

Behind the Mirage in the Desert - Customary Land Rights and the Legal Framework of Land Grabs

Fatmata S. Kabia

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Behind the Mirage in the Desert— Customary Land Rights and the Legal Framework of Land Grabs

Fatmata S. Kabia[†]

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[†] B.A., with distinction in International Relations, University of Pennsylvania, 2012; J.D.- I.L.A. Candidate, Cornell Law School, 2015; Articles Editor, Cornell International Law Journal. I would like to thank Professor Muna B. Ndulo for his guidance while researching and drafting this piece. Thanks to the editors and associates of the Cornell International Law Journal for their hard work and thoughtful suggestions for this Note. I would also like to thank my family and friends for their encouragement and support, with special thanks to my parents who helped inspire the piece.

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Introduction

As of 2012, U.S. and foreign corporations have invested an estimated fourteen billion dollars of private capital in farmland and agricultural infrastructure.¹ These investments reflect a trend of increasing land deals worldwide that covers an area of nearly 1,148 million acres.² Of this land, approximately two-thirds were acquired in Africa.³ Africa therefore appears to be at the center of this wave of investment.⁴ In West Africa alone, there have been about 115 large-scale land deals in agriculture, with the United States, China, and Saudi Arabia as some of the largest primary and secondary investors.⁵

Social scientists attribute these large investments to impending food security concerns; countries will soon require an increase in agricultural output to meet the predicted demand.⁶ Others state more generally that Africa is attractive to investors because of the perceived abundance of available land and resources, as well as favorable fiscal and tax incentives.⁷ Based on the volume of these investments, scholars have likened the phenomenon to a gold rush where investors—led by states, agribusinesses, and private equity funds—move feverishly in pursuit of resources.⁸

The level of investment over the past ten years has been so potent that countries such as Sierra Leone and South Sudan have sold about 32% and

1. Smita Narula, *The Global Land Rush: Markets, Rights, and the Politics of Food*, 49 STAN. J. INT'L L. 101, 111 (Winter 2013) (citing *Farms and Funds: Investment Funds in the Global Land Rush*, INT'L INST. FOR ENV'T & DEV. 1 (Jan. 2012), available at <http://pubs.iied.org/pdfs/171211IED.pdf>); *Understanding Land Investment Deals in Africa: Deciphering Emergent's Investments in Africa*, OAKLAND INST. (June 2011), available at http://media.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_EAM_Brief_1.pdf (describing case study of agricultural investment in Africa).

2. *Analysis: Land Grab or Development Opportunity*, BBC NEWS (Feb. 12, 2012), <http://www.bbc.co.uk/news/world-africa-17099348> [hereinafter *Opportunity*].

3. *Id.*

4. Pan African Parliament, *Making Investment Work for Africa: A parliamentarian response to "land grabs"*, at 2 (July 22, 2011) [hereinafter *Making Investment Work*].

5. *Western Africa*, LANDMATRIX, http://www.landmatrix.org/get-the-detail/by-target-region/western-africa/?order_by= [hereinafter *LANDMATRIX*].

6. Mark Bowman, *Land Rights, Not Land Grabs, Can Help Africa Feed Itself*, CNN NEWS (June 18, 2013), <http://edition.cnn.com/2013/06/18/opinion/land-grabs-africa-mark-bowman/index.html> (“[W]ith the global food supply needing to increase by an estimated 70% by 2050, [Africa] is at the heart of the challenge at food security”).

7. *Making Investment Work*, *supra* note 4, at 2.

8. Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L.J. 504 (2011).

10% of their landmass, respectively.⁹ Large-scale land acquisitions, however, are not inherently detrimental. In theory, these investments could mutually benefit foreign investors and local populations. Investors gain access and rights to the land and its resources, which could improve their enterprises, while local populations potentially receive more jobs, export earnings, and advanced technologies.¹⁰ At the state level, large-scale investment could also satisfy countries' needs to improve productivity and market access.¹¹ As the Comprehensive Agriculture Development Program (CAADP) illustrates, Africa needs 250 billion dollars of investment to develop infrastructure in rural areas between 2002 and 2015.¹² Thus, the African continent has a strong interest in allowing large-scale land investments.

In reality, these development opportunities are not realized and investment rarely results in win-win situations. Studies reveal that with the promise of agricultural value, these land deals actually result in devastating consequences for local communities. Notably, these export-driven land deals do not account for local interests¹³ and evict local farmers from land they have long regarded as their own.¹⁴ This result is particularly striking when considering deals that involve investors from the financial sector. In these cases, less than 12% of the acquired land is put under production, suggesting that the land only supports highly speculative ventures.¹⁵ Therefore, the local population does not even get to experience the potential upside of investment—development. For these reasons, critics of the large-scale land acquisitions more accurately describe the phenomenon as “land grabbing.”¹⁶

Reporters Harry Verhoeven and Eckart Woertz assert, however, that Africa's land grab is a myth—nothing more than a “mirage in the desert.”¹⁷ They argue that despite years of heated debate, scholars know very little about what occurs on the ground.¹⁸ In the case of Sudan, for example, confidential Ministry of Investment statistics revealed that only about 20% of agricultural partnerships saw some degree of implementation, sug-

9. LANDMATRIX, *supra* note 5.

10. *Opportunity*, *supra* note 2.

11. *Id.*

12. *Making Investment Work*, *supra* note 4, at 2.

13. *Opportunity*, *supra* note 2 (referring to International Labor Commission reports saying that the jobs created are few, short-lived, and low paid, and that the public revenues are limited by tax exemptions).

14. See Bowman, *supra* note 6; see also *Opportunity*, *supra* note 2 (discussing ILC study finding that in Uganda, 200,000 people claimed to be evicted from their land as a result of large land deals).

15. *Making Investment Work*, *supra* note 4, at 3 (referring to the Oxfam case study of Ethiopia, Ghana, Mali and Tanzania).

16. Harry Verhoeven & Eckert Woertz, Op-Ed., *Mirage in the Desert: The Myth of Africa's Land Grab*, CNN (July 9, 2012), <http://edition.cnn.com/2012/07/05/business/op-ed-africa-land-grab/index.html> [hereinafter *Mirage*].

17. *Id.*

18. *Id.*

gesting that the established view of land grabs was distorted.¹⁹ Prevailing scholarship and current statistics, however, reveal that land grabs and their effects are real.²⁰ Verhoeven and Woertz's argument nevertheless highlights the level of uncertainty and vagueness underlying land grabs. Scholars concede that land grabs often result from secret deals where the details of the agreements are not disclosed to the public.²¹ Further, scholars also find that land grabs seem to eschew democratic planning and evade local participation that would otherwise create a system of rights and responsibilities for enabling the people to voice their consent to sell the land. The question remaining is how these large-scale land acquisitions are possible. Perhaps Verhoeven and Woertz's mirage is not in the effects of land grabs, but is instead in the legal framework under which land grabbing occurs.

The Note undertakes this review by examining the sources of law at the national and international level that govern the way in which large-scale land transactions occur in Africa. Part I begins by briefly introducing the bifurcated legal system in Africa, where African customary law²² and common law govern the people's rights and responsibilities.²³ Section A defines customary law from a historical perspective. As this system is a relic of the post-independence governments,²⁴ the hierarchical relationship of authority corresponds with the subject of dispute and ethnic background of the parties.²⁵ Section B describes the investors in large land transactions and how they may complicate land deals. Part II then analyzes the land rights that the systems afford. Part III describes the structure of land deals and examines how land rights operate when foreign investors seek to purchase large tracts of land. Recognizing the negative ramifications of land grabs on local communities, Part IV then contends that African customary law, when supported by international law, can adapt to afford real property rights rather than a mirage.

19. *Id.* (basing findings on confidential statistics from Sudan's Ministry of Investment).

20. See SANDRA F. JOIREMAN, *WHERE THERE IS NO GOVERNMENT: ENFORCING PROPERTY RIGHTS IN COMMON LAW AFRICA* (2011); Chris DeLaubenfels, Book Note, 45 N.Y.U. J. INT'L L. & POL. 362 (2012) (reviewing SANDRA F. JOIREMAN, *WHERE THERE IS NO GOVERNMENT: ENFORCING PROPERTY RIGHTS IN COMMON LAW AFRICA* (2011)); Narula, *supra* note 1.

21. *Making Investment Work*, *supra* note 4, at 4.

22. Technically a single "African customary law" does not exist. The customary law, sometimes noted as "traditional law" differs by tribe and ethnic group, although certain characteristics underlie all of the customary law systems in Africa. See a full discussion of the topic in Part I of this Note. Here, I employ the term "African customary law" to avoid confusion in Part VI where the Note discusses the distinct customary international law.

23. See ANTHONY ALLOTT, *The Reception of Extraneous Law*, in *NEW ESSAYS IN AFRICAN LAW*, 21-27 (1970).

24. *Id.*

25. See JOIREMAN, *supra* note 20, at 9 (attributing Africa's poorly defined property rights to the colonial era where the indigenous people were thought to hold land in common); William Twining, Lecture at the University of Chicago: The Place of Customary Law in The National Legal System of East Africa (Jan. 1, 1964) (describing the relationship between customary law and the common law).

I. Background: Bifurcated Legal System in Africa & the Investor Problem

To better understand the legal context of land grabbing, it is helpful to illustrate (1) the complexity of the domestic legal systems in Africa, and (2) the complications that investors pose on this framework. Scholars characterize Africa's legal environment with the term "legal pluralism," where multiple systems of law coexist in a single jurisdiction.²⁶ More broadly, practitioners understand legal pluralism as the "state of affairs in which a category of social relations is within fields of operation of two or more bodies of legal norms."²⁷ In Africa, the relevant legal norms are the common law and African customary law systems.²⁸

A. Defining African Customary Law

At the time of independence, state constitutions in Africa defined customary law as understood during the colonial era. As a result, scholars find complementary definitions of customary law among various states with similar colonial legacies. For example, Ghana interprets customary law as "comprising of rules of law which by custom are applicable to particular communities . . . not being rules of common law under any enactment providing for the assimilation of such rules of customary law, as are suitable for general application."²⁹ In Sierra Leone, the constitution defines "customary law" as "any rule, other than a rule of general law, having the force of law in any chiefdom of the provinces whereby rights and correlative duties have been imposed . . ."³⁰ Nigeria similarly sees customary law as "local custom that includes a rule, which in a particular district or among members of a tribe or clan . . . has from long usage, obtained the force of law."³¹ African governments thus see customary law as a separate body of law that contrasts the common law, or state-made law, while simultaneously, relegating customary law to a position of authority similar to local custom.

In practice, there is no single "African customary law." Customary law varies by country and by ethnic group. In Nigeria alone, there are 350 ethnic groups, each with its own system of customary law.³² Nevertheless, there are certain characteristics of customary law that are consistent across ethnic groups. Primarily, customary law operates on a personal level, inva-

26. Olu Agbede, *Legal Pluralism*, in *FUNDAMENTALS OF NIGERIAN LAW*, 235-48, at 235 (Ayo Ajomo ed., 1989) [hereinafter *Legal Pluralism*].

27. Gordon R. Woodman, *Legal Pluralism and the Search for Justice*, 40 *J. AFR. L.* 152, 157 (1966).

28. *Legal Pluralism*, *supra* note 26.

29. ANTHONY ALLOTT, *The Definition of Customary Law and Repugnancy of Customary Law*, in *NEW ESSAYS IN AFRICAN LAW* app. C at 161 (1970) [hereinafter *The Definition of Customary Law*] (referring to Ghana's /interpretation Act (C.A.4), s. 18(1)).

30. *Id.* (referring to Sierra Leone's Local Courts Act 1963 (No. 20 of 1963), s. 2).

31. *Id.*

32. *Legal Pluralism*, *supra* note 26, at 235 (citing OBAFEMI AWOLowo, *THOUGHTS ON NIGERIAN CONSTITUTION* 24 (1966)).

riably tying a person to the customary law of his ancestors.³³ Adherents further describe customary law as living law that adapts over time to the needs of the community.³⁴ Accordingly, this Note will refer to African customary law as the personal law relating to members living under the traditional African legal system.

B. African Customary Law in the Common Law Context

Once incorporated into the formal legal system during colonialism, African customary law was forced to comply with the requirements of the dominant legal culture.³⁵ This hierarchical view of the common law and African customary law has formed through the colonial regime. During the nineteenth century, for instance, colonial courts limited the recognition of African customary law under the “repugnancy proviso,” also known as the “repugnancy clause.”³⁶ The repugnancy clause prevented African customary law from applying in so far as it “oppose[d] the principles of public policy and natural justice.”³⁷ Courts understood these principles to characterize Western European ideas of moral propriety.³⁸ Consequently, the common law and Western ideals functioned as a “check” on the authority of African customary law. This meant, for example, that even in customary law marriage, which was wholly governed by African customary law, the bride’s uncles negotiated the marriage arrangement on her behalf,³⁹ and the bride had to consent.⁴⁰ Similarly, custody awards determined under African customary law had to be decided on the basis of the child’s best interests regardless of payment or bride wealth.⁴¹ In both circumstances, African customary law had to adapt to fit within the dominant legal framework.

Later in the twentieth century, courts declined to invoke the repugnancy clause because of two emerging schools of thought: functionalist anthropology and legal positivism.⁴² Functionalist anthropology compelled scholars and lawmakers to regard customary law on its own standards rather than in European terms.⁴³ Legal positivism then “de-contextualized law by abstracting it from its social and moral or ethical background.”⁴⁴ Despite these movements, modern courts will not apply

33. *Id.* at 237.

34. T.W. Bennet, *The Compatibility of African Customary Law and Human Rights*, 1991 ACTA JURIDICA 18, 20 (1991).

35. *Id.* at 18-35. Although this work pertains to the South African legal system, the analysis of African customary law is widely applicable to other African countries with bifurcated legal systems.

36. *Id.* at 23.

37. *Id.*

38. *Id.*

39. *Legal Pluralism*, *supra* note 26.

40. Bennet, *supra* note 34, at 24.

41. *Id.*

42. *Id.* at 24-25.

43. *Id.* at 24; KAPLAN & MANNERS, *CULTURE THEORY* 55ff (1972).

44. Bennet, *supra* note 34, at 25 (citing R.B. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* 31-34 (1978)).

African customary law if the customary law fails to satisfy modified conceptions of the repugnancy and incompatibility tests.⁴⁵ As such, customary law is “[still] only applicable as long as it is not repugnant to justice and morality.”⁴⁶

The sustained hierarchical relationship between common law and African customary law is most evident when we look to African states’ constitutions. One prime example is the Kenyan constitution’s supremacy clause and section on judicial authority. Under the supremacy clause Article 2(4), the constitution states that “any law, including customary law that is inconsistent with the constitution is void to the extent of the inconsistency”⁴⁷ The constitution is thus clearly placed on a higher level than African customary law. The constitution further explains common law’s supremacy in Article 159 on judicial authority. There, Clause 3 states that traditional dispute resolution, recognized in African customary law, “shall not be used in a way that . . . is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this constitution or any written law.”⁴⁸ Clause 3 seemingly indicates that African customary law is lower than not only the constitution, but also lower than *any* codified law. From the language “repugnant to justice or morality,” it is clear that vestiges of the colonial conception of customary law persist in the modern legal system.

Similar distinctions exist in the African court systems. In Nigeria, for example, the judiciary established separate courts to administer the different laws.⁴⁹ The resultant problem is that there is a divergence in the quality of justice, given the different procedural rules and the fact that the racial origin of the litigant determines the court system that the litigant can use.⁵⁰

C. Land Grabs Reveal Endemic Problem of the Bifurcated Legal System

The arguably larger problem with the bifurcated legal system involves choosing which law to use. In most cases, the applicable legal system is not prescribed.⁵¹ Relevant considerations thus reflect choice of law principles.⁵² The general rule is that parties “may select the law to be applied to their relationship, provided that the decision does not prejudice a third party’s rights.”⁵³ Apart from this general rule, courts look to objective elements that include (1) the nature and form or a prior transaction; (2) the subject matter and environment of a transaction; and (3) the litigant’s cultural orientation.⁵⁴ For land tenure that involves members of a tribe or

45. *The Definition of Customary Law*, *supra* note 29, at 162.

46. *Id.*

47. CONSTITUTION, art. 2(4) (2010) (Kenya).

48. *Id.* art. 159 (3)(b)-(c).

49. *Legal Pluralism*, *supra* note 26, at 236.

50. *Id.* at 238.

51. Chuma Himoga, *The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just the Beginning?*, 117 S. AFR. L. J. 306, 314 (2000).

52. *Id.*

53. *Id.*

54. *Id.* at 314–15.

chieftdom transferring rural land, African customary law typically applies. The local sellers' "cultural orientation"—the rural environment and traditional society that they belong to—helps establish African customary law as controlling in this characteristically informal and small-scale tenure. If both parties (seller and buyer) live under the same traditional system, the choice of law is even clearer. Large-scale land acquisitions, however, operate differently. As the actors involved in these large-scale transactions differ from those in traditional tenure, land grabs present a different scenario for the law to operate.

D. Understanding the Participants in the African Land Grab

Researchers observe that three types of investors participate in the African land market. The first group encompasses cash-rich but food-insecure states, particularly from the Gulf Region and Asia.⁵⁵ This group of actors operates through sovereign wealth funds and state trading enterprises.⁵⁶ The second group includes Western "agribusinesses"⁵⁷ that aim to expand market opportunities.⁵⁸ The third and newest group to the African land market comes from the financial sector.⁵⁹ Here, banks, private equity funds, pension funds, and hedge funds acquire land for speculative ventures.⁶⁰ Private equity funds include institutional investors and wealthy individuals.⁶¹ Many of these private equity funds investing in farmland, however, are not listed on a stock exchange⁶² and very little of their information is publicly available.⁶³ By contrast, pension funds are highly regulated investors that essentially manage the public's money.⁶⁴ Hedge funds, like mutual funds, pool and professionally manage investments.⁶⁵ Hedge funds are, however, "more flexible in their investment strategies and generally adopt a more aggressive approach with high levels of speculation."⁶⁶ This third group of financial sector investors, as the Note will reveal, is the most problematic.

Part of the legal quandary stems from the investors' aims. Investors are primarily interested in balancing risks and returns.⁶⁷ For this reason, investors see farmland as an opportunity for potentially high, long-term returns and as a way of diversifying risk away from traditional assets such

55. *Making Investment Work*, *supra* note 4, at 3.

56. *Id.*

57. *Id.* (defining agribusinesses as enterprises that specialize in food production, processing, and exporting).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Farms and Funds: Investment Funds in the Global Land Rush*, INT'L INST. FOR ENV'T & DEV. 2 (Jan. 2012), available at <http://pubs.iied.org/pdfs/17121IIED.pdf> [hereinafter *IIED*].

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *IIED*, *supra* note 61, at 1; OAKLAND INST., *supra* note 1.

as equity and bonds.”⁶⁸ Specifically, investors like agribusinesses expect high returns from rising farmland values and increased agricultural productivity on acquired lands.⁶⁹ Some investors also pursue large-scale land acquisitions with high yield potential and invest further in agricultural productivity,⁷⁰ with the goal of increasing their annual returns.⁷¹ As the value of the returns fluctuates with the price of agricultural commodities in export and domestic markets, investors can protect themselves from short-term swings by leasing out land and transferring risk to the farm operators.⁷² Generally, the investors are more interested in the long-term effects on commodity prices.⁷³ Consequently, their investment strategy allows them to realize growing returns from agriculture.⁷⁴ These long-term, large-scale economic goals require neither day-to-day control over the land, nor personal relationships with those on neighboring tracts. In that sense, the fundamentally detached and formal nature of large-scale land transactions differs from the small-scale, informal, and personal transactions that operate under African customary law. The emerging legal issue with land grabbing is that sellers transfer large tracts of rural land by using customary law in commercial transactions that by nature and subject matter are historically governed by the common law.

II. Contrasting Land Rights Under African Customary Law and Common Law

In Africa, land tenure regimes, like legal norms, can vary within a single country.⁷⁵ In some cases, the “traditional” or “communal” land tenure system exists side by side with “modern” individualized tenure.⁷⁶ Common law, which recognizes private ownership, governs the transfer of land in the export sector. Thus, in a valid export-oriented land transaction, the title and use of land goes from the private owner to the buyer, as stipulated in the contract. By contrast, African customary law establishes communal property rights for rural land, where the chief has the power to allocate land on behalf of the community.

The division between these legal norms and land tenure regimes became less distinct with the individualization of property rights in Africa over the course of the twentieth century.⁷⁷ This development effectively gave greater rights to the individual cultivating household, reducing the

68. *IIED*, *supra* note 61, at 1.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *IIED*, *supra* note 61, at 1.

75. Catherine Boone, *Property and Constitutional Order: Land Tenure Reform and the Future of the African State*, 10 *AFR.AFFAIRS* 557, 565 (2007).

76. Sam Rugege, *Chiefs Commoners and The Land: Struggles over Control and Access to Land in Colonial Lesotho*, 8 *LESOTHO L.J.* 1, 34 (1992).

77. Ryan Bubb, *The Evolution of Property Rights: State Law or Informal Norms?*, 56 *J. L. & ECON.* 555, 559 (2013).

authority of extended family groups and chiefs.⁷⁸ Currently, rural land in Sub-Saharan Africa generally falls within two types: the communal regime and the user rights regime.⁷⁹ In the communal regime, traditional authorities continue to exercise political influence and play an important role in resource allocation.⁸⁰ Under the user rights regime, state agents instead play an ongoing role in local resource allocation,⁸¹ thus altering the character of customary land rights to reflect the private ownership aim of the common law.

A. Traditional Land Ownership in Customary Law Lands

1. General Rights

Generally, “traditional” or “communal” land tenure is the system in which the land belongs to the whole community and is not owned by individuals with the right of disposal.⁸² Here, individuals “only have rights of access for use,” whether for residential, agricultural, or other purposes.⁸³ This land does not include communal production and consumption.⁸⁴ The traditional land tenure system is thus communal in the sense that an individual accepts that, as a member of a particular community, he or she has an inherent right to allotted land for residence and subsistence cultivation.⁸⁵ Accordingly, membership in local community, village, clan, or kinship group confers land-use rights.⁸⁶ Such membership rights also include the community’s right to keep its land from being sold and removed from the community through a headman once the holder ceases to be a member of the community.⁸⁷ Further, all members have equal access to undivided grazing land of the village or ward.⁸⁸ Thus, under the traditional system—when completely set apart from the common law’s individualized system—all land is either unclaimed no-man’s land or is under the exclusive dominion of a particular clan.⁸⁹ In the communal regime, state action upholds and ratifies these arrangements, enabling non-elected, non-state local level actors like chiefs to exercise traditional land management powers.⁹⁰

2. The Power to Distribute Land

Traditionally, a chief’s power correlates with his “control over access to

78. *Id.*

79. Boone, *supra* note 75, at 565.

80. *Id.*

81. *Id.*

82. Rugege, *supra* note 76, at 34.

83. *Id.*

84. *Id.* at 35.

85. *Id.*

86. Boone, *supra* note 75, at 563.

87. *Id.*

88. Rugege, *supra* note 76, at 35 (citing C.K. MEEK, LAND LAW AND CUSTOM IN THE COLONIES 18-19, London: OUP (1946)).

89. *Id.* (citing Philip Meyer & Iona Meyer, *Land Law in the Making, in AFRICAN LAW: ADAPTATION AND DEVELOPMENT* 59 (Hilda Kruper & Leo Kuper eds., 1965)).

90. Boone, *supra* note 75, at 563.

agricultural and residential land by people under [his] jurisdiction.”⁹¹ Thus, in a communal regime, the chief’s role as custodian of the land often includes settling disputes between lineages, reallocating land among lineages, and superintending transfers to land within the community.⁹² Scholars emphasize the importance of the chief’s duty to allocate land.⁹³ In fact, a statute in Letheroll specifically stated, “All chiefs and headmen must by law provide people living under them with lands to cultivate.”⁹⁴

The authority to distribute land is particularly important to land grabs. Under the African customary law arrangement, the chief in the area must sanction the transfer of the right to use land. The ideology is that the land belongs to the community as a whole, and the king only administers the land on the behalf of the community to control scarce resources.⁹⁵ Even in the pre-colonial period of customary law, land was not alienable by its holders, whether for consideration or *gratis*.⁹⁶ The community as such has no real control over the distribution of land.⁹⁷ In that regard, chiefs have the sole authority to redistribute and allocate land in their role of determining who is part of the community.

3. *When the Power to Distribute Creates the Power to Revoke and Transact Land*

As custodian of the land, the chief can revoke land from individuals for either one of two reasons: inspection or neglect.⁹⁸ Under the chief’s power of inspection, the chief can take arable land away from the head of household if the chief is satisfied that the household has more than it needs for subsistence.⁹⁹ Practitioners justify inspection on the grounds that the land is allocated according to need. If the circumstances change, then revocation makes egalitarian sense in terms of equity vis-a-vis the entire community.¹⁰⁰ Nevertheless, the chief has discretion in deciding whether to reallocate the land.

A chief can also take arable land away from a subject due to neglect or non-utilization.¹⁰¹ The original idea was to prevent people who migrated away from the area from claiming fields back on their return.¹⁰² The chief’s power in this instance is unchecked, resulting in a unilateral decision to divest land. In that way, the chief’s discretion under African customary law can become a pretext for land transactions that exclude the local people’s input.

91. Rugege, *supra* note 76, at 33.

92. Bubb, *supra* note 77, at 559.

93. Rugege, *supra* note 76, at 39.

94. *Id.* (citing Laws of Lerotholl 1992. Law No. 8).

95. *Id.* at 37.

96. *Id.* at 36.

97. Rugege, *supra* note 76, at 39.

98. *Id.* at 40.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 41.

4. *Scope of Customary Law Title is Too Narrow to Counteract Chief Decision-Making*

In the communal land tenure system, title includes everything above and below the ground. Title therefore encompasses not only the acreage of land, but also the crops and minerals. Here, the king or chief has paramount title.¹⁰³ For the Akan in Ghana, whose spiritual belief considers the ancestral stool the head of the community, the stool has paramount title. The chief therefore holds the title in trust for the community. Similarly, when examining Northern Rhodesia (present day Zambia) an anthropologist observed that “all land and its products belonged to the nation through the king.”¹⁰⁴ This common title of the nation to all the land translates to individual access to plots of land allotted by the king through his village headmen to heads of households for use.¹⁰⁵

This is particularly problematic in circumstances where land investors choose to transact directly with chiefs. Even if locals oppose the chief’s power to allocate and revoke land under the African customary law system, the individual’s lack of title to the land renders him unable to adequately affect the transaction.

B. Identifying the Problem: Weak Customary Land Rights For Individuals Yield Vulnerable Sellers in Land Grabs

On crucial issues regarding who owns land under customary law and whether land can be sold, there is considerable agreement. As the previous subsection illustrates, chiefs have the paramount title while individuals in their communities have usufruct rights. The broader problem for individuals is that the use rights are not codified, but only locally understood. Consequently, foreign investors are more likely to transact under the guises of the user rights regime.

1. *User Rights Regime Dilutes Customary Rights*

Under the user rights regime, governments challenge pre-existing rights, land management processes, and land-allocation authorities by standing behind land claims of “whoever uses the land.”¹⁰⁶ The conflict with African customary land rights occurs in situations where the user rights rule enforces the land rights of individuals who are unrecognized members of the local community. These individuals include immigrants or migrants (“strangers”) who have created plots outside their home locales but within another locale that observes African customary law’s communal regime. As explained above, the chief has the ability to determine community membership through land allocation. Under the communal regime, strangers who migrate outside of their home communities typically have to

103. Bubb, *supra* note 77, at 558-59.

104. Rugege, *supra* note 76, at 35 (citing M. GLUCKMAN, POLITICS, LAW, AND RITUAL IN TRIBAL SOCIETY (1965)).

105. *Id.*

106. Boone, *supra* note 75, at 564 (discussing farming context, but applying the statement more generally to use rights).

bargain with the chief of their host community and pay some form of regular tribute in exchange for the right to use land.¹⁰⁷ In those circumstances, the community retains a reversionary interest in the land.¹⁰⁸ When investors instead impose a user-rights regime on individual land users, they circumvent the chief's power, removing the equitable exchange for rights that would occur under African customary law's communal regime. In the interim, this legal conflict creates a seemingly irreconcilable apparent versus actual authority issue. The ultimate result is that individuals that transact directly with investors for land are stuck between legal systems, where their rights and those of the community are uncertain.

As these individuals are typically farmers with low levels of education, they are typically less equipped to defend their interests. Consequently, parties permit deals that evict local farmers from land that they regarded as their own.¹⁰⁹ Therefore, it is not surprising that less than 12% of the land acquired through these transactions is put under production, suggesting that the land only supports highly speculative ventures.¹¹⁰ This is the legal framework through which land grabbing occurs.

III. Mechanics of a Deal: African Customary Law and Common Law in Action

Even in Mozambique, which is seen as having one of the best land reform systems in Africa due to the country's provision of legal title to communities, the government still allocates land under legal community title to foreign investors.¹¹¹ This suggests that the African customary law land rights have little weight in large-scale land acquisitions. Part III of this Note will deconstruct the land deal process in Africa to reveal (1) why parties do not recognize African customary land rights and (2) how decision-makers can improve the process.

A. Land Deals From the Investor Perspective

Land deals begin with investor action, where investors typically interact with one another. In theory, each investment undergoes the same internal process: due diligence; screening against the fund's investment strategy; board approval; establishment of legal structures to provide investors with various forms of ownership; and management to facilitate risk as well as investment entrance and exit.¹¹² The only large difference occurs with public investors, such as sovereign wealth funds. Public investors begin investment by paying a management fee to an asset management company.¹¹³ Then, as with other modes of investment, fund managers

107. Bubb, *supra* note 77, at 559.

108. *Id.*

109. Bowman, *supra* note 6; see also *Opportunity*, *supra* note 2.

110. *Making Investment Work*, *supra* note 4, at 3. (referring to Oxfam case study of Ethiopia, Ghana, Mali and Tanzania).

111. *Making Investment Work*, *supra* note 4.

112. *IIED*, *supra* note 61, at 3.

113. *Id.*

seek investment funds that go through the process of due diligence, screening, and board level approval.¹¹⁴ At that time, capital is put in the farmland of these large-scale land acquisitions.¹¹⁵ Through this process investors expect a return on their investment to funnel back through the channels of investment.¹¹⁶

Observers typically begin to see inequitable results once investors interact with the state in which the land is located. One can attribute this result in part to investors' expectations over the course of a land deal. Investors regard the domestic laws and regulations of the host country as the primary source of law. In the typical transaction, the host government enters into a contract where it defines the price, quantity, and duration for the purchase or lease of the land.¹¹⁷ Here, the host government uses a framework agreement to commit itself to making the land available to the investor.¹¹⁸ The later process involves more specific instruments (primarily contractual) that actually transfer all or part of the land.¹¹⁹ As part of the agreement, the *seller* provides a range of rights and remedies for the investor in addition to the contract mentioned above. Yet, the degree to which these deals are negotiated or standardized varies across countries and across the different stages of the negotiation, where instruments that allocate land tend to be more standardized.¹²⁰ The parties then layer the contracts over the domestic law.

From the host country's perspective, the preparation and negotiation processes for large-scale land deals often involve multiple government agencies.¹²¹ Even in states that offer a central point of contact within the government for prospective investors, this contact will not address all aspects of the land deal.¹²² At minimum, the contact engages with authorities (typically government agencies) at the local level. In Tanzania, for example, this requires several governmental agencies to coordinate: the Tanzania Investment Center must formally approve the investment for financial viability; the Ministry of Agriculture must assess the agricultural viability of the land; and the Ministry of Lands and Housing Development must look at the land registration. In practice, this communication is poor and undermined in part by the agencies' preference to only report positive outcomes.¹²³

The final contracts between the host governments and incoming investors are not public.¹²⁴ This privacy exacerbates potential inequalities. On

114. *Id.*

115. *Id.*

116. *Id.*

117. *Making Investment Work*, *supra* note 4, at 7.

118. See Lorenzo Cotula et. al., *Land Grab or Development Opportunity? Agricultural Investments and International Land Deals in Africa*, 2009 INT'L INST. FOR ENV'T AND DEV. 65, available at <http://pubs.iied.org/pdfs/12561IIED.pdf>.

119. *Id.*

120. *Id.* at 65-66.

121. *Id.* at 66.

122. Cotula, *supra* note 118, at 66.

123. *Id.*

124. *Id.* at 68.

the investor's end, as described above, each investment also undergoes an internal process of due diligence; screening against the fund's investment strategy; board approval; establishment of legal structures to provide investors with various forms of ownership; and management to facilitate risk, as well as investment entrance and exit.¹²⁵ Yet, as most fund managers and institutional investors manage other people's money, they have a "fiduciary duty to ensure that they invest with appropriate advice to maximize returns commensurate with an acceptable level of risk."¹²⁶ This assessment, however, is economically focused and pressures investors to maximize profit absent other considerations¹²⁷ that could better account for customary land rights.

B. Finding a Place for Customary Land Rights

Theoretically, the local populations' land rights could enter the state level of the land deal. In practice, however, the rights do not apply. The question is why. One reason could be that the party seeking the land is not always the state. Instead, there are investors that may either work with the state and bypass the local population or transact directly with individuals who have little bargaining power. Further, there is little recourse at the state level for deals that take advantage of the weak African customary land rights. For example, investors can negotiate directly with landowners, who are typically farmers with low levels of education and less equipped to defend their interests. Yet, these negotiations appear acceptable because deals continue to take place behind closed doors, and the details of the agreements are not made public. Given the diminishing authority of African customary law and increasing desire for foreign companies and governments to invest in large "unoccupied" land, African customary law seems to provide a false sense of rights to those living on customary lands. Consequently, customary land occupies a gap in the legal system that investors and beneficiaries can exploit.

The result is a process that lacks the local population's consent and participation. African customary law, however, deals with the collective. Thus, granting individual title is not likely to solve the problem. For the legal framework to protect customary land rights, it must account for this aspect of group use and communal rights while providing the consent missing from the land deal process.

IV. The Potential for International Law to Reinforce Customary Land Rights

As African customary law is living law, in theory, it can adapt to mitigate the effects of land grabs. The question is how. Part IV of the Note argues that local authorities can look to the international legal system.

125. *IIED*, *supra* note 61, at 3.

126. *Id.*

127. *Id.*

Gathering inspiration from international law is easiest for monist states. Under the monist theory of international law, domestic law is subordinate to international law.¹²⁸ As a consequence of this unified legal system, domestic courts may look to sources of international law—such as treaties and international customs—when determining cases that implicate international concerns.¹²⁹ Even if state authorities were to subscribe to the dualist theory, where international law and domestic law occupy different legal spheres, international law could at least persuade, if not compel, domestic legal outcomes.¹³⁰ Thus, examining sources of general international law may be helpful in addressing rights in the African context.

The constitutions of several states, including Senegal, Namibia, and Cameroon, explicitly refer to international law.¹³¹ These states' documents indicate that their domestic laws are subject to binding international law.¹³² Simultaneously, common law systems in Africa, as explained in Part II of this Note, acknowledge that African customary law is part of the law of the state so long as the customary law is not repugnant to the state's constitution.¹³³ Thus, the state's body of law accounts for both international law and African customary law existing in the same legal framework. This section of the Note will therefore discuss the ways in which international law can reinforce customary land rights *without changing* the fundamental characteristics of African customary law. The text will reveal that even when constitutions do not expressly refer to international law, people can look to regional institutions that recognize international law.¹³⁴ These regional institutions have successfully applied international human rights law to the issue of land rights. Accordingly, the remainder of this section will analyze the potential for international human rights law to reinforce the property rights under African customary law.

A. Existing Sources of International Law Support Land Rights for Indigenous Peoples

International law recognizes the right of indigenous peoples over lands and territories that they have traditionally occupied. Scholars assert that the principle of reallocation, in theory, should protect indigenous peo-

128. 65 L.N.T.S. 19 (1933) [hereinafter *Montevideo Convention*].

129. *Id.*

130. *Id.* Nsongurua Udombana suggests that the principle of *pacta sunt servanda* eliminates the monism/dualism issues that arise when trying to implement international law, particularly the African Charter in African states. See Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter*, 40 STAN. J. INT'L L. 105, 126 (2004). With reference to international law made through treaties, the Vienna convention asserts that under *pacta sunt servanda*, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 115 U.N.T.S. 31 [hereinafter *Vienna Convention*].

131. Udombana, *supra* note 130, at 125-26.

132. *Id.* at 125 (citing CONSTITUTION OF NIGERIA (2014), § 199 ch. I, 12(1)).

133. Udombana, *supra* note 130, at 126.

134. DAMROSH, HENKIN, MURPHY & SMIT, INTERNATIONAL LAW CASES AND MATERIALS 975 (5th ed. 2009).

ple from encroachment on land for large-scale investment because the declarations require “free and informed consent.”¹³⁵ Free and informed consent is the “right of indigenous peoples to make free and informed choices about the development of their lands and resources.”¹³⁶ The aim of the provision is to “ensure that indigenous peoples are not coerced or intimidated” and that their consent is sought and freely given “prior to the authorization and start of any activities.”¹³⁷ Practically, this requires the state or investors, depending on the structure of the land transaction, to give the people full information about the scope and impact of any proposed developments.¹³⁸ Fundamentally, this process would ensure that the peoples’ “choice to give or withhold consent is respected.”¹³⁹

Yet, this free and informed consent likely only affects international legal obligations when recognized as a treaty, customary international law, general principle, decision from an international tribunal, or part of international legal scholars’ work.¹⁴⁰ As detailed below, the principle of free and informed consent exists in treaty law.¹⁴¹ In some cases, however, the relevant treaty may not directly apply to an African state if the state is not a signatory to the treaty.¹⁴² For this reason, local populations will have a stronger case for defending land rights if free and informed consent is also considered international custom. An international custom is defined as state practice supported by *opinio juris*.¹⁴³ Thus, a practice becomes international custom when exercised widely among states due to a sense of legal obligation or reciprocity. As the remainder of this section will illustrate, the requirement of “free and informed consent” appears in several sources of international law, which strongly suggests that the requirement has become an international custom.

The Declaration on the Rights of Indigenous Peoples reiterates support for indigenous peoples’ free and informed consent.¹⁴⁴ This United Nations General Assembly resolution provides that states “should consult and cooperate in good faith with the indigenous peoples involved through their own representative institutions in order to obtain free and informed consent prior to the approval of any project affecting their land or

135. Olivier de Shutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L.J. 534 (2011).

136. Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights Within International Law*, 10 NW. U. J. INT’L HUM. RTS. 54 (2011).

137. *Id.*; U.N. Comm’n on Human Rights, Sub Comm. on Promotion and Protection of Human Rights Working Group in Indigenous Populations, *Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior, and Informed Consent*, P 57, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (July 14, 2005) (prepared by Antoanella-Iulia Motoc and the Tebtebba Foundation) [hereinafter *CHR Standard Setting*].

138. *CHR Standard Setting*, *supra* note 137, at 47.

139. *Id.*

140. See International Court of Justice, art. 38.

141. See *infra* Part IV at 25.

142. See Vienna Convention, *supra* note 130, art. 11-12.

143. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES §102(2) (1987); see also *infra* note 166.

144. United Nations Declaration on the Rights of Indigenous Peoples, Sept 13, 2007, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (2007), art. 32(2) [hereinafter UN DRIP].

resources . . . particularly with regards to the utilization or exploitation of mineral, water, or other resources.”¹⁴⁵ The resolution likely comports with African customary law’s framework because the Article 32(2) provision indicates that states should cooperate through the indigenous people’s “own representative institutions.”¹⁴⁶ These institutions in customary law, as discussed earlier, involve chiefs, groups of locals, and headmen that consult the chiefs. Article 28 of the resolution further suggests that the provisions would apply to all rural lands operating under African customary law. Specifically, Article 28 defines the scope of the affected lands to those “traditionally owned or otherwise operated.”¹⁴⁷ Traditional ownership extends the principle of free and informed consent to chiefs who have paramount title, while the text regarding “otherwise operated” land likely applies to the land where individuals have usufruct rights.

International treaties also contribute to an international custom of requiring free and informed consent from indigenous populations in land transactions. The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), for example, requires state parties to the convention to “respect the principle of free, prior, and informed consent of the affected peoples” concerning a people’s right to participate in cultural life.¹⁴⁸ The Committee on Economic, Social, and Cultural Rights (CESCR), the supervisory body of the ICESCR, interpreted Article 15 of the covenant to include the rights of indigenous peoples to restitution of lands, territories, and resources traditionally used and enjoyed by indigenous communities if taken without the prior, informed consent of the affected peoples.”¹⁴⁹

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) may also indicate an emerging custom for recognizing indigenous populations’ right to property. In fact, ICERD Article 5 explicitly refers to indigenous people’s right to property.¹⁵⁰ Relevant for foreign investors in the mining industry, this ICERD right to property includes the right to land and subsoil resources.¹⁵¹ The Committee on the Elimination of Racial Discrimination (“CERD”) further finds that international law prohibits parties from making any decision relating directly to indigenous people without their informed consent.¹⁵² When read together, Article 5 and General Comment 21 interpret ICERD to require potential investors to receive the locals’ separate informed consent for both the land and resources such as coal or oil. Thus, as in the Declaration of Rights of Indigenous People, state parties must “ultimately ensure the con-

145. *Id.*; Ward, *supra* note 136, at 58.

146. UN DRIP, *supra* note 144, art. 32(2).

147. *Id.* at art. 28.

148. International Covenant on Economic, Social, and Cultural Rights, art 15, P1(a).

149. CESCR, *General Comment No. 21 Right of everyone to take part in cultural life* (art. 15, P 1 (a), of the *International Covenant on Economic, Social, and Cultural Rights*), U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) P 36; Ward, *supra* note 136, at 58.

150. ICERD, art. 5.

151. *Id.* art. 5(d)(v).

152. CESCR, *General Comment No. 21*.

sent of the indigenous people with regard to the development and resource exploitation within their traditional lands and territories.”¹⁵³

Although these general comments and recommendations on the application of U.N. treaties are not legally binding decisions, they indicate consensus in the international community. This consensus has influenced persuasive regional decisions in African Regional courts.

In the landmark decision of *Endorois v. Kenya*, delivered on February 4, 2010, the African Court on Human and Peoples’ Rights affirmed a report by the African Commission on Human and Peoples’ Rights recognizing the indigenous peoples’ right to property.¹⁵⁴ There, the court found that the Endorois, a pastoralist community in central Kenya, had customary rights to land from which the Kenyan government had dispossessed them in 1973. To arrive at this conclusion, the court relied upon the African Charter.¹⁵⁵

The second portion of the African Charter specifically addresses the right to property as a type of egalitarian or positive right that “enhances the power of the government to do something for the person” while “displaying a highly social orientation.”¹⁵⁶ This right under the African Charter accords with the Article 17 of the Universal Declaration of Human Rights, where the right to property “may only be encroached upon in the interest of public need or in the general interest of the community.”¹⁵⁷

The *Endorois* decision also looks to other sections of the Charter to support the indigenous people’s right to land and subsoil resources. Specifically, the court refers to the African Charter’s solidarity rights—rights not vested in the individual, but in the collective groups of individuals

153. Ward, *supra* note 136, at 57.

154. The African Commission interprets and applies the African Charter using human rights standards that include decisions by U.N. treaty bodies. In doing so, the African Commission may also consider principles of law exercised by states party to the African Charter as well as African practices consistent with international human rights norms. See generally African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3/CAB/LEG/67/3 rev. 5, 21 I.L.M. 59, art. 60-61 (1982) [hereinafter *African Charter*]; see also Udombana, *supra* note 130, at 120.

155. The goal of the African Charter was to “borrow from modernism only what does not misrepresent our civilization and deep nature.” Udombana, *supra* note 130, at 112 (citing President Leopold Sedar Senghor, Address at Meeting of Experts for the Preparation of the Draft African Charter on Human and Peoples’ Rights, Dakar, Senegal (Nov. 28, 1979), in REGIONAL PROTECTION OF HUMAN RIGHTS BY INTERNATIONAL LAW: THE EMERGING AFRICAN SYSTEM 121, 124 (P. Kunig et al. eds., 1985)).

156. Nsongurua J. Udombana argues that the African Charter enshrines three traditional generations of human rights: civil and political rights (libertarian rights); economic, social, and cultural rights (egalitarian rights); and peoples’ or groups’ rights (solidarity rights). Udombana adopts Karel Vasak’s human rights typology where there are three generations of human rights: liberty, equality, and solidarity. Udombana, *supra* note 130, at 115 (citing Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 Mich. J. Int’l L. 1209, 1224-25 (2003)). See generally Karel Vasak, *A 30 year struggle; The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO Courier, Nov. 1977, at 29; see also African Charter, *supra* note 154, art. 14.

157. African Charter, *supra*, note 154, art 14.

called “peoples.”¹⁵⁸ One such right, articulated in Article 21, safeguards the “right of peoples to dispose of natural wealth and resources in the interest of the peoples.”¹⁵⁹ The goal is to “promote[] international economic cooperation based on mutual respect, equitable exchange, and the principles of international law.”¹⁶⁰ In *Endorois*, the court considered the fertile lands and lake “natural wealth and resources.”¹⁶¹ As the Kenyan government’s decision to move the Endorois did not serve the Endorois interests, the court found that the government had threatened the peoples’ Article 21 rights.¹⁶² In light of this and other provisions, the African Court of Human and Peoples’ Rights held that the Endorois eviction from Lake Bogoria violated the Endorois’s rights under the African Charter as an indigenous people.¹⁶³ Specifically, the eviction provided the Endorois with only minimum compensation and violated their right to property (Article 14); culture (Article 17(2) and (3)); religion (Article 8); natural resources (Article 21); and development (Article 22).¹⁶⁴ By consequence, the court ordered the Kenyan Government to restore the Endorois to their ancestral land and to compensate them.¹⁶⁵

Regional and international practice regarding property rights for indigenous populations extends beyond the domain of existing treaty obligations for states. Thus, the property rights appear to rise to the level of international custom, where there is state practice and *opinio juris*.¹⁶⁶

B. Locals Can Invoke International Custom to Protect African Customary Law Land Rights

African customary law can couple with international customary law to provide a stronger system of land rights and prevent land grabs. As Section A illustrates, international treaties, conventions, and a regional court decision support this proposition. Excluding indigenous property regimes from the property protected under the conventions would perpetuate the long history of indigenous peoples’ forced dispossession, which contra-

158. Udombana, *supra* note 130, at 117.

159. African Charter, *supra* note 154, art. 21(1).

160. *Id.* art. 21(3).

161. 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf [hereinafter *Endorois v. Kenya*].

162. *Id.* ¶¶ 265–68.

163. *Id.* at Recommendation ¶ 1.

164. African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3/CAB/LEG/67/3 rev. 5, 21 I.L.M. 59 (1982); *Endorois v. Kenya*, *supra* note 160, ¶¶ 238, 251, 268, 298.

165. *Endorois v. Kenya*, *supra* note 160, at Recommendation ¶1.

166. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 53 (2001) (explaining that norms of customary law arise when a preponderance of states and other authoritative actors converge upon a common understanding of the norms’ content and generally expect future behavior in conformity with the norms).

venes the object and purpose of the convention.¹⁶⁷ Some may argue, however, that several conceptual difficulties apply when adapting African customary law to the principles of international custom. This section finds that African customary law can address these concerns.

1. *Potential Impediments*

One potential concern in applying customary international law and treaties to the African context is defining an “indigenous population.” With African populations’ migratory history, especially during nineteenth century border changes and modern warfare, the “indigenous population” is not well defined.¹⁶⁸ Furthermore, even when an investor dispossesses a particular ethnic group of its land, the group may not have been the original occupants. In that sense, the group is not truly “indigenous” to the area. African courts have already confronted this issue. In *Endorois*, for example, the African Court of Human Rights did not inquire as to whether the Endorois pastoralist community originally occupied its land prior to European colonization. The court used the 1973 government reallocation as a time marker for where to assert ownership. When we look to the legal structure governing rural African communities, African customary law adequately accounts for the issue of defining the community. As discussed in Part II of this Note, the chief’s land allocations reflect community membership. Under African customary law, the chief thus determines the members of the community when he or she allocates land to individuals for use.

A second concern is that domestic law may prevent international custom from applying to indigenous populations. The magnitude of this impediment depends on the individual state’s constitution. Constitutions in a dualist system do not generally consider treaties of international law as self-executing.¹⁶⁹ Consequentially, domestic legislative processes must occur before the treaty can come into force. For example, the text of those constitutions similar to the 1999 constitution of Nigeria may provide that “no treaty between the Federation and any other country should have the force of law except to the extent that any such treaty has been enacted into law by the National Assembly.”¹⁷⁰

By contrast, other constitutions call for the direct implementation of international law. For example, the supremacy clause of the Kenyan consti-

167. *Id.* at 43. Although this refers to rights in the American system, the property rights afforded in the American Convention of Human Rights and the American Declaration on the Rights and Duties of Man parallel the rights in the African Charter and ICERD. Thus the authors’ discussion regarding the object and purpose of those treaties is applicable to the present discussion.

168. See Boone, *supra* note 75, at 564-65 (discussing the difficulty of identifying indigents).

169. The terms “self-executing” and “non-self executing” are typically used in the American context. This Note employs the typology to streamline understanding of the different African systems.

170. Udombana, *supra* note 130, 126 (citing CONSTITUTION OF NIGERIA (1999) ch. I, 12(1), available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>).

tution mandates the following: “[G]eneral rules of international law shall form part of the law of Kenya.”¹⁷¹ Further, Part 6 of the clause continues, “any treaty or convention ratified by Kenya shall form part of the law of Kenya under th[e] Constitution.”¹⁷² The analysis above reveals that the free and informed consent of indigenous people with regard to property sales is likely both a treaty obligation and international custom. Consequentially, the principle would apply in a state like Kenya, where the state party to the treaty automatically adopts general rules of international law or international custom.

2. Guiding Principle as Overall Solution

States may nevertheless avoid this inquiry altogether under the *jus cogens* norm of *pacta sunt servanda*. The Vienna Convention asserts that under *pacta sunt servanda*, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹⁷³ Consequentially, states must adhere to the provisions—or at least refrain from contravening the treaty’s object and purpose—regardless of the domestic process. Below, this Note will explore how this principle, when coupled with the principle of free and informed consent, could greatly affect the process underlying large-scale land transactions so that such transactions are no longer land grabs.

C. A New Land Deal

As explained in Part II, the way in which private and institutional investors use land acquired in large-scale land deals is alien to African customary law. Thus, if large-scale land deals are to take place, African states need to create (1) a mechanism for obtaining and determining community involvement that reflects the principle of free and informed consent, and (2) a mechanism for land sales.

Part IV, Section A illustrates that the principle of free and informed consent can apply to African states, placing obligations on both foreign investors and government agencies that facilitate the land deals. Here, investors would work with chiefs and local headman who would typically control the land transactions under African customary law.¹⁷⁴ Working through chiefs and headmen likely increases the possibility for the indigenous people to take part in decision-making—as compared to land deals that entirely circumvent local actors. Even so, the people’s participation is not guaranteed because chiefs do not have a pure agency relationship with the indigenous people that they govern. In a pure agency relationship, a fiduciary responsibility arises when a principal manifests assent in an agent that the agent shall act on behalf of the principle and subject to the

171. CONSTITUTION OF KENYA 2(5) (2010).

172. *Id.* at 2(6).

173. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 115 U.N.T.S. 31.

174. See *supra* Part II; see also *supra* Part IV(A).

principal's control.¹⁷⁵ Unlike elected officials, chiefs generally do not consult voting schemes and polls to arrive at decisions.¹⁷⁶ Chiefs instead receive advice from local headmen or other influential members of the community.¹⁷⁷ In that regard, chiefs are not purely agents. Despite acting on the people's behalf, chiefs are not truly subject to the people's control. Chiefs thus have more autonomy than elected representatives or other "agents of the state."¹⁷⁸ Given this power imbalance, the resulting issue then involves extending consent to the local people who are apart from indigenous leadership. A potential solution must therefore ensure that individual community members can consent to the large-scale land deals so that they may, albeit within limits, act on their own behalf, subject to their own control to counteract any self-dealing by the chiefs and headmen.

1. *Mechanism for Community Involvement*

This standard of free and informed consent could serve as the basis for a mechanism to obtain community agreement. Given the community-based nature of customary law societies in Africa, this process for obtaining agreement would likely involve informal gatherings with clans and kinship groups potentially implicated by the land sale. Though a strong policy, this consultation would likely have to include precise steps in order to avoid the pitfalls of other consultations in the African context. For example, land acquisition consultations in Mozambique were not effective because the communities did not receive relevant information prior to the consultation meetings.¹⁷⁹ Further, the meetings primarily consisted of male community leaders rather than ordinary members.¹⁸⁰ This lack of adequate representation exacerbated the fact that the consultations were typically performed in one meeting without compete records.¹⁸¹ For these reasons, a mechanism for obtaining the people's free and informed consent would require several meetings to occur at different points in the negotiation process; where chiefs would attend the consultation along with a proportionate representation of interested parties (that includes women and other land users); where a third party would transcribe the record; and where the investor (or representative) would present each interested party with a detailed presentation of material aspects of the project and the parties could provide their comments in an open forum. In accord with African customary law, this consultation would involve community leaders. Yet to adhere to the principle of free and informed consent, the process would allow for free information sharing and meaningful comment from the indigenous peoples. To respect investor aims, the consultations would not disclose commercial information. Further, the information for inter-

175. RESTATEMENT (THIRD) OF AGENCY (2006).

176. See, e.g. BARBARA A. BARDES, PUBLIC OPINION: MEASURING THE AMERICAN MIND Part II (2012).

177. *Id.*

178. *Id.*

179. Cotula, *supra* note 118, at 72.

180. *Id.*

181. *Id.*

ested parties and local stakeholders would not in effect include more than the investors would have already provided in their internal due diligence. Thus, these measured consultations may reinforce the legal framework to prevent land grabs.

2. Mechanism for Large-Scale Sales

In terms of new mechanisms for land transactions, some scholars have contemplated institutional measures that implicate more than the negotiation process.¹⁸² Such instruments include shareholder and tax requirements. In Sierra Leone for instance, the policy instituted in 2009 requires that Sierra Leonean hold 5% to 20% of shares in biofuel investment.¹⁸³ In theory, this plan could prove effective given that the managers and directors at the center of the investment would then owe fiduciary duties to those in-country shareholders.¹⁸⁴ The problem, however, is that this seems to protect local people after the initial investment has occurred. In that sense, the shareholder requirement may not adequately address the inequitable transfer of land that occurs *during the course* of the large-scale land deals. Sierra Leone couples this requirement with out-grower schemes in agricultural investment.¹⁸⁵ This policy has not yet been successful given the fact that investors prefer to create more robust business models and run the projects themselves.¹⁸⁶

An alternative solution could involve instituting a tax on developers to discourage speculative ventures or providing a tax haven for investors that promote economic development. Imposing these measures would increase the likelihood that the land sales that occur reflect terms to which the people would freely consent.

Taxes may introduce an avenue for regulation given that the official land fees seem to play a relatively unimportant role in government land allocations—particularly in rural areas.¹⁸⁷ Here, the government either fails to charge the fee or charges a merely nominal rate.¹⁸⁸ For instance, in the Northern State in Sudan, the rent for 1.03 acres of land may cost about \$2 or \$3 USD.¹⁸⁹ Possible reasons for the nominal fee include the low land rents and the fact that the government perceives the expected benefits of the deal to exceed the opportunity costs.¹⁹⁰ In the Daewoo-Madagascar land deal, for example, the government did not even require rent on account of the focus on job creation and infrastructure development.¹⁹¹ Thus when governments enter land deals with a focus on infrastructure

182. See generally Cotula, *supra* note 118.

183. *Id.* at 84.

184. See BARDES, *supra* note 176, at Part III.

185. *Id.*

186. *Id.*

187. Cotula, *supra* note 118, at 78.

188. *Id.*

189. *Id.* at 79 (comparing rent of 1 fedan of land in the rural area to the rent of about \$15 to \$20 USD for 1 fedan in the city of Khartoum).

190. *Id.* at 78.

191. *Id.* at 79.

benefits, they often disregard initial land fees to investors. Although it may be plausible for there to exist higher prices in private-private transactions, where information is typically not disclosed, the generally low prices indicate that imposing a tax on speculative ventures may not be an undue burden.

Some may argue however, that such taxes would discourage all investment—not just investment from the financial sector. True, one motivation for large-scale land investment in Africa is the favorable tax and fiscal incentives.¹⁹² In fact, the Sudanese government exempts agricultural concessions from custom duties, tax on all capital items, and income and profit tax in hopes of building agriculture as a strategic sector.¹⁹³ Consequently, tailoring tax to benefit investors that support local economic development could result in a win-win situation. Here, sovereign investors and agribusiness could profit from relatively inexpensive investment and potentially high long-term returns, while the local population could benefit from the capital inflow and potentially mitigate their own food security concerns.

Although these tax measures do not directly implicate the principle of free and informed consent, the principle—as incorporated in African customary law and the common law—can bolster the tax measures. This is particularly true in the initial segment of the typical large-scale land deal, where the government agency interacts with the investor. Importantly, the principle of free and informed consent may in turn obligate the government to ensure that the decision to impose the tax on a particular investor still allows for the indigenous people to give or withhold consent to the sale.

Conclusion

As this Note has illustrated, land grabs take place behind a complex legal framework where the rights of the local populations are uncertain. Media reports and legal scholarship suggest that a laissez-faire perspective will not suffice to rectify the issue.¹⁹⁴ Thus, international law must protect against these land grabs by enforcing real property rights. The idea is that property is “not a primary quality of assets, but the legal expression of an economically meaningful consensus about assets.”¹⁹⁵ When rights conflict between African customary law’s communal regime and the common law’s user-rights regime that foreign investors expect, there is little consensus. Typically, investor expectations dominate at the expense of the local population.¹⁹⁶ The challenge for African countries is to integrate these legal conventions in a way that benefits all parties involved.

192. *Making Investment Work*, *supra* note 4, at 7.

193. Cotula, *supra* note 118, at 80.

194. *See supra* Introduction, Part II.

195. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 157 (2000).

196. *See supra* Part III.

In examining sources of law at various levels, this Note revealed that the power of chiefs to allocate land varies vis-à-vis foreign investors, depending on whether the African country's government operates under the communal regime or user-rights regime. This variation exposes the gap in the bifurcated legal system. Recognizing the devastating evictions and lack of development that local communities face in the wake of land grabs, this Note then explored the potential for international law to reinforce customary law and remedy the issue. The key source of international law is the emerging custom of "free and informed consent" for indigenous people.

The analysis illustrated that it takes more than speaking with the chiefs to garner the "free, prior and informed consent of the affected peoples."¹⁹⁷ Given the complexity of the bifurcated legal system and high potential for domestic self-dealing, the local population must have a meaningful opportunity to comment on the project before it is implemented. Such opportunity must also adequately account for the nature of African customary law, while complying with international standards for the rights of indigenous populations. International law thus imposes obligations on the state, and by extension the investor, to garner the indigenous people's free and informed consent. In practice, a mechanism for this consent would require several meetings to occur at different points in the negotiation process; where chiefs would attend the consultation along with a proportionate representation of interested parties (including women and other land users); where a third party would transcribe the record; and where the investor (or representative) would present each interested party with a detailed presentation of material aspects of the project and the parties would provide their comments in an open forum. In adhering to the principle of free and informed consent, the process would allow for free information sharing and meaningful comment from the indigenous peoples. To respect the diverse aims of states, agribusiness, and private equity fund investors, the consultations would also not disclose commercial information.

This conceptualization can change the way in which parties enter the new wave of large-scale land deals in Africa. Instead of a process that sets African customary law aside from the state-made law, land deals can occur through an integrated framework where international law strengthens African customary law. The aim is that this will transform land grabs to development opportunities where African customary law can provide real property rights rather than a mirage.

197. See *supra* Part IV.