

Briefing

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Policy pointers

As land rights violations continue to occur, legal empowerment practitioners must rethink how to respond. A new flexible land rights redress approach is needed, grounded in the goals of communities.

It is imperative to invest in grassroots legal literacy, empowerment and dialogue skills prior to pursuing any redress strategies. This will enable communities to choose their redress pathway.

'Soft-legal' alternatives to litigation, such as dialogue, may be more appropriate at times. This could increase impact and reach, reduce risks and lower costs.

Practitioners should identify the specific political economy dynamics and investor value chains implicated in land rights cases. What are the key pressure points or 'legal chokeholds' and how can these be leveraged?

Redress for land and resource rights violations: a legal empowerment agenda

A recent wave of large-scale commercial investments in agriculture, extractive industries and other land-based sectors has compounded the 'global resource squeeze' in low- and middle-income countries.¹ But many communities affected by land rights violations struggle to assert their rights or obtain redress. Demand for legal support outstrips resources and what is available is not always appropriate. Pursuing litigation often presents significant obstacles and risks to the communities involved without offering any certain outcomes. To complement litigation efforts, this policy briefing suggests that an alternative and flexible mechanism to defending land rights is more effective — tailored to the local context and supporting communities to make informed decisions about what forms of redress to pursue. This approach should strengthen land governance processes in the longer term — but requires investment and commitment from donors, local partners and other legal empowerment practitioners.

Pathways to redress: what are the issues?

As commercial pressures on land and resources continue to rise, a new land rights response approach is urgently needed to assist communities facing pressures on their land.^{1,2} Such an approach should rapidly respond to community requests for assistance and promote socio-legal literacy and empowerment, while connecting communities to relevant legal expertise.

Despite sustained public attention to 'land grabbing' and efforts to increase accountability in investment processes, many affected people still struggle to assert their rights and obtain redress in the face of large-scale commercial concessions. Rural communities and civil society organisations use a variety of strategies aimed at terminating

deals, redressing illegality, obtaining land restitution or pursuing alternative development pathways.³ At other times, they demand inclusion in agricultural ventures as workers or outgrowers or advocate for better terms of consultation or compensation. Often, strategies target state institutions that allocate resource rights to commercial operators or focus on private-sector actors in the 'investment chain' behind the deals — operating companies, lenders, suppliers and buyers.^{4,5} Tactics also vary depending on social differentiation between and within rural communities.

There have been victories in domestic and regional courts, although governments can be slow to implement judgements. And there have been advances using grievance mechanisms and other strategies, such as engaging in dialogue

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with relevant government bodies.^{6,7,8} For many, however, redress remains beyond reach. Activists and community leaders struggle to navigate the procedures required. Geographic barriers, power imbalances and constrained information stand in the way — as does limited finance for legal support.⁹ Many face harassment by governments or private-sector actors and, worryingly, assassinations of land rights defenders are on the rise.¹⁰

Litigation to seek redress for land rights violations is often considered first. But political economy factors may compromise the independence of local courts, while litigation in countries with fairer courts has legal and practical complications. And public interest litigation requires substantial financial resources. Some large law firms will provide free advice, but they are often reluctant to engage in costly and protracted litigation. Many development agencies also hesitate to fund legal redress work and there is no consistent or affordable network of legal aid for land rights violations.

From research to action

Recent research by the International Institute for Environment and Development (IIED) and the Global Legal Action Network (GLAN) has explored how and why a flexible land rights redress approach should be developed. Research began by examining the investment chains that underpin land-based investments. Who are the key actors? What drives them and how do they relate to one another? What are the leverage points along the chain and which legal empowerment practitioners have had experience of using them? The findings informed an action-oriented agenda to create learning materials for civil society advocates¹¹ and promote lesson sharing among activists.^{6,12} GLAN and IIED also worked with other researchers and legal empowerment practitioners to explore options for developing redress support responses.¹³

Both GLAN and IIED then developed small-scale pilot projects exploring ways to support community redress goals. GLAN joined an international support network working with nine communities in the Democratic Republic of Congo (DRC) claiming traditional rights to land seized in the 1900s and later passed to new investors. IIED partnered with the Tanzania Natural Resource Forum (TNRF) and the International Land Coalition (ILC) to support four villages whose land had been allocated to a now-failed biofuel project in Kilwa District (Box 1).

Main lessons

Know the community and help them define clear ‘asks’. The pilot projects generated key insights into how to advance the redress agenda. Communities whose rights and aspirations are at stake must be in the driving seat — any approach must respond to their needs and goals. And defining clear ‘asks’ is essential.

Working with communities requires a substantial investment in grassroots legal awareness, support and deliberation so that they can make informed choices about the available redress options. Yet building consensus within communities can be a lengthy process, especially when investor and/or government consultations at the time of the land acquisition were poorly done or non-existent, or when social differentiation means community members have divergent interests. This approach may be challenging for some existing ‘clearinghouse’ models, where organisations channel requests for legal support to specialist service providers, such as corporate law firms, often based in faraway countries.

In Tanzania, it took nine months of facilitation by TNRF and IIED for village councils to request that the government reaffirm their right to manage the lands. In the DRC pilot, the nine communities agreed to file a complaint with the development finance institutions that invested in the project.¹⁴ But, as yet, they have not reached a clear consensus on the preferred outcomes.

It is also paramount that redress interventions integrate locally based practitioners working to strengthen accountability. In Tanzania, TNRF’s involvement was decisive in convincing local stakeholders to pursue dialogue.

Know the investment chain and its pressure points. Finding effective ways to tackle land rights redress must take into account both the political economy of a country and the social dimensions of its laws. Our socio-legal empowerment vision incorporates both, and provides practical tools for citizens wishing to use the law to advocate for their rights.

One of the first steps is knowing which laws are relevant. Communities seeking land rights redress may find the project involves a multi-territorial investment chain regulated by laws and redress options in many different jurisdictions. An overview of the entire chain is therefore essential to understand where parent companies, lenders and buyers are legally incorporated. This will help identify the most effective pressure points, or ‘legal chokeholds’,⁵ to target along the chain — and develop concurrent actions along it.

Legal empowerment approaches must also be tailored to the local context. As these evolve over time, so too should the strategies adopted. In the Tanzania pilot, for example, until a new investor applies for the necessary permits, key decisions are still in the hands of the Tanzanian government. With little investment chain to speak of, dialogue with government at national and decentralised levels is currently the best way forward.

Know what options are available. Redress strategies range from mobilising UN Special Rapporteurs to using grievance mechanisms established by lenders or certification bodies. Others may involve lobbying authorities in export markets to reconsider trading preferences or initiating litigation in other countries.

Deciding on court litigation should be considered carefully, however. It is not always helpful and can involve substantial costs, long-term commitment and uncertain outcomes. This increases risks for the community members involved. Soft-legal arrangements can provide an alternative. In the DRC pilot, rather than challenging the legality of the concessions in court, the communities decided to use the grievance mechanisms of the financial institutions that provided financing to the project.

In contrast to litigation or complaint proceedings, 'hand over and get out' strategies — such as submitting communications to a prosecutor's office, which then runs the litigation — are more time-bound and easier to manage. But they still often expose people to intimidation. In many cases, strategies centred on dialogue are preferable. And no matter which pathway communities choose, understanding relevant legal rights and requirements can help structure the dialogue and enable negotiating 'in the shadow of the law'.

International organisations are often removed from the site of land conflicts. They face few risks. But local actors may be exposed to intimidation and repression — including the suspension of NGO licences, legal action, physical violence, arrest or even murder. Political space can change — and shrink — over time, leaving activists exposed to future problems that may be hard to foresee. Any redress interventions should fully consider and address these risks.

Know the facts and gather evidence. Any legal or soft-legal proceeding requires considerable evidence. Community members are often best placed to collect this. But they may lack the skills to document the necessary information or it may be difficult and costly to collect, particularly if they face opposition after advocacy has started and if political space has become restricted.

Box 1. Experience with a biofuel project in Kilwa, Tanzania

In 2006–2007, a Dutch company launched a large jatropha plantation for biofuel in the Kilwa District of Tanzania on lands belonging to four villages. Civil society organisations, researchers and some government officials in Tanzania noted problems with the land acquisition process. The company had begun operations without a land lease and then went into liquidation. The Tanzania subsidiary was subsequently acquired by a new investor that has yet to obtain the necessary permits to begin work. Since that time, there has been an ongoing dispute between government officials and the four village councils/assemblies over who owns the land.

TNRF and IIED received a request from the four communities to provide assistance. Our interventions have integrated many of the elements discussed in this policy briefing — legal literacy, investment chain analysis and the facilitation of dialogue.

Source: Sulle and Nelson (2013)¹⁵

Action is needed to coordinate community data collection and produce rigorous analysis of the resulting evidence. For example, in Tanzania, TNRF and IIED facilitated meetings between government authorities and community members to triangulate facts about the legal status of the lands in question and the land allocation process. Key facts were written down and shared in a report for all stakeholders to validate. This created a common factual baseline about the project.

Know the political economy. Legal empowerment practitioners must understand the political economy around land conflicts. Which political and business actors are involved in the project or policy in question? Who is resisting change? And who are your allies?

In the Tanzania case, the government was open to participating in dialogue. But in the DRC, a grassroots representative supporting communities reported receiving 'a threatening phone call from a state intelligence officer and was accused by a local administrator of inciting the population to revolt'.¹⁴ Understandably, the communities preferred to involve the development financial institutions, which has generated international visibility and created a platform for engagement.

Towards a land rights redress mechanism

To move forward, the land rights movement must develop flexible and efficient arrangements to better channel support to land rights victims. We propose the creation of a new 'on demand' land rights redress response mechanism, which is set up to receive and facilitate the redress of land rights complaints from communities or their advocates. Such a mechanism would need to build on the following seven basic principles:

- Co-design legal empowerment interventions with local rightsholders. This requires significant investment in community organisation and consensus building but will improve land governance processes and strengthen land tenure in the long run.
- Connect community demand for legal empowerment support to appropriate organisations and/or financial resources. Identify networks of organisations that offer complementary skillsets — particularly locally based centres of legal support.
- Actions must be based on a solid understanding of context and political economy. What are the investment chains involved? Where are the 'legal chokeholds'?
- Consider the full spectrum of strategy options from dialogue to litigation. Experiences should inform which pathways could be scaled for future redress interventions.
- Use participatory monitoring to check that commitments to redress land rights violations have been implemented. It is also important to ensure that compensation or benefits are shared equally with marginalised groups within communities.
- Make use of existing land rights networks. This can help widely publicise the different types of legal empowerment support available and offer a greater choice in deciding which options to adopt.
- Emphasise the importance of learning and sharing. Building and training peer-to-peer networks of legal empowerment practitioners will help sustain redress work in the long run. Document experiences and disseminate findings using both written and audio-visual formats. This will inform future land policy design and implementation.

Reflections for legal empowerment practitioners

Assisting communities to seek redress for land rights violations can take years of engagement. Legal empowerment practitioners must consider whether they can dedicate the necessary long-term financial and human resources. Advocates should also consider how to handle a variety of different cases. Are new alliances needed with other organisations with complementary skillsets?

Practitioners must also recognise that they and community members may have divergent goals, which must be reconciled. For example, a community might choose a small financial settlement over establishing a legal precedent, which a practitioner might prefer. Intervening in land rights conflicts can also create unrealistic community expectations and practitioners must decide how best to respond.

Final thoughts

As we set out to build a flexible redress mechanism, many questions remain unresolved. How could such an initiative be financed sustainably? Should it be demand-driven or prioritise resource-pressure hotspots around the globe? How could its impact be scaled up without diluting efficiency? And one key question still remains. Victims of land rights violations face very real risks when seeking redress. What can be done to reduce these risks to local actors and the communities they support?

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Knowledge Products

The International Institute for Environment and Development (IIED) promotes sustainable development, linking local priorities to global challenges. We support some of the world's most vulnerable people to strengthen their voice in decision making.

TNRFF is a collective civil society-based initiative to improve natural resource management and conservation in Tanzania by addressing fundamental issues of governance.

GLAN is a team of lawyers who seek to break new ground on accountability for human rights abuses. Their work is guided by GLAN's Legal Action Committee, a diverse and select team of experts drawn from legal practice, academia and investigative journalism.

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Notes

¹ Cotula, L (2016) 'Land grabbing' and international investment law: toward a global reconfiguration of property? *Yearbook on International Investment Law & Policy 2014–2015*, 177–214. <http://pubs.iied.org/G04091> / ² We purposefully do not define or limit the scope of what constitutes a 'land rights violation' to allow any aggrieved community to seek support. / ³ Hall, R, Edelman, M, Borrás Jr, SM, Scoones, I, White, B and Wolford, W (2015) Resistance, acquiescence or incorporation? An introduction to land grabbing and political reactions 'from below'. *Journal of Peasant Studies* 42(3–4): 467–488. / ⁴ Cotula, L and Blackmore, E (2014) Understanding agricultural investment chains: lessons to improve governance. IIED, London and FAO, Rome. <http://pubs.iied.org/12574IIED> / ⁵ Ferrando, T (2017) Land rights at the time of global production: leveraging multi-spatiality and 'legal chokeholds'. *Business and Human Rights Journal* 2(2): 275–295. / ⁶ Lomax, T (2015) Asserting community land rights using RSPO complaint procedures in Indonesia and Liberia. IIED, London. <http://pubs.iied.org/12584IIED> / ⁷ Singh, S (13 February 2019) A long road to remedy. *Medium*. <https://medium.com/@AccountCounsel/a-long-road-to-remedy-4095f62d69ee> / ⁸ For a critique of the mechanisms cited in Lomax (2015) and Singh (2019), see: Desierto, D (22 February 2019) Lingerings asymmetries in SDGs and human rights: how accountable are international financial institutions in the international accountability network? *EJIL: Talk!* <http://bit.ly/2TvtlAT> / ⁹ Columbia Center on Sustainable Investment (2019) Innovative financing solutions for legal and technical support to communities. <http://bit.ly/2TFj9va> / ¹⁰ Global Witness (2018) At what cost? Irresponsible business and the murder of land and environmental defenders in 2017. <http://bit.ly/2SLxy4k> / ¹¹ Blackmore, E, Bugalski, N and Pred, D (2015) Following the money: an advocate's guide to securing accountability for agricultural investments. IIED and Inclusive Development International. <http://pubs.iied.org/12583IIED> / ¹² See, for example: Berger T (22 October 2015) Holding actors in agricultural investment chains to account. <http://bit.ly/2Hln89G> / ¹³ Berger, T, Cotula, L, Ferrando, T, Cuinn, G and Fairburn, H (2017) How to promote transnational accountability in relation to 'land grabbing'? Insights from a brainstorming event. GLAN, IIED and CED. <http://pubs.iied.org/G04187> / ¹⁴ GRAIN (7 November 2018) DRC communities file complaint with German development bank to resolve century-old land conflict with palm oil company. <http://bit.ly/2HiB301> / ¹⁵ Sulle, E and Nelson, F (2013) Biofuels Investment and Community Land Tenure in Tanzania: The Case of Bioshape, Kilwa District. Future Agricultures Consortium. www.africaportal.org/documents/11635/FAC_Working_Paper_073.pdf