

Communal Land Tenure 1994-2017:
Commissioned Report for High Level Panel on the
Assessment of Key Legislation and the Acceleration of Fundamental Change,
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COMMUNAL LAND TENURE 1994-2017

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1. Introduction

Twenty years have passed since the homelands were reintegrated into a unitary South Africa, yet the legacy of the colonial and apartheid past continues to haunt these areas.ⁱ Almost 17 million people or a third of the population of South Africa reside in the former homelands, which the post-apartheid government calls 'communal areas', according to forms of communal tenure.ⁱⁱ However, for most of the people living in these areas the full recognition of their land rights remains unrealised as the South African government has been unable to develop laws and policies that sufficiently capture the nuanced ways in which people experience and regulate relations of communal tenure in their everyday lives.

Tenure security refers to the legal and practical ability to defend one's ownership, occupation, use of and access to land from interference by others.ⁱⁱⁱ A critical component of tenure security is the legal right not to be unlawfully or arbitrarily evicted from one's home.^{iv} Without secure tenure, people are unable to exercise their rights over land and face the risk of losing these rights altogether.^v Some authors assert that tenure security has social dimensions (the relationships between people in relation to land as they exist in practice) and legal dimensions (the legal recognition granted to those relationships in terms of statutory or customary law). The legal insecurity of land tenure is a critical challenge facing those living in communal areas. In many areas individuals or families that have occupied and used the same piece of land undisturbed for generations may find that they have weak legal claims to the land they inhabit. This insecurity has exacerbated the vulnerability of these historically marginalised groups who bore the brunt of apartheid's racially discriminatory law and continues to place them at risk of exploitation and dispossession. Moreover, tenure insecurity has also compounded the socio-economic disadvantages experienced by people in communal areas.^{vi} Poverty in communal areas remains deep and widespread. Although absolute poverty has declined slightly throughout South Africa,^{vii} the former homelands have persistently been burdened with the highest levels of poverty and deprivation in the country.^{viii}

This is, in part, due to the historical impact of the colonial and apartheid governments. The apartheid government systematically established and maintained a complex legal framework that effectively prohibited black people from legally owning land. Indeed, the detailed system devised through the decades ensured that the degree of tenure security that black people were entitled to was more precarious than the tenure security to which white people were entitled. At its core, the approach to black people was that they would be perpetual tenants on the land they occupied and used. The system meant that the land rights available to black people were limited to customary land rights in the homelands or statutory land 'rights' which provided for a permit-based system.^{ix} These rights were 'generally subservient, permit-based or "held in trust"' by the government or the South African Development Trust.^x The rights held by black people were therefore of a 'second class status'.^{xi}

The strengthening and protection of the tenure security of the people living in communal areas is therefore a critical objective of the post-apartheid government. In order to address the negative consequences of colonialism and apartheid on the tenure security of those living in communal areas it was necessary not only to repeal the apartheid laws that had created this insecurity, but also to 'construct a new system ...

based on a clear understanding of how existing property relations have developed, and why those relations do not satisfy people's needs'.^{xii} To achieve this objective the Constitution recognised the right to security of land tenure in section 25(6). This provision states that '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or comparable redress'. Section 25(9) further requires that government pass legislation to give effect to this provision. The post-apartheid government is therefore constitutionally obliged to protect and strengthen the land rights of people in communal areas.

To rectify the historical imbalances in power brought about by colonialism and apartheid and to give effect to the Constitution, the post-apartheid government embarked on a multi-faceted land reform programme. The programme aims to address unequal land-holding patterns and protect, secure and strengthen the land rights of historically disadvantaged people. South Africa's land reform programme is set out in the *White Paper on South African Land Policy* (1997). One of the central components of South Africa's land reform policy is tenure reform, which is aimed at protecting, securing and strengthening the rights that people have over land, especially where those rights are weak as a result of racially discriminatory laws and practices.^{xiii}

However, despite the constitutional imperatives on the state, the tenure insecurity of those living in the former homelands persists. While the government has enacted laws to enhance the security of tenure of farm dwellers and labour tenants, there is currently no substantive legislation to secure and promote the land rights of the people living in the former homelands (other than the Interim Protection of Informal Land Rights Act (IPILRA)).^{xiv} This legal vacuum has contributed to the insecure nature of people's land rights in communal areas.^{xv} As this report will illustrate, this insecurity has been worsened by colonial and apartheid distortions of customary law and the unequal power relations that were supported by these distortions, many of which have been reproduced or entrenched in the democratic dispensation.

The report is set out as follows: Section Two looks at the historical and contemporary understandings of communal land tenure in order to frame the discussion going forward. Section Three briefly sets out the legal and policy framework related to communal tenure by analysing the most important legislation, policies and policy developments associated with communal land tenure. This section focuses specifically on governments' attempts at giving effect to section 25(6) of the Constitution. Section Four highlights a number of contentious debates in relation to land rights in communal areas. Section Five examines the extent to which people in communal areas whose rights were legally insecure as a result of colonialism and apartheid are more or less secure than prior to 1994. This section also looks at the linkages between property, inequality and tenure insecurity. Section Six concludes the paper and makes several recommendations for possible alternative approaches to securing the land rights of people in communal areas.

2. Communal Land Tenure

Before considering contemporary notions of communal tenure, it is useful to examine the pre-colonial conceptions of communal tenure and the ways in which these tenure systems were influenced by the colonial and apartheid states and notions of private property. Such an analysis will help identify the key characteristics of contemporary customary land practices.

Colonial administrators held significantly distorted perceptions of communal tenure systems. These distortions were, in part, intentional endeavours by colonial powers to retain and codify a version of 'communal' tenure that would best suit their interests.^{xvi} One of the main misconceptions espoused by colonial administrators was that common tenure described a wholly collective system of land ownership that was void of notions of individual interest.^{xvii} The characterisation of communal land tenure systems as 'collective' in nature belied the often complex and nuanced ways in which the interests over land fluctuated between more 'exclusive' rights and interests and more 'collective' rights and interests. Some authors have disputed this notion of communal tenure as follows:

'Many forms of property encountered in Africa are significantly less exclusive than what is normally associated with ownership. This is not to argue that African land tenure is essentially communal, but often several layers of interest in property are recognised as legitimate.'^{xviii}

Another pervasive tendency of colonial officials was to interpret communal tenure through the common law lens of their own countries.^{xix} In particular notions of ownership had a profound impact on how colonial officials perceived communal tenure.^{xx} The concept of ownership, as interpreted by these colonial administrators, was characterised by the absolute and exclusive concentration of interests in land in a particular individual.^{xxi} Colonial powers did not recognise this notion of ownership in communal tenure systems and, consequently, declared ownership alien to customary law systems.^{xxii} However, colonial powers also assumed that 'land must always have an owner even where rights have never been defined'.^{xxiii} It is through these legal arguments that the colonial powers legitimised their appropriation of the 'unowned' land of indigenous communities.^{xxiv}

As communal tenure would not lend itself to notions of exclusive ownership, colonial administrators attempted to describe communal tenure arrangements as a distorted form of 'trust' law in terms of which land would be held by a chief on behalf of a tribe.^{xxv} This legal manipulation of communal tenure aided the colonial state in its system of indirect rule. The colonial state enhanced and distorted the powers of traditional leaders by granting them far-reaching and extensive powers in relation to land. In this vein, colonial officials agreed to maintain their political support of traditional leaders as long as they cooperated with the Crown and furthered its colonial objectives. Many of the traditional leaders that refused to cooperate were replaced by more persuadable leaders. Characterising communal tenure as a form of trust was widely embraced by colonial officials and was later effectively employed by the apartheid state to further disenfranchise black people in the homelands by establishing the South African Development Trust (SADT) and similar trust arrangements. These distorted notions became central to understanding of communal tenure practices and continue to influence how many think about communal tenure today.

In recent years, these versions of communal tenure have been highly contested by scholars who argue that communal tenure systems historically encompassed a number of defining features and continue to be characterised by these features today.^{xxvi}

Okoth-Ogendo describes communal tenure practices in markedly different terms to those described above. He rejects the notion that communal tenure is necessarily 'communal' in nature- with 'collective' ownership vesting in a whole group and decisions made by the community as a whole. Instead he argues that social relations create 'reciprocal rights and obligations that bind together, and vest power in community members over land'.^{xxvii} In other words, to determine who is granted access to, or control over, land one has to

consider the rights and obligations that arise from the relationships between people.^{xxviii} This approach to communal land tenure is based on the fact that land relations in terms of customary law are relational - that is, they are about the relationships between people as they relate to a piece of land. As opposed to people's powers or entitlements over land.

Cousins articulates a similar notion of communal tenure when he states that communal tenure is inclusive and 'socially embedded'.^{xxix} According to him, 'land tenure was [and is] both "communal" and "individual" and can be seen as a 'system of complementary interests held simultaneously' by different people.^{xxx} In other words, communal tenure systems are based on an idea that individuals and families hold relative rights to the same residential and agricultural land. These relative rights may even overlap.^{xxxi} These individuals and families have to negotiate access to common resources such as land for grazing, forests or rivers. Communal tenure systems are therefore 'nested' or 'layered' with different people or groups holding varying degrees of rights and interests over land and resources.^{xxxii} For this reason, communal tenure practices require decision-making about land to take place at various levels and with various people or groups, including individuals, households, kinship networks and wider communities. To illustrate this point, Cousins describes the process through which a man might try to obtain land in terms of communal tenure systems. He writes that a man would first ask his father for permission to use family land, if that land is unavailable he would ask his neighbour, and if he were unable to acquire land in this way he would approach the headman to acquire land in the vicinity.^{xxxiii}

These layered systems of decision-making stand in stark contrast to the attempts of the colonial and apartheid states to centralise decision-making power over land in traditional leaders.^{xxxiv} In practice, decision-making in relation to land seems to be much more nuanced and inclusive. This is not to say that traditional leaders have no role to play in decisions about land. In some parts of South Africa, traditional leaders perform important functions in relation to land. However, their functions in relation to land vary by area and according to the practices of the particular group.^{xxxv} For example, in parts of KwaZulu-Natal traditional leaders fulfil an important role by confirming the transfer or allocation of land that has been decided upon by other levels of the group or community.^{xxxvi}

The colonial and apartheid states also ignored and undermined communal tenure practices that emphasised exclusive use by individuals or families. Kerr has argued that the rights and interests that individuals or families hold over residential and arable land are much more individualised than traditionally believed - with people exercising strong rights of occupation, use and access to the exclusion of others.^{xxxvii} This is different to the rights that individuals and families have to use common resources, which is much more communal in nature. Kerr's research was based on an analysis of existing communal tenure systems under apartheid by examining both the customary practices that existed in communities and the formal legal framework as developed by the apartheid government and interpreted by the courts. Kerr says evidence of these exclusive rights can be found in the right of a household to return to residential land after vacating the area (provided that the household informed the headman of their intention to return). The practice of bequeathing and inheriting residential and arable land (which the apartheid government tried to prevent through regulation) also provided evidence of the existence of exclusive rights. Kerr also refers to court cases where apartheid judges referred to these land rights as 'titles', according to Kerr this shows that, in certain circumstances, communal tenure systems create strong rights for individuals and families in relation to land. These rights are legally equivalent to ownership although different in nature.^{xxxviii}

Another feature of communal tenure systems is that they are flexible and are constantly adapting and changing based on circumstances. In this sense, communal tenure practices are similar to notions of living customary law. Some scholars have described living customary tenure systems as hybrid systems consisting of laws, rules and practices.^{xxxix}

3. The Legal and Policy Framework

This section briefly outlines the laws and policies that have a bearing on communal land tenure in South Africa. As this section will show, the South African government has attempted to develop a number of laws and policies to regulate the tenure security of people living in communal areas. However, the government has, as yet, been unable to enact and implement a law that adequately captures the nuanced ways in which people experience and regulate relations of communal tenure in their everyday lives. The laws, policies and policy developments related to communal land tenure are discussed below.

Constitution of the Republic of South Africa (1996)

South Africa adopted the final version of the Constitution in 1996 after a long process of constitutional negotiations with a range of political parties. The Constitution is the supreme law of South Africa,^{xl} which means that all laws and policies must be consistent with it.

Section 25(6) and (9) of the Constitution provide the impetus for according legal recognition to the informal and customary land rights of people living in the communal areas. Section 25(6) of the Constitution provides a right to tenure security:

'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or comparable redress.'

and section 25(9) of the Constitution requires that government pass legislation to give effect to that right:

'Parliament must enact the legislation referred to in subsection (6).'

These provisions seek to ensure that those whose tenure is legally insecure as a result of previously racially discriminatory laws or practices are granted constitutional protection and compel Parliament to protect, secure and strengthen the rights of those with insecure tenure through legislation. The state is therefore constitutionally obliged to protect and strengthen the tenure rights of people living in communal areas. If the state fails to comply with this imperative it is in direct conflict with the Constitution.

In addition, section 7 of the Constitution mandates the state to 'respect, protect, promote and fulfil' the rights contained in the Bill of Rights, which includes the right to tenure security for those whose tenure is insecure as a result of previous racially discriminatory laws or conduct. Although these obligations are interconnected, the duties these obligations place on the state differ in practice.^{xli} The obligation to 'respect' places a duty on the state not to impair a person's existing right to tenure security. In other words, the state must refrain from interfering directly or indirectly with the tenure security that people have realised for themselves. The state would fail to comply with this obligation if it were to pass legislation that weak-

ens the rights that people have in relation to land. The obligation to 'protect' requires the state to take measures to prevent others, including individuals, groups and corporations, from interfering with the right to tenure security of those living in communal areas. It was in compliance with this duty that the state enacted the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). However, this obligation does not end with the enactment of protective legislation, it also requires that the state ensure that such protective legislation is effectively implemented in practice. The obligation to 'promote' and to 'fulfil' the right to tenure security requires that the state 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realisation of the right' to tenure security.^{xliii}

Interim Protection of Informal Land Rights Act (IPILRA)

In 1996, Parliament passed the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) in order to give effect to its constitutional obligations in terms of section 25(6) and (9). IPILRA was intended to act as a 'holding measure' or 'safety-net' to ensure temporary legal protection for people without formally recognised land rights while government developed more comprehensive legislation to protect and regulate communal tenure.^{xliiii} However, due to the absence of a more comprehensive law governing communal tenure an annual extension of IPILRA has been necessary since 1996.^{xliiv}

Section 2(1) of IPILRA provides that an individual may not be deprived of his or her 'informal rights to land' unless he or she consents to such deprivation (or the government expropriates the land in question and pays adequate compensation). The Act defines informal rights of land broadly.^{xliv} Informal rights in land refer to:

- The right to use, occupy or access land that falls within one of the former homelands (or was previously South African Development Trust land). Customary rights to land would fall within the scope of this definition, including customary rights to residential or arable land, and the use of and access to common resources (for example grazing land).^{xlvi}
- The rights of beneficiaries of trust arrangements created in terms of a law passed by Parliament. This would, for example, include people living on land registered in the name of the Ingonyama Trust or the Lebowa Minerals Trust.^{xlvii}
- The rights of individuals who previously had valid Permission to Occupy (PTO) certificates.
- The rights of beneficial occupiers from anywhere in the country (who have occupied land continuously since the beginning of 1993).^{xlviii}

Where land is held on a communal basis, IPILRA provides that an individual may be deprived of their informal rights in land in terms of the 'custom and usage' of the community provided that certain requirements are met.^{xlix} First, the community that is disposing of the land in which an individual retains an informal right must pay the affected individual appropriate compensation.ⁱ Second, section 2(4) provides that a decision to dispose of rights in land may only be taken by the 'majority of holders of such right' that are present or represented at a meeting convened to discuss the deprivation.ⁱⁱ IPILRA further sets out various due process protections in relation to any meeting convened to consider the deprivation of informal rights in land, including that sufficient notice be given to the affected individuals and that such individuals be granted reasonable opportunities to participate in such meetings.ⁱⁱⁱ

The protections laid out in IPILRA require individuals or corporations that seek to acquire or use land in communal areas to negotiate with those individuals or families who hold informal rights over communal land directly. However, in practice IPILRA is 'routinely ignored and undermined'.^{liii} For example, Claassens refers to opaque mining deals in the North West, Limpopo and KwaZulu-Natal where individuals and families were deprived of their informal rights to land. The mining companies involved in these deals failed to obtain the consent of informal rights holders in accordance with the requirements of the Act.^{liv}

Despite the important protections provided in IPILRA, the Act has various limitations. The Act provides minimal protection against the deprivation of informal rights. It provides no legal certainty about the nature of the rights it seeks to protect and seems to have been used to secure rights in only 'a few cases'.^{lv} Perhaps most significantly, awareness of IPILRA is extremely low among government officials and those that it is intended to protect.

Scholars have suggested a variety of interventions that would strengthen IPILRA, including the need to make IPILRA permanent.^{lvi} The need to strengthen the legal and practical protection of informal rights by issuing Regulations in terms of IPILRA,^{lvii} raising awareness of IPILRA and strengthening the enforcement mechanisms provided for in the Act.^{lviii}

KwaZulu Ingonyama Trust Act (1994)

The Ingonyama Trust was established in 1994 to manage land owned by the former government of the KwaZulu homeland immediately prior to the Act's commencement.^{lix} The Trust is currently responsible for managing approximately 2.8 million hectares of land in KwaZulu-Natal. The Trust was established by the KwaZulu Ingonyama Trust Act KZ4 of 1994 (the Ingonyama Trust Act), which was enacted by the KwaZulu Legislative Assembly and came into effect on 24 April 1994 - days prior to South Africa's first democracy election. The Trust land vests in the Ingonyama, the Zulu monarch King Zwelithini, as trustee on behalf of members of communities defined in the Act. The Act was significantly amended in 1997 to create the Ingonyama Trust Board to administer the land in accordance with the Act.^{lx}

While the Trust has wide-ranging powers to manage the land registered in its name, there are various provisions in the Act that provide protection for the land rights of the beneficiaries of the Trust.^{lxi} Section 2(2) of the Act states that the land that previously formed part of the KwaZulu homeland would be held in trust by the Zulu king for the 'benefit, material welfare and social well-being of the members of the tribes and communities' living on the land. Section 2(5) of the Act provides that the Ingonyama 'shall not encumber, pledge, lease, alienate or otherwise dispose of any of the said land or any interest or real right in the land, unless he has obtained the prior written consent of the traditional authority or community authority concerned'. Section 2(8) of the Act further states that 'the Ingonyama shall not infringe upon any existing rights or interests'. The Act therefore grants legal protection for the occupation, use and access rights that people have over land that is administered by the Trust.

The Trust also acknowledges that people have strong rights over the land it administers. For instance, in the Trust's 2012/2013 Annual Report, the Trust's chairperson Jerome Ngwenya said that the people living on Trust land 'know that their rights are not adequately described by leasehold as theirs is more than this'.^{lxii} In the Trust's 2011/2012 Annual Report, Ngwenya goes even further, arguing that 'while in a legal sense [the people occupying the land administered by the Trust] are the beneficial occupiers, in reality [they] are the

true owners'.^{lxiii} The Trust has also recognised that the people living on the Trust land have more rights than simply the right to occupy or live on the land.^{lxiv} It therefore seems that the Trust does recognise that the people living on the land have strong rights to use the land in various ways, for example using communal land for grazing.

However, despite these statements and the protective provisions contained in the Ingonyama Trust Act, the Trust has been subject to a great deal of controversy for failing to protect the land rights of people living on the land it administers. The Trust has come under fire for its ongoing conclusion of long term surface lease agreements with mining companies, in terms of which it signs lease agreements with mining companies to enable mining activities on land which is often occupied and used by local communities.^{lxv} These agreements are sometimes concluded without proper community consultation and lead to the deprivation of use rights and access to land.^{lxvi} The Trust has maintained that it has acted within the law. According to section 2(5) of the Ingonyama Trust Act the Trust is obliged to obtain the written consent of traditional councils before authorising mining or development activities. The Trust has argued that the written consent of the traditional council is *all* that is required to conclude a lease over Trust land.^{lxvii} According to this interpretation, decision-making power is vested solely in traditional councils. However, this approach undermines the customary consultation requirements that often exist in communal tenure systems. For instance, a study of customary land law in Msinga conducted by the Institute for Poverty, Land and Agrarian Studies (PLAAS), found that when an outsider seeks access to land it is insufficient for them to merely receive the approval of a traditional leader.^{lxviii} The demarcation of the land must include the consultation of the potential neighbours of the outsider applying for land and the *ibandla* (a council of local men who are 'old enough to be wise'). Communal land tenure systems therefore clearly require broader consultation before land rights can be granted to outsiders. In spite of this, the Trust has continued to issue lease agreements to mining companies, threatening the land rights and livelihood strategies of rural communities.

The Parliamentary Portfolio Committee on Rural Development and Land Reform, which is mandated to hold the Trust to account, has also criticised the Trust for its lack of transparency. In particular, parliamentarians have raised serious concerns about the revenue received by the Trust and the apparent failure on the part of the Trust to reroute its revenue back to the beneficiaries of the Trust.^{lxix}

Land Rights Bill (1998)

The first attempt by the post-apartheid government to enact legislation regulating communal tenure was the Land Rights Bill of 1998. However, in June 1999 the incoming Minister of Land Affairs Thoko Didiza decided that the Bill was too complex and involved too much state support for rights-holders and local institutions, and decided to begin the drafting process anew.^{lxx}

The Bill sought to upgrade customary land rights by giving them statutory recognition without altering their essential character.^{lxxi} The Bill would have maintained the Minister of Land Affairs as the nominal owner of the land in communal areas, but would have given 'protected land rights' to individuals or groups. The control and management of these protected land rights would have been in the power of the rights holders.^{lxxii} The Bill provided for the possibility that protected rights could be registered, although the rights would exist even without being registered.^{lxxiii}

Communal Land Rights Act (2004)

In 2004, Parliament passed the controversial Communal Land Rights Act 11 of 2004 (CLRA). The passage of the Act through Parliament was highly contested, with a number of civil society groups raising questions about the Act's constitutionality in parliamentary portfolio committee hearings on the Act.^{lxxiv} The Act was, however, never implemented due to the fact that it was legally challenged by four rural communities on various grounds of constitutional invalidity. The primary concern of many rural communities was that the CLRA would have undermined their tenure security because it granted sweeping powers to traditional leaders and councils (who would act as 'land administration committees'), including control over occupation, use and management of communal land.^{lxxv} The Act was challenged in court on a number of bases. In October 2008, the North Gauteng High Court declared fifteen fundamental provisions of the CLRA invalid and unconstitutional, including provisions governing the transfer and registration of communal land, the determination of rights by the Minister and the establishment and composition of land administration committees.^{lxxvi} These provisions were therefore struck down on substantive grounds. However, when the decision was referred to the Constitutional Court for confirmation, the Court struck down the CLRA in its entirety on the basis that the incorrect public consultation process had been followed in its journey through Parliament.^{lxxvii} Although the Constitutional Court declined to deal with the substantive issues raised by the applicant communities, the critical outcry against the CLRA indicated that people in communal areas were opposed to traditional leaders having absolute power over the land that they occupied and used.^{lxxviii}

The CLRA provided for the 'transfer of title' over communal land to communities subject to various conditions.^{lxxix} In order to qualify for title to be transferred to a community, such community would be required to draw up and register a set of tenure rules in order to gain recognition as a juristic person capable of owning land. The community would need to survey and register the 'community' boundaries; and subject all the residents of the community to a rights enquiry to investigate the nature and extent of the existing rights and interests in land.^{lxxx}

The Act created 'land administration committees' to 'enforce rules and exert ownership powers on behalf of the "community"'.^{lxxxi} Section 21(1) of the Act provided that traditional councils that are recognised in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 'may' act as land administration committees. There was considerable uncertainty about whether communities could choose which entity acted as the land administration committee. The Department of Land Affairs claimed that communities were able to choose between their traditional council or some other entity, while the Department of Provincial and Local Government claimed that, where traditional councils exist, they would automatically become the land administration committees.^{lxxxii} This issue was compounded by the fact that the CLRA failed to provide a clear set of procedures for how a community should make such a choice.

The Act therefore granted considerable powers over land to traditional leaders and councils. Not only did this significantly undermine the tenure security of people living in communal areas, whose relationships with their traditional leaders ranged from 'good, to distant, to hostile', but the Act also 'strengthened traditional leaders and councils politically at a time when the relationship between them and elected local gov-

ernment officials remain[ed] unresolved and often tense'.^{lxxxiii} The Act would have granted traditional leaders and councils more extensive powers over land than provided for in customary law and would have undermined the local indigenous accountability structures, making it difficult for ordinary people to hold their traditional leaders to account.

Some scholars noted that the 'wide discretionary powers vested in the Minister as the sole determinant of how the conversion of land rights will be undertaken' based on the land rights inequity also raised constitutional concerns.^{lxxxiv}

Communal Land Tenure Policy (2014)

In September 2014, the Department of Rural Development and Land Reform published their Communal Land Tenure Policy (CLTP). The policy, like the CLRA, proposes to transfer the 'outer boundaries' of 'tribal' land in communal areas to 'traditional councils' (the new name for the tribal authorities created in terms of the Bantu Authorities Act 68 of 1951). In theory, the policy - referred to as the wagon wheel - also provides for Communal Property Associations (CPAs) or trusts to own land titles with input from members (as prescribed in the Communal Property Associations Act 28 of 1996 and trust law). However, the CLTP and the Department's Draft Policy Paper on CPAs indicate that no new CPAs will be established in areas where traditional councils exist. As traditional councils exist wall-to-wall in the former homelands, government's new policy will effectively put an end to the institution of CPAs.

The policy provides for communal land to be transferred into the name of traditional councils. This would mean that traditional councils would be granted full ownership of land. The individuals or families who occupy and use communal land would be granted 'institutional use rights'. Given that ownership would vest in traditional councils, the institutional use rights granted to individuals and families could be trumped by the rights held by traditional councils.

Moreover, the CLTP provides for traditional councils to manage and control the development of any communal property areas including areas designated of grazing, forests and rivers. Traditional councils would also be in charge of investment projects related to common resources.

The CLTP was criticised on a number of grounds by civil society. One of the primary concerns was that the schema established by the policy made no provision for individuals and households with institutional use rights to hold traditional councils accountable for their decisions.

Communal Land Bill (2016)

The new Draft Communal Land Bill of 2016 (CLB) is the most recent attempt by government to create legislation that regulates communal land. On 9 May 2017, the Minister of Rural Development and Land Reform Gugile Nkwinti informed the Parliamentary Portfolio Committee on Rural Development and Land Reform that the Bill would be introduced in Parliament in June 2017. Previous versions of the CLB have been made available to the public. These versions are analysed briefly below.

Although the Bill is founded on the regulatory scheme envisioned in the CLTP, it does differ from the policy in a number of respects. The main difference is found in clause 28(1), which states that a community can,

by a resolution supported by at least 60% of the households in the community, choose to have its communal land managed and controlled by one of three institutions: a traditional council; a CPA; or the Ingonyama Trust. In reality the CLB offers communities an artificial choice because the government's Draft Policy Paper on CPAs states that no new CPAs will be established in areas where traditional councils already exist – that is, most of the former homeland areas. If this policy is not amended, communities will not in reality have the right to choose a CPA as the institution they prefer to acquire, hold and manage their land. It is important to note that the power to register CPAs lies only with the Department of Rural Development and Land Reform (the Department) – which has strongly opposed and undermined CPAs in practice. This means that within the former homelands traditional councils and the Ingonyama Trust are likely to remain the only options available to communities. It should be noted that in clause 28 the Bill lays out a very vague mechanism for exercising such choice, stating only that the procedure will be prescribed by an organisation determined by the Minister. The CLB also provides that the Minister may not transfer communal land into the name of a community if there is a 'dispute' about the land (clause 10 of the CLB). It is not entirely clear what would qualify as a 'dispute' and this uncertainty could mean that transfers could be held up for many years. There are numerous examples of disputes over tribal boundaries and CPAs that have been used as the reason why land transfers to CPAs have been delayed for over 10 years in some cases.

The CLB provides that decision-making about land requires a resolution supported by 60% of the households in a specific 'community'. Clause 14(a) provides that the institution chosen by the community to manage their land cannot sell, lease or otherwise alienate their land unless this is supported by a resolution supported by 60% of households in the community. It is unclear how the Department decided that 60% of the households in the community would be sufficient to make decisions about the alienation of land. There are a number of problems with these requirements. First, these clauses do not differentiate between different types of right holders. For example, some people will have the right to access the land while others will have the right to occupy the land (the right to live on the land). The interests of these rights holder are clearly different and should be treated differently in the decision-making process. Second, these clauses fall short of the protection provided in the IPILRA. As noted above, section 2(1) of IPILRA says that no person may be deprived of their occupation, use or access rights to land without their consent (and appropriate compensation). Only in relation to communal resources (like grazing land and forests) does IPILRA provide that a majority of the rights holders can decide to agree to a deprivation. As the CLB does not make this distinction, it does not conform to IPILRA.

Clauses 6 and 7 of the CLB give the Minister of Rural Development and Land Reform the power to confirm, convert or cancel existing land rights after having a land enquiry conducted to determine the land rights on a particular piece of land. If the Minister decides to cancel people's land rights, the Minister can either find that the land rights should be incorporated into the land held by the institution the community chose to manage the land (clause 7(a)) or that the holder of the land right can be granted another type of right that the Minister can decide on (clause 7(b)). From the way in which these clauses are written and the CLTP, it is clear that these provisions will leave room for the Minister to grant people 'institutional use rights' to small areas like their household plots. These institutional use rights will however be subject to, and therefore trumped by, the outright ownership simultaneously vested in the community and traditional councils.

Traditional Leadership and Governance Framework Act (2003)

The Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) governs the structures of traditional governance. It is the overarching piece of legislation within whose framework laws like the CLRA and the Traditional Courts Bill (TCB) would operate. Although not directly related to communal land tenure, the Act has had a profound impact on the power relations in communal areas. It therefore remains important for the purposes of this report.

While an in-depth review of this law is not provided here, some of the key provisions and criticisms are highlighted below:

- Section 20 of the TLGFA vests power in traditional leaders or councils - or creates the impression that it vests power in traditional leaders or councils. It provides for powers to be given to traditional authorities through the passage of legislation. Section 20 of the Act lists a range of areas in which traditional leaders or councils can be given a role, the list includes: land administration, the registration of births and deaths and the administration of justice.
- Through the deeming provisions in section 28, the TLGFA entrenches the boundaries of the tribal authorities created in terms of the Bantu Authorities Act 68 of 1951. In this section, the Act deems the tribal authorities of old to be traditional councils of the democratic dispensation. Thus the boundaries of traditional councils mirror those of the tribal authorities created by the 1951 Act.
- Section 3 of the TLGFA lays out the composition requirements for traditional councils. The Act requires that 60% of the council's membership be appointed by the traditional leader and that the remaining 40% be elected by the community. Council membership is required to be one-third women. The timeframe for meeting these requirements was initially one year, but this was extended numbers times through amendments to the Act. Despite ten years having passed since the Act, many councils across the country have not had the requisite elections, calling into question their legitimacy. These composition requirements were intended to counter the fact that the tribal authority boundaries were adopted wholesale into the Framework Act. The failure of many councils to meet these composition requirements hangs like a cloud over these structures. The Department's policies and Bills that seek to vest ownership in these traditional councils do not take into account the questions surrounding the legitimacy of these institutions.
- The TLGFA tries to foreclose the ability of groups to constitute themselves independently of traditional authorities.
- Even if the TLGFA does not give substantial rights to traditional leaders or does not extend their rights, the government has effectively created the impression that it has enhanced their functions and powers - especially in relation to land. The failure on the part of government to unequivocally spell out that traditional leaders do not have these powers, as no law has been passed giving them such powers, has created a situation of legal uncertainty which allows traditional leaders to act with impunity.
- Others have argued that the state is pandering to the traditional leadership lobby because they believe that the traditional leadership lobby holds considerable power with the rural voters when in reality it is not clear that they do.^{lxxxv}
- It is dangerous to court this lobby when it has been clear that traditional leaders want to be acknowledged as the exclusive owners and controllers of land in the former homelands.^{lxxxvi}

The Traditional and Khoisan Leadership Bill B23 of 2015 (TKLB) introduced in September 2015 will repeal the Traditional Leadership and Governance Framework when it is passed. The TKLB presents a number of challenges for rural communities in relation to tenure security the main points of which are dealt with below:

- The Traditional and Khoisan Leadership Bill re-entrenches the same problematic and deeply contested boundaries carried into South Africa’s democracy by the TLGFA. In addition to not departing from these boundaries the Bill would also seek to address the questions around the legitimacy of traditional councils by essentially giving councils another opportunity to comply with the composition requirements. This means that should the Department continue to develop policies and Bills that envisage an ownership role for traditional councils, community land would still be held (or owned) by structures based on contested boundaries and imposed identities.
- Clause 24 of the TKLB provides traditional councils with the authority to: ‘enter into agreements or partnerships with municipalities, government departments and, most importantly, any other person, body or institution’ (emphasis added). For communities living on land on which companies or the state seek to mine this provision would have serious implications for people’s rights under IPILRA. This is because this clause in the TKLB does not require any consultation with community members before such agreement or partnership is entered into thus undermining a communities’ ability to consent to the deprivation, as is required by IPILRA. This means that traditional councils could enter into agreements about mining which would impact on people’s land rights without consultation, a clear abrogation of people’s rights under IPILRA.^{lxxxvii}
- The TKLB makes an important distinction between Khoi-San leadership structures and other ‘traditional’ leadership structures. For ‘traditional’ leadership structures in communal areas, the TKLB puts in place a hierarchy of traditional communities that occupy a geographical area over which traditional councils have jurisdiction and that are headed by traditional leaders. In other words, leaders and councils in the former Bantustans will have authority that is connected to a particular piece of land and whoever lives on it. On the other hand, Khoi-San leaders and councils do not have authority that is connected to a particular piece of land – instead, their jurisdiction extends only over people who are considered part of the Khoi-San community and voluntarily affiliate through a rigid procedure of affiliation. Some scholars have argued that a system based on voluntary affiliation could be put in place for traditional communities in communal areas. This would do away with the imposed apartheid and colonial tribal boundaries that currently form the basis for traditional governance under the TLGFA and TKLB. However, the TKLB has continued to differentiate between these groups and compels ‘traditional’ communities to ascribe to a system of traditional leadership, whether they wish to or not.

In 2017, the Department of Cooperative Governance and Traditional Affairs (COGTA) published the Traditional Leadership and Governance Framework Amendment Bill B8 of 2017 (TLGFA Amendment Bill) for public comment. The short Bill deals primarily with the status of traditional councils by extending the timelines related to their compliance with the composition requirements mentioned above. Given that the timelines for compliance have already passed, it is unclear how the TLGFA Amendment Bill can rectify the failure to comply through retrospectively extending the timelines for compliance. The TLGFA Amendment Bill therefore raises serious questions about the legal status of traditional councils and the transactions entered into by traditional councils that are not compliant.

The TLGFA, the TLGFA Amendment Bill and the TKLB do little to counter the practices of some traditional leaders on the ground. Neither pieces of legislation advocate for a form of customary law that places people at its centre. In relation to communal tenure and land rights the endorsement of a top-down, centralised customary law has the potential to strip communities, families and land buying groups of land rights they have held for generations.

Spatial Planning and Land Use Management Act (2013) and its Regulations

The Spatial Planning and Land Use Management Act (SPLUMA) was passed by Parliament in 2013 to create a new framework to govern planning permissions and approvals, set parameters for new planning developments and determine lawful land uses. The law was necessary due to the repeal of apartheid era planning laws that had left our planning laws fragmented, complicated and inconsistent. SPLUMA therefore sought to develop a 'uniform, effective and comprehensive system' of planning that 'promotes social and economic inclusion'. The Act also empowered the Department of Rural Development and Land Reform (DRDLR) to pass regulations. These Regulations were passed in 2015 and came into effect on 1 July 2015. Although many have noted SPLUMA's progressive elements, the coming into effect of the law has been subject to a lot of controversy.^{lxxxviii} This is largely as a result of the powers that SPLUMA and its Regulations grant to traditional councils. When the Minister of Rural Development and Land Reform briefed traditional leaders on land-related legislation in July 2015, the traditional leadership lobby resisted the Act and called for government to suspend its implementation on the basis that they were not consulted properly during the legislative process.

The powers of traditional councils in relation to planning and land use are governed by regulation 19(1) and (2) of the SPLUMA Regulations, which read:

'19 (1) A traditional council may conclude a service level agreement with the municipality in whose municipal area that traditional council is located, subject to the provisions of relevant national or provincial legislation, in terms of which the traditional council may perform such functions as agreed to in the service level agreement, provided that the traditional council may not make a land development or land use decision.

(2) If a traditional council does not conclude a service level agreement with the municipality ... that traditional council is responsible for providing proof of allocation of land in terms of the customary law applicable in the traditional area to the applicant of a land development and land use application in order for the applicant to submit it in accordance with the provisions of the Regulations.'

Regulation 19(2) empowers traditional councils to provide proof of a customary land allocation to anyone living in that traditional area that makes an application for development and land use. This would mean that traditional councils would be able to define the content of customary law (by determining what qualifies as 'customary' for purposes of proof). This creates the potential for local land allocation to be taken over by traditional councils. In addition, to assume that traditional councils are the only structures entitled to decide what the content of customary land rights are will undermine the customary laws and practices of many rural communities. For many of these communities land allocation and management takes place at multiple different levels, including family, household, clan, village and sub-community. Local customary law is therefore often characterised as a layered system rather than a system that centralises power in traditional councils. To focus land planning and land use in traditional councils therefore does not hold true to many rural people living in the former homelands.

There are also constitutional questions about whether traditional councils can legally be granted land planning and land use powers in terms of service level agreements with municipalities. This is because the Constitution does not provide for traditional leadership or traditional councils to exercise governmental func-

tions or powers. This was confirmed in the *Certification of the Constitution of the Republic of South Africa, 1996* case where the Constitutional Court made it clear that if traditional leaders were supposed to have governmental powers and functions the 1993 Interim Constitution would have specifically said so. Instead, it was only stated that the 'institution, status and role' of traditional leaders should be recognised.^{lxxxix} This is also how traditional leaders are recognised in section 211 of the Constitution at present, which makes their recognition subject to customary law. Against this background, the constitutionality of substituting elected local government officials with largely unelected (and sometimes apartheid-imposed) traditional councils to perform land use and management functions of a municipality is concerning.

The Regulations also fail to clarify how traditional councils will be held accountable for the land use management powers and functions that they could perform in respect of service level agreements, or for the responsibility of providing proof of customary land allocations (where there is no service level agreement). The land development and use application of any person living in a traditional area is still dependent on the actions of a traditional council. This is because the Regulations require that the council first provides proof of a land allocation, or assume that the traditional council will be in control of the initial allocation process, in order for a person to submit their application. Effective mechanisms for holding a traditional council accountable to ordinary people and local government are therefore missing in the Regulations.

Communal Property Associations Act (1996)

Beneficiaries of land reform, restitution or redistribution programmes who want to acquire, hold and manage land as a group are required to establish legal entities through which to do so. These new legal entities needed to accommodate a range of land holding practices that existed on the ground, many of which were group centred. In an attempt to develop a legal entity that is suited to this objective, lawmakers created Communal Property Associations (CPAs). The Communal Property Associations Act 28 of 1996 (CPA Act) provides for the establishment of CPAs. The Act provides details on the registration of CPAs, how CPAs are to be run and provides for government oversight to enforce the rights of ordinary members who hold rights as part of the group.

An important feature of CPAs is that these entities operate according to democratic principles, including fair and inclusive decision-making processes. It is for this reason that the Constitutional Court described the CPA Act as a 'visionary piece of legislation' that was aimed at 'transform[ing] customary law and bring[ing] it in line with the Constitution'.^{xc} In terms of the Act, the CPA members collectively develop a written constitution based on principles of democracy, inclusion, non-discrimination and equality.^{xcⁱ} Members are also required to democratically elect a committee every couple of years. Although the committee manages the daily affairs of the CPA, it remains accountable to the ordinary members. These democratic features make CPAs an important and necessary alternative that should be available to land reform beneficiaries.

Over the years a number of problems have arisen in relation to CPAs. CPAs have been crippled by financial and administrative mismanagement.^{xcⁱⁱ} As a result, CPAs have not always been able to comply with the requirements laid out in the CPA Act including holding annual general meetings and the election of new committees. This is, in part, due to the fact that CPAs remain severely under resourced when compared to other legal entities.^{xcⁱⁱⁱ} In some CPAs, the committees or powerful CPA members have abused their power and neglected the interest of ordinary CPA members. The rights of vulnerable groups are particularly at risk, including the rights of women. The establishment, functioning and legitimacy of CPAs has also been

resisted by traditional authorities, as traditional leaders and councils seem to believe that CPAs challenge their authority in communal areas.^{xciv} However, these problems are primarily attributed to the lack of institutional support and effective oversight from government.^{xcv} In fact, the Department of Rural Development and Land Reform has acknowledged that it has not provided enough support to CPAs promising that it would direct more resources, capacity and training towards CPAs and establish an institutional home for CPAs – the CPA office.^{xcvi}

These problems have led to government to becoming disillusioned with CPAs, leading to a withdrawal of support for these institutions as they currently exist. This change in approach is reflected in policy. The DRDLR's CLTP states that 'registration of new CPAs on traditional communal tenure areas will be carefully considered and principally discouraged'.^{xcvii} These policy moves against CPAs are deeply concerning in light of the Constitutional Court's recent unanimous judgment in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority*. In this judgment the Court expressly affirmed and protected the right of land restitution and redistribution beneficiaries to choose which legal entity they want to hold and manage land held on a communal basis. In fact, the Court recognised the importance of CPAs – in particular, their features as democratic land-holding institutions – as a critical option that should remain available to land restitution and redistribution beneficiaries.^{xcviii}

Earlier in 2016, the Communal Property Associations Amendment Bill B12 of 2017 (CPA Amendment Bill) was published for public comment. The CPA Amendment Bill has been criticised for failing to provide effective mechanisms to address the existing challenges facing CPAs. In particular, the Bill subverts the right of land restitution or redistribution beneficiaries to choose the legal entity to hold, manage, control and administer land held on a common basis.^{xcix} Some have also argued that, in an apparent attempt to protect CPA members against abuses of power by powerful members, the Bill goes too far. The Bill, for example, redefines CPAs as institutions that manage and administer land, rather than own land and grants the Minister of Rural Development and Land Reform extraordinary discretionary power in respect of decisions about the alienation and use of land that have far-reaching implications for the autonomy of CPA members to manage their land as they see fit.^c

4. Key Debates

This section briefly examines a number of major contemporary debates about communal land tenure.

Power Dynamics in Communal Areas

Given the particular history of the former homelands and the fundamentally political nature of their construction as a means of advancing racial segregation, those drafting legislation aimed at undoing this divisive political project need to ensure that the laws they craft do not inadvertently re-entrench the very thing that they seek to correct. Laws do not operate in a vacuum, rather their efficacy and traction in people's lives is influenced by the dynamics of power on the ground in local communities. The deeply political nature of the land question presents lawmakers with the difficult task of crafting legal solutions to deeply political challenges. For these legal interventions to be viewed as legitimate they should be crafted with a sensitivity for the realities that people face on the ground.

In what can be labelled a deep irony some of South Africa's richest mineral reserves lie beneath the soil of the former homelands. The very areas where people hold the most insecure land rights are the areas of incredible mineral wealth. The impact of this reality is that it heightens the stakes for both these insecure communities and the political, business and traditional elites who seek to benefit from this mineral wealth. Increasingly community members who speak up in order to protect their land rights do so at great risk to themselves. Even in instances where there are no minerals at stake community activists and ordinary rural citizens risk damage to their property when they challenge these elite groups. In spite of the protections and promises in the law and in the Constitution communities find themselves coming up against increasingly violent backlash for demanding compliance with the law.^{ci}

Emboldened by interpretations of the law that stretch and bolster their powers some of the traditional elites conduct themselves in ways that are not endorsed by the law. For example the TLGFA lists land administration as one of the areas in which traditional authorities can be given a role through legislation. At present there is no law giving them this role, since the striking down of the CLRA. This has not stopped some traditional leaders from conducting themselves as if they have such powers and more. Communities in the former homelands find that their traditional leaders are acting as if they are empowered to administer communal land. In other more extreme instances traditional leaders and traditional councils present themselves as the sole representatives of the community, empowered to take decisions about the communities land with little to no consultation. While this is not the experience of all communities it is increasingly the experience of communities on land rich in minerals. These leaders conduct themselves in this manner confident that the might of law is behind them. They rely on being able to assert that they are the custodians of customary law and thus determine its content. Leaving their communities struggling to hold them to account and wondering what has become of the intrinsically democratic principle of 'inkosi yinkosi ngabantu' (a chief is a chief through the people).^{cii}

Some traditional leaders defend their actions by claiming that they are empowered through customary law to wield these powers and make such decisions on behalf of their communities, but communities assert strongly that even under customary law traditional leaders never had such powers. Poor rural communities are trying to assert and hold onto their land rights in a context where traditional leaders are wielding powers of land allocation that far exceed the types of powers held under customary law and in some communities the exercise of these powers amounts to illegal land sales.^{ciii}

In other instances community members must oppose development on their land that has been sanctioned by traditional authorities or local government authorities. Opposition to such development taking place on land to which communities have customary rights, is in some cases classified as opposition to development in its entirety. Characterisations of this kind set up binaries: one is either in favour of development or against it without engaging with what exactly is meant by development. It forces community members to go up against traditional or government authorities as an 'enemy' of development projects and the sole reason why communities will lose out on the benefits that these projects promise. This places strain on relationships and increases the risk for those seeking to protect their land rights. Decisions regarding development and mining deals are made with no consultation and little regard for communities rights under IPILRA. Communities wake up to find themselves living amongst mining activities or inside a wildlife reserve with no strong mechanism to protect their land rights. This non-consultative approach to community development re-enforces the idea that all development is good for communities and they should accept it without question.^{civ}

In some communities the power dynamics are influenced by traditional leaders requiring communities to pay tribal levies. These are amounts charged by traditional authorities for a variety of 'expenses' to which they expect community members to contribute. Some traditional leaders rely on a particular reading of laws like the TLGFA and provincial framework laws (specifically the Limpopo Framework Act) to require that communities pay these levy amounts. The consequences of not paying are that community members will be denied access to basic entitlements including proof of address (necessary for obtaining an identity document or opening a bank account) or will be prevented from burying family members. This distinction in treatment between South Africans who live in the former homelands in comparison with those who live in the urban areas, ultimately undermines the idea of one equal citizenship.

These dynamics enhance the vulnerable state of communities, armed only with the little known and scarcely used IPILRA they must assert and defend their land rights against elites who enjoy greater access to resources and, in some cases, the backing of the government. Any law aimed at strengthening the security of tenure of those living in communal areas will need to navigate and mitigate these power dynamics. Current legislative proposals would have the effect of exacerbating these dynamics. For example, the proposed Traditional and Khoisan Leadership Bill would empower traditional and other elites to enter into agreements on behalf of communities. The Bill does not expressly require consultation with the community, it only requires that the agreement be 'beneficial' for the community. Given that traditional elites are already conducting themselves in this manner and making unilateral determinations about what is beneficial for the community this Bill is unlikely to do anything to curb the conduct of some traditional authorities.^{cv} While the dynamics of power do differ across communities the experiences of those communities where the dynamics are skewed are worth noting. As they provide lawmakers with the type of potential worst case scenario they are trying to rectify.

Land Grabs in Communal Areas

The lack of secure tenure in communal areas renders many people living in these areas vulnerable to potential exploitation in the form of land grabs. Land grabs (or land rushes) refer to the large-scale acquisition of land in rural areas by transnational and national companies, governments and land speculators.^{cvi} These acquisitions can take the form of sales or long-term leases.^{cvi} Although land grabs are aimed at acquiring unused or vacant land, land that is occupied and used by rural or indigenous communities is often acquired in this way as well. Over the last ten years land grabs in the former homelands have increased dramatically with the discovery of rich mineral deposits in these areas, including platinum, chrome and titanium in the North West and Limpopo and coal in Mpumalanga and KwaZulu-Natal.^{cvi}

Land grabs have a potentially devastating impact on the tenure security and livelihood strategies of hundreds of thousands of land-dependent households living in communal areas. People living on communal land are at risk of being dispossessed of their rights to occupy, use and access land. Processes to negotiate access to land with community groups are also unsatisfactory as a result of heavily unequal power relations; with large transnational corporations and traditional elites, on the one hand, squaring off against small rural communities living in far-flung areas, on the other. This inequality is exacerbated by the precariousness of people living in communal areas, due to high levels of poverty and lack of tenure security.^{cix} Some scholars have argued that the vulnerability of people living in the former homelands severely constrains their ability to freely make choices about land and hampers their ability to resist attempts on the part of companies or land speculators to acquire their land.^{cx} For instance, people may feel pressured into

making decisions that would provide them with short term security at the expense of their long term needs by accepting inadequate compensation for their land rights or being persuaded by the promise of job opportunities.^{cxii} As a result, some authors have argued that those deprived of their rights to land are often deprived involuntarily or are, at least, 'ill-informed or even misled about the benefits of surrendering' their rights.^{cxiii} Moreover, the effects of these deprivations are often permanent and irrevocable given the legally binding manner in which these deals are concluded.^{cxiii}

The nature of the compensation paid to individuals and families for their rights to land during negotiations is often inadequate. In many instances those affected are compensated only for the market value of the dwellings they constructed on communal land, the losses they are likely to experience as a result of the loss of their crops for one year and marginal reparatory compensation when ancestral graves need to be relocated. These amounts are, at most, sufficient to compensate individuals or households for a couple of years. In addition to this type of compensation, corporations claim to assist rural communities by providing infrastructure including, for example, educational activities and clinics. However, when one considers the far-reaching impact that the loss of land rights has on the ongoing security of these families and their dependence on inter-generational subsistence livelihood strategies, determining compensation in this manner is clearly unjust. Any additional infrastructure promised by corporations has minor impacts on the lives of people living in communal areas, if this infrastructure ever materialises at all. Many are therefore worse off after they surrender their land rights.

The actions of government institutions are fundamental to these processes. Some scholars have argued that governments play a critical role in enabling or containing land grabs.^{cxiv} The central premise of this argument is that governments have the ability to create and amend property law - the main tool used to negotiate and regulate land acquisitions. In this way, 'land rushes past and present have relied upon legal manipulations which deny that local indigenous ('customary') tenures deliver property rights, thereby legalizing the theft of the lands of the poor or subject peoples'.^{cxv} History is replete with instances of property law being manipulated to serve the interests of colonial or corporate powers. For instance, Wily writes of the English Parliament's adoption of the General Enclosure Act of 1845, which legally dispossessed and privatised land held as commonage (including small holdings) throughout England to provide 'vacant' land (and labour) to private capital during the industrialisation era.^{cxvi} Those permitted to occupy commonage areas were evicted and displaced. The jobs and opportunities created in terms of these processes fell short of those promised by English politicians, forcing the English government to establish poor houses that, in the 19th century, became the foundation of the national welfare system.^{cxvii} Governments therefore cannot wipe their hands of responsibility for land grabs.

The role of governments in enabling or constraining land grabs is also evident on a more practical level: sales or long term leases over communal land are often issued by government entities.^{cxviii} The reason for this is, at least in many African countries, that the majority of the land that was held by communities or families in terms of communal land tenure is legally registered in the name of the government.^{cxix} An example of these types of deals in the South African context is the Ingonyama Trust, which the Supreme Court of Appeal has held to be an organ of state,^{cxx} issuing long-term surface lease agreements with mining companies over land that is occupied by people in terms of communal tenure.

In order to promote foreign direct investment and stimulate economic growth governments often 'actively welcome commercial land investors and structure legislation accordingly'.^{cxxi} However, assumptions about the benefits of these land deals should be carefully scrutinised.^{cxxii} As Wily writes:

'[T]he benefits to host governments are opaque. Aside from likely personal rewards to facilitators and signatories, and the strategic conviction that such investments offer the new path to growth ... the answer must lie in anticipated technology transfer, prompts to infrastructure development, the pickings and leavings of products not fit for export, and most of all, the promise of jobs. As suggested above, these are not yet forthcoming.'^{cxxiii}

Moreover, these land deals are often justified on the basis that they will result in economic benefits for South Africa at a macro level, while the interests of those affected are not taken into account. The rights and interests of the poorest South Africans living on communal land are thus sacrificed for abstract notions of economic growth. Land grabs also have the potential of contributing to a number of intractable social ills, including food insecurity and poverty. This is because land and natural resources are central to the livelihood strategies of three quarters of rural households who still live below the poverty line worldwide.^{cxxiv}

The World Bank has also recently released a report on land grabs which clearly shows that land grabs are mainly occurring in countries where land buyers can exploit governments that are plagued by corruption. These governments are unable to adequately regulate land transactions, and are unable to prevent buyers from targeting the poorest rural communities (especially those living according to communal land tenure systems).^{cxxv} The World Bank has therefore recognised that land grabs pose serious threats to poor rural communities. For this reason, the report concludes with a set of guiding 'principles for responsible agricultural investment' which, if applied, will assist in curbing the exploitative effects of land grabs. These principles include: that new investments recognise and respect the existing rights to land and natural resources held by local community groups, and that new investments should ensure that their ventures generate desired social and distributional impacts.^{cxxvi} Although these principles are structured as voluntary guidelines, they could go a long way to ensuring that people living on communal land are protected against exploitation and provide a useful basis for legislative and policy development.

The concern expressed by academics and experts clearly highlights the potential threat posed by ongoing land grabs in communal areas and how these land grabs negatively impact on the rights of people living in terms of communal land tenure systems. Law and policy makers need to recognise that they play a critical role in either enabling or containing exploitative land grabbing processes. Laws and policies regulating communal land therefore need to pay careful attention to the need for future land acquisitions to be conducted in a manner that is fair and recognises the underlying rights to land that many on communal land hold.

Free, Prior and Informed Consent

The principle of free, prior and informed consent (FPIC) is an emerging international law standard that aims to facilitate, promote and protect the rights of communities to land and natural resources in the context of development. In essence, the four pillars of this standard are:

- *Free* - the local community should not be intimidated, coerced or manipulated into consenting to development;
- *Prior* - the local community's consent should be sought in advance of the commencement of the proposed development so as to enable the community to analyse, evaluate and make an informed decision during public participation or negotiation processes;
- *Informed* - the local community should be given full, accurate and up-to-date information about the scope and impact of the development activities in a manner that is accessible and understandable; and
- *Consent* - the local community should have a choice to give or withhold their consent for the proposed development, which includes the ability to practically insist that certain conditions be met before consent is granted.^{cxxvii}

The procedural rights enshrined in the FPIC standard are therefore concerned with ensuring that local communities are properly informed, able to actively participate in decision-making processes related to their land and natural resources, and able to freely pursue their economic, social and cultural development.^{cxxviii} FPIC thus provides clear support for the notion that any negotiations with rural communities about the use or acquisition of communal land should be characterised by participatory dialogue and should be based on the principle of genuine consultation and negotiation.

FPIC is strongly backed in a variety of international and regional legal instruments, including the ILO Convention 169 Concerning Indigenous and Tribal People in Independent Countries (1998), the UN Declaration on the Rights of Indigenous and Tribal People (2007) and the African Charter on Human and People's Rights (1981).^{cxxix} While the South African government has not ratified all of these international law instruments, it is bound by the African Charter due to its status as a member state of the African Union.^{cxxx} In addition, these international and regional instruments have considerable persuasive value and should be taken into account when drafting legislation or policies dealing with the land rights of people living in communal areas.

Many of the procedural protections inherent in the FPIC standard are echoed in IPILRA, including that an individual may not be deprived of his or her informal rights to land without consenting to such deprivation and the procedural protections provided in the context of the deprivation of informal rights held on a communal basis. Nonetheless, the FPIC standard can play an important role in further promoting and strengthening the rights of communities living in communal areas.

Formalisation of Land Rights

One of the debates in relation to land and property rights that has gained considerable currency is the theory that the formalisation of property rights - particularly, the notion that informal property rights should be formalised into exclusive ownership that is recorded and confirmed by a title deed - is central to economic development and poverty reduction. Although this theory is not wholly novel, it gained popularity in the works of Hernando De Soto.^{cxxxi} At its core, this theory posits that formally securing 'informal' property rights in a manner that is "legible" to outsiders' enables the right holder to invest their property to reap economic benefits.^{cxxxii} The greater the powers and entitlements of the right holder to the property, the less constrained they are in using their land to better their lives. Central to this theory is the notion that property rights that are readily transferable as a commodity improve the right holder's access to credit, thereby

allowing the right holder to offer their land to a lender as security for a loan.^{cxxxiii} Formalising property therefore transforms ‘informal’ land into capital ‘with a life of its own’ through mortgaging of land to secure credit. Other classical economists, including Smith and Mill, also believed that property rights underlay economic growth.^{cxxxiv} For this reason notions of private ownership and its perceived ability to create economic growth have played an important role in how land tenure systems are structured in Western market economies.

However, a number of respected economists and academics have begun to challenge many of the assumptions underlying De Soto’s theory. The primary argument levelled against De Soto’s theories relate to his narrow conceptions of ‘informality’, which he essentially takes to mean any claims or arrangements that exist outside the constraints of formal state law.^{cxxxv} This approach has been criticised on the basis that it fails to recognise that

‘a range of sub-state actors from tribal kingdoms down to villages and squatter communities manage their land through their own normative systems of varying complexity and rigor. The fact that those systems are not validated by national law does not deprive them of objective reality.’^{cxxxvi}

De Soto’s theories are particularly ill-suited to communal land tenure systems as he considers these systems ‘informal’ when they are ‘actually an alternative formality, a sub-national alternative to the formality of the national state’.^{cxxxvii} In fact, some authors have noted that land tenure reform programmes funded by development agencies that sought to replace customary law systems wholesale with formalised property rights have ‘had very mixed results, including weaker than anticipated positive impacts and unanticipated negative impacts’.^{cxxxviii} Communal tenure systems have proved to be remarkably resilient, with these systems being reasserted by communities when formal systems do not adequately address their needs or hybrid systems developing, which incorporate elements of both the formal tenure system and the customary tenure systems.^{cxxxix}

Another key criticism levelled against De Soto’s theories is that there is a large body of literature that seems to discredit De Soto’s principal argument that formal title enables access to credit and therefore increases economic productivity.^{cxl} For example, *The Economist* (August 2006) acknowledged, after reviewing recent studies in Argentina and Peru, that commercial lending biases toward the poor persist in spite of poor people holding formal title.^{cxli} In other words, ‘poor people with title are no more likely to obtain loans from commercial banks than those without’.^{cxlii}

Finally, a number of authors have warned that De Soto’s theories should be approached with caution. These authors assert that De Soto fails to acknowledge that his emphasis on the alienability of property rights also carries potentially negative distributional consequences, which may leave poor households worse off than before.^{cxliii} This is due to the fact that the formalisation of property rights not only bring opportunities but also bring risks by exposing the poor to market forces from which their ‘informality’ has, to some extent, shielded them.^{cxliiv} Formal title may have potentially detrimental impact on poorer rights holders who are ‘more prone to distress sales’, forcing them into deeper poverty and widening inequality.^{cxliv} As Nyamu Musembi asserts, ‘[a]ny redefinition of property rights produces winners and losers’^{cxlvi} - it seems particularly ironic that the losers in De Soto’s theory may be the poor in whose name formalisation of property rights take place.

De Soto's theories may be insufficient to address the unique precariousness of people living in communal areas in South Africa. Academics and specialists specifically caution that traditional notions of the formalisation of land rights can present a misfit with customary land rights. The prioritisation of one owner for each piece of land that is at the heart of the formalisation debate is unsuited to accommodating the layered and nested nature of customary land rights. Moreover, as outlined above, an uncritical reliance on De Soto's theories may have negative unintended consequences. Law and policy makers should therefore carefully scrutinise the inherent assumptions underlying developmental laws and policies.

Women's Land Rights in Communal Areas

The land rights and tenure security of women in the former homelands has been shaped by the manner in which both colonialism and apartheid distorted customary systems. Both the colonial and apartheid states relied on male elders in defining the content of customary law. This resulted in a customary law system that foregrounded the patriarchal elements of custom and customary law. This further contributed to the legitimisation of a narrative that erased women's land rights and made women's access to land dependent on their husbands, fathers or male relatives. It was the dominance of this narrative that obscured the fact that historically women had recognised rights to land as wives, sisters and daughters. Laws like the Natal Code of Zulu Law Proc R151 of 1987 gave women the status of minors and placed them under the authority of their fathers and, upon marriage, of their husbands. Women's ability to assert their land rights were dependent upon the grace of the male household head or the traditional leader. Not only did this hamper women's access to land and the security of their right to land, but it also meant that predominantly women could only access land as wives. As the dominant expectation was that women would marry and move away from their natal home, unmarried sisters and daughters would be placed at a disadvantage as their attempts to assert a claim for land at the family home under the household head would be rejected on the basis that their 'place' should be in the home of their husband.^{cxlvii}

Of course there were many areas where women and their communities operated outside of these constructed narratives regarding the role of women and their land rights. The dominant characterisation of women as wives was presented as part of custom since time immemorial, thus limiting conceptions of women outside of this role. Historically there have always been independent, unmarried women with access to land, but these models of women did not suit colonial and apartheid purposes. There were places and spaces in which this convention was not the norm and women were able to assert claims to land as wives, sisters and daughters. In these areas, male household heads recognised their daughters and sisters and provided them with land. For example, research in the Eastern Cape has explored how, when it comes to inheritance and succession, the notion of 'a responsible person' being the one to inherit as opposed to the strict idea of an heir has allowed women to inherit the family home.^{cxlviii} The colonial and apartheid legal framework closed down spaces for this type of recognition of women's rights to land. Instead this legal framework continued to make women's contributions in working the land and maintaining homesteads invisible. The imposition of the hut tax and other charges contributed to the migrant labour system taking hold and the homelands becoming areas of out migration. It was women who were left to till the land while men were forced to seek work in the mines and in factories. They kept homesteads going with little to no security or acknowledgement while men remained the household head, in some cases in name only.^{cxlix}

These limited, patriarchal notions of black women are slowly being rebutted by rural communities emboldened and reassured by the transition to democracy. A survey of 3 000 women across three provinces conducted by the Community Agency for Social Enquiry (CASE), shows an increase in the number of women

getting residential sites in their own name in the years after 1994.^{cl} Although the rate of the increase varies across the three sites, the common explanation given for why women and communities feel that this is now possible is South Africa's transition to democracy and the rights and values in the Constitution.^{cli} There is great potential inherent in the spaces that communities and women are continuing to carve out for themselves, even more so now that these spaces are buoyed by the constitutional principles like equality, freedom and human dignity.^{clii}

However, critics of the government's attempts to secure tenure in communal areas caution that these spaces and the community led initiatives they inspire are under threat. They explain that past attempts to secure the tenure of people living in communal areas failed to adequately address the specific challenges faced for women and, in some instances, exacerbated these challenges. For example, the CLRA - which is discussed elsewhere in this report - did not adequately address gender inequality. The CLRA allowed for the upgrading of 'old order' rights such as PTO certificates to 'new order rights'. However, the law did not take into account that PTOs had generally been issued only in the name of the male household head rendering the rights of women invisible. By allowing these rights to be upgraded the CLRA have endorsed this exclusion.^{cliii} This formulation would, once again, have make women's rights secondary and subject to the rights of the title holder.^{cliv} The CLRA did make provision for joint tilting allowing for the title deed to be registered in the name of a husband and wife, however the guarantee of tenure security that this provision offered was limited given that not all women are wives. The Act would therefore have excluded sisters, daughters and unmarried women.

Critics of the CLRA point out that far from strengthening women's security of tenure this arrangement would have made many women less secure. For those women already battling against being evicted by their male relatives, secondary rights enforceable only at the whim of the primary rights holder would be of little use. The fact that this would mainly have impacted on women flies in the face of equality and dignity. These and other substantive arguments were never tested in the Constitutional Court as the CLRA was struck down on procedural grounds.^{clv}

Even in communities that have chosen to have their land administered by Communal Property Institutions (CPIs), of which the most common are CPAs and trusts, provision is not always made for women to access land. In these instances, women find themselves having to assert their rights against those of the collective. In some cases, women are excluded from these decision-making structures. This can happen where there is no adequate support for these land holding institutions encouraging them to hold regular inclusive elections.

The legal challenge to the CLRA and its subsequent striking down provided the government with an opportunity to adapt their approach and adopt one better suited to ensuring the tenure security of women in communal areas. However, the most recent policy document on communal land tenure issued by the DRDLR indicates that not much has changed in the Department's thinking and approach. The CLTP - which is unpacked in more detail elsewhere in this report - proposes that the title owner of land in communal areas should be the traditional council. The policy assigns the title owner with the power to allocate land. It is important at this point to mention that although women's experiences of these councils vary, the negative experiences are worth noting as they may be helpful in thinking about how to secure women's tenure rights if indeed the Department insists on using traditional councils as the only bodies tasked with land administration. Traditional councils are created by the TLGFA, because these councils were the tribal authorities of old the Act provides for very specific transformative composition requirements. The law requires the traditional council to be comprised of members who are appointed by the traditional leader, this makes up

60% of the council. The remaining 40% of members are elected by the community. The final requirement is that the council membership be one-third women. Some of the women who have been appointed or elected to these councils have been subjected to abuse and various levels of disrespect. In this context too women would be reliant on structures that lend themselves to patriarchal dominance to ensure their security of tenure.^{clvi}

The CLTP and the subsequent versions of the Communal Land Tenure Bills developed from it, envisage giving 'institutional use rights' to households and individuals. There are long running debates on the benefits of formalising land rights including formalisation through titling. Academics and specialists caution that traditional notions of titling can present a misfit with customary land rights. The prioritisation of one owner for each piece of land that is at the heart of formal titling is unsuited to accommodating the layered and nested nature of customary land rights. Women's rights and access to land are part of the network of rights that in some cases draw much of their strength from social recognition rather than formal recording. Legislation aimed at securing the tenure of women within these systems needs to be cognisant of these dynamics and how both formal titling and the centralisation of decision-making power interfere with the ability of women to navigate and negotiate within these spaces.^{clvii}

The concern expressed by academics and activists is that if the Department continues with proposed legislation and policies in the same vein as the CLRA it would not be enough to protect women's land rights and ensure their tenure security. In fact, it could be detrimental to women's ability to access land and may, once again, close down the space for community led initiatives enhancing women's rights to land.

Breakdown in Land Administration Systems

The tenure security of those living in communal areas has been compounded by the collapse of land administration systems in the former homelands. The apartheid government developed an intricate system of land administration for the former homelands based on a myriad of laws and regulations. As mentioned above, the apartheid government granted conditional land rights to black people in the homelands in the form of permits. Recognition of black people's rights to land were therefore dependent on a permit-based system. The permit-based system required a sophisticated system of land administration on the part of the apartheid government with the need for comprehensive and updated record-keeping, the supervision of land allocations, and the administrative capacity to maintain such a system. After 1994, land administration systems declined considerably. This is due to a number of factors, including the uncertain status of land rights in communal areas and the failure on the part of national government to ensure that land administration worked effectively in these disadvantaged areas.^{clviii} Some scholars have identified the break down in land administration systems as one of the most significant challenges facing land reform in communal areas.^{clix}

The collapse of land administration systems has severely impacted on the accuracy and reliability of official land records and registers in relation to land rights in communal areas, specifically in traditional council offices and the provincial departments charged with maintaining these records. In many instances, this has rendered individuals or families living on communal land insecure. For instance, in some parts of the Eastern Cape many individuals or families continue to rely on outdated PTO certificates issued by the apartheid government as their only form of proof of land rights.^{clx} Moreover, people who have been allocated land in terms of communal tenure systems since 1994 may not have any recorded form of proof of these rights.^{clxi}

The government, at national, provincial and local levels, also lacks the administrative capacity to ensure that land administration systems are properly run.

This legal and administrative vacuum has created a fertile breeding ground for abuses of power by some traditional leaders and government officials.^{clxii} Key issues in this regard include unofficial land allocations by traditional leaders, 'double' allocations over land to which individuals or families already hold pre-existing land rights (that are protected in terms of national legislation such as IPILRA), and large-scale unlawful land occupations.^{clxiii}

The inability of government to address the decline in land administration systems in the former homelands has been severely criticised. Manona notes that government's lackadaisical approach to land administration systems in communal areas has enabled deprivations of land rights to continue unabated.^{clxiv} He urges government to provide legal recognition to people's land rights, record these rights through some form of locally based record-keeping system, and urgently strengthen the protections available to people with informal land rights by enacting regulations in terms of IPILRA.^{clxv} Others have also advocated for government to strengthen its land administration capacity (both human recourse capacity and skills development) to ensure that it is able to provide the necessary support and resolve disputes speedily.^{clxvi} In particular, the need for more institutional support to land holding entities, such as CPIs, has been reiterated.

5. Assessment of Communal Land Tenure

Twenty years after the end of apartheid, almost 17 million people or a third of the population of South Africa reside in the former homelands. Most of these people live in severe poverty and vulnerability. While absolute poverty in South Africa has decreased slightly (mainly through the provision of social grants and the extension of basic services to poor households),^{clxvii} the former homelands have persistently been burdened with 'significantly higher levels of deprivation and poverty than the rest of South Africa'.^{clxviii} These findings are confirmed through measuring poverty levels in terms of individual or household income (so-called 'money-metric measures') as well as measuring levels of deprivation in relation to various non-monetary dimensions, including lack of material possessions, social and human capital, employment deprivation, the lack of decent housing and access to basic services.^{clxix} By using the 2011 Census data, economists have shown that deprivation along non-monetary dimensions, as measured in terms of the South African Index of Multiple Deprivation, are concentrated disproportionately in the former homelands.^{clxx} Of the most deprived wards in the country (the bottom 20% of wards with the highest levels of deprivation), the vast majority (more than 90%) were located within the former homelands.^{clxxi} These findings have led economists to assert that those living in the former homelands are still 'the poorest and most deprived' in South Africa.^{clxxii} Moreover, these findings show that the 'deprivation gap between [those living in the former homelands] and the rest of the country has not narrowed in the period between 2001 and 2011'.^{clxxiii} The poverty found in the former homelands is structural or 'chronic' in nature - that is, poverty that lasts for a period of five consecutive years or longer - which has deep-seated causes and is much harder to eliminate.^{clxxiv}

Although there have been some indicators of success, these have been few and far between. Economists have, for example, reported a drop in hunger levels in the former homelands, which has been attributed to the expansion of social grants rather than the South African government's land reform policy.^{clxxv} In fact, the land reform policy, which specifically seeks to address this structural problem, 'has had a limited effect in addressing the problem of hunger' in the former homeland areas.^{clxxvi} While the expansion of social

grants has effectively led to this shift in hunger levels, economists warn that these measures may be ineffective in addressing the more deeply rooted dimensions of poverty, inequality and unemployment in the former homelands.^{clxxvii}

South Africa is therefore characterised by acute levels of spatial inequality, with those living in the former homelands being significantly worse off than those living in the rest of the country. Twenty years after the former homelands were incorporated into a unitary South Africa, apartheid's spatial geography is very much alive. This persistent inequality is fuelling rural-urban migration, the growth of informal settlements and other informal occupations of land, and has been linked to the recent increase in social unrest.^{clxxviii}

To understand the causes of the extreme poverty and disadvantage in the former homelands, it is important to adopt a holistic approach. Recently, economists have argued that it is critical to unpack the environmental and systemic conditions that have rendered people constantly vulnerable.^{clxxix} This may include the existing power relations and social dynamics of people trapped in poverty. Moreover, when attempting to develop targeted interventions to alleviate social ills, the potential impact of any structural, legislative or policy intervention must be carefully scrutinised to ensure that such intervention does not entrench the very conditions or social relations that 'create marginality, maintain vulnerability and undermine the agency' of the rural poor.^{clxxx}

It is therefore critical to take stock of who is likely to be empowered by legislative and policy interventions and who is likely to be disenfranchised. In the South African context it seems evident that the powerful rural elites (including traditional leaders, land speculators and international and local corporations) have been disproportionately advantaged by the legislative and policy framework put forward by government, while the rights and interests of individuals and families living on communal land have been systematically undermined or ignored. In an in-depth analysis of the causes of poverty in the North West, Francis writes that rural households from the former homelands have been rendered particularly vulnerable as result of the exploitative systems of patronage and local political structures that were propped up during apartheid and shaped the heavily skewed distributional regime that continues to exist today.^{clxxxi} She says that ordinary people in the North West were 'systematically discriminated against' in favour of well-connected rural elites, including traditional leaders.^{clxxxii}

This report clearly shows that twenty years after the homelands were reintroduced into a unitary South Africa people living in these areas remain acutely vulnerable. Although some people in communal areas are slightly better off than they were prior to 1994, the vast majority continue to be plagued by insecure tenure and many have been dispossessed of their land rights altogether. The legislative and policy interventions adopted by government in the context of communal land tenure and rural development have not been able to address the chronic tenure insecurity that burdens many living in these areas. Nor is it likely that the laws and policies currently proposed by government will satisfactorily address this issue. Instead the laws and policies governing communal land tenure and traditional governance have done little to remedy widespread poverty and deprivation, the pressures of ongoing land grabs by rural and corporate elites, the highly unequal power relations in rural areas, the gendered nature of access to land, the breakdown in land administration systems and the negative impact of tenure insecurity on livelihoods. These laws and policies have therefore entrenched the very conditions and social relations that 'create[d] marginality, maintain[ed] vulnerability and undermine[d] the agency' of the rural poor.

As this report indicates, some of the primary drivers of this insecurity are:

- The absence of a law governing communal land tenure, as constitutionally mandated by section 25(6) of the Constitution. The inability on the part of the government to pass legislation that sufficiently captures the nuanced ways in which people experience and regulate relations of communal tenure in their everyday lives, means that those living on communal land have no means of securing their tenure. Without such a law, people are forced to rely on the poorly implemented and enforced interim measures provided for in IPILRA.
- The current legal framework and proposed legislation in respect of traditional governance or governance in areas under traditional leaders prioritises and gives preference to traditional leaders at the expense of ordinary rural people. This legal framework shifts the balance of power to elite rural groupings and emboldens some amongst those groups to interpret and manipulate the existing legal framework in a manner that benefits them personally. The political and symbolic support of traditional leaders and councils through legislation means that rural communities are pitted against traditional authorities when asserting their land rights and facilitates a situation where traditional authorities make it difficult for community members to secure their tenure.

Government's failure to provide adequate support to the land holding vehicles it has created, for example CPAs, is another critical driver of insecurity. The difficulties that CPAs face in getting registered, developing written constitutions and holding regular elections of committee members to prevent membership from stagnating or the CPA being 'captured'.^{clxxxiii} In addition to the challenges faced in trying to establish and run a CPA there is the possibility that the formations of such institutions will be challenged by traditional leaders or councils, who are politically supported by legislation.^{clxxxiv} This indicates that even when people have managed to make use of the land holding vehicles created in terms of legislation to secure their rights, their lack of tenure security may threaten the stability of those rights.

6. Conclusion and Recommendations

In order to address the egregious consequences of colonialism and apartheid on the tenure security of those living in communal areas it is necessary not only to repeal the apartheid laws but also to 'construct a new system ... based on a clear understanding of how existing property relations have developed, and why those relations do not satisfy people's needs'. In this respect, it seems the post-apartheid South African government has failed. Although the government initially put in place the Interim Protection of Informal Land Rights Act (IPILRA), this law has done little more than provide a thin layer of legal protection to the rights of people in communal areas.

Moreover, the absence of a law governing communal land tenure - as constitutionally mandated by section 25(6) of the Constitution - and government's inability to pass legislation that sufficiently captures the nuanced ways in which people experience and regulate relations of communal tenure in their everyday lives, means that those living on communal land have no way of securing their tenure.

We recommend that:

- The state should develop legislation to comply with the provisions of section 25(6) and (9) of the Constitution that grants legal recognition to the rights that individuals, families and groups have over communal land in a manner that is consistent with the nuanced ways in which people in communal areas regulate their land rights in practice.
- The legislation referred to above should comply with all facets of the state's obligations in relation to right to tenure security of people whose tenure is insecure due to past racially discriminatory laws and practices, namely to respect, protect, promote and fulfil this right. In other words, the legislation developed to give effect to this right should: grant legal recognition of rights to land of people in communal areas (including rights held in terms of customary law), provide protective measures to ensure that these rights are protected against infringement, and aim to strengthen tenure security on an ongoing basis. The protection mechanisms of the legislation should be based on the basic protections provided for in IPILRA, but should not be limited to it.
- The legislation referred to above should contain provisions to facilitate clear and transparent land rights investigations or enquiries to determine what rights people hold in practice. The legislation should provide for the registration or recording of people land rights in a manner that would be suitable to the people whose rights are being protected. The record system should be capable of easy verification, should be affordable and flexible.
- The legislation referred to above should offer individuals, families and groups living in communal areas a range of tenure options and grant them a genuine choice in relation to these options. It should also provide clear guidance as to how those choices will be exercised and what mechanisms will be used.
- In the process of developing legislation to give effect to section 25(6), the state should be careful not to rely too heavily on common law principles or notions of ownership, which may be foreign to and distort communal land tenure systems. Instead tenure models should be developed that are in keeping with the existing normative systems used by people in communal areas to manage land in practice and should be based on an approach acknowledges people's conceptions and re-imagining of belonging. Such a process would be in keeping with the Constitutional Courts remarks in *Alexkor Ltd v Richtersveld Community*, where the Court emphasised not viewing customary law or indigenous law through a common law lens.^{clxxxv} Moreover, the development of legislation in this vein would indicate that the state takes seriously the constitutional recognition of customary law systems on equal footing with the common law.
- In the process of developing legislation to give effect to section 25(6), the state should consult meaningfully and in good faith with communities in communal areas. In particular, the state should seek to ensure that the concerns of vulnerable groups, including women, are given adequate consideration. The state should also be careful not to give undue consideration to powerful interests groups at the expense of marginalised groups.
- The state should adopt and implement a range of legislative, administrative, budgetary and practical measures to protect the tenure rights of people living in communal areas, with a particular focus on the rights of vulnerable groups. In this light the state should ensure that it enforces IPILRA effectively, including providing fines to individual or institutions who do not comply with IPILRA, rendering contracts that are inconsistent with IPILRA invalid, and developing sufficient institutional capacity to enforce IPILRA. Moreover, the state should develop mechanisms to monitor transactions in relation to communal land - especially land where it acts as nominal owner - to ensure that the land rights of people living on communal land are protected.
- The state should take legislative measures to clarify how existing laws interact with each other and should clarify the respective responsibilities and roles of state actors in relation to communal land

tenure. This should include ensuring that legislation that impacts on the tenure security of people living on communal land is consistent in its requirements regarding the access and use of communal land.

- The state should take immediate steps to strengthen the system of land administration in communal areas, including ensuring that appropriate record-keeping systems are put in place, that records are regularly updated and accessible, and that land administration is better resourced and has increased capacity.
- The state should recognise the autonomy of the people living on communal land in relation to decision-making about their land. In this light, the state should not elevate the role of traditional leaders in relation to land administration above that of the people in a way that leaves communities voiceless and reliant on traditional leaders to speak on their behalf. The role of traditional leaders or councils in land administration should be developed in a manner that is in line with, and led by, how communities conceive of this role in practice. In relation to investments or developments on communal land, there needs to be departure from the idea that all development will benefit rural communities and that they therefore need to quietly accept it. Rather there must be recognition of the fact that communities are not homogenous entities (differently placed people will be affected differently by development) looking to have 'solutions' handed down to them which is why there must be an emphasis on and a commitment to consultation.

7. End Notes

ⁱ The apartheid government issued various laws to segregate the population of South Africa along racial lines. One of the most significant laws was the Black Land Act 27 of 1913 which restricted the areas where black people could legally live to 7% of the land in South Africa. This law was followed up with the South African Development Trust and Land Act 18 of 1936, which provided an additional 6% of the land for occupation by black people. The government used these laws to pass the Group Areas Act 41 of 1950 which severely restricted the ability of black people to acquire, hold and occupy land throughout South Africa and created the ten rural reserves referred to as homelands (Transkei, Bophuthatswana, Ciskei and Venda) or self-governing territories (KwaNdebele, QwaQwa, Gazankulu, Lebowa, KwaZulu and KaNgwane) for different "ethnic groups" within the black population. The segregation of people and division of land was further made possible by legislation allowing for the forced removal and eviction of people from their land. See Wilhelmina du Plessis, 'African Indigenous Land Rights in a Private Ownership Paradigm', *Potchefstroom Electronic Law Journal*, 14, 7 (2011), p. 45; Aninka Claassens, 'Contested Power and Apartheid Tribal Boundaries: The Implications of "Living Customary Law" for Indigenous Accountability Mechanisms', *Acta Juridica* (2011), p. 175.

ⁱⁱ Ben Cousins and Ruth Hall, *Rights without Illusions: The Potentials and Limits of Rights-based Approaches to Securing Land Tenure in Rural South Africa*, PLAAS Working Paper No 18 (2011), p. 1; Tara Weinberg, *The Contested Status of Communal Land Tenure in South Africa*, PLAAS Rural Status Report 3 (2015), p. 6.

ⁱⁱⁱ Weinberg, *Communal Land Tenure*, p. 3. See also Ashraf Mahomed, *Understanding Land Tenure Law: Commentary and Legislation* (2009), p. 28; Gladys Mutangadura, "The Incidence of Land Tenure Insecurity in South Africa: Policy Implications for Sustaining Development", *Natural Resources Forum*, 31 (2007), p. 176; Hanri Mostert, 'Customary and Statutory Perceptions of Tenure Security in South Africa', in Aurelia Colombi-Ciacchi (ed.), *Governance Meets Law* (forthcoming, Cambridge, 2014); and Housing Development Agency (HDA), *Informal Settlement Upgrading: Incrementally Upgrading Tenure under Customary Administration* (2015), pp. 4-10.

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- ^{iv} Mahomed, *Understanding Land Tenure Law*, p. 28. This means that there is a close relationship between the right to secure tenure contained in section 25(6) of the Constitution and the right not to be arbitrarily evicted from one's home contained in section 26(3) of the Constitution.
- ^v See Mutangadura, "Land Tenure Insecurity in South Africa", p. 177.
- ^{vi} According to the UN Food and Agriculture Organization (FAO), insecure tenure "increase[s] vulnerability, hunger and poverty..." See the FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012), p. v.
- ^{vii} Murray Leibbrandt, Ingrid Woolard, Arden Finn and Jonathan Argent, *Trends in South African Income Distribution and Poverty since the Fall of Apartheid*, OECD Social, Employment and Migration Working Papers No 101 (2010), p. 10.
- ^{viii} Michael Noble, Wanga Zembe and Gemma Wright, 'Poverty May Have Declined, but Poverty and Deprivation are Still Worst in the Former Homelands', *Econ 3x3* (published online 27 May 2014), p. 1. See also Michael Noble and Gemma Wright, 'Using Indicators of Multiple Deprivation to Demonstrate the Spatial Legacy of Apartheid in South Africa', *Social Indicators Research*, 112, 1 (2013), pp. 187-201.
- ^{ix} Since the system was permit-based, the particular permit would determine the types of rights a person had in relation to land. Some of these permits included residential permits, lodger's permits, hostel permits or certificates of occupation. See Juanita M Pienaar, "Tenure Reform in South Africa: Overview and Challenges", *Speculum Juris*, 1 (2011), p. 110; Cousins and Hall, *Rights without Illusions*, p. 4.
- ^x Samuel M. Kariuki, 'Failing to Learn from Failed Programmes? South African's Communal Land Rights Act', African Studies Centre (ASC) Working Paper (2004), p. 7.
- ^{xi} Department of Land Affairs (DLA), *White Paper on South African Land Policy* (1997), pp. 57-67; Du Plessis, 'African Indigenous Land Rights'.
- ^{xii} Geoff Budlender and Johan Latsky, 'Unravelling Rights to Land and Agricultural Activity in Rural Race Zones', in Michael de Klerk (ed.), *Harvest of Discontent: The Land Question in South Africa* (Cape Town, 1991), p. 115.
- ^{xiii} The tenure reform programme seeks to give effect to section 25(6) and (9) of the Constitution. The other two pillars of the land reform programme are land redistribution (the process of changing the racial patterns of land ownership in South Africa) and land restitution (the process of returning land to people who were dispossessed of their land under apartheid as a result of racially discriminatory laws or practices). See DLA, *White Paper on South African Land Reform*; Pienaar, "Tenure Reform in South Africa", p. 110.
- ^{xiv} IPILRA was enacted in 1996 as a temporary law to protect people with insecure tenure from being deprived of their land rights. See the discussion on IPILRA.
- ^{xv} Weinberg, *Communal Land Tenure*, p. 3.
- ^{xvi} Ben Cousins, 'Characterising "Communal" Tenure: Nested Systems and Flexible Boundaries', in Aninka Claassens and Ben Cousins (eds.), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town, 2008), p. 111.
- ^{xvii} Catherine Cross, 'Landholding Systems in African Rural Areas', in Michael de Klerk (ed.), *Harvest of Discontent: The Land Question in South Africa* (Cape Town, 1991), pp. 63-97; Tom W. Bennet, *Customary Law in South Africa* (Lansdowne, 2004), p. 377; Du Plessis, 'African Indigenous Land Rights', pp. 50-51; Weinberg, *Communal Land Tenure*, p. 7.
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- ^{xl} Section 2 of the Constitution states: 'This Constitution is the supreme law of the Republic; law and conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.'
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- ^{xlv} Weinberg, *Communal Land Tenure*; LARC, *People's Law Journal: Rural Land Justice*, p. 71.
- ^{xlvi} LARC, *People's Law Journal: Rural Land Justice*, p. 71.
- ^{xlvii} LARC, *People's Law Journal: Rural Land Justice*, p. 71.
- ^{xlviii} Beneficial occupation refers to the situation where an individual occupies land peacefully for an extended period of time, as if he or she were the owner, but without formal legal rights. See Weinberg, *Communal Land Tenure*, p. 12.
- ^{xliv} LARC, *People's Law Journal: Rural Land Justice*, p. 71.
- ⁱ LARC, *People's Law Journal: Rural Land Justice*, p. 71.
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- ^{liii} Aninka Claassens, 'Land Tenure in Communal Areas: Progress and Policy Constraints' (2016), p. 5, an unpublished presentation to the Parliamentary Portfolio Committee on Rural Development and Land Reform, Cape Town, 2016. See also LARC, *People's Law Journal: Rural Land Justice*, pp. 72-73.
- ^{liv} Claassens, 'Land Tenure in Communal Areas', p. 5.
- ^{lv} Cousins and Hall, *Rights without Illusions*, p. 4.
- ^{lvi} Claassens, 'Land Tenure in Communal Areas'; Siyabu Manona, "'Informal' Land Rights under Siege Eighteen Years into Democracy' (2012), an unpublished paper presented at the Rural Women's Action Research (RWAR) Programme Seminar Series at the University of Cape Town, Cape Town, 30 March 2012.
- ^{lvii} Section 4 of the IPILRA provides for the Minister of Rural Development and Land Reform (DRDLR) to issue binding regulations to complement the Act. Civil society has consistently urged the government to consider issuing such regulations. See, for example, Manona, "'Informal' Land Rights under Siege'.
- ^{lviii} Claassens has called for the Department of Rural Development and Land Reform to ensure greater enforcement of IPILRA. She notes that the Department could enhance compliance by declaring a contravention of IPILRA a criminal offence, making transactions that violate IPILRA rights void, and by employing land rights officers to ensure compliance with IPILRA. See Claassens, 'Land Tenure in Communal Areas', p. 30.
- ^{lix} Centre for Law and Society (CLS), 'Land Rights under the Ingonyama Trust', CLS Factsheet (February 2015), p. 1.
- ^{lx} CLS, 'Land Rights under the Ingonyama Trust', p. 1.
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- ^{lxii} Ingonyama Trust Board, 'Annual Report 2012/2013' (2013), p. 7.
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- ^{lxiv} See, for example, Ingonyama Trust Board, 'Annual Report 2012/2013', p. 7, where Ngwenya writes: 'What is important though is the subtle acknowledgement that communal land ownership consists of more than land ownership'.
- ^{lxv} See Tabela Timse, 'King Trust sells people out to mining', *Mail & Guardian* (published online 5 June 2015); and Stha Yeni, 'Bayede Newspaper, traditional leaders and mining deals in KwaZulu-Natal', *Custom Contested* (published online 25 August 2015).
- ^{lxvi} A number of communities in KwaZulu-Natal have expressed dissatisfaction about the manner in which the Trust has concluded surface leases claiming that they had not been adequately consulted during the negotiation of these leases, and that they did not consent to the deprivation of their land rights as required by IPILRA. See LARC, *People's Law Journal: Rural Land Justice*, pp. 62-67.
- ^{lxvii} Ingonyama Trust Board, 'Annual Report April 2014 to March 2015' (2015), p. 2.
- ^{lxviii} Ben Cousins, Rauri Alcock, Ngdidi Dladla, Donna Hornby, Mphethethi Masondo, Gugu Mbatha, Makhosi Mveli and Creina Alcock, *Imithetho yomhlaba yaseMsinga: The Living Law of Msinga, KwaZulu-Natal*, PLAAS Research Report No 43 (2011).
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- ^{lxxii} Kariuki, *Failing to Learn*, pp. 9-10.
- ^{lxxiii} Kariuki, *Failing to Learn*, p. 10.
- ^{lxxiv} Cousins and Hall, *Rights without Illusions*, p. 8.
- ^{lxxv} Weinberg, *Communal Land Tenure*, p. 14.
- ^{lxxvi} *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 838 (GNP).
- ^{lxxvii} The Constitutional Court held that the Act had been incorrectly tagged in Parliament as a Bill not affecting the provinces (in terms of section 75 of the Constitution) when it should have been tagged as a Bill af-

fecting the provinces (in terms of section 76 of the Constitution). See *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

^{lxxviii} Cousins and Hall, *Rights without Illusions*, p. 8; Weinberg, *Communal Land Tenure*, p. 14.

^{lxxix} Cousins and Hall, *Rights without Illusions*, p. 9.

^{lxxx} Cousins and Hall, *Rights without Illusions*, p. 9.

^{lxxxi} Cousins and Hall, *Rights without Illusions*, p. 9.

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^{lxxxiii} Elizabeth Francis, *Poverty: Causes, Responses and Consequences in Rural South Africa*, Chronic Poverty Research Centre (CPRC) Working Paper No 60 (2006), p. 9.

^{lxxxiv} Kariuki, *Failing to Learn*, p. 21.

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^{xc^{vi}} DRDLR, 'Draft Policy Paper: Communal Property Associations', p. 9. See also CLS, 'Community Property Associations', p. 4.

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^{xc^{viii}} See, generally, *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* 2015 (6) SA 32 (CC).

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^{c^{viii}} Weinberg, *Communal Land Tenure*, p. 20.

^{c^{ix}} Francis, *Poverty*.

^{c^x} Wily, 'Looking Back to See Forward', p. 751; Francis, *Poverty*.

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- ^{cxvii} Wily, 'Looking Back to See Forward', pp. 755-756.
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- ^{cxvi} See, generally, World Bank, *Rising Global Interest in Farmland*.
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- ^{cxviii} Ashukem, 'Included or Excluded', p. 12.
- ^{cxix} Although the African Charter does not expressly refer to FPIC it enshrines a variety of rights that are instrumental to FPIC, including the right to property (in article 14), the right to self determination (in article 20(1)), the right to natural resources (in article 21) and the right to development (in article 22(2)). See Ashukem, 'Included or Excluded', pp. 10-12. See also African Commission on Human and Peoples' Rights (ACHPR), *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, para. 291, where the African Commission noted that the right to development includes FPIC.
- ^{cx} Although South Africa has not ratified the UN Declaration on the Rights of Indigenous Peoples or ILO Convention 169, it has expressed its support of the UN Declaration on the Rights of Indigenous Peoples.
- ^{cxvi} See Hernando De Soto, *The Other Path* (New York, 1989); and Hernando De Soto, *The Mystery of Capital: Why Capitalism Trumps in the West and Fails Everywhere Else* (London, 2000).
- ^{cxvii} John W. Bruce, 'Simple Solutions to Complex Problems: Land Formalization as a "Silver Bullet"', in Jan Michiel Otto and André Hoekema (eds.), *Fair Land Governance: How to Legalize Land Rights for Rural Development* (Leiden, 2012), pp. 31-56; Celestine Nyamu Musembi, 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights', *Third World Quarterly*, 28, 8 (2007), pp. 1457-1478.
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- ^{cxvi} Bruce, 'Simple Solutions to Complex Problems', pp. 31-56.
- ^{cxvii} Bruce, 'Simple Solutions to Complex Problems', pp. 31-56.
- ^{cxviii} Bruce, 'Simple Solutions to Complex Problems', pp. 31-56.
- ^{cxvix} Bruce, 'Simple Solutions to Complex Problems', pp. 31-56. See also Nyamu Musembi, 'De Soto and Land Relations in Rural Africa', pp. 1461-1462; Benjaminsen, Holden, Lund and Sjaastad, 'Formalisation of Land Rights', pp. 28-35.
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- ^{cxli} 'Of Property and Poverty', *The Economist* (26 August 2006), pp. 11-12.

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- ^{cxlvii} Martin Chanock, *The Making of South African Legal Culture: Fear, Favour and Prejudice* (Cambridge, 2001); Weinberg, *Communal Land Tenure*.
- ^{cxlviii} Rosalie Kingwill, 'Custom-building Freehold Title: The Impact of Family Values on Historical Ownership in the Eastern Cape', in Aninka Claassens and Ben Cousins (ed.), *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (Cape Town, 2008).
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