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Ownership and use rights of Forest Natural Resources

A briefing prepared by ClientEarth

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Introduction

Purpose of this document

This document aims to give an overview of the rights local communities and civil society have to access information in relation to forest governance. We will also look whether there are any gaps in the legal protection of the right to access information. To do so we have analyzed how access to information 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 same right.

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.

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 access to information is provided in the law. We are aware that practice often differs from this. However we hope this briefing can 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.

Link with participation and access to justice

Ownership and use rights of land and resources are intimately linked the right to share the benefits that arise from these resources. Landowners, even if they are not exploiting the land themselves, they usually are entitled to a part of the benefits accruing from this exploitation. Similarly when resources are exploited on lands subject to use rights, the rights-owners are often entitled to a certain share of the benefits from this exploitation.

1 Our understanding of 'Ownership' and 'Use Rights'

1.1 Ownership as a bundle of rights

A common and useful approach to defining ownership is to envision it as a 'bundle of rights'. The bundle includes a collection of both usage and ownership rights. The following categories of rights can be distinguished within this bundle:

Control rights: the right to manage and to alienate a property. The alienation rights included under control rights can in some cases be limited. For example in a trusteeship relation the alienation can only be allowed if it serves the best interests of the beneficiary within that trust-relationship.

Management rights: the right to manage the property. This rights includes limited alienation rights. The property manager can for example give out leases or grant other use rights

Use rights: these rights encompass the right to use the property, in terms of accessing it and exploiting it. Use rights generally speaking cannot fundamentally change the property they lie on.

Complete ownership is made up out of control, management and use rights with regards to a certain property. In principle, the ownership of land prevails above and below but in some countries, the law can separate ownership of land from the natural resources on or underneath it. It is common for the government to retain ownership rights over sub-surface mineral resources, with only the land and surface resources available for private ownership

Ownership of land and natural resources in Ghana is a good (but complicated) example of how these different strains of rights can belong to different people and/or institutions and relate to different resources. Where lands may be owned by subjects of stools, the control may be vested in the stools on behalf of and in trust for their subjects. Naturally occurring timber is vested in the president in trust for the stools concerned, managed by the Forestry Commission, while pre-existing customary rights are also recognised.

1.2 Characteristics of ownership

Generally ownership rights are considered to be immune from third party termination (apart from state expropriation) and include the right to exclude others from accessing the property. They are perpetual (no expiry date) and include the right to alienate (sell, rent,...).

An ownership right can be either individual or collective. The Western-style private property rights model of most state legal systems is based around the idea of individual title. By contrast, customary land systems may see land ownership as collective. Statutory legal systems may choose to respond to this by allowing collective title, or by giving the community leader an individual title which he then holds in trust for the rest of the community.

Box 1: Community rights: different formulas, same outcomes

In many countries, customary ownership systems exist alongside the statutory legal systems, both with diverse perceptions of property. Different countries have devised different (non-)solutions or to this legal pluralism. In Ghana communities may own the land but almost complete control rights are given to the stools, skin and state. In Gabon the state is owner of all forest-lands, only recognizing long term private leases. Whatever the constellation, it seems however that Colonialism in Africa has often led to depriving communities of decision power concerning (valuable) natural resources on and underneath the land they depend on. Often local communities can only rely on insecure use right in relation to their lands.

To redress this legal unbalance an increasing recognition of customary ownership rights can be legally translated into recognition of reinforced use rights and/or more complete ownership rights.

1.3 Characteristics of use rights

As explained above, use rights are intimately linked to ownership rights and vice versa. There is however a need and certain benefit in providing clarification to how and which use rights can be separated from ownership. Use rights can be defined across a large spectrum, some are very strong and encompassing like usufruct¹ and others are rather weak or specific and can be extinguished passively (e.g. right to hunt). For this briefing we will focus on the rights which are particularly relevant for local communities. The competition between various use rights on the same piece of land is often the root of disputes between local communities and external forces.

Generally, a use right cannot be established if it compromises another pre-existing use right that has a promised length of term attached to it (eg. it is granted for a term of 5 years, or in perpetuity). This protection will not apply, however, if the pre-existing use right was granted in a form that made it revocable at the will of the landowner, as in the case of a license: in such situations, the landowner would be free to alter or terminate the pre-existing usage right in favour of the new usage right. There will also be problems with protecting pre-existing use rights if these rights were not formally recognised by law (eg. a customary right).

1.4 Basis of ownership and use rights

Ownership and use rights find their source in the law, contracts or usage and can therefore be found in different types of documents like leases, licenses, sale agreements...

¹ Usufruct is type of usage right which allows the right's holder to use and profit from any proceeds for the whole of the property as long as the property is not damaged or destroyed

Because of the link between use rights and ownership, the former are often considered as 'burdens' attached to the ownership deed of the land. They can take the form of a :

1. Formal burden on the title deed of the land;
2. Contract between the owner of the land and the holder of the use right, or between the government and the holder of another use right (e.g. a concessions contract between a government and a company, where one of the terms of the lease is that the company permits certain other uses by local communities);
3. Law;
4. Usage.

2 Ownership and Use Rights in National Law

2.1 The 1992 Constitution

Everybody has the right to own property

In its fifth chapter on fundamental rights and freedoms the Constitution guarantees everybody's right to own property². This general recognition of the right to property is repeated in the following chapter six on the directive principles of state policy³.

Ownership and trusteeship of land and natural resources are differentiated

In its chapter 21 the Constitution lays down the ground rules in relation to ownership of land and natural resources. To understand the provisions related to ownership one has to first understand the difference between 'lands or resources vested in someone' and 'lands or resources vested in someone on behalf of and in trust for someone else'. The former refers to ownership of the mentioned lands or resources, the latter refers to trusteeship. The Constitution installs a type of trusteeship in relation to some lands and resources which entails an almost absolute control over them. However, in such a trust-relationship, the ownership (stripped of any decision power) remains with the beneficiary. The trustee holds responsibility for the management and use of the property that has been entrusted to him, He can manage and use it himself or redistribute these rights to others. Reading the Constitution the following emerges:

5. Public lands are vested in the President on behalf of and in trust for the people of Ghana⁴. The Lands Commission will manage public lands and other lands vested in the President⁵. In other words; the people own, the state controls and the Land Commission manages, all for the benefit of the people of Ghana.
6. All minerals in their natural state are also vested in the President on behalf of and in trust for the people of Ghana⁶. Similarly; the people own and the state controls for the benefit of the people (the management tasks of the Minerals Commission are however not included in the Constitution)
7. All stool lands are vested in the appropriate stools on behalf of and in trust for the subjects of the stool in accordance with customary law and usage⁷. Any disposition or development of any stool land has to be approved by the regional lands commission⁸. So other words;

² The Constitution 1992, Article 18 (1)

³ Ibid, article 36 (7)

⁴ Ibid, Article 257 (1)

⁵ Ibid, article 258 (1)

⁶ Ibid, Article 257 (6)

⁷ Ibid, Article 267 (1)

⁸ Ibid, Article 267 (3)

communities own and the stool controls these lands and their resources with some oversight by the regional lands commission.

The Constitution does not mention who owns and manages natural resources other than minerals in their natural state, nor does it mention who owns Family lands and how these relate to Stool and Skin lands.

Managers of land are Trustees (fiduciaries)

One of the most important provisions relating to ownership is contained in the guiding principles of state policy, where it stated that ownership and possession of land carry a social obligation to serve the larger community. In addition managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, the stool, Skin or family concerned and are accountable as fiduciaries in this regard⁹. In a fiduciary relationship, one person vests trust in another whose aid, advice or protection is sought in some matter. In such a relation the fiduciary is required to act at all times for the sole benefit and interest of the one who trusts.

In this provision we can find what the Constitution means if elsewhere it mentions land is vested in the President/Stools/Skins in trust for and on behalf of the people of Ghana/their subjects. Clearly the state or chiefs are not owners of lands, they just control and manage these lands for the benefit of their subjects and they are accountable to this regard. The control, management and use of land given in trusteeship should benefit the subjects, not the trustee. This is where trusteeship differs fundamentally from other use rights. A use right serves the rights-holder, while making use of this use rights he is allowed 'to fill his pockets' as long as he does not destroy or fundamentally change the property on which his use right lies. In a trust relationship the trustee he is rather considered an obligation-holder. He is not allowed to 'fill his pockets' and is obliged to exercise his control over the property in the way most beneficial to the beneficiary. A trustee is allowed to sell, change, even destroy the property if, and only if, this is in the best interest of the beneficiary.

No specific mentioning of use rights but recognition of customary law

The Constitution does not specifically mention use rights of local communities. However it does recognize customary law to be part of Common law¹⁰ and therefore part of the laws of Ghana. Customary law is defined by the Constitution as rules of law which are by custom applicable to particular communities in Ghana¹¹. The Constitution continues by obliging the State to integrate appropriate customary values into the fabric of national life through education and conscious introduction in national planning¹²

Compulsory acquisition of property is governed by procedures and safeguards

⁹ Ibid, Article 36 (7)

¹⁰ Ibid, Article 11 (1) (e) and Article 11 (2)

¹¹ Ibid, Article 11 (3)

¹² Ibid, Article 39 (1)

In article 20 the Constitution provides for a number of rules in relation to compulsory acquisition of property by the state. Compulsory acquisition is only done for public interest and to promote the public benefit. The necessity of the acquisition has to be clearly stated and has to provide a reasonable justification. In addition acquisition can only be done under a law which makes provision for the payment of fair and adequate compensation, and provides for a right of access to the High court. Where the acquisition results in the displacement of any inhabitants, the state has to resettle them on suitable alternative land with due regard for their economic wellbeing and social and cultural values.

Ownership of land by non-citizens

Non-citizen cannot acquire a freehold interest in any land in Ghana. Leaseholds to non-citizens are limited to 50 years but are renewable.

The Constitution Review Commission recommends that all natural resources be vested in the President in trust for and on behalf of the people of Ghana

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 Constitutional Review Commission titled 'from a political to a developmental constitution'. In July 2012 the Ghanaian government released a white paper in which it accepts a number of the recommendations made by the constitutional review commission and explains the rejection of others (a white paper is a type of document presenting government policy preferences). 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.

Chapter 12 of the report of the CRC is subdivided in two sub-themes: the ownership and vesting of natural resources on one hand and the management of natural resources on the other.

In relation to ownership the CRC recommends that the Constitution should provide that lands and natural resources are owned by the people and are vested in the President in trust for and on behalf of the people of Ghana¹³. Stool and Skin lands should at the same time continue to be vested in the respective stools and Skins in trust for and on behalf of the people of the communities according to customary law and usage¹⁴. Family lands should be included in within the definition of Stool and Skin lands¹⁵. The possibility for the state to acquire property compulsorily (subject to a number of conditions) should be retained¹⁶. The Administration of Lands Act should be reviewed to detail out conditions and processes for the compulsory

¹³ Report of the Constitutional Review Commission, Chapter 12, n° 71

¹⁴ Ibid, Chapter 12, n° 72

¹⁵ Ibid, Chapter 12, n° 73

¹⁶ Ibid, Chapter 12, n° 111

acquisition of lands¹⁷. Where lands are compulsorily acquired and are not used for the purpose they were acquired for the original owners should have the right to have their property returned subject to the return of any compensation given¹⁸

Amongst the various recommendations in relation to the management of lands and natural resources the CRC recommends the inclusion of a number of basic principles in the natural resources chapter. One of these principles is that when the state compulsorily acquires property it shall promptly and fairly compensate for it based on the book value¹⁹. The state shall also regulate the extraction and utilization of resources in such a way that bearing and resource fringe communities are not disadvantaged and that the numerous human rights abuses are dealt with forthwith.

2.2 The legal protection of ownership of forest resources

In the same way the Constitution distinguishes between ownership, trusteeship and management for mineral resources, the ownership, control and management of forest resources can be vested in different entities. There are however no legal provisions separating specific use rights from ownership, control and management rights. This means use rights can only exist separately based on permits, contracts or customs.

There are also no specific legal provisions separating the ownership, control and management of non timber forest resources from the ownership, control and management of the land and timber resources that make up that forest. Generally speaking this means that land/tree owners also own the non-timber forest products (NTFP) from the trees/land. It seems the granting of a Timber Utilization Contract (TUC) does not change the ownership of NTFP. TUCs concern only the right to the commercial timber parts of trees. The Forestry Commission has the responsibility to ensure that non-timber forest products (NTFP) are not harvested by TUC holders and that TUC operations are sympathetic to NTFP production²⁰. According to this logic of cuts in off reserve areas do not belong to the TUC holder but to the communities/farmers concerned.

In relation to timber resources a double distinction needs to be made: timber resources from naturally occurring or from planted trees on the one hand, timber resources in forest reserves and timber resources in off reserve areas on the other. After a short summarizing table we will look into the legal origin of each of the 4 different situations of ownership, control and management.

2.2.1 Naturally occurring forests

¹⁷ Ibid, Chapter 12, n° 113

¹⁸ Ibid, Chapter 12, n° 124

¹⁹ Ibid, Chapter 12, n° 150

²⁰ Manual of procedure Section A, Information Sheet A2.9 paragraph 3.5

On reserve ownership, control, management and use rights of natural forests

Box 2 : Simplified summary table on natural forest resources ownership, control, management and use rights – ON-RESERVE

Ownership	Public land and timber on it owned by the people of Ghana Stool land and timber on it owned by subjects of the Stool (=communities) Family land and timber on it owned by family Private land and timber on it owned by private owner
Control	Stool land and timber on it initially vested in the Stools in trust for and on behalf of their subjects + superimposed trusteeship of State All other land and timber on it vested in the State in trust for and on behalf of the stools concerned
Management	All timber and other forest resources managed by the FC for benefit of landowners
Use rights	All use rights controlled and managed by state for benefit of landowners

Ownership of naturally occurring trees is not separated from the ownership of land by the Constitution or any of its implementing acts and regulations. Therefore the ownership of natural trees (even if stripped from any control over it) coincides with the ownership of the land on which the trees occur. Forest reserves can be created on different types of land. Government lands, stool lands and private lands at the request of their respective owner and generally any land of which the President decides, on the advice of the FC, it should be protected (to protect the forest to safeguard the water supply, assist agriculture and forest crop well being or secure the supply of forest produce to fringe communities), all can be subject to the establishment of a forest reserve thereon²¹. The establishment of a forest reserve does however not change the ownership of the lands within it; it assures the management of the reserve is done by the owner under the direction of the FC or by the government for the benefit of the owner²². The continued ownership by the original owners is taken into account in the development of strategic plans for forest reserves. One of the objectives of this planning is to ensure that as owner of the forest reserve and the people of receive the gross revenue arising from the utilization of the forest reserve, less any deduction for the FC authorized by law²³.

As provided in the Constitution, stool lands are owned by the communities and vested in the appropriate stools in trust for and on behalf of them²⁴. However the 1962 Concessions Act (act 124) seems to superimpose state trusteeship on stool lands on top of the stool trusteeship (or other previous ownership rights) for all lands within forest reserves²⁵. Therefore it is the State who has control, as a trustee, of forest reserve lands and the trees occurring thereon. To judge

²¹ Forest Act, 1927 (CAP 157) Section 2

²² Ibid, Section 18

²³ Manuals of procedure, Section A, Instruction Sheet A2.9 paragraph 2.1

²⁴ The Constitution 1992, article 267 (1)

²⁵ The Concessions Act, 1962 (Act 124), section 16 (1)

whether the state is living up to its trustee-obligations one has to take into account the objective of on-reserve land use which is forestry for protection, for local people and for production²⁶.

Box 3: Policy Guidance on Forest Reserve Management in the High Forest Zone in the Manuals of Procedure²⁷

Forestry for what:

To ensure that the biological and environmental values of the permanent forest estate are preserved and secondly to sustainably produce forest products that can contribute to domestic and commercial economies, provide funds for forest management and generate revenue for the resource owners.

Forestry for who:

For the benefit of the resource owners and in the interest of the nation. The benefits to be provided for the resource owners include forest produce for domestic use and revenue from resource utilisation as defined in the Constitution.

Forestry by whom:

The Forest Service manages the forest reserves, according to agreed objectives and standards, on behalf of its two clients; the resource owners and the national interest. The manager can engage contractors to undertake certain operations including timber harvesting.

Forestry - how:

Integrated forest reserve management systems that can reconcile the Protection, Production and People elements of forest reserve management in perpetuity.

Where the state has the control over forest reserves, it has attributed the responsibility for managing it (including protected areas) to the Forestry Commission²⁸. The Forestry Commission act clarifies by stating that management responsibilities include planning for the sustainable use, monitoring and controlling the harvesting of forest resources. The FC in addition has to make recommendations to the MLNR on the grant of licenses and management practices to be included in the Forest and Wildlife policy²⁹. Because the state does not own forest resources the FC acts as a 'service provider' (and therefore is a body corporate, has a service charter,...). The manuals of procedure require the FC to agree with the landowners on a service agreement

²⁶ Manuals of Procedure, Section A, Instruction sheets A2.6, A2.7 and A2.8

²⁷ Ibid, Instruction Sheet A2.1, paragraph 3.3

²⁸ Forestry Commission Act, 1999 (Act 571), Section 2 (2) (b)

²⁹ Ibid

wherein deductions for management expenses are agreed upon. These deductions can only be used for activities agreed upon in the management plan³⁰.

Because use rights are not separated from the land and forest resources they lie on, the trusteeship over those rights has been transferred to the state together with the trusteeship over the land. As a trustee the state is obliged to manage the resources for the best benefit of the original owners in trust for and on behalf of whom it holds the control. Again, this is reflected in the manuals of procedure where maintaining a perpetual flow of forest produce to communities with domestic user rights is one of the aspects which needs to be integrated in the Forest reserve Management Plans³¹

Off reserve ownership, control, management and use rights of natural forests

<i>Box 4 : Simplified summary table on natural forest resources ownership, control, management and use rights – OFF-RESERVE</i>	
Ownership	Public land and timber on it owned by the people of Ghana Stool land and timber on it owned by subjects of the Stool (=communities) Family land and timber on it owned by family Private land and timber on it owned by private owner
Control	Public land and timber on it vested in the State in trust for the people of Ghana Stool land which was subject to a timber concession before 1962 Concessions act and timber on it is vested in the State in trust for the Stools concerned Timber on all other lands is vested in the State in trust for the Stools concerned
Management	All timber is managed (in more restricted way) by the Forestry Commission for benefit of landowners and land users (farmers)
Use rights	Use rights linked to public/stool/family lands are controlled by State/stool/family for benefit of their respective subjects Use rights linked to private lands are controlled by landowner Use rights linked to trees on all lands are controlled by State for benefit of landowners

As is the case for ownership of forest resources within forest reserves, in of reserve areas, actual ownership of naturally occurring trees is not separated from the ownership of land by the Constitution nor by any of its enabling Acts and regulations. Therefore the ownership of natural trees (even if stripped from any control over it) coincides with the ownership of the land on which the trees occur. This means communities are the owners of timber resources on stool lands, and the stools have the control over these resources in trust for and on behalf of the communities³². It seems the same reasoning applies to timber occurring on Family lands. Managers of family land are fiduciaries charged with the obligation to discharge their functions for the benefit of the

³⁰ Manuals of Procedure, Section A, Instruction Sheet A2.9, paragraph 2.3

³¹ Ibid, Instruction Sheet A2.9 paragraph 3

³² The Constitution, 1992, article 267 (1)

family concerned³³. Where lands are privately owned, the owner will also own the forest resources included thereon.

Again the 1962 Concessions Act seems to superimpose State trusteeship on top of the stool trusteeship. Any land, a part from forest reserves, that was subject to tree or timber concessions before the commencement of the Concessions Act are vested by it in the President³⁴. All rights with respect to timber in any other land (here trusteeship over timber resources is separated from the land they occur on) is also vested in the President³⁵. Off-reserve trusteeship does however differ from on-reserve trusteeship to the extent the objectives of on-reserve and off-reserve land use are different (and therefore parameters for judging whether the control is exercised in the best interest of the beneficiary will also differ). In on reserve areas forestry for protection, for local people and for production is the main objective of land use³⁶. In off-reserve areas agriculture is the primary activity off-reserve and forestry has to fit into the farming system, not vice-versa³⁷.

Congruent with the afore-mentioned different objectives, the management responsibilities of the FC in relation to off reserve forest resources are more limited as in relation to on reserve areas (including protected areas). According to the Forestry Commission Act the FC has to regulate the utilization of forest and timber resources in off reserve areas ((as opposed to managing) by vetting and registering contract to market timber, setting standard and guidelines and providing for checks and procedures along the timber supply chain³⁸.

As is the case for forest reserves, use rights are not separated from the land or forest resources they lie on. Where off-reserve lands have been vested in the President in trust for and on behalf of the stools concerned³⁹ the situation for use rights is the same as for on-reserve areas. However the situation in off reserve areas where only trees were vested in the president⁴⁰ in trust for and on behalf of the concerned stools. For these areas difference has to be made in between use rights that lie on timber and trees (for example collecting fruit) and use rights that lie on land (for example grazing cattle). The state controls and manages the former in the best interest of the beneficiaries, the latter are controlled by the Stools or Skins in the best interest of their subjects.

2.2.2 Planted timber

Planted timber is fundamentally different from naturally occurring timber because it is not a naturally occurring resource. Therefore the ownership of planted trees does not by default coincide with the ownership of the land they are planted on In the same way as a farmer owns

³³ Ibid, Article 36 (8)

³⁴ Concessions Act , 1962 (Act 124), section 16 (3)

³⁵ Ibid, section 16 (4)

³⁶ Manuals of procedure, Section A, Instruction Sheets A2.6,k A 2.7 and A2.8

³⁷ Manuals of Procedure, Section F, Instruction Sheet F1.1, paragraph 1.5

³⁸ Forestry Commission Act, 1999 (Act 571), section 2 (2) (a)

³⁹ Concessions Act , 1962 (Act 124), section 16 (3)

⁴⁰ Ibid, section 16 (4)

his crops even if not planted on his own land, a planter owns the trees he has planted even if it was not on his own land.

Timber can be planted under various schemes. Although these schemes are not included in the Timber Resources Management Acts and Regulations they are recognized under the Forest Plantation Development Plan⁴¹. Different schemes have different constellations of ownership, control, management and use rights. Because the state is only a trustee of the lands making up forest reserves control management and use of forest reserve resources should always benefit the original landowners

On reserve ownership, control, management and use rights of planted forests

In on reserve areas the government can replant trees and timber itself (model plantations) or with the help of hired labor and supervision (GPDP) or with the help of local farmers (MTS). It can also allocate degraded parts of forest reserves to private companies for plantation development (State allocated degraded lands)⁴².

Box 5: Simplified summary table on natural forest resources ownership, control, management and use rights – ON-RESERVE

	8. Model Plantation	Government Plantation Development Program	State allocated degraded land	Modified Taungya system
Ownership	Timber planted and therefore owned by the State	State and landowners own planted timber according to GPDP report	Timber Planted and therefore owned by private companies	Timber planted by the State in collaboration with local farmers so shared ownership of planted timber
Control	No trusteeship so controlled by State	No trusteeship so controlled by State	No trusteeship so controlled by planter	No trusteeship so controlled by State
Management	State	State with the help of hired labor and inspectors	Managed by planter	Managed by State and Farmers
Use rights	All use rights controlled and managed by state	All use rights controlled and managed by state	Use rights relating to trees (like collection of fruits) owned, controlled and managed by private company Use rights relating to the land owned	Use rights relating to planted trees and timber owned and managed by state and farmers. Especially clear during first years

⁴¹ Forest Plantation Development Plan, launched the 20th of January 2010,

⁴² Forestry Commission Act, 1999 (Act 571), section 2 (2)(c)(iii)

			by land owners and controlled and managed by State	(intercropping)
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Model plantation

Model Plantations are research oriented small plantation lots established by FC plantation managers to undertake mixed species tests and experiment with various planting designs and tree spacing. Nothing is specified in relation to ownership, control, management and use of the timber proceeds from these model plantations, which therefore lie with the state who planted them.

Government Plantation Development Plan/Project

Using available funding through Highly Indebted Poor Countries (HIPC) initiative, the state established industrial plantations on degraded forest reserve lands. Plantation workers and supervisors were hired and paid. However responsibility for management of these plantations lies with the Forestry Commission. According to the annual report of the National Plantation Development Program the plantations established under this scheme are owned by the state and the respective landowners who are entitled to royalties⁴³.

State allocated degraded land

The state has allocated proportions of degraded reserves to private entities for the establishment of forest plantations. This is encouraged by offering the majority of the revenue from the harvest of timber to the private entity who receives 90%. The remaining 10% have to be paid to the state. The private entities therefore have ownership, control, management and use rights over the planted timber, they just need to share a (small parts) of the benefits with the state. No specific rules have been provided for use rights. Therefore all use rights which relate to the planted trees are controlled and managed by the private company because they own the trees. However, use rights that relate to the land on which the plantations are established (like right to access...) still are controlled by the State (because these lands are vested in it in trust for the landowners).

Modified Taungya System

Under the Modified Taungya System farmers are allocated shares of land in degraded parts of forest reserves and are given seedlings to reforest the area. They are also permitted to plant food crops on the same land during the first years of plantation establishment until the forest cover closes (intercropping). In spite of being mentioned in the Forest and Wildlife policy, the MTS does not have a specific legal basis in one of the acts or regulations governing the forest

⁴³ National Forest Plantation Development Program, Annual report 2011, Ministry of Lands and Natural Resources

sector. In some cases the terms and conditions have been laid down in signed agreements. The Community Forest Management Project (CFMP) also used this system to establish community plantations.

It is not entirely clear what ownership, control, management and use rights structures govern the timber resources that come from these plantations. Logically ownership would be shared between the state and the farmers who collaboratively have established the plantations. Therefore control, management and use rights also lie with state and farmer together. This is confirmed by the fact that farmers are allowed to intercrop (= use right) in the plantations during the first years of their establishment.

Off reserve ownership, control, management and use rights of planted forests

At first sight the Concessions act does not seem make a difference between naturally occurring and planted trees in off-reserve areas when vesting them in the President⁴⁴. However the Concessions Act has to be read with the modifications necessary to give effect to the Timber Resources Management Act⁴⁵. In this act it is stated that no timber right shall be granted in respect of land with private forest plantations or land with any timber grown or owned by any individual or group of individuals. This means planted timber is not intended to be included in the vesting of trusteeship by the Concessions Act.

Box 6: Simplified summary table on natural forest resources ownership, control, management and use rights – OFF-RESERVE

	Expanded plantation development program	Private off reserve plantations
Ownership	State and landowners (?) own planted timber	Landowner
Control	No trusteeship so controlled by State and landowners	Landowner
Management	State and landowners	Landowner
Use rights	State and landowners	Landowner

Expanded plantation development program

Recently the National Forest Plantation Development Program has started to also support off-reserve plantation development through the Expanded Plantation Development Program to ensure that Districts/Municipals without degraded forest reserves would also benefit from job opportunities being created through the Plantation Development Program⁴⁶. Although the structure of ownership, control, management and use rights in relation to these plantations are

⁴⁴ Concessions Act, 1962 (Act 124), Section 16 (4)

⁴⁵ Timber Resources Management Act, 1998 (Act 547), Section 22 (2)

⁴⁶ National Forest Plantation Development Program, 2011 Annual Report, Ministry of Lands and Natural Resources

not entirely clear one can assume it is similar to the on reserve plantation development program. Ownership, control, management (with the help of hired plantation workers and supervisors) and use rights would therefore lie with the state and the respective landowners who entitled to royalties⁴⁷.

Private off reserve plantations

These are plantations that have been established without any intervention from the state. Ownership, control, management and use rights therefore lie 100% with the landowner if he was also the planter. If the trees were not planted by the landowner the agreement between him and the planter will determine who owns, controls and manages the timber resources and the use rights that lie on them.

2.3 2012 Forest and Wildlife Policy

From the very start the new forest and wildlife policy recognizes the change in focus of the management system of the FC. The FC is shifting its focus from a government-led system to a community-government collaborative management approach⁴⁸. In addition to the mentioned collaborative management, recognizing multi stakeholder interests in forest and wildlife is included as a guiding principle of the policy.

The policy is built up out of 5 policy objectives. For each of these objectives a number of strategic directions are given, some of which specifically mention ownership, control or management. Short explanations will be given in relation to the strategic directions of particular importance.

Within the first objective the policy provides for the involvement of communities in managing wildlife in all forest areas through Community Resource Management Areas and for traditional autonomy for the protection and management of sacred forests and community dedicated forests. Traditional sacred sites are to be considered national protected areas and planning agencies and protected area managers are have to engage with the custodians of these sites. In addition a dedicated fund for the sustainable management of sacred natural sites will be established. (Managing and enhancing the ecological integrity of forest, savannah, wetlands and other ecosystems)

The second policy objective provides for the development of incentives to support public, private and community investment in forest plantation development. A national reforestation plan will be developed and the Plantation Development Fund will be reviewed to set up a National Reforestation Fund. (promoting the rehabilitation and restoration of degraded landscapes through plantations development and community forestry)

⁴⁷ Ibid

⁴⁸ 2011 Forest and Wildlife Policy (final draft – October 2012) - 2.1.2. *Collaborative Forest 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 management (Strategic direction 4.1). This means the 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). Efforts will be put in place to define property, tree and forest tenure rights and rationalize the forest fees and taxation systems and ensure resulting equitable distribution. (Policy objective 4)

3 Ownership in International Law

Among the various international instruments relating to human rights and the environment more than 60 are applicable in Ghana.

Communities' rights over their land and resources are protected through a variety of different forms in international law. The most obvious form is through a right to property. This has been proclaimed by the Universal Declaration of Human Rights⁴⁹, as well as in the African Charter on Human and Peoples' Rights⁵⁰. Often international treaties provide more general rights to access land and resources instead of referring directly to the protection of property. Generally, international law grants much more detailed protection for the land and resource rights of indigenous peoples than it does for non-indigenous peoples.

In this section we have handpicked some of the most relevant treaties, and their specific provisions, focusing on rights to land and 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 Charter⁵¹. It contains a general right to property which may only be subjected to compulsory acquisition for reasons of public interest and in accordance with an appropriate national law⁵².

Quick reference

Full name: African Charter on Human And Peoples' Rights

Common Name: African Charter

Year: 1981

Ratification by Ghana: 1989

Entered into force: 1986

Legal status: Legally Binding

It also contains a collective right for all peoples to freely dispose of their wealth and natural resources⁵³. This right must be exercised in the interest of the people, and if the resources are damaged they have a right to lawful recovery of their property and to compensation.

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

⁴⁹ Universal Declaration on Human Rights, 1948, Article 17

⁵⁰ African Charter on Human and Peoples' Rights, 1986, Article 14

⁵¹ Ibid, Art. 1

⁵² Ibid, Art. 14

⁵³ Ibid, Art. 21

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.

The African Commission on Human Peoples' Rights has, in its decisions on the interpretation of African Charter rights, further defined components of the right to property and free disposal of natural resources to include the right to housing (Ogoni case –see box below). States have the obligation to take active steps to ensure ownership rights are registered and protected (Endorois case – see box below).

Box 7: The Endorois case

Traditional ownership is protected by the African Charter, the state needs to take active steps to protect and register traditional ownership and compulsory acquisition needs to be proportionate

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. The Endorois Community alleged that their eviction from their traditional lands, as well as the failure to provide according compensation, constituted a violation of their right to property (art 14), their right to free disposal of natural resources (art 21), as well as a number of other rights under the African Charter.

The Kenyan government argued that these lands did not legally belong to the Endorois, as the community had not registered the land as formal ownership title. The government had correctly followed a procedure set out in an existing law for the creation of game reserves. Thus, they argued, their eviction of the Endorois was legal.

The African Commission did not accept the Kenyan government's arguments. All parties agreed that the lands in question had traditionally belonged to the Endorois. This is enough to raise the protection provided by article 14 and 21 of the African Charter regardless of whether or not titles to their land were formally registered. In addition the government is required to take active steps to ensure domestic legal protection for Article 14 and 21 rights; it is not enough to pass a law giving communities the chance to register their own title. The significant practical barriers to registering ownership title means the government may have to take positive legal measures to ensure these rights are recognised, if necessary including special efforts for indigenous communities

The Commission continued concluding that the eviction even if in accordance with national Kenyan law was in breach of the Charter because the Kenyan legal framework itself did not meet the standards of Articles 14 and 21. The upheaval and displacement of the Endorois from their land and the denial of their property rights over their ancestral land is disproportionate to any public need served by the game reserve.

As a result, the African Commission found the Kenyan government had breached the Endorois' rights under both Article 14 and Article 21, and ordered the Kenyan Government to compensate and restore the Endorois to their ancestral lands.

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/>

Box 8: The Ogoni Case

The right to property includes the right to housing and the state needs to actively protect the right to property

In 1996, two non-governmental organizations, the Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) have lodged a complaint before the African Commission on Human and Peoples' Rights.

The communication alleged that the military government of Nigeria had been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People. The communication alleges violations of the right to property, which includes the right to housing.

According to the Commission the right to housing obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from and to prevent the violation of any individual's right to housing by any other individual or non state actors like landlords, property developers, and land owners. Where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies

So, even though this damage was directly caused by Shell rather than the government, the government was liable because it had failed in its duty to actively protect communities' property rights against third parties. By giving a "green light" to Shell's

activities, the government facilitated the destruction of the communities' property and thus fell short of the minimum conduct expected by governments.

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

Source: <http://www.achpr.org/communications/decision/155.96/>

According to the African Commission's case *Gabriel Shumba v. Zimbabwe*, the right to property does not only cover rights that are formally recognised by the state as ownership rights. It can also cover other types of rights and interests in land, including use rights. This means that, even where communities' land tenure is only recognised by the state as use rights, these must still receive the protection required by Article 14, namely that they can only be removed by the state in the case of a strong overriding public interest, and following the process of an existing domestic law.

3.2 Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of all forms of Racial Discrimination (ICERD) is considered to be the only international legal instrument specifically addressing issues of racial discrimination. It established an expert body of 18 independent experts responsible for monitoring the implementation of the Convention's provisions. The Committee also publishes general recommendations/comments. In its recommendation 23 "The Committee

especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories"⁵⁴

Quick reference

Full name: International Convention on the Elimination of All Forms of Racial Discrimination

Common Name: ICERD

Year: 1965

Ratification by Ghana: 1966

Entered into force: 1969

Legal status: Legally Binding

In the recommendation quoted above, the Committee recalled that the situation of indigenous peoples has always been a matter of close attention and concern. In this respect, the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.

3.3 Indigenous and Tribal Populations Convention

⁵⁴ *General Recommendation No. 23: Indigenous Peoples: . 18/08/1997*

The Indigenous and Tribal Populations Convention is an International Labour Organisation (ILO) convention passed in 1957. ILO convention 107 has since been replaced with a new Indigenous and Tribal Peoples Convention in 1989⁵⁵. However, Ghana has not ratified the new convention, which means that it is only bound by the convention from 1957.

Article 3 of the Convention requires the government to provide special protection for the property of indigenous populations. In addition, the government must recognise that indigenous peoples have a right of ownership over their traditional lands, which can be either collective or individual⁵⁶. The government must also pay attention to indigenous peoples' customary laws when defining their rights and obligations under government law⁵⁷.

Indigenous peoples should not be removed from their traditional lands without their free consent, unless in exceptional situations where it is needed to protect national security, promote national economic development, or improve the indigenous peoples' health⁵⁸. If removal of the peoples is necessary for these reasons, the removal must be done in accordance with a national law, and the government must provide the removed people with lands of at least equal quality to their old lands, or with monetary compensation if the people prefer⁵⁹.

The government must respect indigenous populations' own procedures for transferring ownership rights from one person or group to another, so long as these transfers allow the needs of the whole indigenous population to be met⁶⁰. There must be arrangements to prevent people who are not members of the population from taking advantage of these customs or of the population's lack of legal understanding in order to secure their ownership rights⁶¹.

Reporting on ILO Conventions is governed by Article 22 of the ILO Constitution. one year after the entry into force of a Convention that it has ratified, the government has to send its first report on the implementation of the Convention to the ILO. After this, reports are due at regular intervals. The ILO body examining the application of ratified Conventions is the Committee of Experts on the Application of Conventions and Recommendations (CEACR).

Quick reference

Full name: Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, International Labour Organisation Convention 107.

Common Name: Indigenous and Tribal Populations Convention

Year: 1957

Ratification by Ghana: 1958

Entered into force: 1959

Legal status: Legally Binding

3.4 Maputo Convention

⁵⁵ Indigenous and Tribal Peoples Convention, ILO convention 169, 1989

⁵⁶ ILO convention 107, article 11

⁵⁷ Ibid, Article 7 (1)

⁵⁸ Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, International Labour Organisation Convention 107, Art. 12

⁵⁹ Ibid, Art 12(2)

⁶⁰ Ibid, Art 13(1)

⁶¹ Ibid, Art 13(2)

The Maputo Convention is the revision of the earlier African Convention on the Conservation of Nature and Natural Resources (1968).

The Convention requires governments to pass laws regulating the collection of forest resources, including hunting, fishing, and harvesting of timber and non-timber forest products. These laws should set the procedure for the issue of permits, and make sure that uses of forest products are sustainable. This may include policies like closed seasons, temporary bans on collection of certain resources if they are becoming depleted, and the prohibition of certain methods of hunting, fishing, or plant collection that cause mass destruction to these resources (for example the use of fire, snares, or certain types of nets)⁶².

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

The Convention also requires governments to promote the establishment of areas managed by local communities for the conservation and sustainable use of natural resources⁶³.

Finally, the Convention states that National Parks should take into account the needs of local communities, including subsistence resource use though only to the extent that this will not go against the conservation goals of the National Park⁶⁴.

Every two years Ghana has to report 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 information on related international agreements. Further compliance procedures have to be set up by the Conference of Parties created by the convention. However, because the convention has not entered into force yet neither of those reporting and compliance procedures are operational.

⁶² Revised African Convention On The Conservation Of Nature And Natural Resources, 2003, Article 9 (3)

⁶³ Ibid, Article 12 (3)

⁶⁴ Ibid, Annex 2 Conservation Areas : National Park: protected area managed mainly for ecosystem protection and recreation

Conclusions

The rules that govern ownership, control management and use rights of forest resources are very complex. Trusteeship relationships are established in the Constitution and in acts, sometimes even are superimposed, natural forest are separated from the land they grow on in off-reserve areas, they are not on-reserve. Very little can be found in relation to ownership control, management and use rights in relation to planted timber. This complex system has led to confusion between some of the 'bundles of rights' that make up complete ownership. The Constitutional provision detailing the fiduciary relationship created by the vesting of some lands and natural resources in the President/Stool/Family is key because it clearly states that managers of public, stool and family land are accountable as fiduciaries to their respective subjects.

The Constitution Review Commission has recognized this confusion and therefore recommends an amendment of the Constitution to clarify that all natural resources are owned by the people and vested in the President on behalf of and in trust for the people of Ghana.

Within acts and regulations, only few traces of the aforementioned accountability can be found and provisions clarifying ownership, control, management and use rights in relation to planted timber are almost entirely absent.

If Ghana wants to live up to its international obligations and if it aims to empower the Forestry Commission to manage Ghana's forest resources in a sustainable, legal and collaborative way, reviewing and clarifying the legal framework on ownership, control, management and use rights of forest resources will prove to be an essential step.

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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