9
Real Land Governance and the State: Local Pathways of Securing Land Tenure in Eastern DRC

Aymar Nyenyezi Bisoka and Klara Claessens

Introduction

In this chapter, we will analyse the different manifestations of the state in the domain of land governance in Eastern DRC, in order to improve our understanding of its modes of action in a so-called fragile state. Securing property rights, as well as the delivery and registration of land ownership and occupation rights, are roles that are classically associated with the state. However, the management of these rights and its related conflicts requires arbitration by a public authority, often outside of the state. In Eastern DRC, different non-governmental actors and local elites set up mechanisms to ensure this public role. Through the analysis of different cases studying the involvement of institutions and individuals that have no a priori links with the state (such as NGOs, customary authorities and economic actors) in the delivery of services in the domain of land governance, we will demonstrate how these actors are intrinsically linked with the state. This analysis will shed light on processes of state legitimisation and state-building through these linkages.

Studying the delivery of public services in the domain of land management, and the role of state and non-state actors herein in the DRC, is particularly relevant given the country recently embarked on an ambitious land-reform process. After being re-elected in 2011, President Joseph Kabila highlighted the need for a land reform process to increase the well-being of both rural and urban populations, to limit the number of (land) conflicts, diminish the threat of large-scale land grabbing, to protect property rights more securely, and to facilitate access to credit:

> We will also improve the development and infrastructure of the national territory to achieve … a better living environment for our urban and rural populations. To this end, special attention will be given to land reform, with the aim of limiting the number

> of conflicts, better protecting property holders and facilitating access to credit. (Kabila, 2011)

To kick-start the reform process, the Ministry of Land and the United Nations Human Settlement Programme (UN-Habitat) organised a nationwide dialogue. At a national seminar in 2012, the various actors drafted a document in which they agreed on the need for a thorough, inclusive, bottom-up revision of current land policies with respect to human rights and biodiversity (DRC: MAF, 2012).

The data in this chapter was collected by the two authors in the course of their respective PhD projects on land governance and access to natural resources in the Great Lakes Region between 2010 and 2016. Both research projects used an inductive, qualitative case-study approach, mainly through in-depth interviews and focus-group discussions with relevant stakeholders, such as small-scale farmers, concession holders, local elites, customary authorities, state authorities, and members of NGOs and civil-society organisations. What is presented in this chapter is only a small selection of relevant cases, analysed throughout these research projects.

In what follows, we will first unpack the most important theoretical concepts. Second, we will give an overview of land governance in the DRC, with particular attention given to the current land-reform process. Next, we will discuss three particular cases where non-governmental actors took up an active role in the delivery of public service in the land arena. We will show how the state is never far from these initiatives, either because it is called upon to grant them legitimacy or because its institutions and symbols are used or mimicked for the same purpose. These cases of land governance beyond the state not only take place in "informal" spaces or at the margins of the law. Referring to the state, or to its institutions and symbols, grants a certain degree of legitimacy to the state. This legitimation process gradually instils new rationalities, contributing to the strengthening of the idea of the state. Following De Herdt (2011), we then conclude that these rationalities constitute an historical "software", necessary for the functioning of the state under construction.

The state, public services and state formation

What makes the analysis of the state difficult is the fact that it is neither a nominalism – a neutral word serving as an instrument to label reality (Panaccio, 2012) – or simply a conceptualism; a reality

endowed with an ontological existence (Marenbon, 1997). As political anthropology suggests, the state is what it announces itself to be as an idea, as well its everyday practice. Hence, to think of the state also implies demonstrating how practices of state legitimation and representation contribute to the process of its formation (Sharma & Gupta, 2006). This dual way of seeing the state is rooted in political sociology, where the state is seen as both a material and mental structure (Bourdieu, 2012).

However, state activities are not exclusively exercised by state institutions in the sense of Abrams and Bourdieu. Besides multiple and diverse manifestations of the state itself,

> … there are also so-called traditional institutions vying for public authority, often bolstered by government recognition … In such cases it is difficult to ascribe rationality to the "state" as a coherent institution; rather, public authority becomes the amalgamated result of the exercise of power by a variety of local institutions and the imposition of external institutions, conjugated with the *idea* of a state (Lund, 2006a, pp. 685–6).

Lund (2006a, 2006b) calls these institutions, which are not the state but which exercise public authority, twilight institutions.

A number of activities, negotiated between state and non-state institutions, contribute to the legitimisation of the state. Here again, it is important to make the distinction between the state as a structure and the state as an idea. First, the structure of the state is shaped through its recognition by other forms of authority – including twilight institutions – participating in authorisation processes, such as land-access negotiations. As Lund (2006b) demonstrates, the participation of the state in the process of recognising an individual's access to resources reinforces the authority and legitimacy of the state, thus contributing to a process of state formation. According to him: "when an institution authorizes, sanctions or validates certain rights, the respect or observance of these rights by people, powerful in clout or numbers, simultaneously constitutes recognition of the authority of that particular institution" (Lund, 2006b, p. 675). Claims to access land, for example, grant authority to the part of the institution that authorises access. The capacity of an institution to allow such access constitutes authority, and consequently contributes to the formation of the state.

In the context of this chapter, we start from the idea that the state can only be understood in relation to other political and social spaces

that shape relations of domination between individuals and the groups to which they belong (Balandier, 1971). Legal pluralism is a valuable approach to look at this interaction between different co-existing social fields. "[It] draws attention to the possibility that within the same social order, or social or geographical space, more than one body of law, pertaining to more or less the same set of activities, may coexist" (von Benda-Beckmann & von Benda-Beckmann, 2006, p. 14). Each social field has different loci of authority that overlap and interact with other social fields. Because of this interaction and overlap, each field is semi-autonomous. This means that each social field generates internal rules and symbols, but is also sensitive to decisions and rules produced by surrounding social fields (Moore, 1978; Griffiths, 1986). The state, then, becomes a place of politics like so many other social spaces. This vision allows us to understand how state actors negotiate their power and authority with actors and institutions in other social and political spaces, and vice versa (Titeca & De Herdt, 2011).

The semi-autonomous quality of the different legal fields might raise questions about the use of state and non-state domains as analytically distinct categories. Indeed, if different social fields are permeable and mutually influencing, the strict dichotomy between state and non-state domains might be considered false. However, we choose to continue using both categories for the purposes of analytical clarity but also, more importantly, because we believe these are relevant categories in the everyday practices and imaginaries of involved actors.

Overview of land governance in the DRC

Below, we give a brief overview of land governance in the DRC, paying particular attention to the current land-reform process.

Historical overview

In general terms, a very broad amalgam of arrangements governs land access and land distribution in the DRC. Because several different ministries deal with land questions, they have overlapping and often conflicting interests and jurisdictions. Besides the state, there are other institutions that produce rules and norms governing land relations. These are often collectively framed under the simplified header of "customary", "communal" or "informal", but they actually include a broad range of arrangements that are historically informed and locally specific (Claessens, 2017).

Despite this reality, there have been several attempts to institutionalise or deny this normative and legal plurality. During the colonial period, a dual land-system was installed in which state law governed state land (*terres domaniales*), and customary law governed indigenous land (*terres indigènes*). This legal dichotomy created a normative duality in the social significance of land: "in the villages, land possession defined a social relation; on plantations, land possession ascribed alienable property rights" (Van Acker, 2005, p. 83). There was thus a de jure recognition of customary land tenure, but colonial interests always overruled local ones. In fact, "indigenous" rights were defined in a very restrictive manner, and the formalisation of these flexible and complex customary systems often entailed reinventing those rights to suit the coloniser's political ends. The vast majority of the land was declared vacant, which led to the expropriation of most of the autochthone communities' land. In addition, the legislation transformed the value of land, allowing it to became a crucial source of monetary wealth with which to finance the colonial project (Clement, 2013; Nzongola-Ntalaja, 2002).

In 1973, Zairian President Mobutu introduced a process of nationalisation or *Zaireanization*, which imposed 100% Congolese ownership on all agricultural, industrial and commercial enterprises.[1] For land exceeding 100 hectares, the political decision on land registration rested with the president or a competent minister. In practice, gaining access to large tracts of land, such as agricultural plantations or forest reserves, depended on being part of the inner-circle of the Mobutist state. Elites who acquired plantations during this time were locally known as *acquéreurs*,[2] or people with privileged political relations (Van Acker, 2005). This, combined with the introduction of the 1973 land law, "strengthened the state's control on the attribution of land rights. It was supposed to be an indirect instrument for the modernization of land institutions, as it allowed the privatization of land that was until then governed by customary arrangements" (Peemans, 2014, p. 19).

The 1973 land law declared all land to be state land. Before this, the colonial legal duality was still applied. From then on, public authorities that could issue registration certificates (*certificats d'enregistrement*) governed the land. Farmers or investors could apply for one of two kinds of certificate: a concession in perpetuity (*concession perpétuelle*), which is only available to Congolese citizens, or an ordinary concession (*concession ordinaire*), which is for 25 years but can be renewed (Mugangu Matabaro, 2008). The new land law made provisions for the management of land held under customary tenure.

Article 389 stipulated that land occupied by local communities could be held under customary arrangements through a presidential decree. However, even though the 1973 land law is still valid, this presidential decree has yet to be promulgated. Since 1973, the legal status of customary tenure has, to say the least, been highly ambiguous. There is considerable confusion over which authorities are responsible for governing them and over the rights of the users of the customary land (Mugangu Matabaro, 2008; Utshudi Ona & Ansoms, 2011).

Because of the introduction of the 1973 law, transactions based on customary law became illegal and local communities lost legitimate control over their land, at least on paper. In reality, however, because of the weak implementation capacity of the state and the legal ambiguity surrounding the management of the customary lands, the new law resulted in the de facto persistence of the colonial legal-duality between state and customary land (Vlassenroot & Huggins, 2005). This does not mean that land relations did not evolve. Vlassenroot and Huggins (2005) describe how the 1973 land law profoundly reshaped property structures and access rights. The role of customary authorities as guardians of the land was undermined, and they had to reposition themselves in the changing political landscape. As a result, traditional patron–client relationships gradually eroded, and were partly replaced by new patrimonial relations based on economic gain and wealth accumulation. More concretely, local customary chiefs tried to maintain the positions they had acquired under colonial rule by becoming gatekeepers during the transition from customary control to the introduction of the modern legal system (Vlassenroot & Huggins, 2005).

The current land reform process

The developments described above led to arbitrariness in land division and (re)distribution processes, tenure insecurity and the proliferation of land conflicts. The need for a thorough reform of the land legislation became imperative to addressing these problems. The DRC is one of the last African countries that have embarked on such a land-reform process. Initiated in 2012 and currently suspended, this reform attributes – at least on paper – great importance to local forms of tenure security, in line with the contemporary institutional and political framework about land governance on the African continent. This framework is relatively new and is part of a second generation of African land reforms.

Whereas the first generation of land reforms on the continent was inspired by the idea that customary land governance could not

provide tenure security to boost investment and economic growth,[3] a second and more recent generation of reforms is influenced by research demonstrating the viability and negotiability of customary tenure, in combination with a more human-centred development discourse (Toulmin & Quan, 2000). The land reforms introduced in the immediate aftermath of independence in the 1960s and 1970s[4] proposed the state-led creation of private, individual property titles, whereas more recent reform programs focus on land decentralisation through registration at the level of local governance structures (Delville, 2002). This should lead to the development of more flexible and lighter certification schemes, with the aim of securing land rights more quickly, and at a low cost, by relying on local communities when recognising and validating rights (Colin, Le Meur & Léonard, 2009). The current land-reform process in the DRC should be situated within this second and more flexible wave of African land reforms (Nyenyezi Bisoka & Ansoms, 2015).

The leading land reform document, "Note De Politique Foncière Congolaise", puts forward several arguments when justifying the need for a thorough land reform (DRC: MAF, 2012). First, the obsolescence of previous land laws and their inadequacy in relation to new socio-economic dynamics linked to the requirements of fighting poverty and boosting development. Second, the inconsistencies in the current land administration, which are mostly due to the existence of different, co-existing norm and rule-making systems. This second argument, again according to the underlying logic of the land reform, potentially fuels conflict and impedes international investment (DRC: MAF, 2013). This discourse, stressing the importance of tenure security, is in line with the position of important donors such as the World Bank (Falloux & Rochegude, 1988). In its conceptualisation of tenure security, the World Bank promotes the recognition and participation of local actors in the reform process, believing a direct link exists between land registration, private investment and poverty reduction. Furthermore, they establish a relationship between the informality of land rights and tenure insecurity (Lund, 2000).

The Congolese state thus proposes an approach based on participatory land governance, promoting land-tenure security in order to eradicate food insecurity and conflict, and to increase the viability of subsistence agriculture. This is supposed to pave the way for agricultural investment and increased productivity through the creation of a more open peasantry environment. Furthermore, this should eradicate, or at least reduce, the prevalence of land conflicts. Tenure

security is then obtained through the clarification, recognition and formalisation of local land rights, as well as more efficient and streamlined land governance and administration (DRC: MAF, 2013). The proposed land reform thus assumes a direct and mechanical link between the proposed policies, the formalisation of land rights, conflict prevention, increased investment and poverty eradication.

However, many actors have already cast doubts about the feasibility of such a policy in the context of the DRC (Claessens, 2017; Nyenyezi Bisoka & Ansoms, 2015). As proof, the process of land reform is completely blocked for the moment. On the one hand, political actors do not seem to make this reform a priority. On the other hand, chronic political instability does not provide for an opportune moment for its implementation. Finally, the way in which this reform will really be implemented remains unclear, partly because of the significant social, political and economic differences between various Congolese regions. It is, for example, not clear whether or not the systematisation and formalisation of local transactions in writing will be effective (if at all possible) in the face of a customary oral tradition. Consequently, the Congolese state continues to rely on the outdated 1973 land law, and has great difficulty in providing quality services in land management and land dispute resolution.

In the meantime, local and international organisations, as well as individuals outside the state, have initiated mechanisms to manage and access the land, and to deal with the ever- increasing number of land conflicts. Often, as we will demonstrate below, they mirror, mimic and recycle the state's reference system, and as a consequence should not be analysed in isolation from the state. Furthermore, the state becomes a key player in the legitimisation of these mechanisms of tenure security and conflict mediation.

The role of non-state actors and their relation to the state in land management

As was noted earlier, the Congolese state did not manage to reform the land code, and the state's capability to deliver public landed services – such as land-conflict mediation and the delivery of land titles – is dysfunctional. Consequently, a gap arises between the Congolese statutory land framework and actions and decisions in land management at the local level. In what follows, we will analyse three cases from the provinces of South and North Kivu in Eastern DRC, showing how non-state actors propose arrangements in order

to position themselves in this framework. However, in order for these arrangements to work, they need the involvement of the state, both actively and discursively. The state manifests itself, formally or substantially, through the legitimisation and implicit reinforcement of these arrangements originating outside the state.

Using pieces of paper to formalise local land rights in Kabare and Kalehe

Under the ~~new~~ land law, only a few large landowners were able to register their land. The rest of the land remained governed by a broad variety of locally specific arrangements. In an attempt to secure property and access rights, "small papers" signed between the seller and the buyer of land are increasingly used in order to secure local land tenure (Mugangu Matabaro, 2008; Utshudi Ona & Ansoms, 2011). The purpose of these papers is not to cancel oral forms of land transfer, but rather to formalise these arrangements in the absence of an effective land law. However, they have sometimes increased confusion and created a proliferation of land conflicts because of the lack of uniformity and mechanisms to ensure authenticity and reliability. As a response, different non-state actors in South Kivu have initiated consultations with customary chiefs and local communities in an attempt to systematise these documents and to rationalise their content with the underlying idea to transform these papers into property documents, recognised by all relevant stakeholders including the state.

Yet, these documents are still very locally specific. In the territory of Kabare, they are referred to as "customary-type land contracts"[5] whereas in the territory of Kalehe they are known under the more general header of "occupation and exploitation of customary land" (Mushagalusa Mudinga & Nyenyezi Bisoka, 2014). For non-state actors, these pieces of paper are part of a process of ~~securing land~~ and preventing land conflicts. Furthermore, they serve to strengthen the position of local farmers by guaranteeing local tenure security and protecting them against any monopolisation of customary chiefs, elites or powerful neighbours. Ideally, these documents could be used as a material basis for the land registry office in ~~any~~ attempt to apply for a registered title.

In Kalehe, different NGOs made efforts to formally introduce these certificates. First, individual consultations with the customary authorities were set up in order to convince them of the importance of written documents in avoiding property conflicts. Second, customary chiefs were invited to participate in a workshop to exchange ideas

and draft different possible scenarios. Finally, a conference was organised with different relevant stakeholders. Besides customary authorities, representatives from the state apparatus – such as the local administrators and the local tribunals – participated, with the aim of harmonising procedures for issuing certificates and giving them a legal status.

In Kabare, the process of establishing customary land contracts followed a similar trajectory. Here, the process began in 2009 with meetings initiated by civil society actors in order to raise awareness amongst local customary chiefs. During these sessions, the results of various research projects on land conflicts and their main causes were discussed. Next, bilateral meetings between a civil society organisation and the customary authority of Kabare were set up in order to convince the latter of the importance of its involvement in the establishment of social peace through the provision of secure land access for its citizens. In 2012, this process resulted in the development of the customary-type land contracts.

Whereas the initiatives in Kabare and Kalehe originated outside of the state, they cannot be understood in isolation from the state. First, the move from an oral to a written tradition in transferring land rights is a way of imitating the state's instruments to recognise property, and hence can be seen as an attempt to attach a certain legitimacy to claims originating outside state arenas (Chimhowu & Woodhouse, 2006). Second, the spill-over of state instruments in non-state arenas is mostly accompanied by the presence of state actors. In both territories, attempts were made to include state authorities in the design and implementation phase. This can again be seen as a deliberate move to increase the legitimacy of local practices. Third, these initiatives have been supported by the European Union, the Swiss Cooperation and UN Habitat, institutions that are supporting the land reform process in line with the new land framework stressing the importance of local land security and decentralised land management. It is probably for this reason that clear elements of this framework are found in these initiatives. Finally, the objective seems to put in place certificates or contracts which would replace the "land contracts" provided for in the land reform – which is not yet in place. These NGOs thus seem to be taking the place of the state, which in principle should grant certificates to landowners in the spirit of the new land law.

Using pieces of papers to transfer property rights in Kalehe's plantations

The use of written papers to formalise arrangements originating outside of the statutory realm, to manage social relations and to prevent property conflicts, also occurs outside of the customary domain. On agricultural plantations obtained through an ordinary concession, for example, arrangements of land access and land distribution have been formalised through the use of written documents. This process grants public authority and political power to economic actors – the concession holders. In Eastern Congo, the word plantation refers to specific kinds of large agricultural concessions, most often outside the customary domain. Most of these concessions were established during the colonial period, when they used to produce tropical export crops. Today, after years of political unrest and decades of plunder, foreign colonial settlers have left, and export crops have been replaced by food crops for domestic consumption and sale in local markets. Local Big Men and leaders play a pivotal role in the distribution of land, labour and profits on the plantations. For this reason, the term plantation refers to a large extension of land, on which the management of production and labour derives from the disintegration of the colonial mode of production (Claessens, 2017).

In one particular plantation, Mukwidja, twenty hectares of the plantation have been divided into small residential plots by the concession holder, a local Big Man with connections in important elite circles. He is involved in different economic (e.g. as the president of a local mining cooperative), as well as political, activities. Additionally, as the paternal uncle of the *chef de groupement* (the local representative of the customary authority), he holds strong ties with the customary lineage.

The plantation is thus divided into an agricultural zone (the plantation) and a residential zone (the agglomeration), each with a different set of rules regulating access to the land. But in both zones, the most important gatekeepers are the concession holder and his manager. As in most plantations in the area, land access in the agricultural zone is managed through three land-access mechanisms: *métayage*, *salongo* (both implying labour in exchange for land access for seasonal production) and monetary rental contracts (Claessens, 2013, 2017).

In the residential zone, other rules with regard to land access apply. After having obtained the plantation in the early 1990s, the concession holder started dividing up the land in order to sell the

residential plots in the agglomeration. According to the concession holder, he divided 25 hectares into such plots in collaboration with the land registry service, which issued him with a document confirming the plantation's new legal position.[6] By the end of 2013, twenty hectares were occupied by approximately 1,500 households. People interested in obtaining a residential plot in the agglomeration have to approach the plantation manager. Once the interested buyer has transferred the money, or an arrangement for a credit sale has been agreed upon, the plantation management prepares a "property contract" in the form of a receipt. According to the concession holder, these receipts transfer property rights to the buyer and, consequently – once the transaction is completed – the land no longer belongs to the plantation but to the "new owners of the land". The new owner is now entitled to occupy, sell or install tenants on the plot. However, according to the beneficiaries of these "property contracts", nobody has yet been able to transform their receipt into a title at the land registry office.

The property receipts are a very local and temporal attempt to ensure tenure security, and to pursue the very personal agenda of the concession holder. However, their legitimacy is confined to the physical borders of the (former) plantation. The volatility of these arrangements became clear in a neighbouring plantation where similar land access arrangements were negotiated between the land users and the plantation's management. However, when the management changed, they no longer recognised the written documents issued under the governance of the previous management. These developments worry Mukwidja's inhabitants. Local civil society reacted by setting up a meeting with the concession holder. They asked him to show documents from the land registry office proving that the agglomeration had been officially parcelled out:

> To reassure the population, we asked [the concession holder] to show us the document of the land registry office proving that the creation of the agglomeration is legal. He said that he has the document, but he didn't show it to us. He also said that the receipt he gave us is sufficient and that we shouldn't panic. We accepted his words without being satisfied.[7]

Besides the practice of transferring property rights, the concession holder also refers to the state arena while legitimising the local land governance arrangements. He refers to the potential advantages of the agglomeration's development in terms of economic prosperity,

security and stability. More concretely, he uses arguments related to the locality's economic and security situation, and states that its foundation contributes to a boost in local development. He calls it an "urbanization project" based on the model of Butembo, a city in the province of North Kivu, where he witnessed this little town develop into a regional trading hub. "When people keep on coming to Mukwidja, I prefer that it is an agglomeration instead of an agricultural plantation. Commerce is replacing concessions."[8] According to him, Mukwidja has some comparative advantages that will help develop the agglomeration into a commercial centre. The first is its strategic location between the region's two major towns of Goma and Bukavu, not to mention its advantageous position on the lakeside with access to the island of Idjwi and to Rwanda. In addition, he underlines the security advantage by stating that there has never been pillaging in Mukwidja; "every time armed groups and even the Congolese army were coming, I gave them something and every time they left without any problem." This is also confirmed by some inhabitants of the agglomeration:

> During this period of rebellion, our locality was very safe. After all, he is a man with good relations. He also developed good relationships with the leaders of the RCD,[9] military leaders and political leaders … He was the only one that could talk to the rebels and he was the only one the rebels would listen to. He could tell them what to do and what not to do.[10]

This legitimising discourse refers to the historical role of the colonial and the postcolonial state as the provider of security, development and the daily organisation of the peasantry. Here it is important to distinguish again between the state as a system and the idea of the state (Abrams, 1977; Sharma & Gupta 2006). Indeed, since the implosion of the Congolese state in the 1990s, security and development are partly being organised outside of the state (Meagher, 2012). Despite these practices, claims with regard to the role of the state are to a large extent based on a collective memory of a strong and developmentalist state, mainly referring to the colonial period and the initial years of the one-party state, until the end of the 1970s. This imaginary of the state continues to influence claims being made with regard to the role of the state. In this sense, discursive references to strong leadership, development and security are important elements on which an ideal image of the state is constructed.

Formalising local agreements in order to mediate land conflicts in Fizi and Uvira

For a final example of how local arrangements originating outside of the statutory realm are clearly linked with the state, and even with more international frameworks, we move southwards to the Ruzizi planes, where land-use and land-access conflicts between cattle holders and agriculturalists are prevalent. When dealing with these conflicts, some actors no longer choose to rely on informal mediation sessions and verbal compromises. Instead, they increasingly relate to a signed agreement, locally known as "*acte d'engagement*".[11] This has been observed in conflicts between farmers (Babembe and Bafuliiru), pastoralist (Banyamulenge) and customary chiefs in the territories of Uvira and Fizi (Mushagalusa Mudinga & Nyenyezi Bisoka, 2014). Since 1996, customary chiefs, mainly Babembe and Bafuliiru, have accused cattle raisers of not paying their rights of passage (*itulo*), and of allying with armed militia to steal their cattle. In turn, pastoralist accuse the customary chiefs of infringing their freedom of movement and discriminating against them. The *itulo* has always served as a mechanism to regulate relationships between cattle raisers and the customary authorities of the territories they cross and in which they graze with their livestock. Concretely, *itulo* is paid in the form of a gift – traditionally in kind (cassava for farmers, gold for diggers, or cows for cattle raisers) – to the local chiefs in exchange for their kindness, recognition and protection.

In 2011 (Baraka/Fizi) and 2012 (Uvira), thanks to the facilitation of local civil-society organisations, the three conflicting parties met and defined mechanisms to manage and facilitate the cohabitation of agriculturalist and cattle raisers. They developed a text, "agreement for a peaceful transhumance", containing the commitments of each party and how conflicts related to access to livestock, land and water should be managed. These signed agreements introduced some novelties compared to their oral predecessors. They included the organisation of a joint prospecting mission to identify and determine the areas of passage and grazing, the establishment of joint committees – including representatives of customary authorities, farmers and cattle raisers – to manage conflicts, and, finally, the maintenance of *itulo*'s non-monetary and symbolic nature. For their part, the customary chiefs committed to invest in the safety of the cattle raisers, in particular by dissociating themselves from armed groups and accepting the possibility of paying the *itulo* collectively. The cattle raisers, on the other hand, committed to disarm, as well as respecting the land and wells of the farmers when grazing and

crossing. Today, this document serves as a reference in the management of land disputes related to transhumance in the territories of Fizi and Uvira.

In North Kivu, a similar type of arrangement between local populations, customary leaders and civil society had more far-reaching consequences, since it resulted in the elaboration of a land decree, eventually adopted by the provincial assembly in 2009–10. The initiators of this agreement were not only involved in conducting research on land conflicts in North Kivu, but they also offered suggestions for land reform at the national level. After a careful analysis of the types, causes, actors and consequences of land conflicts, these initiators found that customary authorities had succumbed to the influence of the socio-political context in an opportunistic way. Their analysis criticised the limitations of the local normative framework governing land issues and its role in the perpetuation of land conflicts. In particular, they demonstrated that the unrealistic expectations of the ordinance foreseen in Article 389 of the 1973 land law (see earlier this chapter) led to a continued vagueness with regard to the management of customary land, to the advantage of customary authorities managing these lands. This ambiguity favoured opportunistic customary leaders, who manipulated land rules to facilitate personal access, or the access of their personal network, to the detriment of peasants (Claessens, Mudinga & Ansoms, 2014; Nyenyezi Bisoka, 2016; Utshudi Ona & Ansoms, 2011). To remedy this situation, these organisations undertook consultations with customary leaders, local people and leaders of local organisations, with the aim of making concrete policy proposals. Furthermore, a code of conduct for customary chiefs in land matters was drafted, signed and adopted, in the form of a provincial decree by North Kivu's provincial assembly.

The establishment of these agreements and decrees is linked to a lack of clear regulations regarding transhumance and the role of customary chiefs in land management. This lacuna encouraged several non-state organisations to reflect on land tenure security in line with the new land framework and the newly proposed land law in the DRC. Even if these initiatives are implemented at the micro level, non-state actors sometimes advocate for the integration of positive local practices and concerted local norms into national land reform. The objective is then to arrive at a land reform through a bottom-up process by clarifying the ambiguities, integrating the forgotten elements, and capitalising on the opportunities not captured by the 1973 law. In this specific case, non-state organisa-

tions believed that overarching land regulations at the national level are imperative, while at the same time local specificities must be taken into account, something the 1973 law failed to realise.

Local land arrangements and the state

Three main points arise out of comparison of our three case studies. First, the 1973 land law attributes a clear monopolistic role to the state as the sole deliverer of services in the domain of land management. However, this law was clearly unrealistic in light of the already apparent political struggles over land access and distribution originating from the colonial policies and the postcolonial nationalisation policies, and was hence never implemented in practice. This has been recognised by the 2012 land reform process, which states that the 1973 law was never adapted to local realities, and that its de jure implementation led to dysfunctional land governance. Consequently, the state was, and continues to be, incapable of delivering these services, especially in rural areas.

This brings us to the second main point of this chapter, namely that the incapacity of the state to deliver services in the domain of land governance according to the 1973 law does not mean that the state is absent in local land-governance arenas. All three cases clearly show how different non-state actors, such as NGOs, customary leaders and individual actors, take responsibility over roles classically associated with the state, such as land access regulation, tenure security and conflict mediation, and hence are involved in service delivery. Indeed, apparent non-political arenas, such as land governance, then "reveal themselves to be active sites of political negotiations and mediation over the implementation of public goals and the distribution of public authority in which local and regional identities and power relations are shaped and recast" (Lund, 2006a, p. 686). This is a clear example of a twilight institution (Lund, 2006a, 2006b) where non-state actors offer public services in the domain of land governance and thereby exercise public authority.

This offers opportunities for non-state actors. The most obvious example is the plantation of Mukwidja, where the concession holder clearly attempts to control his own land access and to enforce his local power position by actively creating a pool of subjects dependent upon him for their access to land and livelihood. In the two other cases, the political character of the land management arrangements is less ostentatious, but nonetheless present. In these cases, NGOs

with the collaboration of customary chiefs participate in the decision-making processes land access rules.

The third main point is that, while these land management practices indeed fill a void in the state's capacity to deliver services, it is fascinating to see that they do so by making references to the state and its instruments.

In the plantation case study, this clearly appears in the form of the receipts containing clear references to ownership documents delivered by the state. Furthermore, the assertion that these documents are recognised by the state, and can be exchanged for official documents at the land registry offices, is a clear reference to state institutions. Also, in the other cases discussed in this chapter, official documents were imitated in order to increase their legitimacy. In addition, the participation of state agents in activities organised by NGOs to convince state institutions to legally recognise documents delivered outside of the state realm clearly link these informal practices to the state. Hence, the state remains an important player, both practically and discursively, in the land governance arena. These arrangements either use elements from the statutory realm to legitimise their actions, or seek the explicit involvement of state actors in moving arrangements from the non-statutory realm to arrangements formally recognised by the state.

We provide below examples from our three cases in order to further clarify this point. The different attempts to formalise customary land access and distribution practices in Kalehe and Kabare all took the form of written documents. The mere fact of formalising social relationships in a written form is a way of mimicking "the sources of legitimacy of property recognized by the state" (Chimhowu & Woodhouse, 2006, p. 257). These actors want these "little papers" to be recognised at the same level as officially registered land titles. Therefore, they contain similar information as official titles, such as the measurement of the plot, the name and signatures of the both parties and their witnesses, and official stamps.

This imitation of the state's practices is always accompanied by the presence of real state actors. In Kalehe, for example, the administrator of the territory was involved as a state representative in the negotiation set up by the NGOs. His presence, however, does not mean that these arrangements will be formally recognised per se. It is rather a deliberate attempt to increase the legitimacy of these practices in order to encourage the local population to adhere.

Also, in Mukdiwja, in establishing his public authority and to boost the legitimacy of the locally negotiated land-access arrangements,

the concession holder actively evokes symbols from the statutory realm. This process of legitimation takes two distinct forms. First, it is the use of the state's instruments, in this case the receipts, or locally registered land-property titles which should look as much as possible like formal property titles. Second, in his discourse, he actively instrumentalises the idea of the state to legitimise local practices. For example, he stresses his alleged collaboration with the land registry office when subdividing the plantation. This is a clear attempt at showing how these arrangements are almost equivalent to formal property titles. The importance of stressing this collaboration with the state is noticeable in the local population's attempts to get hold of the land registry's documents. Furthermore, while stressing his role as a local Big Man, he refers to the role of the state as facilitator of development and security. Through connectedness in official elite circles, he becomes part of the state's image in the eyes of the local population. In this way, Mukwidja's inhabitants attempt to reach the state through the concession holder.

In Baraka, Fizi and Uvira, local NGOs were involved in conflict mediation between cattle raisers and farmers. Again, it would be too simplistic to state that they are simply taking over the state's role to mediate conflicts. They actively sought the compliance of the state in their local arrangements in order to increase their legitimacy. The presence of both customary leaders and state actors is imperative to ensuring the efficiency and the durability of these arrangements. There is thus a certain contradiction in the NGOs involvement. If they need the compliance of the state to be legitimate, why not resort to the state directly? Here, again, it is important to differentiate between the state in its local manifestation through individuals, and the need of the population to see their rights legitimised by the state. The involvement of NGOs points to the dissatisfaction of the local population with state representatives, whereas the *idea* of the state remains important to legitimise local practices. Consequently, while mediating between cattle raisers and agriculturalists, NGOs simultaneously mediate social relationships between the local population and local state elites.

As a final example of how elements from the state arena are used to legitimise local practices, we could refer to dynamics in North Kivu. Here, NGOs were involved in the mediation of land conflicts and drafted a code of conduct for customary chiefs. This code was drafted in statutory language in order to appeal to provincial legislators. Later on, this code was indeed adopted by the provincial assembly as a decree. Local arrangements were thus transformed into

state law without the state taking initiative. More than this, non-state actors took ownership of the whole process of drafting new laws. This does not mean that local state actors were not involved. As was said before, their presence was instrumental in assuring local legitimacy and facilitating the code's transformation into an official decree.

In summary, in all three cases active attempts were made to legitimise local arrangements by drawing on elements from the state, which, implicitly, contributes to the legitimation at once of these practices and of the state. In fact, we could speak about a double legitimation process. The state can formally recognise local arrangements, as was the case with the code of conduct eventually adopted as a decree by the provincial assembly in North Kivu. But legitimation might also occur from a bottom-up perspective, whereby clear references to the statutory realm are used to evoke local legitimacy.

Conclusions

The goal of this chapter was to reflect on the different manifestations of the state in Eastern DRC, based on practices of service delivery in the domain of land governance. From the outset, we have analysed the empirical cases through a socio-anthropological perspective on the African state. This perspective suggests thinking of the state beyond its institutions, and rather on the basis of its actions and various manifestations at the local level. These manifestations are always dependent on specific socio-historical processes, to each issue at stake and to each local context. Such a "weblike" description of society shows that the state cannot be understood in isolation from local initiatives that have no a priori link with the state system, and vice versa.

Through different case studies of local land governance, we showed how the imagination and manifestation of the state in this particular field is peculiar. The Congolese are not completely paralysed by the ineffectiveness of the 1973 land law that is supposed to govern the delivery of service in the area of land management. Different non-state actors draw on state symbols to legitimise their actions. On the other hand, the state also "lends" its symbols to individuals and institutions active in the delivery of land services to the population. We called this a double process of legitimisation, since the state can formally legitimise (for example, through legal recognition) local land arrangements, whereas legitimation can also be induced from a bottom-up perspective through (discursive and other) references to the state and appropriation of its symbols.

Different non-state actors – such as civil society organisations, individuals and customary authorities – are involved in land governance on three different, but interlinked, levels, with regards to filling a void in the state's capacity to deliver services, as important drivers of processes of social change, and ultimately as part of a process of state-building. First, their involvement might be of pragmatic nature, since locally introduced land arrangements compensate for the 1973 land law's ineffectiveness, which is mainly caused by the inadequacy of the law in relation to specific realities on the ground. This is more widespread in rural areas, where most of the land is not formally registered.

Second, the involvement of non-state actors in the delivery of land management services and distribution is part of a process of social change. In a context where most land is still mainly managed by local and customary practices, the introduction of written documents as instruments to formalise certain access rights is an important element in this process of change. Gradually, the need for written documents to replace oral proof in customary arrangements becomes important and more widespread, since the latter no longer sufficiently secures access rights.

Third, the involvement of non-state actors is part of a process of state-building. The use of written documents introduces new constellations of authority and legitimacy that were irrelevant before. Access rights are no longer only determined by (mostly oral) testimonies of local authorities. It also becomes a matter of questioning the authenticity of the signed papers. What is their legal nature? Who are the witnesses? Which authorities signed them? Who contests them? Our case studies have shown that the formal or informal involvement of state authorities is important in strengthening the legitimacy of these documents, even if they originate outside the state. Moreover, the case of North Kivu showed how non-state actors used the state to legitimise and even legally enforce initially informal arrangements. This important legitimising role of the state can also be observed in the case of Kalehe's plantation, where an individual transferred property rights to the new occupants of the plantation. To reinforce the legitimacy of these documents, he uses state symbols. Furthermore, he underlines his compliance with the state's requirements in terms of land distribution and registration by insisting that the subdivision of the plantation was recognised by the land registry office.

The question remains as to how the dynamics in the different cases contribute to processes of state-building. Following De Herdt (2011), we distinguish between two different processes of state-building. On the one hand, there is the institutional setting and on

the other hand there is the "software" necessary to make the institutional machinery function. Beyond institutional mechanisms, cognitive predispositions are needed before institutional reform can be understood, internalised and applied. Following this logic, the cases we developed in this chapter are examples of how particular local predispositions in the domain of land governance are gradually being built. In the process of state-building, local land management practices are gradually moving towards a specific rationality, similar to that of the state's, that conceives access rights on the basis of (mainly private) land ownership (Nyenyezi Bisoka, 2016).

In short, it is a question of determining the owner of the land before considering its users. The increasing use of written documents and the importance of obtaining state legitimation introduced by non-state actors introduces and internalises this rationality. This more private rationality can be considered as an element of the "software" in the processes of state-building. This is often done to the detriment of communal notions of ownership, enshrining the inalienability of land – a rationality founded in the customary realm. The successful implementation of land reform is therefore not primarily based on the actors' ability to establish and enforce strong institutions, but rather on people's practices that seemingly reproduce notions of the state, its roles and its different manifestations.

Notes

1 The economic crisis that followed forced Mobutu to revise this policy in 1975 and return 60% of the nationalised enterprises' capital to their original owners.
2 Literally "acquirers".
3 For a historical overview of land reform on the African continent, see Bassett (1993).
4 It should be noted that these reforms were often continuations of policy choices put in place by the colonial administration.
5 In French, these contracts are referred to as "contrat foncier coutumier-type".
6 Interview. Mukwidja concession holder. Mukwidja (14 November 2013).
7 Interview. Mukwidja inhabitant. Mukwidja (14 November 2013).
8 Interview. Mukwidja concession holder. Mukwidja (14 November 2013).
9 The RCD (Rassemblement congolais pour la Démocratie) was a rebel movement that played a major role in the second Congo war (1998–2003). During this conflict, they occupied and managed vast territories in Eastern DRC. Access was (and continues to be) used as a resource to reward allies and to gain proximity to the political centre. The reference in this quote to the alleged relationship between the concession holder and the RCD should be considered in this regard.
10 Interview. Civil society representatives. Mukwidja (15 November 2013).
11 "Act of Engagement".

References

Abrams, P. (1977) Notes on the difficulty of studying the state. *Journal of Historical Sociology* 1 (1): 58–89.

Balandier, G. (1971) *Sens et puissance*. Paris: PUF.

Bassett, T.J. (1993) Introduction: The land question and agricultural transformation in sub-Saharan Africa. In: Bassett, T.J. and Crummey, D. E. (eds) *Land in African Agrarian Systems*. Madison, WI: University of Wisconsin Press, pp. 5–18.

von Benda-Beckmann, F. and von Benda-Beckmann, K. (2006) The dynamics of change and continuity in plural legal orders. *The Journal of Legal Pluralism and Unofficial Law* 38 (53-54): 1–44.

Bourdieu, P. (2012) *Sur l'État: Cours au Collège de France 1989–1992*. Paris: Seuil et Raisons d'agir.

Chimhowu, A. and Woodhouse, P. (2006) Customary vs. private property rights? Dynamics and trajectories of vernacular land markets in sub-Saharan Africa. *Journal of Agrarian Change* 6 (3): 346–71.

Claessens, K. (2013) « Sans plantations, je ne peux pas vivre »: l'accès négocié aux plantations agricoles dans le territoire de Kalehe. In: Reyntjens, F., Vandeginste, S. and Verpoorten, M. (eds) *L'Afrique des Grands Lacs: Annuaire 2012–2013*. Paris: L'Harmattan, pp. 249–67.

Claessens, K. (2017) Land, Access and Power. Case studies from Kalehe, DRC. PhD Dissertation: Institute of Development Policy and Management, University of Antwerp.

Claessens, K., Mudinga, E. and Ansoms, A. (2014) Competition over soil and subsoil: Land grabbing by local elites in South Kivu (DRC). In: Ansoms, A. and Hilhorst, T. (eds) *Losing Your Land: Dispossession in the Great Lakes*. Woodbridge: James Currey, pp. 82–102.

Clement, P. (2013) The land tenure system in the Congo, 1885–1960: Actors, motivations and consequences. In: Frankema, E. and Buelens, F. (eds) *Colonial Exploitation and Economic Development: The Belgian Congo and the Netherlands Indies Compared*. New York, NY: Routledge, pp. 88–108.

Colin, J.-P., Le Meur P.-Y. and Léonard E. (eds) (2009) *Les politiques d'enregistrement des droits fonciers: Du cadre légal aux pratiques locales*. Paris: Karthala.

De Herdt, T. (ed.) (2011) *A la recherche de l'Etat en R-D Congo*. Paris: L'Harmattan.

Delville, P.-L. (2002) When farmers use "pieces of paper" to record their land transactions in Francophone rural Africa: Insights into the dynamics of institutional reform. *European Journal of Development Research* 14 (2): 89–108.

DRC: MAF (Democratic Republic of Congo: Ministère des Affaires Foncières) (2012) Atelier national sur la réforme foncière: Communiqué final.

DRC: MAF (Democratic Republic of Congo: Ministère des Affaires Foncières) (2013) Réforme foncière: Document de programmation.

Falloux, F. and Rochegude, A. (1988) Land tenure as a tool for rational resource management. In: Falloux, F. and Mukendi, A. (eds) *Desertification Control and Renewable Resource Management in the Sahelian and Sudanian Zones of West Africa*. Washington, DC: World Bank, pp. 10–27.

Griffiths, J. (1986) What is Legal Pluralism? *Journal of Legal Pluralism* 24: 1–56.

Kabila, J. (2011) Speech given during his inauguration. Available from: www.congoplanete.com/download/

DISCOURS%20DE%20JOSEPH%20KABILA%20LORS%20DE%20SON%20INAUGURATION%20LE%2020%20DECEMBRE%202011.pdf [Accessed 28 November 2018].

Lund, C. (2000) *African Land Tenure: Questioning Basic Assumptions*. London: IIED.

Lund, C. (2006a) Twilight institutions: Public authority and local politics in Africa. *Development and Change* 37 (4): 685–705.

Lund, C. (2006b) Twilight Institutions: An Introduction. *Development and Change* 37 (4): 673–84.

Marenbon, J. (1997) *The Philosophy of Peter Abelard*. Cambridge: Cambridge University Press.

Meagher, K. (2012) The strength of weak states? Non-state security forces and hybrid governance in Africa. *Development and Change* 43 (5): 1073–101.

Moore, S. F. (1978) Law and social change: The semi-autonomous social field as an appropriate subject of study. In: Moore, S. F. *Law as a Process: An Anthropological Approach*. London: Routledge and Kegal Paul Books, pp. 719–46.

Mugangu Matabaro, S. (2008) La crise foncière à l'est de la RDC. In: Marysse, S., Reyntjens, F. and Vandeginste, S. (eds) *L'Afrique des Grands Lacs: Annuaire 2007–2008*. Paris: L'Harmattan, pp. 385–414.

Mushagalusa Mudinga, E. and Nyenyezi Bisoka, A. (2014) Innovations Institutionnelles des acteurs non-étatiques face à la Crise foncière en RDC: Légitimité, efficacité et durabilité en question. In: Reyntjens, F., Vandeginste, S. and Verpoorten, M. (eds) *L'Afrique des Grands Lacs: Annuaire 2013–2014*. Paris: L'Harmattan, pp. 159–79.

Nyenyezi Bisoka, A. (2016) Invention de la terre et production des anormaux dans le dispositif foncier en Afrique: Pouvoir et résistance à l'accaparement des terres en Afrique des Grands Lacs. PhD Dissertation. Université catholique de Louvain.

Nyenyezi Bisoka, A. and Ansoms, A. (2015) Accaparement des terres dans la ville de Bukavu (RDC): Déconstruire le dogme de la sécurisation foncière par l'enregistrement. In: Marysse, S. and Omasombo, J. (eds) *Conjonctures congolaises 2014*. Paris: L'Harmattan, pp. 217–38.

Nzongola-Ntalaja, G. (2002) *The Congo from Leopold to Kabila: A People's History*. London: Zed Books.

Panaccio, C. (2012) *Textes clés du nominalisme: Ontologie, langage et connaissance*. Paris: Vrin.

Peemans, J.-P. (2014) Land grabbing and development thinking: The Congolese experience. In: Ansoms, A. and Hilhorst, T. (eds) *Losing Your Land: Dispossession in the Great Lakes*. Woodbridge: James Currey, pp. 11–35.

Sharma, A. and Gupta, A. (2006) *The Anthropology of the State: A Reader*. Malden, MA: Blackwell.

Titeca, K. and De Herdt, T. (2011) Real governance beyond the 'failed state': Negotiating education in the Democratic Republic of Congo. *African Affairs* 110 (439): 213–31.

Toulmin, C. and Quan, J. (2000) *Evolving Land Rights, Policy and Tenure in Africa*. London: IIED/ Natural Resources Institute.

Utshudi Ona, I. and Ansoms, A. (2011) Reconciling custom, state and local livelihoods: Decentralized land management in South Kivu (DRC). In: Marysse, S. and Ansoms, A. (eds) *Natural Resources and Local Livelihoods in the Great Lakes Region of Africa*. London: Palgrave Macmillan, pp. 26–48.

Van Acker, F. (2005) Where did all the land go? Enclosure and social struggle in Kivu (DRCongo). *Review of African Political Economy* 32 (103): 79–98.

Vlassenroot, K. and Huggins, C. (2005) Land, migration and conflict in eastern Congo. In: Huggins, C. and Clover, J. (eds) *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*. Nairobi/Pretoria: African Center for Technology Studies/ Institute for Security Studies.