WHOSE LAND ARE YOU GIVING AWAY, MR. PRESIDENT?

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SUMMARY

Using Africa as example, this paper challenges the tenure grounds upon which third world governments are leasing land to foreign investors. It argues that most leased lands are ambivalently the property or right of governments to lease or alienate. The main basis of argument is that customary property rights have rarely been formally extinguished. Presumption by governments that this is unnecessary on grounds that the land is unowned or that customary land interests do not amount to property are egregiously flawed in historical and current reality. Even where customary ownership has been lawfully superseded by state ownership, the procedures followed have been constitutionally questionable in most domestic laws and in international human rights law as necessarily encompassing land rights in agrarian societies.

There are also practical concerns of development and security soundness. With the exception of arrangements whereby farmers are directly contracted by investors, lazy, backward-looking approaches are being tolerated at the very time when felt gaps between rich and poor and state-people conflict makes an inclusive approach to natural asset-based capitalist transformation imperative. It is nonsensical for developing economies to once again miss the opportunity to equitably engage the majority rural poor as shareholders in agrarian enterprise (presuming this enterprise to be viable). While fault lies equally with the international aid and commerce community and with host governments which are putting their citizens' lands in the global market place without their consent, the latter, not investors, are the land grabbers.

Codes of conduct and international trading regulation are insufficient brakes. More fundamental alteration is required in the identity of lessor and accordingly in the rights and duties of host governments. Remedy lies in accelerated domestic and international legal acknowledgement that customary and other longstanding unregistered land tenancy amounts to a real property interest, registered or not. This must be inclusive of collectively owned estates, a main casualty of large-scale leasing. Without this change, majority rural landholders remain little better than squatters on their own land, a condition already wrongfully endured for a century or more. Although some statutes in Africa have made this change, its pursuit is no easy challenge as more widely failing reformism demonstrates. While house plots and cultivated lands begin to be more easily secured, millions of hectares historically owned and use by rural populations are still being kept vulnerable to technically legal appropriation and reallocation by governments. While hardly new, the current wave of state-to-state backed leasing hardens an already dangerous dichotomy between the interests of governments and their people.

This reflects a thornier problem underwriting this issue; that tenure reforms and the democratizing trends within which they are nested continue to fail to challenge the embedded neo-patrimonialism upon which state-people relations are built in pre-open order societies (North et al., 2009) such as still dominate the agrarian world. In these countries, the rent-seeking marriage of political, traditional, and economic elites is so solidly embedded that there is little incentive for the kind of equitable participation which new generation capitalist transformation demands. Instead, in not grasping the nettle, governments are putting themselves in position for strife and civil war to eventually coerce this. In going along with the status quo the international community and investors share responsibility for this rising risk.

Key words: customary land rights, Africa, foreign land leasing, neo-patrimonialism.

INTRODUCTION

WHAT THIS PAPER IS AND IS NOT ABOUT

The current surge in inter-state and international company land leasing in Africa and other continents needs little introduction. The facts, or where facts are shaky, soundly suspected trends, are amply in the public domain.[i]

Aspects of note include: (i) although some 40 or so countries including Cambodia, Indonesia, Russia, Ukraine, Paraguay and Argentina are lessor, the focal target is on land rich and income poor Sub Saharan Africa; (ii) Saudi Arabia has been from the outset and remains the major lessee; (ii) rental rates are cheap in Africa explaining some of the incentive, along with suspected lax conditionality, opaque tenure laws and cheap labour costs; (iii) most lands being allocated are on the basis of lease, not absolute grant or sale, although where leases are renewable they may as well have been sold given the impact on customary users;[ii] (iv) terms and conditions are unclear, parties being coy to release details, raising concerns as to content as well as information rights; (v) while the lessor is almost always a host government, lessees are widening in type from governments and linked sovereign wealth funds to private companies, investment banks, hedge funds and commodity traders looking for quick returns; and (vi) food production is a main objective in the current wave of leasing, triggered by heightened fears of global food shortages following a slump in grain stocks in 2007-08 and sharp rises in food prices. This adds to a slightly earlier trend of leasing for biofuel production, triggered by anticipated decline in oil reserves, compounded by environmental commitments to increase plant-based fuels.

It is also a fact that while what has been termed global land grabbing has provoked an unusual degree of press commentary, this and less populist analysis has mainly focused on the economics, such as in the impact upon family farming and host country food security of biofuel dominance and query as to how current leasing is different from preceding waves of private agribusiness land purchases in especially Latin America and Asia. *The Economist* put it well:

> "When private investors put money into cash crops, they tended to boost world trade and international economic activity. At least in theory, they encourage farmers to switch from growing subsistence rice to harvesting rubber for cash; from growing rubber to working in a tyre factor; and from making tyres to making cars. But now governments are investing in staple crops in a protectionist impulse to circumvent world markets" (May 23rd 2009).

These and related issues rightly continue to be debated. One of the more interesting concerns raised is whether arid Middle Eastern countries are investing less in the land itself than in capturing water futures which go with the land. Comparable doubts are being expressed around Chinese interest in the African continent, with presumption that this may be less for production than capture of natural resources for the longer term, and even locations to deploy surplus Chinese labour.

These relate to worries as to how far investors are being legally bound to produce with vigour and whether foreign leasing will slide into speculative land hoarding. GRAIN, for one, finds the rise of non-agricultural business and hedge funds ominous (16 November 2009). Many ponder the role of local partners in this regard. This resonates with trends seen in Ethiopia for example where local investors, often politicians and officials, do little more than enclose the leased land, and worse, are now predicted to default on substantial government loans, saddling federal and regional administrations with massive debt (pers. comm., Lars Palm, 26

March 2010). Sulle and Nelson, 2009 raise a related concern in Tanzania, where payment of promised compensation to villagers for releasing their lands to government for forward lease to investors, relies upon the investor first using the new title for collateral and making money and repaying government, thereby laying undue risk upon already poor communities.

In amongst these debates it has taken some time for domestic tenure issues to come to the fore (and which given the past history of foreign land leasing in countries like Sudan and the fact that these initiatives not only failed to be sustainable but generated war, suggests a startling lack of institutional memory). Even then, emphasis has largely been upon the abuse of local land rights which occurs through sale or lease of lands being *used* by local communities. The assumption tends to be that host governments own the lands which they are selling or leasing or at least have undisputed legal authority to lease, that the customary or unregistered rights being interfered with do not amount to private property interests, and that the essential abuse is social and can (therefore) only be challenged on humanitarian or agro-economic grounds.

The tenurial legality and justice of land leasing can and must be challenged

It is these matters which this paper sets out to explore. The working hypothesis is simply that a great deal of affected land is subject to *sufficiently ambivalent tenure* to doubt the legality of its leasing by the state in the first instance. Further, it is posited that a statutory 'con' lies at the heart of undue liberties which governments are taking over their citizens' lands; in purposive persistence of archaic norms which enable whole populations to be retained as tenants at will and on increasingly dubious and dangerous grounds. Even should this exploration find this not to be the legal case everywhere – and there are exceptions - we are left with clear directions in which rural land security must be heightened to protect the natural capital of the majority rural poor, and to assure their equitable partnership in more lucrative use of their lands.

Finally, the paper's focus is on Sub Saharan Africa. This is because at least 18 of 33-40 countries worldwide which are newly leasing lands for foreign control and investment are in that region, and because two thirds of the total known land area affected is in that region, or around 15 million ha of an estimated 25 million ha (GTZ, 2009). This is in addition to some 73 million hectares of earlier leased lands for oil, mining and timber extraction by largely foreign enterprise in five Congo Basin states alone (Sunderlin et al., 2008). This is also a sub-continent which has a notoriously abusive history of treatment of indigenous/customary land rights, and which continues to negate or undermine the property rights of some 500 million rural Africans, as outlined in this paper. Recent valiant tenure reformism also shows signs of retracting not expanding, in the face of evidently lucrative (to some) benefits which this new wave of land leasing promises. No attempt is made to assess those benefits. The single question which this paper seeks to help answer is "whose lands exactly are being leased?"

I AN OVERVIEW OF THE PROBLEMATIC

Most field based researches try to identify the third world lands being leased for biofuel, food or livestock production under the aegis of multiplying bilateral investment treaties (BITS). Although more clarity is anticipated from World Bank study (2009), details as to the tenure of leased lands are often curiously opaque. On the one hand, researchers appear to accept that the State or Government has statutory grounds for leasing out. At the same time, there is enough known about this status to know this is not the full story.

GTZ, 2009 describes a Libyan investment in Mali which illustrates the reasons for confusion. This was based on a bilateral investment treaty between the two countries signed in June 2009, leasing 100,000 ha at no cost to Libya for up to 99 years. This land was declared 'free from any juridical constraints or individual or collective property that hinders the exploitation of the land', having been registered as the property of the Niger Basin Authority in the mid 20th century. At the same time it is customarily owned, occupied and used and is in fact both the most important rice producing zone in Mali and key to agro-pastoralist transhumance. Although not so reported by GTZ, the history of Malian tenure over the last century would suggest that at no time were customary property rights extinguished, as such degree of right was not considered as existing. Cession or agreements with local communities were not obtained prior to lease to Libya. Displacement, loss of farmland, flooding of villages, felling of forests, blockage of transhumance routes, lack of irrigation water for Malian fields and dust pollution from the Libyan construction works, are already reported and resistance to the development is being mobilised. Mainly contracted Chinese labour is being used, limiting local employment benefit. Rice production is scheduled for repatriation to Libya. No compensation for loss of access or land use rights has been promised or paid to affected citizens.

Clearly the issue at contention goes deeper than who is the statutorily registered owner, requiring clarification of the status of customary property interests, both within Mali's domestic land law (1996, 2000, 2006), its constitutional bill of rights (1992) and in international law to which it is signatory. It is also necessary in such cases to inquire into the conditions under which the Niger Basin Authority acquired the land 50 or so years past and how customary rights were then handled. Even then, the results can only prove ambivalent, given the Catch 22 of Malian land law, by which customary rights are recognised as existing on *unregistered* lands, but only *registered* statutory entitlements amount to a real property interest.

Not all African states adopt such strategies. As described later, several of the above-listed countries already leasing customary property to foreign investors do so under very different circumstances, and with accordingly less injustice to local rights. However it will also be shown that most African governments claim legal ownership of customarily occupied lands, on one or other or several of the following grounds; that the land is untitled, considered vacant and ownerless in the absence of visible settlements and farms; that the land is considered to have been abandoned, because no recent cultivation prevails; or simply because the state has declared itself the radical title holder of all land or these lands specifically.

Local and historical reality is of course different and gives lie to the underlying presumption in the above, that much of Africa was and remains unowned (*terra nullius*). Instead, it takes little investigation to see that virtually every inch of the continent is *owned* under indigenous/customary norms; *used* in accordance with custom: e.g. shifting cultivation, grazing, hunting, wood & non-wood extraction, spare lands for expansion of farming and habitation, etc., and, where not settled or cultivated is normally the *common property* of identifiable communities within whose customary territorial domains these assets fall.

The fact that modern governments often still do not acknowledge this bespeaks the continuing contradiction faced by an estimated 500 million rural Africans today – and many other millions of rural families globally–that national statute and local common or customary law acknowledge tenure in different and incompatible ways.

These populations do not even have easy recourse to international law, which is unenforceable without full adoption of its terms into domestic law and of ambivalent utility in the matter of majority land rights in Africa in respect of the two instruments which are most pertinent on this matter; the International Labour Organization's Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries and the more recent UN Declaration on the Rights of Indigenous Peoples (2007). These focus on the land rights of marginalized indigenous peoples, and have quite widely been used by regional commissions of inquiry and courts to advice recalcitrant governments to remedy abuses.

However, in the African context, definition of indigenous peoples proves problematic, focused as it is upon hunter-gatherer and pastoral societies, under five percent of current rural populations which historically acquire and hold land through community-based or customary systems. While there is no question that marginalized groups deserve special assistance in securing their land rights, it is regrettable that opportunity afforded to its Commission on Human and People's Rights to clarify this issue was not taken up. Instead, while acknowledging that the rights of all peoples need to be respected, its Working Group on Indigenous Peoples/Communities (2003) fell back on descriptions of indigenous peoples as if limited to minority hunter-gatherer and pastoral societies on the continent.

Thus on several sides, contradiction and imperfections offer an ideal situation for externally driven land capture. At the root lies a persisting legal fact; that many 21st century national land laws do not accord customary land holding equivalency as real property. Depending upon the perspective, this renders many a majority rural population the permissive occupants and users of land which accordingly must belong to someone else – the State, perhaps? The good news for host governments and foreign investors seeking to accelerate access to local lands is that this condition pertains to not only the mere 14-20 million hectares believed to be already recently leased on the continent to external interests, but to potentially one billion hectares. Of course much of this land in infertile and too costly to render fertile, but livestock keeping and crops suitable for semi-arid conditions need not be deterred.

II LOOKING TO CAUSE

To understand how overlapping and uncertain tenure has come to affect such as major proportion of the African continent, it is necessary to look back at recent history. Drawing upon detailed examination of this subject and documentation in Alden Wily, *forthcoming*, these general observations should suffice here.

1. The 20th century saw steady attrition in majority land rights

First, the conflict predictably begins – *but does not end* – with colonization. *Second*, it begins - and *continues* – with socio-legal manufactures. *Third*, the attitude to customary land rights began a good deal more benignly than is usually credited to colonizers. Taking the last century as a whole, the situation *has steadily deteriorated*, at least until 1990. In fact, some of the worst abuses to land rights have followed independence for colonized areas, as outlined shortly.

2. Class and capitalism have played major roles in the demise of rights

Complicity of elites engaged in maximising returns from capitalist transformation has been central to diminishing majority rights, particularly given still often unachieved separation of personal economic interest with political and governance powers. It now seems inaccurate to

ignore the role which real or neo-feudal relations in some parts of the continent played in this and the ease with which colonial masters, and then post-independent states have been able to reconstruct and sustain patrimonial relations for their convenience, including in determination of the content and regulation of community-derived land rights. Only one aspect of this complex relationship is delivered today in debates in no fewer than ten Africa countries (e.g. Ghana, Zambia, Malawi, South Africa, Sierra Leone) as to the rights chiefs have come to exercise or claim over community lands. That is, the demise of majority land rights cannot be entirely attributed to colonial policies, in that these found ready buy-in from chiefly elites and which are quite frequently retained in the patrimonial relations of state and people today, as especially affecting their resource rights. Moreover, even without colonialism, capitalist transformation may as well on its own engineered the strident polarisation in rights which now manifests primarily as a state-people and aligned statutory-customary divide.

3. Tenure uncertainties and contradictions are a legacy of the 20th century

Fulsome state capture of not just sovereignty but all founding rights to the land within local territories would have produced a simpler pattern of dispossession and recovery on the African continent that is the case today. Over the last century there have been brakes on this implicit objective of the colonizing parties at Berlin in 1885, producing significant contradictions. These began with the awkward precedents set by traders and even royally chartered companies themselves by initially buying large chunks of coastal Africa, implying Africa was not exactly unowned, along with at times fairly equitable treaties within kingdoms and chiefdoms providing security and goods in return for exclusive trading rights for humans, ivory, gold and other assets. It may end today with rising lack of compliance of rural populations with such diminishment and manipulation of their land interests as has in the interim occurred. From the outset there were inconsistencies in the classification of native rights. Some stronger polities retained radical title a lot longer than others (e.g. as in Zambia, Sierra Leone and Liberia) and some continue to so until the present (as in Ghana). Agreements in many a littoral enclave such as in Senegal, Zanzibar and the Kenyan Coast, led to special tenure arrangements, often overcome only with urbanization tenure norms. Even in respect of inland majorities, the need ‘to keep the natives fed and content’ required a measure of tenure security be awarded, and had the additional advantage of helping control rapacious land grabbing by settlers themselves.

Indeed, it could be argued that for as long as it seemed that there was land and resources enough for European settlers and Africans alike, legal opportunity to demonstrate communal native title was availed, such as in German Cameroon in 1896, and throughout Francophone West Africa in 1904-06 and again in the 1920s and 1930s. As the difficulties of managing the vast hinterlands conquered or ceded between 1885 and 1930 came into view, indirect rule mechanisms in especially Anglophone Africa produced their own reconstructions of customary domains, communal tenure and customary law. At the same more solidly emerging colonial states need control over African lands, labour and production to make their enterprise viable. Following the Second World War, any pretence of honouring African land rights could be done away as the ‘unavoidable demands’ of capitalist transformation took over responsibility for their demise, and in which local elites were increasingly beneficiaries. As is well known, this was much aided by the East African Royal Commission on Land Tenure (1953-55) and then UN agency insistence during the 1960s that the ‘backward’ African tenure regimes give way to European individualised norms for the sake of economic transformation and the polarization in landholding (and landlessness) needed to trigger industrial growth.

4. Legal diminishment of customary land ownership has been a largely common effort

While each African state accrued a distinctive tenure history over the century from 1890, and differences by colonizer would emerge, commonalities were stronger in both instruments used to limit indigenous land rights at convenience, and in the effects. The British, French, Portuguese, Belgians and initially Germans did after all share common objectives, a common history as experienced colonizers of other continents, and in particularly in the case of the Portuguese and French structured federal relations among their African territories resulting in promulgation of common land policies and laws (French laws largely drafted in Senegal, the headquarters of the West African Federation). Although more autonomous the British shared similarly although with significantly different success in applying the same founding dispossessory legislation in 1890-1904 (developed in the Indian Raj) in Sudan, Ghana, Kenya, and Nigeria.

Hindsight suggests five techniques were fairly uniformly applied to limit indigenous claims to own the land, each of which had substantial legal precedent in home country law as arising from previous colonial experiences in the Americas, Asia, and more latterly, Oceania, and of course nearer to home, such as English treatment of Ireland from the 15th century.[iii]

These included replacing local territorial sovereignty with that of the conquering nation (the 'right of discovery'); applying a founding principle of European feudal tenure whereby the sovereign claimed not only political jurisdiction but root ownership of lands within the territory, diminishing existing land owners to varying degrees of tenancy to the crown or state (an elision of *imperium* and dominium); denial that indigenous land interests equated with private property as understood in industrialised Europe, where entitlement with industrialization had evolved into largely individualised and fungible assets; application of the convenient notion of 'vacant and unowned lands' where cultivation or settlement was not evident, limiting acknowledgement of occupancy and use to areas of evidential occupant with a counterpoint construct of 'wastelands' falling logically to the state; and on the basis of the necessities of state-making, capturing ultimate control over the disposition of landholding, and to which relatively quickly legal instruments for compulsory acquisition were applied. Latterly, an increasingly broad interpretation of *public purpose* has served as well, hand in hand with consolidation of state radical title as described below. It is significantly this lack of separation between control and tenure which continues to blight land relations in agrarian economies (and dictatorships) until the present. It is not incidental that a core element of current land reformism in Africa is just as much about (unevenly) devolving *power over land relations* as about slowly lifting the hand off shameful suppression of customary land ownership.[iv]

There would prove one major drawback to the integral strategy of dispossession above. For in failing to legally acknowledge that native rights are more than permissive possession of lands for occupancy and use, their character as property rights could hardly be extinguished (and to do so would have been in any event too expensive in compensation), as extinction would acknowledge this attribute. Legal extinction could only occur through procedures which indisputably supersede that interest, such as by registration of a native's occupied and used land under a freehold or like absolute entitlement. Declaring unregistered lands to be under the jurisdiction or guardianship of the state would increasingly show itself as not quite enough. Hence over time, and particularly in Francophone Africa, the stratagem of declaring most valuable areas of unregistered lands as not just public or state land but as the private property the State would come in handy.

5. Independence: business as usual- but worse?

Independence did not mark major departure in political or legal treatment of customary land rights. On the contrary, there was a startling degree of continuity extending beyond the transition period in which colonial positions were simply adopted into new constitutions and laws. Some countries would barely alter these positions until the 1990s (e.g. Madagascar, The Gambia, Chad, Central African Republic and Swaziland).

More commonly, legal changes tightened the screws against majority rural land ownership as advised by the late colonial advisers, now donors. Decades of ambivalence gave way to lightening certainty that conversionary individualized titling was the answer, building upon the statutory norms for European settler registration in place since the 1900s, and which by the 1950s were being actively used by African elites with means, particularly in urban areas. New titling laws began to be enacted all around the continent in especially the 1970s. Registration programmes abounded. Millions of secondary and collective rights were only saved due to their limited reach in practice.

Meanwhile less cumbersome instruments to advance proclaimed agricultural transformation could be pursued. For example, in 1965 Malawi enacted a Land Act to remove original title in customary lands from chiefs enabling him to directly grant these lands in leasehold without local consent. Chad in 1967 turned customary lands into public land, deemed vacant. Mauritania deemed all untitled lands to be subject to *Shari 'a* rather than customary law, sharply increasing the requirement of evidential sustained and active use. DRC passed laws in 1966 and 1973 clarifying customary tenure as permissive occupation rights. In 1970 Zambia removed the special status of Barotseland where allodial ownership had been recognised throughout the colonial period. Sudan enacted the Unregistered Lands Act, 1970 to declare all untitled land (95% of the country) to be Government Land (and "deemed to have been so registered") and thence easily leased to entrepreneurial officials, politicians and Middle Eastern investors. In Somalia, Siyad Barre passed the Agricultural Land Law, 1975, abolishing clan-based tenure and making only cultivated lands in that vast pastoral territory available for deeds recognition, mainly through state cooperative developments. In 1982 newly independent Zimbabwe restructured the Tribal Lands Act into a Communal Lands Act, much restrictive on rights and with title firmly vested in the President, while at the same time pursuing restitution of white-owned farms in non-communal areas. In 1982 Burundi sought to overcome land shortages by making land rights dependent upon sustained and active land use, with title guaranteed after 30 years irrespective of how the land was obtained, to prove a double discrimination for the thousands forced to flee civil conflict. In Liberia, the unique Hinterlands Regulations originally devised in 1929 and consolidated in 1949 and which had enabled better-off chiefdoms to secure absolute title to nearly one million hectares, failed to appear in the new Civil Code of 1973, throwing the status of these entitlements into uncertainty, not least because a new 1974 enactment provided only for communities to buy back their lands from government.

It is unfair to condemn such measures as deliberately malign. Most new governments were broadly persuaded of the importance of government control over landholding and struggling to deal with the fact that the majority of their citizens were unregistered land owners, deemed at the time an obstruction to development. It should not go without note that this was also a period in which the powers over landholding distribution which native councils and traditional authorities in many parts of the continent had acquired during 1930-1960 were reined in through their replacement with more democratically formed district, county or *cercle* institutions. Tanzania, Burundi and Cape Verde among others also deployed measures

to limit landlordism. Villagization, an important strategy in post-independent Mozambique, Tanzania and Ethiopia were brave attempts to not only make service delivery more viable at scale but to limit polarisation and landlessness, especially severe in neo-feudal Ethiopia.

In short, while one ultimately ill-conceived policy and law after another tumbled out in the 1960s to 1980s, each had redeeming features. In Tanzania for example, *Ujamaa* collectives in the 1960s and then villagization in the 1970s would give rise to clear socio-spatial community domains and village-level government upon which further securement of majority land rights would be later solidly built. And even while Idi Amin's Land Decree of 1975 turned already deemed customary occupants into 'tenants at sufferance' meaning government no longer needed their consent to evict them, the same law did away with the exploitative tenancy arrangements which British-created *mailo* tenure had enabled several key local chiefdoms to develop. Similarly, while 1960s legislation in Ghana deprived rural communities of their ownership of timber and control over their forests, and (briefly) established State title over the northern third of the country, there was also an attempt to regulate already vibrant rent-seeking by chiefs over the untilled lands of their subjects by providing in 1986 for registration of occupation as customary freeholds. The misfortune here was that chiefs logically became the allodial owners, also registrable, at the expense of such communal title that existed. Meanwhile Cameroon, along with a number of other Francophone territories, did away with admittedly lukewarm colonial provisions permitting if not amply encouraging communal registration of lands, and to more firmly institute the idea that unregistered lands were either national lands which farmers were allowed to use or outside these small zones, vacant and ownerless, Togo alone departed the new norm, abandoning the legal construct of vacant and ownerless lands.

There were other important initiatives aimed at advancing rather than retrenching majority customary property rights, among which legislation in Nigeria (1978), Senegal (1964) and Botswana (1968) were notable, but which would all prove flawed in critical ways as later exampled

6. Undercutting customary rights at the roots

With hindsight, signs of the times were clear in firm centralization of tenure authority overall. The ultimate instrument was retention and expansion of the colonial habit of vesting ultimate ownership of at least presumed vacant and unoccupied lands in the Crown or Governor. By 1990 half of all Sub Saharan states had enacted this position and several more would do so in following years (e.g. Eritrea, Rwanda). Most of the remaining states had by then vested at least unregistered land – encompassing all customary lands – in the state. The incidence of registered freehold or like entitlements was by then still fewer than ten percent of the sub-continent, largely absorbed by South Africa, Namibia and Zimbabwe white settlement.

Ominously, this capture of radical title was hardly symbolic, as this status in the hands of Europe's Heads of State had become. Instead it was steadily interpreted by many presidents and their governments as a licence to landlordism. A great deal of interference in unregistered lands accordingly occurred throughout the 1960-1990 era, 'public lands' and reserved lands becoming at times the personal fiefdom of presidents, ministers and senior officialdom, or sites for inequitable settlement schemes granting land cheaply to selected beneficiaries.[v] The litany of wrongful sales of public lands, trust lands and excisions from forest reserves for what proved to be private purpose during the 1980s in particular is more fully documented for the case of Kenya, but with echoes around much of the continent.[vi] Extinction of customary rights in areas Governments needed for public or not-so public benefit soared

(populations in nine areas of northern Tanzania lost their rights in 1973 alone). Attempts were even periodically made remove the need for Governments to pay for the lost houses and crops and most independent states continue to owe literally millions of dollars worth of compensation to unpaid occupants and users. Issue of concessions for oil, mining and timber extraction also soared during this period, displacing some millions of customary landholding from six Congo Basin States alone. Extension of game reserves and declaration of Hunting Areas had similar effect.[vii] The upshot overall was that by 1990 customary landholders were in even less secure possession of their customary properties than ever before.

7. Reforms are failing to make sufficient difference

Tenure reform from the 1990s came no minute too soon. Some have restored admittance of real property rights to millions of Africans whose families have been occupying and using the same lands including communal domains for generations or centuries. Tanzania, Uganda, Mozambique, and in more limited ways, Benin, Madagascar and South Africa are lead examples. There is little doubt that a generalized reform in the status of community-derived land rights is afoot on the continent, and one in which constitutional, local governance and natural resource rights and governance reform helpfully elide (with no fewer than 32 new national constitutions, 27 new local government laws, and 38 new forest laws promulgated since 1990 alongside 30 new country land laws enacted or in draft). Kenyans for example look with anticipation to the passage of their draft Constitution which inter alia will launch case by case reclassification of unregistered communal lands embracing two thirds of the country as individual community-owned property no longer held in dubious aggregate trust by county councils or alienable for even more doubtful 'presumed local benefit' by the Minister of Lands.

And yet, the case for progress can be sorely exaggerated. For thorough assessment of what has and has not changed suggests a serious shortfall upon the need to remove up to 500 million Africans beyond their ignominious status as little better in law than squatters on their own land and evictable with striking ease. Uganda, for example, remains the only country to have done away with the odious separation of ownership of the soil and ownership of rights to the soil, governments showing little sign of releasing this ultimate stranglehold on customary tenants. The enormous advantages to state parties which such centralized entitlement have demonstrated over the decades seem to have proven simply too useful to be surrendered.

There has also been a discernible slow down after boldly announced intentions in the 1990s, visible in no fewer than 15 countries from Senegal and Guinea Bissau in the west, to Eritrea in the north, and Angola, Lesotho and Swaziland in the south. In light of the curiously many years it has taken land commissions thus far to deliberate, one may also be forgiven for finding the clutch of new land commissions being established (Liberia, Sierra Leone, Gambia, Sudan & Nigeria) perhaps more excuse for delay. While several Francophone West Africa states have made progress in recent years, the same cannot be said for sister Francophone and Belgium Central African countries, which with the possible exception of Congo and CAR remain obdurately resistant to tenure change. Meanwhile restitution of white-owned lands to African communities has also proven dismally slow in southern Africa.

Rising land values of uncultivated lands doubtless helps discourage reform. Decades of capture of forest/timber and wildlife values through entrenching such areas as national or even the private property of the State (Cameroon, 1994) or at least claiming the trees (e.g. Charles Taylor's forest law of 2000) and expanding cession of these areas to state or private

exploiters, suggests as much. As does steadfast resistance in land and constitution reform to at least partial ownership of minerals, such as historically locally mined surface minerals, to those upon whose ancient lands these assets are found. Now even open dry pasturage is proving attractive to commercial dry land farming by non-customary investors. It hardly needs stating that the current new wave of foreign direct investment in land adds disincentive to reforms. With exceptions (see below) gains to citizenry at this point have more or less settled upon the old focal sphere of compromise between introduced and indigenous norms; allowing for the securitization of (only) those estates customarily occupied for settlement and cultivation.

Customary possession of the remaining 1.2 billion hectares of naturally collective customary property (forests, woodlands, pastures and wetlands) which are not already drawn under national or government ownership, are possibly more vulnerable than ever. Signs of this are even apparent in those states like Mozambique and Tanzania, whose two governments went the extra mile in the 1990s in assuring rural citizens that their customary rights to such areas were as safe in new laws as their huts and farms. As investor pressure for lands rises and as rural communities slowly but steadily set out to delimit and title their communal lands, amendment to the 1997 Land Law now restricts each community to 1,000 ha allocations. In Tanzania, no attempt has been made to remove the useful contradictory provisions of the Land Act, 1999 and Village Land Act, 1999 which leave a loophole for government to claim ownership of lands which are neither settled nor farmed, exposing communal pastures and woodlands to loss. Allegedly, limitation upon how much communal property can exist within declared village land areas is also being mooted.[viii]

III SO WHO OWNS LANDS WHICH ARE BEING LEASED?

While lengthy, the preceding overview has been necessary to explain likely overlaps and inconsistencies in the ownership of lands being leased have come about, their complexities and how these must cause for concern to participating actors.

In order to squeeze out as much exactitude as possible in the situation, the following measures of customary/community-derived land security are applied on a country by country basis. From the foregoing these should now make sense.

Indicators of the Status of Customary Property Rights

1. Have customary land rights been *formally extinguished as a genus of tenure* (this excludes specific areal extinctions)?

2. Are property rights subordinate to state title *only in respect of customary lands* (i.e. making an unequal playing field between registered and unregistered land holders)?

3. Are customary rights given *equivalent legal force* to rights sourced through other regimes?

4. Does this protection of property apply even if the rights/estates are *unregistered*?

5. Does legal support for customary rights explicitly include lands traditionally and currently owned *in common (*such as normally affecting forests/woodlands, wetlands, pastures and rangelands)?

6. May customary properties including commons be appropriated for public purpose *without* compensation for the value of the land itself?

7. Does registration convert the right into a *non-customary form* of tenure or may it be registered 'as is'?

8. Is cheap, voluntary, easily accessible and simple registration of rights and transactions available for the customary sector?

9. Is *community-based* land administration recognized as a legal source of land interests, and its decisions enforceable by the courts?

10. Does recognition of rights include natural assets *attached to the land* (forests/timber, products, clays, surface minerals)?

11. Does the state retain right to issue concessions for hunting, timber extraction, ranching developments, commercial agro-fuel or food production, mineral exploitation, mining, oil and other non-local developments *without* –

    (i) Formally acquiring the land at open market values; *or*

    (ii) Ensuring equitable shareholding with customary owners; o*r*

    (iii) Assisting customary owners to directly lease the land themselves for an approved commercial purpose? And -

12. Does state law distinguish between classifying land for *protection purposes* (wildlife, forest, catchment reserves) and *ownership of the protected land*, or does setting aside automatically cancel customary ownership and associated rights in favour of the state?

The Results

Should all the above indicators be positively met in domestic land legislation, then we may be fairly sure that customary landholding citizens, not the state, own lands vulnerable to FDI leasing. Unfortunately not a single one of 40 African states reviewed does so, although one or two come fairly close (see below). As a whole, the results are not encouraging; in the majority of cases, customary land rights continue to be constrained in several or more of the following legal conditions -

1. Not recognised as a real property right, only a right of lawful occupancy & use
2. Even these attributes guaranteed only through formal registration
3. Registration itself often remains a matter of extinguishing the customary right in favour of a non-indigenous statutory form of tenure such as a freehold, leasehold or 'new order' right
4. In the process important incidents of customary tenure including its source of authority are diminished or extinguished
5. Recognition of customary land rights remains available only for settled or farmed estates (house plots, homesteads, fields)
6. Recognition remains dependent upon sustained and visible use (*mise en valeur*), de-securing lands deliberately subject to non-invasive or conversionary use (grazing, hunting, gathering) and shifting cultivation

7. Communal rights are recognised as existing but remain vested outside the community in trustee boards, councils, commissions or the state
8. The notion of 'vacant & ownerless lands' is retained to capture state tenure of much of the above communal property
9. Governments continue to remove the most valuable commons from citizen tenure in the form of national reserves, parks, allocated hunting areas, and continue to fail to distinguish between tenure and making certain of these owned lands subject to firm conservation, use and development conditions
10. Wholesale loss of customarily owned surface minerals, local ponds, lakes and streams, and sometimes even natural tree cover, along with arguably more justifiable national ownership of subterranean oils and minerals, major rivers and coastal waters
11. While decentralization has become handmaiden to democratization, new laws often continue to fail to support customary land administration at the logical and necessary community level, continuing to devolve authority no lower than district or commune levels, often institutionally linked to central government
12. Laws continue to appropriate root title to customary lands to the state and to use this is more than symbolical ways
13. Compensation for taken customary lands continue on the whole to only cover evidential improvements (houses, value of crops) and may not even provide this unless titled, and
14. Laws often give legal *priority to commercial use of land* over and above family-farming by structuring private commercial enterprise as a 'public purpose' - and without requiring compulsory partnership with existing owner.

Country Cases

Ranking or even clustering countries on the basis of the above is difficult as a single negative attribute may outweigh several positive conditions. Given the special vulnerability of un-cultivated commons to state out-leasing their treatment is more heavily weighted than some other conditions. For example, while Namibia, Botswana and most recently Madagascar firmly acknowledge customary land holding as real property (or in the case of Ethiopia, recognize acquired and community-endorsed interests as real rights) their failure to extend this to embrace common properties places them in a less protected category. Or it may be the case that the full force of vesting title in the state or head of state is modified by other provisions; thus while Eritrea, Gabon, Senegal and Tanzania are among the many countries which have done so, security of customary rights to that national domain is strongly variant in these states, ranging from statutory extinction of customary rights and replacement with state-granted rights (Eritrea) to as strong legal acknowledgement of community or customarily-derived property rights to what is nonetheless declared national domain (public land) in Tanzania.

With such caveats, clustering countries in terms of strength of customary rights is attempted below, with concomitant implication that the stronger and wider the legal support, the more likely it is that customary land holders are the rightful lessors of land to local and foreign investors and equally as legally able to withhold or condition consent.

Class A: most support for customary ownership

At least in law, **Tanzania** (1999), Uganda (1998), **Ghana** (1986, 1994) and **Mozambique** (1997) fall into this first category, coming closest to overriding dispossessory norms, but in each case not in a full-proof manner as exampled earlier. **Southern Sudan**, not yet an

independent country, may also be included, although application of its new land law (2009) is slight to non-existent and already being eroded by its inserted loophole enabling it to lease communal lands without the consent of local communities.

Still, in law these countries at least recognize customary tenure as a legal source of property and do not require formalization in registered entitlements for this to be upheld administratively or in the courts. They all make customary holdings equivalent in legal force and effect as property rights which have been acquired through non-customary routes. Families and communities as well as individuals are recognized as natural legal persons lawfully owning property, and no restrictions are placed upon collective ownership of forests, woodlands, pastures etc unless withdrawn for protection reasons. At compulsory acquisition for public purpose, compensation is to be paid is on the same grounds and at the same level as for an equivalent statutorily owned property. These countries also acknowledge or institutionally provide for customary and/or community-based land administration, as corollary to recognizing indigenous tenure, and with the exception of Mozambique empower these bodies to register rights and issue legal titles.

Tanzania arguably stands out as most just in its protection of community-derived rights, in that it meets most other criteria listed above. This includes legal enablement for existing or future reserved areas to be restituted to or remain as customary property while being subject to conservation regulation.

And yet, it also must be observed that this is a country whose land laws prevent customary landholders or communities directly leasing their properties to non-local investors, even with approval. Therefore while the rural community (or as relevant its individual families) is technically the rightful lessor, it may not do so legally. While this limitation was instituted to limit distress or rent-seeking sales of rights by communities or more specifically, their elected leaders, it does give pause as to just how autonomous customary property rights are.

South Africa must be included in Class A having laid down support for customary rights in its constitution (1996) and demonstrated good faith in its (still limited) restitution initiatives. However it has done poorly in its handling of tenure in the former homelands, where some 14 million customary landholders reside and may still only uncertainly secure their interests under a flawed (and constitutionally contested) communal land rights law (2004).

Class B: Some support for customary ownership

The land laws of **Botswana** (1968), **Namibia** (2002) and **Madagascar** (2005) also legally respect customary interests as real and voluntarily registrable property and would be included in the above category were it not for the fact that these countries limit realization of this to house and farm plots, leaving valuable local common properties wide open for non-customary lease, and without the consent of those communities.[ix] In contrast, **Angola**'s new land law (2004) does provide or 'customarily useful domain' inclusive of substantial commons to be delimited, but with uncertain status as equivalent to private concessions available through other routes. In addition, Angola's 2004 law is still not in force, raising query as to commitment to its new provisions.

Benin (2007), **Cote d'Ivoire** (1998), **Burkina Faso** (2009), **Niger** (1993, 2000), **Zambia** (1995), and in distinctive ways, **Nigeria** (1978) and **Lesotho** (1979), **Senegal** (1964, 1996) acknowledge customary interests as somewhat more than occupation and use rights but still do not endow these with the same legal force as statutory entitlements. Compulsory registration, in force in Angola, Cote d'Ivoire and Namibia, has also not proved helpful and

although necessarily extended, leaving untitled properties in uncertain status. New laws in **Congo** (2004, 2006) and in the **Central African Republic** (2009) are believed to make all forms of customary rights to land registrable but not enough is known about these cases to more than tentatively include them here.

Class C: Much less support for customary ownership

Much less security of customary ownership is availed in the remaining 22 countries examined. This is not to say that positive new land policies are not in place, the case in **Malawi** and **Kenya**, or are anticipated through above-mentioned new land (**Liberia, Sierra Leone** & **Somaliland**).

There are other reasons for exclusion from Classes A and B. Some countries have done away with customary or community-derived rights altogether, replacing these with state-granted rights. This is the case in **Ethiopia** (1975, 1997, 2005), **Eritrea** (1994, 1997), **Somalia** (1975), **Rwanda** (2005), **Burundi** (1986) and **Mauritania** (2004). This is not necessarily obstructive on its own.

In Ethiopia for example, a major farm titling programme is underway which aims to stabilise the right holding of millions of families who have secured plots under various settlement and redistribution programmes since 1975. While the fact that these rights are hardly customary (with main exceptions in Tigray) is not a major concern given that many allocates were in fact landless previously, the fact that most of the rural area and virtually all traditionally communally owned and used lands have been excluded in most titling exercises, is cause for concern. This is not least because these presumed unowned lands are targets for foreign direct land investments. Additionally, it seems that some fertile highland areas have been withheld from allocation to land short poor communities, in favour of direct state or regional state allocation of these lands to preferred national investors.

Class D: least support for customary interests

Still, such conditions as above are less dispossessory than where customary rights are definitively no more than permissive occupation and use rights in law on national or public lands and where no provisions for their securitization are made other than by statutory grant or lease from government, and generally limited to house and farm lands. Although each case is different, this is broadly the legal situation for millions of rural landholders in **Sudan** (1984), **Cameroon** (1974), **Mali** (1993, 1996, 1997), **Gambia** (1991), **Zimbabwe** (1982), **Chad** (1967, 2002), **DRC** (1973, 1980), **Gabon** (1967), **Somalia** (1975) among others, and with no avenues of real protection afforded from state (or in **Swaziland** from the King) in respect of unbridled powers of reallocation of these lands to outsiders.[x]

IV THOUGHTS ON WHAT TO DO?

It is unfortunate but perhaps inevitable that such a mixed and complex situation exists in respect of customary or community-derived land ownership in Sub Saharan Africa. Yet it is difficult to not conclude that governments are surely the majority owners of Africa's rural lands. Even in the best of legal protection circumstances common properties remain most vulnerable to wrongful if legal appropriation from longstanding owners, without their consent. As of old, law itself may be manipulated or amended to defeat local interests where these interfere with the designs of the central state. How far these interests amount to genuine

public purpose and benefit is moot where this involves an exchange of the natural capital of the rural poor for enterprises which may deliver no compensatory livelihood or values.

Codes of conduct and firmer international regulation of inter-state investment are important levers for change and are rightly pursued. However this is unlikely to be enough to assuage what appears to be a hardening in the separation between government and people's rights – and interests. This is particularly so where parties on both sides of the table take current legal tenure conditions as given (quite aside from being advantageous to their interests).

Tackling the founding obstruction to rural land justice

However it is this status quo which deserves most bold and precise challenge. The root question around this within the context of FDI is simply who is the rightful lessor of rural lands. A basic objective must be to promote and require legal recognition of long-standing occupancy and use as private property rights, irrespective of whether or not this is formally registered or whether or not the properties are possessed individually, by families or by communities.

Moving finally beyond colonial interpretations

A critical aspect must here be highlighted. Although much space has been devoted in this paper to considering customary rights, it must be reiterated that these are important not because they may or may not have a long history as traditional mechanisms, but that they derive from and are sustained by ordinary groups of citizens on the one hand (communities) and that they are existing and longstanding rights on the other. Hence the recurrent reference in this paper to customary *or community-derived and sustained rights*.

Put another way, not too much time should be spent on exploring the historical nature of customary or other informal land interests in agrarian economies. It could in fact be shown that there has been such a high degree of manipulation of these interests over the last century in Africa (and longer elsewhere) and associated manufacture in constructs, that it is difficult to answer questions around tradition and especially pre-colonial norms. It may even be well argued that such interests were indeed originally more territorial than real estate in a modern sense of real estate property.

But such matters are quite beside the point. Millions of the world's rural poor live, farm, pasture animals and hunt and gather on lands upon which their livelihood and rights to development depend, and with a history of occupation and use which suggests that it is not just unjust but irrational to not legally and developmentally treat these lands today as their rightful private property. In Sub Saharan Africa alone some 500 million rural people are directly affected by out-dated or inapplicable notions of property in modern agrarian economies which unduly maintain majority land rights in subservience to industrial society norms. This is aside the fact that the last century has in any event seen significant adoption of western property norms into indigenous systems.

Putting titling back into perspective

In relation to this, the fact that so few states have extinguished customary rights in their entirety needs to be brought into play. For once it is accepted that current customary land holders are more than occupants and users but legal owners of the lands they individually or collectively use, then legal remedy can be swift. Uganda, Tanzania and Mozambique have all proceeded on this basis. Constitutional or land law acceptance of this can lay down a basic platform of protection. With this in place, voluntary registration becomes a useful process of

not just clarifying and confirming rights but double-locking these against wilful diminishment, but not necessarily essential in itself.

While Madagascar and Ethiopia offer evidence that mass titling is possible, both have restricted their horizons to homesteads in the rural domain. Additionally, without continuing donor funding, they may find it difficult to complete even these objectives. While remaining a worthy objective, significant adjustment to what can and cannot be titled is required.

Recognizing that localised institutional empowerment is key

It may also be more productive in the medium term to focus less upon titling than upon much more fully developing the genuinely community based land administration foci which protection of customary interests always requires. Clarifying and embedding areas of respective community jurisdiction, bringing traditional authority-led institutions into more democratic operational mode, and empowering local actors may in the longer term do much more for popular mobilisation and demand for legal respect of majority rural land rights classical dependence upon formalization.

Putting international law to work

An advantage in current FDI is that its dependence on inter-state treaty support and WTO, GAT and GATT regulation means that international law itself can be more easily brought into play as providing at least standards to work from if not easy legal redress, due to the unenforceability of most relevant conventions and declarations without clear adoption of their principles into domestic laws. Although referred to as international law, protocols, covenants, charters and declarations are advisory. Accordingly, countries are 'encouraged', 'invited', and 'urged' to adopt their terms.

This is also the case with the decisions of the African Human and People's Rights Commission. It is up to national governments to act or not act upon its recommendations. In general, there is little chance of a successful ruling in favour of communities unless clear supporting provisions are identified in the national law. Several famous cases of restitution in South Africa, for example, have enjoyed success because of the clear constitutional and land law commitment to restitution. A recent ruling of the African Commission concerning the land rights of a minority pastoral group in Kenya, the Enderois, seeking unpaid compensation for their eviction to make way for a wildlife reserve, is also likely to see result on the basis that the hopefully adopted draft Constitution provides specifically for such concerns to be addressed.

Theoretically more enforceable would be decisions of the African Human Rights Court in Tanzania. In practice, its performance has been weak, with not a single decision issued since its establishment in 1998, and only two or three cases even on its caseload. Nor have more than a handful of African states formally submitted to its jurisdiction.

There are in any event limitations in the focus of international law on the manner of land rights which need to be pursued. It was observed earlier that the most useful text relating to customary land rights has been developed in respect of minorities and indigenous peoples. For as long as Africans as a whole are not deemed to fall into this category, or to self-declare themselves as 'indigenous peoples', there remains an awkwardness in bringing customary interests in general to the attention of courts and commissions through this route. Lacuna in the definition of indigenous peoples as applying to Africa needs to be directly addressed.

Adopting a shareholding approach to rural investment

Working towards consent, compensation and benefit sharing are important targets for advocates of citizen land rights. Ensuring that this extends to lands leased not just for biofuel or food production but to lands taken for mining, timber extraction and contractual hunting and tourism is also critical. However, something more than this is required for rural populations to not be unduly affected by a likely in FDI demand. Enabling communities to direct lease out their land for regulated rent return is the least complex way forward. An enterprise shareholding model would be a more sophisticated development. Cases where rural farmers are being contracted to farm in accordance with investment plans are a step towards this. An extension would be to develop and test arrangements wherein affected communities are more than contracted parties or beneficiaries of social or other pay-offs but directly partner new enterprise. Forms and levels of shareholding can be developed which limit their risk and liability. Properly constructed, a win-win situation for investor and community can emerge. A great deal of resentment and risks of conflict can be assuaged.

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Endnotes

[i] Although from a narrow information base, which the World Bank's current initiative should help overcome. GRAIN, CaPri, ILC, Action Aid, the UN Special Rapporteur on Food Security, and Oxfam's land website are among those providing information. Cotula et al., 2009 provided details on foreign direct investments in land under 1,000 ha in Ethiopia, Sudan, Madagascar, Mali and Ghana. GTZ updates this for Mali and Madagascar and adds Cambodia and Laos. Also refer Sulle and Nelson, 2009 on Tanzania.

[ii] GTZ, 2009 reports Egypt gaining a 99 year usufruct on lands in Sudan (Citadel Capital) and China acquiring a similar use right for 70 years in Cambodia (Chinese Farm Cooperation – Pheapimex Group).

[iii] See Alden Wily, forthcoming for explication of these techniques.

[iv] See footnote above.

[v] [v] One would like to exclude Botswana in particular from this generalization, especially given that in this same period it reduced the area of State Land to around 6% of the total land area, still the smallest proportion on the continent. However, its strong presence in the management (and initially) appointed membership of Land Boards, and its handling of nationalization of rights to the vast communal grazing lands to the benefit of elites could be argued as a version of wrongful capture and reallocation of important community property.

[vi] Refer Kenya's 2004 Commission of Inquiry of Illegal/Irregular Allocation of Public Land.

[vii] All these matters as others in this section are fully documented in Alden Wily, *forthcoming*.

[viii] Pers comm. Official at Ministry of Lands, Housing & Human Settlements Development, Dar es Salaam.

[ix] New legislation in Congo (2004, 2006) appears to make customary rights registrable in their current form but not enough is known about this case to include it here.

[x] Again, full documentation of cases is available in Alden Wily, *forthcoming*.