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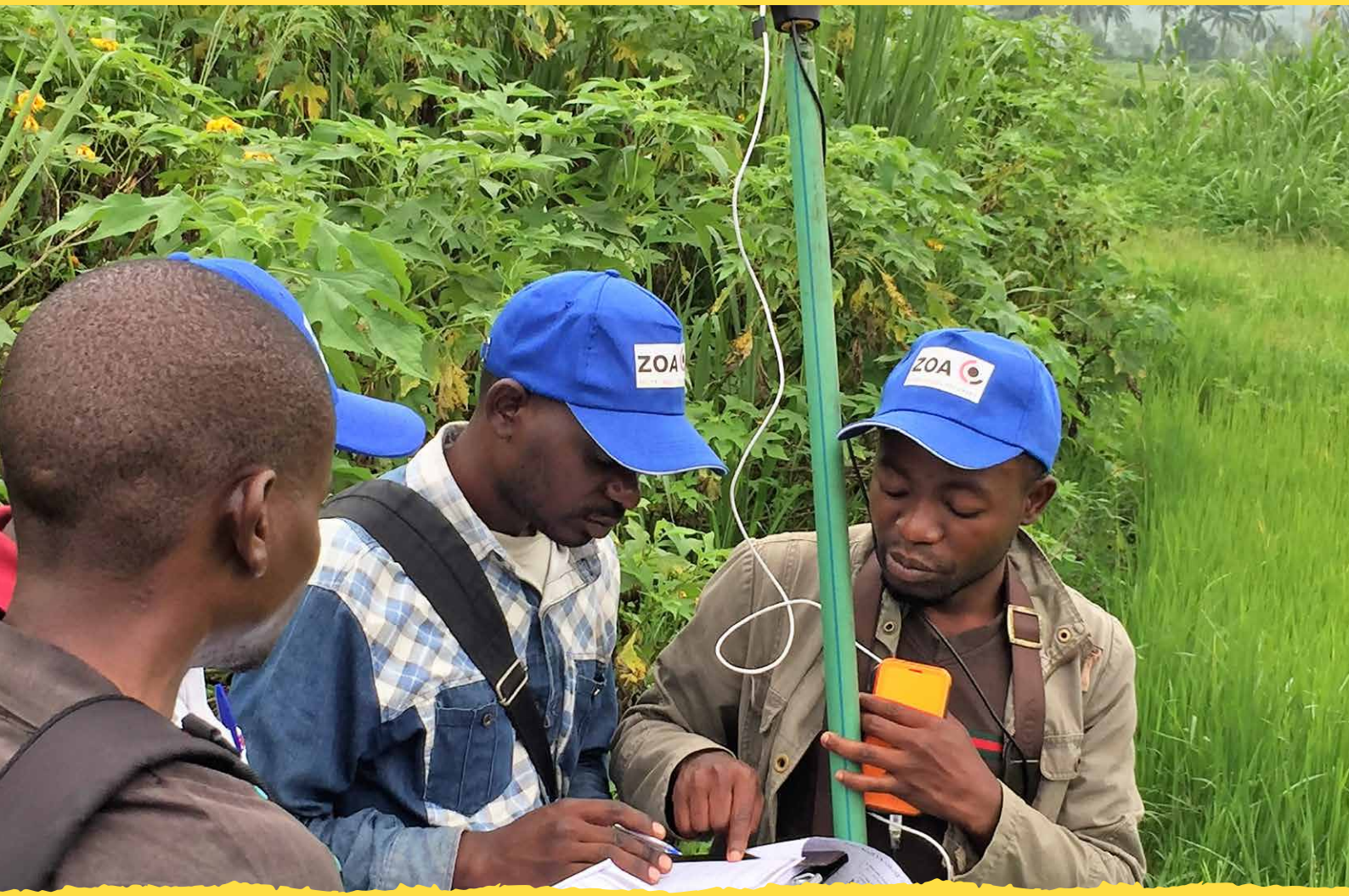

Photo: David Betge

Land Disputes, Land Tenure Registration and Access to Justice in Fragile and Conflict Affected States: Questioning our Assumptions

Practice Brief

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Knowledge Management Fund | Knowledge Platform Security & Rule of Law

1 Introduction

Formalizing land rights, through land tenure registration (LTR), is seen as having potential to significantly contribute to increasing agricultural productivity in Africa,[2] notably by improving land tenure security, enhancing access to credit, creating conditions for land-based investment and fostering land markets. A recent trend is formalization in fragile and conflict affected settings (FCAS). LTR programs are underway in countries such as Burkina Faso, Burundi, the Democratic Republic of Congo, Ethiopia and Uganda and are being considered in Chad, Mali and Somalia. In these contexts, whilst enhancing access to credit, investments and land markets will be considered important intermediate objectives, the immediate objective is to address high levels of land disputes.

High levels of disputes, as observed in FCAS, can be disruptive and impede development, peace and security. The empirical literature suggests that unresolved land disputes can prevent investment and decrease agricultural production.[3] There are indications, also, that land disputes may adversely affect disputants' food security.[4] As FCAS are typically characterized by migration, structural inequality and exclusion in land access, this increases the occurrence and complexity of land disputes. There is a significant risk that LTR confirms such (persisting) exclusionary and discriminatory practices. Finally, the literature identifies unresolved land disputes as a potential source of larger scale violent conflict, particularly when such disputes overlap with ethnic divisions and their build-up coincides with economic, political, or demographic shocks.[5]

LTR consists of systematically identifying land holdings and the persons who hold rights to these lands. The results (location, dimensions, boundary markers, name of the rights holder) are recorded in a registry (*cadastre*) and proof of registration is given to the rights holder. Theories of change underpinning LTR programs tend to be based on the idea that it helps to prevent disputes, for example about boundaries or transactions, and, more generally, to make land rights less vulnerable to contestation. This improved security, in turn, is assumed to create the conditions for increased investments, access to credit and productivity. In practice, however, these assumptions do not necessarily hold. Older empirical studies quite consistently did not find evidence of a reduction in disputes following LTR[6] and the effects of the newer generation of low-cost, community-based LTR programs being applied in FCAS, are ambivalent.[7]

Organizations implementing LTR programs in FCAS often struggle to understand the full complexity of the contexts in which they operate. This can result in programs that are insufficiently comprehensive to effectively address land disputes in the long term.[8] This practice brief puts focus on the often-disregarded access to justice (A2J)[9] dimension of sustainable land governance. It brings together lessons learned by academics, practitioners and policy makers regarding

[1] The author is grateful for valuable contributions made to the drafting of this brief by David Betge, Bertus Wennink, Gemma van der Haar, Mathijs van Leeuwen and Marco Lankhorst. All errors and opinions are the author's

[2] Byamugisha, F., 2013, Securing Africa's Land for Shared Prosperity: A Program to Scale Up Reforms and Investments, World Bank Africa Development Forum series, Washington DC, US.

[3] Deininger, K., and R. Castagnini, 2006, Incidence and Impact of Land Conflict in Uganda, in: Journal of Economic Behavior & Organization, v. 60, i. 3, p. 321.

[4] Uyang, F.A., E.N. Nwagbara, V.A. Undelikwo and R.I. Eneji, 2013, Communal Land Conflict and Food Security in Obudu Local Government Area of Cross River State, Nigeria, in: Advances in Anthropology, v. 3, i..4, p. 193; Linkow, B. (2016). Causes and Consequences of Perceived Land Tenure Insecurity: Survey Evidence from Burkina Faso. Land Economics, v. 92, i. 2, p. 308. University of Wisconsin Press. Available at: http://le.uwpress.org/content/92/2/308.abstract.

[5] Deininger, K., 2003. Land Policies for Growth and Poverty Reduction. Washington DC: World Bank.

[6] See Platteau, J., 1996, The evolutionary theory of land rights as applied to Sub-Saharan Africa: A critical assessment, in: Development and Change, v. 27, i. 1, p. 29 and Dickerman, C., 1989, Security of Tenure and Land Registration in Africa: Literature Review and Synthesis, University of Wisconsin-Madison LTC Paper n. 137.

[7] See Deininger, K. and R. Castagnini, 2004, Incidence and impact of land conflict in Uganda, World Bank Policy Research Working Paper n. 3248; Benjaminsen, T., S. Holden, C. Lund, and E. Sjaastad, 2008, Formalisation of land rights: Some empirical evidence from Mali, Niger and South Africa, in: Land Use Policy, v. 26, p. 28; and Holden, S., K. Deininger and H. Ghebru, 2010, Impact of land registration and certification on land border conflicts in Ethiopia, World Bank, Washington, D.C...

[8] See: Betge, D. Land Governance in Post-Conflict Settings: Interrogating Decision-Making by International Actors. Land 2019, 8, 31.

[9] This brief adopts the UNDP definition of access to justice: the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards. Under this broad definition access to justice is about more than improving justice seekers' access to courts or providing legal representation. There is no access to justice where citizens (especially marginalized groups) have no confidence in the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. Access to justice involves thus normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight. See UNDP, 2004, Access to Justice, available at: https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf; and https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice.

Photo: Marco Lankhorst

the interfaces between land disputes, LTR and access to justice.[10] It notably assesses the following sets of assumptions to be found in Theories of Change (ToC) underlying these programs: assumptions regarding the causes of land disputes and the ability of LTR to remove these (Section 2); assumptions regarding the way in which land disputes are handled during the LTR process (Section 3); and assumptions regarding the emergence of disputes following LTR and the links to A2J (Section 4). A final section provides recommendations for donors and practitioner organizations that want to provide support to LTR.

[10] This brief is based on a review of literature, a workshop – held on 10 February 2020 in The Hague with support from the Knowledge Platform for Security and Rule of Law – that brought together academics, practitioners and policy makers, and individual interviews with workshop participants following the event. In the footnotes, video clips of experts and practitioners are mentioned who illustrate some of the trends discussed in this brief. These clips were produced by Radboud and Wageningen University in the framework of this project to facilitate the discussion. Please contact M. van Leeuwen for more information.

2 On the causes of land disputes and the impact of LTR

Assumption: High levels of land disputes are caused by weak institutions unable to provide tenure security

LTR programs, in their simplest form, are based on the assumption that weak land governance institutions are unable to provide adequate tenure security, notably in the form of proof of ownership, and thus leave room for disputes to emerge. It is important to realize, however, that the range of land governance problems that contributes to the prevalence of land disputes is far wider. The adoption and implementation of laws and policies on land, agriculture, housing or planning that are poorly designed and not the result of stakeholder participation or reforms of institutions involved in land allocation and dispute resolution can certainly reduce access to land for more vulnerable members of the population and result in tensions. The same applies to insufficient checks on exclusionary behaviour, including land grabbing, by the state, elites or companies.[11] Moreover, in many FCAS these governance problems occur in a context of land scarcity, population pressure, adverse climatic factors and limited off-farm income-generation opportunities, resulting in often fierce competition over land[12] that will not disappear with LTR. And these problems tend to be compounded by the effects of ethnic tensions, recurrent political crises and violent internal conflict,[13] which lead to massive population displacements. The land holdings thus left behind are almost invariably occupied, some by opportunistic neighbours, others by people who themselves had been forced to flee or were driven to move by over-population elsewhere. The resulting overlapping land claims tend to be highly sensitive and complex and complicated to solve in LTR and will produce disruptive effects for prolonged periods of time.[14] To address these issues, improvements in governance and legitimacy and capacity of institutions will be needed beyond the narrow sphere of LTR.

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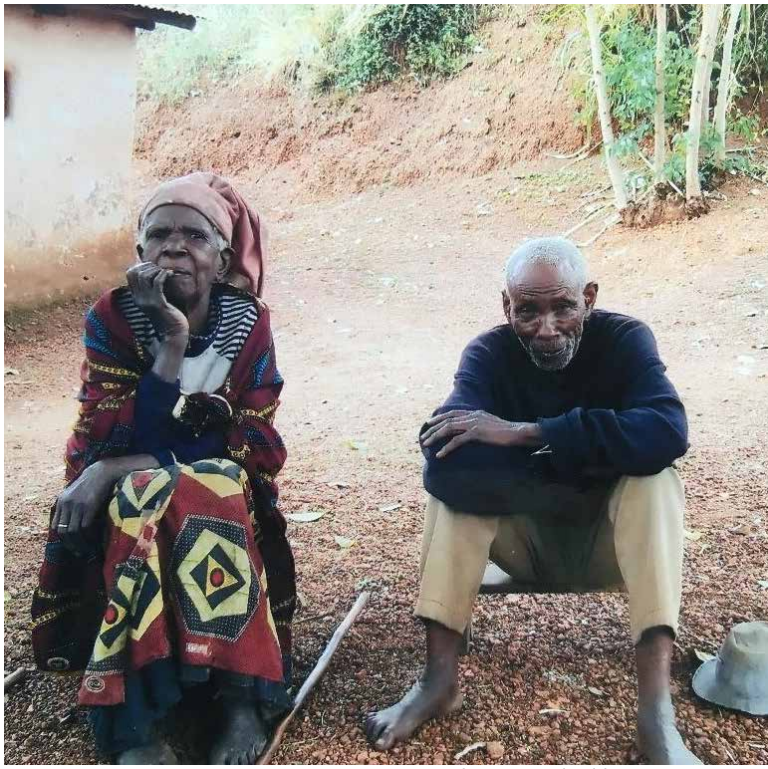
Assumption: LTR is equally effective with regards to the reduction of all types of disputes

LTR program ToCs will often be based on the idea that by systematically identifying and recording land holdings and rights holders the scope for disputes about ownership is reduced. It should be realized, however, that whilst this may be true for disputes about boundaries or sale and purchase, it is less likely to be the case for other types of dispute. In rural parts of many FCAS, where customary tenure arrangements prevail, most land will be acquired

[11] Eck, K., 2014, The Law of the Land: Communal Conflict and Legal Authority, in: Journal of Peace Research, v. 51, i.4, p. 441.
[12] Barron, supra, note 4.
[13] Wehrmann, B., 2008, Land Conflicts: A practical guide to dealing with land disputes, GTZ Land Management, available at: https://www.giz.de/fachexpertise/downloads/Fachexpertise/giz2008-en-land-conflicts.pdf
[14] See the videoclip produced by Radboud University in the framework of this project where J. Unruh discusses this topic in the context of Afghanistan. See also Van der Haar, G. and M. van Leeuwen, 2019, War-induced displacement: Hard choices in land governance, Land, v. 8, i. 6, p. 88, available at: https://doi.org/10.3390/land8060088.

by succession. This reality is reflected in often very high levels of disputes about succession in civil courts.[15] LTR alone will not affect the prevalence of such disputes, as they are about which of the owner's family or community members are recognized as successors or how the estate left by the deceased is to be divided among them. The answer to these questions is not found on a title certificate. The same applies to disputes between incumbents and returning refugees or IDPs who fled prior to LTR. Moreover, in FCAS confiscation of land by the state or state officials will be a major source, if not the most important source of contestation around land. Whilst LTR could in theory protect against this, if citizens do not have any means of starting legal action against the state, it won't make a difference. This means that in some contexts the potential positive contribution of LTR to reduction of dispute levels and to achievement of related intermediate outcomes may be limited.[16]



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Assumption: Beneficial effects of LTR outweigh the risk of increased land conflict and disputes

It is necessary to carefully examine whether LTR programming is called for in a given context, as its potential to address land disputes may be limited. More importantly, fast-track programmes in FCAS can also have adverse effects. Several studies find evidence of an initial rise in dispute levels brought on by LTR.[17] There are two broad reasons for this effect. First, as registration teams start identifying and delineating parcels and naming right holders, latent disputes will come to the surface, because everyone who holds a claim to land that risks being registered in someone else's name, is forced to claim or forego his right. Second, LTR tends to rely on self-identification by owners, supported by testimony of neighbours and family members. When undertaken at significant scale, a lot can go wrong in such a process especially since FCAS present high levels of displacement and structural inequality and exclusion in land access is commonly seen. As a consequence, the process may not capture pre-existing customary rights or rights of right-holders who migrated for economic or political reasons. Moreover, local elites or politicians may abuse the process,[18] as can community-based volunteers involved in LTR or mediation, local partner organisations and local authority officials. The initial surge in disputes engendered by LTR can be quite substantial.[19] It is essential, therefore, for LTR programs to explicitly plan for strengthening of the capacities of local institutions and courts to deal with this work, in an inclusive and sustainable manner, and to deal with such an increased volume of work. Some studies also show that the initial surge in disputes is accompanied by a rise in land-related violence,[20] suggesting that failure to settle a larger volume of cases peacefully at an early stage may lead them to escalate.

[15] See e.g. Lankhorst, M. and M. Veldman, 2011, Engaging with Customary Law to Create Scope for Realizing Women's Formally Protected Land Rights in Rwanda, in: Working with Customary Justice Systems, Post-Conflict and Fragile States, E. Harper (ed), International Development Law Organization, Rome; and Kohlhagen, D., 2009, Statistiques judiciaires Burundaises: Rendement, délais et typologie des litiges dans les tribunaux de résidence, RCN Justice & Démocratie Research Report.

[16] Stevens, C., Panfil, Y., Linkow, B., Hagopian, A., Mellon, C., Heidenrich, T., Kulkarni, N., Bouvier, I., Brooks, S., Lowery, S., and Green, J. (2020), Land and Development: A Research Agenda for Land and Resource Governance at USAID, at p. 61.

[17] Holden, S., K. Deininger and H. Ghebru, 2010, Impact of land registration and certification on land border conflicts in Ethiopia, World Bank, Washington, D.C; Veldman, M and B. Wennink, 2019, Promoting land ownership certification in Makamba, Burundi, Final impact study (phase 4), Royal Tropical Institute; and Veldman, M and B. Wennink, 2019, Promoting land ownership certification in Mabanda and Vugizo, Burundi, Final impact study (phase 7), Royal Tropical Institute. See also the videoclip in which L. Churcher discusses this topic in the context of Uganda.

[18] See e.g. the videoclips in which J. Unruh discusses the case of Afghanistan, S. Takeuchi discusses the case of Rwanda and D. Buuma Bitalya discusses the case of the Democratic Republic of Congo.

[19] See Veldman and Wennink, 2019, supra footnote 14.

[20] Ibid.

3 On the handling of disputes during LTR

To produce accurate and just outcomes, LTR depends on the presence of rights holders, on their understanding of their rights and the stakes and on their ability to react and follow the prescribed procedures when their interests in land are threatened. LTR programme ToCs tend to gloss over such factors and implicitly assume landholders to be sufficiently aware of rights and processes. For the following reasons, without provision for significant investment in supportive measures, such assumptions will be fragile.

Assumption: Land holders involved in LTR will understand when their rights are threatened

Communities confronted with LTR initiatives are usually characterized by significant mobility. This can for instance be labour migration to the capital or to areas where labour-intensive forms of agriculture are practiced. In addition, in FCAS, community members with claims to land may be displaced, internally or abroad. More traditional means of publicising planned LTR activities in their places of origin, in government gazettes or newspapers, if foreseen, may not reach them and when they do, it cannot be assumed that these people will be able to return or take measures to protect their interests. Second, it cannot be taken for granted that right-holders will know when their interests are threatened by the LTR process. LTR will generally be presented to communities as a tool to resolve problems and prevent disputes. They will seldom be informed that the process involves inherent risks of rights being incorrectly recorded and thus of dispossession. In most LTR programmes, apart from general information campaigns, no supporting mechanisms are foreseen allowing land holders to ask questions or to seek advice. Dispossession may result from opportunistic or malicious behaviour of more powerful and better informed and connected community members. But the reasons may also be more complex. In particular, it is often poorly understood, both by land holders and program implementers, that the rights recorded will not be identical to the rights as previously exercised, particular if a transition from customary to statutory law is involved. For example, in many African systems of customary law, women's land rights are subjected to oversight or a superior right by a male family member. It may thus appear natural to them that the right of the man is given priority in LTR. But without tailored advice women will struggle to appreciate that failure or inability to also reflect their right will mean that they will be deprived, under the statutory regime, of the right of opposition against alienation of the land that they would have under customary law.

Assumption: When LTR threatens land holders' rights, they will know how and be able to seek redress

LTR programs and applicable legislation and regulation will generally provide for mechanisms to deal with disputes over parcels that emerge during LTR. For newer generation programs, this usually involves a first tier of mediation-based or other alternative dispute resolution mechanisms manned by community members or community leaders. Some form of judicial process will also be foreseen for disputes that cannot be settled at the community level, as well as time-bound opposition procedures for people who became aware that their interests were harmed only after LTR has had its course. Even assuming that people will understand when their rights are threatened, it cannot be taken for granted that these mechanisms will successfully prevent or correct erroneous recordings of land rights. For the same reasons that land holders may not know when their substantive rights are infringed, they may not be aware of the ways in which to seek redress. And even if they do, they do not necessarily have the ability to act on that knowledge. For fear of repercussion, women may for example be very reluctant to challenge the recording of their right in the name of their husband or other male family member. In this context it should be noted that access to legal aid services for land holders who fear their rights may be threatened is generally not foreseen in LTR programs. The quality of first tier mediation was also called into question in

the exchanges between practitioners on which this brief is based,[21] with the implications that, though considered settled for the purpose of LTR, disputes may effectively continue to fester and can re-emerge later. Particularly in contexts characterized by legal pluralism[22] and institutional multiplicity, disputes will often flow to other institutions than those foreseen in LTR ToCs. This can result in disparity between information recorded, the outcome of dispute resolution, and the perceptions of parties involved. The fundamental objective of LTR to improve tenure security can thus be undermined.

Assumption: The law provides solutions for all disputes that emerge during LTR

A final assumption that needs to be questioned concerns the ability to actually resolve certain types of dispute during LTR. As is evident in the example about the non-recording of women's rights to land provided above, not every problem that may emerge during LTR will have been foreseen or adequately dealt with by the legislator. Disputes between returning refugees and persons who acquired their land after their flight are another frequently occurring example in FCAS contexts. Given the obvious sensitivity of such issues, absent clear and non-discriminatory legislation, the risk of LTR affirming or creating inequities is substantial. A review of the legislative and policy framework, reaching beyond the instruments directly regulating the process of LTR and informed by an analysis of the problems specific groups could encounter in seeking to gain recognition of their rights, is seldom part of LTR programming.

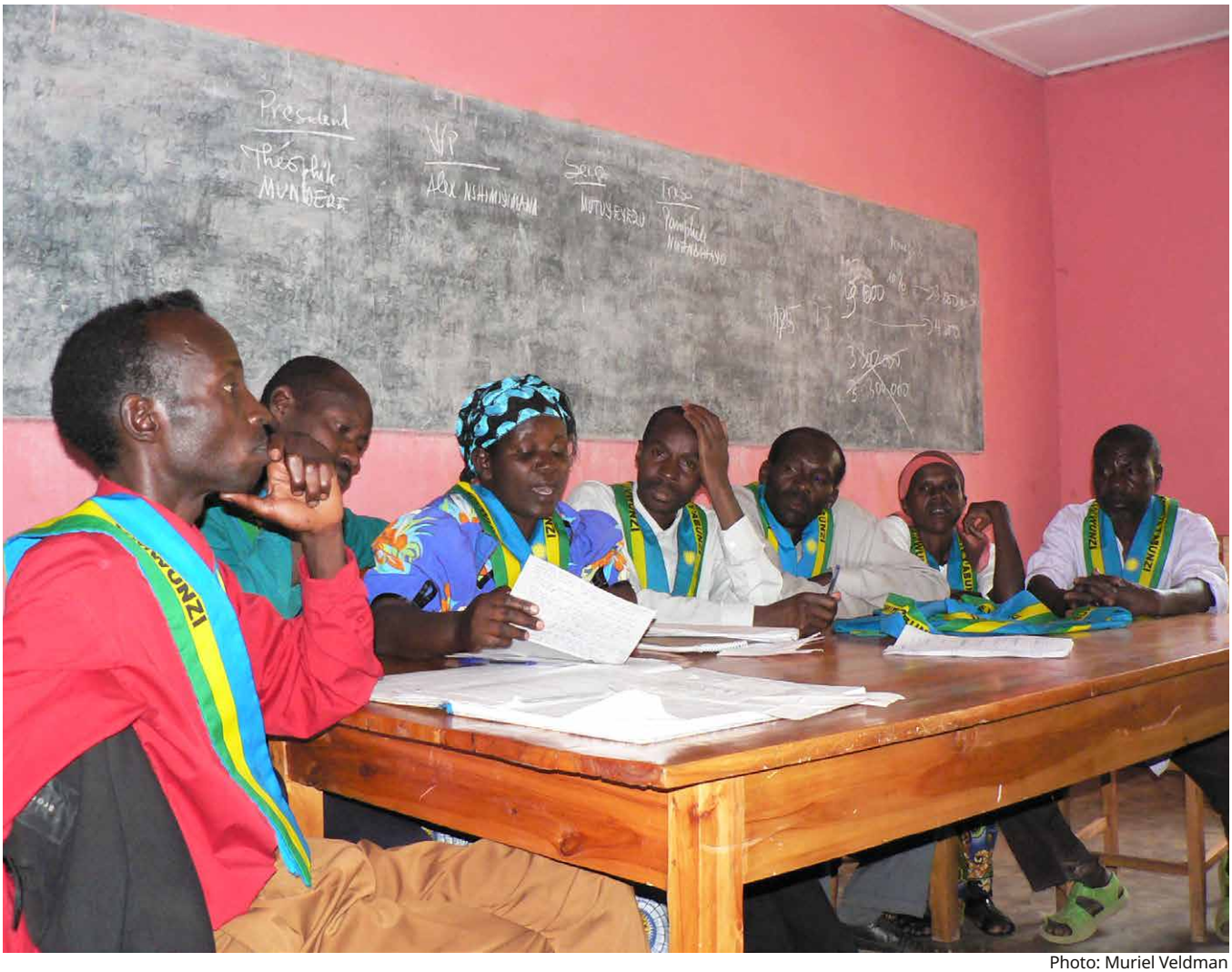

Photo: Muriel Veldman

[21] See e.g. the videoclip in which L. Churcher discusses this topic in the context of Uganda.
[22] See e.g. the videoclip in which M. Wiber discusses this topic more generally and D. Buuma Bitalya discusses it in the context of the DRC.

4 On the emergence of disputes following LTR and the links with A2J

As we have seen, land disputes are likely to continue to emerge in substantial volumes even after LTR. In as much as LTR program ToCs look beyond the immediate lifetime of their intervention and reflect this reality, they will tend to assume that legitimate institutions are available and accessible to receive and handle disputes over registered tenure, that proof of ownership provided through LTR will be used and determine the outcomes of proceedings, that the party that prevails in these proceedings will be able to enforce the decision and that this will eventually result in wide-spread awareness that there is little chance of success in challenging a registered owner and thus in a long term reduction of disputes. These are again assumptions that warrant close scrutiny in the context of FCAS.

Assumption: Holders of recorded land rights have sufficient access to justice to defend their interests

However counter-intuitive this might seem, research shows that without specific measures to this effect, courts do not necessarily consult the information stored in land registries when deciding on land matters, often due to lack of knowledge of the new system, and, when they do, they lack means to verify whether the information in the records reflects the situation on the ground.[23] In this regard it should be realized that recording of transactions occurring post-registration is one of the main challenges affecting sustainability of LTR programs in FCAS, leading to progressive and potentially disruptive inaccuracy of records.[24] Moreover, enforcement of civil judgments can be fraught with problems, meaning that a successful court case supported by a title certificate may not lead to any change in the realities on the ground.[25] And in the perception of land-holding justice seekers, relationships and money will be at least as important in dispute resolution by courts or other institutions as the truth and the facts noted on a land certificate.[26] There will be a widespread perception that if a certain authority adopts an undesired decision, another institution can be found and convinced to produce a more favorable outcome (forum shopping).[27] These factors, which in varying degrees apply to all FCAS, make that over time owners and prospective disputants are likely to develop doubts about the protective value of registration. In sum, without targeted measures to foster better access to justice for holders of recorded land rights, the expectation of a long-term reduction in disputes reflected in LTR ToCs needs to be treated with caution.

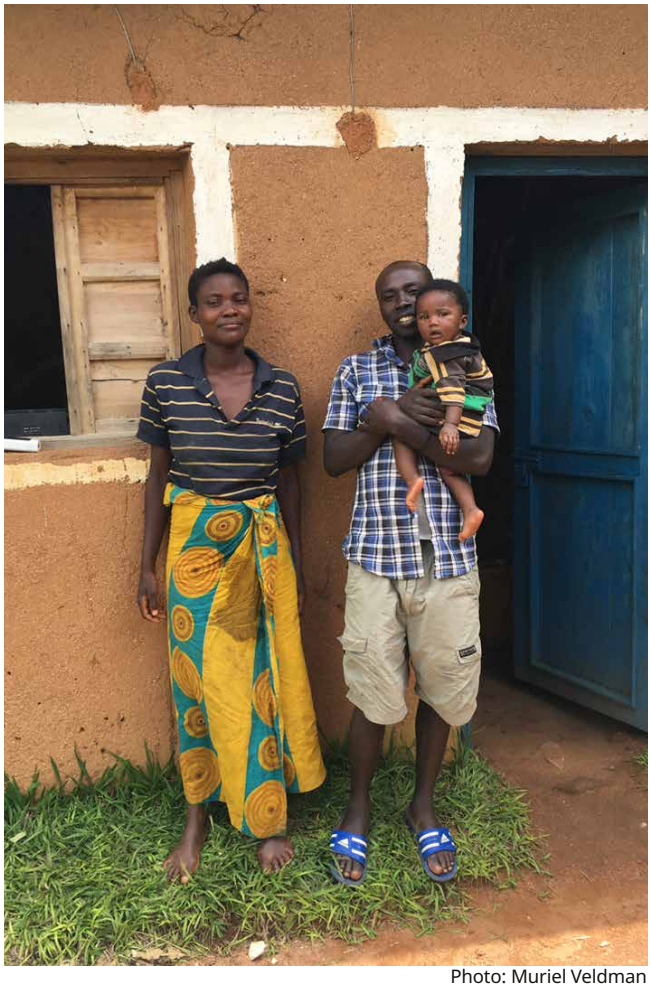

Photo: Muriel Veldman

[23] See Veldman and Wennink, 2019, supra, footnote 14.
[24] Ibid.
[25] See Kohlhagen, 2009, supra, footnote 13.
[26] See Veldman and Wennink, 2019, supra, footnote 14.
[27] Ibid.

5 Conclusion and recommendations

Many FCAS face elevated levels of land disputes. These can impede development, peace and security. LTR is often put forward as an important part of an effective policy response to deal with this problem. However, the effects of LTR cannot not be taken for granted in FCAS. Improving various aspects of access to justice, in a broad sense, will often be indispensable to the success of LTR in terms of reducing and managing dispute levels and to avoid exacerbating existing problems.[28]

- Given the centrality of land dispute reduction in LTR programming in FCAS – including for realizing expected follow-up effects such as land market development, better access to credit and enhanced land-based investment - land dispute management should be an integral, explicit and detailed component of LTR program ToCs.
- In such contexts, LTR programming and ToC development should best be preceded by an assessment (informed by political economy analysis and conflict sensitivity analysis) to determine whether conditions are met for LTR to contribute to a reduction in disputes, whether prior or complementary action is needed, notably to improve access to justice, or whether less invasive policy or programming options are available and preferable.
- The inquiry regarding the need for prior or complementary action should put focus on the ability, particularly of marginalized land holders, to claim and defend their rights during and after LTR, considering legal awareness (the basics of their substantive and procedural rights), access to legal advice and assistance, and equitable access to capable and legitimate dispute resolution mechanisms.
- It should also consider the legal and policy framework surrounding LTR and dispute resolution, with attention for discrimination or exclusionary practices affecting land rights inscribed in or inadequately dealt with by law or policy, as well as the possibility that vagueness or uncertainties regarding mandates or responsibilities of (e.g. customary) institutions lead to problems, such as forum shopping, corruption and inability to enforce decisions and, ultimately, to the persistence of disputes despite LTR.
- Most LTR programming foresee some mechanisms to resolve disputes that stand in the way of registering land holdings, but these tend to take the form of one-off exercises in mediation or adjudication necessary to allow mass registration to proceed. However, it is important to realize that, even with complementary measures taken, disputes over land are likely to continue to emerge in substantial volumes and to consider ways to sustainably strengthen dispute management capacity after completion of the LTR process.
- In so doing, it will be preferable not to create new institutions or mechanisms to deal with the disputes arising during or after LTR, as these can lead to ill-adjusted outcomes, may increase the scope for forum shopping and corruption, can erode pre-existing institutions, and without buy-in from local stakeholders will struggle to survive after the end of the program. As much as possible dispute levels should be managed by relying on and strengthening capacity of existing institutions, including customary and community-based institutions.

[28] See also the 4 digital postcards that summarize the key messages of this brief and that are available on the Knowledge Platform Rule of Law website.

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