



Whose Lands Are You Giving Away, Mr. President?

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What this paper is *not* about ...

Issues abundantly covered elsewhere, such as does foreign direct investment (FDI) in developing countries -

- Aid or hinder host country food security?
- Take extreme advantage of low land & labour costs?
- Is more to do with securing land, resources & water than production?
- Is more about circumventing global markets than boosting trade & host country economies?
- Risks destroying host country family farming & livelihood?
- Will further indebt host countries when easy government loans underwrite risky foreign investment? Etc.....



What this paper *is* about ...

One founding question: who is the **rightful lessor** of rural lands in developing agrarian economies? State or people?

Specifically:

1. Is government lease of millions of hectares to foreign investors **indisputably legal** under domestic laws?
2. If so, is this **legitimate** given the history of how governments have acquired these lands, and the tenure status in which often majority rural citizens are left?
3. Is there not a better way forward?



Why the focus on Sub Saharan Africa?

1. At least 18 of the 33-40 countries leasing lands for foreign direct investment are in Sub Saharan Africa which is –
 - Predominantly dependent upon land based livelihood
 - Remains food deficit
 - Has an abusive history of treating majority land rights
 - Notorious in some cases for low levels of government accountability to citizen rights
2. Over two thirds of the global land area under new foreign lease for biofuel & food production is in Sub Saharan Africa

Still, legal & legitimacy tenure concerns in Africa are mirrored in most Asian states similarly subject to the trend



What lands are being leased in Africa?

Rural lands over which the State presumes ownership -

1. Because UNTITLED (not held under *registered* ownership)
2. Considered VACANT & OWNERLESS (because no houses or farms)
3. Considered ABANDONED (because no recent cultivation)
4. The state claims ULTIMATE TITLE over unregistered customary land and misuses this trusteeship

In practice these lands are –

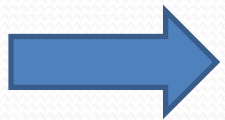
- OWNED, by custom
- USED, by custom: e.g. shifting cultivation, grazing, hunting, wood & non-wood extraction, spare lands for expansion of farming and habitation, etc.
- COMMON PROPERTY - integral to community domains



Dominant status of customary owners on these lands

Acknowledged as lawful **occupants & users**, not *owners*, and may remain on these land until Governments find better use for these lands

(With exceptions) the common result: - est. 500 million rural African citizens are in effect **squatters on their own lands**



Perfect conditions for 'legal' capture of citizens' lands, resources, only capital & future by FDI in alliance with governments, compounding major other losses through concessions & elite capture



And the even better news for land takers ...

So far **only 14+ Mha** leased out in 19 SSA countries, and these include 9 countries where customary rights have or are gaining increasing respect as private property interests and limitations can be brought into play [Tanzania, Uganda, Mozambique, Angola, South Sudan, Malawi, Kenya, Madagascar & Zambia]

Yet much more scope for government & FDI land taking in 28 other African states and with **more than on billion ha under suitably vulnerable tenure.**



Need to understand how African property interests have been rendered so vulnerable

In general –

1. Begins but *does not end* with colonial strategies
2. Begins and remains with clever *contradictions*
3. *Shifts* over the last century – largely *for the worse*, particularly after 1960/Independence
4. Begins through different colonizer norms but has broadly the *same end effects* by 1990: majority dispossession
5. Current reformism since 1990 is *failing to make the needed difference*
6. New wave of FDI ups the disincentive to reform



Dispossessing rural populations has not been entirely plain sailing producing contradictions...

1. Pre-colonial traders including royally chartered companies often *bought* lands from coastal chiefs, thereby acknowledging Africa was not empty of owners. At same time could not afford to buy millions ha of hinterland in the carve-up of the whole continent 1885-1930.
2. African compliance with colonial plans & promises was mixed; led to special tenure arrangements in West Africa.
3. The 'natives' needed to be kept fed and happy and on the land producing, so some security of occupancy & use had to be given.



Continued

4. Colonizers did not have the manpower to manage vast hinterlands, had to resort to allowing chiefs to regulate local landholding.
5. At same time increasingly needed to control African labour, their production, and their lands for plantation developments.
6. Needed complete control over most valuable natural assets; wildlife (skins, ivory), gold & minerals, rivers for transport, timber , gum arabica, etc.

Instruments of dispossession: 1880-2000

1. **‘Right of discovery’** endowing sovereignty, used to diminish territorially based land rights, critical in native tenures where domains held communally
2. **Elision of *imperium & dominium*** using European (especially British) feudal tenure in which Head of State is not only political sovereign but becomes owner of the soil, and the only source of legal rights to use the land
3. ***Terra nullius*** – the helpful colonizing notion that undeveloped land = unowned land = most of Africa is ownerless (***vacante & sans maitre***)

Continued

4. **'Not property'**: African landholding does not equate with European notions of real estate, because unlike industrialized societies (i) are use-based (ii) can be held by families or communities, fuzzy legal persons; (iii) land and rights to land cannot be freely sold
5. Particular anathema to **community ownership**; conceived as = no ownership = tragedy of the commons; particularly took off from 1950s.
6. **Centralization of authority over land**: on two grounds (i) all property stems from the Crown, and (ii) only the state has the vision, wisdom, means to wisely determine land use and rightful holders. Enabled both reconstruction & diminishment of community based tenure regulation

OUTCOME FOR RURAL MAJORITIES

Limited outright *legal abolition* of customary rights but also limited full recognition of customary lands as real property. Growing number of exceptions but the majority case includes some or all of the following –

1. Right of occupancy & use, not ownership acknowledged
2. Secured only through statutory registration
3. Registration itself often extinguishes the customary right in favour of an introduced form of tenure
4. Recognition is often available only for developed lands (houses, farms, etc)



Continued (1) ...

5. Recognition remains dependent upon **sustained and visible use** (*mise en valeur*). De-secures non-invasive uses (grazing, hunting, gathering) and shifting cultivation
6. Often **excludes common properties** (marshlands, local water rights, forests/woodlands, rangelands, pasturelands, hilltops), remains vested in Boards or State
7. Often retains '**vacant & ownerless lands**' as classification of commons diminishing claim
8. Removes **best commons** in form of reserves & parks, hunting areas, failing to distinguish between tenure & regulation/management conditions



Continued (2)

9. Wholesale cooption of customary ownership of surface minerals, local waters, sometimes natural tree cover
10. Usually fails to support customary land administration at necessary **community level**
11. Often appropriates the **root title** of customary lands to state and uses this in more than symbolical ways, from trusteeship to landlordism



Continued (3)

12. Usually fails to pay compensation for **value of the land**, only evidential improvements to the land (houses, value of crops), especially if unregistered customary property

13. Gives de facto and often legal *priority to commercial use of land* over family based farming in structuring private commercial enterprise as a ‘public purpose’ - and without requiring compulsory partnership with existing owner.

Security Level of Customary Rights in Africa

CRITERIA TO MEASURE THIS in order of importance:-

1. Have customary land rights been **formally extinguished** as a genus of tenure?
2. Are property rights subordinate to state title **only in respect of customary lands**?
3. Are customary rights given **equivalent legal force** to rights sources through other regimes?
4. Does this apply even if the rights/estates are **unregistered**?
5. Does legal support for customary **rights explicitly include estates held in common** (e.g. Forests, pastures, rangelands)?



Continued (1)...

6. Can 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, accessible, simple** registration of rights and transactions available?
9. Is **community-based land administration** legal, supported and decisions enforceable by the courts?
10. Does recognition of rights **include natural assets attached to the land** (forests/timber, products, clays, surface minerals)?



Continued (2)

11. Does 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 for open market values & additional due compensation; *or*
 - (ii) ensuring equitable shareholding with customary owners; *or*
 - (iii) assisting customary owners to directly lease the land themselves for an approved commercial purpose?

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 in favour of the state?

Results for 40 African states

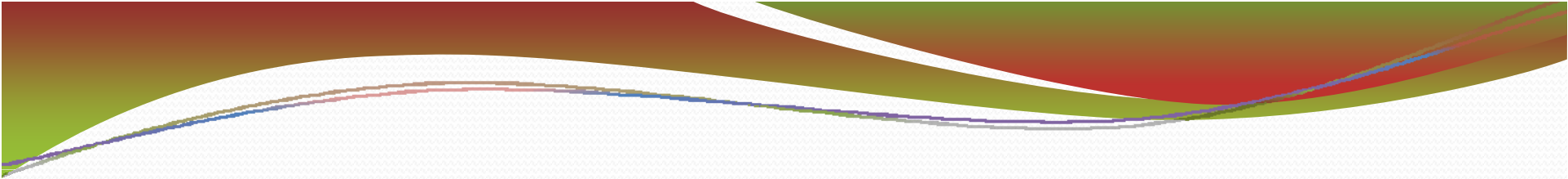
- CLASS A:* Meet ALL criteria: **0** [although Tanzania near]
- CLASS B:* Meet first key 5 criteria: **4** [Uganda, Mozambique, Ghana, Tanzania (and Southern Sudan)]
- CLASS C:* Meet some criteria **10** [Niger, Botswana, Namibia, Kenya, Madagascar, Benin, Cote d-Ivoire, Burkina Faso, South Africa]
- CLASS D:* Recognised but less protection **14** [Angola, Kenya, Mali, Nigeria, CAR, Sierra Leone, Liberia, Malawi, Senegal, Togo, Congo, Ethiopia, Zambia, Ethiopia in critical aspects]
- CLASS E:* Minimal protection **12** [Eritrea, Somalia, Rwanda, Burundi, DRC, Cameroon, Zimbabwe, Chad, Gambia, Mauritania, Cape Verde, Sudan]

So Who Owns Target Lands?

TARGET STATE	LEGAL OWNER	CUSTOMARY LAND
DRC	STATE	ALIENABLE/LEASABLE AT WILL
MADAGASCAR	MIXED	CUST. RIGHTS RECOGNISED & UNDER REGISTRATION BUT EXCLUDES COMMONS
SUDAN (NORTH)	STATE	STATE LEGALLY LEASES AT WILL
SUDAN (SOUTH)	CITIZENS	CONTRADICTION: RECOGNIZED AS PROPERTY BUT DOES NOT REQUIRE CONSENT FOR STATE LEASING
ETHIOPIA	MIXED	FARMS BEING REGISTERED BUT MOST LEASES ON NON-FARMED LANDS



FDI TARGET	LEGAL OWNER	CUSTOMARY LANDS
MOZAMBIQUE	CITIZENS	LEASES BY LOCAL NEGOTIATION
MALI	STATE	FREELY LEASING THESE LANDS
TANZANIA	CITIZENS	REQUIRES STATE ACQUISITION FIRST
ZAMBIA	CITIZENS	REQUIRES CHIEF'S CONSENT & STATE ACQUISITION FIRST
CONGO	STATE	CAN FREELY LEASE OR ALIENATE
LIBERIA	MIXED	REQUIRES CHIEF'S CONSENT FIRST
UGANDA	CITIZENS	MAY LEASE THEMSELVES OR STATE MUST ACQUIRE TO LEASE

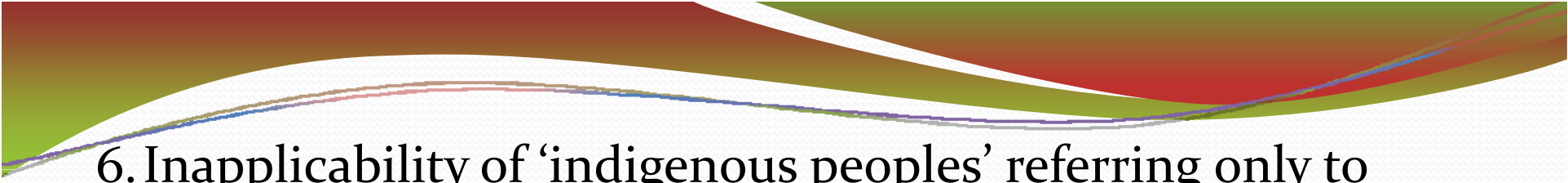


FDI TARGET	LEGAL OWNER	CUSTOMARY LAND
KENYA	COUNCILS	TRUSTEES WITH UNDUE POWERS
NIGERIA	COUNCILS	TRUSTEES WITH UNDUE POWERS
CAMEROON	STATE	CUSTOMARY RIGHTS PERMISSIVE ONLY
MALAWI	STATE	DUE TO NEW POLICY LOCAL CONSENT PREFERRED
ANGOLA	MIXED	CAN ALIENATE OR LEASE UNLESS COMMUNITY CONCESSION ALREADY ESTABLISHED
ZIMBABWE	STATE	COMMUNAL AREAS VESTED IN PRESIDENT
GHANA	CITIZENS	MAY DIRECTLY LEASE



Needed: a stronger focus on tenure vulnerability

1. Invest more heavily & coercively in tenure reform
2. End the ludicrous failure to acknowledge community-derived rights as property interests sustaining majority tenancy on state owned lands
3. Shift the focus from farm to commons
4. Legally, bring the fact that customary rights have not always been extinguished into play
5. Codes of conduct & conditions are insufficient; more precise and enforceable international law needs to be developed and applied

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6. Inapplicability of ‘indigenous peoples’ referring only to hunter-gatherers & pastoralists in Africa needs to be resolved as limits use of significant international law
 7. Devolutionary land administration needs to be made more important than titling
 8. Widen attention to include status of reserved lands and concessions for timber, oil & minerals
 9. Work to do away with re-created feudal separation of ownership of the soil and rights to land and abusive scope of public purpose
 10. Adopt a rigorous shareholding approach to agricultural investment and introduce mechanisms to limit local & foreign investor land & resource hoarding