Nothing New Under the Sun or a New Battle Joined? The Political Economy of African Dispossession in the Current Global Land Rush

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Abstract
This paper focuses upon local conditions which allow governments of agrarian economies in especially Sub Saharan Africa to lease rural lands at scale to investors without the consent of customary owners. The key enabler examined is persisting failure in many domestic laws to recognize customary interests as amounting to rights of real property. Related enablers include the failure of democratic decentralization to restore meaningful authority over land disposition to rural communities, and insufficient rule of law to curtail the ability of state actors and associated elites to abuse principles of public interest for private gain. As governance concerns, analysis is nested in overview of broader limitations in the modernization of the modern African state, still dogged by neopatrimonial relations and sustaining pursuit of classical strategies of transformation which build significantly on the dispossession of the poor. The current land rush in Africa further entrenches this, and, it is argued, does so both dangerously and unnecessarily at a time when tolerance of abuse of human (land) rights is fraying, and when the opportunity exists to establish a more inclusive route to agrarian transformation by acknowledging the immense land and resource capital customarily possessed by the sub-continent's rural poor.

Key words: customary land tenure, common property, land grab, Africa

I ISSUE AND ARGUMENTS

The subject of this paper is the erosion of legal and practical respect for the land and resource rights of millions of Africans in the face of a surge in state land leasing to local, regional and foreign investors. The surge is now sufficiently evident in especially Sub Saharan Africa (SSA) but also other agrarian continents to be ranked a 'global land rush' or, from different perspectives, a 'global land grab'.

The key argument explored in this paper is that much of the lands being leased by African governments are not indisputably theirs to give, and more legitimately the property of their rural citizens. To this extent the 'land grab' is primarily domestic, between African governments and their rural citizens, although more popularly interpreted as an inter-state or north-south land grab. Although not covered here, this is similarly the case in Latin American and especially Asian jurisdictions where the surge in large-scale land allocations is also underway. In India, Cambodia, and Indonesia, for example, the unsatisfactory legal status of particularly collectively-owned customary rights is, as in Africa, the basis upon which abuse of majority land interests also mainly proceeds (see ELDF & FES, 2011 for India, Colchester, 2011 for Indonesia, GTZ, 2009 for Cambodia).

Much of this paper will explore how the ability of modern African governments to dispose of their citizens' lands at will is hardly new and on the contrary historically evolved through the same kind of global resource-seeking pressures now enjoined. However it is also suggested that the current rush promises such new heights of dispossession and in such changed socio-political circumstances that the instruments legitimizing it could face their dying days. To this extent the land rush is welcome as potential tipping point to socio-political change in how landed resources are owned and controlled, a founding concern of land-based economies.

In the meantime, the trend is dangerous to social stability. It also further delays the longstanding need to look afresh for paths of agrarian transformation which build upon, rather than against, the interests of majority poor. To achieve this, it is argued, recognition of the bountiful landed capital customarily possessed by rural communities is a logical starting point; this offers a foundation for their productive inclusion rather than exclusion from resource-based development. The key missing pre-requisite and incentive is legal and applied acknowledgement that these assets are in fact their property.

The Customary Sector

The context for this discussion is customary or indigenous African land tenure. This is best understood as a *community-based* system of regulating land and resource ownership, access and use. Although its norms carry over significantly generation to generation (hence deemed 'traditional' or 'customary' tenure), the regime is always contemporary; this is because it is sustained only for so long as the living community adheres to its norms, and periodically updates these to meet changing pressures. As land shortage and commoditization have accrued over the last century two key evolutions widely seen have been a hardening of definition of 'our land' as 'our real *property*' and associated refinement of sometimes quite fluid boundaries between the land domains of respective communities (Alden Wily, 2007 for Liberia; Idelman, 2009 for Mali; Komey, 2008 for Sudan).

The same century has seen persistent denial of the strength of land interests which customary regimes deliver, along with attempts by governments to replace these community-based regimes with introduced western forms of state-derived and controlled tenure, and within which the holding of land on an individual and formally registered basis becomes virtually the only acceptable tenure form.

Despite this, the customary sector remains the largest realm of landholding in Sub Saharan Africa today. This is in numbers of adherents (ninety per cent or more of the total rural population; i.e. around 500 million people). It is also so in the physical expanse of the sector.

Both are most indicated by the fact that only a tenth of Sub Saharan Africa's 2.36 billion hectares is subject to state-derived registered entitlement (Alden Wily, 2011a). Setting aside the tiny proportion of the sub-continent embraced by urban areas (less than one percent) most titled rural lands are located in Namibia, Zimbabwe, Kenya and especially South Africa (Deininger, 2003, Schneider et al., 2009). Another thirteen percent of lands, in the form of most valuable forests, marshlands and rangelands, have been removed from the customary sector to create parks and reserves. These protected areas are held to be the public property of the nation or as often, the private property of governments (Alden Wily, 2011a). Excluding these reserves and titled lands, the customary sector still remains vast at around 1.8 billion hectares. By far the majority of this area (around 1.6 billion hectares) comprises forests, woodlands, marshlands, and grazing lands, which communities by tradition (and logic) own and use on a collective basis ('the commons'). This is because titled or untitled cultivation in Africa remains very low, at around 189 million hectares (ibid). It is therefore the legal status of the commons which focuses this paper.

Pernicious Dispossession

Clearly, tenure problems face the customary sector.

First, critical values and assets associated with African (and other indigenous tenure regimes around the world) have been largely taken away from the customary sector over the last century of state-making. This includes wholesale loss of rights to minerals, oil, or water associated with customary lands, and less uniformly, loss of wildlife, tree and timber ownership. While nationalization of subterranean resources, sea, large rivers and lakes has justifications and were not, in any event, normally considered ownable in customary norms, the loss of a community's rights to local lakes and streams, bank-sides and shore-line resources, and sometimes anciently-mined iron and gold workings, are less certainly just. These are matters which indigenous communities on other continents and especially Australasia have begun to successfully take up (McKay, 2004). Extinction of local ownership of trees on the land, and/or key products like timber or Gum Arabica has also been pervasive in Africa. This is frequently through blanket provisions that forests and woodlands are national property. Nearly 98 percent of forests in Africa belong to the state (FAO, 2008). Rural communities have also seen demise in their right *to control* the disposition and use of their traditional lands. In practice, chiefs exercise considerable land authority, often only in default of active reach of the state and generally confined to allocations for houses and farms. Later, exceptions to the rule will be outlined, in the form of modernized community-based authority such as in Benin and Tanzania. In the main however, customary landholders lost ultimate control of their lands and landholding a long time ago. For example, it seemed logical to administrations that valuable forests and wildlife range could only be conserved by removing these from local jurisdiction. Only in face of repeated resulting open access tragedies resulted has lawful community-based management of especially forests begun to entrench (Alden Wily, 2003a, RRI & ITTO, 2009).

The platform for losses above has been a more basic denial that customary regimes deliver real property. The statutory norm, country to country, has been that these deliver only rights of occupation and use to otherwise un-owned land. Africa was, in short, a land empty of owners and has remained so in law for much of the 20th century as described later. In practice, the situation has been more complex – and contradictory, as reflected in continued confusion and legal ambivalence as to the existence and force of customary law, a main subject of which is land tenure. Differential treatment of categories of customary property has also evolved. The most marked is between lands held for settlement or farming (and generally owned on a family basis), and the much larger domain of collective lands covering local pastures, woodlands, etc. Distinctions in legal treatment of these assets are important for they are differently affected by the current land rush.

The Global Land Rush

Little background needs to be given on this much-publicized phenomenon, ultimately triggered by price hikes for oil and food in 2007-08.[1] The key concern here is what this surge bodes for the customary land sector, and despite a decade or so of tenure reform supposedly designed to strengthen these rights (see later). This is further salient for suggesting a more clearly surfacing disconnect between the property interests of rural communities and their governments. This highlights neo-patrimonial attributes of the modern African state and the path of capitalist transformation upon which it is embarked, now so formidably interlocked with global interests and drivers, making it less and less easy for ordinary rural poor to challenge or transform. Aspects most relevant to this are outlined below.

A trend unlikely to diminish

First, as well as predominantly affecting Africa (two thirds of large leases are in SSA), and occurring at extraordinary speed (the World Bank shows that large-scale acquisitions have multiplied by a factor of ten this last decade) the surge shows signs of being more expansive than previously calculated and could already involve some 70 million hectares of lands leased for large-scale development, and mainly since only 2009.[2]

Nor is the surge likely to be short-lived. This is suggested by the term of leases, virtually all renewable and some extending to 99 years. It is also suggested by the expanding purpose of acquisitions beyond agriculture into ranching, plantations, carbon trading, and simply speculation (GTZ, 2009). When land takings for mining, oil and timber concessions are factored in, the area coming under large-scale and often foreign lease is yet more significant, although issue of timber concessions is declining due to sharp falls in timber prices (Karsenty, 2011). As the underlying driver for many investors to secure water comes into more explicit play, the trend could expand again, focusing upon the rich but fragile Nile and Niger basins, already supporting millions of families under customary regimes (Niasse, 2011).

The customary sector is most affected

Relatively few large-scale leases, especially to foreigners, derive from the private, titled landholding sector (Alden Wily, 2011a). Rather these derive from so-called public or state lands, a classification which almost entirely overlaps the customary domain.

Moreover, it is rarely ordinary customary landholders of these areas who are serving as lessors but their governments, demonstrating official positions as to ownership of these lands. As mere occupants and users of these presumed unowned lands, local consent is not usually required, nor routinely sought (GTZ, 2009, Cotula et al., 2009). Where it is sought and secured, case studies suggest this is granted on the back of insufficient information as to the implications and through promise of compensatory employment which so far has largely failed to materialize and/or be sustained (see EDC (2011) for Ethiopian and FIAN (2010) for Kenya and Mozambique).

Nor may affected communities derive comfort from the fact that governments are mainly leasing rather than selling their lands outright to investors; the term of lease will deprive one to four generations from even accessing or using these lands, the issue of their ownership aside. Even should these lands be eventually returned to customary land owners, they are unlikely to be in useable condition as the salutary experiences of large-scale mechanized

[1] Deininger & Byerlee, 2010 for the World Bank provides an accessible and recent review.

[2] ILC with Oxfam, CIRAD, GTZ and the University of Bern have been carrying out a tracking and verification exercise since early 2010, with results to be published mid-2011.

farming in central Sudan in the 1970-80s illustrates and sugar farming in community marshes in Rwanda and Kenya already foretells (Saeed, 1980; Veldman & Lankhorst, 2011, FIAN, 2010).

Invaluable communal lands are at stake

Within the customary sector, communal assets are most affected and targeted (Alden Wily, 2011a). The latter rests upon denial of these lands as owned (see later) and the former (partly) upon ignorance that these lands are central to rural livelihood. Direct values of local commons have been shown to be immense and sometimes constituting 90 percent of livelihood, as documented by IUCN, UNDP, FAO and the World Bank, even when only forest resources within community domains are considered (Emerton, 2010). Poorest households are consistently the most dependent upon local collective resources (and definably poor households remain the majority in rural Africa (PRB, 2005). Accordingly, land takings even of uncultivated lands near communities can be fairly safely expected to pauperize rural communities further – unless of course much-promised employment opportunities are provided in compensation, and at scales which make a difference to the survival and savings of poor people. Thus far this has not materialized.

There are more severe effects; removal of natural resource removes potential opportunities which still exist for poor rural communities to use this sleeping capital to make changes themselves, such as raising money for local facilities or incomes, or as might be entertained through being able to lease out these lands themselves. This is not fantasy; there has for example been a substantial history of poor communities in Southern Africa raising significant incomes from hunting and tourism enterprises through in effect leasing their lands and/or receiving significant shares from the profits (Alden Wily & Mbaya, 2001, Nelson (ed.), 2010).[3]

The targeting of uncultivated lands for lease is not surprising; commons provide the scale of contiguous and intact estates sought by large-scale investors. Many developers and especially those planning to plant jatropha and oil palm prefer virgin or forested lands, as do those beginning to apply for land for carbon trading purposes (RRI, 2011). Those seeking lands to turn into commercial ranches target pastoral lands, much as those securing oil, mining and timber concessions target forest and/or savanna lands. Host governments also direct investors to unfarmed lands to minimise physical displacement, conflict, and the costs of compensating farmers for lost buildings and crops. Most important for this discussion, governments also consider unfarmed lands to be 'unowned, vacant, idle and available'; explicit policy for example in Madagascar and Ethiopia (Alden Wily, 2011a).

This is not to say that settlements and smallholding farms are not being affected by current large-scale rural land leasing. In many cases they are, and especially including where shifting cultivation operates and renders the distinction between communal and private lands indistinct, with cases in Liberia, DRC and Mozambique already apparent (*ibid*). Smallholders even quite remote from the site of leasing may also be affected, already the case in Mali where upstream water-taking for commercial rice production is decreasing the availability of domestic and irrigation flow for thousands of downstream farmers (Niasse, 2011). It is also the case in Kenya where dams created for commercial sugar cane production is both now flooding adjacent smallholdings and depriving downstream farmers of water (pers. comm. Fred Pearce, February, 2011). One can only speculate (as Niasse does) what might happen to transhumance for thousands of agro-pastoralists in Southern Sudan, should the great interest being expressed in farming the Sudd materialize. Impacts upon livelihood in and around the equally massive Niger Delta can be expected as large-scale water-hungry rice, wheat and

[3] Latin America provides an even greater plethora of community-based natural resource income generation including well-developed small scale timber enterprise in Mexico among other states (Molnar et al., 2011).

sugar cane proceeds. And yet these are the kind of landscapes the World Bank declares to be the sleeping giants of agricultural growth, to be awakened by international investment (World Bank, 2009). Water limitations and environmental fragility, let alone existing high levels of land degradation, appear to have slight presence in the large-scale leasing discourse, notes a puzzled Niasse.

Land capture with new trenchancy and provocation

Involuntary loss of customary domain is, of course, neither new nor confined to external drivers. Local notables historically find means to secure undue shares of lands for their larger agriculture and livestock-raising enterprises than poorer households (Hesseling, 2009 for Senegal; Mendelsohn, 2008 for Namibia; Cullis and Watson, 2005 for Botswana). It would also be naïve to ignore the fact that hierarchical and even feudal relations have underwritten some African societies and frequently persist in more modern form, such as in the powers over lands which chiefs may exert or the land ownership strictures placed upon longstanding immigrant or powerless minority ethnicities. As routinely, elites within the community or persons associated with it take disproportionate advantage of rent-seeking opportunities when externally-driven commercial opportunities arise. From place to place chiefs may be found who reconstruct their land trusteeship as outright ownership , in order to secure the lion's share of payments made by developers for housing estates on the edge of Africa's multiplying towns and cities (Ubink, 2008 for Ghana; Gumbo, 2010 for Zambia; Peters and Kambewa, 2007 for Malawi).

Inter-community competition for resources is also historically fierce, most tangible between settled communities and nomadic pastoralists in East Africa and the Sahel (Nori et al., 2008; Beeler, 2006). As settled communities expand, they are less willing to allow seasonal grazing by visiting pastoralists. Pastoralists also historically compete aggressively for pasture among themselves, and all the more so as they are squeezed in their home areas, often due to expanding government schemes.

And yet, pressures and losses to the majority poor deriving from within or among rural communities pale in comparison to the scale of losses to commons experienced through dispossession by external dictate. This has included creation of zones for European settlement and farming (e.g. absorbing 145 million hectares of customary domain in South Africa, Zimbabwe and Namibia (Alden Wily & Mbaya, 2001)); creation of above-mentioned protected areas extinguishing community rights to nearly 300 million ha of their most valuable forests, wetlands and rangelands; as invasive issue of concessions over communal lands for industrial timber, mineral, gas and oil extraction, and reallocation of 'public lands' for state-run and private agri-business. The last have ranged from late 19th century oil palm plantations all along the west coast of Africa (Amanor, 2008) to mid-century one million acre schemes for rubber development in Liberia, cotton in Sudan and groundnuts in Tanganyika (Alden Wily, 2007) to more recent land-grabbing at scale by post-colonial administrations for allocating to favoured ethnicities, parastatal or private commercial farming, such as widely seen from the 1960s in Sudan and Kenya among many other states (Bruce & Migot-Adholla (eds.), 1994, Saeed, 1980, Cliffe, 2011).

When viewed in this context, the 20-30 million hectares confirmed as already leased since 2007-08 represents more continuity than change and is – as yet – not especially startling in its dimensions.

More ominous is the internationalized capitalism underwriting this surge and the grist this gives to sustaining the trend. Lessees include not only international companies influential in their own right but also other governments and companies they support, including from aggressive land and resource seekers like China, Korea and Gulf States. Their governments have much to bargain with including lucrative loan and aid packages and without such

restrictive conditions traditionally imposed by western donors (Brautigam, 2011). The fact that such land acquisitions are nested in a surge of bilateral investment treaties provides new levels of investor/lessee protection, not least because these in turn have recourse to international trade law, surveyed by Heri et al., 2011. As Perez et al. (2010) show in arbitration cases between international companies and aggrieved host governments or affected communities, the rights of the former usually prevail.
Of course large-scale leasing of rural lands never has and still cannot occur with the welcoming support of host governments, senior levels of which are noticeably closely linked with local business. Although perhaps unnoticed by home populations, the wealth of African elites (including fabulously and dubiously wealthy political leaders) has been finding its way for several decades into European and North American markets, helping to open routes for return investment in Africa (*African Business*, 2009). For ordinary farmers, this apparent lateralization of class interests across countries and continents tightens threats to their land rights, practically delivered in local-international partnerships and seemingly speculative acquisitions in preparation for this (Tamrat, 2010, Schoenveld, 2010). Such alliances and shared interests link local and international land capture in ways newly difficult for affected communities to resist, and promise to harden already widely in-country patterns of advantage and disadvantage.

Famously neo-patrimonial aspects of African governance underlie this, in that local African elites frequently constitute a class of citizens who have for some time combined traditional, political, economic and even juridical and military power-holding in increasingly trenchant ways (Chabal and Daloz, 1999, Erdmann and Engel, 2006, NIC, 2008). This suggests that it may be difficult for central decision-making to be genuinely distinct from the personal economic interests of this class or to be readily subject to the level of self-regulation which North et al. (2009) for example consider a key marker of a genuinely modern democracy. It is therefore of note that the majority of new large land lessees in Sub Saharan Africa (with the exception of Sudan) are in fact local nationals in their individual or private company capacity, and with politicians and senior officials well-represented (Tamrat, 2010 and EDC, 2011 for Ethiopia; FIAN, 2010 for Kenya and Mozambique). Commonsense suggests that these decision-makers are unlikely to be deflected from strategies which add to their capital (land) assets, justified by their promise of personal contribution to the economy through taxation and job provision. Fortunately, they may look to almost half a century of promotion of precisely such polarizing strategies as the key to growth, most recently in the requirements of World Bank-led structural adjustment policies that African governments make rural lands freely available to commercial investors.

It is ironical therefore that the land rush is occurring at a time when governance and tenure reforms of the last decade or so suggested alternative trends, at least in terms of more localized and inclusive norms for decision-making around land and natural resources, and in greater protection of customary land interests as laid down in a number of new national land policies, constitutions, and land laws (see below). A notable contributor has been widespread retention (and in some cases, furtherance) of legal limitations upon speculative land acquisition and land hoarding (see Alden Wily & Mbaya, 2001 for concrete examples).

That such provisions have been hollow declamations or contradicted by stronger provisions, or simply reflect willful abuse of the law, may be concluded from the striking lack of public transparency which surrounds so many large-scale land allocations at this time and the dearth of informed local consultation prior to leasing. It could also be concluded that the stakes have simply got higher in the money that can be made in the name of economic growth and

(indeed badly needed) agricultural investment. In this setting the interests of the majority rural poor are once again being side-lined, and policy and legal debate as to who owns the especially off-farm resources being resolved with unanticipated finality.

Or perhaps not so finally? For of related concern must be the impetus the new wave of disposal of so-called public lands may be expected to give to civil conflict, and in the absence (thus far) of the levels of industrialisation classically required to absorb the dispossessed and deflect grievance. I have shown elsewhere, for example, how handover of community lands at scale to investors in northern Sudan is occurring on the back of failure by the government in Khartoum to restitute (as impliedly required by the 2005 Peace Agreement) the millions of hectares already taken from communities for similar large-scale private agriculture in the 1970s and 1980s; land theft which contributed significantly to the long civil war of 1983-2002 (Alden Wily, 2010b). Responsive formation of local militias is now being reported (Large and El-Basha, 2010, Flint, 2011).

In short, while the current land grab bespeaks the same kind of subordination of majority land interests launched with colonialism a century past and sustained through much of the last century, it exists today in an era where such trends could have been expected to be curtailed and where popular resistance is more likely to arise. Despite their poverty, rural Africans (let alone their urban advocates) can be assumed to be more socio-politically aware and worldly interconnected than their forefathers and less tolerant of one of the most fundamental human rights in agrarian societies, the right to secure tenure. Steady rise in civil society mobilization around land rights in agrarian economies bears witness to this (often in the form of land alliances among burgeoning non-government and community-based organizations). If anything, state-backed land grabs can be expected to boost demands for land rights change.

II LEGAL ENABLERS TO DISPOSSESSION

The preceding section suggests there are important local drivers to the current land grab aiding and abetting more international drivers. This paper now focuses on those local drivers considered most effective in delivering such incautious promise of dispossession of rural poor in service of (presumed) dramatic agricultural and resource-based growth. These are primarily matters of law. They include relaxation of limitations upon foreigners acquiring land and resources in African states, and associated legal liberalization in foreign investment conditions and expansion in definition of what constitutes public interest to cover private purpose.

Most enabling of all is the failure in so many African countries to acknowledge customary landholding as real property in the first instance; or at least as possessing the same force and protection given to statutorily-derived and sustained landholding. This lacuna enables untitled customary lands to be deemed to be unowned and as a consequence fall by default to the state. This makes it perfectly legal for governments to sell or lease these lands to those of their choice. For some time those of their choice have prominently included many of their own cadres; concretely documented as systemic abuse of public trust in Kenya (RoK, 2004, Kanyinga et al., 2008) but as widely observed in other African states (e.g. Kasanga & Kotey (2000) for Ghana). To this extent what most distinguishes the current land rush is not its novelty but its consciously reinforced internationalized capitalism.

Governance inadequacies associated with the founding tenure shortfall must also be briefly observed. The first is the questionable situation by which failure to recognize customary lands as real property renders states, or more precisely, governments of the day, the majority owners of African lands. With majority levels of land dependence and yet no surety that majority public interest will take precedence, this places millions of Africans at the mercy of uncertainly benign landlords. Weak rule of law, or more exactly weak political and judicial will, compounds their vulnerability. For as the above-cited Kenyan reviews illustrate, not just 'irregular' allocations made by a government but also those which are definitively illegal can be circumvented with impunity, it seems, by those determined upon a course of land capture.

A common lack of genuinely devolved governance over land holding is a further structural impediment to security of even local occupancy and land use. This absence is wider than the land sector, manifest in reluctance of most (but not all) African states to sufficiently devolve local government to the periphery (i.e. to villages) or even to fully empower the mid-level county and commune institutions which they do create. Most of these district, cercle or commune local governments are in any event de-concentrated arms of central government to the extent they are funded and staffed therefrom and report upwardly rather than to the populations they serve (Ribot & Larson (eds), 2005, Alden Wily, 2003b).

The absence(with important exceptions illustrated later) of empowered and autonomous elected village governments matters in land matters as other arenas, by truncating the socio-political and institutional solidarity needed by communities to be well-informed of the implications of threatening dispossession, to organize to protest or resist this, or to be heard. Although devolved governance is a well-established objective in land and natural resource, it is difficult to find this in the wider agenda of democratization; this as a recent gathering of experts on the subject in Ghana focused almost entirely upon multi-party, legislature and judicial developments (NIC, 2008 *passim*).

Dispossession as a Century-Long Endeavour

A main point made by this paper is that statutory norms enabling politically-engineered theft of customary lands is of longstanding and the current land grab merely heightening delivery of this potential in newly expansive and concrete ways. Although these have their origins in colonial norms they did not end with colonialism. In fact, as I have recounted elsewhere, treatment of customary land rights may now be seen to have begun a good deal more benignly than would follow from the mid 20th century and beyond (and despite brief resurgence of more supportive policies in the mid-1950s to pacify independence movements) (Alden Wily, 2010a and *in prep*.).

Broadly, following the Second World War, any pretence and measures to protect African land rights could be done away with as the 'unavoidable demands' of capitalist transformation took over responsibility for their demise, and in which local elites were increasingly supporting beneficiaries. Nevertheless, current-day statutory diminishment of customary rights on the continent has firm origins in the stratagems of colonizers, and in ultimately similar ways whether French, Portuguese, Belgian, German or British.

In brief, Europe's own historically feudal norms laid the platform for treating Africa as a continent without owners in establishing that not only political sovereignty stems from the head of (the conquering) state but the ownership of land and resources under his or her political dominion (McAuslan, 2006; Cahill, 2007; Alden Wily, 2007, 2011b). Although by the late 19th century this had become symbolical in Europe, the paradigm was conveniently revitalized in European capture of Africa, using justifications already well-established by earlier colonial enterprise in Asia and Latin America (and in the case of the British, even earlier in Ireland where well-developed Irish customary property law was thoroughly suppressed by the 17th century). Setting aside mainly coastal exceptions where worldly-wise chiefdoms resisted cooption of their material land ownership along with loss of political sovereignty, Africans became land tenants virtually overnight.[4]

A main justification was simply that because land was possessed *communally* and additionally, by custom not usually able to be sold, African possession could be adjudged to amount to no more than interests of occupation and use. The land itself was ownerless (*terra nullius*). Accordingly it could be taken without the need to pay compensation, other than for human improvements made to the land in the form of buildings or cultivation. Uncultivated and unsettled lands were usually deemed to be unowned and unownable, called 'wastelands' or '*terres vacantes et sans maîtres'*. This land capture elided nicely with the plantation, timber, gold and other resource- grabbing objectives of colonizers from German Namibia to Francophone Senegal to British East Africa. The collective lands of villages, kingdoms and tribes fell like ninepins to the colonial state (or in the case of Portuguese territories, to Lisbon).

Meanwhile, in accordance with European property norms, ownership of even huts and farms could only be asserted on the basis of registered state grant or through deeds of acquisition and transfer formally registered in government ledgers. While the rising African elite

[4] Notable exceptions included Ethiopia, which remained un-colonized, the hinterland of Liberia, the Buganda kingdom in Uganda and the Barotse kingdom in Zambia, and a clutch of littoral enclaves along west and east coasts of Africa. Several Ghanaian kingdoms most notably deflected three legal attempts in the 1890s to hand over their gold-rich forests to the British Crown, resulting in the almost unique situation of Ghana where most of the land area has remained beyond the reach of classification as unowned public or state lands (Amanor, 2008). Confronted with the same legal instruments in 1899 and 1903 (borrowed from the canon of Indian colonial law) the less experienced Sudanese were not so lucky, seeing more than 90 percent of the country area fall promptly to colonial state ownership (Alden Wily, 2010b).

gradually began to secure such entitlements (mainly in towns), the rural were by 1960 still permissive occupants and users of lands held by colonial governments.

The Failure of Independence to Liberate Land Rights

Casting off the yoke of imperial colonialism in mainly the 1960s did strangely little to alter the land relations of modern African governments with their rural populations (Alden Wily, 2010a, 2011b). On the contrary, there was pervasive continuity in colonial norms extending well beyond an acceptable transition period (and with countries like Madagascar, The Gambia, Central African Republic and Swaziland making virtually no significant land law changes until the 1990s).

More commonly, legal changes progressively tightened the screws against majority rural land ownership as advised by the late colonial advisers, now the new bilateral donors along with thriving UN agencies, which had much to say about agrarian transformation at the time as (El-Ghonemy, 2003, World Bank, 1975). Ambivalence as to how to handle customary tenure gave way to lightening certainty that conversionary individualized titling was the answer to a range of rural sector ills. The model provisions proffered were not significantly different from those already in place in most jurisdictions serving settler registration from the 1900s but enacted in new registration laws all around the continent in the 1960s and 1970s, often under the guiding hand of donors. Compulsory registration programmes abounded (Bruce & Migot-Adholla (eds.), 1994). Millions of secondary and collective rights were in fact only saved due to the limited reach of these programmes, most expansive in Kenya but yet still limited to less than half the country land area half a century later.

Meanwhile less cumbersome instruments to advance agricultural transformation were pursued, amounting to rising nationalization of lands. While in some cases this embraced the entire country, including reducing freeholds to leaseholds held from the State, in others only the customary sector was affected. For example, in 1965 Malawi enacted a Land Act to remove original title in customary lands from chiefs, enabling the President to directly lease these lands without local consent. In 1967 Chad turned customary lands into public land, deemed vacant. Mauritania declared all untitled lands to be subject to *Shari 'a* rather than customary law, increasing the need to prove sustained use to secure occupation. DRC passed laws in 1966 and 1973 confirming customary tenure as rights of permissive occupation only. In 1970 Zambia removed the special status of Barotseland where customary ownership had been acknowledged throughout the colonial period. Sudan enacted legislation in the same year to establish that untitled lands (95 percent of the country area) were Government Land, to facilitate lease of large tracts to local and foreign investors. In Somalia, Siyad Barre passed the Agricultural Land Law, 1975, abolishing clan-based tenure and making only cultivated lands in the mainly pastoral territory eligible for registration, mainly through state cooperative developments. Idi Amin enacted the Land Decree in Uganda in the same year, turning already deemed customary occupants into 'tenants at sufferance' meaning his government no longer needed their consent to evict them.

In 1982 newly-independent independent Zimbabwe restructured the Tribal Lands Act as a Communal Lands Act, with more restrictions on local rights and root title firmly vested in the President (although at the same time pursuing restitution of white-owned farms in non-communal areas 'in the interests of the black majority'). In the same year 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 thousands forced to flee civil conflict and finding their lands on return 'lawfully occupied' by others. In Liberia, the Hinterlands Regulations devised in 1929 and consolidated in 1949 and which had enabled better-off chiefdoms to secure absolute collective title to nearly one million hectares, failed to appear in the new Civil Code of 1973, throwing the status of these entitlements into uncertainty, compounded by a new registration

law which typically focused only upon individualized entitlements. Meanwhile Cameroon, along with many other Francophone territories, confirmed in 1974 that unregistered lands were either national land 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.[5]

Few of these measures were deliberately dispossessory. As well as being broadly persuaded that customary land rights did not amount to property, even in the obviously capitalized conditions of mid 20th century Africa, new administrations were persuaded of the importance of central government control over landholding and struggling to deal with the fact that the majority of their citizens were unregistered land holders, advised as an obstruction to development. Social land justice was sought through other routes, such as in new legal restrictions placed upon residual landlordism in parts of Tanzania, Burundi, Cape Verde, Ghana and Uganda. Powers over farm distribution which native councils and traditional authorities had garnered under indirect central government rule from the 1920s were also widely reined in and these institutions replaced with more democratically formed district, county or *cercle* institutions. 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 polarization and landlessness, especially severe in feudal Ethiopia (Rahmato, 2009). Although abandoned, a positive result in especially Tanzania would be creation of elected village governments, to be eventually mandated in 1999 as the legal land authorities of community land areas, on behalf of village constituents.

Nevertheless, with exceptions (most notably Botswana) by 1990 the majority of Sub Saharan states had entrenched rather than done away with the colonial notion of the state as ultimate land owner, and particularly of any land which lay uncultivated, whether purposely or not. It took little time for presidents and their governments to exercise their powers as real rather than symbolical landlords. A great deal of direct interference in unregistered lands accordingly occurred through the 1970s to 1980s, including in self-declared socialist regimes like Senegal, Ethiopia and Tanzania. For example, populations in nine areas of northern Tanzania lost their rights in 1973 alone (Alden Wily, forthcoming (a)). Attempts were even periodically made to remove the need for government to pay for homes and crops lost in the process and debts to citizens mounted (Kasanga & Kotey, 2001 for Ghana and Alden Wily, 2011b for Cameroon). Issue of concessions for oil, mining and timber extraction also soared during this period, displacing millions of customary landholding from six Congo Basin States alone (Sunderlin et al., 2008). Extension of game reserves and declaration of Hunting Areas in East and Southern Africa had similar effects (Nelson (ed.), 2010). Together with titling programmes which generally adjudicated other than farmlands as central or local government property, the upshot was that by 1990 customary landholders were in even less secure possession of especially uncultivated lands than ever before.

[5] These and other examples are fully documented in Alden Wily, *in prep*.

Tenure Reforms from the 1990s

Tenure reform from the 1990s came no minute too soon (for details see Alden Wily, 2011b). These have had different drivers, with political liberation and/or post-conflict conditions prominent (South Africa, Namibia, Angola, Mozambique, Sierra Leone, Liberia, Uganda, Sudan, Eritrea). Changes have often been launched with the establishment of new constitutional principles of land and property. In more settled economies like Zambia, Malawi, Ghana, Lesotho and Tanzania, World Bank structural adjustment demands have left their mark in the prominence initially given to fostering a free land market. More or less everywhere in SSA since the nineties, customarily-held rights in land are now able to be more freely sold. Alongside this land laws now make it much easier for foreigners to acquire rural land. This is usually on a leasehold basis, and sometimes through circuitous approval mechanisms.[6] These shifts have been almost as uniformly accompanied by creation of investment promotion centres to facilitate foreign land access.

Once underway, reforms gained impetus from wider forces of concurrent democratization, and the politicization arising out of such changes. In practice, land reforms have restored admittance of real property rights to millions of Africans whose families have been occupying and using the same lands for generations. Tanzania, Uganda, Mozambique, and in more limited ways, Benin and Madagascar are lead examples as shown below. New constitutions, forest laws, and local government laws have also helped entrench new terms in some 30 countries. Most recently, Kenya's 2010 Constitution requires legislation be drafted to curtail state powers over public lands, and which just as important, makes public lands a residual category, identifiable only in the absence of private and community rights.

And yet, progress has been both uneven across the continent and lacking in true overhaul in most cases. Uganda, for example, remains the only country to have done away with the separation of ownership of the soil and ownership of rights to the soil which has generated such pernicious state landlordism over the last century. Additionally, after boldly announced intentions in the 1990s, there has been a discernible slow-down, many proclamations not getting past policy statements or constitutional directives. While new investigatory land commissions continue to be established (currently the case in Liberia, Nigeria, Sierra Leone, Gambia, and Sudan), diluted follow-through has proven the norm. The tortuous process of new land law making is itself showing signs of being used as a delaying tactic, while business as usual continues (arguably the case in Liberia, Northern and Southern Sudan and Kenya). Current concentration of rural land investment opportunities presages further weakening of reform initiatives. Forest sector agencies increasingly illustrate the case affecting communal forest rights, marked over the last year or so by virtual cessation of gradual restitution of natural forests to community ownership alongside attacks upon forest communities resisting eviction to make way for concessions, mining or land deals for commercial carbon trading (RRI, 2011, Karsenty, 2011). At the same time, important country precedents of social land justice have been periodically established as laid out below. This assures a legal platform from which communities may protest and protect their rights. They also serve as models which unprotected communities can draw upon for inspiration and provisions to concretize their demands. Whether fully applied or not, legal changes do seem to make a different. Below, distinctions among 30 African states in their legal treatment of customary rights are outlined, to help predict how customary landholders are likely to be affected by invasive, internationally-backed land capture.

Countries Where Customary Land Rights Have Most Support

[6] For examples in fifteen Eastern and Southern African states see Alden Wily & Mbaya, 2001:306.

At least in land law, Tanzania (1999), Uganda (1998), Ghana (1986, 1994), and Mozambique (1997) most closely override dispossessory norms, although in no case in a foolproof manner. In Mozambique, for example, while both the National Constitution (1990) and the Land Act (1997) uphold customary tenure as a legal means of owning rights in land, the mechanisms for doing so fall seriously short of meeting this objective. While investors seeking land must consult with local communities, the procedure does not require the consent of most community members, allowing this to rest on the decision of a handful of potentially self-selected representatives (Akesson et al., 2009). The absence of locally elected village government is sorely felt in such situations, as is the absence of a comprehensively assisted programme through which each rural community in the country delimits its community land area. Investors therefore enter into situations where communities are ill-equipped to negotiate on an equal footing. De Wit and Norfolk, 2010 identify more recently introduced regulations under local government, land and natural resource law which constrain the right of rural communities to serve as private, collective land holders.

In Ghana, key shortfalls derive from the legal support which has been increasingly given (especially in the National Constitution of 1992) to the idea of chiefs as the allodial owners of community lands, rather than trustees, enabling chiefs to capture most of the revenue which may be earned from transfer and sale of especially unfarmed lands (Amanor, 2008, Ubink, 2008). Through this, communities have lost a great deal of land in recent years to investors (Schoenveld et al., 2010). It is noticeable that a recently-launched process of reviewing the 1992 Constitution does not plan to review its land articles.

South Africa should in principle be included in this 'best protection' category, having established support for customary rights in its constitution (1996) and demonstrated good faith if limited progress in its restitution initiatives (van den Brink et al., 2005). Restitution directly affects communally-held lands including 82,000 hectares of State Forests within the former homelands. However, South Africa has done poorly in delivering improved tenure relations generally in the former homelands, where 21 million customary landholders reside on 15.7 million hectares. Although the Communal Land Rights Act (2004) was designed to provide this, the law was not applied and has since been ruled unconstitutional (May 2010). A main cause was that the law opened the way for chiefs to secure root ownership of communal lands, rather than community members. Homeland residents meanwhile secure some protection against reallocation of these areas (still owned by the state) through the terms of the Interim Protection of Informal Land Rights Act (1996).

Although not to become a fully independent country until July 2011, Southern Sudan is the most recent dominion to lay down a legal basis of support for customary land rights, with active attention paid to the ownership of common lands within the sector. In key respects the Southern Sudan Land Act (2009) garners best practice, having drawn significantly on provisions in the land laws of Uganda and Tanzania, new constitutional provisions in Kenya, and some (limited) learning by doing exercises conducted in neighbouring parts of Northern Sudan. The new law makes the holding of lands collectively under customary norms legal and, like Kenya, renders public land a residual category, covering areas for which no customary or private tenure can be proven. Common properties may also be registered in the same way as individually-held land and a certificate of title issued, if requested. The new draft Southern Sudan National Land Policy (February 2011) commits to enacting a more detailed Community Land Act to flesh out the details.

However, the community-level and supporting county institutions through which customary rights may be defined, ordered, and administered are yet to be put in place. Additionally, the law leaves a loophole through which communities could lose substantial common lands. For the law prescribes that any citizen or non-citizen may access land for investment purposes, on condition that the ministries concerned consult with the communities and 'take their views

duly into consideration'. That is, formal community consent is not required. Land may also be compulsorily acquired for public purpose, defined to enable private purpose to be included, as noted earlier, increasingly the legal norm. Many large-scale land investments affecting community lands are under consideration in Southern Sudan, several of which have reached penultimate agreement stage (CHRGJ, 2010).

At least in law all six states listed above recognize customary tenure as a legal source of property and just as important, do not require formalization in registered entitlements for this to be upheld administratively or in the courts. This is reasonable in an environment where titling of any kind is prohibitively expensive and usually difficult to complete or sustain. These laws also make customary landholding of equal force and effect to rights acquired through non-customary routes, such as in the form of statutory freeholds and leaseholds. Families and communities, as well as individuals, are held to be natural legal persons able to lawfully own property (although with new limitations recently introduced in Mozambique). No restrictions are placed upon collective ownership of forests, woodlands, pastures, etc. unless these lands have been already withdraw as nationally protected areas. At compulsory acquisition for public purpose, compensation is to be paid on the same basis and rates as for statutorily-owned property.

With the main exception of Mozambique, these countries also acknowledge or institutionally provide for customary and/or community-based land administration, as corollary to recognizing indigenous tenure. These bodies are empowered to administer customary rights, both individual and collective, to issue evidential titles and/or to provide the basis for which county or district bodies do so. Establishment of Customary Land Secretariats in Ghana is in practice only slowly underway (Quan et al., 2008). Tanzania's elected village governments, as legally mandated land managers, have been in place for several decades and already administer land matters, although few have yet developed the requisite Village Land Registers or procedures for formally issuing titles to families or for earmarking commons against private entitlement in these registers (Kironde, 2009).

The importance of formalized, democratized and legally acknowledged community based government cannot be over-stated as a platform for acknowledging and securing customary land rights, indisputably most advanced in Tanzania. Tanzanian law also most explicitly assures communities rights to both retain ownership of valuable forest, marsh or other lands, subject to their pursuance of conservation legislation. This has been carried through in the Forest Act (2002), already resulting in the establishment of several million hectares of community-owned forest reserves. Additionally (like South Africa) the law enables gazette national reserves to be restored to community ownership. While no Tanzanian village has been assisted to take up this opportunity, community management of adjacent national forests now embraces an additional several million hectares, availing grounds for restitution claims in the future. Needless to say, and in contradiction to the spirit of the new land laws of 1999, wildlife policy refrains from acknowledging the implications of local land tenure, a source of contention between affected communities and government, as commercial hunting areas continue to be established over village lands, with major areas allocated to lessees from Gulf States (Matte and Shem, 2006).

Countries Where There is Significant Support for Common Property Rights

The land laws of Botswana (1968), Namibia (2002), and Madagascar (2005) also legally respect customary interests as registrable property. These countries would be included in the above best practice category if it were not for the fact that they limit this recognition to house and farm plots; this leaves local commons open for non-customary lease, and without requiring community consent. In the case of Botswana and Namibia, the issue of customary title is also not equivalent to rights acquired in the form of leasehold of freehold. Nor are their

local land boards significantly devolved below district level, although local chiefs and committees play consultative roles.

Nevertheless, Botswana deserves special note as being one of the first African states to treat customary rights as real property. Its 1968 law vested root title of tribal lands in (originally chief-led) Tribal Land Boards. This model was adopted by Namibia and Malawi's Land Policy (2002). In practice, due to the communities being unable to secure their grazing lands as village property, large tracts of community commons have been leased by the Boards to wealthy individuals for commercial ranching (Cullis & Watson, 2005).Botswana's Land Boards are also dubiously autonomous and with legal accountability upwards to central government, not to local community members (Alden Wily, 2003).

A similar situation exists in Namibia, where the Communal Land Reform Act (2002) excludes commons from recognition as the registrable property of communities and has opened these same lands up for private commercial lease for terms of up to 99 years. The Nature Conservation Amendment Act (1996) and the Forestry Act (1994) also allow for commons to be devoted to private revenue-generating purposes, and in ways which enable local customary owners/users to be excluded, although compensatory benefit-sharing arrangements are well advanced in some cases. More serious has been issue of borehole permits and fencing rights to elites, each time enclosing up to 2,500 hectares against community use. Rural Namibians speak openly of a land grab by the wealthy from within and beyond their communities (Mendelsohn, 2008).

Madagascar has seen improved legal treatment of customary rights since 2005, including devolving authority to issue customary entitlement to some 1,500 rural communes, compared to the vesting of this power in a mere 46 Boards in Namibia and half that number in Botswana (Teyssier et al., 2008). However, as in Namibia and Botswana such entitlement is available in Madagascar only in respect of house and farm plots. Historically owned and used grasslands and forests remain vested in the state and which has shown no reluctance to lease out these lands to local and foreign investors in recent years (Andrianirina-Ratsialonana et al., 2011).

In contrast, Angola's new land law (2004) recognizes 'customarily useful domains' inclusive of commons and the boundaries of which are to be delimited, partially following the Mozambique model. This does not carry the same force as registration of individually granted rights, concessions or leases, nor provide easily for this to be undertaken. The law also makes it clear that 'valuable resources' may be excluded from customarily useful domains.

Land laws in Benin (2007), Côte d'Ivoire (1998), Burkina Faso (2009), Niger (1993, 2000), Zambia (1995), Nigeria (1978), Lesotho (1979) and Senegal (1964, 1996) also acknowledge customary interests as worthy of protection. Helpfully, this covers collectively-held lands, not just family houses and farms. However, none of these countries endow customary rights with the same legal force as statutory entitlements. In addition, in different ways they circumscribe how rights may be formally acknowledged. Compulsory registration, in force in Angola, Côte d'Ivoire, and Namibia, is one among many impediments, leaving unclear the tenure of massively unregistered customary lands. The situation in Senegal is deceptive in that while land laws of 1964, 1976, and 1996 provide for 60 per cent of the land area to be *administered* locally as community territories (*zones de terroir*), the reality of ultimate state ownership has become increasingly landlord-like, with communities unable to protect their lands from being randomly redesignated as state lands, and reallocated to private persons or investors. Rangelands and forests have been at the frontline of losses (Hesseling, op cit.).

Newer laws among the above are distinctly more fulsome in their respect of customary tenure. Benin's legislation is especially notable, arrived at through a lengthy process of village-level consultation and piloting, and acknowledging customary landholding as real

property interests, and fishing and pastoral interests as unalienable access rights (Lavigne-Delville, 2010). Delimitation of village boundaries is followed by identification of every land right within the domain, from individual and family rights to those held collectively. Certificates may be issued on request and deemed acceptable collateral for securing credit. The law falls down however in that such entitlements once again do represent a full title in land. This requires formal registration under relatively unchanged procedures, dating back to colonial times, and removing customary incidents from the entitlement.

Countries Where There is Limited Protection of Common Property Rights

There is much less security of customary ownership in the remaining fifteen countries examined. This is not to say that positive new land policies are not in place (the case in Malawi and Kenya) or anticipated through new land commission deliberations, such as underway in Liberia, Sierra Leone, Senegal, Somaliland, and Nigeria. For example, advances made by Kenya's new constitution have been touched upon above, but which promulgation seems to be triggering a local land grab as councils rush to formally allocate untitled community lands to individuals and investors, pending enactment of anticipated land laws curtailing such powers (Ndurya, 2011).

Liberia has an unusual history in its treatment of customary land rights, which were unusually well-recognized during early colonial times but systematically limited from the 1950s as administrations sought to freely allocate these lands to private and multi-national developments (Alden Wily, 2007). Customarily owned forests cover two-thirds of the country, and agitation in particular over their loss to concessionaires eventually resulted in a Community Rights Law with Respect to Forest Lands (2009). This acknowledges community forest ownership but lays out awkward routes for this to be acknowledged. Adherence to procedures designed to include and protect community interests have thus far been poorly observed by the Forest Development Authority and which has so far failed to ensure that timber concessionaires pay communities the rent or royalty shares they are due. The status of forests drawn under the National Forest category is also ambivalent, important as most of the resource is so classified. The Land Commission established in 2009 is charged, *inter alia*, with clarifying customary land rights and their administration and at the time of writing is drafting a new act towards this purpose but ominously titled a Public Lands Act.

Some other countries are excluded from earlier categories above due to their wholesale extinction of customary rights. This is the case in Ethiopia (1975, 1997, 2005), Eritrea (1994, 1997), Somalia (1975), Rwanda (2005), Burundi (1986), and Mauritania (2004).

This does not necessarily spell the total loss of rights which were customarily acquired but denies their validity unless converted into titled statutory rights. In Ethiopia, mass titling since 2005 has significantly stabilized farm occupancy (Rahmato 2009). Nevertheless, communally-owned and used lands have largely been excluded, and despite provision in federal and regional state laws that these would be registrable 'commonholds'. These areas are legally most vulnerable to re-designation. This has come to pass with rapidly rising local and international demand for large estates, absorbing one million hectares by 2009 with applications for another two million hectares in the pipeline (Deininger and Byerlee, 2010). Case studies show that land takings have most affected grazing lands, belonging to settled communities and especially pastoralists (EDC, 2011). Local forests have also been given away to investors (Tamrat, 2010).

A comparable position exists in Rwanda, which has also seen significant redistribution and reallocation of farmlands following civil war in the 1990s. Under the Organic Land Law of 2005, households seeking farmland are more or less guaranteed access, to be entrenched in mandatory registration in the form of renewable leases on national land. In contrast, marshlands and other traditionally collective assets amounting to 10 per cent of the total land area are vested in the state, and are steadily being reallocated to private businesses, but which

are unable to provide employment or benefits to anywhere near the level of dis-benefit suffered by affected communities (Veldman & Lankhorst, 2011).

There are still other countries where legal support for communal tenure affecting shared land assets is even less available than in the above cases. Although each is different, this is broadly the situation for millions of rural landholders in Northern Sudan (1984), Cameroon (1974), Mali (1993, 1996, 1997), Zimbabwe (1982), Chad (1967, 2002), DRC (1973, 1980), Gabon (1967), and Somalia (1975).

In Cameroon, for example, two land laws of 1974 established that only occupation and use of land for housing or farming purposes were grounds for acquiring a title deed, and which is itself only obtainable through extinguishing the customary right and purchasing a freehold-like entitlement. Untitled land has since been made government land (Alden Wily, 2011b). Collectively-held lands represent an important sector, with over half the country covered by forest and significant pastoral lands existing in the north. Forest law in 1994 confirmed that forests are national property and where reserved, automatically made the private property of government. Some 2,500 communities have already been dispossessed of these resources through issue of commercial concessions of their lands to the timber industry. Evictions from lands gazetted as wildlife reserves are also common. There is little to suggest that rural Cameroonians are any other than vulnerable squatters on their own land.

The situation is no better in Northern Sudan, where an earlier-mentioned law in 1970 vested untitled land in the state to enable government to allocate these lands at will to private investors for large-scale mechanized farming (Suliman, 1999). The Civil Transactions Act of 1984 modified this in pledging protection of existing occupancy to lands *under cultivation*. Despite legal obligation under the Interim Constitution (2005) to incorporate customary law into state legislation, and to consider restitution of above losses, this has not occurred, leaving common properties as vulnerable to involuntary reallocation today as in 1970 (Alden Wily 2010b). As considered earlier, the new wave of communal land allocations to investors is provocative to conflict, and not least since Southern Sudan establishes a considerably more just paradigm for northern Sudanese to agitate for.

III CONCLUSION

In sum, despite important exceptions emerging in new land legislation since the 1990s or pledged through more recent policy deliberations, most Africans in Sub Saharan Africa remain tenants of state in the eyes of national law. This is most clearly the case in regard to their communal lands, the very assets which the land rush most affects. On the whole, state landlordism remains alive and well and the taking of customarily-owned lands still routine and legal. While long-existing, this is now encouraged and consolidated by international interests.

While clearly not the driver of dispossession, the law is culpable handmaiden of such policies which foster capitalist transformation through traditional dispossessory routes, and in the case of Africa, in conditions where governments are hardly impersonal arbiters. Changing the law is correctly a target for fair (and arguably, lasting) social change. This becomes even more of a requirement given little sign of accelerating industrialisation and employment opportunities conventionally required to compensate for losses and lessen land grievance. Nor may many African governments yet be trusted or bound to put the interests of their populations ahead of aligned private sector interests, and in circumstances where 'public purpose' in the law bears such circuitous relation to genuinely public or majority interest.

Even in the absence of strong rule of law, fairer land law and limitation upon the boundaries of 'public purpose' in law would make it more difficult for governments to willfully remove local lands from communities. Some evidence of this exists in the correlation between the scale of lands being leased and the level of legal protection for customary land rights. Accordingly, Sudan, DRC, Madagascar, Ethiopia and Mali are among those countries which have disposed greatest amounts of their citizens' land in the last several years (Alden Wily, 2011a).

The exception to the rule is Mozambique among the major land lessors. This may partly be explained by well-established procedures through which investors must directly negotiate with local communities and are used to offering sufficient incentives for those they meet with agree, unfortunately not necessarily a cross-section of community members but sometimes self-selected representatives or traditional authorities, and whose accountability to community members is moot. This is integral to the more serious failure to complement fair land rights law since the 1990s with the essential instrument of application and uptake – legally-empowered institutional land governance at the community level. As beginning to be demonstrated in Benin, Burkina Faso and Niger but most particularly in Tanzania, such grassroots elected local government does seem to provide a viable platform through which benign legal norms may be actively protected. The Tanzanian Government has been no keen than other governments on the continent to offer large tracts of lands to investors but the existence of operating elected village governments throughout the country has made it less easy for so much land to slip involuntarily out of community hands (e.g. see Sulle and Nelson, 2009). These conditions have also encouraged the Tanzanian Government to turn more actively to out-grower arrangements which do not interfere with the root ownership of the affected resources.

How to change unjust land law is a more difficult task, especially given that the land rush generically discourages active pursuit of such reforms by lessor governments. In principle, international law should play a role in protecting the human rights of agrarian communities in the region. The most relevant instrument directly concerned with the protection of majority land rights is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), and before it, the ILO 169 Convention (Indigenous and Tribal Peoples Convention, 1989). Gathering rulings in regional courts in especially Latin America have indeed forced some

recalcitrant governments to accept that indigenous peoples own the lands they historically live on, and inclusive of the unfarmed commons (Lynch, 2010).
The situation is less positive in Sub Saharan Africa where the African Union's Working Group on Human and People's Rights determined that indigenous peoples refers to the continents' 25 million hunter-gatherer and pastoral societies, or less than five per cent of the total customary landholding rural population (ACHPR, 2003). While well-meaning in respect of those disadvantaged groups, this makes it more difficult for communities which do not self-declare themselves as indigenous peoples and/or are so defined, to draw upon the Declaration for support. Therefore the most recent accession of DRC to UNDRIP (January, 2011 www.irinnews.org/report.aspx?ReportID=91564) is a truncated victory given that it is the government's position that this impacts only upon the Pygmy population, and in a context where dispossessory land law from the 1970s remained determinedly unchanged.
Nor is it helpful that until the present only a handful of mainly island African states like Mauritius and Seychelles have acceded to the jurisdiction of the African Human Rights Court set up in 1998 in Tanzania. In any event, bringing cases to the African Union or this court require resources which ordinary communities cannot afford (Alden Wily, 2010a, 2011b).
And yet, the land rush may not be entirely deleterious upon majority land rights. In the first instance, it exposes and activates at scale abusive tenure conditions which have been passively in place for many decades, and brings this to widespread local awareness. A great aid to popular consciousness is now usually marked freedom of domestic press and radio in Sub Saharan Africa, a positive output of democratization, and which has not been noticeably shy in most places to publicize local and international reaction to the land rush on the continent. Topically, human rights centred rebellions in North Africa are not going unnoticed further south on the continent, and perhaps encouraging political leaders to be more cautious in their handling of land issues, of paramount and emotive importance to millions of rural poor. Reportedly, the summoning by the Mozambican President of civil society representatives to discuss land grievances in February 2011 was ultimately triggered by events in North Africa, although planned earlier in recognition that food riots last year were linked to land rights issues and popular discontent with rising numbers of investors taking control of more and more rural lands and resources (pers. comm. R. Knight, February 2011).
Even from the investor side space for reconsideration of the mode of development may begin to be provided. For some time reviewers have been reporting the low proportion of memoranda of understanding eventuating into leases and projects and already leased lands being only slowly and partially developed. Down-scaling or cancellation of plans does seem to occur, as exampled by Andrianirina-Ratsialonana et al. (2011) for Madagascar, Sulle & Nelson (2009) for Tanzania and Brautigam (2011a) and Karsenty (2011) for DRC. Brautigam (2011) and Saferworld (2011) observe that as one of the sub-continent's newest but second largest investor, China is confronting not just the logistical constraints of Africa but also real and costly local resistance in key mining, oil and land-based enterprise (and especially in Sudan), and that this will sooner or later modify its modus operandi. RRI (2011) records comparable if less violent resistance to land investment projects in Mali. Gulf States, the largest group of foreign state-backed investors may also have domestic distractions that cause implementation of their immense land contracts to slow down. Falling timber prices are meanwhile seeing many harvesting and sawmill operations close down in the Congo Basin, giving new impetus to small scale and more community-based timber enterprise (Karsenty, 2011, Molnar et al., 2011). Although mainly limited to Asia and Latin America, there is also scope for communities to begin to be seen as reasonably the logical lessors of their lands, albeit in partnership with technically-advising and rent-seeking national governments (see Colchester, 2011 for Indonesia). While severely handicapped by Forest Development Authority unwillingness to comply with its own new community forests rights legislation, the

promised receipt by affected communities of both land rent and a share of royalties for timber concessions does offer a continental example of directions which could be pursued (Karsenty, 2011).

And finally, while considered here as truncated at this time, basic tenure reforms which acknowledge that the rural landscape is *already* owned, have not entirely disappeared from the horizon, albeit often locked into hesitant policy deliberations towards this end. The power of precedent should also not be underestimated, afflicted communities having a set of improved if not best practice examples of policy and legal tenure reform in Tanzania and Benin among a handful of others to draw upon as they gradually grapple with implications of the surge in leasing of their lands.

And yet, as may be routinely expected, strongly conflicting interests exist and will continue to exert force on this matter as on any other process of capitalist transformation. Not just host lessor governments but international development agencies are classically conflicted as to how far land rights sacrifices need to be made in what continues to be promoted as essential and inevitable conversion of family farming into large-scale commercial enterprise in the hands of others. From this perspective, little has changed over a century. I have suggested earlier and do so again, that the tipping point to modification in this position may only come about in the face of threatening civil conflict. Ideally, this will not develop into land wars in which local communities, or at least the majority poor among them, pit themselves violently against investors and administrations. Whether they will need to so depends primarily upon more governments acknowledging that the lands they are leasing are not after all, vacant, unowned and available, but long the property of their own rural citizens.

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