local community representatives. In the legislative making process prescribed under the 1992 Constitution and the rules of procedure of parliament, Parliament is required to consult and interact with stakeholders with particular interests in bills. Such consultations and interactions take place during the Committee Stage. At the Committee Stage, interest groups can also petition parliament in a memoranda a raise issues with particular bills before the house. For instance, CSOs in Ghana have been engaging with parliament deliberations on the Off-Reserve L.I submitted by the Ministry of Lands and Natural Resources. Also in the run-up to the passage of Right to Information Bill, CSOs formed a coalition that engaged with parliament.

³⁷ Timber Resource Management Regulations, 1998 (LI 1649) Regulation 23

2.4 Shifting further towards collaborative forest and wildlife management with the 2012 Forest and Wildlife Policy

The new Forest and Wildlife policy mentions collaborative resource management from the very outset. Due to the strong interest and rights of local communities in forest resource management the focus of forest management is shifting from a government-led system to a community-government collaborative management approach³⁸. The policy continues by including collaborative resource management in its lists of 16 guiding principles³⁹. The Ministry of Land and Natural Resources concludes:

“An integral part of this policy is a new governance system based on transparency, equity and the involvement of local people, especially forest fringe communities”⁴⁰

The strategic directions within the first policy objective⁴¹ provide that forest reserves’ planning, policy formulation and decision making will be done through intersectoral and multi stakeholder collaboration⁴². Off-reserve timber production areas will be divided in Forest Management Units covered by forest management plans with active involvement of local landowners⁴³. Wildlife management plans will cover all protected areas and communities will be involved in managing wildlife in all forest areas through Community Resource Management Areas⁴⁴. Traditional autonomy will ensure protection and management of sacred forests and community dedicated forests⁴⁵

The forth policy objective⁴⁶ specifically mentions peoples participation in forest and wildlife resource management. In accordance with the new collaborative management style the new forest and wildlife policy wants to institute transparency, equity and legalize public participation in sustainable forest and wildlife resources management⁴⁷. This means the Ministry of Lands and Natural Resources (MLNR) will ensure the enactment of the necessary legislation to facilitate and enhance local participation and control and to enable communities to benefit from the trees on their land (by providing off reserve tree tenure security). The policy further foresees

³⁸ Forest and Wildlife Policy final draft, 2011, paragraph 2.1.2

³⁹ Ibid, Paragraph 3.2.3

⁴⁰ Ibid, Paragraph 3.3

⁴¹ Managing and enhancing the ecological integrity of forest, savannah, wetlands and other ecosystems

⁴² Forest and Wildlife Policy final draft, 2011, Policy Objective 1, Strategic direction 1.1

⁴³ Ibid, Policy Objective 1, Strategic direction 1.2

⁴⁴ Ibid, Policy Objective 1, Strategic direction 1.3

⁴⁵ Ibid, Policy Objective 1, Strategic direction 1.5

⁴⁶ Promoting and developing mechanisms for transparent governance, equity sharing and peoples participation in forest and wildlife resource management

⁴⁷ Forest and Wildlife Policy final draft, 2011, Policy objective 4, Strategic direction 4.1

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the development of a strategic national plan and necessary legislation to address illegal logging and chainsaw activities⁴⁸.

⁴⁸ Ibid, Policy objective 4, Strategic direction 4.2

3 Participation in International Law

As mentioned in the introduction, participation comes in many shapes and sizes. From the more commonly recognized participation of citizens in their government (e.g. art 25 International Covenant on Civil and Political Rights) to the promotion of public participation in environmental matters (e.g. principle 10 in the Rio Declaration). A growing number of multilateral environmental agreements and other international initiatives promote stakeholder participation in environmental decision-making. Often secretariats, commissions or courts provide additional clarity on how general provisions need to be understood and applied. An example is the document called “the Rio Conventions: Actions on Forests” elaborated by the secretariats to the Rio conventions⁴⁹. This text identified local and indigenous community participation as an opportunity for the implementation of forest-related commitments under the three conventions on biodiversity, desertification and climate change. In some cases, even if the convention at first sight does not mention participation of local communities in forest governance, these secretariats while looking over implementation of the conventions apply general rules to the specific case of local community participation in forest governance.

Box 1: The United Nations Committee on the Elimination of Racial Discrimination on the development of the new forest law in Cameroon

In response to a case brought by NGOs on proposed new forest law in Cameroun the Committee recalls its general recommendation N°23 on the rights of indigenous people which urges the states which signed the covenant on the Elimination of Racial Discrimination to ensure that indigenous people live in conditions that allows economic and social development that is sustainable and compatible with their cultural particularities. The General Recommendation calls upon states to make sure that no decision directly linked to indigenous peoples’ rights and interests be taken without their informed consent⁵⁰.

The Committee also asks the State to provide information regarding the measures taken in order to organize significant consultation processes involving the relevant indigenous people. Such measures should recognize and enforce the right of indigenous people to effective participation and to preliminary free and informed consent – namely through the use of representatives chosen by the indigenous people themselves – and that said measures do so according to the indigenous

⁴⁹ Convention on Biological diversity, United Nations Convention to Combat Desertification, United Nations Convention to Combat Climate Change

⁵⁰ General Recommendation No. 23: Indigenous Peoples, 18/08/1997, article 4 (d)

peoples' decision making processes and customs in a fashion and a language that is accessible to them.

Finally, the Committee bids the State to review the draft forest law in order to determine whether it is in conformity with relevant international human rights norms with regards to indigenous people and, if need be, amend it.

Letter from the Office of the High Commissioner for Human Rights to the Government of Cameroon, 1st of March 2013, ref CERD/82nd/GH/MC/SW
http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Cameroun1March2013.pdf

Some instruments which contain meaningful provisions for the participation of local communities are not considered in this legal briefing because Ghana has not yet ratified them. The Nagoya Protocol⁵¹ and ILO Convention n°169⁵² are examples of this.

Among the various international instruments relating to human rights and the environment more than 60 are applicable in Ghana. In this section we have handpicked some of the most relevant treaties and provisions included within them that focus on participation of citizens, civil society and local communities in decisions that affect their lands and forest resources.

3.1 African Charter on Human and Peoples' Rights

This international instrument was created to protect the human rights and freedoms of people living in Africa.

Like many other treaties the African Charter obliges states who are part of it to adopt legislative and regulatory measures to give effect to the rights recognized by the Charter⁵³. It also contains the general right of every citizen to participate in the government of his country, either directly or through chosen representatives⁵⁴.

Quick reference

Full name: African (Banjul) Charter on Human And Peoples' Rights

Common Name: African Charter

Year: 1981

Ratification by Ghana: 1989

Entered into force: 1986

Legal status: Legally Binding

⁵¹ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010), Article 6 and 7

⁵² International Labour Organisation Convention n°169, 1989, article 2(1), 15(2), 16, 23, 25, 27.

⁵³ African Charter on Human and peoples' Rights, 1986, Article 1

⁵⁴ Ibid, Article 13

What makes the African Charter especially interesting is the fact that its provisions can be enforced through the African Commission and the African Court. The African Commission on human and Peoples 'Rights has the power to interpret all the provisions of the present Charter at the request of States, NGOs and even individuals. The Commission's final decisions are called recommendations. The mandate of the Commission is quasi-judicial and as such, its final recommendations are not in themselves legally binding on the States concerned.

The mission of the African Court is to strengthen the human rights protection system in Africa and to ensure respect for and compliance with the African Charter on Human and Peoples' Rights, as well as other international human rights instruments, through judicial decisions. Ghana is one of the only five countries allowing nongovernmental organizations and individuals to also make an individual complaint to the African Court.

Based on its authority to interpret the Charter the African Commission and treat individual complaints the African Commission decided that the right to property included in article 14 of the Charter includes local communities' the right to effectively participate in decision processes regarding any development, investment, exploration or extraction plan within their lands (see box below).

Box 2: The Endorois Case

The right to property includes the obligation to seek consent in case of compulsory acquisition

In the 1970s, the Kenyan government evicted hundreds of Endorois families from their land to create a game reserve for tourism. The Kenyan Centre for Minority Rights Development and the Minority Rights Group International submitted a claim before the African Commission on behalf of the Endorois Community (after domestic legal efforts and action failed to constitute an effective remedy for the alleged violations).

The Commission found that the Kenyan government had violated the Endorois rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development, under the African Charter (Articles 8, 14, 17, 21 and 22, respectively). With respect to the lack of consultation with the community, the African Commission stated:

"In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations

to consult and to seek consent – or to compensate - ultimately results in a violation of the right to property”⁵⁵

The African Commission continues:

“In the instant case, the African Commission is of the view that no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a prior environment and social impact assessment was not carried out. The absence of these three elements of the ‘test’ is tantamount to a violation of Article 14, the right to property, under the Charter. The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the Game Reserve (or other adequate forms of compensation) also extends to a violation of the right to development.”⁵⁶

Therefore the right to property (article 14 of the Charter) and the right to development (art 22) include the right of local communities to participate (to be consulted and to consent) in decision processes that affect their land.

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003

Source: <http://www.achpr.org/communications/decision/276.03/>

The African Commission further decided in the Ogoni Case⁵⁷ that the Nigerian Government had violated the right to free disposal of natural resources⁵⁸ by not involving the Ogoni communities in the decisions that affected the development of Ogoniland.

⁵⁵ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, N° 226

⁵⁶ Ibid, N° 228

⁵⁷ Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, Case n° 155/96

⁵⁸ African Charter on Human and Peoples' Rights, Article 21

3.2 Maputo Convention

The Maputo convention is the revision of the earlier African Convention on the Conservation of Nature and Natural Resources⁵⁹. One article is of particular relevance. Article 16 is entitled procedural rights and obliges Ghana to adopt legislative and regulatory measures necessary to ensure participation of the public in decision making processes with a potentially significant environmental impact. The article further refers to access to information and access to justice. Article 12 further promotes the establishment of areas managed by local communities

According to the Guidelines made by the International Union for Conservation of Nature (IUCN) this means Ghana must enable the active participation of local communities in the process of planning and management of natural resources and ecosystems, as an incentive for conservation.

Once the convention has entered into force Ghana will have to report every two years to the Conference of Parties established by the convention on the legal texts it has adopted to implement the Convention, the names of the agencies or coordinating institutions empowered to be focal points and on related international agreements. Further compliance procedures have to be set up by the Conference of Parties created by the convention.

3.3 United Nations Declaration on the rights of indigenous people

Although not legally binding, the UNDRIP is one of the authoritative texts in international law when it comes to the rights of indigenous peoples. However, because UNDRIP is not legally binding it is up to Ghana to translate its provisions in to national law before indigenous communities would be able to actually enforce the rights which have been confirmed in the declaration.

Quick reference

Full name: Revised African Convention On The Conservation Of Nature And Natural Resources

Common Name: Maputo Convention

Year: 2003

Ratification by Ghana: 2007

Entered into force: yet to enter into force (8 more ratifications needed)

Legal status: Future Legally Binding

Quick reference

Full name: United Nations Declaration on the Rights of Indigenous People

Common Name: UNDRIP

Year: 2007

Endorsement by Ghana: Ghana voted in favour of the declaration during the General Assembly of the UN in 2007

Legal status: Not legally binding

⁵⁹ African Convention on the Conservation of Nature and Natural Resources, 1968 (Algiers Convention)

According to the UNDRIP indigenous people have the right to participate in the process to recognize their rights in relation to lands, territories and resources⁶⁰. The declaration also includes numerous references to Free and Prior Informed Consent (FPIC); Indigenous peoples' approval is needed for any project affecting their lands or territories or other resources⁶¹. Other situations where FPIC is required include resettlement, use of indigenous lands, storage or disposal of hazardous material and protection of culture⁶². Article 28 completes these provisions by adding the right to redress and restitution where FPIC has not been guaranteed.

However two of the main concepts included in the UNDRIP are left undefined. The General Assembly has chosen not to include a definition on indigenous peoples. Other international bodies have followed this approach, because all African peoples could be considered to be indigenous. Free Prior and Informed Consent has not been defined by the declaration either. The limits of both of these concepts will therefore be determined by national law of implementing states.

3.4 United Nations Convention to Combat Desertification

The UNCCD is known as one of the most important legally binding international agreements linking environment and development to sustainable land management. The UNCCD encourages the participation of local people in combating desertification and land degradation. This convention is particularly relevant for communities in the Northern part of Ghana whose dry sub-humid, semi arid and arid lands fall under the convention. Forests in this zone are an important and fragile resource.

Quick reference

Full name: United Nations Convention to Combat Desertification

Common Name: UNCCD

Year: 1994

Ratification by Ghana: 1996

Entered into force: 1996

Legal status: Legally Binding

Participation of local communities is mentioned as one of the principles guiding the implementation of the convention⁶³ and as one of the obligations under it⁶⁴. The convention obliges its member states to develop a National Action Program. The participation of local communities is particularly important in the development of these plans⁶⁵. The convention is

⁶⁰ United Nations Declaration on the Rights of Indigenous People, 2007, Article 27

⁶¹ Ibid, Article 32.2

⁶² Ibid, Article 10 / 11 (2) / 16 / 19 / 28 (1) / 29 (2)

⁶³ United Nations Convention to Combat Desertification, 1996, Article 3

⁶⁴ Ibid, Article 5

⁶⁵ Ibid, Article 9 and 10

complemented by an annex specifically focusing on combating desertification in African countries. The importance of participation of local populations is also mentioned in the annex⁶⁶

3.5 Convention on Biological Diversity

The CBD was inspired by the world's growing commitment towards sustainable development. As specified in its article 1, it regulates the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources

The convention obliges Ghana 'where appropriate' to provide for public participation in environmental impact assessment procedures⁶⁷. To follow up on the implementation of the convention, Ghana has to submit regular reports to the Conference of Parties. In its last report Ghana considered the full and active participation of traditional authorities, landowners, communities and other stakeholders in protected area management a high priority activity.

Quick reference

Full name: Convention on Biological Diversity

Common Name: CBD

Year: 1992

Ratification by Ghana: 1994

Entered into force: 1993

Legal status: Legally Binding

⁶⁶ Ibid, Regional implementation annex for Africa, Article 4.2.b; 6.2; 8.1; 8.2.c; 8.3.c; 9.a; 11.g.

⁶⁷ Convention on Biological Diversity, 1992, Article 14 (1) (a)

3.6 Voluntary Partnership Agreement between Ghana and the European Union (Legally binding)

The Voluntary Partnership Agreement (VPA) is a trade agreement concluded between Ghana and the EU. It aims to provide a legal framework to ensure that timber and timber products imported to the EU have been legally produced. In addition the agreement aims to enhance forest law enforcement and governance.

Participation of multiple stakeholders has been one of the guiding principles respected throughout negotiations for the VPA. This is reflected in the VPA text that provides for stakeholder consultation in strategies and programs implementing the agreement⁶⁸.

The VPA includes a list of areas of legal reform identified by Ghana. A number of these reforms can be addressed through subsidiary legislation (= regulations). Other more important reforms will need extensive consultations and stakeholder participation⁶⁹.

Finally the VPA contains a specific provision on civil society participation within the Timber Validation Committee (see Box below)

Quick reference

Full name: Voluntary Partnership Agreement between the European Community and the Republic of Ghana on Forest law enforcement, governance and trade in timber products into the Community

Common Name: VPA

Year: 2009

Ratification by Ghana: 2010

Entered into force: 2010

Legal status: Legally Binding

Box 3: Civil society participation within the Timber Validation Committee

The Voluntary Partnership Agreement (VPA) between Ghana and the EU details in its annex V the institutional arrangements necessary for the implementation of the VPA. Included within it is a list of different stakeholders that should make up the Timber Validation Committee (TVC). However Regulation 5 of L.I 2184 on membership of the TVC omits "Civil Society" as contained in the VPA and replaces it with representatives of the Trade Unions Congress and National House of Chiefs. This composition of the TVD has been contested by civil society organizations because those organizations that have participated in the negotiation of the VPA are not represented within the

⁶⁸ Ghana-EU Voluntary Partnership Agreement, Article 16

⁶⁹ Ibid, Annex II

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institutions governing its implementation. The difference between the VPA and the LI might relate to the worry civil society is not specific enough terminology. However it is based on the misunderstanding that Chiefs and trade unions represent civil society whilst they only are a specific part of it. This way, maybe unwillingly, civil society participation has been restricted by only selecting certain groups of civil society organizations. The two representatives mentioned in LI 2184 are Civil Society organizations. but our at the same time there are concerns limiting civil society participation to them would be narrowing the scope of CSO representation within the TVC to such an extent it could be considered in to be in contradiction with the Voluntary Partnership Agreement. The Ministry of Land and Natural Resources has in response promised to find short and long term solutions to accommodate these concerns.

Conclusions

The current laws governing the forest sector provide for some rights for civil society and local community representatives to participate in Forest Governance:

- Civil society is represented in the Forestry Commission (but no meaningful mechanisms for accountability exist);
- Farmers and landowners have the right to be involved when identifying lands suitable for timber exploitation, in case of off-reserve lands they need to consent in writing;
- Landowners have the right to be present to calculate stumpage fees.

Many of the other opportunities for local community and civil to participate in Forest Governance are mentioned in the manuals of procedure (or the FC Service Charter) without legal backing in the Timber Resources management acts and their implementing regulations. Farmers' and landowners' right to participate in the elaboration of Forest Management plans, Operational Specifications and Social Responsibility agreements is therefore rather weak. When the state does not respect the procedures for participation it sets out in the manuals of procedure there is no judicial redress available.

Taking the limited legal protection of the right to participate into account it is questionable whether the legislation lives up to the standards set out in international agreements Ghana has ratified. The Constitutional Review Committee as well as the new Forest and Wildlife Policy recognize the need to include further provisions protecting the right to participate in the forest's and/or natural resource's legal framework. Only after reviewing the current legal framework to include increased legal protection of civil society's and local communities' right to participate in forest related decision making processes will the Ministry of Lands and Natural Resources be able to justify calling their management style of forest resources 'collaborative'.

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ClientEarth is a non-profit environmental law organisation based in, London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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