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Customary Land Tenure in the Modern World

Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #1 of 5

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Liz Alden Wily*

Briefs on *Reviewing the Fate of Customary Tenure in Africa*

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This is the first in a series of briefs about modern African land tenure that provides up-to-date analysis on the status of customary land rights in Sub-Saharan Africa. The purpose of the series is to inform and help to structure advocacy and action aimed at challenging the weak legal status of customary land rights in many African countries.

The focus of the five briefs is the tenure status of naturally collective resources such as forests, rangelands, marshlands and other uncultivated lands. Governments often regard such lands as un-owned public lands or state property, making them particularly vulnerable to involuntary loss. A premise of this series is that most of these lands are rightfully the property of rural communities, in accordance with customary norms. This conflict of claim and interest directly affects most rural Africans and among whom 75 percent still live on less than US$2 a day.[1] As affirmed by international development agencies, the poorer the household the greater its dependence on off-farm natural resources.[2] Just as importantly, many African rural poor no longer have sufficient access to farmlands to compensate for the loss of their collective lands.

This first brief provides a general background to customary land tenure today. A main conclusion is that this form of tenure represents the *major* tenure regime on the continent and one which is vibrantly active. This is not least because it is community-based and thus easily attuned to the concerns of present-day communities. Changes in customary land tenure also reflect often inequitable trends, including accelerating class formation and the concentration of landholding. Such trends, which jeopardize the rights of the majority poor, are increasingly having a direct effect on precious local common resources such as forests. Advocates must seek to ensure that land reforms are structured with the interests of poor majorities in mind.

1 What is customary land tenure?

Tenure means landholding. *Customary land tenure* refers to the systems that most rural African communities operate to express and order ownership, possession, and access, and to regulate use and transfer. Unlike introduced landholding regimes, the norms of customary tenure derive from and are sustained by the community itself rather than the state or state law (*statutory land tenure*). Although the rules which a particular local community follows are known as customary law, they are rarely binding beyond that community. Customary land tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility. Of critical importance to modern customary landholders is how far national law supports the land rights it delivers and the norms operated to sustain these. This is a main subject of these Briefs.

Another term for customary land tenure is *indigenous tenure*. This is contested in Africa because, although all Africans are indigenous to the continent, the African Union's Commission on

* Liz Alden Wily is an international land tenure specialist and a Rights and Resources Fellow.

Human and People's Rights defines indigenous peoples as mainly hunter-gatherers and pastoralists.[3] This grouping comprises around 25 million people in Sub-Saharan Africa, only six percent of Africans who govern their land relations through customary norms today. In this series of briefs, all Africans are regarded as indigenous, and accordingly the terms customary and indigenous tenure are used interchangeably.

2 How widespread is customary land tenure?

Customary or indigenous land tenure is a major tenure system on a worldwide scale. It is not confined to Africa. Customary land tenure even governs lands in industrial economies, such as rural commons in Spain, Portugal, Italy, and Switzerland and territories belonging to indigenous minorities in Europe, North America, and Oceania. The system operates most expansively in *agrarian economies,* that is, those societies where most of the population is dependent on, and most of the gross domestic product is derived from, land-based production and use, not off-farm industry and urban employment.

CUSTOMARY LAND TENURE IS A MAJOR GLOBAL SYSTEM FOR LANDHOLDING

The global reach of customary land tenure may be estimated conservatively by counting populations in regions where introduced forms of landholding have not replaced local indigenous norms to a significant extent. This may then be narrowed to poor rural populations on the grounds that wealthier landholders are among the first to extinguish their customary rights in favor of (costly) registered statutory ownership. In 2009 there were more than two billion rural poor in Asia (excluding China), Latin America, and Africa, of whom 428 million lived in Sub-Saharan Africa. This may be taken as a guide to the *minimum* number of customary landholders in Sub-Saharan Africa today. When better-off customary landholders are included, the number rises to over half a billion people.[4] An increasing number of customary land occupants have no or insufficient farmlands, making the status of their collective resources even more important.

The land area used by the customary sector is immense.[5] An indicator of its extent may be obtained by excluding from the total land area formally titled properties governed by statutory law. Most titled properties are in cities and towns, which account for less than one percent of the land area of Sub-Saharan Africa.[6] The number of *rural* parcels under title is surprisingly small, although these involve large areas in mainly Zimbabwe, Namibia, and especially South Africa (the former white farms). One quarter to a third of Kenya's area and 12-15 percent of Uganda's area are subject to formal title. Elsewhere rural titled lands usually account for only 1–2 percent of the country area. Despite recent expansion of rural titling in Ethiopia, Madagascar, Rwanda, and Namibia, the process focuses only on household farms, excluding communal assets, meaning that comparatively small areas are being brought under non-customary entitlement.

Most of the customary sector is overlaid with definition as in fact public, state, national or government lands, not the property of the customary owners. Within this sector, nearly 300 million hectares of wildlife and forest reserves and parks are most definitely excluded from the customary sector; this is because the procedure for their creation normally extinguishes customary interests in favor of the state. In most Francophone states, declaration of a national reserve automatically renders the land the private property of the state.

Even after excluding wildlife and forest reserves, urban lands and privately titled lands, the customary domain for which access and rights are governed by community-evolved norms (i.e. customary land tenure) potentially extends to 1.4 billion hectares. Given that only 12-14 million hectares of Sub-Saharan Africa are under permanent cultivation, it may safely be assumed that most of the customary sector comprises unfarmed forests, rangelands, and marshlands. These lands may be

referred to as the *commons* of customary tenure, those assets in the customary sector which are not owned and used by individuals or families but by all members of the community.

Few commons are acknowledged as the property of communities in national land laws. Exceptions include the village land areas of mainland Tanzania (approximately 60 million hectares), the stool, skin, and family lands of Ghana (18 million hectares) and the delimited community areas of Mozambique (7 million hectares). Most of the remaining 1.4 billion hectares of untitled rural lands are claimed by the state, although some are delimited as trust, tribal, *zones de terroir,* or other land classes which at least acknowledge that customary occupancy and use dominate in those areas.

3 How identifiable is the customary domain?

Customary domains are rarely homogenous. Parks and mining, timber, and agricultural concessions create large "holes" in the customary domain. When wealthier farmers obtain formal statutory title for their homesteads they extinguish customary title, thereby creating smaller holes in the overall community land area.

Customary domains are also fuzzy at their edges, especially where they adjoin Africa's ferociously expanding cities and multiplying towns. Chiefs or farmers routinely sell lands on the urban fringe to developers or have these taken.[7] There are instances where rural communities retain control over urbanized lands. This is partly the case, for example, in Accra, the capital city of Ghana, where transactions in outer neighbourhoods are formally conducted according to customary norms and under the aegis of formal Customary Secretariats run by chiefs.[8] It is also common for urban poor to use customary norms to secure and authenticate occupation in slums and informal settlements in cities.[9]

THE CUSTOMARY DOMAIN HAS SOCIAL AND PHYSICAL DIMENSIONS; THE FORMER MAY EXTEND INTO URBAN AREAS

A more complex blurring of the physical and social edges of the customary domain has arisen through the common practice around the continent of persons moving to live in cities nevertheless often retaining land, or the right to land, in their home villages. The influence and wealth of this sector often influences land customs of villagers. This phenomenon comes sharply into focus when urban members of a community has sufficient influence to carve out large farms from the commons, and privately title these to entrench their security according to state law, and to be able to sell these parcels on to others, irrespective of wider community support for this.[10] Tensions may also arise when wealthy villagers living in town send large numbers of livestock to their home villages, consuming a disproportionate share of the common grazing areas.[11] The global land rush (Brief 5) is stimulating domestic land grabs of this kind for profit, in turn accelerating concentration, the introduction of market-based norms and placing pressure on common resources.[12]

The greater the value of the resources affected, the greater the tension over norms. It is unclear, for example, if Liberian villagers will agree that village members who live permanently in Monrovia or other towns should receive a share of the rent and royalties they hope to earn from timber concessions. Even more dispersed and urbanized indigenous populations in North America, Europe, Australia, and New Zealand have had to grapple with this issue, raising complex questions about the extent to which customary ownership is residentially or ethnically defined. Similar questions are being asked about the meaning of ancestral lands in Kenya.[13] In Africa, a rising distinction is being drawn between those who belong to the rural community as (absent) social members and those who are residential members, with greater use and benefit privileges to the commons.

4 Why do customary regimes persist?

Last century in Africa and elsewhere there was a broad expectation and political intention (especially from the 1950s) that customary landholding and governance would disappear.[14] Clearly this has not happened. Nevertheless the sector has endured great attrition due to:

a. chronic encroachment since the 1890s as a result of specific land-takings to provide areas for white settlers; government and private-sector developments for rubber, cotton, sisal, and food crops; and more recent expansion of agricultural, biofuel, and carbon-trading enterprises,

b. the withdrawal by the state of prime forests, rangelands, and marshlands for protection purposes (terrestrial protected areas),

c. the removal of other assets from customary landholders through the nationalization of water, foreshores, minerals, oils, wildlife, and often forests or at least the trees growing on those lands,

d. the suppression of customary rights through policies and laws that deem such rights to be less than ownership, and

e. titling programs designed to replace customary interests with introduced European forms of tenure, and mainly freehold and leasehold rights.

DESPITE ENDLESS ENCROACHMENTS AND SUPPRESSION OF RIGHTS, THE CUSTOMARY SECTOR REMAINS STRONG AND ACTIVE

Reasons for the failure of customary land tenure to disappear include:

a. a gap between what national law dictates and what continues to exist on the ground; best illustrated in overlapping state and community tenure over public lands,

b. with notable exceptions (e.g. Rwanda and Eritrea), the reluctance of African governments to formally extinguish customary rights as a genus, and rather to reinterpret what these mean; this allows customary norms and interests in land to continue until they clash directly with incoming state or private-sector interests,

c. the limited reach of conversionary titling programs, and

d. the continuing relevance of customary norms to existing patterns of land use and rights and the way they tightly interweave with social relations.

Kenya's land and titling policies can be used as an example.[15] While administrations since 1922 have enjoyed root ownership and control over customary lands, this has in theory been in the interests of occupants, while in fact granting these administrations legal powers to dispose of those lands at will. The program begun in the 1960s to convert occupancy into freehold entitlements was not entirely successful: less than one-third of the country area was covered, leaving other customary tenants uncertain of their rights. Even people who obtained titles through compulsory titling have preferred to regulate land transfer and use on the basis of local community customs. Most have not even collected their deeds and/or recorded change of ownership since. Nevertheless, millions of rights owned by women and family members were in law lost in the process of converting farm ownership to individual and absolute entitlement in the name of (usually male) household heads. Bureaucracy and corruption in land procedures and registries have seriously undermined the proclaimed sanctity of registered entitlement, upon which trust the statutory system depends. Many communities feel more confident relying upon customary norms for their tenure security.

This is because the socially-embedded nature of customary land norms means they are accessible, largely

cost-free (payments to chiefs for land allocation and other services notwithstanding),[16] and inseparable from the realities of present-day land use. The arbiter of norms is always the living community, obviously acutely responsive to changes in conditions that affect its land-based livelihood. Although accountability can be an issue, control is retained in the community rather than removed to unreachable and unaccountable government authorities and who charge fees for their services. The intertwining of customary norms and actual land use also provides greater nuance and flexibility; communities can more easily differentiate rights to land, such as distinguishing between primary ownership and secondary access rights, which may be necessary to regulate seasonal access among and by pastoralists.[17]

Compared with non-indigenous systems, customary regimes are also inherently better able to integrate cultural aspects, such as inheritance practices, where deceased may be buried, and the protection of sacred groves. Communal rights to forests, rangelands, marshlands, and other shared resources are most obviously unsuited to the individualization project which has proven the bedrock of coerced conversion of interests into statutory entitlements. Retention of control over collective assets has a tremendous influence over the strength of community-based landholding norms generally. Introduced tenure regimes generally treat such resources as un-owned and un-ownable by communities. At registration, such as in Kenya, commons have routinely been made the property of the state, or divided among better-off community members.[18]

There are other, more recent political reasons lessening the drive to extinguish customary tenure systems. These include public demand for more democratic and decentralized governance, arising from political changes sweeping the continent since the 1990s. This has had an impact on the forestry sector, contributing to local wariness about the justice or necessity of handing over precious common forest lands to governments to own and manage.

There is also increasing recognition, at home and abroad, that security of existing tenure is a basic human right in an agrarian society. It is becoming accepted that the subordination of customary land interests has largely been a state invention and rests on the embarrassing presumption that Africa was "empty of owners" when the colonial era, followed by modern state-making, got under way.[19] International law, in the form of declarations and protocols, plays some role in lessening tolerance of mass dispossession, although argued elsewhere as entirely inadequate.[20]

THE LEGAL ATTITUDE TO CUSTOMARY RIGHTS AND REGIMES IS CHANGING

Such factors are helping to drive domestic reform in legal perceptions of customary tenure.[21] Titling has not been abandoned but with important differences in approaches. Most notably, in some countries it is now possible for customary rights to be registered *without being extinguished and replaced* with a different (and usually highly individualized) form of tenure. In some cases, collectively held properties like forests and rangelands may also be titled as belonging to a community.[22] One impact of these changes is that customary rights to land are becoming *statutory rights of customary ownership*. The new land laws of Mozambique (1997), Uganda (1998), Tanzania (1999), and Southern Sudan (2009) provide most comprehensively for this integrated plural legalism. The continent-wide extension of such changes would bring to an end the century-long attempt to subordinate and suppress customary tenure as a legal means of land ownership.

5 How archaic is customary land tenure?

In the hands of anthropologists and political scientists of both neo-classical and Marxist bent, a main orthodoxy of the 20th century was that indigenous forms of tenure were born of a static, pre-capitalist past and

therefore structurally inimical to the requirements of capitalist transformation.[23] With the active encouragement of the international aid community, communal possession was especially reviled from the 1950s as obstructive to modernization.[24] Gareth Hardin, as is well known, added his penny's worth to destructive effort in his confusion of collective landholding with open-access regimes (1968).[25] These positions played admirably into the hands of resource-grabbing post-colonial administrations, who could safely sustain the myth that landholding rights existing under customary tenure could not be legally accepted as amounting to more than occupancy and use rights ("possession"). Unfarmed forests and rangelands in particular were treated as un-owned and were taken by governments.

Sometimes communities have been able to defend their lands without resorting to physical means by dramatically influencing policy. An early example of this was when, three times in the 1890s, Ghanaian coastal chiefs successfully prevented the British from declaring their gold-rich forests to be Crown property by showing that the communal nature of indigenous tenure meant that "no land is un-owned in Gold Coast", not even uncultivated lands.[26] This worked well: almost uniquely, customary lands in Ghana have since been treated as a private property, owned by chiefdoms and families.

NOT ALL CUSTOMARY NORMS ARE TRADITIONAL; MANY ARE MADE BY PRESENT-DAY COMMUNITIES

In less positive ways, the institution from the 1920s of so-called Indirect Rule in Anglophone Africa and Liberia and more direct rule or *Indigenat* in Francophone Africa reshaped customary norms, often empowering or creating chiefs as *de facto* owners and controllers.[27] A legacy today is recurrent tension between the rights of chiefs and subjects in those areas where chiefs remain supported in state law in unreformed (un-democratised) ways. These tensions centre firmly upon the right of traditional leaders to dispose communal lands, often for profit and without permission of the community. There is a fine line between chiefs as (often self-declared) owners of all land in customary laws, and chiefs as trustee administrators of the commons. The issue is so contested within the customary sector in some countries that constitutional provisions have begun to be laid down (e.g. Ghana, 1992) and issue of undue prerogative to chiefs helped see an important land act struck down recently in South Africa as unconstitutional (2010).

Another legacy of indirect rule is the power that (now more democratically formed) district and county governments wield over customary land, even though they are remote from villages. Despite this, it can also be shown that colonial administrations enforced a degree of equity as to land access within some traditionally inequitable societies. As yet as the colonial era advanced, such inequities were also nurtured as elites became allies of colonial administrations, often for the sake of land.[28]

A multitude of other factors have affected customary regimes, often in ways that make it difficult to determine the extent to which change is externally or internally driven. Religion also is a factor, perhaps best seen in the manner in which customary norms of inheritance in Mauritania, Chad and Senegal are entirely determined by *Shari'a*.

More pervasively, state policies, land scarcity, education, and especially the commoditisation of land and polarisation of communities into rich and poor classes through continuing capitalist transformation have all affected the way in which customary land relations are formed and regulated. Therefore it is not surprising that notions of what constitutes a customary right to land do seem to move closer to the norms of introduced statutory tenure, favouring the rich more than the poor. A frequent result is a disproportionate appropriation of community resources by leaders, larger farmers, and stock owners.[29]

From all such factors customary regimes are distinctively malleable. In recent decades these shifts

within the customary sector have been quite widely visible around the continent:

a. declining sanction against the sale of family lands,

b. the introduction of written witnessing of transactions,

c. a shift of farming usufructs into rights of perpetual and absolute ownership, especially where houses and crops are permanent,

d. an increase in democratic decision-making in the exercise of customary jurisdiction, although with an opposing trend in some case whereby chiefs are even more forceful than customarily the case in defining and exercising powers,

e. shifts in the centre of gravity of communal domains from tribal territory to clan area to village domain as population grows,

f. a reduction in the proportion of communal to farmed land within many village domains,

g. a hardening of perimeter boundaries between neighbouring villages,

h. a hardening of attitudes to customary access and tenure by outsiders, as the effects of land shortages are felt,

i. signs of increased pressure on vulnerable groups within communities, such as women, orphans, in-laws, and ethnic minorities when it comes to accessing new lands to farm,[30] and

j. lessening adherence to old norms which dictate that there should be land for every family in the community, along with a polarization of wealth within modern customary communities, and yet contrary hardening demands for equity, especially where this did not historically exist (many customary regimes, particularly in coastal West African areas, were not as equitable as traditionally presumed).

There are many inconsistencies in such trends, often engineered by public policy. As a result of both political and popular pressure, for example, the 2010 Lesotho Land Act makes women co-owners of family land, posing difficulties in distinguishing between customary and statutory landholding norms. South African women have also recently been shown to actively change customs to assure their modern rights.[31] The Village Land Act, 1999 in Tanzania purposely makes decision-making around customary norms the prerogative of the elected village government.

6 How similar are customary regimes?

Each customary regime is distinctive to its community but there are also commonalities that apply within and between countries and even continents. Thus, despite being nested in industrial economies, Maoris in New Zealand, community-forest and pasture owners in Spain and Portugal, and Indians in North America share foundational norms with indigenous land systems in Africa.

THE GLOBAL COMMONALITIES IN THE PRINCIPLES OF CUSTOMARY REGIMES IS STRIKING

These norms stem from the shared template of community-based regimes. This is expressed in:

a. community-based *jurisdiction* over landholding,

b. territories, domains or community land areas: acknowledgement within the customary sector that each community owns and controls a discrete areas (and may access others by arrangement and which themselves become customary rights of access),

LANDLESSNESS AND LARGE ESTATES ARE NOW FOUND IN THE AFRICAN CUSTOMARY SECTOR

c. collective ownership or possession and control over naturally communal resources such as forests, rangelands, and marshlands, and

d. the tendency for the size of customary territories or domains to be periodically adjusted so that they remain at the scale at which community-based control can be effective.[32]

Differences between customary regimes are most actively determined by the systems of land use employed. Five broad patterns of customary tenure are discernible in Africa today:

a. By custom, a hunter-gatherer group or band (e.g. Ogiek in Kenya, San in Botswana, and Baka in Cameroon and the Democratic Republic of the Congo) usually owns a single, discrete—but often vast —land area. The owning group settles at different places within this territory over a year, using different resources. Reciprocal rights of access and use are accorded to neighbouring bands.

b. Pastoralists in East Africa and the Sahel generally pattern their land rights and access in more complicated ways than hunter-gatherers (or cultivators). A typical pattern is for the group to own a home domain, respected as its land by other pastoralist group (with periodic disputes). The group may co-own a second area or resource (often water) with several other clans. Nomadic pastoralists typically also acquire seasonal access rights to lands belonging to another (often settled) community or cluster of communities. Pastoralists also establish transit, watering, and pasturing rights along their migration routes to these domains.

c. Where shifting cultivation is practised (e.g. in many parts of West Africa), it is usual for the land to be community-owned and for farmers to hold usufructuary rights to the areas they clear and cultivate. As the availability of land declines, the conditions of the usufruct become more stringent, including a reduction in the number of years that fields may be left fallow and still belong to the clearer.

d. Where farming is permanent, usufructuary rights generally mature into absolute rights as reflected in the term “customary freehold” used by customary landholders in Nigeria, Sierra Leone and Ghana. Unsettled and unfarmed lands remain common property.

e. There are cases where communal property is now limited to service areas. However, even in the most densely populated and commons-deprived areas of Rwanda, Burundi, Kenya, southern Uganda, and Tanzania, communities often retain forests and marshlands as community property (although the governments of Rwanda, Burundi, and Kenya now claim ownership of these assets). Even when commons have almost entirely disappeared, communal jurisdiction often remains in the form of socially-enforced rules on inheritance and ownership transfer.

7 How equitable are customary norms?

A popular orthodoxy is that African tenures are equitable, that there is no landlessness, and family size serves as the key determinant of differences in farm size. Historically this was true in areas where fertile land was abundant and pioneer farming the rule.[33] The right to access land and resources remains a dominant principle in most African regimes, but it has become less easy to deliver as the population has increased (nine-fold over the 20th century) and as the gap between rich and poor has grown.

It is startling to note that the Gini Coefficient for smallholder farming in Mozambique, Rwanda, Ethiopia, Zambia, and Zimbabwe is comparable to feudal ratios in Asia in the 1960s and 1970s.[34] When the large estate sector is included, the inequities are even worse. Accordingly, some poverty reduction strategies identify rising rural landlessness, alongside the paradox of "idle lands", as an issue in African countries.[35] Studies also remark on a rise in absentee landholding, tenancy, and unsatisfactory farm labor conditions.[36]

Historical inequities should not be ignored, either. Feudal-like tenure—with landlordism, the outright exclusion of most poor classes, and even slavery—existed widely in pre-colonial times in both farming and pastoral communities.[37] Indebted chiefs were even known to have sold whole communities and their lands to other chiefs.[38] It is likely that such inequities grew during the pre-colonial mercantile era, as kings, chiefs, and emirs traded slaves, ivory, skins, gold, and later palm oil and cacao with European privateers.

The influence of such practices on modern-day relations is significant; there are reports that slavery continues in the Sudanic states (and was only made a criminal offence in Mauritania in 2007). Landlord–tenant relations were only outlawed in Tanzania in 1968 and Burundi in 1977, and they remain nominally lawful in *mailo* tenure in Uganda.

A milder but more pervasive trend of institutionalized inequity exists around traditional authorities. Some of their privileges are long-inherited and sustained. Others have been created more recently, such as through the practices of indirect rule in Anglophone colonies mentioned above. Still other privileges are reconstructions of the past: for example, it is commonly reported in West Africa that tribute relations have become *de facto* rental payments for sustained permission to occupy lands.[39] This most affects migrants but also makes it difficult for youthful indigenes to access land. The "drinks money" paid to chiefs in eastern Nigeria to secure new land for shifting cultivation is reported to be so inflated that it constrains farming by the poor.[40]

The inequity that traditionally affects women in modern customary regimes is addressed in all new national land policies and legislation.[41] There is consensus that cash-cropping targeting male farmers and titling programs vesting ownership in men have exaggerated gender inequalities, and there is concern that HIV AIDS is diminishing the land rights of widows and orphans.[42] Despite legal or policy improvements, there is uneven acceptance of gender-equitable ownership within the customary sector. Sometimes women succeed in their struggle.[43] Sometimes they fail, as illustrated by the still unsuccessful decade-long struggle of Ugandan women to secure co-ownership of family farms.[44]

OUTSTANDING STRESS ON CUSTOMARY LAND RELATIONS IS BETWEEN STATE AND PEOPLE

8 Conclusions

This brief has challenged conventional positions that customary land tenure is an anachronism that is diminishing. Rather, customary land tenure is clearly being practised by the majority of communities in Africa, is vigorous in its norms, has considerable commonalities across boundaries, and mirrors existing rural society in all its complexities, contradictions, and trends. Tugs of war abound—between genders, generations, chiefs and subjects, indigenes and immigrants, hunter-gatherers and cultivators, settled populations and nomadic pastoralists, village members who live in towns and those who remain, those who have secure statutory deeds over their farms and those who remain with undocumented rights, and those who are (comparatively) rich and poor.

Too concerted a focus on traditionalism in customary regimes may blind us not only to the natural

and increasing heterogeneity of rural communities but also to the painful reality of majority land insecurity. The weak status of customary land rights in national laws is a condition shared by many (although no longer all) rural communities in Sub-Saharan Africa. The bottom line is that *most* rural Africans occupy and use lands that are not accepted in statutes as their private individual or collective property. This particularly affects their tenure over forests, rangelands, and marshlands. Revitalized co-option of these lands through the global land rush now increases this vulnerability.

A PRO-POOR APPROACH TO SECURING CUSTOMARY RIGHTS IS NECESSARY

Four avenues to greater progress present themselves.

Changing the law is a priority. As long as individuals, families, and collective holdings in the customary sector do not have legal force as properties in this highly commoditised world, half a billion Africans will remain tenants of the state, or, in the words of an appeal court judge in Tanzania in 1994, "squatters on their own lands".

A more strategically sensible approach is to recognize that customary rights to land have the force of modern real property, whether registered or not. The forces against such recognition, however, are as strong today as they were a century ago. They may even be more so, given the way that elite interests dovetail with policies that aim to keep as much untitled land as possible under the *de facto* ownership of governments; this enables them to dispose of their citizens' lands at will, including to domestic and foreign investors.

Furthering democratization of land and resource administration is also crucial. Solidarity within and between communities is handicapped by the absence of enabling institutional mechanisms and powers. The devolution of forest governance has played an important role in Africa in increasing recognition that many forests belong to communities, but has in practice delivered on this tenure in only a handful of states (Gambia, Liberia, South Africa, Mozambique, and Tanzania).

Tenure security policies need to shift focus from farms to commons. Many governments are loath to remove customary-sector families from their houses and farms but have no compunction in reallocating their commons to other uses and users. This is because compensation, albeit of a token nature, is now normally required when houses and crops are interfered with, even on untitled customary lands, but is rarely extended to commonly held forests, rangelands, and marshlands. Yet such unfarmed commons are the major asset of most rural communities. They are often the main or only source of livelihood for the land-poor and landless; with assistance, they have the income-generating potential to raise millions out of poverty.

Reasons to pursue a pro-poor approach to customary rights include:

a. the poor are the majority in the customary sector (75% by international measures),

b. the poor are *most* dependent on common resources, and which are the natural capital most easy for states and private sectors to appropriate,

c. not just the state but local elites have proven best able to manipulate customary norms in their own favor, and at the expense of the majority poor, and

d. elites have proven most able to escape the subordination by governments of rights to customary landholdings.

9 Implications for forest tenure

Governments are the majority owners of forests in Africa today. Nevertheless, state ownership is a

comparatively recent phenomenon stemming from colonial capture of valuable resources. Previously, forests by tradition were the property of individual communities.

The restitution of forest ownership from state to people in Africa should be on the agenda because:

a. forests are a critical source of livelihood for most rural communities and especially the majority rural poor,

b. forests still constitute a significant proportion of the customary land assets of communities, but their benefits are lost to ordinary citizens because of state appropriation,

c. the (human) land rights of the majority of African people are at stake—justice cannot be done until the indigenous ownership of forests is acknowledged,

d. governments have not proven effective as forest managers. In contrast, where communities are empowered to manage forests, conservation improves, and at much less cost to treasuries.[45] A major incentive for communities to sustain forests in good condition is to be recognized formally as the owner, albeit without the right to sell, clear, or subdivide the resource. Even the most valuable of forest resources can be protected and sustained just as well under local ownership as under state ownership.

Endnotes

[1] See: http://www.prb.org/pdf05/05WorldDataSheet_Eng.pdf and http://www.prb.org/Publications/Datasheets/2010/2010wpds.aspx.

[2] Emerton, L. 2010. *Quantifying the Impacts of Barriers to Pro-poor Forest Management. Livelihoods and Landscapes Strategy: Markets and Incentives Discussion Paper*. Gland: IUCN.

[3] *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*. Adopted by the African Commission on Human and People's Rights, May 2003, Niamey, Niger.

[4] The rural population of sub-Saharan Africa was 571 million people in 2010 (see endnote 1).

[5] For data see Alden Wily, Liz. 2011. *The Tragedy of Public Lands: The Fate of the Commons under Global Commercial Pressure*. Rome: International Land Coalition. http://www.landcoalition.org/publications/tragedy-public-lands-fate-commons-under-global-commercial-pressure.

[6] In fact most recent remote sensing suggests that cities and towns cover only 31,052 square kilometres of 0.13 percent of the total land area of Sub Saharan Africa; A. Schneider, M. Friedl and D. Potere. 2009. A New map of Global Urban Extent from MODIS Satellite Data. *IOP Science Electronic Journals.*

[7] Development Workshop and Centre for Environment & Human Settlements (UK), 2005. *Terra. Urban land reform in postwar Angola: research, advocacy and policy development*. Occasional Paper No. 5, London; Ubink, Janine. 2008. Struggles for land in peri-urban Kumasi and their effect on popular perceptions of chiefs and chieftaincy. In *Contesting Land and Custom in Ghana*. Ubink, Janine and Kojo Amanor, eds. Leiden: Leiden University Press.

[8] Ubink 2008. As cited in endnote 7.

[9] Development Workshop 2005 as cited in endnote 7.

[10] For Liberia, see Alden Wily, Liz. 2007. *So Who Owns the Forest? An Investigation into Forest Ownership and Customary Land Rights in Liberia*. Monrovia: Sustainable Development Institute. http://www.rightsandresources.org/publication_details.php?publicationID=102. For Ghana, see Ubink, Janine and Kojo Amanor, eds. 2008 (endnote 7). For Botswana, see Cullis, Adrian and Cathy Watson. 2005. *Winners and Losers: Privatizing the Commons in Botswana*. London: International Institute for Sustainable Development. For Malawi, see Peters, Pauline and Daimon Kambewa. 2007. *Whose Security? Deepening Social Conflict over Customary Land in the Shadow of Land Tenure Reform in Malawi*. Boston:

Harvard University Centre for International Development.

[11] Nori, Michelle, Michael Taylor, and Allesandra Sensi. 2008. *Browsing on Fences: Pastoral Land Rights, Livelihoods and Adaption to Climate Change*. London: International Institute for Sustainable Development.

[12] For up-to-date examples of this in Benin, Burkina Faso, Niger, and Mali, see Hilhorst, Thea, Joost Nelen, and Nata Traoré. 2011. Agrarian change under the radar screen: rising farmland acquisitions by domestic investors in francophone West Africa. Presentation made at the International Conference on Global Land Grabbing, 4–8 April 2011. http://www.future-agricultures.org/index.php?option=com_docman&Itemid=971.

[13] e.g. http://findarticles.com/p/articles/mi_qa5327/is_302/ai_n29130466/ and http://www.standardmedia.co.ke/InsidePage.php?id=2000027073&cid=470&story=Squatters%20on%20their%20ancestral%20land.

[14] As first laid out by the East African Royal Commission, 1953–1955 (Cmd. 9475) and later reflected in the Report of the Commission on Land Tenure in Francophone Africa (1959).

[15] For Kenya, see National Land Policy of Kenya, 2009; Wily, Liz and Sue Mbaya. 2001. *Land, People and Forests in Eastern and Southern Africa at the beginning of the 21st Century*. Nairobi: IUCN; Bruce, John and Shem Migot-Adholla, eds. 1994. *Searching for Land Tenure Security in Africa*. Iowa: Kendall/Hunt; and Hunt, Diane. 2005. Some outstanding issues in the debate on external promotion of land privatization. *Development Policy Review* 23(2).

[16] Among famous studies see: for Botswana, Schapera, Isaac. 1970. *Tribal Innovators: Tswana Chiefs and Social Change 1795–1940*. London: Athlone Press; for Zambia and Malawi, see Chanock, M. 1991. Paradigms, policies and property: a review of the customary law of land tenure. In *Law in Colonial Africa*. Mann, K. and R. Roberts, eds. London: Heinemann; and for Senegal, see Snyder, F. 1982. Colonialism and legal form: the creation of 'customary law' in Senegal. In *Crime, Justice and Underdevelopment*. C. Sumner, ed. Cambridge Studies in Criminology XLVI. London: Heinemann. See also Cotula, L., ed. 2007. *Changes in 'Customary' Land Tenure Systems in Africa* London: International Institute for Environment and Development.

[17] See endnote 16 for examples.

[18] See references in endnote 15.

[19] See brief 2.

[20] See brief 5 and also Alden Wily, 2011 as cited in endnote 4.

[21] See brief 3.

[22] See brief 4.

[23] See Bates, R. 2001. *Prosperity and Violence the Political Economy of Development*. London: W.W. Norton & Company.

[24] *Report of the East African Royal Commission on Land* as cited in endnote 14; and The World Bank. 1975. *Land Reform: A Sector Policy Paper*. Washington, D.C.: The World Bank.

[25] See brief 2.

[26] Amanor, Kojo. 2008. The changing face of customary land tenure. In Ubink and Amanor 2008, as cited in endnote 7.

[27] See Snyder (1982, as cited in endnote 16), for Senegal; Chanock (1991, as cited in endnote 16) for Malawi and Zambia; and Amanor (2008, as cited in endnote 26) for Ghana.

[28] See Amanor, Kojo and Sam Moyo (eds). 2008. *Land and Sustainable Development in Africa*, Zed Books.

[29] A case of which is well-exampled by Simo Mope 2011; Land grabbing, governance and social peace-building in Cameroon: Case study of the role of elites in land deals and commoditisation in the North West Region. Presentation made at the International Conference on Global Land Grabbing, 4–8 April 2011. http://www.future-agricultures.org/index.php?option=com_docman&Itemid=971

[30] Examples of these changes are variously provided in Alden Wily (2007, as cited in endnote 10), Nori et al. (2008, as cited in endnote 11), Ubink (2008, as cited in endnote 7), Amanor (2008, as cited in endnote 24), Cotula (2007, as cited in endnote 16) and Chaveau, J-P., J-P. Colin, J-P. Jacob, P. Lavigne Delville, and P. Le Meur. 2006. *Changes in Land Access and Governance in West Africa: Markets, Social Mediations and Public Policies*. London: International Institute for Environment and Development.

[31] Budlender, Debbie, Sibongile Mgweba, Ketleetso Motsepe, and Leilanie Williams. 2011. *Women, Land and Customary Law*. Johannesburg: Community Agency for Social Enquiry.

[32] That is, over-large villages will divide into two to keep manageable the operational sphere of community-based norms. When land is less scarce, younger families migrate to unoccupied areas, thus establishing controlling rights.

[33] Bohannan, P. 1963. Land, tenure and land tenure. In *African Agrarian Systems*. Part II. D. Biebuyck, ed. London: International Africa Institute.

[34] T. Jayne, D. Mather, and E. Mghenyi. 2005. Smallholder farming in difficult circumstances: policy issues for Africa. Paper presented at the Conference on the Future of Small Farms, June 2005, Withersdane Conference Centre, Wye, United Kingdom.

[35] e.g. See Government of Ghana. 2003. *Poverty Reduction Strategy*. Accra: Government of Ghana.

[36] e.g. See Government of Kenya. 2010. Kenya's *National Land Policy*. Nairobi: Government of Kenya.

[37] For Liberia see Alden Wily, Liz. 2007, as cited in endnote 10. For Ghana see Amanor 2008 (as cited in endnote 26) and Ubink 2008 (as cited in endnote 7). For Côte d'Ivoire see Sara Berry, 2008. Ancestral property: Land, politics and 'the deeds of the ancestors' in Ghana and Cote d'Ivoire. In Ubink and Amanor (eds) as cited in endnote 7; for Niger see Cotula and Cisse 2007 in Cotula 2007 (as cited in endnote 16); for Malawi see Peters and Kambewa 2007 (as cited in endnote 10). See also Komey, Guma. 2008. The denied land rights of the indigenous peoples and their endangered livelihood and survival: the case of the Nuba of the Sudan. *Ethnic and Racial Studies* 31:5, 991–1008; and J. Clover 2005. Land reform in Angola: establishing the ground rules. In *From the Ground Up: Land Rights, Conflict and Peace in Sub Saharan Africa*. J. Clover and C. Huggins, eds. Nairobi: ACTS.

[38] Amanor 2008, as cited in endnote 26.

[39] Amanor 2008, as cited in endnote 26, Berry 2008, as cited in endnote 37.

[40] For Nigeria see Adedipe, N.O., J.E. Olawoye, E.S. Olarinde, and A.Y. Okediran. 1997. *Rural Communal Tenure Regimes and Private Landownership in Western Nigeria*. http://www.fao.org/docrep/w6728t/w6728t13.htm#E11E11

[41] See http://www.undp.org/oslocentre/docs07/Land_Rights_Reform_and_Governance_in_Africa.pdf.

[42] Walker, Cheryl. 2002. *Land Reform in Southern and Eastern Africa: Key Issues for Strengthening Women's Access to and Rights in Land.* http://info.worldbank.org/etools/docs/library/36270/WWalker-Land%20Reform%20and%20Gender.pdf.

[43] Gender discrimination was another reason why the Communal Land Reform Act, 2004 was overturned by the Constitutional Court of South Africa in 2010. Women led the lobby against this law.

[44] Uganda Land Alliance Statement on the Occasion of International Women's Day, 8 March 2011.

[45] See Porter-Bolland, Luciana and others (2011) Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics. *Forest Ecology and Management* 2011.

The Rights and Resources Initiative (RRI) is a strategic coalition comprised of international, regional, and community organizations engaged in development, research and conservation to advance forest tenure, policy and market reforms globally.

The mission of the Rights and Resources Initiative is to support local communities' and indigenous peoples' struggles against poverty and marginalization by promoting greater global commitment and action towards policy, market and legal reforms that secure their rights to own, control, and benefit from natural resources, especially land and forests. RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, D.C. For more information, please visit www.rightsandresources.org.

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RIGHTS + RESOURCES 5th Anniversary

Putting 20th-Century Land Policies in Perspective

Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #2 of 5

NOVEMBER | 2011

Liz Alden Wily*

Briefs on *Reviewing the Fate of Customary Tenure in Africa*

1. *Customary Land Tenure in the Modern World*
2. ***Putting 20th-Century Land Policies in Perspective***
3. *Land Reform in Africa: A Reappraisal*
4. *The Status of Customary Land Rights in Africa Today*
5. *The Global Land Rush: What It Means for Customary Rights*

RRI PARTNERS

This brief looks at the tenure policies pursued by colonial and early post-colonial governments in Sub-Saharan Africa, to help explain current policies.[1] The focus is on how the customary land rights of Africans were treated, especially with respect to forests, rangelands, marshlands, and other collectively held resources.

The formal subordination of customary land rights in Africa began but did not end with colonialism, and the colonial legacy therefore should be kept in perspective. The situation for majority land interests deteriorated throughout the 20th century and some of the worst abuses followed independence.

Nor can colonialism be entirely blamed for the tenure and distribution inequities that so profoundly afflict African rural land rights today because they partly originated in pre-colonial feudal practices and even slavery. Other non-policy causes of subordination have derived from the capitalist transformation and class formation that accompanied modern state-making in the 20th century, and may well have occurred in Africa even without colonialism.

Still, the foundation for the mass abuse of customary land rights was indisputably established by colonial norms. This brief explores those norms and provides an account of changes in the post-colonial era up to 1990.

1 How were 20th century tenure policies expressed?

The principal vehicles of 20th-century tenure policies were laws and court rulings; accordingly, their content is the focus of this brief. Important policy statements began to appear in the 1950s, most famously in the report of the (British) East African Royal Commission 1953–1955 and the comparable 1959 *Rapport de la Commission du Secteur Rural* in Francophone Africa. The importance of law as instrument of land dispossession is significant; from the outset colonial administrators were determined to make dispossession of Africans legal. This was likely more to satisfy critical politicians and publics at home, than to keep things orderly.

2 Were colonial strategies similar across the continent?

The tenure strategies of the various colonial regimes in Africa had both commonalities and differences. Commonalities stemmed from:

a. A shared if competitive agenda to establish 'spheres of economic influence' and to exploit resources and labor to serve European economies.

b. The habit of colonizers of applying the same techniques in different colonies—e.g. Germany applied the same land ordinance in Cameroon

* Liz Alden Wily is an international land tenure specialist and a Rights and Resources Fellow.

and Tanzania in 1895/96.[2] Norms were also borrowed from earlier colonies— e.g. Britain introduced Indian Empire land laws into Africa.

c. The federated approach adopted by Portugal and France—Portugal treated its possessions[3] as part of Portugal (and eventually reconstructed these as provinces in the new "African–European State of Portugal" in 1951). France governed through two federations which covered West and Central Africa, respectively, directed from St Louis in Senegal and Brazzaville in the French Congo.[4] Laws were drafted in those capitals and sent to each territory to adopt and apply. This explains the largely uniform content and timing of land laws across Francophone Africa (1904, 1906, 1925, 1932, 1935, 1955 and 1959).

d. The common transformations enjoyed (or endured) by African territories, including the commoditization of land and hardening inequity of access through class formation and land concentration, as well as the effects of population growth, commercialization of agriculture, and expansion of towns.

AS THE COLONIAL MISSION WAS SIMILAR ACROSS EUROPE, THE STRATEGIES OF LIMITING AFRICAN RIGHTS TO LAND WERE SIMILAR

There were also differences between regimes. For example, Portuguese and German colonization was conducted by military men, while British and French colonialism was carried out by civil servants, who therefore had to work harder to appease especially influential African communities. Differences in pre-colonial mercantile relations also played a major role, as did the different status of territories as provinces of the European homeland, semi-autonomous colonies, protectorates, or, after 1919, territories mandated by the League of Nations then United Nations.

3 How did colonizers undermine african ownership?

Early international law played a pivotal role in the legal demise of customary rights in the colonial era in the form of the *General Act of the Berlin Conference on West Africa* (the "Berlin Act"), which was signed in February 1885 by 13 European states, Turkey, and the United States, all desperate to establish markets in Africa for unsold manufactures (Europe was in Depression from 1873 to 1896) and to secure raw materials and products (e.g. oil palm and rubber) to revitalize their industries. In practice, this economic scramble for Africa quickly segued into a political scramble as free trade gave way to competitive protectionism by key signatories, and as rapid expansion into hinterlands reminded Europeans of the existence of millions of hectares of invaluable resources and potential labor. Creation of political colonies and protectorates to safeguard interests was inevitable.[5] Fortunately for the Powers, the international law they had signed demurred from any commitment to pay for acquired lands, as had become a practice during the 19th century, anticipated in 1885 as amounting only to some expansion of already existing European enclaves along the West African coast (Article 34). Instead, the law specified that natives were to be amply compensated for any disturbances by the "blessings of civilization" that European presence would deliver in the form of education, Christianization, and the suppression of slavery (Article 6).

The devices for denying customary rights were borrowed from previous colonization experiences in Asia and the Americas—and, even further back, from the forceful replacement by the British of customary rights with English feudal ownership in parts of Ireland in the 12th century.[6] With differences and some exceptions, the following six stratagems were applied throughout Sub-Saharan Africa from around 1890:

a. *The 'right of discovery'*: replacing the territorial sovereignty of African kings, chiefs, and emirs with that of the conquering nation, on the grounds that there could not be two sovereigns.

This was especially efficacious where customary land ownership was indeed vested in kings and chiefs.

b. *Capturing property along with political suzerainty:* the colonizers exerted political control over their territories but, as they had done in the Americas, they cleverly expanded this to include founding ownership of the land within those territories (radical title or root title). This feudal device diminished African land rights to varying degrees of tenancy under European heads of state.

c. *Denial that indigenous possession amounted to ownership:* the claim to root ownership of the land was justified by colonizers on the grounds that Africans didn't *own* their lands in a manner which European law could accept, by the 19th century imbued with the tenure norms of industrialised Europe, signalled by land commoditisation, enabling owners to freely sell their properties in an open market. By virtue of Africans holding lands in common, not as individuals, and these lands not being fully tradable, Africans could conveniently be deemed to only *possess* the land rather than own it.[7] This opened the way for declaring native lands to be without owners (*terra nullius*) and Africans merely their possessors, that is, occupants and users. Customary norms aided and abetted this where land was viewed as belonging to God and/or in the temporal hands of communities, communities themselves a perpetual intergenerational entity which made absolute alienation of their lands difficult.[8]

d. *The wasteland thesis*: this strengthened colonial state possession of all but cultivated and settled lands by revitalizing the 17th-century thesis of Locke that real property only comes into being through labor.[9] Thus, forests, rangelands, marshlands, and other landscapes not transformed into farms could be deemed vacant or "wastelands". As such, they fell like ninepins to state tenure.

THE LEGAL TECHNIQUES OF DISPOSSESSION WERE WELL PRACTISED ON OTHER CONTINENTS

e. *Disempowerment*: this was easily achieved by centralizing control over landholdings, which undermined local determination of the meaning of property and rights and the ways in which these could be secured. Indirect rule was deceptive in this regard. It gave the appearance of local control, where chiefs were co-opted as agents of the state, but in reality it reconstructed the political geography of customary tenure in critical ways, including how community domains were defined and power relations within these exercised. It is not incidental that current land reforms in Africa are just as much about devolving power over land into more local and democratic institutions as about redressing the shameful suppression of customary ownership.

f. *Respecting native occupancy to keep the peace:* it was expedient to uphold local occupancy in order to salve colonial consciences and to ensure that useful production continued and natives were "kept fed and content" ("peaceful native occupancy" became a watchword). Defining areas where Africans could lawfully reside also helped limit rapacious land-grabbing by European settlers and profiteers. In the early decades of colonialism it seemed that there was enough land for all and that African occupancy and European land development and resource exploitation could co-exist, albeit one firmly subordinate to the other. Therefore native occupation was not to be disturbed unless necessary. "Necessary" meant where the lands were needed for state, settler, or investor enterprise (profiteers and companies abounded).

LEAVING THE DOOR AJAR

The legal effect of the six stratagems was not to deny that African land interests existed but to de-

contextualize and reconstruct them as rights of occupation and use, not outright ownership. As shown below, intentions were not always malign. Nor did colonial (or post-colonial) governments feel the need for or were able to formally extinguish customary rights, as this would have implied acknowledgement that Africans *owned* the lands. This has left scope for a reinterpretation of the legal meaning of customary interests in land, taken up with alacrity in current reformism.[10]

COLONIZERS DID NOT SO MUCH DENY THAT AFRICANS HAD RIGHTS TO LANDS, AS DENY THAT THESE RIGHTS SHOULD HAVE THE FORCE OF PROPERTY. TO ADMIT THIS WOULD BE TO DEPRIVE THEMSELVES OF VALUABLE LANDS AND RESOURCES

4 Were colonial strategies stable over time?

Taken as a whole, colonial policies remained consistent but implemented with much more severity as the reality that there was not after all enough land to meet colonial and native interests. Increasing use and exploitation of native labor for colonial enterprise also hardened official attitudes to customary rights. As independence neared, late colonial advisers focused upon what they thought best for Africans, strongly shaped by their own and aligned elite convictions of the forms of modernization required.

To describe these shifts, the colonial era is discussed in three broad phases.

PHASE I: UNDERMINING AFRICAN OWNERSHIP OF AFRICA: 1880–1919

Contradictions abounded between the inclination of colonizers to ignore local land rights and secure whatever resources they could for themselves, and the reality of not always being able to do so. Public opinion in Europe was partly responsible for blunting ambition, following the abolition of slavery and the rise of humanitarian and missionary activity. But more serious was the precedent which Europeans had themselves set by buying lands from natives.

Much land was simply taken from Africans by brute force, especially in the 17th and 18th centuries but decreasingly in the 19th century. Trading companies, and individual investors and profiteers often "bought" land from African coastal chiefs including with signed bills of sale listing the top hats, shoes, beads, etc.[11] By the 1830s colonization societies along the Liberian and Sierra Leone coasts were buying land for cash. More formal trading agreements also abounded (e.g. by 1881 the Royal Niger Company had no fewer than 400 contracts to use land along the West African coast) and what was in effect a bilateral investment treaty had been negotiated "between African and European sovereigns of equal power" of Britain and the Gold Coast (Ghana) in the 1840s and was explicit that this would not interfere with local land ownership.[12]

This posed difficulties for European Powers when it came to expansionism into hinterlands. Paying for all those lands, even at low prices, was out of the question. Without military support, conquest and subordination was also uncertain. Alliances with local leaders were necessary. Thus, in 1902, the British found themselves having to reward the assistance of the King of the Buganda in securing Uganda for them by granting him and his noble families legal title to their lands (and thereby turning the King's subjects into tenants), while the rest of Uganda was simply deemed British property (Crown Lands). Arabs along the Nile were also recognized as holding absolute property while Africans in the Sudan were deemed to be merely occupants of the property of the new colony.[13]

European law already governed relations with natives ahead of colonial expansion and could not be so

easily set aside. The French Civil Code had been established as the law in French enclaves in West Africa in 1830. As well as being interpretable as protecting customary rights (Article 713), the code's introduction into local regulations in 1855 guaranteed privileges to "assimilated" Africans, including their right to acquire private property. This directly shaped Francophone land policy thereafter.

English common law was also clear that existing protectorate arrangements did not allow colonizers the right to take and alienate native lands. This drove British determination to convert protectorate agreements into full colonies wherever it could, not achieved in Ghana until 1895, in Southern Nigeria until 1906, and in Kenya until 1920. Botswana, Lesotho, and Swaziland avoided the same fate by not being incorporated into the Cape Colony or Transvaal of British South Africa between 1885 and 1906. This set the treatment of customary land rights in those states on a novel path. In 1903 the Basuto King issued his own Laws of Lerotholi, which specified how land in the kingdom was owned and allocated. The Tswana also secured recognition that tribal customary law governed their land relations in Botswana—at least in areas not occupied by San (Bushmen hunter-gatherers), whose lands became Crown Lands.

With decades of dealings with Europeans behind them, African coastal communities were neither naive nor unknowing of colonial intentions with the signing of the Berlin Act. Some assimilated natives from St. Louis and Brazzaville had homes in Paris. The Ashanti King of Ghana, among others, had long maintained an embassy in London to service his slave-trading and gold-trading interests. Accordingly, Ghanaian elites successfully rebuffed British efforts in 1894, 1897, and 1910 to turn their gold-rich forest lands into property of the Crown, fully aware that this would deprive them of incomes able to be derived from leasing these lands to foreigners, especially gold-mining companies. These elites formed an Aborigines Rights Protection Society and sent a deputation to the Privy Council in England to argue that "no land was un-owned" in the Gold Coast and that customary tenure should form the basis of the modern colonial state.[14] Various researches and court cases backed them up. Their success in London meant that 70 percent of Ghana remains the private collective property of customary communities today, although this is not without problems (see below).

AFRICANS WERE NOT AS COMPLIANT AS COLONIZERS WISHED

Later, other influential chiefs in Nigeria would similarly use the British courts to secure their land rights. As colonial occupation of Lagos Island grew over the 1896-1919 period, local chiefs took the administration to court in a landmark ruling in 1921. Through this, the colonial government in Southern Nigeria was forced to accept that King Docemo of the Benin Empire had not actually *sold* Lagos Island to the United Africa Company in 1861 (a company which the British Government then bought); he had only ceded his *political sovereignty*, leaving native land ownership unimpaired. [15]

For the majority of Africans, such opportunities were not available or seized. Overall the fate of millions as the tenants of one or other European Head of State was firmly established from the outset.

Africans were not passive. Throughout the continent, protests and violence occurred and reoccurred as local lands were infringed by European settlers, merchants, and investors. Terrible killings followed the arrival of thousands of criminals shipping to Angola before 1900 told to help themselves to land.[16] In 1898, chiefs in Sierra Leone violently protested the loss of lands outside Freetown. Rebellion rages in Tanzania from 1905-07 as German settlers, companies and profiteers helped themselves to native lands and as the German military administration forced natives to grow cotton on their smallholdings. In Sudan, the first of many protests against land and forest loss occurred in 1908. Colonizers reacted to resistance oppressively, but none so severe as the genocide visited upon the Herero and Nama tribes in

German South West Africa (Namibia) during 1890-1908, as they fought against the clearance of their lands for white settlements; only angry public protest in Berlin eventually put a stop to this.[17]

AFRICAN RESISTANCE TO LAND THEFT WAS A GOOD DEAL MORE ACTIVE THAN USUALLY REMEMBERED TODAY

Commonalities in the early colonial mission

Despite difficulties colonial land capture proceeded satisfactorily, and with these broad similarities territory to territory, as embedded in early colonial legislation:

a. establishment of colonial *control* over all lands and imperial *title* over as much land as possible,

b. often distinct treatment of land law and administration for coastal/enclave areas and hinterlands,

c. early subdivision of territories into different *tenure classes*, particularly Crown/state lands, private lands and public lands, with the foundations laid for native reserves and separate development policies,

d. a strong orientation of early land laws towards controlling wayward and greedy European companies and settlers (mainly Anglophone Africa), and mainly to protect the claimed prerogative of the new colonial state to be the sole authority which could take the lands of natives; steps included making it illegal for Africans to sell or lease lands directly to Europeans,

e. swift promulgation of land acquisition laws to ensure a legal route for taking native occupied lands at will, including conditions that made it clear that no payment of compensation was required for lands that were uncultivated,

f. creation of dual land administration systems, one catering to Europeans, assuring them of tenure security in ways familiar to them and able to be upheld by courts at home, and one entrenching state ownership and control of native lands, usually embracing more than 90 percent of each territory. Examples of the above follow.

In **Sudan** the Land Title Ordinance, 1899, barred the sale of land to non-natives who had no paper titles to these lands and reduced the rest of the country to government land that was divided into lands "subject to no rights" and land "subject to rights vested in a tribe, section, or village". These rights were diminished in 1901 with the declaration that forests and timber belonged solely to government. The Land Acquisition Act, 1903, ruled that compensation for land-takings for public purpose would not be paid for lands "not amounting to full ownership" (i.e. without title deeds). The Land Settlement Ordinance, 1905, tightened the noose, making all waste, forest, and unoccupied lands government land. "Unoccupied" land was defined as land "free from private rights or not amounting to full ownership". Any sale, mortgage, or disposal of native lands without government consent was forbidden in 1918.

The foundation for homelands was established in **South Africa** during this era with the passage of The Land Act, 1913, which set aside seven percent of the country as native areas where customary law would apply. The millions of Africans living in the remaining 93 percent of the country were denied this right; they had the choice of becoming wage labourers on their own lands or moving to the reserves.

In **Kenya**, much larger tracts of land for natives were acknowledged by the passage of the East African Crown Lands Ordinance, 1915, but these were deemed to be Crown Land, making Kenyans tenants of the state. Settlers in Kenya acquired around three million hectares, while settlers in Malawi were given 1.5 million hectares in 1894.

Meanwhile, German imperial decrees issued for **Tanzania** in 1895 and **Cameroon** in 1896 also established the empire's ownership of *herrenlos*, lands considered vacant and ownerless due to the absence of proven rights or contracts. This was largely driven by the need to regulate the alarming behavior of colonization societies, which had been "buying up thousands of acres for trinkets".[18] The decrees did not stop them, causing the military governor in 1903 to deny settlers absolute rights until they had cleared and farmed at least half their allocations.

King Leopold II of Belgium adopted similar positions in his 1885, 1886, and 1906 ordinances for the **Congo Free State**, which halted native sales and cessions to outsiders and required missionaries and merchants to produce proof of past purchases or contracts they had made with native leaders. Native lands were described as "occupied" if visibly settled and farmed. "Unoccupied" lands became state land. A 1912 decree confirmed that "all ownerless things belong to the Colony, except for respect for customary indigenous rights and what may be said on the subject of the right of occupation".

Having previously allocated thousands of hectares of "fallow" (un-owned) land in **Angola** and **Mozambique** to Portuguese feudals, companies and criminals, Portugal introduced legislation in the 1890s requiring the registration of lands these arrivals had acquired. Settlers acquired 1,800 square miles between 1907 and 1932. Some 98 square miles in the midst of some of these areas were reserved for natives, defined as fallow lands and not permitted to be sold to private (Portuguese) citizens.

In **Senegal** (and most other French possessions), an undeveloped form of land registration had been in place since 1855. Its procedures were updated in 1900 and 1906, partly to make it easier for assimilated natives to register deeds of purchase in the *Livre Foncier*. In practice, registration was pursued by only handfuls of Africans living in coastal enclaves (only a couple of thousand Africans were acknowledged as French citizens in a

THE MOST PERNICIOUS INSTRUMENT AGAINST AFRICAN RIGHTS WAS INSTITUTIONALIZATION OF THE NOTION OF VACANT AND OWNERLESS LANDS SIMPLY BECAUSE THEY WERE UNFARMED. THIS DEEPLY AFFECTED FOREST TENURE

Francophone empire comprising 69 million people in 1939).[19] No provision was made for native family or community tenure. It was a similar case in Afro-American-settled **Liberia**, which extended registration (begun in the 1850s) only to "Aborigines who become civilized" (i.e. wear clothes and top hats and have windows in their houses).[20]

PHASE II: TIGHTENING THE NOOSE AGAINST NATIVE RIGHTS: 1920–1945

The period between the two world wars deepened contradictions in the handling of customary land rights. On the one hand, colonial enterprise came into its own as a support for metropolitan states. This was especially so following the Great Depression of the early 1930s, when there was increased capture of African raw materials and labor and an expansion of plantation agriculture for rubber, sisal, cotton and oil palm. Peasant commodity production was coerced through a combination of hut taxes, coerced labor for public works, control over crop movements and prices, and other negative incentives.[21] English soldiers were rewarded for their service with lands within Anglophone territories, accelerating local dispossession and forced labor and tenancy on white farms. An early resistance movement dedicated to nationalism, the East African Association (1921), arose in Kenya in response to these injustices, inspired by Gandhi's Indian nationalism and Marcus Garvey's black nationalism.[22] In Francophone Africa, where white settlement was never encouraged (except in a small area of Côte d'Ivoire), French commercial companies increased their control over native production as the main route of extraction.

On the other hand, the international community was increasingly aware and decreasingly tolerant of land-takings. For example, the new League of Nations was infuriated when, in 1920, Britain vested native lands in Tanzania in the Governor in trust for His Majesty the King of Great Britain. It formally reminded Britain, Belgium, and France that they had *not* been ceded former German territories in Africa in 1920 as *owners* but only as trustees with powers of management. Those countries had also formally agreed under international law to protect native land rights (Article 6 of the Mandatory Agreement).[23] The Governor of Tanzania got around this problem by enacting another law (Land Tenure Ordinance, 1923), which respected Tanzanian rights to "use and enjoy" (the King's land). Still hounded by the League of Nations, Britain grudgingly deemed (in 1928) these rights to be similar to the titled rights of occupancy that were being awarded to settlers—but only as long as *use* was visible and active. Meanwhile the Governor launched "a certain amount of white settlement to develop the country's resources" (1926), which in fact involved about a million more hectares.[24]

CAPTURING THE LANDS OF AFRICANS WAS NOT ALWAYS SMOOTH-SAILING

It was easier for the colonizers to tighten state tenure and control in non-mandated territories. In Sudan, therefore, laws were enacted in 1925 and 1939 confirming state ownership of native lands although presented in a positive light; while proclaiming that native rights would be protected, this was limited to "rights to cultivate, to pasture and to collect forest produce". Actually *owning* the land was not mentioned. Just to make sure, the law also stated that such rights could not "be promoted into ownership".[25]

In South Africa, policy hardened during the inter-war years against African occupancy outside scheduled reserves. Separate areas for Europeans and Africans were also formally established in Zimbabwe by the Land Apportionment Act, 1930. In Zambia, in contrast, Africans gained substantial lands through the creation of native reserves—but, as in Sudan, in ways that made it clear that these did not mean rights equivalent to the ownership recognized for non-local communities.

In Francophone Africa, *direct rule* was imposed through appointed indigenous authorities, religious courts, and native police. These were bound to apply clear sets of rules on all matters (the *indigenat*). *Indirect rule*, as created by the British in Gambia, Malawi, and other Anglophone territories as well as Liberia, spread through the 1920s and 1930s as a means to lessen the great expense of administering vast hinterlands. While it was claimed that the resulting "native authority" systems were acting in the interests of customary land law, even governors admitted that the system abundantly altered the meaning and boundaries of native tenure. [26] This was achieved by redefining tribal areas to suit the colonial state and through the continuing reconstruction of norms in rules handed down by provincial commissioners for recruited chiefs (with stipends) to apply.

As example, in central **Sudan**, only 16 of 65 Nuba territories were recognized in 1932; the rest were aggregated and placed under the control of Arab leaders, who were considered to be more competent. The common lands of the Nuba were also largely reallocated to Arab pastoral tribes, sowing the seeds for future conflict.[27] In **Ghana**, native councils sealed the subordination of commoner rights to chiefs in 1928. The powers of village chiefs were centralized to paramount chiefs. Rent-seeking by the latter became rampant; fees were extracted from mining and timber companies and from more humble cocoa farmers moving in from the north, and they were never distributed to community members.[28] Legislation in 1945 in Belgian **Congo**, **Rwanda**, and **Burundi** empowered chiefs by declaring that all abandoned lands reverted to them.

The creation of native reserves made it difficult for Africans to acquire lands outside their designated areas.

The most productive lands were targeted for European companies or settlers, making people squatters on their own land and helping to generate an ethnically rather than a community-based definition of "our lands". In **Kenya** this would become a source of conflict half a century later, as the Kikuyu, who possessed fertile lands attractive to Europeans faced an acute shortage of land within reserves but also resentment when they migrated with colonial encouragement to other parts of the country.

Anglophone and Francophone administrations still differed on whether better-off Africans should be able to secure title deeds for their private house plots and farms. The British believed that such privatization would trigger class conflicts.[29] The French felt compelled to make concessions given the Civil Code and introduced the Decret du 8 Octobre 1925 Instituant un Mode de Constatation des Droits Fonciers des Indigenes en AOF. This was designed to address the fact that assimilated Africans were not registering their lands by providing for a lesser procedure of rights confirmation, but it could still only be applied to individually held houses and fields. In 1935 another law sealed the dismissal of communal rights, stating that lands "not covered by title and not exploited or occupied for more than ten years belong to the state".[30] A 1920 law in the Belgian Congo dictated similarly.

Therefore, by one route or another, the inter-war period saw the uniform consolidation of customary rights as no more than rights of access and use, and occupation where villages were in place. Forests, rangelands, and marshlands were legally removed from native ownership. The situation was worst in **Lusophone** Africa (Portuguese). In 1926 the new fascist regime in Lisbon reneged on pre-war acknowledgement that customary occupation deserved some protection. Without the barrier of either native reserves or indirect rule, land losses rose sharply as European immigration accelerated, creating swathes of new cotton and coffee plantations.[31]

There were exceptions. In **Liberia** in 1921, the Supreme Court overturned a 1916 ruling that Monrovia only possessed political jurisdiction over the expansive hinterland, deciding instead that sovereignty included ultimate control of land disposition. In any event, said the Supreme Court, "it is unnecessary to seek or secure the willing consent of uncivilized people, as through (subordination to the state) they gained civilization".[32] However, chiefs from the hinterland, meeting in Suehn two years later, persuaded Monrovia that native land rights had to be respected. This led to regulations for the hinterland (1926, 1935, and 1949) that declared tribal title to exist, irrespective of whether it was described in formal deeds. The opportunity was given for chiefdoms to double-lock this security by acquiring fee simple Aboriginal Title Deeds on the basis of survey only. Five wealthy chiefdoms did so before 1945. This secured (they thought) one million acres as community-owned lands in absolute title.[33]

THE EXCEPTIONS TO ABSOLUTE DISPOSSESSION WERE SIGNIFICANT, PROVIDING MODELS STILL PURSUED TODAY

It should also be noted that the 1920s and 1930s saw a rising rural elite, often led by chiefs, members of native authorities, and protégés of Christian missions, who secured large areas of land for themselves, and avidly adopted cash-cropping. In Kenya, the Kikuyu Central Association was established to lobby for the issuance of private title deeds such as white settlers held and to secure the substantial areas of land these elites had carved out of reserves, at the expense of poorer families.[34] Commentators in both Tanzania and Kenya reported that "by 1940 there were Africans owning tractors".[35]

PHASE III: ABANDONING PRETENCE THAT AFRICAN TENURE COUNTS: 1946–1960

The end of the Second World War saw a surge in grant of lands to European companies and to settlers (in

Anglophone Africa), but at much greater scale than seen after the end of the First World War. Native production of cash crops was also coerced, itself creating considerable landlessness when farmers failed to meet targets. Large schemes were favoured. For example, around 85,000 families were evicted from lands in Tanzania between 1945 and 1951 to make way for the infamous "groundnut scheme" (1946) which was directly administered by the British Ministry of Food, partly funded by multinationals, and managed by former British army officers promised land at the end of the war.

PRIVATIZATION POLICIES GOVERNED TREATMENT OF NATIVE TENURE FROM THE 1950s

Throughout the continent, respect for "peaceful native occupancy" dwindled and the scope of public purpose expanded to allow the state a free hand in issuing concessions to agri-business and for timber and mining extraction. The creation of forest reserves was accelerated to mark out areas for indigenous timber extraction or, in drier countries, for the replacement of native forest with commercial exotic species.

Where natives resisted, ways were found to circumvent their claims. Thus, when Meru elders of **Tanzania** went to the United Nations to present their grievances against eviction for new settler estates, the government in Dar es Salaam responded by passing a new law (in 1950) that improved local consultation but did not require consent. The *Public Preserved Areas Act, 1954*, further limited the conditions under which compensation was payable. Attempts by some Africans to reassess the status of customary tenure in the courts failed in a landmark case (1953–57); this ruled customary rights to be no more than lawful possession (i.e. not ownership).[36] In **Liberia**, provisions for hinterland communities to secure collective titles were finally re-worded in 1956 to reduce such rights to mere possession. Such shifts in support for customary rights were echoed around the continent.

By the mid-1950s, the demise of customary rights was routinely justified as in the interests of natives themselves. Customary ways of landholding and the holding of lands collectively in particular, were marked out as an impediment to agricultural growth. It was concluded that land tenure should be "removed entirely from the sphere of customary law".[37] The East African Royal Commission (1953–55) led the way, its vision reflected in a similar investigation in Francophone Africa (the 1959 *Rapport de la Commission du Secteur Rural*) and by the Food and Agriculture Organization of the United Nations, the United Nations Development Programme, and the World Bank.

These agencies shared a vision of instituting an entirely free market in land through privatization at scale and the removal of the authority of the customary sector over land relations. This transformation was needed, they said, to enable poor farmers to sell their lands and to provide the landless labor needed to kick-start industry, while enabling richer Africans to buy up their lands and establish commercial farming. Programs to convert peasant farms into individual-owned and statutorily described entitlements were planned in many states to deliver the extinction of customary tenure. African elites needed no encouragement; they had already steadily been entering the (mainly urban) land market, taking advantage of the registration regime set up originally for settlers.

As independence loomed, new laws were drafted by colonial advisers to express these reforms (as they were called). Broadly they had similar precepts and procedures. A slight difference between laws in French and Anglophone territories at this time was that the former made it possible for Africans to acquire lands collectively, although it transpired, limited by the requirement that "evident and permanent possession of the land" must be demonstrated, thereby neatly excluding the opportunity for communities to secure

forests, rangelands or other unfarmed collective assets.

To be fair, there were also more benign moves designed to curtail the powers that chiefs and economic elites within the African community had acquired in the inter-war years. The *indigenat* of Francophone Africa was abandoned in 1947 and laws passed in Anglophone territories supposedly democratizing native councils. However, what this really meant was to draw powers more definitively into the safe hands of the state, not to devolve those powers to communities. "It is a sobering reflection", wrote the Governor of Tanzania in 1951, "that the whole of land administration is carried on without any participation by Central Government ….".[38] Nevertheless, the interests of local elites and colonial administrations were well aligned, these parties sharing the conviction that customary tenure must give way to introduced forms of privatised landholding, and in the process freeing up rights to millions of hectares of commonage.

5 Did independence liberate customary rights to land?

Little real change to the legal status of African tenure occurred in the period 1960–90. Some states (e.g. Central African Republic, Gambia, Madagascar, Sierra Leone, and Swaziland) barely altered colonial land laws at all until the 1990s. Those that did, largely circumscribed customary rights further, aided by conversionary titling programmes where these operated. Acknowledgement of property remained limited in law to statutory entitlements. Millions of *de facto* customary rights belonging to women, family members, and seasonal rights holders, and especially those held in common by community members over uncultivated forests, rangelands, and marshlands, were saved in practice only because of the limited reach of such programs.[39]

More perniciously, new post-colonial land laws took treatment of majority customary land rights to new depths of suppression. Even the few occupancy and use rights protected by colonial laws were frequently done away with. Thus Sudan passed the Unregistered Lands Act, 1970 making all untitled lands the private property of government, rather than unowned lands controlled by the state in trust for the population, a subtle but critical difference in the protection obtainable. The Democratic Republic of the Congo enacted laws clarifying customary tenure as strictly permissive (1966, 1973). Cameroon (1974) and Uganda (1975) did similarly. Chad converted customary lands to public land deemed vacant (1967), while Mauritania subjected customary possession to *Shari 'a* law, requiring holders to produce documentation and demonstrate active use to sustain legal occupancy. Somalia abolished clan tenure (1975) laying the seeds for terrible clan land wars. In 1982, newly independent Zimbabwe restructured the Tribal Lands Act into the Communal Lands Act, vesting these lands in the President without mention of trusteeship function and who at the same time pursued the restitution of white-owned farms in non-communal areas "in the interests of the black majority". In the same year Burundi aimed to overcome land shortages by making land rights dependent on sustained use, with title guaranteed after 30 years irrespective of how the land was obtained; a double discrimination for the thousands of people who had been forced to flee conflict and who found, on return, that their lands were "lawfully occupied" by others. Where loopholes existed through which rural communities might claim ownership, these were closed. In Liberia, the 1929-49 Hinterlands Regulations, already diluted in 1956, failed to appear in the 1973 Civil Code, followed by a 1974 law which laid down procedures for titling entirely shaped around individualization. Newly independent Zambia removed the special status of Barotseland, where the *Litunga* (king) had uniquely retained title. Malawi curtailed residual powers of chiefs over land in 1965, and rural Ghanaians, while not losing title, saw their lucrative forests taken into state custody (1962). In Kenya, the new government constitutionally acknowledged native areas as county council lands held in trust for the occupants, but granted those agencies and itself full powers of disposition.

Only in Botswana did Independence bring with it new acknowledgement that tribal land is owned, not merely occupied (1968) but in a manner which also leaves most of these lands vulnerable to the privatised ranching schemes the government favours (1975). Similar programmes, usually foreign donor-backed, mushroomed around the continent, from the rice schemes of the Niger Basin to the sorghum and sesame schemes of Sudan, the elite-led ranching schemes of Kenya, and the wheat schemes of Tanzania, governments convinced that large-scale mechanised farming and ranching schemes were the route to growth. Thousands of customary land owners were evicted in the process.

Nationalization and African socialism (particularly in Guinea, Senegal, Tanzania, Mozambique and Ethiopia) drove this heightened dispossession around the continent, new African Administrations taking over ownership of either all lands in the country or only the majority - those rural lands held under customary law and not yet titled. The effects (and purpose) of the former was to reduce freeholds owned by foreign companies and persons to leaseholds, held from the state and dictated by its terms. The purpose and effect of the latter was to give the new governments a free hand to lawfully take and reallocate even occupied and used lands at will, and, additionally, to not even be required by law to pay compensation for the few occupancy and use rights which colonial laws had acknowledged as protected. State landlordism flourished, sometimes for the creation of settlement schemes for land-needy but much more often to provide land to burgeoning numbers of state companies (parastatals) or private interests. Even long-declared national parks and forest reserves were not immune to excisions for such purposes.[40]

As in colonial days, real security of tenure was achievable only through individually established statutory entitlement, and only house plot and permanent farm lands eligible for such entitlement. However, by 1990, titled lands covered less than ten percent of Sub-Saharan Africa, mostly in the vast white farming areas of Namibia, Zimbabwe, and South Africa. Half a billion Africans were still technically landless—permissive occupants or even squatters on their own customarily acquired lands.

None of the above is particularly surprising. Class formation and land commoditisation had grown apace since 1945; politicians and civil servants who assumed power in the 1960s constituted economic elites, and yet closely tied to traditional forms of leadership and who bring with them to power and office a particularly paternalist and tribally-centred new nationalism, delivered for some decades in tribally-aligned one party governments.[41] At the same time members of this new African middle class shared not only political power and business interests but the convictions of market-led development so strongly advocated by the new donors (the former colonizers) and international agencies, and which reached an apogee in the land papers of the World Bank in 1975. By the late 1980s and early 1990s, steps to meet these same convictions will become conditions of structural adjustments loans.

The fact that Africans owned their lands, the provisions of introduced European laws notwithstanding, was conveniently forgotten during the 1960-90 era. Indigenous tenure regimes in general and communal landholding in particular were to be extinguished as fast as possible in service of individual-centric economic growth, but through programmes which were, as shown above, not delivered to significant degree outside Kenya. Template land registration laws, drafted in the offices of UNDP and donors were, on advice, adopted around the continent. And, as now so well-known, Gareth Hardin, confusing collective group-owned property with open access regimes, added his penny's worth to destructively good effect (1968), particularly in regard to the most expansive and arguably precious resource of African communities – their commons.

6 Conclusions

In summary, the rights of Africans to their lands began to be formally suppressed in the 1880s along with colonial state-making, and remained on a downward path for the next century. Because of public opinion at home in Europe, colonizers needed to make their actions lawful and used the law accordingly. The primary instrument was a denial that Africans owned their land, especially those lands that by tradition were held collectively. European notions of tenure, most marked by the necessity that lands should be able to be sold freely, consistently superseded African notions of property. The protection of even use rights plummeted after 1945. Tolerance gave way to an impatient determination to finally extinguish customary tenure. By then, African elites entirely shared the views of colonizers, and the most influential international agencies, giving the movement plenty of force and sustaining it through the 1960s to the 1980s. In this way, elite class interests took over colonial interests as the guiding hand of mass dispossession. The relatively straightforward theft of African lands by Europeans became class theft, making challenge much more difficult. By 1990, colonial norms were still underwriting the dispossession but they were being put to use by Africans themselves.

7 Implications for forest tenure

Setting aside exceptions such as those in Ghana and enclaves in Sierra Leone, southern Nigeria, and Zambia, it is clear that communal rights to forests were an early casualty of colonial capture of Africa—along with communal rights to areas of rangelands and marshlands and traditional rights over surface minerals, local waters, and beaches. More often than not, at a stroke of a pen, the ownership of such lands—"wastelands"—fell to state tenure.

This remains the case in most (although not all) African states.[42] Even customary access to these lands is often not allowed at all or is only tolerated until the lands can be put to productive commercial use by more powerful actors. The failure to provide statutorily for collective tenure or entitlement stands out as the most glaring legal omission of the last century. It is little surprise therefore that the state owns 98 percent of forests and woodlands in Sub-Saharan Africa today, with only 0.1 percent owned by communities and not much more (0.4 percent) set aside for legal local use.[43] It is not difficult to see where advocacy needs to focus.

Endnotes

[1] Current land policies are discussed in briefs 3 and 4.

[2] For clarity, the modern names of states, rather than their colonial designations, are largely used here.

[3] Angola, Mozambique, Guinea Bissau, Cape Verde, and Sao Tome and Principe.

[4] The West African federation, *Afrique Occidentale Francaise*, governed modern-day costal Mauritania, Senegal, Mali, Guinea, Côte d'Ivoire, Burkina Faso, Benin, and Niger from Senegal from 1904 to 1959, and Togo from 1921. The French Equatorial Africa Federation governed modern-day Gabon, Central African Republic, Republic of the Congo, and Chad from 1910 to 1959.

[5] Eric Hobsbawn. 1987. *The Age of Empire* 1875-1914. Abacus, London.

[6] The legal mechanisms and thinking are more fully covered in Alden Wily, Liz 2007 *So Who Owns the Forest,* SDI, Monrovia & FERN; Alden Wily, Liz, 2011. *Whose Land is It? The status of customary land tenure in Cameroon.*CED & FERN.

[7] The distinction between possession and ownership is thoroughly embedded in all European law.

[8] See endnote 5 above.

[9] Locke, John. 1689. Of property. In *Two Treatises of Government*.

[10] See brief 3.

[11] Examples of bills of sale are provided in Alden Wily, Liz. 2007 as cited in endnote 5.

[12] Amanor, Kojo. 2008. The changing face of customary land tenure. In *Contesting Land and Custom in Ghana*. Ubink, Janine and Kojo Amanor, eds. Leiden: Leiden University Press.

[13] In fact, an Anglo-Egyptian Condominium, ruled jointly by Britain and Egypt.

[14] Amanor 2008. As cited in endnote 11.

[15] Case of Amodu Tijani vs The Secretary, Southern Provinces, the Judicial Committee, His Majesty's Privy Council, 11 July 1921.

[16] Clover, Jenny, 2005. Land Reform in Angola: Establishing the Ground Rules. In Jenny Clover and Chris Huggins eds. *From the Ground Up: Land Rights, Conflict and Peace in Sub Saharan Africa*. ACTS Press/Pretoria: Institute for Security Studies. http://www.iss.co.za/pubs/Books/GroundUp/7Land.pdf

[17] Zimmererer, Juergen and Joachim Zeller, eds. 2008. *Genocide in German South-West Africa: The Colonial War of 1904-1908 and its Aftermath*. London: Merlin Press Ltd. See also http://en.wikipedia.org/wiki/Herero_and_Namaqua_Genocide.

[18] Iliffe, J. 1969. *Tanganyika Under German Rule 1905–1912*. Cambridge: Cambridge University Press.

[19] Hessling, Gerti. 2009. Land reform in Senegal: l'Histoire se repete? In Janine Ubink et al. eds. *Legalising Land Rights, Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden University Press.

[20] Alden Wily, Liz. 2007 as cited in endnote 5.

[21] Bryceson, D. 1980. Changes in peasant food production and food supply in relation to the historical development of commodity production in pre-colonial and colonial Tanganyika. *Journal of Peasant Studies* 7(2).

[22] Kanyinga, Karuti, Lumumba, Odenda and Amanor, Kojo. 2008. The Struggle for Sustainable Land Management and Democratic Development in Kenya: A History of Greed and Grievance in *Land and Sustainable Development in Africa*. Zed Books, London and New York.

[23] Rwanda and Burundi were handed over to Belgium; Tanzania and parts of Togo and Cameroon were handed over to the British; British South Africa took over the administration of Namibia; and France took over the administration of most of Cameroon and Togo.

[24] Wily, Liz. 1988. *The Political Economy of African Land Tenure A Case Study from Tanzania*. No. 2: Development. Norwich: School of Development Studies, University of East Anglia.

[25] Sudan's Land Settlement and Registration Act, 1925, and Prescription and Limitations Act, 1939.

[26] Phillips, A. 1955. The future of customary law in Africa. *Journal of African Administration* VII(4). The impact of indirect rule on customary tenure became a major subject in social research from the 1960s. For the case in Zambia, see Colson, Elizabeth. 1972. *Crime, Justice and Underdevelopment*. In *Colonialism in Africa, 1870–1960*. Volume 3. V. Turner, ed. Cambridge: Cambridge University Press. For a Francophone case see Snyder, F. 1982. Colonialism and legal form: the creation of 'customary law in Senegal. In *Crime, Justice and Underdevelopment*. C. Sumner, ed. Cambridge Studies in Criminology XLVI. London: Heinemann.

[27] Komey, Guma Kundi. 2010. Communal land rights, identities and conflicts in Sudan: the Nuba question. Paper presented at the Human Rights Dimensions of Land in the Middle East and North Africa, MENA Land Forum Founding Conference, Cairo, 10–12 May 2009. http://www.hic-mena.org/documents/Kunda%20Kumey%20Nuba%20Question.pdf.

[28] Amanor 2008. As cited in endnote 11.

[29] Kanyinga et al. as cited in endnote 20.

[30] Hesseling, 2009 as cited in endnote 18.

[31] Clover, 2005 as cited in endnote 15.

[32] Alden Wily 2007. As cited in endnote 5.

[33] Alden Wily 2007. As cited in endnote 5.

[34] Kanyinga et al. 2008. As cited in endnote 21.

[35] Bryceson 1980. As cited in endnote 17. Also see Ngugi wa Thiong'o. 2010. *Dreams in a Time of War*. Nairobi: East African Educational Publishers Ltd.

[36] Mtoro Bin Mwamba vs. Attorney-General, High Court, Tanganyika.

[37] Mitchell, P. 1951. Review of native administration in the British territories in Africa by Lord Hailey. *Journal of African Administration* 6.

[38] Mitchell 1951. As cited in endnote 36.

[39] Bruce, John and Shem Migot-Adholla, eds. 1994. *Searching for Land Tenure Security in Africa*. Iowa: Kendall/Hunt.

[40] Most clearly documented in Kenya in the 2004 report of the Commission of Inquiry into the Legal, Land Policy, Constitutional and Institutional Framework on Land (the Njonjo Commission).

[41] Chabal, Patrick and Jean-Pascal Daloz. 1999. *Africa Works Disorder as a Political Instrument*. The

International Africa Institute in association with James Currey and IndianaUniversity Press.

[42] See brief 4.

[43] RRI and ITTO. 2009. *Tropical Forest Tenure Assessment: Trends, Challenges and Opportunities.* Yokohama: International Tropical Timber Organization/Washington D.C.: Rights and Resources Initiative. http://www.rightsandresources.org/publication_details.php?publicationID=1075

The Rights and Resources Initiative (RRI) is a strategic coalition comprised of international, regional, and community organizations engaged in development, research and conservation to advance forest tenure, policy and market reforms globally.

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Land Reform in Africa: A Reappraisal

Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #3 of 5

NOVEMBER | 2011

Liz Alden Wily*

Briefs on *Reviewing the Fate of Customary Tenure in Africa*

1. *Customary Land Tenure in the Modern World*
2. *Putting 20th-Century Land Policies in Perspective*
3. ***Land Reform in Africa: A Reappraisal***
4. *The Status of Customary Land Rights in Africa Today*
5. *The Global Land Rush: What It Means for Customary Rights*

RRI PARTNERS

This brief casts a critical eye over the land reform trend that has emerged in Sub-Saharan Africa since 1990. It finds that there has been much less change in tenure paradigms than anticipated and insufficient change in how land matters are governed. Most urban and rural poor in 2011 have no more security of tenure than they possessed in 1990. However, the most disappointing shortfall is in respect of lands which around a million rural communities in Africa traditionally own and use collectively. This directly affects the future of forests.

1 What is land reform?

'Land reform' has meant different things over the last century. Its main focus has been redistribution of farmland to remove landlessness and tenancy in feudal economies. More than 50 governments launched "land to the tiller" reforms between 1917 and 1970. Key avenues were the:

a. abolition of private ownership and the creation of state collectives (e.g. in Russia, China, Vietnam, and Cuba),

b. creation of citizen-owned collectives (e.g. in Honduras, Mexico, and El Salvador)

c. setting of ceilings on landholdings, with the redistribution of the surplus to the tenants and workers of landlords (e.g. in Egypt, Bangladesh, Nepal, and Afghanistan), and

d. abolition of absentee landlordism.[1]

Although 350 million households (mainly in China) gained land for the first time through redistributive farm reforms during this era, most initiatives were only half-heartedly implemented and/or did not have lasting effects. Reforms in East Asia, including those engineered by the American Army of Occupation in post-World War II Taiwan, Japan and Korea, were generally most successful. While communist regimes developed their land reforms autonomously, anti-feudal reforms in most other countries were promoted by the United Nations Development Programme, the Food and Agriculture Organization, and some bilateral aid agencies who considered rural landlessness, tied tenancy and absentee landlordism to be major impediments to agricultural growth.[2] A common constraint against full success was that politicians and officials were often the absentee landlords and lacked the political will to see reforms through. By the 1970s most states were abandoning or modifying redistributive land reform. *De-collectivization* was most dramatic in China and the USSR and its satellite republics such as Hungary and Romania. It also took place in Latin America. Reforms permitting *private land rights* were introduced widely, encouraged by the World Bank's commitment to a free market in land as a prerequisite to economic growth, as laid out in its 1975 Rural Sector Land Policy. By the 1980s, International Monetary Fund/World Bank structural adjustment programs were demanding the liberalization of land markets as a condition for loans

* Liz Alden Wily is an international land tenure specialist and a Rights and Resources Fellow.

to governments. This resulted in a surge of land concentration that undermined family farming, most notably in Latin America, and administered the *coup de grace* to redistributive land reform globally. It also caused much social distress and discontent.[3] Compensatory poverty-reduction strategies and market-assisted land reforms were introduced as palliatives.[4]

INTERNATIONAL ACTORS HAVE BEEN EXTREMELY INFLUENTIAL IN SHAPING LAND REFORMS UP UNTIL THE PRESENT

The path of land reform in Sub-Saharan Africa has been distinctive mainly for its lack of redistributive policies. Traditionally feudal and colonial-induced landlordism (such as in the *prazo* estates of Angola and Mozambique) existed but landlessness was considered by colonial and post-colonial administrations to be limited. Only **Egypt** (1962–69) and **Ethiopia** (1975) formally redistributed farmlands to eliminate highly exploitative tax, tribute, and labour relations.[5] *Collective farming* was also experimented with from the 1970s in Mozambique, Senegal, Somalia, Sudan, and Tanzania to make it easier for peasant farmers to adopt mechanization.

More broadly, Africa did not escape the exhortations of colonizers (now turned donors) and international agencies to privatize landholdings, and there was a flurry of new land registration laws in the 1970s. Land reform between 1960 and 1990 either meant **nationalization** (adopted mainly by socialist administrations), or more often, **privatization.** This was intended to eliminate "archaic" customary land tenure, and especially any vestige of holding lands in common, to prompt a market in land, liberated from any local social or collective responsibilities. Inevitably, privatization was most relevant to and targeted at farm and house plots, but in the process placed the existence of communal land assets like forests and pastures in jeopardy.

Kenya took the lead in launching privatization at scale through systematic individualization, titling, and registration, as first laid out in the pre-Independence Swynnerton Plan of 1954. Security of tenure was thereafter to be dependent on the promised sanctity of title deeds and the incorruptibility of remote government-held registers, not on community assurance. In the process of adjudication and registration, any collective property of the community was subdivided among richer households with the capacity to farm large areas, or vested in government authorities, which then proceeded to put these lands to other uses including selling to elites.[6]

Concurrent reforms in neighboring **Tanzania** nationalized expatriate estates, abolished freehold tenure, outlawed land sales, and, through the Ujamaa and then Villagization programs, aggregated hamlets to facilitate the provision of services to the peasantry. "All land belongs to government and individuals only have the right to use and occupy it" and "Tanzania is not for sale!" were popular slogans[7], reminiscent of colonial strictures on natives.[8] In the process of villagization, customary norms were not extinguished, but they were discounted; elected village governments, not chiefs, were to make land related decisions. The traditional boundaries of family homesteads gave way to street formations whereby houses could be near to services, and new farms were laid out next to each other to facilitate shared use of tractors. The main lasting effect was to significantly equalize landholdings (no family was permitted to be landless), to limit absentee farming (lands left unfarmed for some years were turned over to village governments for reallocation), and to make inroads into some of the less equitable traditions regarding land access by women.[9]

In **Senegal**, land reform in the 1960s also redefined country land tenure in the interests of nationalized African communalism. Cultivated lands were also placed under rural councils, but located at district not village level, and much more expansive areas of uncultivated lands were taken by central government ("pioneer

zones") to be made available for commercial farming, including cotton schemes. There were no physical relocations, but customary rights and traditional authority were also undermined as in Tanzania, although not entirely extinguished.[10]

Nationalization to one degree or another was in fact the norm in Sub-Saharan Africa during the first decades of independent regimes. In some cases this did not affect the existing private sector (those properties which were already under state-guaranteed entitlement) whose owners retained their rights intact (e.g. Namibia, Malawi). In others, freeholds were converted to leaseholds held from the state for terms up to 99 years (e.g. Tanzania as above, along with Sudan and Zambia). However the titled private landholding sector was with exceptions small,[11] so the main impact was upon rural majorities, those families and communities which owned land under customary norms. Nationalization meant that presidents or governments made themselves the ultimate owner of these lands, much as their colonial predecessors had done, and with limited restraints. These new landlords became noticeably more rapacious with each decade, helping themselves at will to their citizens' lands on grounds that such "public lands" were not legally owned by their occupants and users. Lands without farms were especially vulnerable to large-scale land takings for state projects or at the whim of presidents or senior politicians and officials, and often for private interest.[12] Tackling such abuses of state power would become one of the objectives of reforms after 1990.

2 What most distinguishes land reform after 1990?

Today, some form of land-tenure reform is under way in *around half* of the world's 207 independent nations. Almost all of these states have transitional and especially agrarian rather than industrial economies; that is, economies which rely upon land-based production rather than manufacturing or other industries for their GDP and where access to land is crucial to majority livelihood. The directives of national policies and laws therefore matter

a great deal, and notwithstanding the rapid urbanization occurring in most agrarian states at this time.[13]

Outside Africa, six trends have dominated land reformism since 1990:

a. Many reforms (e.g. in Thailand, Albania, Lithuania, and Croatia) focus only on improving *land administration*, with privatization retained as a target, and there is a tendency to sidestep issues of tenure.

b. There is continuing but partial or ambivalent *privatization* from decollectivization (e.g. in China, Vietnam, Armenia, Belarus, Uzbekistan, and Mongolia), especially relating to the ownership of formally traditional collective lands like forests and rangelands.

c. Reforms have been triggered as part of *post-conflict reconstruction* (e g. in Afghanistan, the Balkans, El Salvador, Timor-Leste, and Guatemala), reflecting the significant role of land-related injustice in causing civil wars.

d. New attention is being paid to *unregistered occupancy*, as witnessed in the expanded horizon of reformism to embrace the concerns of millions of untenured occupants ("squatters") in the world's multiplying cities.

e. *Rights-based reforms* have emerged, as demonstrated in reforms improving *indigenous rights* in Australia, New Zealand, Norway, and most widely in Latin America, where 18 states have changed their laws to acknowledge the existence and authority of indigenous people and bringing several hundred million hectares of native territories under native title.[14]

f. There has been a steady rise in *popular land-rights movements*, including transnational movements, again most prominently seen in the peasant agrarian movements of Latin America. The most influential movement has been *La Via Campesina*, which established regional and then global campaigns.[15]

Land reform has also strongly come onto the political and public agenda in **Sub-Saharan Africa.** As well as being driven by all or some of the above, reforms on the sub-continent are also driven by the following:

a. Sustained international agency pressure to bring land *more freely into the market place* and to make it *more freely available to foreign investors*. This was the initial impetus for state-led reforms in Mozambique, Tanzania, Uganda, and Zambia.[16]

b. Revitalized commitment to *privatization through the extension of statutory entitlement*, in the awareness that only tiny areas of each country (southern African states excepting) are subject to formal deeds or titles.

c. Local demand by urban and rural elites for greater privatization and for the *removal of limitations on land acquisition* (and upon speculation), as well as frustration with laborious and un-transparent transaction procedures.

d. The decision (perhaps due to donor coercion) to tackle the obviously *failing sanctity of title deeds* and near-inoperative land registries, and to root out corruption; explicit objectives of reforms in, for example, Ghana, Kenya, Lesotho, Malawi, Nigeria and Uganda.

e. Concern that current land-tenure and administration regimes are not dealing fairly or systematically with *rapidly multiplying small towns and expanding cities*, a motive of reformism in, for example, Angola, Ghana, and Liberia.

f. *Widespread political change* from 1990, resulting mainly in the adoption of multi-party politics and an uneven reach into the local-governance and judicial sectors.

g. A series of significant *civil conflicts and wars* in the region, the resolution of which prompted the inclusion of land reforms in post-conflict reconstruction strategies; this was the case in Angola, Burundi, Eritrea, Ethiopia, Liberia, Mozambique, Rwanda, Sierra Leone, and Sudan.

h. Widespread *constitutional reform* stemming from the above two factors, in the process opening the way for the reassessment of principles of property, with more popular input than was previously the case.

i. *Natural resource management reform*, arising mainly from environmental concerns expressed at the 1992 Rio Earth Summit that promoted decentralization, especially of the management of forests as a route to improved conservation. Nearly 20 Sub-Saharan African states adopted community forestry for this purpose in the 1990s (and possibly 25 states by 2011), although with widely differing impact upon forest tenure. Even where forests have not been made the property of communities, community forest management helps trigger demand for this.

j. *The end-game of residual colonialism* in Mozambique, Namibia, South Africa, and (from 1980) Zimbabwe;regime change overturned discriminatory landholding on the basis of race and put restitution on the land-reform agenda.

k. Along with, or as a consequence of, all the above, a gradual coming of age of *popular democratization*, decreasing tolerance of legal abuse and bureaucratic interference in local land occupancy, growing awareness of injustices in policies and laws—resulting in a slow but steady rise in rights-

based demands, often shaped by ethnic considerations (such as seen in Kenya in respect to ancestral lands and in the handling of immigrant settler land rights in Ghana and Côte d'Ivoire).

l. More recently, emerging *resentment of land losses* by rural communities where their customarily-held land is infringed or taken for commercial purposes, heightened by the surge in allocations of large areas to foreign and local investors since especially 2007.[17]

More steady pressures have also contributed to demand for changes in land policies and laws. Rural landlessness in Sub-Saharan Africa has risen almost to levels seen in feudal Asian economies in the 1960s and 1970s.[18] Research in Uganda shows that 84% of the poorest people continue to live in rural areas, mirrored elsewhere on the continent, and most affecting young males, a potent source of demands for change.[19]

3 How widespread is land reform in Africa?

Sub-Saharan Africa comprises 43 mainland states and eight island states (of which Madagascar is the largest).[20] At least 32 of these states (63%) have started land-reform processes since 1990. This does not mean that the processes are the same or even particularly reformist in practice. Nor does it mean that reforms are well advanced. Some are not much more than publicly-proclaimed intentions.

Nevertheless, this reformism suggests that land matters are a critical issue in the region. This is illustrated by the endorsement by the Heads of State of the African Union in July 2009 of the Framework and Principles for African Land Policy, a statement drafted by the Economic Commission of Africa. This statement affirms that reform is a prerequisite for poverty eradication and socio-economic growth and includes a pledge to prioritize land policy development and implementation processes in each country. It remains extraordinary and indicative

REFORMS HAVE BEEN DRIVEN BY CONTRADICTORY COMMERCIAL AND RIGHTS-BASED DEMANDS

however that customary land rights are not explicitly mentioned in this statement of intent, despite the fact that the vast majority of rural Africans possess land under customary norms. The statement does include an objective of ensuring that new land laws "provide for equitable access to land and related resources to landless and other vulnerable groups".

4 What process is being followed?

A review of the ways in which reforms evolved in the 1990s in 13 **Eastern and Southern African** countries[21] found the following:

a. The decision to reform was always *state-led* and donor-influenced.

b. The trigger to reform was always a single problem, such as the need for an urban land policy in Tanzania (1990); the need to find land for millions of displaced people and returnees in Rwanda (1997); post-liberation commitment to the restitution of white farms in Zimbabwe (1980, 1990, and 1992) and South Africa; declared dissatisfaction in 1988 with the continued existence of the feudal *mailo* tenancy regime in Uganda (established by the British in 1902); and political commitment to nationalise and redistribute rural holdings equitably in Eritrea (1992).

c. *Single-issue reformism did not last in any instance*, reviews as to needed action quickly making it essential to overhaul a wider range of subjects. The establishment of state-mandated commissions of inquiry became the commonest mode for this, none of which sat for less than a year (e.g. 1991–92 in Tanzania, 1990–95 in Mozambique, and 1996–99 in Malawi).

d. In the process, "national land reform" became more *broad-based*, covering land use, land administration, land tenure, land distribution, land conflict resolution, and land market and mortgage concerns.

e. In all but one case (Eritrea), *public opinion* was increasingly if often belatedly sought (e.g. Rwanda, Uganda, and Zambia), although this was usually on the basis of already-drafted state-formulated policies. In some cases, public participation took the form of sensitization about the meaning of new land laws (e.g. the famous Land Campaign in Mozambique in 1999 following the enactment of the Land Act, 1997, and its implementing regulations of 1998). *In no case was there pre-reform piloting of new strategies or approaches to land rights.*

OVER THE LAST DECADE PUBLIC CONSULTATION HAS BECOME A MAIN ROUTE OF LAND POLICY FORMULATION BUT LEAST SO IN CONGO BASIN STATES

Land reform in West African Francophone states during the 1990s was somewhat different. For example:

a. Reforms in Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, and Senegal emerged mainly through decentralization measures.

b. Concerns to more rigorously regulate *land use* were the main objective, including prompting formulation of pastoral codes in Burkina Faso, Mali, and Niger. This helped extend the vision of reform beyond the family farms of settled communities.

c. *Learning-by-doing* was integral to processes in Guinea, Côte d'Ivoire, Benin, and Burkina Faso, where the launching of the Rural Land Plans Programme from 1990 was designed to test how majority land interests could be best secured.[22]

While each country initiated its reforms independently, regional sharing became common from 2000. Many provisions in new national land policies and laws are borrowed from other countries. For example, the newest national land law, the Southern Sudan Land Act, 2009, borrows heavily from Ugandan and Tanzanian land laws, as well as draft legislation never adopted by Sudan (Khartoum). Civil society groups pressuring for reforms and donors calling regional meetings are main drivers of this sharing.

In both Anglophone and Francophone Africa, the approach to reform has also changed since 2000. A great deal more effort is being made towards public consultation, participatory decision-making, and piloting to test approaches. This is seen in Benin, Burkina Faso, Niger, and Mali; in the manner through which Kenya's 2009 land policy and 2010 national constitution were arrived at; and in the pledges of consultation and field research made by sitting Land Commissions such as in Liberia and Nigeria. Civil-society land advocacy groups have also become better organized and more demanding of their inclusion in policy formulation.

Many land laws have been amended within the first five years of enactment. One law has even been struck down as unconstitutional (May 2010). This is the Communal Land Reform Act, 2004 of **South Africa** designed to reform tenure in the former homelands affecting 16 million hectares and most rural South Africans. Women's groups initially brought complaints before the courts on grounds that women's interests were insufficiently provided for. Other groups were concerned that the law left too much scope for chiefs to proclaim themselves as owners rather than trustees of land. Government itself showed signs of tacitly supporting the demise of the law, possibly regretting over-generous provisions for communities to regulate and administer their land relations themselves. No replacement law has since been enacted, leaving 21 million South Africans in a situation which would be little better than under apartheid land laws were it not for the

extension of the Interim Protection of Informal Land Rights Act of 1996.

Main reasons for early amendments to new land laws are also telling. In **Uganda** commitment in the Land Act, 1998 to establish sub-district land and tribunal bodies was quickly downscaled due to the immense and previously uncalculated costs of setting up some five thousand new institutions. Ugandan women were also enraged by the failure of a crucial co-ownership clause, declaring spouses to be equitable owners of the prime family house and farm, to appear in the enactment despite its approval in parliament, and have repeatedly brought proposed amendments to members of parliament with still no success. *Mailo* tenants have also agitated for their status as tenants (as of 1998 only paying peppercorn rents) to be revoked to enable them to sell the land they or their forefathers have occupied, long before the British turned their ownership into tenancy to the Buganda King who had supported their conquest of the area. There have also been attempts to limit generous provisions affecting communal resources in Mozambique, Tanzania, and Uganda, countries noted for best practices in their 1990s laws.[23] Benin, Burkina Faso, and Senegal have all replaced laws enacted in the 1990s; in Senegal, a 2004 law has also been suspended pending the findings of a new land commission set up in 2006.

Thus, while more and more African countries take up the task of land reform, it is clearly a work in progress. With widening awareness it is also proving more difficult for politicians to marry popular demands with the privatization objectives of elite-driven administrations. Discussion and decision-making in the newer Land Commissions of the Gambia, Liberia, Nigeria, Senegal, and Sierra Leone and Mauritania are likely to be cautious and conservative than emerged from land commissions in the 1990s.

Meanwhile there has been tangible retrenchment or slow-down in commitments. The governments of Botswana, Swaziland, and Zambia have failed to finalize national land policies after many years of reports and debate. Ghana (1999) and Malawi (2002) produced national land policies with substantial reforms but have since not delivered the laws needed to instrumentalize these. Cameroon has recently declared that reforms will be made to the land laws of the 1970s but with no sign that this will alter the status of some 11 million customary land holders as no more than tolerated occupants and users of public lands controlled by the government.

On the other hand, there have been some positive surprises, such as the explicit commitment of Liberia to ensuring that majority customary rights are secured—a commitment backed by the recent issue of provisional procedures for accessing public lands which may favour community interests. Additionally, now that Liberians have been assured that customary ownership of forestlands will be respected (through the new Community Forest Rights Law, 2009) and with a pilot initiative laying down practical steps through which rural communities (referred to as "towns" after the American system) could secure communal title, the Land Commission may find it cannot escape re-introducing legal provision for rural persons including families and communities to be recognized as legal property owners. Another positive development is the expeditious manner in which the new state of Southern Sudan laid down its cogent Land Act, 2009, and draft National Land Policy, 2011, neither of which leave much doubt as to the supremacy of popular land rights—on paper at least. No steps have been taken to establish the local institutions needed to protect these rights.

Difficulties in applying new terms in land laws have also been experienced, and particularly where governments are required to put in place new institutional arrangements, or curtail their own powers. Local uptake by poor families or communities of improved opportunities has also been slow. One of the most adventurous new land laws is the Village Land Act, 1999 of **Tanzania**; this makes the elected governments of each of the 12,000+ rural communities the legal land manager, including powers to set up Village Land Registries, identify and register lands belonging to all

members of the community, as well as issuing title deeds to individuals or families for house and farm parcels. Fewer than 800 villages so far have taken steps towards this and only where donor-funded projects assist them to do so. Only around 300 of several thousand communities in Mozambique have established communal area rights under a 1997 law making such claims possible. Few local land commissions have been launched as planned in **Benin, Burkina Faso,** and **Mali**, where such commissions are charged with producing an inventory for every single land rights within the village land area, for local level recognition. In these cases, much of the work of assisting communities is carried out by non-governmental organizations and who are often the prime movers where developments have moved more quickly.[24]

The restitution of white-owned lands has also proved disappointing in **Namibia** and **South Africa** under World Bank-advised market-assisted norms. Less than three million hectares of the 26 million hectares earmarked for transfer from white to black farmers in South Africa had been achieved by 2009, and the figure is even lower in Namibia.[25]

To be fair, in some cases, incremental implementation of new provisions is deliberate, given the failure of states to meet deadlines they set for themselves for even core programmes. This has proved true, for example in the cases of **Angola, Namibia** and **Côte d'Ivoire** which all set deadlines for compulsory registration, necessarily extended once or now twice. There are exceptions to this slow pace; mainly seen in the mass farm titling initiatives operating in **Madagascar, Rwanda**, and especially **Ethiopia**, where millions of farm titles have been issued to smallholders since 2005.

5 New land law as the prime indicator of reform

The passing of laws says nothing about the content of those laws nor means that the public or officialdom is vigorously using their provisions. Nevertheless, the enactment of new land laws is indisputably the single most important marker of commitment to reforms. New constitutions are also playing pivotal roles by laying down new principles and obligating law makers to develop enabling instruments. This has been the process in Mozambique (1990), Uganda (1995), South Africa (1996), Kenya (2010), and Southern Sudan (2005, 2011). The status of legal reform in the local government and natural resources sectors also needs to be considered, given the importance of these as hand-maidens to land reform. Table 1 lists the status of new legislation in early 2011.

Table 2 provides a rough classification of progress in land reform as it affects rural majorities.

6 What is changing through land reforms?

The aims and scopes of new land policies and laws differ country to country. However these trends are discernible:

a. Land rights have become *a constitutional subject*, with sometimes entire chapters devoted to laying down principles. This embeds key elements of policy, provides a sturdy foundation for claims, and directs legislation.

b. Land as a *fungible commodity* is being promoted, and there is widespread removal of structures against the sale of customary/untitled lands.

c. *The right of foreigners to acquire land is being enhanced*, although mainly only as leaseholders—i.e. without the right to buy land in absolute title. Simplified procedures for foreign access are routinely entrenched in land laws, highlighting the importance given to this subject.

d. *Tenancy is subject to stronger regulation*, as are workers' rights on private farms.

e. Mechanisms for *land-dispute resolution* are devolving to committees and tribunals, with

TABLE 1 NEW CONSTITUTIONAL, LAND, LOCAL GOVERNMENT, AND FOREST LEGISLATION SINCE 1990

Country	Constitution	Local Government Laws	Land Laws	Forest Laws
Angola	1992	2007	1992, 2004	(draft)
Benin	1990	1997, 1999	2009	1993
Burkina Faso	1997	1996	2009	1997
CAR	1995		2009 Draft, 2009 Draft	2008
Chad	1996 (2005)	2002	2001	1994, 2002
Republic Congo	2002		2000, 2004, 2006, 2011	2000
Côte d'Ivoire	2000		1998	
Eritrea	1996	1996	1994, 1997	2006
Ethiopia	1995	1992	1997, 2005	1994
Ghana	1992	1993	(1993)	1998
Gambia	1997	2002, 2004	1990, 1991	1998
Guinea	1990		1992	1999
Kenya	2010	draft 2011	draft 2011	2005
Lesotho	1993	1997	2010	1999
Malawi	1994	1999	(2004)	1997
Mali	1992	1993, 1995,1999	1996, 2000,2006	1995
Madagascar	1992	1994	2005, 2006, 2007, 2008	1997, 2001
Mauritania	1991		2000, 2005	
Mauritius	2008	(2006, 2008)	1999 (2005), 2007	
Mozambique	1990	1997,2002	1997	1999
Namibia	1990	1992	2002	2001
Niger	1996	1993	1993, 1997	1999
Rwanda	2003	1999, 2000, 2006	2004	
Senegal	2001	1996	2004	1998
Sierra Leone	1991	2004	2003, 2004, 2005	
South Africa	1996	1997,2000, 2002	9 laws 1994–2004	1998
Southern Sudan	2005, bill 2011	2009	2009	draft 2009
Tanzania	under review	(1992, 1999)	1999, 2002, 2007	2002
Uganda	1995	1997	1998	2003
Zambia	1991	(1992)	1995	1999

Note: Parentheses indicate amendments to older laws. New land commissions are in place in Liberia and Nigeria to plan reforms. Chad's 2001 law establishes an observatory to review tenure and so, in itself, does not reform old laws. Note also that some blanks indicate a lack of information and others that no new law in place.

TABLE 2: STATUS OF LAND REFORMS, MID 2011

Legal Reforms Under Implementation	Legal Change with Limited Implementation	Commission Instituted, Policy in Place, or Minor Reforms Achieved without New Land Law	Reform Intentions Slowed or Halted Altogether	Uncertain or No Intention to Reform
Benin	Angola	Gambia	Botswana	Cameroon
Ethiopia	Burkina Faso	Ghana		Cape Verde
Madagascar	Eritrea	Guinea	Côte d'Ivoire	Chad
Mozambique	Guinea Bissau	Kenya	Democratic Republic of the Congo	Equatorial Guinea
Namibia	Lesotho	Liberia	Guinea	Gabon
Rwanda	Mali	Nigeria	Malawi	Guinea
South Africa	Niger	Senegal	Senegal	Seychelles
Tanzania	Southern Sudan	Sierra Leone	Sudan	Somalia
			Swaziland	Togo
			Zambia	Zimbabwe* Central African Republic

* Excepting in matters of restitution of white-owned farms to black Zimbabweans. A comprehensive policy affecting communal areas was devised in 1998 but never adopted.

recourse to formal courts as a secondary option; this is intended to limit the massive backlog of land cases in judicial systems in almost all African states.

f. *Legal pluralism is being promoted*, with customary law accepted as a legal source of decision-making and delivery of property rights, although in highly variable ways and with many constraints.

g. *Support for women's land rights is being entrenched in law,* some laws providing that husbands and wives co-own family property, thus protecting female rights at inheritance and widowhood.

h. *Public participation* is often made obligatory in future land-related policymaking.

i. The duties and powers of land administrations are being *decentralized*, although not always to the community level, or with primary authority.

j. *Landlordism by chiefs is being curtailed,* mainly through the creation of democratic land governance institutions at or nearer to community level, and in which chiefs are members or with which they are bound to work.

k. *Entitlement is being expanded* to enable the certification of customary rights in legally acknowledged ways, although often with less legal force than property rights provided through non-customary registration procedures.

l. *The formalization of rights* (statutory entitlement) is being simplified and localized and formal survey requirements are being replaced to better enable mass access at low cost. In many countries this opportunity is however still inferior to the force of rights secured through titling parcels as non-customary freehold or leasehold rights.

m. Reforms are making it more possible for *families, groups and communities* as well as individuals to formally record their land interests and hold titles for these.

n. It is becoming possible for lands other than farmed or settled parcels to be recorded *as (collectively) owned,* although this is still not widespread.

o. Customary rights *are now less corralled* within reserves and communal, tribal, or trust lands. Instead, reforms increasingly define customary tenure as a source of landholding, alongside other sources (i.e. introduced forms of tenure).

p. With exceptions (Eritrea, Ethiopia, and Rwanda), policies and laws *no longer aim to extinguish customary landholding.*

7 What best practices may be observed?

A limited number of reforms include some of the following changes affecting tenure security:

a. accepting longstanding squatter occupation in cities and towns as lawful occupancy and unable to be disturbed without compensation,

b. recognizing that rural customary tenure is *on a par* with statutory tenure as a route to established legal rights to land,

c. acknowledging of customary rights as *private property rights* to the extent that they have equivalent force and effect in law as rights acquired through introduced statutory norms such as freehold and leasehold,

d. providing in law for the recognition of customary landholding as due respect as private property *even where they are not formally certified or registered*,

e. providing, nevertheless, for the cheap, localized, and sustainable voluntary registration of rights within the context of community approval, to enable those who wish, *to double-lock their rights in approved registers,*

f. accepting customary *norms* as determinants of rights and transactions, as long as they do not negate natural justice or constitutional principles,

g. extending the acknowledgment of customary land as property *beyond farms and houses to cover collectively held customary resources such as forests, rangelands, and marshlands*,

h. making it explicit in law that state acquisition of customary lands for public purposes requires the payment of compensation *at the same levels and on the same terms* as the compulsory acquisition of statutorily registered private properties,

i. making it possible for lands already taken by the state, including national forest and wildlife reserves *to be restituted* to community ownership or other arrangements made to compensate the original owners,

j. *devolving authority over rural land relations* to elected community level bodies, local and central government agencies to provide technical assistance, oversight and recourse in the event of maladministration,

k. making *free, prior and informed consent* a prerequisite to acquisition by the state of customary lands of any kind, except in times of national emergency or for genuinely public service purpose,

l. outlawing discriminatory customary practices against women, disabled, orphans and immigrants,

m. structuring laws so that they are relevant to pastoral communities not just settled farming communities, and

n. removing the distinction between *possession* and *ownership* of land.

No single new land reform law provides for all the above. Those in Mozambique, Southern Sudan, Tanzania, and Uganda come closest[26], while those in Benin, Burkina Faso, Madagascar, Mali, and Namibia share somewhat fewer such attributes. Much older reforms in Ghana and Botswana also provide for some of the above attributes.

8 What is not changing?

Another way to assess current land reformism is to identify significant gaps affecting the status of majority rural land rights. Shortfalls are most common in the following:

a. Since 1990, only Uganda (and Kenya through its 2010 constitution) have done away with the outdated and corruptible distinction between ownership of the soil and ownership of rights to the soil. Although new laws generally emphasis the ultimate ownership of land by presidents as *trusteeship* only, this still leaves ample scope for state landlordism.

b. The notions of *terra nullius* meaning vacant and unowned lands, and the related notion of *wastelands* to cover lands which are not visibly occupied and used, still underlie the norms of many new land laws. This allows administrations to pretend that *customary lands are without owners* and that unfarmed lands like forests and rangelands are in particular so.

c. Related to the above, the definition of what constitutes "effective occupation" has not changed in many states, with the result that many uncultivated lands, including forests, rangelands, and marshlands, remain vulnerable to denial that they are owned by local communities.

d. Little policy or legal development has focused on protective actions at the crucial urban–rural interface, where so many unregistered customary land rights are lost to state and private-sector housing schemes and without compensation to customary owners.

e. Although a handful of best-practice cases are setting invaluable precedents, the majority of new reforms have ***not*** endowed customary interests with respect as private property rights, retaining the position that these are no more than occupation and use rights on government or un-owned public lands.

f. No changes have been made to the legal ownership of *local waters* (i.e. streams, ponds, and lakes), beachfronts, surface minerals, or marshlands, still deemed to be national or government property, thereby denying customary ownership of these traditional assets.[27]

g. Few land policies and laws explicitly enable the ownership of *protected areas* to be restored to communities (South Africa and Tanzania are exceptions).

h. While a number of laws improve the recognition of farms and houses as private properties as registrable without conversion to statutory forms of tenure, few laws extend this to acknowledgement of forests, rangelands, and marshlands as private (group-owned) properties and registrable as such.

i. Even where collective assets such as forests and rangelands *are* acknowledged as the communal property of rural communities, there has been insufficient development of legal constructs for this to become a common and fully accessible form of legal tenure, outside bureaucratic and costly mechanisms such as communal property associations.

j. Formal registration of land interests *remains the dominant route to tenure security*, even after a century of demonstrated difficulties in applying this at scale. Only one or two countries have established

that existing rights to land will be fully upheld *without certification or (the even more expensive and conversionary) registration.*

k. The interpretation of public purpose to allow the pursuit of significant private purposes under its aegis *has not been curtailed in a single case*, leaving the poor still vulnerable to involuntary land losses for purposes which are in reality designed to enable private commercial profit from the taking of their lands.

l. Many reforms have *not* tackled the contradiction between recognising customary rights and yet enabling the state to issue concessions for mining or timber harvesting without making communities shareholders of those developments or significant beneficiaries. .

m. Few laws have made it obligatory for the payment for lands taken for public purpose to be made *prior* to the land-taking, sustaining a situation in which most African governments owe millions of dollars in compensation to individuals and communities.

n. Devolutionary land authority and administration has *not* emerged as a flagship of African land reform. With exceptions, rural communities are still deprived of their customary and now democratic right to control, monitor, and administer local land relations. In most cases, crucial functions, including the legal registration of rights, remain with the state, decentralized at best to remote district or commune levels.

o. Only a few land laws have instituted measures to *outlaw land-grabbing* and undue rent-seeking by traditional authorities.

p. Despite rising rural landlessness and polarized farm sizes, few new laws have instituted measures to outlaw *absentee landlordism, land-hoarding, and speculation* or activate land ceilings for private landholding. On the contrary, promotion of large-scale agriculture by entrepreneurs, investors and mega-companies remains a main objective of mostreforms.

q. Women's land rights have improved in legal terms, but the same cannot be said for the special interests of pastoralists, hunter-gatherers, immigrant families, and former slave communities. Pastoralism and hunter-gathering are still not considered uses of land sufficient for establishing legal land rights.

r. Where customary landholding has been deemed a form of private land ownership, the proportion of the national land estate categorized as government/ state/public lands has declined sharply; for example, most of the land areas of Southern Sudan, Tanzania, and Uganda (as well as Botswana and Ghana over a much longer period) are now legally the private property of customary communities or their members. Because so many other land reforms retain the designation of *uncultivated lands* as without owners and unoccupied ('wastelands' or *terres sans maitres), the overall balance of state owned and community owned lands rights is little changed*. This is so even when farms and houses are recognised as private property because these areas constitute a tiny proportion of the total customary sector.

9 Conclusions

The glass half-full, glass half-empty picture presented above reflects the mixed outcomes of new land reformism thus far in Sub-Saharan Africa.

On the one hand, reforms in some countries are laying down important precedents that may focus the demands of less-well-served peoples. Reformism has also raised awareness of the injustices associated with the sustained use of colonial-introduced paradigms, and which render most of the population in African states still not lawful owners of their lands, only lawful occupants and users of national or government property.

On the other hand, the reforms made so far have proved to be less transformational than required to assure majority tenure security and to ensure that customary rights (or, in the case of urban populations, longstanding occupancy) cannot be unduly interfered with by the government of the day or associated elite private interests.

The crux of the disappointing results of reforms is the treatment of customary rights. It is still rarely the case that customary rights have been considered worthy of equitable legal respect as a *form of private property*—albeit one which, unlike statutory private property, may be subject to community-derived sanctions against absolute sale.

Nor have major inroads been made in removing the priority placed by governments on taking lands for private enterprise to support modernization. In all but a handful of states, it is still extremely easy to take land away from untitled and customary landholders for purposes that are, at most, only remotely in their interest/to their benefit. This may be so even when new land laws have been introduced under the banner of justice, suggesting that the content of laws is more a juggling of the status quo than radical surgery to remove longstanding ill-treatment and injustices that affect the majority.

10 What does this mean for forests?

The disappointing performance of reforms is reflected in the fate of forest tenure.

It will be evident from the foregoing that while change to customary tenure is a central subject of current reformism, it has been extended very unevenly to "wastelands" (as colonial law referred to them); those lands within community areas which are, by custom, owned and used collectively for purposes other than cultivation. With exceptions[28] most villagers in Sub-Saharan Africa are only lawful *users* of their forests. Ownership remains with the state or state agencies.

Nor has the surge in community-based forest management since 1990 made much difference to this dispossession. While 20–25 countries now have provisions for designating communities as lawful managers or co-managers of forests, such provisions extend to recognizing these communities as *owner-managers* in less than ten of those states. Even in best-practice cases, tenure does not always carry with it the normal rights of ownership.

In **Ghana**, for example, although customary forest ownership has long been recognized, enactments in the 1960s placed control over those properties into the hands of the state. Chiefs receive a share of revenue from forest exploitation controlled by the state, but other laws, including the 1992 constitution, do not oblige chiefs to share such revenue with members of the community.[29] In contrast, **Liberia** has recently (2006, 2009) enacted laws that acknowledge customary ownership and community rights to rental and other shares of revenue, as well as community rights to manage less expansive and valuable classes of forests. However, the state has no action plan to restitute National Forests to communities, even though most of these areas belong to communities and who were never paid when their rights were extinguished, and some of whom had acquired collective entitlement to these lands.

In virtually all other Sub-Saharan African states, reforms have not extended to the revocation of state appropriation of forests now declared to be national forest reserves or parks. Legal avenues for this are provided in South Africa and Tanzania but have only been activated in a couple of cases in South Africa. Instead, most new land and/or forest laws confirm existing reserves as government property (most recently in Southern Sudan in 2009).

Who owns forests is a matter of crucial importance to the future of forests. Globally, there is mounting evidence that forests managed by communities are better conserved than those managed by governments. Underwriting this management with acknowledged

ownership is crucial if communities are to have a stable and strong incentive to limit degradation and deforestation, and to prevent wilful reallocation of these lands to industrial farming interests. Community ownership does not obviate the creation of commercial concessions over forestlands, but does ensure that communities are, at the least, beneficiaries of such developments, and ideally, economic partners in viable commercial enterprise.

Endnotes

[1] A summary of 20th-century land reform is provided as Chapter 1 and Annex A of Alden Wily, Liz, Devendra Chapagain, and Shiva Sharma. 2008. *Land Reform in Nepal: Where is it Coming From and Where is it Going?* Kathmandu: Department for International Development, Nepal.

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[8] See brief 2.

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[12] For example, it was under the regime of President Moi in Kenya (1978–2002) that millions of hectares of state and trust lands were reallocated by the president and his land commissioner for private purposes; see Kanyinga 2009, as cited in endnote 6.

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[20] Sudan is included in the definition of Sub-Saharan Africa, and as two states, Sudan (north Sudan) and Southern Sudan.

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[24] Lavigne Delville, 2010 as cited in endnote 22.

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[27] The exception of South Africa needs note: the Minerals Resources Act came into force in 2002, removing private ownership of minerals and placing it in the hands of the state on behalf of the nation, but with the state then selling those rights.

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The mission of the Rights and Resources Initiative is to support local communities' and indigenous peoples' struggles against poverty and marginalization by promoting greater global commitment and action towards policy, market and legal reforms that secure their rights to own, control, and benefit from natural resources, especially land and forests. RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, D.C. For more information, please visit www.rightsandresources.org.

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RIGHTS + RESOURCES 5th Anniversary

The Status of Customary Land Rights in Africa Today

Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #4 of 5

NOVEMBER | 2011

Liz Alden Wily*

Briefs on *Reviewing the Fate of Customary Tenure in Africa*

1. *Customary Land Tenure in the Modern World*
2. *Putting 20th-Century Land Policies in Perspective*
3. *Land Reform in Africa: A Reappraisal*
4. ***The Status of Customary Land Rights in Africa Today***
5. *The Global Land Rush: What It Means for Customary Rights*

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1 Clarifying the parameters

Other briefs in this series have defined what is meant by customary land tenure in Sub-Saharan Africa and how it has been treated officially over the last century, including by recent reformism.

It has been concluded in those briefs that the crux of just treatment lies in national laws respecting **customary land interests as having equivalent force** (and therefore protection) with private properties acquired through non-indigenous tenure systems deriving from Europe. (The latter are often referred to as statutory rights given that national statutes (laws), not rural communities govern their attributes and security).

Private property has been explained as *not* necessarily always existing as individual property, being as well owned by families, groups and *communities*. In regard to naturally collective resources like forests, rangelands and marshlands, and which are not usefully privatized into the hands of individuals, a critical measure of due respect for customary rights is where national laws make it possible for communities to secure these communal assets ('the commons') as their **private, group-owned property**, owned in undivided shares and used under communal rules.

Under derived European land ownership norms, formally introduced into Africa by colonialism, a landholding cannot amount to "property" unless it is fully fungible, which means it can be freely traded as a commodity. Modern thinking in land tenure prefers to leave such attributes of property up to the owners.

Colonialists and post-colonial administrations have also found it convenient to rule that only land which is used for houses and farming can be eligible as "property". The main objective of this paradigm has been to enable governments to declare land that is neither cleared nor farmed as **unowned,** and therefore by default the property of the state, and able to be disposed of at its will. This condition has done great damage over the last century to traditional community rights over forests, rangelands and marshlands.

Why should Africa's hundreds of thousands of rural communities want their lands recognized as property? The reality in today's commoditized world is that being recognized as merely a lawful occupant and user of someone else's land (usually the state's) has never been a protection and is even less so today.

Until individuals, families and communities in the customary sector are recognized as lawful owners of their lands, they run the continuing and worsening risk of losing those lands to others. Because governments consider themselves the *de jure* or *de facto* owner of these customary lands, losses usually occur through the state reallocation for other purposes or to private persons seeking large areas of land of their own, often for industrial agriculture or private commercial

* Liz Alden Wily is an international land tenure specialist and a Rights and Resources Fellow.

agriculture. This has been acceptable to administrations over the last century on grounds that only wealthy individuals/companies can successfully commercialize production. It has also meant that governments do not have to invest in the smallholder sector (and it has not, especially over recent decades). Therefore challenging unjust tenure norms also challenges paradigms which sustain majority rural populations in poverty, including a lack of opportunities to create wealth out of their substantial land resources. Who owns forests is central to such considerations, as a resource with immense values.

An additional comment must be made on **statutory tenure**. This refers to laws made at national level, usually by parliaments. The choice is not between customary or statutory tenure. The choice is between whether or not national law gives its support to customary 'law' (the rules about land made by communities) and to the land rights those systems deliver.

In fact, where full support is given, customary land rights become in effect, *statutory land rights*; rights to land which national law recognizes and protects, and which courts will therefore have to uphold when those rights are interfered with. This is why it was noted above, that it is confusing that rights to land under introduced tenure systems are referred to as statutory rights. Under true reform in a customary-rich region such as Africa, both rights which are derived from customary systems and from introduced systems should both be, in effect, "statutory land tenure".

Earlier briefs in this series have also made clear that **indigenous** and **customary land tenure mean the same**. Both refer to systems which are locally derived, not introduced from foreign climes. "Indigenous peoples" is, in contrast, a term often used to refer to communities who live by hunting and gathering or pastoralism. Such communities constitute a tiny minority of all those Africans who own land customarily.

Customary land tenure has also been discussed as best conceived (and referred to) as **community-based tenure.** This is because the outstanding characteristic of all customary/indigenous regimes around the world is that the norms and procedures of these systems are determined and sustained by communities, not outside bodies like governments, and that communities are themselves a continuing and living entity. Accordingly, norms practised by customary systems usually include many modern practices, as devised by living communities who make adjustments to meet modern situations. What never changes and is therefore "traditional" is this fact that jurisdiction always comes from, and is sustained by, the community. This does not mean that rights to land within the community land area are always equitable (they are not) or that some members (usually chiefs or elites) do not have undue say in how land ownership and access is distributed and regulated (they usually do).

The purpose of this brief is to offer a fairly precise picture as to the national law status of customary land rights in Sub-Saharan Africa today (2011). This is done by analysing what current laws say about such interests in 35 Sub-Saharan states. Because the vast majority of the customary domain is in fact composed of lands by tradition owned and used collectively (forests, rangelands, marshlands), this brief also pays special attention to what current land laws say about their tenure.

2 What are primary indicators of just legal respect for customary land rights?

Customary land interests are respected in national laws if they are:

a. treated as equivalent in legal force to land interests obtained through non-customary (usually introduced statutory) regimes; that is, accepted as an equitable form of private property,

b. able to be certified or registered without first being converted into non-customary forms of landholding,

c. bound to be upheld as private property by government and the courts, even if they are not formally certified or registered,

d. respected to equal degree as property whether owned by families, spouses, groups, or whole communities, not just individuals,

e. understood in the law as expressible in different bundles of rights, including, for example, the seasonal rights of pastoralists,

f. respected where they refer to unfarmed and unsettled lands such as forests, rangelands, and marshlands,

g. acknowledged as including rights to above-ground resources such as trees and wildlife, and also to local streams and ponds, coastal beaches, and surface minerals that have been extracted traditionally for centuries (e.g. iron and gold),

h. given primacy over non-customary commercial investment purposes seeking rights to the same land,

i. recognized as requiring legal support for community-based, democratically formed land administration to be successfully and fairly regulated,

j. supported by the creation of local-level dispute resolution bodies, whose decisions carry force and whose rulings rely on just customary practices,

k. reined in legally where customary norms are unjust to ordinary community members (e.g. as a result of undue chiefly privilege) or to vulnerable sectors such as women, orphans, the disabled, hunter-gatherers, pastoralists, immigrants, and former slave communities,

l. given the same protection as statutorily derived private properties when required for public purposes, as indicated by the extent to which the law requires the same levels of compensation to be paid and the same conditions to both forms of property to apply,

m. recognized as existing even where forest and wildlife reserves have been overlaid on customary lands, so that due separation is made between land ownership and the protection status of those lands, and

n. provided for in such a way that officials, courts and especially customary land holders may easily understand and apply supporting provisions in law.

Some of these indicators are canvassed in Table 1, which reviews the legal status of customary land rights in 35 of Sub-Saharan Africa's 51 mainland and island states. Others are addressed in the subsequent commentary.

3 How do countries fare?

TABLE 1: THE LEGAL STATUS OF CUSTOMARY LAND RIGHTS TODAY[1]

Country; key laws	Statutory status of customary land rights	Specific effect on common properties
ANGOLA Constitution, 1992 Land Law, 2004	POSITIVE TO MIXED: Customary rights recognized as property interests but not equivalent to state-granted or purchased rights ("concessions"). No provision for direct entitlements to individuals, families, groups, or communities (Constitution, Article 12 (4) and Land Law, articles 9 & 37).	POSITIVE TO MIXED: The land law recognizes community land areas through provision for "delimitation of useful domains" held by communities in perpetuity; communities are unable to transfer the areas. Nor can registered useful domains be subject to investor concessions or other private rights. However the implication is that such domains include only immediately adjacent and used lands excluding valuable forests and rangelands (Article 34). Few useful domains have been delimited or registered so it is difficult to know how successful this paradigm is for community rights.

BENIN Land Law, 2007	POSITIVE: Building on Rural Land Plan experiences from 1994, the law recognizes customary rights as property. These may be formalized as Rural Land Certificates, evidential of ownership until proven otherwise before a judge (Article 111). These rights are nevertheless not of equal legal force with rights acquired through statutory means as the law provides for voluntary conversion of these rights into statutory entitlements, and losing the attributes of customary rights in the process.	POSITIVE: The investigation and certification regime is explicitly geared to include groups, communities, and especially family rights (articles 3 and 5). Delimitation of community areas is also provided for, inclusive of forests and rangelands. These may be certified as community property. A problem lies in the weaker force of certificates and the requirement for expensive formal surveys to alter this. While a number of communities have established inventories of rights within their community land areas, certification has been slow.
BOTSWANA Tribal Lands Act, 1968 (amended 1986, 1993)	POSITIVE TO MIXED: The law vests all customary lands in (district-level) land boards, although comprising significant numbers of state-appointed members. Boards may issue Certificates of Customary Grants for residential, farm, grazing, public use, and other purposes, geared to house and farm lands. The certificates are not equivalent to leases that land boards may also issue, including to non-customary landholders.	NEGATIVE: The law does not provide directly for common property titles and treats commons as available to all citizens and by lease to foreigners, with the result that many grants of local commonage have been made to non-local elites and investors to the detriment of majority community rights. The law also overrides the traditional notion of each village community holding customary rights to specific spheres of grazing land within the tribal area; this was centralized in 1968 as tribal grazing lands, laying the path for the above.
BURKINA FASO Land Law, 2009	POSITIVE: Following diminishment of customary rights in the 1984 Agrarian and Land Reform Law, the Land Law, 2009, provides for "local land charters" in which all rights within the community domain are to be identified and recorded. The voluntary issuance of certificates by communities is possible by local consensus (articles 12–15). Equity with rights obtained under introduced statutory procedures is assured. Other than in this respect the law is similar to that enacted in Benin.	POSITIVE: Possession may be exercised lawfully by an individual, family, or collective (Article 34). The definition of "areas of collective use of natural resources" is obligatory in local land charters (Article 2). The *de facto* exclusion of pastoral interests within these "collectivities" has been noted, however, a focus of lobby groups.
BURUNDI Land Code, 1986	NEGATIVE: Customary interests are secondary to the fact of actual occupation, which, given Burundi's history, can discriminate against customary owners. Farms are registrable as private property if occupied for 30+ years, encouraging land-grabbing by elites and denying original ownership by thousands of now-returning refugees. No provision has been made for certification of customary individual, family, or collective interests.	NEGATIVE: All forest, marshlands, and other uncultivated lands are owned directly by the state.
CAMEROON Land Tenure Ordinance 1/1974 State Lands Ordinance 2/1974	NEGATIVE: Customary rights are treated as no more than the occupation and use by families and communities of state or un-owned lands. Occupation and use for farming and houses are acknowledged as lawful but not amounting to real property until converted into registered entitlements through an expensive and remote procedure. A pledge to land reform was made in early 2011 but with indications that this is not intended to significantly affect the status of customary land rights.	NEGATIVE: Only "effectively occupied" land is lawful, thereby excluding traditional ownership of forests, rangelands, marshlands, etc. These are classed as national lands, which the state may allocate at will. There is a loophole in the law whereby a community with a viable production plan and capital could acquire a grant of that land by the state, but it is geared to commercial investors working with communities.

CENTRAL AFRICAN REPUBLIC Constitution, 1995 Land Law No 63, 1964 Draft Agro-Sylvan Law, 2009 Draft Law on Indigenous Peoples 2011	NEGATIVE: The 1964 land law places all unregistered holdings within the private domain of the state. Only those who develop the land intensively may apply for formal land rights. The draft Agro-Sylvan Law recognizes customary tenure as a legal basis for establishing registrable rights but is far from being delivered in law. A law has also been drafted to bring respect for the land interests of indigenous peoples (pygmies and pastoralists) in line with ILO 169 (ratified in 2010) and which, if passed, would make a big difference to their rights, but not of the majority non hunter-gatherer or pastoral populations. However it could set a precedent for wider change.	MIXED: There is a potential under the still-draft Agro-Sylvan law for pastoralists to be acknowledged as having rights over pastures, through group registration procedures (articles 160–168). This opportunity does not include forests.
CHAD 3 land laws, 1967 Law No 7, 2002	NEGATIVE: There have been minimal changes to land laws since 1967. Untitled land belongs to the state. A 2001 law establishes an investigatory commission ("Observatory"), which could produce new policy advice but given the long passage of time now looks like a sop to pacify public demands.	NEGATIVE: Communities may manage pastoral commons but not own them (Law 7, 2002). Aristocrats allegedly retain the largest share of access and control.
CÔTE D'IVOIRE Rural Land Domain Law, 1998	MIXED: Under the 1990 Rural Land Plan (*Plan Foncier Rural*) there was a clear commitment to map all customary rights for certification. The Rural Land Domain Law, 1998, provides for such land certificates to be issued based on custom but followed by *mandatory* conversion into statutory entitlements subject to formal mapping. These do not necessarily alter the incidents of the right, just the source of jurisdiction, thereby removing control from communities. There is a plethora of disputes between indigenes and immigrants, the latter only permitted to obtain leases (one cause of the civil war). No certification or registration has been undertaken in practice.	MIXED: The 1998 law provides for the registration of individual, family, clan, village, or local-authority lands from the customary sector, but these claims must be converted into registered entitlements to be upheld as private property rights. The cut-off date has passed and presumably been extended until further notice, but there has been no progress in registering individual, family, clan, or village lands inclusive of commons. It could be that the recent ending of the civil war might see these land security measures reactivated.
DEMOCRATIC REPUBLIC OF THE CONGO Land Code, 1973 amended 1983 Forest Code, 2002 Constitution, 2006	NEGATIVE TO MIXED: The 1973 law upheld customary rights but only as access rights on state land. Its promise (Article 389) to clarify and protect customary rights has never been met. The new constitution pledges to protect possession of lands held individually and collectively in accordance with law or custom (Article 34) however with possession interpreted as occupation and use rights only, with intention to retain untitled lands vested in the state. The government continues to routinely allocate customary lands to third parties, although the consent of the traditional authority is required.	NEGATIVE TO MIXED: Uncultivated land is held by the new constitution (Article 34) to be empty of owners; it acknowledges the existence of collective rights, but as use rights only. It also provides for customary land administration (traditional authorities), but subject to the higher authority of the state. The new Forest Code does provide for community concessions (Article 22) which could provide a route to more effective community control given the term of concessions and the exclusivity of their rights but the enabling law has remained in draft.

ETHIOPIA Constitution, 1995 Federal Land Law, 2005 Regional state land laws, 2006 & 2007	MIXED: Customary rights were abolished in 1975, confirmed in a land law of 1997, and replaced with recognition of existing holding rights as registrable, mainly for houses and farms. Often existing holdings are in fact based on traditional occupation. This system was upheld by the 2005 land law. A mass titling operation is under way in four of nine regional states, focusing on farm holdings.	NEGATIVE: Although groups, peasant associations, and other legal persons, including non-governmental organizations (NGOs) and companies, may hold lands collectively, there has been limited group registration over six years of mass rural titling (a few cases in Amhara). The federal government and regional states also reserve the right to reallocate commons to individuals or companies as required. Pastoral and other communal rights dominate in five states, where no formalization is under way and with less legal protection from reallocation. Significant reallocation of communal lands to private investors has occurred since 2005. Forests are broadly treated as federal or regional state property, with limited provision for community-owned forests. Some forests including Parks have also been partially allocated to investors.
ERITREA 1994 Land Proclamation and key Regulation 1997 Constitution 1996	NEGATIVE: Customary land rights were abolished in 1994, but actual occupancy is the basis of security of tenure and remains largely customary.	NEGATIVE: Commons are not recognized as ownable.
GABON Laws of 1963 (No. 14), 1963 (No. 15), 1976 (No. 2), 1971 (No. 16), 2003 (No. 26) Constitution, 2000 Forest Code, 2001	NEGATIVE: There have been no new policies on customary rights since decolonization. Laws vest all land and its control and management in the state and recognize customary rights as use rights on state land including in the Permanent Domain of the State. Titled such as in Permits to Occupy may be obtained over lands which are demonstratively occupied and used. Many conflicts exist among land use claimants which the law of 2003 attempted to address.	NEGATIVE: There are no provisions for the collective ownership of, or even the protection of collective use rights to, customary lands. Forests belong to the state. Most are under long-term commercial concession to foreign companies. The Forest Code enables communities to create a Community Forest over which they may have management rights but the enabling decree is not in place after a decade. A 2007 law on national parks allows communities to exercise some uses in periphery areas of parks only, but again no enabling degree.
GAMBIA State Land Act, 1991	NEGATIVE TO MIXED: The State Land Act recognizes customary rights as a legal form of possession but as permissive occupants on state land. The minister may declare any area to be state land in order to issue leasehold titles. Communities may receive leaseholds, however.	MIXED: The only route to security is statutory leasehold. This is being used for community forests, giving some tenure security to communities who prove good management. The government is the landlord, and customary incidents are lost. Policy reform is likely, as a Land Reform Commission is in place and the strong precedent of in effect collective leaseholds over community forests is likely to ensure that collective tenure is addressed.

GHANA Constitution, 1992 Registration of Land Titles Act, 1986	POSITIVE: Up to 80% the land area is designated as customary lands under the ownership of chiefs, family heads, clans, or communities, although chiefs and family heads dominate. The land law of 1986 and the 1992 constitution strongly favor chiefs as owners, leaving their subjects as tenants of the chief. There has been little registration of customary freeholds provided for in 1986 as the procedure is expensive, bureaucratic, and centrally controlled.	POSITIVE TO MIXED: In principle, a community or family may be the allodial owner (root owner of the soil). In practice, chiefs and family heads claim this, and they have ample legal support. Moreover the state took trustee ownership of virtually all forests within the customary sector in the 1960s, sharing revenue with chiefs and district councils but not community members. Unfarmed lands are characteristically controlled by chiefs and frequently sold to outsiders or favored families. Immigrants have minimal rights.
KENYA Constitution, 2010 National Land Policy, 2009 Trust Land Act, 1962 Group Ranches Act, 1967	MIXED: Customary land (about 67% of the country's land area) is vested in county councils as trustees for populations and with undue powers to dispose of these lands in the presumed interest of those populations. This right is also exercised by central government as the legal administrator. Generally, farming/house customary occupancy is not interfered with, except for registration, which converts the right into freehold, removing rights from community jurisdiction. The new constitution turns trust lands into community lands held by groups and communities, but only through case-by-case registration; in the meantime, county councils remain trustees. No enabling law for Community Land has been enacted.	MIXED: Commons have proven vulnerable to administrative decisions by the president and land commissioner, in alliance with county councils. Individualized titling has also subdivided many common properties in favor of wealthier families. Masai and some other pastoralists have had opportunities to bring commons under group title, but those without livestock are usually excluded, remaining clients of livestock-owning elites. Most group ranches are now subdivided into private farms to the benefit of the better-off. Group title will be provided for under laws to be enacted in the light of the new constitution. However, all existing forest and game reserves and any forests/woodlands that are not sacred groves remain the property of the state or county councils. While claims for ancestral domains to be recognised has been a source of conflict and killings among tribes, the constitution does not clarify how their grievances can be met and not enabling legislation is in place.
LESOTHO Land Act, 1979 Land Act, 2010	NEGATIVE: The Land Act, 2010, does not mention customary rights but provides for the issuance of titles over rural land. The objective is to convert all customary holdings into statutory leaseholds, held from the state. The situation is regarded by many as especially negative given that customary land law through the *Laws of Lerotholi, 1903* remained in force until 1979 when the act removed ultimate title from the King to the President and removed powers of chiefs to allocate land. While communities welcome more democratic local land allocation institutions security of tenure based on customarily-acquired lands is slight, and limited to house and permanent farm lands.	NEGATIVE: Although the law provides for both corporate and unincorporated bodies (i.e. communities) to register title, there is no provision for securing community rights to traditional pasture lands, a main resource. For all intents and purposes these remain vested in the state at which is able to reallocate these to investors or individuals at will.

LIBERIA Hinterland Law, 1949 Registration Law, 1974 Public Land Law (origins in 1890s) Community Rights Act with Respect to Forest Lands, 2009	MIXED: The status of customary rights is strong in principle but, in practice, confused and disputed. The Hinterland Law, 1949, recognized "the right and title of tribes of an adequate area for farming and other purposes" and "protected against any person whatsoever". This language was changed in the Liberian Code, 1956, which reduced fee simple (freehold) title to the right of *possession and use of land only*. The new Aborigines Law did not appear in the 1973 Civil Code, raising questions as to its force. The 1974 Registration Law requires that tribal reserves be recorded as existing on public land, and the Public Land Law provides for something similar. These lands may be alienated subject to the chief's permission on behalf of community. The Land Commission was established in 2009 to devise a new policy and law by 2013. Interim Public Land Regulations, 2011 still require customary owners to buy their own land back from the state, albeit at token prices.	POSITIVE: Collective rights to forests and other lands have some protection, in principle and past practice (see in other column) and which enabled communities to secure original title over 1 million ha of mainly forest lands. Private property law also provides for communal entitlement through the issuance of public land sales deeds. Around 40% of the total land area is under collective entitlement (averaging 30,700 hectares per parcel) through either Aboriginal Title Deeds or Public Land Sale Deeds although the tenure status of both is now uncertain. In addition, many of these areas were interfered with by the creation of National Forests in the 1960s which extinguished customary rights although without constitutionally required payment of compensation. The Community Rights Act with Respect to Forest Lands, 2009, now acknowledges that customary common property rights to forests exist and awards a proportion of rent and revenue to customary owners when the state allocates concessions over their lands.
MADAGASCAR Law No. 019 of 2005 Law No. 031 of 2006 Decree No. 1109 of 2007	POSITIVE: Under new land laws (2005–2007), occupancy is recognized and upheld even without a title. The issuance of certificates is devolved to the commune (district) level (there are 1,500 communes) but not to village level. Good early progress has now slowed due to a lack of donor funds.	MIXED: The law provides for collective entitlement as well as individual entitlement, and even if there is no entitlement, customary rights are to be upheld. However, collective entitlement appears to be interpreted as mainly family tenure and it does not appear that any customary pasture or forestlands have been titled to communities. The class of protected lands is also very wide, minimising the area of forests or rangelands which could be available to private community tenure.
MALAWI Land Act, 1965 Customary Land (Development) Act, 1967 Land Policy, 2002	MIXED: The land policy supports customary rights as property interests and establishes a system for their voluntary registration and a locally based customary land administration regime, including the chief but with elected advisers. However, no new law is in place (a bill was withdrawn in 2007) and current laws vest customary lands in the state, and enables commercial lease of these lands without local consent.	MIXED: The land policy provides for commons to be the private, group-owned properties of communities, or groups, but no enabling legislation has been enacted. The World Bank-funded Community-based Land Management Program aims to promote a new law.

MALI Order No 00-027/P-RM, 2000 (amended 2002) Law No 96-059, 1996 Agricultural Orientation Law, 2006 Pastoral Charter Law No 1, 2004	NEGATIVE: The Land Code, 2000, maintains customary rights as use rights on state land. Rural municipalities have administrative control over lands in villages (around 700 in each municipality) and may issue concessions on the basis of survey, written records, and fees. Therefore, even though devolved to district level local government, decisions are remote. Concessions are *petits papiers* and can be issued readily to individuals, families, and communities as well as outsiders, but they have to be transformed into registered entitlements to be upheld as property, a further expensive procedure. A new rural land policy is in preparation.	NEGATIVE: While there is clear legal provision for communities to control and manage commons, there is no provision for them to be recognized as owners, making them vulnerable to the dictates of local and central government. Dispossession of untitled lands is now common, including to foreign investors.
MOZAMBIQUE Constitution 1990 Land Law, 1997	POSITIVE TO MIXED: Article 9 recognizes customary rights and provides for statutory entitlement on request, with survey. Registration may be in the name of a community, a chosen group name, or the name of individuals, corporate persons, men, or women (Article 7). Regulations (1998, 1999) provide procedures. Limited progress has been made in delimitation; with no clear state program, NGOs are left to facilitate. A main problem with the law is that there is a lack of community-level institutional formation to assist communities to define their respective domains or democratically represent communities. Another problem is that non-customary land holders and foreign investors may all apply for the same lands, without the precedence of customary owners of those lands being clearly stated.	POSITIVE TO MIXED: While customary collective rights to land are fully recognized as existing, the level of protection for these is low without formal registration. This is made difficult because of the lack of systematic national procedures to help communities agree, define and register these domains. Accordingly, private investors have found it relatively easy to secure vast areas under 50 year leaseholds n the basis of fairly limited consultation with community leaders or elites. Only 230+ community areas (among potentially 10,000) have been delimited and titled. An attempt in 2010 to limit the size of area a community may claim was dropped.
NAMIBIA Constitution, 1990 Communal Land Reform Act, 2002 Regulation No 37, 2003	MIXED: Customary lands ('Communal Areas') remain vested in the state while former white areas absorbing 44% of the land area remain under freehold tenure. The 2002 law created regional communal land boards which may issue certificates of customary rights for residential and housing purposes only, as lifetime usufructs and subject to a 20 ha limit. Traditional Authorities must approve these entitlements. Registration is a laborious process, and the issued right is not fully transferable. Registration is also compulsory, with a cut-off date, if families are to secure homesteads, now passed and with only a tiny proportion of the estimated 230,000 certificates needed issued. The cut-off date has now been extended.	NEGATIVE: The law explicitly excludes unregistered commons from entitlement as family or community assets. Since 2002 very large parts of these lands have been enclosed by elites of areas which vary between 2,500 and 10,000 ha for ranching purposes. Many of these are secured by taking out commercial leases over these lands. In either case the local community loses all access to its traditional commonage. The Government of Namibia is sponsoring a review (2011) which may recommend that control over communal lands is directly vested in communities under long leasehold, and from which it may if it wishes sub-lease parcels. No proposals to vest title in communities have been forthcoming.

NIGER Rural Code, 1993	MIXED: The rural code and guidelines established 57 rural land commissions to issue titles on the basis of customary rights, which are acknowledged to exist but at registration are converted into statutory entitlements. The procedure is slow, dependent on survey and mapping, and begins as a temporary concession until the land is developed. Chiefs are issuing informal certificates in lieu of legal backing (*petits papiers*).	NEGATIVE: There is no provision for group or community entitlement to commons. Land that is not under "productive use" (*mise en valeur*) (i.e. cultivation) falls to state for potential reallocation. There have been many cases of this in recent years, including allocations to foreign investors.
NIGERIA Land Use Decree, 1978	MIXED: Customary rights have been recognized since 1903 in the Southern Protectorate and in 1910 in the Northern Protectorate, followed by the Land Tenure Act, 1962, and the Land Use Decree, 1978, but with radical title vested in governors and the administration of rural lands vested in local governments, crippling community control. Rights may be formalized in statutory or customary rights of occupancy, and certificates issued. The National Land Commission was established in 2009 to review policy and laws.	MIXED: Provision was made in the 1978 law for grazing areas of up to 5,000 hectares in size to be allocated and able to be held in common as customary rights of occupancy. Few communities bother to do this, and in practice chief-led tenure regimes continue, with provision made for the communal use of all lands not allocated to farming. The situation varies by state/tribe. District and state governments have powers to reallocate unregistered lands.
RWANDA Constitution, 2003 Organic Land Law, 2005	MIXED: The Organic Land Law abolished customary rights but protects previously obtained rights. It makes registration mandatory in renewable leases of 15–99 years but also provides for the issuance of absolute title in unspecified conditions (usually to investors). There is sharply rising polarization in farm ownership.	NEGATIVE: There is no provision for group titling; this affects all communities who, by tradition, owned the 10% of lands that are marshlands, which the law made state property. These areas are routinely sold to investors or elites. All forests are also state property, directly dispossessing minority hunter-gatherers. Provisions for the ownership of grazing lands are unclear.
SENEGAL Land Law No 64-46, 1964 Law 76-66, 1976 *Code des Collectivités Locales*, 1996 *Agro-Pastorale Loi,* 2004	MIXED TO NEGATIVE: All unregistered land belongs to the state, with distinctions drawn between urban zones, classified zones, pioneer zones, and *zones de terroir*; the latter (around 58% of total land area) are occupied and used areas, for which villagers hold access rights based on rural council allocation. Although the powers of rural councils were trimmed in 1996, this was in favor of centralization, not devolution to communities. The 2004 law was suspended while a Land Reform Commission (established in 2006) considered new policies.	NEGATIVE: There is a strong emphasis on rights being upheld on the basis of demonstrated use (cultivation, houses). Commons have proven easily reallocated by government or councils in favor of investors, urban expansion, and personal privatization by entitlement. Some local forests have been lost. The 2004 law promotes commercial farming and also recognizes pastoral use as a productive use, but is not in force.
SIERRA LEONE Local Government Act, 2004 National Land Policy, 2005	MIXED: There are inconsistencies in retained old land laws, but the Local Government Act (2004) vests title over non-titled land in chiefs and heads of families. This echoes the National Land Policy, 2005, which plans to recognize allodial (primary title) over community lands (or chiefdoms) but likely to be vested in chiefs. The Policy also aims to provide for subjects to be issued with customary freehold entitlements and lesser interests including customary leaseholds and sharecropping contracts (similar to Ghana). Capture by chiefs is widely anticipated, although it is also expected that they will be legally endowed with only trustee rights but with powers which will legalize allocations by them.	MIXED: The current land law regards customary occupancy as permissive, and proposals do not provide for communities to own land directly but rather for communal land ("community" or "chiefdom" land) to be a distinct class of land alongside state public land, private land (statutory freeholds), and family land (another customary form). This would be satisfactory if it were not for the strong implication and likelihood that chiefs rather than community members will gain legal ownership of commons and be able to dispose of these lands more or less at will, creating personalised rent-seeking injustices already long experienced in Ghana.

SOUTH AFRICA Constitution, 1996 Interim Protection of Informal Land Rights, 1996 Communal Property Associations Act, 1996 Communal Land Rights Act, 2004	POSITIVE TO MIXED: The constitution upholds customary rights, which were also given protection under the 1996 law. However, the Communal Land Rights Act, designed for former homelands, was struck down as unconstitutional in 2010, largely because it opened the way for chiefs to make themselves trustee owners of customary lands, deemed undemocratic. Also, the registration of customary rights as "new order rights" was deemed to unduly convert customary rights into introduced forms, with expected loss of important customary attributes including community-derived jurisdiction and accountability. Customary rights outside the former homelands have been recognized through a process of application for restitution, the results of which are normally cash payments in lieu. The process has been fairly satisfactory. The customary rights of workers on lands owned by commercial farmers (often white) is yet to be satisfactorily redressed, and killings of owners has been common.	POSTIVE TO MIXED: In principle there is nothing stopping a community claiming a collective right over naturally collective assets. One or two communities have seen vast land areas restored to their ownership, including some parts of National Parks and Reserves. The mechanisms for a group or community to secure ownership are however complex. The Communal Property Associations Act, 1996, provides a bureaucratic and costly route for this and uptake has been limited.
SUDAN (North Sudan only) Interim National Constitution, 2005 Civil Transactions Act, 1984	NEGATIVE: The Civil Transactions Act, 1984, retains customary lands as permissive occupancy on government land, although some customary use rights, especially settlement and cultivation, are to be upheld (articles 559–570). The 2005 constitution pledged to progressively address customary rights and to restore lands wrongfully taken between 1967 and 2005 but there has been no action since and none is anticipated. Attempts by Southern Kordofan and Blue Nile States to introduce devolved systems for customary land rights to be respected and registered were rejected.	NEGATIVE: Most of Sudan's land is, by custom, owned and used communally but is still being freely reallocated by government to investors and private persons, involving millions of feddan (acres). This failure has been a significant trigger to armed civil unrest and possible reactivation of civil war in Southern Kordofan, Blue Nile and Darfur states.
SOUTH SUDAN Interim Constitution, 2005 Draft Constitution, 2011 Land Act, 2009 Draft Land Policy, 2011	POSITIVE: The constitution(s) and new land law directly support customary land rights, registered or not, "with equivalent force in law with freehold or leasehold rights acquired through statutory allocation, registration, or transaction" (Section 8 (6)). Such rights may be held in perpetuity. The constitution also provides for registrable derivative rights of occupancy and use to a person or community (Section 17), such as would apply to pastoralists using an otherwise owned local land area. The Land Act provides for ward (*payam*) land councils to supervise traditional authorities, although this is not being implemented. It also provides for a class of Community Land to encompass all customarily owned lands (Section 11). The major constraint is the lack of implementation of the institutions at the local level required to protect and administer customary interests. Few remote Sudanese are even aware of their new legal rights.	POSITIVE: There is full legal protection for community-owned forests, pastures, shrines, etc., which may be registered (Section 11 of the Land Act), although they are also protected without such registration. The ownership of a legal right to communal land may be in the name of a community, clan, family, community association, or traditional leader (Section 58). A community may issue leases of up to 99 years on customary land of more than 250 *feddan* (acres) with approval of the *payam* land council, county land authority, and Minister for Lands (Section 15). No councils are in place and state leases are being issued to investors on the advice of the investment authority, with minimal consultation. Nor is there legal obligation for obtaining free, prior, and informed consent prior to the state delimiting an investment zone, although communities must be compensated (Section 63).

(Mainland) **TANZANIA** Land Act, 1999 Village Land Act, 1999 Land Use Planning Act, 2007 Forest Act, 2002	POSITIVE: Land laws recognize customary rights as having equal legal force and effect as rights acquired through grant or purchase from the state. In practice, customary rights are stronger because they are held and registrable "in perpetuity" whereas statutory rights have a limited term. Nearly 70% of the land area is "village land" and to which the Village Land Act applies. Each village is in the process of defining its village land area and once registered makes the elected village government the lawful controller and manager of those lands. This includes the right to set up its own Village Land Register, register collectively owned areas, and issue titles of Customary Rights of Occupancy over house and farm plots. Communities may issue customary leases to non-villagers in certain conditions but who then have to make the village their principal residence. The land and forest laws also make it possible for National Parks and Reserves to be owned by communities.	POSITIVE: Each village community is obliged to identify and register communal lands in its village land register as community property *before* granting title to families or individuals on residual lands (Village Land Act, Section 12). Few such registers are yet set up. Also, in practice, the government routinely persuades villages to surrender "unutilized" or "spare" commons to the state to be reallocated by the Tanzania Investment Centre and leased to foreign investors for 99 years. The Forest Act, 2002, has been critical in providing another and easier route route through which all 12,000+ village communities may secure complete control over forest/woodlands or lands which could become forest/woodlands within their Community Land Areas. Several million hectares of forest/woodlands are under such status.
UGANDA Constitution, 1995 Land Act, 1998 Land (Amendment) Act, 2010 Draft National Land Policy, 2011	POSITIVE: The constitution (Chapter 15) makes customary land tenure a fully lawful route to land ownership along with freehold, leasehold, and *mailo* (a form of feudal tenure introduced by the British in Buganda areas in 1902). The Land Act, 1998, provides for the voluntary acquisition of certificates of customary ownership (sections 5 and 6) to be regulated by customary law, anticipated for uptake mainly for individual and household parcels or lands belonging to a traditional institution (Section 4). Title may be converted to freehold, weakening the equivalency of these certificates with freehold titles. Without registration, customary rights are legally bound to be upheld. There has been minimal issue of certificates of customary ownership. A main constraint is that governing institutions are only at the district level; remote from villages. There is also no supervision of actions by chiefs or elites.	POSITIVE: Communities are owners of customary communal land, whether registered or not, but they may form a communal land association to formalize this (Section 16). Few if any have so far been formed. In practice, internal land-grabbing by elites is common and rising. The state is also actively creating special areas for investment, public purpose and claims ownership of all waters, wetlands, forest reserves, national parks and other areas reserved for touristic or ecological purposes, although in trust for the nation (Article 45). This limits community rights over these areas to management and use rights.
ZAMBIA Land Act, 1995 Draft Land Policy, 2010	MIXED: 88% of the land area is termed customary lands, and the permission of chiefs is needed prior to reallocation. Land may be registered under a customary leasehold title (Section 8) for individual parcels for houses or cultivation only. The state exerts strong powers over customary lands, as do chiefs, with continuing leasing of uncultivated lands (commons) to non-customary owners. Unregistered rights do not compare well with registered entitlements in either legal force or effect.	NEGATIVE: There is no clear provision for commons to be registrable as collective property, and they are vulnerable to alienation on the recommendation or demand of the state or through chiefly permits, which do not require community consensus. The draft land policy makes no substantial changes although it is under challenge by local groups.

ZIMBABWE Communal Lands Act, 1982	NEGATIVE: The 1982 law recognizes customary rights as permissive occupancy and use only, ownership directly vested in the President and who holds strong legal powers to reallocate any part of these lands at will via local district councils. The draft land policy, 1998, provided for the exercise of customary tenure as a property regime administered at the village level, but was never approved or adopted. The focus of tenure change has been since limited to restitution of white-owned farms to black individual and groups, with considerable success but with major questions pertaining as to who have been beneficiaries. Security of tenure by these beneficiaries is also limited.	NEGATIVE: There is no provision for the recognition of common properties. Conversionary leasehold is the only viable route. In practice it is not easy to remove commons from local council authority or from the customary sector.

4 Which countries give most support to customary rights over forests?

Table 1 illustrates how countries vary in their policies and laws for customary rights. A minority of national land laws (8–9, or about 25% of the 35 surveyed countries) are assessed as broadly positive in their treatment of customary rights. In terms of law, the most positive are Uganda, Tanzania, Burkina Faso and Southern Sudan. Even in these cases there are limitations in law and especially post-law implementation and practice. A further 11–13 (about 37%) are mixed—that is, neither all bad nor all good. Such ambivalence has three main sources:

a. Protection of customary rights may be now provided but is legally applicable only to lands which are *occupied and used*, and in effect, family properties. This leaves most of the customary land resource involving forests, rangelands, marshlands and other traditionally collectively owned lands without protection.

b. Customary rights may be protected but only if they are made subject *to formal survey, registration and titling*, and under the non-customary system, so they are in effect removed from the customary sector.

c. New policies are in the process of being formulated with indications that positive improvements *might* be made.

Moreover, 13–16 surveyed states (up to 46%) have either not changed their laws to recognize customary interests as having force as real property rights, or have retained in new land laws denial that these interests are more than permissive rights of occupancy on national or government lands. In such situations, customary rights to unfarmed lands are again especially ill-treated.

Nevertheless, that nine countries do now give positive support to customary land rights suggests a slowly improving trend. Among this group, **Tanzania** meets most of the criteria listed earlier as demonstrating justiciable respect for customary rights. There are several factors which allow the Tanzanian case to stand out:

a. Its land laws enable customary landholders to register their interests "as is" and protects those rights even if they remain unregistered.

b. These rights apply to all categories of property within the community, whether designated for the purpose of a shop, a house, a family farm, a community forest, pasture or marshland, or water source area, or simply spare land within the community land area.

c. By creating a very strong construct of community land area ("Village Land Area" or VLA) every one of the country's 12,000+ rural communities may secure

their overall resources at relative speed, by agreeing and mapping the perimeter boundary of their domain with neighbouring villages, and having this VLA registered at district level. Customary law (in effect, as defined by elected village governments) applies in these areas.

d. Longstanding provision has been made for Tanzanian villages to elect their own governments ("Village Councils") and these democratic bodies are made the legal manager of all land matters within the VLA, subject to the ultimate authority of the community itself; this includes being able to make by-laws as to land tenure and land use, and which the courts must uphold. It also includes being able to control land titling itself, through Village Land Registers. That is, only the community can decide who gets title and on what grounds, guidelines provided in the law. District, regional, and national bodies have advisory oversight over the decisions and operations of the Village Land Managers, not authority, although the law also makes provision for a minimum of 100 villagers to challenge the decisions of its village government.

e. Collective properties are given special protection; no community may proceed to issue titles over individual or family lands until the community has agreed which resources are rightfully communal, owned by all members of the communities. Description of these common properties is to be registered in the Village Land Register.

f. Customary land rights, whether registered or not, are given equal legal force and effect to rights obtained through statutory grant or purchase.

g. Communities may petition to have classified forests and wildlife areas (Parks and Reserves) returned to their tenure, although no community has sought to do so yet.

h. Because customary rights are upheld as full private property rights (and whether owned by individuals or communities), when the state wants these lands for other purposes, it must buy these at open market rates from the community and pay compensation for other losses incurred through that purchase; this acts as a major disincentive to wilful appropriation without strong cause.

Several other states have made much improved provision for community-based governance of land matters but fall short in other ways. **Benin**, for example, has failed to make the status and legal force of customary rights fully equivalent to those applying to holdings under statutory deeds or titles. **Southern Sudan** falls short in that its largely excellent new land law (2009) does not have the localized institutional support to see it put into practice. Additionally, it fails to require local consent for land-takings by the state for investment purposes. **Mozambique** weakens the state's proclaimed support for customary rights by failing to either provide for a devolved and democratic land administration regime or to launch a systematic delimitation of community land areas inclusive of common assets. Without these, communities are ill-equipped to deal with requests by investors to surrender their lands for commercial enterprises. Permission tends to be easily secured by consulting with often self-selected representatives.

Ghana, Botswana and Liberia all have longest histories in recognizing customary rights as property interests, but also fall down in delivering this in specific ways. **Ghana** has long allowed chiefs to capture primary rights over all lands and finally rooted this in law in constitutional law in 1992. **Liberia** has remained politically and legally ambivalent as to its support for customary rights and only weakly applies this. The new Government of **Botswana** after Independence was the only administration to not bring customary property (Tswana "tribal lands") under state tenure but stopped short of including non-Tswana with such rights, leaving

San hunter-gatherers as state tenants over one third of the country until 1978.

Uganda deserves special mention in paving a radical path in its 1995 constitution by doing away with the colonial-inherited vesting of root title in governments and presidents and which has been so abused. Ugandans own both the soil and rights to the soil under one of three systems; customary tenure, leasehold tenure, or mailo tenure.

However, Uganda's land law does *not* make provision for communities to directly own forests or other ecologically important areas, a right it reserves to itself or to local governments. Nor have village governments with legal land powers been established, limiting action to secure customary rights. Uganda's law also failed to do away with institutionalized tenancy under the *mailo* tenure, although an amendment to the land law in 2010 now protects tenants from eviction. Uganda's new land policy (2011) plans to remedy most of the above.

5 How is collective ownership curtailed?

Limitations to the protection of collective properties are discussed above. However, much more severe constraints apply in the 27 country laws assessed as negative or mixed in their support of collective rights.

Many of these laws do not recognize unfarmed lands as ownable other than by the state or the government of the day. Many agree that these resources are subject to customary rights but do not view such rights to be more than permissive rights of *access,* and limit such access where protected areas are created. In **Botswana** and **Namibia**, for example, district bodies may own such lands in trust for local communities but may also dispose of them to individuals or investors. Villages have routinely found their grazing lands enclosed against them. Similarly, **in Ethiopia, Madagascar**, and **Senegal,** lesser support for locally owned commons than for cultivated lands has repeatedly been demonstrated in the ease with which governments allocate these lands to private persons and companies. **Congo Basin** countries have been especially remiss in failing to reform treatment of customary land rights, despite some pledges to do so. There is a slight chance however that some Congo Basin states as well as The Gambia, Kenya, Nigeria, Sierra Leone, Senegal and Liberia might eventually afford communities the same degree of legal protection for the collective ownership of forests and rangelands as offered for houses and farms. Policy-making land commissions are still sitting or laws being drafted in these states.

6 The implications for forest tenure

Natural forests cover around 478 million hectares in Sub-Saharan Africa (including Sudan). Virtually all of this is legally owned by the state. There is a reasonable chance that *unreserved forests* will be systematically acknowledged as the property of communities in only **Benin, Burkina Faso, Ghana, Mozambique, South Africa, South Sudan, Tanzania,** and **Uganda.** The total forest area of these countries is around 160 million hectares (some 60 million hectares of which is attributed to Southern Sudan). From this must be withdrawn the estimated 40–50 million hectares designated as protected areas (forest reserves and parks).

Therefore, around 110 million hectares *could* be acknowledged as the collective property of communities, or nearly one-quarter of the total resource. This is a potential figure only, since even this group of countries, with best-practice land laws, require communities to demarcate and often survey and declare, or secure more formal gazettement of forests, in order to be entrenched as their private, group-owned property. There are very few natural forests indisputably recorded as community property, such as in the form of registered community forest reserves—less than five million hectares in Sub-Saharan Africa. Most customary forest owners have no such recognition.

The potential for the remaining three quarters of Africa's forests to be vested in community hands is slight.

At most, rural communities may gradually acquire more rights to *manage* forests, although most likely only as secondary partners with government agencies. A large proportion of forests in especially the Congo Basin and West Africa are already under private concessions and whose terms are for some decades and renewable. Meanwhile, as we know, large areas of forest are being degraded or lost altogether. Rates of loss have not significantly declined in Africa since FAO began collating figures. Many communities are among those who believe this will not change until their customary ownership of forestlands is more properly accounted for in regulation and management regimes.

Endnotes

[1] Content in this table is supported by a direct review of the laws cited therein, as well as by over 100 papers that are not listed due to their large number.

[2] Constitutions and forest laws are only mentioned in this table where they have a direct impact over customary tenure.

The Rights and Resources Initiative (RRI) is a strategic coalition comprised of international, regional, and community organizations engaged in development, research and conservation to advance forest tenure, policy and market reforms globally.

The mission of the Rights and Resources Initiative is to support local communities' and indigenous peoples' struggles against poverty and marginalization by promoting greater global commitment and action towards policy, market and legal reforms that secure their rights to own, control, and benefit from natural resources, especially land and forests. RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, D.C. For more information, please visit www.rightsandresources.org.

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The Global Land Rush: What This Means for Customary Land Rights *Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #5 of 5*

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Liz Alden Wily*

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5. ***The Global Land Rush: What This Means for Customary Rights***

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Other briefs in this series examine the history and current status of customary land rights in Africa. These are rights enjoyed by more than half a billion people in sub-Saharan Africa, most of them (75%) definably poor.[1] Customary rights apply to lands that are acknowledged locally to be under the jurisdiction of a community. They are acquired, defined, and upheld by modern rural communities to meet present-day circumstances, but shaped by practices ("customs") which may be longstanding ("traditions"). Customs usually include the right of members of the community to access lands to cultivate and to share use of remaining off-farm resources such as forests, rangelands, marshlands, ponds and streams.

Following a century of population growth, capitalist transformation, and evolving policies encouraging large-scale farming, Africa today is characterized by unequal farm sizes, rising rural landlessness, and growing competition between generations and social classes for land access. Unfarmed commons are declining as cultivation and towns expand. These lands are routinely captured by wealthier, politically connected families, including chiefs. Rural class relations often build on and exaggerate historical inequities, including those deriving from pre-colonial relations, to help create a flourishing education-based and wealth-based class system.

Nevertheless, in 2011 the resources theoretically available to the customary sector in sub-Saharan Africa are immense. Cities and towns absorb only a tiny area—around 3 million hectares. Outside southern Africa, formal land entitlement is limited (1–10 percent coverage in most states, excepting Uganda and Kenya).[2]

While the most valuable forest and wildlife lands have been withdrawn from the customary sector and placed under formal state protection, protected areas still comprise only 300 million hectares, leaving around 1.4 billion hectares of land outside such areas. These lands are mainly classified in law as belonging to the state (or government), or as un-owned lands held in trust by governments. The customary sector largely falls within these lands. Very little of it (around 200 million hectares) is permanently cultivated. A significant proportion of the remainder is believed to have potential for rain-fed farming but is also usually already actively used as forests, rangelands, and marshlands.[3]

The main concern here is that, in accordance with African tenure regimes/customary laws, much of the 1.4 billion hectares is not rightfully state property at all, but rather, the lands of individual rural communities, traditionally arranged in more or less discrete domains ("community land areas"). Outside of densely populated areas where no unfarmed land remains, a typical community domain comprises settlements and farms but predominantly surrounded by lands which by tradition constitute the shared property of all members of community. Forests, rangelands and/or marshlands may dominate in these areas. Access to some of these areas or resources within them, may be customarily

* Liz Alden Wily is an international land tenure specialist and a Rights and Resources Fellow.

shared with neighboring villages or clans. Seasonal access rights held by pastoralists may also apply. However the founding owner/controller of the lands is usually an identifiable community. With some exceptions, no such thing as "un-owned" land exists in Sub-Saharan Africa. Every corner of every state has a customary owner. The extent to which this tenure is respected in modern national law is at the crux of concerns discussed here in relation to an emerging rush for land on the continent.

1 What is the global land rush?

The global land rush refers to the sharp rise in large-scale north–south land acquisition since 2000 and especially since 2007.[4] The term "north" means developed, exceptionally wealthy, or industrial economies, now including the BRICs (Brazil, Russia, India, China) and Middle Eastern states, while "south" means largely poor agrarian economies in Africa, Asia, and Latin America.

DRIVERS TO THE GLOBAL LAND RUSH HAVE BEEN CRISES IN INTERNATIONAL MARKETS AND CAPITALISM

The rush was triggered by the global oil and food crises of 2007/08. Political commitments by especially the European Union, to replace a percentage of oil use with biofuels triggered a rush by companies looking for lands to grow jatropha, sugar cane and especially oil palm at industrial scale for this purpose. Looming shortages of cereals and animal protein drove countries in the north to seek ways to increase supplies that their own production sectors cannot provide. This coincided with a determination by Middle Eastern states to secure water resources to reduce the immense costs of crop production at home and an unstable international food market. It also coincided with the BRICs looking abroad to secure rights to areas rich in oil, minerals, timber and other assets needed by burgeoning economies. The 2009 financial crisis fuelled the land rush further, making available expansive capital withdrawn from failing sectors, and adding to the speculative stakes of cheap land acquisition enormously.

The speed and scale of the trend definitely suggests a land rush. Steady expansion of cultivation, livestock ranching, and large-scale enterprise is not new in developing countries, but has been quite low in Africa until this current surge.[5] Latest figures suggest that deals struck or under negotiation between 2005 and September 2011 may be several times greater than reported in 2009 and 2010.[6]

These figures also confirm a trend observed from the outset, that two thirds of lands being acquired are in Africa. The strong (if not uniform) north–south orientation, and the prominent involvement of governments and state companies as buyers has invoked the popular label of "the new colonialism". The dominance of sub-Saharan Africa as a land provider also suggests to some a new "scramble for Africa".

There is some truth in this. Africans have endured major land losses over the last century associated with foreign dominance.[7] This arose through state policies, as well as population growth, changing settlement patterns, and social transformation. Surges in land losses occurred after 1890 with the formal establishment of European colonies in Africa; after 1920 and 1945 with sharp rises in settler and plantation farming following the two world wars; and during the 1970s and 1980s with African-led large-scale land acquisition, as independent governments distributed large areas of native lands under their control to aligned elites.[8] A commonality between these surges and the land rush today, is that ordinary, rural communities have lost their lands in largely involuntary ways. Moreover, as was the case under colonialism, a frequent intention in the current land rush is not to openly trade the commodities produced on the land but to channel them to the investor country, bypassing markets—suggesting a lack of confidence in or a failure of international commodity markets. Similarly, speculative land acquisition

("profiteering" as it was then called) was as common in the 1880-1900 period as it is today, an unknown proportion of colonial land acquirers doing so with the intention of not producing on the land at all but selling the land on at substantial profit.

On the other hand, the current land rush could not exist without the full encouragement of investment-hungry host governments, who, as shown below, lay down a smooth path for this to occur.

Thousands of pages of academic, journalistic, and international agency policy analysis have been written on the current land rush, or "land grab" as it is often termed, often with few data. Factual field studies and in-country verification are therefore critical.[9] Based on factual studies, the following general features of the global land rush may be listed:

a. Most large-scale acquisitions are not through outright purchase but leases. Given that most leases are renewable, and many already for terms of 50 to 99 years, the distinction is moot.[10] Where community areas are affected, leases take community lands for up to five generations and likely more.

b. It is not known for how long large-scale land deals will continue. Data to be published soon may suggest a tapering off.[11] However this could be due to governments keeping deals more, rather than less secret.

c. It is difficult to be absolute about where most leases are being signed and where most hectares are involved. This is because data for many countries is seriously incomplete, including in Africa. Information is least available in Congo Basin states. With these reservations data published in the past as to largest land lessor states are likely to unevenly confirm.[12] Indonesia, Brazil, Ethiopia and Sudan will almost certainly remain among prominent lessor states.

REFERENCE TO THE LAND RUSH AS THE NEW COLONIALISM IS NOT ENTIRELY MISPLACED

d. The commonest purpose for acquiring lands is to produce biofuels. Emerging data suggests this absorbs nearly twice the area being acquired to produce food crops or livestock.[13] New concessions for oil, mining, and timber extraction, and for taking over forested areas or planting trees in order to secure carbon credits, are fewer but could absorb as many hectares.

e. By far and away the major seller or lessor of lands to investors are governments. Private sector sales are few. This is because most land in lessor states is owned or controlled by governments in absence of customary/indigenous land interests being recognised as amounting to property.[14] That is, governments especially in Africa, legally have an immense land resource to draw from.

f. Claims by governments that they only lease out "vacant and idle lands" or "marginal lands" are not being borne out in practice. Many leased estates are fertile, accessible to roads and markets, and actively used by local communities.[15] Moreover, all these lands are owned under customary norms.

g. Many land buyers or lessees are also governments or government-sponsored agencies and companies. This may further constrain the annulment of arrangements should the investor not perform or should the developments prove deleterious to local populations. This is especially because land deal contracts are nested in bilateral investment treaties.

h. Delivery in terms of buyers actually clearing the land and establishing crops is slow or not even begun. While there are often good reasons for this, there is also concern that much land is being captured for longer-term resource security or speculation.[16] The

active presence of hedge funds, banks and even pension funds acquiring land for medium term returns tend to confirm this likelihood.[17]

INTERNATIONAL ORGANIZATIONS ARE PLAYING A KEY ROLE IN LOCAL LAND LOSSES AT SCALE FOR THE SAKE OF HOPED-FOR GROWTH

i. The land rush is underwritten by international trade law. This includes bilateral investment treaties and free trade agreements signed between governments (by 2009 there were already some 2,600 signed since 2005).[18] As well as assuring the investor compensation should there be expropriation or denial of the right to export the products produced, these give subsequent contracts the backing of international trade law and arbitration services, which some studies find have historically favored investor interests.[19]

j. Acquisitions are normally expressed in binding contracts, not just issue of land deeds. The former usually include "stabilization" clauses which preclude the application of, or require compensation for, new or changed regulatory measures in the host country. These limit the control or recourse which lessor governments have over land uses or even the failure to develop the land.[20]

k. Large-scale leasing is also backed by international lending conditions, advice, protocols and institutions, such as the International Finance Corporation (IFC), the investment arm of the World Bank Group. This and other World Bank departments along with other international bodies have actively promoted market-led land leasing by poor states, with some rebuke that this has so far been at the expense of due diligence on human rights and socio-economic impacts.[21] They have directly assisted host governments to draft the plethora of investment promotion laws enacted over the last decade, to streamline "Doing Business" procedures (such as getting permits), to change laws limiting sale or lease of lands to foreigners, removing provision in land laws which place ceilings of lands obtainable, or impose development conditions, and have assisted in the establishment of Investment Promotion Centres to help investors acquire lands and to smooth the steps to doing business in those states.

l. No such organized assistance has been given to rural communities to protect their occupancy and use in face of investor invasions. International human rights law is weak to begin with, unevenly adopted in domestic law, and often protective of only minority populations who declare themselves as indigenous peoples.[22]

m. Land acquisitions are not being forced upon host countries. On the contrary these are welcomed by present-day governments, persuaded of this as a main route to economic growth and having let their own smallholder sectors fall into demise after decades of minimal investment.[23] Investors are enticed with extremely attractive conditions including virtually total import and export duty exemption and VAT and other exemption for the first decade of operations, the right to introduce foreign labour relatively freely, and to access low interest loans from state banks using their new entitlements as collateral.[24] Moreover purchase or rental costs of land are exceptionally cheap, often around $1 per hectare per annum in Africa. Indeed, the benefits to investors are so multiple that it must be asked what governments hope to gain in return. Setting aside likely personal gains by those facilitating or signing the deals, expectations are for technology transfer, perhaps the 'pickings and leavings' of goods which are not dispatched for export, some amount of infrastructural development, and job creation. It is too early to say if these benefits will be forthcoming. Jobs are certainly not emerging to the level anticipated.[25]

n. Communities in affected areas also hope for jobs, training, and infrastructure. Leaders have been known to sign off on deals or give their approval without community members knowing about the proposition. More broadly, governments gain significant support from business communities in their countries, anxious to partner or facilitate multinational land investments. Local universities routinely provide environmental impact assessment reports advising on soil suitability, frequently directly employed by the land investor.

o. The land rush reflects a shift in the global balance of leading economies. Although companies from Europe, Japan and America are active land lessees, others are from Bahrain, Brazil, China, Libya, Malaysia, Qatar, South Africa, South Korea, Thailand, and United Arab Emirates, along with smaller actors.[26]

p. A regional bias is appearing; Middle Eastern states favoring Africa, and Asian states favoring Asian locations. South Africa is emerging as a major investor in Sub-Saharan Africa, with negotiations by the South African Farmers Union (AgriSA) underway in 22 African states, and a land deal already sealed for 200,000 hectares in the Republic of the Congo, with an option to expand to ten million hectares.[27] Two large-scale farming zones by South Africa farmers are already active in Nigeria.[28] China could emerge as a major competitor to South African interests in Africa, with already large portions of Congo Basin states and Sudan under its aegis through oil, mining and timber concessions, and with an unknown number of land deals for industrial scale rice and oil palm production reported in Cameroon and DRC.[29]

q. Despite the publicity generated by the land rush, a great deal is *not* known about it. It is not known how much land has been brought purely for speculative purposes; how many deals are joint ventures with host governments or local companies, or shell companies; how many deals do make provision for local communities to become contract farmers, tenants, or workers; what employment, technical training, and other benefits are legally binding in contracts; or what arrangements have been made to secure water access for local farmers. Lack of information is due to the secrecy often surrounding large-scale land leasing, although one or two countries (Ethiopia, Tanzania) have pledged to make deals public. Field studies have largely found that deals lack attention to such issues.[30]

LOCAL ELITES JOIN HANDS WITH INTERNATIONAL ELITES IN THE PURSUIT OF LAND-BASED WEALTH PRODUCING A DIFFICULT-TO-CHALLENGE TREND

r. While the impact of large-scale leasing on rural communities has become a major concern of international agencies, this has been delivered in mainly rhetoric and advisory guidelines on investment and land matters.[31] There is scant evidence of this making investors or host governments more cautious in what lands they lease or on what conditions. On the contrary, a recent critique suggests improvements are the exception, not the rule.[32] Very little if any attention is being given to improving international human rights law, so that the imbalance in support for investors and investment through international trade law, and human rights is growing.[33]

s. Attention focuses on the larger and foreign leases of sales, but smaller acquisitions in the 500-1000 ha range are proceeding apace or possibly at an even faster rate. These lands are being leased by both domestic and foreign investors.[34] In some countries most lessees are nationals, although not acquiring the largest areas (e.g. Ethiopia). The surge is also triggering a wave of local speculative acquisitions, wealthy nationals buying up land to sell at profit to

larger enterprises.[35] Polarization between rich and poor in rural areas has been increasing for some time[36] and is now accelerating as rural lands become more valuable. In such circumstances, the majority ordinary poor tend to lose out. A recent study showed this to be the case in Benin, Burkina Faso, Mali, and Nigeria due to the land rush and acquisitions by a new class of domestic agro-investors.[37] Chiefs in several countries are also reported to be selling off their communities' lands for private benefit.[38]

t. Lesson-learning seems limited. As pointed out by the World Bank, the degradation of soils under large-scale mechanised sorghum and sesame farming in Sudan during the 1967-2000 era was swift and immense, similarly the case with colonial British-managed groundnut schemes and more recent Canadian funded and managed wheat schemes in Tanzania.[39] Large-scale rice schemes of the past were also not significantly successful in the Niger Basin.[40] Calculated impact on water availability and downstream access is proving especially weak.[41] Surveys by investors or contractors tend to focus on soil study to determine the best use of the land, without attending to the impact of large-scale mechanized agriculture on fragile lands, and the impacts which clearing of woodlands will cause.

LIKE THE FIRST BIG "SCRAMBLE FOR AFRICA" THIS LAND RUSH IS ABOUT ESTABLISHING ECONOMIC SPHERES OF INFLUENCE AND CREATING NEW MARKETS FOR HOME GOODS NOT JUST ABOUT ACQUIRING LAND AND RESOURCES

u. The global rush for land does not exist alone. This is complemented by a rush by foreign firms to secure contracts in especially Africa for especially major infrastructure projects (Chinese companies now dominate road and rail building around the continent) and a rush for buying up local enterprise. South African ownership now extends widely in Africa in manufacturing, including food and non-food items, mining, coastal and safari tourism, communications, and banking.[42] In addition, foreign companies are looking to poor agrarian countries to expand markets for their own goods, including creation of Special Economic Zones, most advanced in India but also being created in African countries; these enable foreign countries to establish finishing hubs for their products, often with duty-free imports, and to use local labour to create export items. China is among those establishing such hubs in Africa, with eight sites indicated.[43]

v. The land rush is triggering a new leap in potentially irreversible social transformation wherein the poor, already the majority in Africa and Asia, become even more poor and disadvantaged and minority elites become even more deeply entrenched as majority land and resource beneficiaries.[44] Concerns around this are especially focused in sub-Saharan Africa, which is providing so many resources and yet is so poorly equipped to transparently shape and regulate large-scale investment so that it benefits the majority.

2 Why does the global land rush matter to customary landholders?

The global land rush matters to customary rights-holders in Africa for the following reasons:

It is *their* lands that are the targets of large-scale allocations to investors. Their lands are being targeted because in most African states (and also Asia) lands held and used under customary norms are still not considered owned by these users, but in effect, lent by the state, which makes itself the legal owner of these properties.[45] There are exceptions, and in those cases, wilful reallocation of customary lands is proving less smooth and more open to local challenge. In prime host states

like Sudan, Ethiopia and the Democratic Republic of Congo, the taking of lands by governments and handing these over to investors is perfectly legal.

a. **Often the most valuable land assets of rural communities are reallocated to investors**. This is because, in practice, rural huts and farms receive a little more protection than collectively held forests, rangelands, and marshlands belonging to communities. Governments do not wish to remove people from their homes and farms more than necessary. This brake is not applied to their commons, which are not only treated as un-owned but also as *idle and available lands* for governments to reallocate, because they are not permanently cultivated or not cultivated at all, being dedicated to off-farm uses and livelihood. This makes forests, rangelands, and marshlands a main target for allocation to investors, especially where they are accessible to roads and markets and/or fertile. Yet these lands make substantial contributions to livelihoods and, given their extent and potential, are highly valuable to poor communities.[46] The leasing out of these lands by the state limits the potential for communities to realise that value. Opportunities for communities to emerge as lessors of these lands in their own right, as a route to moving out of poverty is now being fairly firmly closed to them by the precedents being set by the land rush.

b. **Despite the focus on common properties held by communities, direct evictions and loss of farmlands is occurring.** This is because a good many of these presumed "unoccupied and idle" lands are used for shifting cultivation and are interspersed with settlement and impermanent farms. This adds to livelihood losses due to losing all or some parts of traditional commons. To take one country as example, in Ethiopia investors (many of whom ally with local politicians and companies) are clearing forests, damming rivers and diverting irrigation from smallholders, causing wetlands crucial to fishing, seasonal fodder production and grazing to dry up, and enclosing thousands of hectares of grazing lands for mechanised biofuel, horticulture and floriculture projects for export. Assisted (or rather, forced) relocation is at least being provided for communities living within one 10,000 ha area, allocated to a Saudi-Ethiopian company, with many more relocations anticipated as the company's lease is expanded to half a million hectares. Local food security is already an issue in a number of leased zones, in a country which already has a history of droughts and famines.[47]

c. **There are minimal legal constraints to the wilful reallocation of customary lands.** Two constraints that could come into play are the need to *pay compensation* when people are removed and the need for state allocations to be *in the public interest*. Neither presents an impediment if customary lands are considered to be less than real properties. Compensation for un-owned but occupied lands is usually limited to covering the value of lost standing crops and houses. Most domestic legislation also allows that compensation can be paid after the fact of eviction. Public purpose is usually broadly defined to include private enterprise on the grounds that this may deliver taxes and jobs in due course.

d. **Transparent, democratic and just governance is also being impeded by practices under the land rush**. Opportunities for meanings of "public purpose" to be limited to genuinely public purpose are diminished by the practices of the land rush. Public purpose as including private purpose is being consolidated as acceptable. This will contribute to even greater involuntary lands losses in the future. Bad practices are being sustained in even those states where customary lands *are* recognized as private properties. In order to avoid payment, governments have been known to persuade owners to surrender their lands for public benefit (as seen in Tanzania and Uganda), to encourage investors to deal directly with pliable (corruptible) chiefs or

other community representatives (as seen in Mozambique and Ghana), and to make arrangements to pay compensation at a later date.[48]

e. **Additionally, large-scale allocation is not often undertaken in consultation with affected communities.** Customary landholders are not protected by fair information and consultation procedures. Nowhere is free, prior, and informed *consent* for the allocation of customary lands obligatory when the public interest is involved. Where there *is* consultation, local permission is rarely granted on the basis of full information**.** Villages in Sierra Leone, Kenya, Ethiopia, Rwanda and Mali are among those who were not told that canal construction for industrial sugar cane production or rice would dry up their wetlands, critical for seasonal rice production, fishing, reed collection, hunting and grazing and deprive them of the waters they themselves need to farm.[49] A case is recorded of a community in South Sudan agreeing to hand over 179,000 ha for an annual fee of $15,000 and construction of a few boreholes to a Norwegian company aiming to make millions on carbon credit deals.[50] Another community in the same region will lose its commons to the tune of 600,000 ha should a deal with a Texas-based company go ahead.[51]

f. **There is no assurance that evicted customary landholders or those deprived of parts of their lands will be able to find jobs or other livelihoods to compensate for their losses.** The losses endured by local communities can be very great, including the commercial value of the land, the recurrent-use values of the resource, and the future value of the land for commercial enterprise. There are additional major social costs, such as those caused by dislocation, which may be incalculable. They may include the loss of community and socio-economic support and the breakdown of families, such as can occur when men have to move to look for work, leaving behind women and children with little or no land to farm and without other support. There are also uncalculated costs in the loss of family farming activity which may be difficult to restart.

g. **The likelihood of legal support for customary rights becomes more remote** with the land rush. Reformism is already incomplete and fragile in especially Africa and Asia.[52] Land reform is likely to be placed even more strongly on the back burner as governments enjoy the benefits of being able to freely lease vast lands out to persons, countries or companies of their choice, including nationals; and as a mesh of binding contracts make changes to policies impossible. Restitution will also become even more remote, even where pledges to this have been made such as in Sudan.

h. **The global land rush is also weakening the application of existing international human rights law** in matters of land rights, and the adoption and interpretation of which is already flawed in Africa because the African Union considers only certain Africans to be indigenous to the continent.[53]

i. **The land rush is also hastening class formation and concentration of land ownership,** including providing a more permissive environment for land hoarding, absentee landlordism, and simply failure to develop all the thousands of hectares which are being made available to investors.[54]

j. **The global land rush undermines the future of smallholder agriculture**, maintaining a focus on industrial agriculture, in circumstances where this is unproven and where the smallholder sector is already starved of investment.

k. **The land rush threatens civil peace**. The deprivation of land and denial of rights to land have been shown historically to be major triggers to conflict and outright civil war.[55] The case of Sudan is topical: the civil war of 1984–2001 was caused in part by local resentment of land-takings by Khartoum for private commercial agriculture, including allocations to

politicians, officials, and foreign banks and enterprises, especially from Egypt. Instead of returning those lands as required by the 2005 Comprehensive Peace Agreement, Khartoum has since allocated yet more lands to other foreign and local parties. This has generated sufficient fury among communities that militia have been formed and Khartoum is increasingly responding with violent attacks in the most affected areas; Southern Kordofan and Blue Nile States.[56]

3 How are customary land rights affected in practice?

Relatively few large-scale enterprises are fully established on the ground and many communities do not yet know how they will ultimately be affected, or even that some or all of their lands now belong to private investors, not the state. Communities often do not discover this until the tractors arrive. Others are signed without specifying exactly which areas in a district will be leased, this being subject to feasibility studies carried out by the investors.[57]

Nevertheless, impacts are already apparent in early cases.[58] A snapshot of several cases follows.

a. A Swiss company leasing 40,000 hectares in **Sierra Leone** has broken its promise to local farmers that their collective marshlands, on which rice is grown, would not be affected by sugarcane production for ethanol. Irrigation channels have drained those swamps, halting local rice production. Only 50 of the promised 2,000 jobs have been created, at lower-than-promised wages. Pastoralists and land tenants have been displaced to make way for the sugarcane plantation, and the large-scale use of chemical pesticides and fertilizers is threatening groundwater and harvests beyond the plantation.[59]

b. In Southern **Mozambique**, villagers evicted from an area declared as a national park have seen the areas promised to them for resettlement granted to a private investor for sugarcane production (30,000 hectares). This land already belongs to other communities, who can also expect to be evicted.[60] Meanwhile, a minimum of 22 large-scale leases to international companies for the production of jatropha and sugarcane directly affect fertile land, forested land, and wildlife areas customarily owned by communities.[61] These allocations stretch the boundaries of domestic land law, which protects customary rights in theory but, in practice, involves procedures that do not promote full and informed consent by all members of the community.

c. In **Democratic Republic of the Congo**, three large leases covering three million hectares have been made to companies from China, Italy, and Canada for oil-palm and eucalypt plantations. All affected land is customarily owned and much of it is forested; it is likely that the forest will be cleared and the communities evicted. In a fourth case, dispossessed villagers are now squatting in the Kundelungu National Park, from which they will in due course be evicted again.[62]

d. On the instructions of the federal government of **Ethiopia**, regional state governments have identified millions of hectares of land to lease to investors for commercial production, in accordance with its Agricultural Development Led Industrialization Program. Nearly one million hectares has been so identified in Benshanguel Gumuz Regional State, leaving scant room for any generational expansion for even settlements and farms, and concern among local populations that their off-farm woodland livelihoods will be lost and their ability to farm curtailed by the clearance of these lands for industrial agriculture, decimating water and soil conservation needed to enable farming in lower areas. Only a handful of the 4,338 jobs that were promised under four of the leases have so far materialized, most of them filled by outsiders.[63] The Bechera Agricultural Development Project in Oromiya Regional State leased 10,700 hectares to an

Indian company for multi-crop production, incorporating most of the rangelands and wetlands used for grazing and seasonal farming, forcing families to sell their stock. Around 300,000 hectares have been leased to the same investor in Gambella Regional State for rice and banana cultivation, with a similar loss of the grazing lands.[64] Commercial exploitation of forests is encouraged and plans are in place to direct investment towards forests that are "encroached, cleared or abandoned" and are considered idle and available by government. This does not reflect reality on the ground, such as in the case of the Arsi Forest, historically occupied and used by Oromo agro-pastoralists.[65]

e. In **Madagascar**, a new (2008) law has simplified land access for foreign investors. Although the two largest allocations (1.3 million hectares to Daewoo and 370,000 hectares to VARUN) were famously suspended, multiple smaller allocations to foreign and domestic investors continue to be made. Forests (of which there are 12.7 million hectares in the country) are considered state property and able to be allocated. The same applies to 37.3 million hectares of pasturelands in dry zones, some of which are seasonally cultivated and/or regarded as future farming expansion areas. State law classifies them as un-owned lands, even though they are, by custom, the common property of rural communities. Newly established commune land bodies are actively involved in leasing these lands to investors, despite a lack of information on the impacts of such action, or on the basis of promises of employment and other benefits that may not be fulfilled.[66]

f. In **Ghana**, 17 commercial biofuel developments—15 of them foreign-owned—have emerged since 2007 with access to a total of 1.075 million hectares.[67] These developments are largely on unfarmed lands that are owned customarily with the root title vested in chiefs. Chiefs receive the rent from any allocation, which they are not required by law to distribute. Compensation is being paid for encroached farmlands but at only US$1 per hectare. The loss of livelihoods heavily dependent on commons is not being compensated. In one study, families had lost 60 percent of their livelihoods and were forced to leave the area to find employment or to indulge in petty trading to survive. Fallow periods have been sharply reduced, with a likely consequent loss of soil fertility. Interviewees still hoped that jobs would emerge once the development gets fully under way.

g. In **Rwanda**, communal marshlands have been declared to be the property of the state and then handed over to private sugarcane companies. A recent study examined the impact of the 50-year lease of 3,100 hectares to the Ugandan-owned Madhvani Group.[68] Most of the 1,000 families affected consider themselves to have been wrongfully dispossessed and uncompensated and are angry that they cannot use the land that the company is not using. They have seen their incomes plunge over the past 13 years and cannot compensate this with the limited, low-paying jobs offered by the company. A smaller, better-off group of farmers have established themselves as out-growers on lands they were able to retain. The loss of the marshes has also placed pressure on hill lands, where steep slopes are now being cultivated and fallow periods have been shortened.

h. Among several large-scale leases in **Mali** is a 99-year lease of 100,000 hectares of prime rice lands to Libya for the production of rice for export. Despite being customary land overlaid with seasonal pastoral use, passage, and watering rights, the land was declared "free from any juridical constraints or individual or collective property that hinders the exploitation of the land" because it had been registered as the property of the Niger Basin Authority some decades previously. Already in 2009 it was reported that families had been displaced, farmlands lost, villages flooded, forests felled, and transhumance halted.[69] Moreover, the availability of water had declined

because of diversion to the Libyan projects, and dust pollution was growing. Since the Libyans are using mainly Chinese labor, local employment has been minimal. No compensation for the loss of access or land-use rights has been promised or paid to affected citizens. Local resistance is being mobilized.

4 What does the global land rush mean for forests?

FORESTS ARE DIRECTLY THREATENED BY THE LAND RUSH

Forests and woodlands have always been vulnerable to land-takings by the state for conservation or commercial logging. In the process, customary rights have been lost on a large scale. In practice, many forests have also been destroyed because of poor management by governments, who historically took control of all forests on the continent.

The land rush increases the risk of forest conversion for agriculture. Indigenous rights to forested lands are also threatened. Unfarmed lands such as forests, rangelands, and marshlands are in the firing line of reallocation for large-scale commercial enterprises. And communities can do little about this for so long as they are not recognized as the legal owners of these lands.

Not only unclassified or ungazetted forests are at risk. Forests created for conservation or designated as national forests are also vulnerable. There are cases in Democratic Republic of the Congo, Ethiopia and Senegal, among others, where investors are being allocated lands within reserves.

DEMOCRATIZATION OF FOREST GOVERNANCE IS THREATENED

An impressive shift in national forest management strategies grew during especially the 1990s, most reflected in the thousands of community forest reserves created around the world. Cutting-edge examples devolved more than managerial rights, empowering rural communities to be recognized as the owner-managers of these reserves. In Africa, most such cases today are found in Gambia and Tanzania. Even without the important anchor and incentive of ownership, thousands of African communities have been incentivized to sustainably use and manage local forests in return for rights to use those resources and regulate their use. As governments look around for fertile lands to give to investors—and biofuel crops (jatropha, sugarcane, and oil palm) grow best on once-forested land—forests come back into their sights, and there is a high risk of a severe weakening of community forest rights and interests. This has already been seen in regard to carbon-trading—governments are less ready to acknowledge local rights when many millions of dollars that may be earned from carbon credits are at stake.

The more avaricious and determined governments such as mainly the case in the rich Congo Basin zone, and forested West African states, may be expected to put a brake on new or emerging initiatives to recognize forest resources as community property. Certainly, it is unlikely that many governments will accelerate the restitution of forest lands to customary owners. Given the overriding failure of state-led forest management in so many situations, and the more effective success of most community-based forest management regimes, this will be a loss to good governance and conservation, as well as to land rights.

THE LAND RUSH COULD SERVE AS A TIPPING POINT FOR A RADICAL RETHINK OF TRADITIONAL POLICIES

It is possible to end this series of briefs on a more positive note, however. The devolution of forest governance and the recognition that most of the continent's forests are rightfully the property of rural communities have proceeded far enough in the last two decades to awaken hope in millions of rural Africans. The theft of local forest lands and other communal assets by governments and commercial investors may not be

endlessly tolerated. When promises of benefits to local populations fail to materialize, the tide of hopeful acquiescence could turn. Forest rights advocacy in Africa needs to focus on helping the rural poor to constructively demand a fairer deal and the upholding of their founding forest-tenure rights.

Endnotes

[1] Refer brief 1 for details.

[2] Alden Wily, Liz. 2011. *The Tragedy of Public Lands: The Fate of the Commons Under Global Commercial Pressure*. Rome: International Land Coalition. http://www.landcoalition.org/cplstudies

[3] Bruinsma, J., ed. 2003. *World Agriculture: Towards 2015/2030.* London: Earthscan; and the World Bank's African development indicators at http://data.worldbank.org/data-catalog/africa-development-indicators

[4] The main recent source on the land rush is The World Bank's report by Klaus Deininger and Derek Byerlee with others, 2010. *Rising Global Interest in Farmland Can it Yield Sustainable and Equitable Benefits?* The World Bank, Washington D.C.

[5] There was an overall rise in the area of land under cultivation of 5.3% in developing countries between 1990 and 2007, and a 2.5% rise in sub-Saharan Africa: World Bank 2010 as cited in endnote 4.

[6] A Land Matrix has been compiled by the International Land Coalition, Oxfam, CIRAD, CDE at University of Bern, GIGA at University of Hamburg, and GIZ, to be made available on the Land Portal website managed by the International Land Coalition before the end of 2011.

[7] See brief 2.

[8] A well-known example of this is Kenya, where the post-independence policies of especially President Daniel arap Moi saw public lands used less for settlement schemes for the landless than for lucrative land-purchase schemes affordable only by the rich and for rewarding politically-connected elites. Refer Republic of Kenya. 2004. *Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land*. Nairobi: Government Printer; and Klopp, J. 2000. Pilfering the public: the problem of land grabbing in contemporary Kenya. *Africa Today* 47(1):7–26.

[9] Refer case studies at http://www.landcoalition.org/cplstudies Also see case studies at http://www.future-agricultures.org/index.php?option=com_docman&Itemid=971. Also refer to the *Journal of Peasant Studies* 38(2), March 2011; GTZ. 2009. *Foreign Direct Investment (FDI) in Land in developing Countries*. Bonn: Division 45, Agriculture, Fisheries and Food; Cotula, L., S. Vermeulen, R. Leonard and J. Keeley. 2009. *Land Grab or Development Opportunity?* London: International Institute for Environment and Development, Rome: Food and Agriculture Organization of the United Nations, and London: International Fund for Agricultural Development; FIAN. 2010. *Land Grabbing in Kenya and Mozambique.* Heidelberg: Food First International Action Network; World Bank 2010 (as cited in endnote 4); CHR&GJ. 2010. *Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment.* New York: Center for Human Rights and Global Justice; and Oakland Institute papers at http://media.oaklandinstitute.org/special-investigation-understanding-land-investment-deals-africa

[10] A sample of twelve contracts described by *Cotula, L. 2011 Land Deals in Africa: What is in the contracts?* IIED, London, includes nine for 99 year terms and three for renewable terms of 20–50 years.

[11] See endnote 6.

[12] As indicated by GTZ and ILC papers as cited in endnote 9 and by The World Bank as cited in endnote 4. Also see upcoming data of the Land Matrix to be published by the International Land Coalition.

[13] See endnote 6.

[14] See brief 4.

[15] Such as seen in Malawi, Mali, Mozambique, Rwanda, and Senegal; refer case studies at http://www.landcoalition.org/cplstudies.

[16] World Bank 2010 as cited in endnote 4. Odhiambo find only 20 percent and 25 percent of ventures, respectively, have started production in East Africa; Odhiambo, Michael Ochieng. 2011. *Commercial Pressures on Land in Africa: A Regional Overview of Opportunities, Challenges and Impacts*. Rome: International Land Coalition.

[17] GRAIN, October 2011.*Unpacking a Chinese Company's Land Grab in Cameroon*. http://farmlandgrab.org/16485

[18] Smaller, C. and H. Mann. 2009. *A Thirst for Distant Lands: Foreign Investment in Agricultural Land and Water*. London: International Institute for Sustainable Development.

[19] Perez, J., M. Gistelinck and D. Karbala. 2011. *Sleeping Lions: International investment Treaties, State–Investor Disputes and Access to Food, Land and Water.* Oxfam Discussion Paper. London: Oxfam.

[20] Smaller and Mann 2009. As cited in endnote 18.

[21] Daniel, Shepard. 2011. *The role of the International Finance Corporation in promoting agricultural investment and large-scale land acquisitions.* Paper presented at the International Conference on Global Land Grabbing, 6–8 April 2011. Land Deals Politics Initiative.

[22] Alden Wily, 2011 as cited in endnote 2.

[23] Ward Anseeuw, Antoine Ducastel and Jean-Jaques Gabas, 2011. *The end of the African peasant? From investment funds and finance value chains to peasant related questions.* Paper presented at the International Conference on Global Land Grabbing, 6-8 April 2011. Land Deals Policy Initiative.

[24] For example see Da Via, E. (2011) The Politics of "Win-Win" Narratives: Land Grab as Development Opportunity? http://www.future-agricultures.org/index.php?option=com_docmanHYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"&HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"task=cat_viewHYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"&HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"gid=1552HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"&HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"Itemid=971

[25] See cases studies listed in endnote 9.

[26] The details will be publicly available on the Land Matrix site as cited in endnote 4.

[27] Hall, Ruth. 2011. The next great trek? South African commercial farmers move north.

[28] Hall, 2011. As cited in endnote 26.

[29] Putzel, L. and others. 2011. *Chinese trade and investment and the forests of the Congo Basin*. Working Paper No. 67. CIFOR, Bogor, Indonesia; GRAIN, 2010 as cited in endnote 17.

[30] See studies referred to in endnote 7 and also Cotula, L. and S. Vermeulen. 2011. Contexts and procedures for farmland acquisitions in Africa: What outcomes for local people? *Development* 2011 54 (1):40–48.

[31] Including voluntary guidelines led by the Food and Agriculture Organization of the United Nations and the Principles for Responsible Agricultural Investment available at http://www.responsibleagroinveatment.org/rai/node/232.

[32] Cotula, 2011. As cited in endnote 10.

[33] Alden Wily, 2011. As cited in endnote 2.

[34] Ratsalonana, Rivo Andrianirina, Landry Ramarojohn, P. Burnod, and A. Teyssier. 2011. *After Daewoo? Current Status and Perspectives of Large-scale Land Acquisition in Madagascar.* Rome: International Land Coalition.

[35] As reported in a number of case studies as cited in endnote 9.

[36] See briefs 1–4.

[37] Hilhorst, T., J. Nelen, and N. Traoré. 2011. *Agrarian change below the radar screen: rising farmland acquisitions by domestic investors in West Africa. Results from a survey in Benin, Burkina Faso and Niger*. Paper presented at the International Conference on Global Land Grabbing, 6–8 April 2011. Land Deals Politics Initiative.

[38] Hillhorst et al. as cited in endnote 36. Also see ILC case studies available at url given in endnote 9.

[39] The World Bank, 2010. As cited in endnote 4.

[40] GTZ, 2009. As cited in endnote 9.

[41] Baumgart, J. (2011*). Assessing the contractual arrangements of large-scale land acquisitions in Mali with special attention to water rights*. GIZ, Bonn.

[42] Hall, 2011. As cited in endnote 26.

[43] Brautigam, Deborah 2011. African Shenzhen: China's special economic zones in Africa. *Journal of Modern African Studies* 49, 1 (2011): 27-54.

[44] Refer briefs 2 and 3.

[45] Refer brief 4. Also refer Alden Wily, Liz. 2011. "The Law is to Blame": The Vulnerable Status of Common Property Rights in Sub-Saharan Africa. *Development and Change*, 2011: Vol. 42 (3): 1-25.

[46] IUCN, 2010. Quantifying the Impact of Barriers to Pro-Poor Forest Management. Livelihoods and Landscapes Strategy. Discussion Paper. Gland.

[47] Guillozet, K., Bliss, J. (2011) Household Livelihoods and Increasing Foreign Investment Pressure in Ethiopia's Natural Forests. http://www.future-agricultures.org/index.php?option=com_docmanHYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"&HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"task=cat_viewHYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"&HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"gid=1552HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"&HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"Itemid=971 Deng, D. (2011) 'Land belongs to the community' Demystifying the 'global land grab' in Southern Sudan. http://www.future-agricultures.org/index.php?option=com_docmanHYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"&HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"task=cat_viewHYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"&HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"gid=1552HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"&HYPERLINK "http://www.future-agricultures.org/index.php?option=com_docman&task=cat_view&gid=1552&Itemid=971"Itemid=971 Shete, M. (2011) Implications of land deals to livelihood security and natural resource management in Benenshanguel Gumuz Regional State, Ethiopia; Oakland Institute, 2011a. *Understanding Land Investment Deals in Africa. Country Report: Ethiopia;* Oakland Institute, 2011b. *Understanding Land Investment Deals in Africa Nile Trading and Development Inc. in South Sudan.* Land Deal Brief; Bues, A. (2011). *Agricultural Foreign Direct Investment and Water Rights: An Institutional Analysis from Ethiopia*. Paper presented at the International Conference on Global Land Grabbing, 6–8 April 2011. Land Deals Politics Initiative. Fisseha, M. 2011. A case study of the Bechera agricultural development project, Ethiopia. . http://landportal.info/resource/global/new-studies-and-policy-briefs-released-under-international-land-coalition-s-global-r

[48] Examples are provided in Alden Wily (2011). As cited in endnote 2. See also, for Tanzania: Locher, Martina. 2011. *"'How come that others are selling our land?' Customary land rights, rural livelihoods and foreign land acquisition in the case of a UK-based forestry company in Tanzania*. Paper presented at the International Conference on Global Land Grabbing, 6–8 April 2011. Land Deals Politics Initiative; Sulle, E. and F. Nelson. 2009. *Biofuels, Land Access and Rural Livelihoods in Tanzania*. London: International Institute for Environment and Development. For Mozambique, see: Nhantumbo, Isilda and Alda Salomao. 2010. *Biofuels, Land Access and Rural Livelihoods in Mozambique*. London: International Institute for Environment and Development; and Cotula 2011 (as cited in endnote 11). For Ghana, see Schoneveld, George, Laura German, and Eric Nutakor. 2010. *Towards sustainable biofuel development: assessing the local impacts of large scale foreign land acquisitions in Ghana*. Paper presented at the World Bank Land Governance Conference, 26–27 April 2010.

[49] Refer to these papers: Da Via, 2011. As cited in endnote 23; FIAN, 2010, as cited in endnote 9; Fisseha, 2011, as cited in endnote 46; Oakland Institute 2011a as cited in

endnote 46; and Veldman, M. & M. Lankhorst (2011) 'Socio-economic impact of commercial exploitation of Rwandan marshes. A case study of sugar cane production in rural Kigali'. International Land Coalition, Rome.

[50] Deng, 2011. As cited in endnote 46.

[51] Oakland Institute, 2011b. As cited in endnote 46.

[52] Refer briefs 3 and 4.

[53] Alden Wily, 2011. As cited in endnote 2.

[54] This does not mean that such provisions do not continue to appear in new land laws and even new constitutions (e.g. Kenya) but the force of these at application is tangibly limited.

[55] For various country overviews of this see Van der Molen, P. and C. Lemmen, eds. 2004. *Land Administration in Post Conflict Areas.* Denmark: International Federation of Surveyors; and Pantuliano, S., ed. 2008. *Uncharted Territory Land, Conflict and Humanitarian Action.* London: Overseas Development Institute.

[56] Alden Wily, Liz. 2010. *Making Peace Impossible? Failure to Honour the Land Obligations of the Comprehensive Peace*

Agreement in Central Sudan. A resource paper. Rome: International Land Coalition.

[57] Cotula, 2011. As cited in endnote 10.

[58] See endnote 9 for case studies. See also Alden Wily 2011 as cited in endnote 2 for a summary of cases in eleven African states as of 2010.

[59] Da Via, 2011. As cited in endnote 23.

[60] Cotula, 2011. As cited in endnote 10

[61] FIAN, 2010. As cited in endnote 9.

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[63] Shete, 2011. As cited in endnote 46.

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[66] Burnod, Perrine, Mathilde Gingembre, Andrianirini Rivo Ratsialonana, and Raphael Ratovoarinony. 2011. *From international land details to local informal agreements: regulations of and local reactions to agricultural investments in Madagascar.* Paper presented at the International Conference on Global Land Grabbing, 6–8 April 2011. Land Deals Politics Initiative.

[67] Schoneveld et al. 2010. As cited in endnote 47.

[68] Veldman and Lankhorst, 2010. As cited in endnote 48.

[69] GTZ, 2009. As cited in endnote 9.

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The mission of the Rights and Resources Initiative is to support local communities' and indigenous peoples' struggles against poverty and marginalization by promoting greater global commitment and action towards policy, market and legal reforms that secure their rights to own, control, and benefit from natural resources, especially land and forests. RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, D.C. For more information, please visit www.rightsandresources.org.

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