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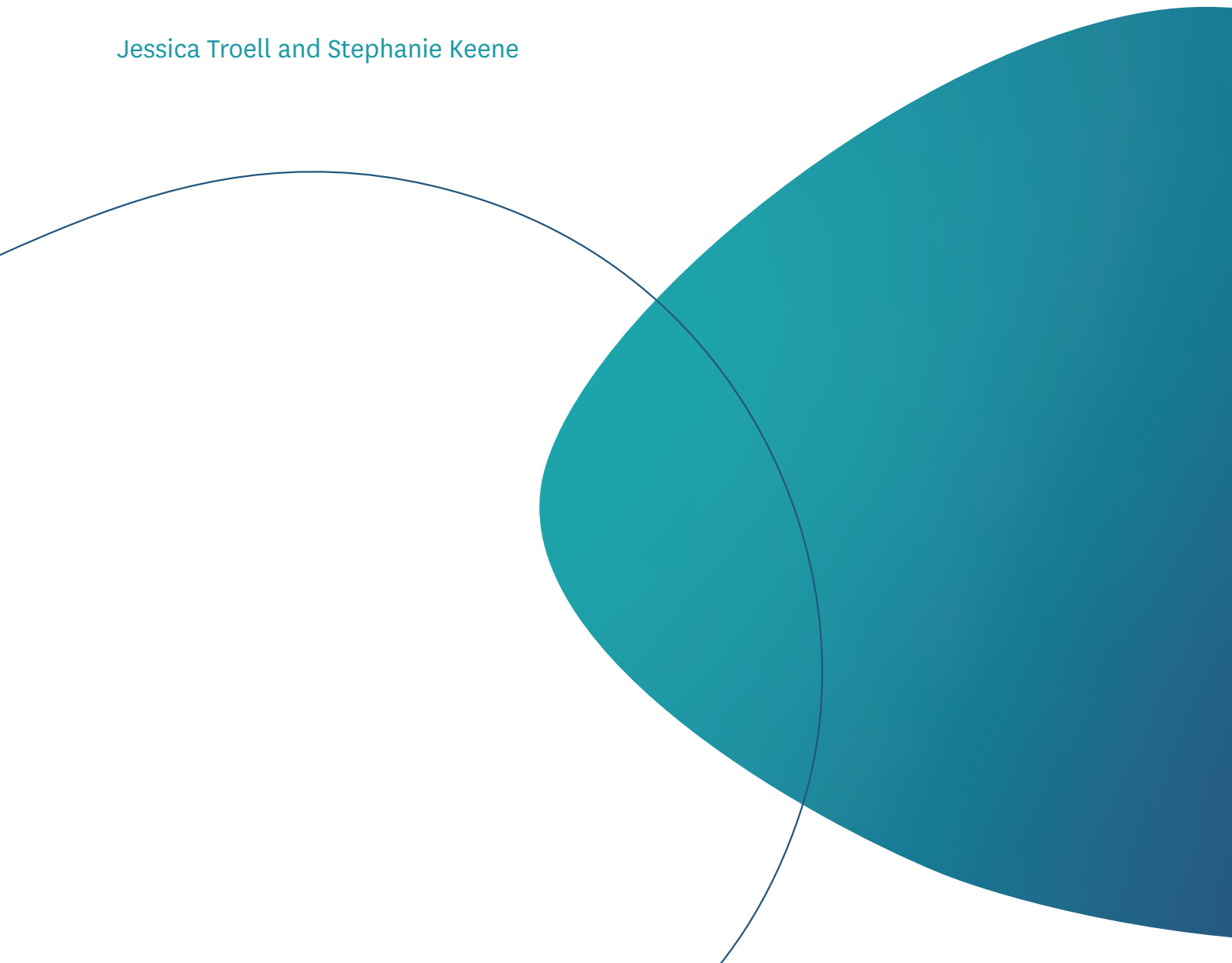
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Research Report

Legal Recognition of Customary Water Tenure in Sub-Saharan Africa: Unpacking the Land-Water Nexus

Jessica Troell and Stephanie Keene



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IWMI Research Report 182

Legal Recognition of Customary Water Tenure in Sub-Saharan Africa: Unpacking the Land-Water Nexus

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Acronyms and Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
CBD	Convention on Biological Diversity
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CRL	Community Rights Law
CWTR	Community-based Water Tenure Regime
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
ELI	Environmental Law Institute
FPIC	Free, prior and informed consent
ICJ	International Court of Justice
ILO	International Labour Organization
IPLCs	Indigenous Peoples and Local Communities
LRA	Land Rights Act
RRI	Rights and Resources Initiative
SDG	Sustainable Development Goal
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WRUA	Water Resource Users' Association
WUA	Water Users' Association

Summary

Despite the progress made in conceptualizing and advocating for secure community-based land and forest tenure rights, there is a critical lacuna in advocacy and policymaking processes pertaining to community-based freshwater tenure rights. Moreover, water tenure as a concept has only recently gained significant traction in global policy circles. This report analyzes national and international legal pathways for recognizing customary forms of community-based freshwater tenure rights held by Indigenous Peoples and Local Communities (IPLCs) in sub-Saharan Africa. It employs a methodological framework and builds on an analysis of community-based water tenure systems that was developed and applied by the Rights and Resources Initiative (RRI) and the Environmental Law Institute (ELI) in the publication *Whose Water? A Comparative Analysis of National Laws and Regulations Recognizing Indigenous Peoples', Afro-Descendants',*

and Local Communities' Water Tenure. Based on the key findings of this analysis, in particular the frequent dependence of IPLCs' legally recognized customary water tenure rights on their legally recognized land and/or forest rights, this report further analyzes national constitutions, national legislation governing water, land, forests, environmental protection and other related matters, international and national case law, and international and regional human rights laws, to explore how legal frameworks are recognizing and protecting customary water tenure rights across sub-Saharan Africa. The findings and recommendations provide a basis for analyzing the comparative effectiveness and potential drawbacks of these legal pathways for the recognition and protection of customary water tenure and ultimately for future work refining and improving legislation and assessing progress in its implementation and enforcement.

Legal Recognition of Customary Water Tenure in Sub-Saharan Africa: Unpacking the Land-Water Nexus

Jessica Troell and Stephanie Keene

Introduction

Community-based tenure systems followed by Indigenous Peoples and Local Communities (IPLCs) around the world regulate access to and use of natural resources on at least half the world's landmass (RRI 2015). The security of IPLCs' land and natural resource tenure rights is vital to supporting rural food and livelihoods security, poverty reduction, conflict avoidance and management, and sustainable development. Growing awareness of the importance of community-based tenure rights has sparked global progress in their legal recognition, particularly for community lands and forests. For instance, between 2002 and 2017, indigenous and local communities' forest tenure advocacy spurred a 40% increase in forest areas legally recognized as owned by and designated for communities (RRI 2018).

Progress in the legal recognition of community-based tenure rights within the rural land and forest sectors has benefited from a consistent consideration of land and forest tenure of IPLCs and the distinctive relationships of these communities with the territories and resources they have historically stewarded. IPLCs primarily hold resources at the community level, and their tenure systems comprise of an interrelated set of land and resource rights that provide a critical basis for their self-determination, cultural identity, livelihoods and economic advancement. Secure land and resource tenure are a key foundation of IPLCs' proven capacity to significantly contribute to equitable and sustainable land and resource management, resource conservation, and climate resilience (RRI 2020a). Despite the progress that has been realized from conceptualizing and advocating for secure community-based land and forest tenure rights, advocacy and policymaking processes pertaining to community-based freshwater tenure rights remain a missing but critical aspect of this discourse (RRI and ELI 2020). While the concept of "water tenure" draws significantly from a large body of work stressing the critical importance of customary water rights (Burchi 2005; Ramazzotti 2008; Boelens and Bustamante 2005), it has only recently gained traction in the global policy arena. This burgeoning momentum can largely be attributed to a growing acknowledgement of the inherent ecological, legal and socioeconomic interlinkages between terrestrial and water resources, along with the

critical role of freshwater security in achieving sustainable and climate-resilient landscapes, rural livelihoods and food security (FAO 2020).

Despite the multi-faceted role of water tenure in achieving development and climate goals, freshwater rights of communities around the world are under increasing threat from unsustainable development, rising pollution, land use changes and major demographic shifts. These impacts are exacerbated by climate change effects that are increasingly affecting freshwater distribution (over both space and time), availability and quality. The legal recognition of the freshwater tenure rights of IPLCs is critical to ensure that communities are able to protect those rights in the face of increasing competition.

In many cases, the security of IPLCs' water tenure rights hinges on the interface between communities' customary laws and government laws that may or may not recognize customary rights as legally valid. In sub-Saharan Africa, over 60% of the land area is estimated to be held under customary tenure (Wily 2011a; RRI 2015, 2020b). The importance of formally recognizing IPLC customary land and forest tenure rights has increasingly been reflected in international policies and laws,¹ and in diverse national legislative reforms throughout the continent (RRI 2015, 2018). Across sub-Saharan Africa, the legal recognition and protection of indigenous and community water tenure are a critical aspect of securing and protecting IPLCs' water security, particularly where third parties may be threatening communities' water rights. However, this does not imply that legitimate recognition emanates only from the state or that states have legitimate authority to revoke or undermine the customary water tenure rights of IPLCs. The legal recognition and protection of customary tenure is only one aspect of overcoming the issues IPLCs face in accessing and defending their water rights, in particular the numerous challenges in effective implementation and enforcement of existing legal protections.

Customary tenure encompasses the relationships between IPLCs and their natural resources (including land and water) which are governed by a set of customary rules and norms that communities use to express and order their

¹ See the United Nations Declaration on the Rights of Indigenous Peoples, Art. 27 (UNGA 2007); Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) (FAO 2012); Governing Tenure Rights to Commons: A guide to support the implementation of the VGGT (FAO 2016); International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples, Art. 8 (ILO 1989); and United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNGA 2019).

ownership, possession, management, use and regulation of those resources. These rules and norms derive from and are sustained by the community itself (rather than from the political authority of the state), are primarily unwritten and passed down orally through generations of community members, and are generally perceived as legitimate and binding on the community and its members.² Customary tenure systems are almost universally community-based, with resources primarily held at the community level for an unlimited duration (Wily 2011b).

While customary law is commonly associated with longstanding traditional practices, customary tenure often embodies highly adaptable rules and norms that continually evolve in response to the changing needs of the community, the management requirements of community resources, the influence of government policies and statutory requirements, and other external developments such as evolving technology (Wily 2011b). The term “living customary law” captures the fact that customary tenure systems are far from static, but rather represent the cumulative and ongoing adaptive responses of communities’ norms to political, economic, ecological, social and legal changes and influences. The resilience of customary tenure systems is largely related to their ability to respond and adapt to local conditions and needs, and to their being embedded in the specific social and cultural mores of the communities in which they evolve (Wily 2011b). However, as land and water resources become increasingly scarce, customary tenure systems can be vulnerable to the influence of “power politics” that favor the privileged and exclude more vulnerable members of communities from access to and control over resources, often reflecting the influence of statutory norms and the relative weakening or undermining of customary governance systems and laws. Customary tenure systems throughout Africa have been profoundly impacted in this manner by decades of colonial and post-independence government influence (Cotula 2007).

This report analyzes national and international legislative pathways for recognizing customary forms of community-based freshwater tenure rights held by IPLCs in sub-Saharan Africa (RRI and ELI 2020). It employs the methodological framework and builds on the analysis developed and published in RRI and ELI (2020). RRI and ELI (2020) conceptualized and defined the rights most central to securing community-based freshwater tenure and assess the “community-based water tenure regimes” (CWTRs) (i.e., legal frameworks recognizing IPLC freshwater rights) established under the national laws of 15 African, Asian and Latin American countries.

The methodology applied in RRI and ELI (2020) was developed through a series of expert consultations and

refined through its application in three pilot countries. The analysis was subject to a rigorous review by 43 national and international experts. The methodology built on other Rights and Resources Initiative (RRI) methodologies for conceptualizing and tracking community land and forest tenure rights but broke new ground by conceptualizing community-based water tenure as a bundle of community-based freshwater rights that interact to support and promote communities’ physical survival, cultural vitality, livelihoods and sustainable development. It accounts for the complex, overlapping entitlements established by a variety of national laws, regulations and case law comprising CWTRs.

Data from RRI and ELI (2020) show that although the customary water rights of IPLCs are recognized in over 80% of the legal frameworks analyzed across Africa, Asia and Latin America, this recognition commonly emanates not from water laws but from constitutional provisions, land or forest laws or a combination thereof. The frequent absence of an *explicit* recognition of customary water tenure rights in national water laws leaves the water security of many communities highly dependent on their legally recognized land and forest rights. The report also demonstrates that the “land-water nexus”—whereby the legal status of communities’ water rights depends on the recognition of their community land and forest rights—is common across community-based tenure regimes, and especially pervasive in Africa (RRI and ELI 2020). Legislative nexuses between IPLCs’ freshwater and land rights can mirror the integrated manner in which many IPLCs customarily govern their territorial land and water resources. Yet, the recognition of communities’ customary resource rights in land and forest laws is often not specific to water, which can undermine the effective protection of customary water rights. These laws are especially ill-equipped to recognize the customary water rights of pastoralists and other nomadic IPLCs whose water rights are often dependent on water legislation and laws specific to pastoralists (see, e.g., Government of Mali 2001). Since tenure regimes characterized by the land-water nexus often lack sufficient coherence and specificity with respect to the particular water rights of communities and of community women, the security and integrity of IPLCs’ customary territorial rights are commonly vulnerable, particularly where land, forest and water laws contradict one another (RRI and ELI 2020).

This report uses RRI and ELI (2020) as a departure point to explore the legal challenges surrounding IPLCs’ customary water tenure security throughout sub-Saharan Africa. It places particular emphasis on: (1) the centrality of various legislative, ecological and management nexuses between IPLCs’ customary land, forest and water tenures; (2) existing legislative avenues for recognizing

² See the International Council on Human Rights Policy’s definition of ‘non-state law’: “Norms and institutions that tend to claim to draw their moral authority from contemporary to traditional culture or customs, or religious beliefs, ideas and practices, rather than from the political authority of the state. We use ‘legal’ to acknowledge the fact that these norms are often viewed as having the force of law by those subject to them” (ICHRP 2009).

customary water tenure in jurisdictions that separate the recognition of customary land and customary water rights; (3) opportunities to reinforce IPLCs' interrelated customary water tenure rights within

the emerging understanding of the human right to water under international law; and (4) the specific challenges of securing women's customary water rights within IPLCs.

Methodology and Caveats

As noted, this report uses RRI and ELI (2020) and its findings as a point of departure for exploring the legal pathways for recognizing and protecting customary water tenure rights in sub-Saharan Africa. Additional research undertaken by the authors included a review of relevant literature and of national and international legislation and case law.

Important caveats apply to this report. The research is limited to the content of the written legislation and cases assessed. It neither attempts to assess the realization of customary water tenure rights in practice in the countries highlighted nor the content of customary laws. The authors recognize that state-made laws are often passed without consultation with IPLCs, and that the provisions recognizing customary laws and practices may therefore not reflect the actual practices or priorities of IPLCs. This report does not imply that the only legitimate recognition of customary water tenure rights emanates from the

state or that states have legitimate authority to revoke or undermine the customary water tenure rights of IPLCs. Moreover, legal recognition and protection of customary tenure represent only some of the challenges IPLCs face in accessing and protecting their water rights. In particular, there are numerous challenges in effectively implementing and enforcing the legislative protections of these rights.

While the legal recognition of customary tenure rights is not a panacea for all IPLC resource challenges, it does provide a critical basis for securing and protecting those rights in many contexts. Consequently, exploring the legislative and judicial pathways for recognizing customary water tenure in sub-Saharan Africa enables a critical analysis of the opportunities to achieve meaningful recognition and protection of customary water tenure within existing frameworks, as well as a basis for assessing progress towards the implementation and enforcement of those legal provisions.

What is Community-based Water Tenure and Why is it Important?

The conceptualization and application of water tenure are still somewhat nascent. This can be attributed in part to the fact that water is a fugitive, inherently shared and essentially public resource, all characteristics that make it difficult to conceptualize water tenure in the same way that tenure is framed for its terrestrial counterparts (FAO 2020). While the specific mechanisms of water tenure are still being refined, its broader concept should be understood as both a legal and social construct and can be defined as “the relationship, whether legally or customarily defined, between people, as individuals or groups, with respect to water resources” (FAO 2020). A core set of rights lies at the center of water tenure that constitute the fundamental elements of relationships between and among rightsholders and the resource.

Despite continued progress in recognizing community-based land and forest tenure rights of IPLCs, the conceptualization of their water tenure is just gaining momentum. The community-based tenure of IPLCs who primarily hold resource rights can be defined as “arrangements in which the right to own or govern land and natural resources (such as freshwater) is held at the community level.” Community-based freshwater tenure rights consist of the “bundle of rights” most essential to these communities' relationships with freshwater resources (RRI and ELI 2020). While IPLCs' freshwater tenure rights fundamentally emanate from the inherent legitimacy of their customary claims to natural resources, the bundle of legal rights comprising secure community freshwater tenure are commonly recognized

under state-issued laws. These include rights of use, both substantive and procedural rights to guarantee access and control over water resources and rights to recourse when entitlements are threatened or terminated. The bundle of rights approach is adapted from well-accepted conceptualizations of land and forest tenure and the approach clarifies the core rights constituting water tenure regimes and facilitates a more holistic understanding of the ways in which community-based land, forest and water tenure rights interact and influence each other (RRI and ELI 2020).

To understand which rights within community-based water tenure systems are legally recognized, RRI and ELI (2020) defined a community-based water tenure regime as “a distinguishable set of national-level, statutory laws and regulations governing all situations in which freshwater rights of use and at least either governance or exclusion are held at the community level.” Thus, the minimum requirement for a legal framework to constitute a CWTR is that it recognizes communities’ rights of use and at least either governance or exclusion. While this definition was developed in the context of research meant to analyze only national-level government laws, the bundle of rights approach can also be used to assess the extent and security of customary water tenure rights as they are traditionally understood and exercised in practice, regardless of their statutory acknowledgment.

In considering the legal recognition of customary water tenure systems under national laws, it is important to acknowledge that state-issued laws often define the bounds of a single rights-holding “community” or other community-based entity capable of holding water tenure rights in a manner that does not necessarily align with communities’ self-identification. For example, Kenya’s Constitution (Republic of Kenya 2010) defines “marginalized community” as

“a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or pastoral persons and communities, whether they are—nomadic or a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.”

Kenya’s Community Land Act defines “community” as “a consciously distinct and organized group of users of

community land who are citizens of Kenya and share any of the following attributes: (a) common ancestry; (b) similar culture or unique mode of livelihood; (c) socioeconomic or other similar common interest; (d) geographical space; (e) ecological space; or (f) ethnicity” (Republic of Kenya 2016a, Sec. 2). Liberia’s Land Rights Act defines community as “self-identifying coherent social group or groups comprising people of all ages, gender, beliefs, and other backgrounds who share common customs and traditions and reside in a particular land area over which members exercise jurisdiction communally by agreement, custom or law and manage their land in accordance with customary practices and norms. A community may thus define itself to be a single village, town, clan, or chiefdom, or a group of villages or towns or clans” (Republic of Liberia 2018, Art. 2(7)).

Other fundamental limitations concerning the scope, specificity and establishment of some CWTRs include legislative failure to meaningfully distinguish among heterogeneous constituents of a given community (such as differences between the legal standing or rights of men and women), and legal requirements for communities to be incorporated as a legal entity or obtain a permit or license in order to enjoy legal water rights recognized by the CWTR.

Community-based water tenure regimes offer varying levels of recognition for the full bundle of rights that may be held by communities (see Box 1). The extent of existing legal protections for this suite of rights is important in the context of the growing scarcity of and pressures on freshwater resources, incidences of large-scale land and water acquisitions (sometimes called “grabs”) and the marked need to reduce the persistent inequities undermining poverty alleviation in rural African communities. Secure community rights to use and govern freshwater for multiple purposes are not only necessary for the survival, health, food security and livelihoods of communities, but also support their ability to effectively steward water resources in the context of their territorial resource management practices, while preserving their cultural identities and knowledge. The ability to protect those rights by excluding third parties from negatively impacting water resources or by enforcing community rules around water is critical, but often overlooked in legal tenure systems (RRI and ELI 2020). Even where these rights are recognized, national laws frequently impose administrative requirements on communities in order to vest those rights (RRI and ELI 2020), which mostly take the form of permitting or licensing requirements, regulations compelling communities to create and/or register specific types of institutions, or requirements for communities to complete an approved resource management plan.³ These requirements can enable more effective and sustainable use and management in some circumstances. However, they are often not tailored to the needs and rights of communities, and can impose onerous

³ This can specifically include water resource management, but given the land-water nexus, often also includes a diverse array of land, forest or other community management plans that either implicitly or explicitly include water.

financial and other burdens where governments lack the capacity to support their implementation (van Koppen and Schreiner 2018).

In addition to the high stakes surrounding the effective recognition of community-based freshwater rights for communities themselves, legal recognition also connotes high stakes for policymakers tasked with governing common pool resources such as freshwater. The very fact of statutory recognition and the granting of legal status to customary rights places IPLCs within the “politics of recognition,” raising difficult questions of legitimacy, power, autonomy and self-determination while also highlighting distributive justice imperatives to achieve

equitable and sustainable development for all (Roth et al. 2015). The process of recognizing customary water rights may also raise questions of how best to ensure a core minimum suite of human (and often constitutional) rights to communities, where customary systems fail to support or even undermine the realization of those rights. This is particularly salient for rural women’s water rights.

Whether customary systems have maintained their integrity or been eroded over time by statutory requirements or political and economic dynamics, there is a need to protect the historically vulnerable and persistently marginalized IPLCs relying on customary water rights from the increasing threats from more

Box 1. Community-based Water Tenure: The Bundle of Rights.

Use rights. Communities use water resources for multiple purposes and laws often distinguish between various categories or levels of water use in determining entitlements. Generally speaking, these categories broadly distinguish between: (1) domestic water uses,^{*} or uses for basic human or subsistence needs; (2) small-scale productive uses or uses for livelihoods beyond a subsistence level but not commercial in nature; (3) commercial use rights that generate income at a higher level and often imply much higher levels of water use; and (4) water uses for cultural or religious purposes. An important characteristic of legally recognized IPLC water use rights is their duration. While some are recognized for an unlimited duration (and are therefore consistent with the perpetual nature of customary tenure systems), others may statutorily impose temporal limitations on IPLC customary water uses.

Transferability rights. In some cases, communities are statutorily authorized to transfer water rights, particularly those associated with a permitted entitlement. However, the notion of transferability of commonly-held resource rights in community territories often contradicts IPLCs’ customary concept of the indivisibility of their territorial rights. Allowing the alienation of water rights can negatively impact collectively managed water governance systems, leading to dispossession of community water resources and the disruption of communities’ way of life and associated customary systems for natural resources governance.

Exclusion rights. The right to exclude outsiders enables rightsholders to protect their water rights and resources from capture or abuse by third parties. Since water is a fugitive resource, claims to water often overlap. Moreover, the legal recognition of water rights must balance the need for exclusivity with the fact that water is an essential public resource and a human right. Therefore, exclusion rights are seldom absolute in the water context, thus enabling third parties to access water to satisfy domestic or basic human needs.

Governance (rulemaking, planning, management, dispute resolution and enforcement) rights. These refer to the rights of communities to plan, make and implement decisions with respect to the abstraction, use, allocation and development of their water resources. These also include the right to make rules regulating community water, to enforce those rules against community members and third parties and to resolve internal conflicts related to water.

Due process and compensation rights. These are procedural rights that enable communities to protect their substantive water rights. They include rights of notice and access to information prior to developments or activities that could threaten or negatively impact communities’ water rights, rights to consultation and participation in decisions regarding those development or activities, and rights to appeal decisions impacting water rights in a court of law and to receive fair compensation if those rights are infringed or terminated.

^{*} The distinction between domestic and small-scale productive (or livelihoods) uses is an important one, particularly in the context of IPLCs. Legal recognition of water use rights generally depends on administrative requirements, such as obtaining a permit or license, but often exempt uses considered to be domestic or “primary” in nature. However, uses for livelihood purposes are more frequently burdened by the requirement for permissions or other administrative prerequisites, which can pose significant challenges to IPLCs in terms of the resources required to fulfill them, where government capacity to implement those requirements is often limited (RRI and ELI 2020; van Koppen and Schreiner 2018).

powerful actors. The recognition of these rights is also inextricably linked to the realization of a broad suite of human rights held by all rural people, including rights to life, food, adequate standard of living and a healthy environment, and is a vital component of a rights-based approach to achieving multiple Sustainable Development Goals (SDGs). Where customary water laws and rights are not recognized, they are at risk of being overlooked, ignored, manipulated or eroded in the face of competing claims for water resources. This poses a substantial threat to communities' water security and, in turn, to their livelihoods, food security and resilience to economic and climatic shocks.

Recognition of the critical importance of secure tenure rights to the specific situation of IPLCs and their distinctive relationships with the territories and resources they have historically and collectively stewarded has led to positive

developments in international and national laws. Yet, as highlighted above, advocacy and policymaking processes regarding community-based freshwater tenure rights have substantially lagged behind the land and forest sectors. Emerging evidence of the various ways in which a legal "land-water nexus" provides IPLCs with recognized customary water rights underlines the need for a better understanding of how to leverage these rights. At the same time, it is imperative to align these rights through national water legislation that more explicitly recognizes the role and importance of customary water tenure regimes and clarifies the relationships between those regimes and legislative water rights systems.

The following sections explore the specific modalities through which international and national policies, case law and legislative frameworks recognize and protect customary water tenure rights.

International and Regional Recognition of Customary and Community-based Water Tenure

While there are no enforceable international legal instruments specifically dedicated to the recognition and protection of IPLCs' water rights, the progressive articulation of customary international laws related to the rights of IPLCs include definitions of territorial and land-related rights that encompass the water resources connected to those lands/territories. These international legal instruments reflect the ecological relationships between terrestrial and aquatic ecosystems, support the integrated manner in which IPLCs steward these ecosystems, and stress the need to recognize the full bundle of IPLC customary rights to land and water resources as an underlying basis for the realization of their human rights and sustainable development.

United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), approved by the United Nations General Assembly (UNGA) in 2007, provides a clear articulation of the rights of Indigenous Peoples to own, use, develop and control their "traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas

and other resources" (UNGA 2007, Arts. 25, 27-8). UNDRIP articulates evolving customary principles of international law with respect to Indigenous Peoples and is an important source of non-binding "soft law," despite the position of some African governments that the concept of indigeneity does not apply to specific groups within an African context. In fact, 35 African States voted in favor of passing UNDRIP in 2007, numerous ethnic groups identify as Indigenous Peoples across the African continent, and the African Court of Human and Peoples' Rights recognized the validity of this self-identification in 2017, with respect to the Ogiek peoples of Kenya (ACHPR 2017, paras 105-112).

The legal recognition of Indigenous Peoples' customary freshwater rights is supported by UNDRIP, which calls upon countries to legally recognize and protect their lands and resources with "due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned" and specifically to recognize Indigenous Peoples' land tenure systems within these territories. It thus urges countries to recognize a comprehensive set of natural resource rights as inherent to Indigenous Peoples' territories. Notably, some Latin American countries have made UNDRIP's provisions enforceable through national legislation.⁴

⁴ Bolivia has adopted UNDRIP as national Law 3897. Human Rights Courts support the notion that it is Customary International Law. For instance, in *Awás T'igni Community v. Nicaragua*, the Inter-American Court of Human Rights held that "there is an international customary law norm which affirms the rights of indigenous peoples to their traditional lands." (IACHR 2001). In *Maya v. Belize*, the Belize Supreme Court affirmed that "both customary international law and general principles of international law would require that Belize respect the rights of its indigenous peoples to their lands and resources." However, there are also counter-arguments that regional differences in the definition and recognition of these rights preclude recognizing UNDRIP as customary international law (Barnabas 2017).

ILO Convention No. 169 on Indigenous and Tribal Rights

While the Central African Republic—which includes the ancestral territories of three Indigenous Peoples (IWGIA 2019)—is currently the only African signatory to the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention No. 169, the ILO Convention provides a strong basis for recognizing and protecting indigenous and tribal peoples’ customary freshwater rights (ILO 1989). The Convention recognizes indigenous and tribal peoples’ enforceable rights to the “natural resources pertaining to their lands,” ensuring that these rights shall be specially safeguarded, including the rights to participate in the use, management and conservation of these resources (ILO 1989, Art. 15). Where States assert ownership of resources pertaining to communities’ lands, they are required to consult communities prior to undertaking or permitting programs for the exploration or exploitation of such resources. Such consultations must be carried out “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures” (ILO 1989, Art. 6). Communities must also receive fair compensation for any damages incurred as a result of such activities (ILO 1989, Art. 15).

African Charter on Human and Peoples’ Rights (Banjul Charter)

The African (Banjul) Charter on Human and Peoples’ Rights, ratified by 54 African countries, recognizes the collective rights of African “peoples” but does not define the term (ACHPR 2005).⁵ The Charter requires that natural resources be “freely disposed of” by all peoples in the exclusive interest of the people and “in no case shall a people be deprived of” this right (OAU 1981, Art. 21). The African Commission’s Working Group of Experts on Indigenous Populations/Communities states that the rights of “peoples” should be available to indigenous populations/communities and minorities in Africa (ACHPR 2005).

In 2019, the Commission adopted Guidelines on the Right to Water in Africa, recognizing the right to water and calling upon States parties to adopt all necessary measures to implement the Guidelines in their legislation through a rights-based approach (ACHPR 2019). The Guidelines specify that States should protect water resources that are of cultural significance to local and traditional communities and guarantee access to individuals and communities who depend on those resources for their domestic and livelihood needs (ACHPR

2019, para 1.5). Specifically, the Guidelines call upon States to “consult, cooperate and engage” with Indigenous Peoples to protect traditional water management systems for their ancestral lands and to respect Indigenous Peoples’ access and use of natural resources in their territory as “intrinsically related to their right to life, food, self-determination and the right to exist as a people” (ACHPR 2019, para 27.1). Further, any “limitations on the right of indigenous peoples to their natural resources, including water resources, can only flow from the most urgent and compelling interest of the state” (ACHPR 2019, para 27.2). More broadly applicable provisions include recommendations that States: (1) take positive measures to ensure participation in decision-making and access to water of vulnerable and marginalized groups; (2) promote gender equality and the protection of women’ and girls’ water rights (including strengthening customary and statutory mechanisms for defending or protecting women’s rights to water); and (3) require transparent, maximum and effective community participation, including the free, prior and informed consent of communities, in decision-making and monitoring of developmental activities that may affect the use of and equitable access to water resources (ACHPR 2019, paras 8.5, 8.8). The Guideline’s due process provisions are applicable to all communities and include conducting human rights and environmental impact assessments that must consider the “impact on the spiritual, religious and cultural rights of indigenous peoples and other traditional communities, customary people’s rights and community existence including livelihoods, local governance structures and culture” (ACHPR 2019, para 29.3(v)). Taken together, this is a clear (if non-enforceable) mandate for African States, of which 54 have ratified the Charter, to recognize, protect and provide safeguards for customary water rights of their IPLCs.

Voluntary Guidelines on Good Governance of Tenure

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) were adopted unanimously by the Committee on World Food Security in 2012 following an international consultative process to engage multiple stakeholders in their drafting (FAO 2012). The adoption of the VGGT provided an important consensus around normative standards for responsible governance of land, forest and fisheries, focusing on the protection of marginalized and vulnerable groups whose food security and livelihoods rely largely on the use of natural resources as commonly held property. The VGGT articulate the critical importance of legal recognition and protection

⁵ In the context of Indigenous Peoples, it can be argued that the collective rights in Part I, Chapter I of the Charter as well as the right to property in Article 14 – taken separately and as a whole – signal an obligation on States parties to respect and protect their right to the ownership, control, use and enjoyment of their ancestral lands, territories and resources. Indeed, the African Commission has noted that “the protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates both (sic) to Articles 20, 21, 22 and 24 of the African Charter.” This is consistent with the decisions and commentary of a variety of United Nations human rights bodies on Indigenous Peoples’ rights to their ancestral lands.

of community-based and customary land and resource tenure rights as an essential aspect of IPLCs' cultural identity and well-being, as well as a cornerstone of achieving food security, secure livelihoods and sustainable development (FAO 2012). The VGGT provide strategic guidance to both State and non-State actors on how to take a rights-based approach to the governance of land and resource tenures and specifically acknowledge the "social, cultural, spiritual, economic, environmental and political value" of land, fisheries and forests to Indigenous Peoples and other communities employing customary tenure systems. The VGGT call upon States to legally recognize and protect customary tenure by ensuring "equitable, secure and sustainable rights" to the land and resources held by communities and to promote effective and meaningful participation of all community members, including vulnerable and marginalized members, in decision-making regarding tenure "through their local or traditional institutions." While the VGGT recognize the importance of water to land, forest and fisheries tenures, it was decided not to include water tenure as it was too nascent a concept at the time (FAO 2012, Preface). More recently, the question of aligning water tenure with the VGGT has re-emerged (FAO 2020). Numerous countries and private sector entities have made commitments to comply with the VGGT.

United Nations General Assembly Declaration on the Rights of Peasants and Other People Working in Rural Areas

In 2018, the UNGA approved the Declaration on the Rights of Peasants and Other People Working in Rural Areas, which recognizes the "special relationship and interaction between peasants and other people working in rural areas and the land, water and nature to which they are attached and on which they depend for their livelihood" (UNGA 2019). The Declaration also expands the scope of many of the protections enshrined in UNDRIP to all communities with resource-based livelihoods, including sedentary local communities, pastoralists and other nomadic or semi-nomadic communities, which includes most African communities practicing customary tenure (UNGA 2019).

Protected rights include individual or collective rights to access and sustainably use and manage land and water bodies to achieve an adequate standard of living; to have a place to live in security, peace and dignity; to cultural development; and to safe drinking water and "water for personal and domestic use, farming, fishing, livestock keeping and for securing other water-related livelihoods, ensuring the conservation, restoration and sustainable use of water" (UNGA 2019, Art. 17). States are called upon to take all appropriate measures to remove and prohibit discrimination in relation to the right to land, to legally recognize tenure rights, including customary tenure rights and

to protect legitimate tenure, including "the natural commons and their related systems of collective use and management" (UNGA 2019, Art. 18). States are also required to "respect, protect and ensure access to water, including in customary and community-based water management systems, on a non-discriminatory basis" and to take measures to guarantee affordable water for personal, domestic and productive uses and prevent third parties from impairing these rights, prioritizing human needs above other water use rights (UNGA 2019, Art. 21).

This Declaration is remarkable not only for its inclusiveness in terms of rightsholders, but for its explicit inclusion of an expansive interpretation of those communities' water rights. While international legal protections for Indigenous Peoples can exclude many African communities that practice community-based tenure (either because they do not identify themselves as indigenous, or because the state does not recognize the application of indigeneity to communities within its jurisdiction), this Declaration clearly includes all communities holding land and water resources customarily. It is also an explicit assertion of the need to specifically recognize the rights of communities not only to water for domestic uses and basic human needs, but also to support their realization of an adequate standard of living and development through the protection of community-based water rights for livelihoods and productive uses.

International Covenant on Economic, Social and Cultural Rights General Comment 15 and the UNGA Resolution on the Human Right to Water

In 2003, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment 15 on the Right to Water, acknowledging that the human right to water is "indispensable for leading a life in human dignity" and a prerequisite for the realization of other human rights, including an adequate standard of living, health and food (CESCR 2003). The right is defined as including "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." This includes water for drinking, cooking and personal and domestic hygiene requirements (CESCR 2003, para 2). The human right to water was recognized by UNGA (2010) as entitling every person to "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses" (i.e., drinking, cooking, personal sanitation and hygiene). The right to water "is also inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and food...[and] should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost among them the right to life and human dignity" (CESCR 2003,

para 3). Accordingly, States are encouraged to consider ways to ensure the provision of water for meeting basic human needs and the best mechanisms, such as legally recognized water rights, for addressing other water-related human rights in ways that advance equity and non-discrimination in water resources allocation and management (UNGA 2010).

General Comment 15 also notes the “importance of ensuring sustainable access to water for agriculture to realize the right to food” and stresses that particular attention should be paid to disadvantaged and marginalized farmers (including women) to have equitable access to water and water management systems (UNGA 2010, para 7). It also establishes that States should pay “special attention” to “individuals and groups who have traditionally faced difficulties in exercising this right,” including women, minority groups and Indigenous Peoples. To achieve this, countries should ensure that women are included in decision-making regarding water resources and entitlements, that traditional water sources in rural areas are protected and that “Indigenous Peoples’ access to water resources on their ancestral lands is protected from encroachment and unlawful pollution” (UNGA 2010, para 16).

As a social and economic right, the obligation on States to realize the right to water for its citizens is one of “progressive realization,” which implies a “constant and continuing duty... to move as expeditiously and effectively as possible towards the full realization” of the right (UNGA 2010, paras 17-18). States are also under immediate obligations, including the duty to respect the right to water, or to refrain from doing anything to interfere with its enjoyment. This specifically includes refraining from “arbitrarily interfering with customary or traditional arrangements for water allocation” (UNGA 2010, para 21). States are also obligated to *protect* the right, including through the prevention of third parties from interfering with the right to water and by providing “an effective regulatory system” including genuine public participation, and to *fulfill* the right by adopting necessary measures to realize the right within national legislative systems (UNGA 2010, paras 24-26). General Comment 15 also elaborates on the normative content of the right to water, clarifying that the most essential obligations of the right apply to

water for basic human and domestic needs (UNGA 2010, paras 24-26).

When included in national law, the right to water can provide an important foundation for IPLCs and women in those communities to assert their legal rights to a minimum quantity and quality of freshwater. At the national level, legal mechanisms for achieving the right to water have included recognition of the right (as either a human or a fundamental legal right) at the constitutional level, as well as various legal mechanisms for realizing the right, such as prioritizing allocation for domestic uses or prioritizing and protecting the specific water rights of vulnerable or marginalized users (including IPLCs).

While the core of the human right to water is broadly accepted to include an (accessible and safe) amount essential to survival, the full context of General Comment 15 underlines the critical importance of States paying special attention to the rights of IPLCs and avoiding arbitrary interference where communities are realizing those rights through customary frameworks. Taken in conjunction with the recognition of IPLCs’ territorial rights (including rights to freshwater) and the expansion of this recognition to a broader set of rural communities practicing customary tenure, there is a pressing need to more clearly define States’ legal obligations to realize, respect and protect a broader range of IPLCs’ customary water rights. In addition, these efforts need to be linked to the human right to water and associated human rights of IPLCs who rely on community-based tenure systems. This is supported not only by the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (as described above), but also by the African Commission’s Guidelines on the Right to Water in Africa, which specify that States must protect water resources that are of cultural significance to local and traditional communities and guarantee access to individuals and communities who depend on it for their domestic and livelihood needs (UNGA 2019, para 1.5). Moreover, the Committee on World Food Security provides clear policy recommendations that include achieving equal access to water for all, prioritizing the most vulnerable and marginalized and implementing policies to effectively meet their livelihoods and food and nutrition security needs (HLPE 2015).

National Legal Frameworks Recognizing and Protecting Customary Water Tenure

Contemporary national legal systems employ a variety of pathways to recognize customary water tenure rights. These include legal provisions that specifically recognize the broad customary rights of Indigenous Peoples and/or local communities, provisions that regulate the management and conservation of natural resources (including water), and provisions that control the use and exploitation of land and natural resources (RRI and ELI 2020). These provisions can emanate from national constitutions, sectoral land, water and other natural resource laws, framework environmental laws, legislation specifically recognizing the rights of certain communities or of customary institutions (e.g., chiefs or traditional authorities) and, increasingly, from the decisions of national and international courts. Legislative provisions for protecting customary water tenure rights can also be found in the procedural guarantees of a variety of laws providing for access to information, recognizing rights to participate in decision-making, and requiring social and environmental impact assessments, among others (RRI and ELI 2020).

Constitutional Bases for Recognizing and Protecting Customary Water Rights

National constitutions support the recognition and protection of customary water tenure rights in numerous ways. A study assessing 52 African constitutions (Cuskelly 2011) found that 33 of them referred to customary law in some form but varied widely in the scope of their recognition. Some constitutions provide general recognition of customary law and institutions, while others provide more specific recognition of the role of those institutions in regulating customary land and natural resources. The Malawian Constitution recognizes existing customary laws as having the force of State law (except where they are inconsistent with the constitution), enables the creation of traditional courts presided over by traditional authorities with jurisdiction over cases in customary law and prohibits customary practices that discriminate against women, particularly those that deprive them of property (Republic of Malawi 1994, Secs 24(2); 110, 200). Similarly, Namibia's Constitution recognizes "both the customary law and the common law of Namibia...to the extent to which such customary or common law does not conflict with this constitution or any other statutory law" (Republic of Namibia 1990, Art. 66). The Namibian Constitution also calls for the legal establishment of a Council of Traditional Leaders to "advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice" (Republic of Namibia 1990, Art. 102(5)). The Constitution of Zambia recognizes Zambian customary law that is consistent

with the constitution as part of its national laws and establishes a House of Chiefs consisting of five chiefs from each province, elected by the chiefs, to represent them in duties including initiating and deciding on matters of customary law and practice, making proposals on the areas of customary law that require codification and advising the Government on traditional and customary matters (Republic of Zambia 2016, Secs 1(1); 7(d); 169(5); 254(1)).

Other constitutional provisions relate to the recognition of customary territory or lands, which can, in certain cases, include customary waters appurtenant to those lands. These examples of constitutionally-based land-water nexuses are explored below.

Recognizing Customary Water Tenure Rights: The Land-Water Nexus

While the constitutional provisions mentioned earlier broadly recognize existing customary water laws and rights, their lack of specificity provides scant protection for those rights. They must be interpreted and applied in conjunction with additional constitutional and/or statutory provisions in order to provide a sound legal basis for the recognition of customary water rights. Data from RRI and ELI (2020) showed that although IPLC customary water rights are recognized in over 80% of the legal frameworks analyzed across Africa, Asia and Latin America, this recognition does not mainly emanate from water laws, but rather from constitutional provisions, land or forest laws or a combination of these laws. Over 70% of the 32 legal frameworks recognizing customary water rights are also characterized by a land-water nexus, whereby communities' freshwater rights depend on the legal recognition of community land, forest or territorial rights (RRI and ELI 2020).

Kenya's Constitution, for example, legally recognizes community land as "vested in and held by communities identified on the basis of ethnicity, culture, or similar community of interest," and defines community lands as including land "lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments...and any other land declared to be community land by an Act of Parliament" (Republic of Kenya 2010, Arts. 61, 63). The constitution also defines land as including "any body of water" on or under the surface of that land (Republic of Kenya 2010, Art. 260). Kenya's Community Land Act of 2016 further defines customary land rights to include those "conferred by or derived from African customary

law, customs or practices provided that such rights are not inconsistent with the Constitution or any written law” and vests all community lands held under customary tenure in communities (Republic of Kenya 2016a, Secs 2, 4(3)). Taken together with the constitutional definition of land, this provides strong legal recognition for customary surface water and groundwater tenure rights appurtenant to community lands held under customary tenure (Republic of Kenya 2016a, Pt II, Sec. 5(3)). Similarly, Zambia’s constitution legally recognizes customary land and its Lands Act of 1995 recognizes customary tenure over these lands (Republic of Zambia 2016, Art. 254). The Lands Act states that land in a customary area shall continue to be so held and recognized, and any provision of this Act or any other law “shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act” (Republic of Zambia 1995, Art. 7(1)). This statement not only recognizes customary land tenure rights, but also the suite of customary rights that are appurtenant to that land tenure, including customary water rights.

In some cases, the land-water nexus provides the only recognition of customary or community-based water rights. Liberia, for example, has no national framework water law and so the recognition of customary water tenure rights derives from its land and forest laws. The Liberian Land Rights Act of 2018 provides enforceable legal recognition of all customary lands, including the right to “possess and use” the water resources thereon (Republic of Liberia 2018, Art. 33(2)(ii)). The Act recognizes communal ownership of customary land and water resources and creates Community Land Development and Management Committees to oversee their management. Notably, these committees must have equal representation of men and women, thus ensuring broader rights for women in water management (Republic of Liberia 2018, Art. 36(6)).

Forest laws can also provide pathways for the recognition of certain communities’ customary water rights in their community forest lands. Zambia’s Forests Act defines forest lands as including the biological diversity therein, which is defined under the Act to include aquatic ecosystems within forests (Republic of Zambia 2015, Art. 2). The Act further recognizes local communities’ rights to participate in the management of forests and their biological diversity and defines forest and forest-adjacent local communities to include those holding land under customary tenure (Republic of Zambia 2015, Art. 2). In Liberia, in order to vest rights to control, manage and use community forest resources, including water resources, communities must form a Community Forest Management Group and conclude a management agreement with the Forestry Development Authority (Republic of Liberia

2009). Similarly, Liberia’s Community Rights Act defines community forest lands as “forested or partially-forested land traditionally owned or used by communities for socio-cultural, economic and development purposes” (Republic of Liberia 2009, Sec. 1.3). Regulations spell out that communities’ rights to access, manage, use and benefit from their forest resources is vested once the community and the Forestry Development Authority have formally signed a Community Forest Management Agreement (Republic of Liberia 2009, Sec. 2.1).⁶

Legal recognition of the territorial rights of Indigenous Peoples or other ethnic groups can also provide the basis for recognition and protection of customary water rights. In 2011, the Republic of Congo passed the first African legislation providing specific legal protection for Indigenous Peoples (République du Congo 2011). The law states that Indigenous Peoples have a right to own, possess, access and use the lands and natural resources that they have traditionally used or occupied for their subsistence and livelihoods (République du Congo 2011, Art. 31). The State is obliged to facilitate delimitation of these lands on the basis of indigenous customary rights and to ensure legal protection, whether or not communities hold the title to those lands. Protections include due process rights for indigenous communities prior to decisions or measures that could impact their land or resources, including participation in socioeconomic and environmental impact assessments (République du Congo 2011, Arts. 3.6, 39). A separate decree elaborates on the consultation and participation requirements applicable to indigenous populations, requiring consultation when any plans, measures or programs/projects related to economic or industrial development are proposed in their territories that could restrict the enjoyment of communities’ rights or threaten their well-being or the well-being of the environment (République du Congo 2019). The consultations, carried out by a commission set up by the minister responsible for human rights and organized through institutions representing the indigenous communities, “takes place with respect for the principle of free, prior and informed consent of the indigenous populations and the guarantee of their right to determine their priorities.”

In 2020, similar draft legislation was passed by the National Assembly of the Democratic Republic of the Congo (DRC) and is expected to be voted upon by the country’s Senate to become enforceable. The Bill includes provisions protecting the rights of Indigenous Peoples to the lands and natural resources that they traditionally own, occupy or use, as well as the right to fully enjoy all natural resources and the benefits derived from environmental services on the lands they traditionally own, occupy or use. Projects or developments likely to

⁶ It should be noted that while the Community Rights Law (CRL) and its regulations are still in force in Liberia, the 2018 Land Rights Act (LRA) also recognizes rights to all resources on customary land as enforceable, which appears to obviate the need for communities to undertake the administrative requirements to become a registered forest community. However, as the LRA is only now coming into force, it is likely that regulations will be passed to clarify the relationship between the two laws and specify how the CRL’s requirements relate to rights to land and resources under the LRA.

impact these lands and natural resources must be subject to a social and environmental impact study and cannot be initiated without the free, prior and informed consent of Indigenous Peoples potentially impacted by those activities (République Démocratique du Congo 2020, Arts. 42-46).

Due Process: Procedural Rights and Recognition of Customary Water Tenure

Customary water rights may also be protected through due process requirements outside of water legislation. National constitutions, environmental protection laws, land laws and other sectoral domestic laws may simultaneously shape the due process rights of IPLCs relating to freshwater resources. International treaties, regional basin-level agreements and international court decisions may also be instrumental in transboundary contexts. RRI and ELI (2020) found that due process rights were recognized in some form across all community water tenure regimes, although regimes with a land-water nexus provided markedly stronger compensation rights to communities. At the same time, in instances where due process provisions do not explicitly address water resources or IPLCs' water rights, they risk not being implemented or enforced.

Environmental impact assessment provisions frequently include requirements to notify relevant stakeholders (which may include IPLCs) and provide them with an opportunity to comment and sometimes participate in decision-making processes when a proposed project or development has the potential to impact water resources in a way that could infringe communities' water tenure rights. Permitting requirements for mining or other potentially harmful activities may also provide opportunities for prior notification and consultation where licensed activities could harm IPLCs' rights.

Procedural guarantees such as these are particularly important and serve as a last but crucial resort where communities' water tenure rights of use, governance and exclusion are not adequately recognized or protected under legislation. Notably, these protections are often more robust in the case of water tenure regimes that have a land-water nexus, as land rights (and thus appurtenant water rights) are more consistently accompanied by a range of due process requirements related to potential expropriation (RRI and ELI 2020).

Recognition of Customary Water Tenure in Courts

Recent decisions of regional and national courts highlight the role of the judiciary in recognizing and protecting the customary water rights of IPLCs through the application of human rights laws and the progressive articulation of legally recognized indigenous and community territorial

and resource rights. In 2017, the African Court on Human and Peoples' Rights awarded a landmark victory to the Indigenous Ogiek People who have been repeatedly evicted from their ancestral home in Kenya's Mau Forest Complex (ACHPR 2017). The Mau Forest is Kenya's largest water drainage basin and the country's most significant "water tower" – mountainous forests from which Kenya's major rivers originate. The government has justified the continued displacement of the Ogiek as necessary to protect Kenya's water supply and the integrity of the ecosystem. The Court's decision, however, found the government's actions to be unlawful and recognized the Ogiek as an Indigenous People deserving of special protection deriving from the continued subjugation and marginalization that they have faced (ACHPR 2017, para 111). Drawing on the United Nations Declaration on the Rights of Indigenous Peoples, the Court affirmed the Ogiek's rights to their ancestral territories (ACHPR 2017, paras 122-28). Given the Ogiek's valid ancestral forest land and resource ownership claims, their capacity as Indigenous Peoples to effectively conserve their resources, and the fact that the Mau Forest's degradation largely stems from other causes, the Court concluded that the Government of Kenya had violated seven separate provisions of the African Charter on Human and Peoples' Rights. These include the Ogiek's rights to non-discrimination, property, culture, religion, natural resources and development. Despite this decision recognizing the Ogiek's ability to sustainably manage the resources of their ancestral homes within the Mau Forest, the Kenyan government has continued to justify the repeated evictions of Ogiek communities in the years following the landmark ruling based on a perceived threat to conservation, and has yet to implement the ruling of restoring the Ogiek's land and resources (Kobei et al. 2020).

The Ogiek decision is significant for its recognition of the critical role of Indigenous Peoples in Africa as effective stewards of their territories and resources, including freshwater. The Court rejected the Kenyan government's assertions that the Ogiek's removal from their ancestral home was in keeping with public interest and that the communities were the primary cause of environmental degradation in the forest. Instead, the Court found ample evidence that the degradation's main causes were encroachments upon the land by other groups and "government excisions for [non-Ogiek] settlements and ill-advised logging concessions" (Kobei et al. 2020). This case was referred to the African Court by the African Commission on Human and Peoples' Rights and is the first case to have reached a hearing stage, setting important procedural as well as substantive legal precedents for future cases (Cultural Survival 2017; Vigliar 2017).

A non-African landmark case further highlights the profound connections between the fundamental human rights of IPLCs, their territorial rights and the critical role of those communities in maintaining the integrity of water resources within their territories. In the Atrato

River Case, Colombia's Constitutional court ruled that the severe pollution resulting from the government's failure to control illegal mining in the Atrato Basin, coupled with its failure to appropriately consult with communities in the Basin prior to granting legal mining concessions, was in violation of the rights to life, health, water, food security, healthy environment, culture and territories of the Afro-Colombian and Indigenous communities living in the basin (Constitutional Court of Colombia 2016, para. 9.39). The court's verdict relied on the concept of "biocultural rights" of indigenous and ethnic communities to administer and exercise sovereign autonomous authority over their territories and natural resources, according to their own laws and customs (Constitutional Court of Colombia 2016, paras 5.11 et seq). Specifically, the court held that biocultural rights "result from the recognition of the deep and intrinsic connection that exists between nature, its resources and the culture of the ethnic and indigenous communities that inhabit them, all of which are interdependent with each other and cannot be understood in isolation" (Constitutional Court of Colombia 2016, para 5.11). The legal bases for these rights emanate both from national legislation and international law, including the ILO 169 Convention, the Convention on Biological Diversity (CBD), UNDRIP and the American Declaration on the Rights of Indigenous Peoples of 2016 which reiterate the rights of IPLCs to their land, territories and natural resources, among others (Constitutional Court of Colombia 2016, paras 5.19 et seq). The court found that despite the lack of a right to water under Colombia's Constitution, such a right exists because of its indispensability in guaranteeing a set of broad rights more directly protected by the constitution, including rights to life, food, health and work, and stressed the foundational importance of the right to freshwater as integral to notions of territorial rights (Constitutional Court of Colombia 2016, para 5.50). Equally as important was the fact that the court also extended the notion of biocultural rights to grant legal personhood to the river itself, designating the Government of Colombia and the ethnic communities in the Basin as legal guardians of the river and significantly expanding the legal role of IPLCs in the Basin as legal stewards of the resources therein (Constitutional Court of Colombia 2016, para 9.32).

Recognition of Customary Water Rights within Water Legislation

Despite the critical role that customary water tenure rights play in ensuring the food security, sustainable livelihoods, economic progress, health and well-being of rural communities throughout Africa, water laws have generally failed to explicitly recognize these rights and clarify their relationship to statutory provisions governing water allocation, entitlements and institutional mechanisms for community-based water management. As explained earlier, the majority of customary water rights enjoying legal recognition and protection find their basis in land and other resource-related or environmental

laws through a "land-water nexus." This section focuses on exceptions to this trend, highlighting ways in which national water laws contribute to the recognition and protection of customary water rights and the various legal mechanisms that are being applied to those ends.

Explicit Legal Recognition of Customary Water Tenure

Namibia's Water Resources Management Act stands out for its explicit recognition of all "customary rights and practices in relation to watercourses" under customary law or attached to a customary land right as defined under the country's Communal Land Reform Act (Republic of Namibia 2013, Art. 1). Beyond this broad recognition, the Act requires that existing water uses, customary rights and customary practices of any traditional community be taken into consideration by governments when issuing new abstraction and use licenses for surface water or groundwater (Republic of Namibia 2013, Arts. 45(2)(j), 56(5)(d)(i)). Although the extent of the "consideration" given to these rights is not defined in the Act, the general regulations of the Communal Land Reform Act specify that lawful residents of communal land (land held in trust for the benefit of traditional communities residing in those areas) may abstract water from any watercourse for household purposes and may abstract water for other purposes with the permission of the relevant Chief or Traditional Authority, thus legally recognizing the authority of the Chief over customary water tenure arrangements (Republic of Namibia 2002, Art. 17(1); Republic of Namibia 2003, Art. 33(3)-(4)).

Mali's Water Code is notable for its acknowledgment of customary water rights while also asserting that water is a public good. The Code enshrines the principle of public water ownership, stating, "water is a public property," while also recognizing that "water can be the object of private appropriation...in conditions fixed by the law and while respecting customary rights recognized to rural populations and, provided they are not contrary to public interest" (Government of Mali 2001, Arts. 2-3). The Code does not specify what these customs are, nor does it explicitly acknowledge customary water rights. In contrast, Mali's Pastoral Charter clearly acknowledges pastoralists' customary water rights, recognizing and legally protecting all rights to use natural resources (including water) for pastoral purposes, without requiring a permit or fee. The Charter also recognizes customary rights over *Bourgoutières* (floodplains), for pastoral communities who have demonstrated "the usual and prolonged exercise of pastoral activities on an area belonging to the State's domain or a community's territory," and grants these communities priority access and use of the water resources for pastoral activities in those areas (Government of Mali 2001, Art. 50).

The Malian example also highlights the role of legal prioritization of customary uses or users in protecting customary water tenure rights. Of the 39 community water

tenure regimes across Africa, Asia and Latin America identified and analyzed in RRI and ELI (2020), 64% (including those in Mali) prioritized water for domestic uses and 56% (including those in Mali) specifically prioritized the domestic use rights of indigenous and local communities over other rightsholders. Another example of such prioritization is the Turkana County Water Act in Kenya. The 2010 Kenyan Constitution decentralized water services to the county level and, despite confusion regarding the relative roles of counties and national government following the enactment of the 2016 Water Act, counties have passed water legislation to implement these functions. Turkana County, which is home to a large population of pastoralists, provides specific protections for pastoral livelihoods by prioritizing water for those livelihoods above all but domestic water uses in its Water Act (Republic of Kenya 2019, Art. 5). The Act further requires the relevant department to take special measures to provide water to pastoralists during times of drought or other pastoral-based disasters (Republic of Kenya 2019, Art. 6).

Mali's Pastoral Code also highlights the use of permitting exemptions to enable the free access and use of water rights for specific purposes or specific communities, which can greatly facilitate IPLCs' exercise of customary water use rights.⁷ While most national water laws exempt water used for domestic purposes or basic human needs from permitting requirements, water uses for livelihoods or small-scale productive uses frequently require permits (RRI and ELI 2020, p. 6). Such permitting requirements often impose restrictions based not only on the purpose of the permitted use, but also on the manner, timing and source of abstraction, and on the duration of the water use right. While some countries exempt specific livelihoods uses, such as Mali's Pastoral Code, others include specific livelihoods or small-scale productive uses in the definition of "domestic" uses that are exempted. For example, Zambia's Water Resources Management Act of 2011 exempts all domestic and non-commercial uses, defined to include: drinking, cooking, washing, bathing or sanitation; subsistence gardening and support of livestock not being commercial livestock husbandry; subsistence fishing; the making of bricks for the private use of the occupier; the dipping of (non-commercial) livestock and firefighting (Republic of Zambia 2011, Art. 2). Malawi's Water Resources Act of 2013 exempts domestic uses from licensing requirements, defining these uses to include human consumption; washing and cooking; watering not more than 30 livestock units; irrigating a subsistence garden and watering a subsistence fishpond (Republic of Malawi 2013, Art. 2).

As noted above, while permitting systems can provide important benefits for water agencies, including monitoring and regulating water abstraction levels and uses, facilitating more effective resource management and

financing water administration and infrastructure, they are rarely tailored to the priorities, needs and capacities of IPLCs and to the often oral nature of customary water tenure systems. These systems place what are often onerous financial and administrative burdens on communities. Moreover, research has demonstrated that the limited permitting capacity of many African governments restricts their ability to reach small-scale rural water users and leaves these communities outside the legal system and vulnerable to infringements on their water rights, including for small-scale productive or livelihoods purposes (Schreiner and van Koppen 2018).

Due Process and Customary Water Rights

Water laws can also be leveraged to protect customary water tenure rights by enshrining due process rights to prior notification, consultation and appeal when activities or proposed activities (including proposed policies, laws, plans, or projects) by third parties threaten those rights.

As noted, Namibia's Water Resources Management Act of 2013 recognizes customary water rights and practices in relation to watercourses under customary law, and requires the relevant ministry to "have regard to... the existing water use by any traditional community from the relevant water resource and the extent of customary rights and practices in relation to the water resource" among other considerations when determining whether to grant a license to abstract and use surface water or groundwater (Republic of Namibia 2013, Arts. 45(j), 56(5)(f)(i)). Similarly, Malawi's Water Resources Act of 2013 requires a consideration of the "existence of any traditional community and the extent of customary rights and practices in, or dependent upon, the water resource to which an application for a license relates" in determining whether to grant water abstraction and use licenses; such licenses must also be subject to "the protection of...uses by virtue of customary rights and practices" (Republic of Malawi 2013, Arts. 41(i), 43(b)). There are no specific requirements to determine whether and how customary rights should be protected in such decisions.

Customary law is constitutionally recognized in Zambia and includes customary water law that does not conflict with the constitution or other national legislation (Republic of Zambia 2016, Sec. 7). The Zambian Water Resources Act of 2011 is less clear about the role of traditional water practices in recognized customary areas, stating only that the Water Resources Management Authority must ensure that customary practices that are considered "beneficial to water resource management" are taken into account in the management of water resources (Republic of Zambia 2011, Sec. 5(2)). The Act also provides due process rights for customary water holders, requiring that the Water Resources Management Authority "shall not allocate any water in a customary

⁷ The authors use the term "permitting" to include all systems of licensing, permitting, or granting legal concessions for the use of water for the purposes of this report.

area without first consulting the traditional authority in that area and taking into consideration the local customs and practices which are beneficial to water resources management” (Republic of Zambia 2011, Sec. 6). It also stipulates that permits for water use in customary areas that are likely to substantially affect water supplies for domestic and non-commercial purposes must have both approval of the relevant traditional authority and put in place alternative means for securing water for the occupants’ domestic uses (Republic of Zambia 2011, Sec. 63). Similar to Namibia’s regulations, these provisions not only require that customary water practices be accounted for in allocation and permitting decisions, but also recognize the authority of the Chiefs over customary water rights within their territory.

Water Users’ Associations (WUAs)

In many countries, water legislation requires communities or groups of users to form institutions for water governance and management of shared resources, such as users’ associations, in order to vest their rights to water. These provisions can enable communities to assert their customary water rights once they have met the legal requirements to form and operationalize such institutions. Kenya’s Water Act, for example, enables the establishment of Water Resource Users’ Associations (WRUAs) as community-based water management institutions that, once legally established, can contract with the National Water Resources Authority to develop a management plan governing their designated water resource (Republic of Kenya 2016b, Art. 29).

While statutory institutions for community-based water management can enable the creation of more equitable, gender-inclusive and sustainable management practices, they are rarely structured to specifically support and protect customary water governance practices in meaningful ways. Indeed, they often reflect and reinforce local power structures, entrenching existing gender inequities. Analyses across African countries have demonstrated that users’ associations rarely meet the criteria for being truly user-driven and participatory, but remain top-down and externally influenced in their creation and implementation (Aarnoudse et al. 2018). In Kenya’s Water Act, for example, no mention is made of the relationship of WRUAs to the clear recognition of customary water rights pursuant to the Community Land Act. This gap leaves open the question of whether certain customary water rights on community lands can vest without the formation of a WRUA. In an equally restrictive fashion, Zambia’s Water Resources Management Act provides that only the government may constitute water users’ associations (WUAs) for any area of a catchment. Communities cannot themselves instigate the formation of a WUA, although they are entitled to nominate members to be part of a WUA in their catchment area who are then responsible for a number of local water resource governance

functions (Republic of Zambia 2011, Secs 24(2), 25). In both these situations, legislative failure to explicitly align the creation and operationalization of users’ associations with existing customary water systems leaves customary tenure rights vulnerable to being disregarded, manipulated (i.e., through elite capture) or fundamentally altered (e.g., through fixing of inherently adaptive rules, imposing limited duration of rights, etc.).

Women’s Customary Water Rights

Rural women have differentiated water needs, priorities, knowledge and responsibilities for both domestic and productive water uses. They play critical yet undervalued roles in water management at the household and community levels, and evidence shows that the effectiveness of water sector interventions in rural areas is strongly associated with women’s participation (Narayan 1995). Despite widespread international recognition of the critical role of women in water governance and decision-making, there is a significant gap between policy and practice. Gender discriminatory norms that persist in many African countries and extend to the internal governance processes of many IPLCs, are reinforced by the lack of laws specifically recognizing and protecting women’s water use and governance rights. Conversely, gender blind laws or laws that blatantly discriminate against women’s resource rights may also undercut existing gender-positive norms of IPLCs, some of whose resource governance practices are more gender-equitable than the structures pervading government systems (RRI and ELI 2020; RRI 2017; van Koppen 2017).

The ability of women within IPLCs to effectively exercise control over their water resources is, in large part, dependent on national laws that recognize and actively facilitate women’s leadership roles in water governance. RRI and ELI (2020) assessed national laws governing 39 community-based water tenure regimes across 15 countries for explicit recognition and protection of women’s water use and/or governance rights (at the community level), and found that only a third (13) of the regimes acknowledge these rights. Of these, only five were specific to water resources, indicating a strong reliance of the minimal protections that women have for their water rights on some form of land-water nexus.

For example, the recognition of customary water rights in Kenya is premised on the recognition of customary land tenure pursuant to the Community Lands Act, as described above. Registered communities under this Act must have a community assembly, led by an elected 7–15-member Community Land Management Committee, which manages community land (and appurtenant water resources) and prescribes rules and regulations (Republic of Kenya 2016a, Sec 15). This election process for the Committee must take account of the “two-thirds rule,” requiring no more than two-thirds of elected members to be of one gender. The Act also prohibits gender

discrimination in “all dealings with customary land” (Republic of Kenya 2016a, Sec 30).

Zambia’s Water Resource Act stands out for providing water-specific protections for women’s water rights, although these protections are in the form of “enforceable policies” that lack specific guidance on how to implement them. Zambia’s water law requires that management of water resources “shall be governed” by a number of principles, including that “there shall be equity between both genders in accessing water resources and, in particular, women shall be empowered and fully participate in issues and decisions relating to the sustainable development of water resources and, specifically, in the use of water” (Republic of Zambia 2011, Sec. 6(k)).

While these provisions technically require that women are represented in land (and water) decision-making and management leadership positions, the likelihood that they effectively guarantee non-discrimination and promote women’s active and meaningful participation in community water governance in practice is less certain. These findings are supported by findings in other global analyses demonstrating scant recognition for women’s rights to community lands and forests. Taken together, the significant reliance of women’s water tenure rights on a land-water nexus and the failure of community-based land tenure regimes to effectively recognize and protect women’s land and forest rights underscores the critical need for governments to prioritize gender-sensitive and coherent legislation that recognizes and protects women’s land, forest and water tenure rights across sectors.⁸

Unpacking the Implications of the Land-Water Nexus for Customary Water Tenure

The findings of this report indicate that the customary water tenure rights of IPLCs throughout sub-Saharan Africa are increasingly recognized in international and national laws. IPLCs’ customary water tenure could also be significantly strengthened through advancements in the interpretation and implementation of the human right to water to address the suite of rights necessary for communities to maintain sustainable livelihoods and food security.

Harmonizing Customary Water, Land and Forest Tenures

While the existence of land-water nexuses can provide more diverse pathways for the recognition and protection of IPLCs’ customary water tenure, and specifically for women within those communities, the failure of most countries to harmonize tenure recognition and protections across the land, forest and water sectors leads to inconsistencies or even contradictions across those laws that ultimately undermine the security of recognized customary water rights. This is evident in Kenya, where the land-water nexus is based on both the national constitution and land sector legislation, which make clear that customary water rights are held by communities on customary lands without requiring a license. Yet, the Kenyan Water Act (passed in the same year as the Community Lands Act (2016)) makes no reference to these existing water tenure rights, thus creating legislative

incongruity and potential confusion about the Water Act’s regulation of communities’ governance, abstraction and use of water (RRI and ELI 2020). Discussions with Kenyan officials charged with implementing the Water Act confirmed that there is continued institutional uncertainty on how to implement these provisions. In countries like Liberia, where the land-water nexus provides the only legal recognition of communities’ water tenure rights, the lack of specificity in land and forest laws leaves these rights open to interpretation. These instances underline the critical need to harmonize provisions recognizing and protecting customary land and natural resource tenures with water rights regulated under water sector legislation.

The prevalence of the land-water nexus as a common basis for the recognition and protection of IPLC women’s water use and governance rights underscores the imperative to strengthen women’s land and forest tenure rights. Where land, forest or other legislation only implicitly recognizes women’s water governance rights (for example, by requiring their representation in community natural resource governance institutions), raising awareness about existing legal rights is necessary to promote their effective implementation. More broadly, there is a pressing need for national water legislation to include explicit provisions to ensure non-discrimination in women’s access to and use of water resources and to promote their active engagement in community-based water governance.

⁸ For recommendations on specific measures that can be taken in the context of forest tenure with relevance to water tenure, see RRI (2017).

Opportunities for Cross-regional Learning

Countries in Africa might also draw on international experiences that highlight more comprehensive, water-specific approaches to recognizing and protecting IPLCs' customary water rights within their territories. In Peru, for example, water legislation gives the traditional water rights of IPLCs specific and heightened protections within legally recognized community territories. The law also recognizes community-based water rights in the areas where communities live, regardless of whether their land rights are legally recognized, thus incentivizing the titling of community territories while ensuring that even land-insecure communities have protected freshwater rights (República del Perú 2009, Arts. 44, 46, 64; República del Perú 2010, Art. 69). The Law on Hydric Resources mandates that the Peruvian State recognize and respect native and peasant communities' rights to use water resources within their lands and the watersheds where they are located for survival, cultural, transportation and economic purposes (República del Perú 2009, Art. 64). This right is considered superior to other rights, inalienable and must be respected in accordance with "ancestral practices and customs" (República del Perú 2009, Art. 64). Native and peasant communities have preferential access to water resources within their lands and are accorded the same rights as are granted to legally incorporated water user organizations under the law (República del Perú 2009, Arts. 11.6, 32, 64; República del Perú 2005, Art. 72).

Bolivia has gone even further in recognizing IPLC resource rights within customary territories by adopting both UNDRIP and the ILO 169 Convention as enforceable national law, thereby granting indigenous and tribal peoples the rights to own, use, develop and control the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired (República de Bolivia 1991). Additionally, the 2009 Bolivian Constitution requires the government to "recognize, respect and protect the uses and customs of the community, of its local authorities and the rural native indigenous organizations over the right, management and administration of sustainable water" (República de Bolivia 2009). Finally, Bolivia's Institutional Framework Regulation Act of 2004 recognizes the right of indigenous, native and peasant communities to conduct sustainable administration of water resources, respecting their authorities, recognizing their traditions, customs, easements and cultural knowledge about water use and providing a legal guarantee (or legal protections) over water sources used for agricultural and forestry purposes (República de Bolivia 2004, Art. 5(f)).

The examples from Peru and Bolivia demonstrate how broad, community-focused and water-specific recognition of IPLC customary water rights in IPLC-focused legislation and overarching water legislation can provide robust protection for IPLC customary water rights within their territories. Such legislation enables communities to

continue to adapt and integrate those practices into their broader territorial governance frameworks. Such integrated, tenure-based approaches could be tailored to the specific context and needs of various African IPLCs.

Strengthening IPLC Customary Tenure Protection in African Water Laws

Beyond recognizing the various ways in which the land-water nexus can strengthen the customary water tenure of IPLCs and harmonizing water sector laws to ensure that they are aligned with such protections, the examples provided here demonstrate how water legislation in many countries can also be strengthened in specific ways that support the recognition and protection of customary water tenure.

Tailoring Administrative Requirements

Water legislation almost universally regulates access to and use of water resources through some type of water use authorization or permitting system. While these requirements can enable more effective and sustainable use and management and manage conflicts between users, they are infrequently tailored to the needs and rights of IPLCs, imposing often onerous financial and other burdens in contexts where governments frequently lack the necessary capacity to support implementation of these requirements (Schreiner and van Koppen 2018). In particular, permits required for livelihoods-based water uses of IPLCs can hamper the realization of interrelated rights of water, food security, development and standard of living, particularly for the 70% of Africans dependent on rural agricultural livelihoods (Schreiner and van Koppen 2018). Despite this, RRI and ELI (2020) found that 44% of the 39 community water tenure regimes analyzed require communities to obtain a permit to use water for livelihood purposes. The limited capacities of many African governments to achieve legal mandates for permitting these uses means that many governments fail to notify IPLCs of the need for permits and to provide them with the information and practical means necessary to acquire a permit. As a result, many IPLCs continue to operate in contravention of statutory requirements that fail to properly support customary water tenure systems (Schreiner and van Koppen 2018). Customary rights to water use for livelihoods and small-scale productive uses must therefore be clearly recognized and supported across sectoral legislation, including exemptions from or tailoring of permitting requirements for IPLCs, where appropriate.

Similarly, where water laws call for institution of users' associations or other community-based water management or governance institutions, these provisions often fail to recognize and build on the existence of customary water tenure rights. The legitimacy and effectiveness of such institutions are often questioned, leading to implementation failures or even competition

between legislatively-established and customary institutions or traditional authorities (Aarnoudse et al. 2018). More flexible approaches that build on customary practices and institutions while aligning them with human and constitutional rights can not only facilitate more effective and sustainable local water management, but also protect against intra-community discrimination in those practices.⁹

Prioritization of Customary Uses/Users

Another legal tool that can strengthen customary water tenure rights is the prioritization within water legislation of customary users and/or specific uses that would benefit IPLCs.

For example, Mali's Pastoral Charter provides priority access to and use of *Bourgoutières* (floodplains) for pastoral communities who have demonstrated "the usual and prolonged exercise of pastoral activities on an area belonging to the State's domain or a community's territory." Similarly, the Turkana County Water Law in Kenya prioritizes water for pastoral livelihoods above all other uses except domestic (Republic of Kenya 2019, Art. 5). Liberia's Community Rights Law prioritizes community members' access to and use of resources (including water) within their community forests (Republic of Liberia 2009, Sec. 5.4). Other legislation prioritizes allocation to customary uses or users during emergencies or in times of drought/water shortage. The Turkana County Act, for example, requires the relevant department to take special measures to provide water to pastoralists during times of drought or other pastoral-based disasters (Republic of Kenya 2019, Art. 6).

While such provisions are included in some countries' water (or other) legislation, the lack of details surrounding these provisions can inhibit their effective implementation. For example, many laws prioritize water for agriculture without differentiating between small- and large-scale water users (Schreiner and van Koppen 2018). Specific prioritization of small-scale users, customary users and livelihoods-based uses, and the application of such prioritization to inform allocation, dispute resolution and management of water during times of shortage, drought or emergencies could be a powerful tool to protect customary water tenure rights.

Strong Due Process Rights and Requirements (National and Transboundary)

Rights to prior notification, effective and meaningful consultations and compensation when water tenure rights

are infringed or terminated are essential protections enabling IPLCs to learn about, influence and even prevent activities or developments that may impact their water resource tenure rights. These provisions can emanate from a diverse set of laws which can provide multiple avenues for asserting these procedural guarantees. At the same time, where due process provisions are not specific to water resources (as in many tenure systems based on land-water nexuses) or to IPLCs' water rights, there is a risk that they will not be implemented in those contexts. The lack of detailed guidance on how to carry out consultative processes can also inhibit meaningful engagement, particularly in the case of IPLCs that are often remote from seats of government, speak different languages, have less experience participating in government processes and may require specific mechanisms to ensure that all members of the community are equitably represented. Due process rights emanating from different sectoral laws may also require effective coordination across agencies.

To address power differences between IPLCs, historically marginalized community members and external actors, both international and, increasingly, national laws are requiring not only consultation with communities prior to decisions or activities that could negatively impact their land and water resources, but also consent. The right to free, prior and informed consent (FPIC) is clearly articulated as applying to Indigenous territorial (including water) rights under UNDRIP and the ILO Convention No. 169 on Indigenous and Tribal Rights, and additional treaties, such as the CBD.¹⁰ FPIC is rooted in the right to self-determination of all peoples under the International Covenant on Economic, Social and Cultural Rights. For Indigenous Peoples, FPIC is broadly accepted as a basic right. This approach is supported by several regional statements and bodies in Africa, including the African Commission on Human and Peoples' Rights (ACHPR), the Economic Community of West African States (ECOWAS), the Pan-African Parliament, and the African Mining Vision, which have all endorsed the use of FPIC with local communities facing impacts from mining, extractives and natural resource projects more generally (Greenspan 2014). Notably, the ACHPR, in its Resolution on a Human Rights-Based Approach to Natural Resource Governance, calls on States to ensure participation of communities in decision-making on natural resource governance, "including the free, prior and informed consent of communities" (ACHPR 2012). Further, a handful of countries now include the right to FPIC in national laws, including Liberia.¹¹ Despite this progress, most countries in Africa have not embedded FPIC in their water or environmental laws, so the water tenure rights of many

⁹ Considerable work on the concept of institutional bricolage provides examples of adapting existing institutional frameworks to new needs. See Cleaver (2012); Merrey and Cook (2012); Suhardiman and Scurrah (2021).

¹⁰ The Convention on Biological Diversity (CBD) stipulates that "access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices;" as well as FPIC in the context of genetic resources and the Conference of the Parties of the Convention have decided that FPIC should be implemented before certain activities related to indigenous knowledge and resettlement, among others (CBD 1992, Art. 8(j)).

¹¹ Liberia includes a requirement for FPIC in its 2002 Environmental Management and Protection Law, Sec. 86(1)(b); the Core Regulations to the National Forest Reform Law: Forestry Regulation No. 102-07; its 2009 Community Rights Law, Sec. 2.2 and its 2018 Land Rights Act, Art. 33. 11.

IPLCs in Africa continue to depend on the implementation and enforcement of less comprehensive consultative requirements.

It is also notable that due process rights for communities in transboundary contexts are often limited or completely missing (RRI and ELI 2020, p. 42). The analysis conducted by RRI and ELI (2020) found that 13 of the 15 countries assessed had no transboundary due process protections for communities living in internationally shared basins. The absence of transboundary due process protections is a particularly salient threat to communities' customary water rights. Without the ability to engage in processes involving prior notice, consultation and appeal, communities lack the legal means of asserting their bundle of community-based water tenure rights, regardless of how strongly protected these rights may be under national legislation.

An exception to the lack of transboundary protections found in the analysis conducted by RRI and ELI (2020) was Article 17(1) of the Convention on the Sustainable Management of Lake Tanganyika, which requires States parties to:

adopt and implement legal, administrative and other appropriate measures to ensure that the public, and in particular those individuals and communities living within the Lake Basin: (1) have the right to participate at the appropriate level, in decision-making processes that affect the Lake Basin or their livelihoods, including participation in the procedure for assessing the environmental impacts of projects or activities that are likely to result in adverse impacts; and (2) are given the opportunity to make oral or written representations before a final decision is taken.

The Agreement on the Establishment of the Zambezi Watercourse Commission also recognizes transboundary due process rights held by the public, although there is no specific mention of community rights or the status of all water users. Africa is home to 63 transboundary river basins that cover 64% of the continent's land area, including many areas customarily claimed by IPLCs.¹² The failure to include due process rights as enforceable requirements of international water agreements thus leaves communities vulnerable to the impacts of decisions made across national boundaries.

Another avenue for asserting due process rights emanating from proposed activities in transboundary basins is where such rights are included in the national impact assessment or other sectoral laws of the country undertaking the activity. In the judgment of the International Court of Justice (ICJ) pertaining to Pulp Mills

on the River Uruguay (*Argentina v. Uruguay*) (ICJ 2010), transboundary impact assessment processes are deemed a "requirement under general international law" as an obligation between States, but the specific due process rights of citizens or groups impacted in one State are determined by the impact assessment requirements of the impacting State's laws.

Women's Customary Water Rights

As illustrated above, pervasive commitments to eliminate discrimination against women at the international and national levels and to promote their equitable participation in water governance have not translated into gender-oriented reforms within most water legislation, which continues to be predominantly gender-blind. Despite evidence that women's secure tenure facilitates improved land and water outcomes and contributes to broader family food security, children's health and increased sustainable agricultural productivity, women's water tenure security continues to rely on insufficient legal protections (Scalise and Giovarelli 2020; Sanjak 2016; Landesa 2012). Without specific provisions recognizing and protecting women's water rights, water laws often reinforce the gender discriminatory norms that can be found in many African countries and frequently extend to the internal governance processes of many IPLCs. While land-water nexuses can create opportunities for women in these communities to assert their water tenure rights, a more integrated approach to customary land and water tenure rights is needed to effectively safeguard their water use and governance rights. The lack of specific protections for IPLC women's water governance rights can also exacerbate gender inequalities in community decision-making processes and due process procedures (RRI and ELI 2020, p. 52).

Strengthening women's water tenure is a clear pathway for achieving gender equality, as well as multiple sustainable development and climate goals by empowering women and girls to act as positive drivers for poverty alleviation, social development and economic growth. Gender-oriented gaps in the recognition of customary water rights are a problem not only for IPLC women, but for their entire communities who depend on women's unique water-oriented knowledge, leadership and water roles to traditionally govern freshwater resources. Notably, global research demonstrates that stronger legal protections for IPLC women's community-based resource rights are often associated with stronger protections for the resource rights of their entire communities, thus contradicting notions that governments or other stakeholders must choose between prioritizing the resources rights of women or those of IPLCs (RRI 2017). The research and legislation presented in this report underscore the critical importance of meaningfully distinguishing among heterogeneous constituents of

¹² GRID-Arendal. Africa major river basins. Available at <https://www.grida.no/resources/5176> (accessed on August 2, 2022).

a given community to ensure that marginalized and/or vulnerable members are equitably empowered by legal frameworks recognizing the community-based freshwater rights of IPLCs. Recognizing customary rights within legislative systems and aligning them

with human rights and non-discriminating standards can accelerate the protection of these vulnerable groups within communities, and can benefit the tenure security, resilience and prosperity of both IPLC women and communities as a whole.

Conclusion

There is a clear need to clarify and build consensus around the concept and application of community-based water tenure, particularly as it applies to customary rights regimes. This will require raising international awareness of the importance of water tenure in general, as well as of the specific ways in which community-based water tenure regimes support and enable IPLCs to achieve equitable and sustainable development and protect their full suite of human rights. Critically, it will also require countries to take specific steps towards a stronger recognition and protection of the customary water tenure rights of IPLCs, acknowledging that these rights must be contextualized within the broader set of territorial rights that enable these communities to protect their cultures and distinctive ways of life in ways that enhance their ability to effectively steward water resources, support sustainable livelihoods and food security, and enhance their resilience to climate change. To this end, governments and other law-making bodies should prioritize the following actions:

Promote legal empowerment of and support for IPLCs, including IPLC women. This will ensure that they are aware of their legally recognized water tenure rights and have the capacity to legally assert and enforce them. Such activities should also involve awareness raising across government ministries and civil society that interface with IPLCs and the establishment of pro bono legal services for IPLCs to assert their legally recognized rights.

Legally recognize the full bundle of community-based water tenure rights, including the use and governance rights of women within indigenous and local communities. Given the pervasiveness of the land-water nexus, such recognition will often require legal reforms across land, forest, environmental and water legislations.

Provide unambiguous recognition and protection to IPLC women's water rights. This will require a cross-sectoral understanding of the ways in which these rights can be strengthened in a harmonized manner

that involves indigenous and local community women's substantive participation and that directly responds to their needs and priorities.

Harmonize laws across land-water nexuses and promote cross-sectoral coordination for more integrated community-based tenure governance.

Lawmakers should evaluate laws across land, water, forest, gender, and other relevant sectors to identify and remedy overlaps and gaps, and to ensure that IPLCs' recognized water tenure rights are consistently recognized and protected across those sectoral laws and recognized in a manner that is gender-sensitive and supports communities' priorities, customary norms and traditional practices.

Strengthen national water legislation to explicitly recognize and protect community-based and customary water tenure rights, particularly the water uses and governance rights of women within those communities, in ways that acknowledge the linkages across their land and water tenures and provide them with broader economic and livelihood opportunities.

Prioritize livelihoods-based water rights of IPLCs by assessing where legal requirements can be tailored more closely to the needs and capacities of communities (e.g., by eliminating, reducing or streamlining permitting requirements), better supporting communities' access to and use of water for sustainable livelihoods and food security, and by legislatively prioritizing the livelihood use rights of communities and other vulnerable rightsholders.

Strengthen due process rights of communities living in transboundary basins. National governments, basin organizations and regional bodies tasked with the strategic development of international water laws should prioritize the inclusion of IPLC-specific rights to prior notification, consultation and appeal to ensure that IPLCs have the legal means to protect their territorial water resources from transboundary threats.

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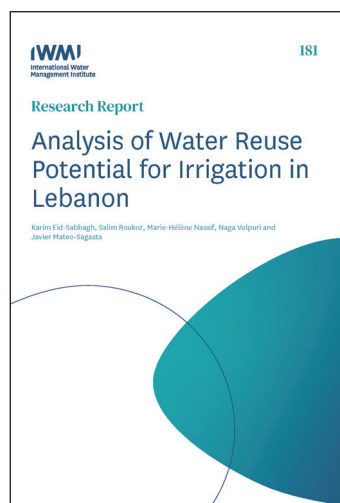
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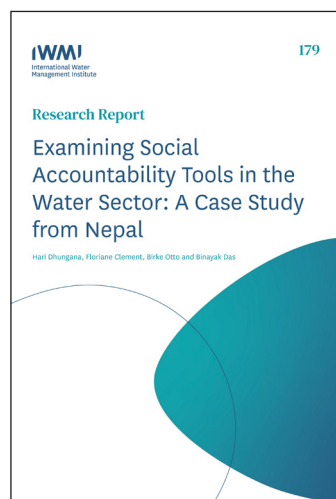
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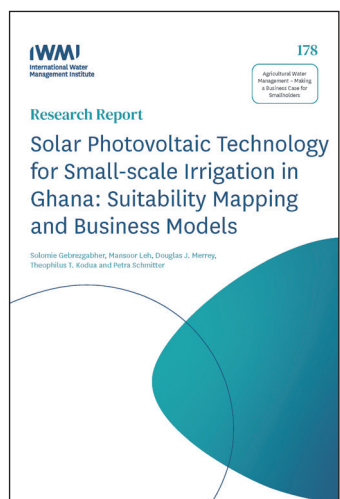
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