

**THE EVOLUTION OF THE INTERNATIONAL LAW OF ALIENABILITY:
THE 1997 LAND LAW OF MOZAMBIQUE AS A CASE STUDY**

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ABSTRACT:

A fundamental right to sell land is implied by a recent resurgence of ownership and alienability references in international law. After decades of ideological controversy, several new documents suggest that the scope of the human right to property is gradually broadening. But a number of nations, including Mozambique, still impose restrictions on land alienability. This Note will use Mozambique as a case study to analyze strengthening international recognition of land alienability rights. While alienability restrictions probably do not violate current obligations, they may soon be incompatible with an evolving standard of private property ownership. But the case of Mozambique presents unique problems in considering the benefits of a private land market, including the historical influences of customary African law, colonialism, and Marxism, as well as legitimate fears over the adverse effects privatization could have on African development. In addition, the will of the people may be manifest by the democratically-elected government's decision to continue its alienability restrictions. Given these concerns, this Note concludes that it may not be prudent to invoke international human rights law to pressure Mozambique and similarly-situated nations to privatize land.

INTRODUCTION

The 1997 Land Law of Mozambique (“Land Law”)¹ embraces customary African law in its innovative land tenure strategy, giving substantial control to local authorities in the delimitation and allocation of land use rights, the resolution of disputes, and the subsequent management of resources.² It also generously protects various human rights interests, such as women’s rights, customary land use claims to uncultivated fields and rights of way, and the rights of internally displaced persons.³ But despite these laudable features of the Land Law, it does not permit the sale of land, vesting ultimate ownership in the State.⁴ Although Mozambican alienability restrictions have been faulted for depreciating land value,⁵ they may be regarded justifiable based on principles of African custom or on the need to at least temporarily protect subsistence farmers from foreign investors.⁶ But whatever the rationale for this sovereign decision, restrictions on the right to sell one’s land may not comply with the human right to property as understood in international law.

Mozambique is one example of various nations limiting alienability in an era when the scope of the international human right to property is gradually broadening. This Note will use Mozambique as a case study to analyze strengthening international recognition of land alienability rights. While determining that the Land Law technically complies with current international law, this Note argues that the definition of property rights is evolving to include the right to sell. Given that trend, international law may pressure Mozambique and other nations that restrict alienability to privatize land, even though privatization may not be beneficial to Mozambicans.

¹ Lei de Terras, Lei N° 19/97 (1997) (Mozam.) [*hereinafter* Lei 19/97]. All citations of the Land Law in this Note are translated by the author.

² For a brief description of the delimitation and registration process, see Christopher Tanner, *Law-Making in an African Context: The 1997 Mozambican Land Law*, FAO Legal Papers Online #26, 44-46 (March 2002), available at <http://www.fao.org/Legal/prs-ol/lpo26.pdf>.

³ See *supra* notes 41-42 and 142.

⁴ Lei 19/97, Art. 3; see *supra* notes 43-50 and accompanying text.

⁵ See *supra* note 51.

⁶ For the customary and economic arguments against land privatization in Mozambique, see *supra* Part III.B.

This Note is divided into three parts. Part I briefly introduces the concept of alienability and summarizes customary African law with respect to land use. It goes on to give a brief history of property allocation in Mozambique and of the development of the current land tenure regime, as established by the 1997 Land Law. This system is then contrasted with other land tenure systems that have been developed by nearby African nations. Part II considers whether the Land Law's provisions regarding land use and ownership rights comply with international land use standards, taking into consideration the multilateral treaties to which Mozambique is a party and current standards of customary international law. Part III discusses the practical reasons for delaying the transition from Mozambique's current regime to a private land market, in light of the debate over whether privatization will aid or hinder economic development in Africa.

I. MOZAMBIQUE'S ALIENABILITY RESTRICTIONS

This Part presents the background for this Note's treatment of Mozambique as a case study in its analysis of the scope of property rights under international law. It will first introduce the concept of alienability. It will then discuss customary African understandings of land use. Mozambique's historical background and the provisions of the current Land Law will be laid out. Finally, this Part will briefly compare the Mozambican regime with other land systems in Sub-Saharan Africa.

A. Alienability

Property is commonly understood in the Western world as an abstract "bundle of rights."⁷ The three most important rights in the bundle are generally considered to be: 1)

⁷ A.M. Honore has identified as many as eleven property rights in the bundle, including (1) the right to possession; (2) the right to use; (3) the right to manage use by others; (4) the right to the income that can be derived from use by others; (5) the right to the property's capital value; (6) the right to security against expropriation; (7) the power to transmit the property by sale, gift, or bequest; (8) the lack of any term on the possession of these rights; (9) the duty to refrain from using the property in ways that harm others; (10) a liability that judgments against the owner may be executed on the property; and (11) a residual claim to any temporary rights that others have in the property. A.M. Honore, *Ownership*, Oxford Essays in Jurisprudence 107, 112-28 (A.G. Guest ed., 1961), summarized by JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 49 (1988). Alienability, as discussed in this Note, is generally referred to as the right to

the right to use property; 2) the right to exclude others from one's property; and 3) alienability, the right to transfer one's property by sale or by gift.⁸ Capitalism requires alienability as a crucial stick in the bundle, on the theory that property will be most efficiently maximized if a private market permits it to be transferred to those who value it the most.⁹ But portraying alienability as a fundamental feature of the right to property is controversial. For example, communist regimes controlled land throughout the Cold War, and many nations continue to restrict private land ownership.¹⁰ As a result, land alienability is not universally recognized as a fundamental right; this Note suggests, however, that the private market ideology is winning the battle in international law.¹¹

B. African Customary Land Rights

Africa is a predominantly agricultural continent, so land rights are vitally important to Africans.¹² Scholars often characterize African land systems as communal, with rights vested in the tribe; and where individuals have use rights, the ultimate reversion is in the community.¹³ Alienability at customary law, where it existed at all,

sell; however, it also comprises others of the rights described by Honore, such as the right to transfer by gift or bequest (7), to lease (4), and to mortgage (arguably, 5 and 10).

⁸ See, e.g., Richard A. Epstein, *Property and Necessity*, 13 HARV. J. L. & PUB. POL'Y 2, 3-4 (1990).

⁹ *Id.* ("By incorporating disposition into the system of property, whatever endowment of rights were originally created can be corrected, modified, combined, or disaggregated time and time again through a series of voluntary transactions... This system would necessarily have a self-generating capacity with each successive exchange or transfer. These private, decentralized, voluntary transactions, enforced by a night-watchman state, would generate more by way of gains than it would produce by way of losses. Through repetitive interaction, we would move to higher and higher levels of social satisfaction..."). See also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 32 (4th ed. 1992).

¹⁰ For examples of nations restricting alienability in Africa, see *supra* Part I.D.

¹¹ *Supra* Part II.B.

¹² Kéba M'Baye, *The African Conception of the Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 138, 149 (1974).

¹³ As explained by Eugene Cotran, "Most writers on African systems of land law agree that the principal characteristic of the systems is that they are "corporate" or "communal" or "usufructuary," rather than "individual." By this they mean that rights in land are not vested absolutely in any individual, but in some corporate group such as the tribe or a political or social authority, and that although an individual may have

was limited to some recognized forms of gift, inheritance, and exchange in kind within the community, while the concept of sale for money was unknown.¹⁴ Land ownership was fundamentally qualified by the spiritual belief that land ultimately belonged to the community. According to Kéba M'Baye, there is a significant lack of real property rights because "in Africa, the land belongs to nobody."¹⁵

European colonization of Africa dramatically transformed African land allocation and property rights. Colonial administrations characterized customary land rights as usufruct¹⁶ in order to expropriate land.¹⁷ Ultimate title was declared to be ultimately

a right of use of the land, the ultimate reversion is in the community or group." Eugene Cotran, *African Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 157, 163 (1974).

¹⁴ I READINGS IN AFRICAN LAW 356-390 (E. Cotran ed. 1970) (describing the land acquisition and alienation rules for various African groups). Various forms of gift and succession were recognized, as well as exchange for the interest in the land. *See, e.g., id.* at 365 ("he could not sell the absolute title to his land, it is true; but he might be able to dispose outright of his interest in land or something on it, such as his farm or house, in return for a consideration."). However, sale of land was generally rare and unnecessary. *Id.* at 238 ("It is often said that the ancient customary law forbade the alienation of land; it is truer to say that the customary law did not provide for alienation, as there was need and no demand for it. Where land was plentiful there was no need for a man to buy or lease a plot. Where occupation was under the control of a chief, the individual occupier had no power to transfer what did not belong to him... sale of any sort of interest by any person was thus almost completely unknown until European influence..."). Customary law is adapting, however, and is beginning to recognize land sales. *See* Jean-Philippe Platteau, *Does Africa Need Land Reform?*, in EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA 51, 53 (Camilla Toulmin & Julian Quan eds., 2000) ("Customary modes of land transfer through gifts, exchanges, loans, renting, pledges or mortgages have intensified and sales of land, though often redeemable to the seller, have begun to take place in some areas, running counter to one of the most deep-rooted customary limitations on land use.")

¹⁵ M'Baye, *supra* note 12 at 149. She continues, "Moreover, the laws of the African cosmogony do not allow such ownership. Neither the land, nor the sky, nor the sea, the pillars of the universe and shelters of the ancestors, can belong to a man. All the lands together make up the patrimony of the community, having been put at men's disposal by God, to enable them to subsist, and so that the race can survive."

¹⁶ I.e., mere use rights. In the famous Nigerian case of *Amodu Tijani v. The Secretary*, the British Privy Council characterized the usufructary right as a "a mere qualification of or burden on the radical or final title of the sovereign." *Amodu Tijani v. Secretary*, Southern Algeria, 2 A.C. 399 (Court of Appeal 1921).

¹⁷ The "usufruct" mischaracterization of African land rights, which emphasized communal ownership at the expense of existing individual claims, helped colonial powers legitimize their expropriations. L. Amede

vested in the sovereign authority of the Crown, rather than in the local tribal communities.¹⁸ Unfortunately, the “usufruct” misconception persisted, and continues to mischaracterize African land rights as only use rights,¹⁹ when customary law originally understood land ownership to entail the right to transfer by gift or exchange.²⁰

This Note’s analysis of Mozambican land laws therefore must recognize three distinct and conflicting sets of ideals: (1) customary land use; (2) the Western framework established under Portuguese rule; and (3) Marxist principles, which were initially adopted by the governing party in Mozambique after independence.²¹

C. History of Land Use in Mozambique and the Land Law of 1997

Customary land systems in Mozambique were first threatened under Portuguese colonial rule. Cultivated land was concentrated in large Portuguese plantations, trading

Obiora, *Liberalism and Property Rights: Remapping the Domain of Property in Africa*, 12 J. LAW & PUB. POL’Y 57, 61-64 (2000). For a history of European expropriation of customary lands in Africa, see Patrick McAuslan, *Only the Name of the Country Changes: The Diaspora of “European” Land Law in Commonwealth Africa*, in *EVOLVING LAND RIGHTS*, *supra* note 14 at 75.

¹⁸ See *Amodu Tijani*, *supra* note 16.

¹⁹ Though widely used, the term “usufruct” is a colonial mischaracterization of customary law, *supra* note 17, and has tainted modern conceptualizations of customary African law. See Cotran’s use of the term “usufructary,” *supra* note 13. For example, the international community, while trying to understand differing land use perspectives, has often tried to describe them as “indigenous.” After studying indigenous land use, a UN Economic and Social Council study remarked in 1983, “For indigenous peoples, the concept of land tenure had a very different meaning. It belonged to the community; it was sacred; it could not be sold, leased or left unused... ownership of the land was held in common by the community as a whole and each group or sub-group or family unit received only the usufruct of a plot. They had what is usually called an “individual right of occupancy,” whereas only a “communal right of alienation” existed.” United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, at 29, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.4 (1983). This summary erroneously oversimplifies the issue by lumping together distinct land ownership systems (those of Africans, Native Americans, aboriginal Australians, etc.) in one analysis, to generalize about “indigenous” understandings of property. Moreover, it was simply inaccurate to characterize African customary land rights as inalienable.

²⁰ *Supra* note 14 and accompanying text.

²¹ See *supra* notes 26-33 and accompanying text.

enterprises, and smaller commercial farms, while native Mozambicans were often relocated to more marginal land.²² In order to accommodate colonial interests and encourage investment while still protecting indigenous rights, the Portuguese classified land into three categories: urban land in and near the cities; village land, where local customary tenure systems remained in place; and “free” land, which constituted the rest of the land and was available for investment.²³ Although this system for the first time recognized indigenous land rights, the best lands were still hoarded for colonists and investors.²⁴

After Mozambique gained independence in 1975, virtually all of the Portuguese fled the country.²⁵ The victorious Frelimo²⁶ party declared itself a Marxist-Leninist party²⁷ and vested all land in the State.²⁸ Most of the old colonial plantations were nationalized, and rural families were again relocated to make room for (and provide labor for) state farms.²⁹ The war for independence was replaced by civil war between Frelimo and the Renamo³⁰ party, and because of the widespread destruction and the lack of

²² Tanner, *supra* note 2 at 5.

²³ *Regulamento da Ocupação e Concessão de Terrenos nas Províncias Ultramarinas* (1961) (Port.); confirmed in Lei N° 6/73 (1973) (Port.).

²⁴ Tanner, *supra* note 2 at 6. Typical Mozambican farm systems depend on other lands not presently cultivated, such as pathways to water sources, grazing grounds planned for future use, or fallow fields which are part of rotating farm plots (“shifting cultivation”). These non-vacant lands were often declared “free land” under the regulations and reserved for colonists or investors. *Id.* at 6, 14.

²⁵ ALBIE SACHS, MOZAMBIQUE LAND LAW 4 (1981).

²⁶ Frente da Libertação de Moçambique (Mozambican Liberation Front), a nationalist party founded by Eduardo Mondlane in 1962 and which incited the war for independence. MARGARET HALL AND TOM YOUNG, CONFRONTING LEVIATHAN: MOZAMBIQUE SINCE INDEPENDENCE 13 (1997).

²⁷ At its 3rd Congress in 1977. *Id.* at 61.

²⁸ Land was nationalized in 1975. *Id.* at 49. State ownership of land was officially codified in 1979. Lei N° 6, Art. 1 (1979) (MOZAM.), translated in SACHS, *supra* note 25.

²⁹ Merle J. Bowen, *Socialist Transitions: Policy Reforms and Peasant Producers in Mozambique*, in LAND IN AFRICAN AGRARIAN SYSTEMS 327 (Thomas J. Bassett and Donald E. Crumsey eds. 1993).

³⁰ Resistência Nacional Moçambicano (Mozambican National Resistance), which was funded by Apartheid South Africa and was notorious for guerilla tactics and economic sabotage. HALL AND YOUNG, *supra* note 26 at 117, 120, 129, 136-37, 166-74.

governmental resources, the overlarge state enterprises struggled and failed.³¹ Economic crisis forced Frelimo to shift its economic policy at its 4th Congress in 1983, leading to decentralization of decision-making in the state sector and the granting of land use rights to the private sector.³² Frelimo finally officially abandoned the Marxist-Leninist ideology in 1989.³³

When nearly three decades of war finally ended in 1992, millions of refugees and IDPs (Internally Displaced Persons) returned to their plundered and drought-stricken fields.³⁴ Since the government did not have the resources to resolve disputes during this massive demographic shift, many of the initial difficulties were handled by local customary authorities, providing a needed cost-effective solution to the problem.³⁵ But many conflicts persisted, and land reform was an urgent priority.³⁶ It was determined that customary resources were best situated to direct the delimitation and subsequent management of the land,³⁷ so the goal of land reform legislation was to set up guidelines

³¹ Bowen, *supra* note 29 at 327 (“In 1981, the Ministry of Agriculture admitted that not one state farm was profitable.”)

³² HALL AND YOUNG, *supra* note 26 at 152-54.

³³ *Id* at 202-03.

³⁴ In the years 1993-95 alone, 1.7 million refugees repatriated and 3 million IDPs relocated to their old lands. Bina Hanchinamani, *The Impact of Mozambique's Land Tenure Policy on Refugees and Internally Displaced Persons*, 7 HUM. RTS. BR. 10 (2000), 12

³⁵ Fortunately, customary land tenure arrangements had survived centuries of colonial rule and warfare and was still an intact and able system. Tanner, *supra* note 2 at 8.

³⁶ Refugees and IDPs often returned to find their traditional fields planted by other IDPs, who had farmed there for years and felt that they had bona fide claims to the land. Others returned to find that large-scale investors had been granted use rights to their land; since the State was desperate to encourage production, investors took advantage of the resulting low fees for land use rights. Even ex-colonial settlers returned with land title deeds. But despite rampant confusion over who was authorized to make final land allocation decisions, anthropological fieldwork demonstrated that customary authority structures were still effectively managing land tenure for most of the country, so those working on land reform recognized the practicality and legitimacy of these systems. *See id.* at 8-11.

³⁷ The drafters concluded that the best approach regarding allocation of lands “was to treat areas where local rights existed as self-contained land management units *within which the prevailing local land customs could and should apply*. Within these areas, customary norms and practices could take care of the allocation and management” of the land. *Id.* at 22.

for the establishment of land rights. In setting up the scope of those rights, the government was determined to maintain State-owned title to all land in Mozambique.³⁸ Also, given heavy international involvement,³⁹ there was likely some pressure to make the Land Law conform to international property rights standards. The resulting 1997 Land Law is commendable for many reasons. It defers to customary law in allocating land and subsequent management,⁴⁰ and it promotes gender equality.⁴¹ Regulations implementing the Land Law, adopted in 1998, also acknowledged and protected rights of way established by customary practice for such uses as access to rivers or seasonal grazing.⁴²

Alienability is still the central feature of the Land Law, which reaffirms that land is vested in the State and is inalienable.⁴³ It outlines three distinct ways of gaining use rights to the land: through customary, historical use; through “good faith” occupation for over ten years (to protect IDPs with claims to land they found unused during the war); or

³⁸ The revised 1990 Constitution continued to vest all land the State. MOZAM. CONST. Art. 35 §1 (“The ownership of natural resources located in the soil and the subsoil, in interior and territorial waters, on the continental shelf, and in the exclusive economic zone is vested in the State.”); Art. 46 (“(1). Ownership of land is vested in the State. (2). Land may not be sold, mortgaged, or otherwise encumbered or alienated. (3). As a universal means for the creation of wealth and social well-being, the use and enjoyment of land shall be the right of all the Mozambican people.”)

³⁹ E.g. the University of Wisconsin Land Tenure Centre, USAID and FAO. Tanner, *supra* note 2 at 11.

⁴⁰ The Land Law gives to local communities the authority to delimit land, resolve conflicts, and manage natural resources. *See supra* note 2 and Lei 19/97, Art. 24.

⁴¹ Gender discrimination is constitutionally prohibited. MOZAM. CONST. Art. 67 (“Men and women shall be equal before the law in all spheres of political, economic, social and cultural affairs.”). However, under highly patriarchal customary systems, women did not enjoy the same rights as men. Tanner, *supra* note 2 at 22. The Land Law therefore explicitly affirmed gender equality regarding land use rights. Lei 19/97 Art. 10 §1 (“Subjects of the right of use and improvement of land include national entities, both collective and individual, both male and female, as well as local communities.”). Unfortunately, although these provisions trump any discriminatory customary practice in theory, the tenure rights of women are still not being wholly respected in practice. Tanner, *supra* note 2 at 35 and 49.

⁴² *Id.* at 29 and 36; *see also* Lei 19/97 Art. 1 §1 and Art. 12(a).

⁴³ Lei 19/97, Art. 3 (“Land is owned by the State and may not be sold or by any other means transferred, leased or mortgaged.”).

through a formal request of the State, to encourage investment.⁴⁴ Use rights last for up to 50 years,⁴⁵ and can be inherited.⁴⁶ Although land is declared inalienable, the Land Law allows for owners of use rights to transfer ownership of improvements.⁴⁷ In urban areas, the issue of transfer of land use rights is not as important because the buildings are considered tradable commodities. But about 70% of all Mozambicans live in rural areas,⁴⁸ where physical improvements are insignificant compared to the value of the extensive land surrounding it.⁴⁹ The State assumes an active role in every use right request and a supervisory role in every use right transfer, so it has significant control over what uses are approved for the land.⁵⁰ Arguably, these administrative formalities and the State's retention of ultimate title lock up some of the value of the land, hindering development and perpetuating poverty.⁵¹

⁴⁴ *Id.* Art. 12 (“The right of use and improvement of land is acquired by: (a). occupation by individual persons and by local communities, according to the customary norms and practices that do not conflict with the Constitution; (b) occupation by national individual persons that, in good faith, have been using the land for at least ten years; (c) authorization of a petition presented by individual or collective entities in the manner established in the present Law.”)

⁴⁵ *Id.* Art. 17.

⁴⁶ Without gender distinction. *Id.* Art. 16.

⁴⁷ *Id.* Art.16 §2 (“The titleholders of the right of use and improvement of land may transmit, *inter vivos*, the infrastructures, constructions and improvements upon it, through a public writing preceded by authorization of the competent state authority.”)

⁴⁸ UNICEF's Mozambique Statistics page (2003) at http://www.unicef.org/mozambique/est_geral.htm.

⁴⁹ Tanner, *supra* note 2 at 38.

⁵⁰ *Id.* at 38-39 (“*It is the investments that are being transacted, not the land.* This is made clear in the Law itself. The Regulations do go one step further and provide for land rights changing hands *without the need to return the use right to the State and go through an entirely new process of requesting land rights.* The transmission of the right is *not* automatic, but the process is far simpler than was previously the case... The transmission process is also a means by which the State can ensure that land taxes have been paid, and that the land in question has been used as intended by the ‘seller’. The final sale of the investments on the land cannot legally go through until formal State approval to transfer the right has been given.”)

⁵¹ *Id.* at 26. However, there is some evidence of an illegitimate land market, especially in urban areas, implying that land already has some value. *Id.* at 38. For arguments in favor of privatization throughout Africa, *see supra* notes 169-173 and accompanying text.

The government's continued retention of title in the State and alienability restrictions, even after abandoning Marxism-Leninism, may suggest that it is justified under customary law. At first, no such parallel existed; Frelimo's initial collectivism clearly conflicted with customary tenure.⁵² But customary law is adaptable, and the current rule may reflect what customary law has become.⁵³

D. Other African land tenure solutions

Mozambique is just one example among many African governments that have set up regimes with alienability restrictions. This section examines the similarities between the land tenure systems of Mozambique and various other African nations, focusing primarily on the use and alienability rights granted under these regimes.

Some African nations have no alienability limitations and completely privatized land, such as South Africa.⁵⁴ Uganda is in the process of establishing a private market, even for customary lands. Ultimate title vests in the "citizens of Uganda,"⁵⁵ and citizens who gain customary tenure receive a customary certificate of ownership, entitling them to

⁵² See *supra* note 14. Mozambicans often objected to the principle of State ownership of all land because they thought of the land that they used as "their" land. Tanner, *supra* note 2 at 26.

⁵³ Cotran, *supra* note 13 at 167-68. Also, it is problematic to suggest that the current status of the law does not represent the will of the people; Mozambique has enjoyed peaceful democracy for over a decade, and duly elected representatives have opted to preserve the vesting of ultimate title in the State. Legislative history of Mozambican enactments is generally unavailable, so it is difficult to determine which interests were voiced when the Constitution and subsequent Land Laws restricted alienability. Greater support for Renamo in certain provinces, especially further north, suggests that the "voice of the people" may not in fact reflect the will of several major ethnic minorities. In the 2004 election, Renamo candidate Afonso Dhlakama achieved a majority of the votes in Sofala province and nearly 50% in Nampula, Zambézia and Manica, even though Frelimo candidate Armando Guebuza won a landslide victory. Mozambique News Agency AIM Reports, *Election Special* (4th Dec. 2004), at <http://www.poptel.org.uk/mozambique-news/newsletter/election5.html>.

⁵⁴ However, during colonization productive land was concentrated into the large private estates, so distributive inequality is a major concern. Julian Quan, *Land Tenure, Economic Growth and Poverty in Sub-Saharan Africa*, in *EVOLVING LAND RIGHTS*, *supra* note 14 at 32.

⁵⁵ UGANDA CONST. Art. 237(1) ("Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.").

lease, mortgage, subdivide, sell, or otherwise transfer the land.⁵⁶ Ugandans with customary certificates of ownership are thus guaranteed full alienability rights, subject to the restrictions of customary law,⁵⁷ and may even apply for freehold title in land.⁵⁸

But Mozambique is clearly not alone in its alienability restrictions. Tanzania, its neighbor to the north, has a very similar land tenure regime. The Land Act of 1998 confirms the constitutional vesting of all land in the President.⁵⁹ Like Mozambique, Tanzania grants use rights, calling them “rights of occupancy” and dividing them into two categories: granted rights (applied for in a formal petition procedure) and derivative rights (which are obtained by customary use).⁶⁰ Tanzania also retains significant control

⁵⁶ Uganda Land Act (1998) Art. 9(2) (“A customary certificate of ownership shall confer on the holder of the certificate the right of the holder to undertake, subject to the conditions, restrictions and limitations contained in the certificate and subject to the provisions of subsection (1) and transactions in respect of that land which may include but shall not be limited to (a) leasing the land or a part of it... (c) mortgaging or pledging the land or a part of it... (d) subdividing the land or a part of it... (f) selling the land or a part of it... (h) disposing of the land by will.”).

⁵⁷ *Id.* Art. 4(1)(e) (customary tenure applies “local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land”). The presumption is that the right to sell is permitted unless restricted by customary law. *See id.* Art. 9(2)(f).

⁵⁸ *Id.* Art. 11(1).

⁵⁹ Tanzania Land Act (1998) Art. 3(1)(a) (“All land in Tanzania is public land vested in the President as trustee on behalf of all citizens.”). Arguably, the phrase “as trustee on behalf of all citizens” may imply that the citizens may retain some reserved rights. Moreover, the vesting of root title does not necessarily limit the scope of property rights granted to the people, which are set forth in detail in other provisions of the Act.

⁶⁰ Tanzania Land Act (1998) Art. 19(1) (“The rights to occupy land which a citizen, a group of two or more citizens whether formed together in an association under this Act or any other law or not, a partnership or corporate body, in this Act called right holders’ may enjoy under this Act are hereby declared to be (a) granted right of occupancy; (b) a right derivative of a granted right of occupancy, in this Act is called a derivative right”); *see also* Art. 2 (“‘right of occupancy’ means a title to the use and occupation of land and includes the title of a Tanzanian citizen of African descent using or occupying land in accordance with customary law;” “‘derivative right’ means a right to occupy and use land created out of a right of occupancy and includes a lease, a sub-lease, a license, a usufructuary right and any interest analogous to those interests”). These rights resemble the rights granted in Mozambique, except that Tanzania does not provide for use rights based on 10-year use, an option that the war-torn Mozambique included to accommodate IDPs. *See supra* notes 34, 44.

over the alienability of use rights; the Act codifies detailed procedures for disposal of rights of occupancy.⁶¹ Tanzania's refusal to permit uninhibited alienability⁶² could therefore put it under the same scrutiny that Mozambique would receive under international law.

Various other African nations impose alienability restrictions. Swaziland curiously splits the difference, giving dual treatment to customary and freehold lands. Swazi law recognizes two distinct types of land – Title Deed Land (TDL), freehold land that can be sold without limitation, and Swazi National Land (SNL), which cannot be.⁶³ Lesotho, landlocked within freehold South Africa, expressly prohibits alienability, and various other African nations impose intermediate forms of alienability restrictions, such as Kenya, Rwanda, Eritrea, Ethiopia, Zambia and Zimbabwe.⁶⁴ These widespread examples of nations restricting alienability throughout Africa call into question the contention of alienability proponents that there is an increasingly universal recognition of a fundamental human right to sell property.⁶⁵

⁶¹ Tanzania Land Act (1998) Arts. 36-40. These provisions are much more elaborate than Mozambique's Land Act, but the effect is the same: use right transfers require government approval.

⁶² In addition to bureaucratic formalities, governmental oversight over alienability also introduces elements of "corruption, nepotism, unconscionable allocation etc." which support criticism of the vesting of radical title in the President. Issa J. Shivji, *The Land Acts 1999: A Cause for Celebration or a Celebration of a Cause?*, Keynote Address to the Workshop on Land held at Morogoro 4-5 (19-20 Feb 1999).

⁶³ SNL can be subdivided into two groups: "land held under customary tenure, which may not be sold, mortgaged or leased and is under the control of the chiefs; and land which is leased, or held in trust by private companies controlled by the monarch." Martin Adams, Siphosibanda and Stephen Turner, *Land Tenure Reform and Rural Livelihoods in Southern Africa*, NAT'L RESOURCE PERSPECTIVES 39 (1999), available at <http://www.odi.org.uk/nrp/39.html>. Because nearly all Portuguese settlers abandoned their freehold lands after independence (*supra* note 25 and accompanying text), Mozambique was not similarly confronted with the challenge of accommodating freehold claims while simultaneously recognizing customary use.

⁶⁴ WILY, LIZ ALDEN AND SUE MBAYA, LAND, PEOPLE AND FORESTS IN EASTERN AND SOUTHERN AFRICA AT THE BEGINNING OF THE 21ST CENTURY: THE IMPACT OF LAND RELATIONS ON THE ROLE OF COMMUNITIES IN FOREST FUTURE, 304-305 (2001).

⁶⁵ See also *supra* note 112 and accompanying text.

II. MOZAMBIQUE'S COMPLIANCE WITH INTERNATIONAL LAW

There is significant uncertainty regarding the scope of the fundamental human right to property, and whether it requires private ownership of land in a free market.⁶⁶ Although there is universal acknowledgement of at least *some* property rights,⁶⁷ there is no universally-recognized principle of a right to *private* property in international law.⁶⁸

Before analyzing international recognition of alienability rights, several points regarding land ownership under international law should be acknowledged. First, international human rights law can only exert external pressure on sovereign nations to modify national property rights. A nation such as Mozambique may or may not yield to this pressure by revising its own statutory or constitutional provisions.⁶⁹ Second, it is important to distinguish alienability restrictions from the vesting of ultimate title.⁷⁰

⁶⁶ The “fundamental” nature of any given human right is debatable. The social compact theory of human rights, as formulated by Locke, describes individual rights as existing at natural law, predating society and governments, and holds that the formation of government requires that citizens surrender some of their rights in order to provide for social stability. John Locke, *The Second Treatise of Civil Government* §§ 4, 89, 95 (1690). The extent of the rights that *must* be surrendered, in order to promote the welfare of the whole, is part of an ideological capitalist-socialist debate that is beyond the scope of this Note, although it is discussed briefly in the context of African development, *supra* Part III.B.

⁶⁷ *Supra* note 86 and accompanying text.

⁶⁸ Patrick M. McFadden, *The Right to Stay*, 29 VAND. J. TRANSNAT'L L. 1, 30 (1996).

⁶⁹ It is doubtful that other nations would invoke international property rights as justification for sanctions or use of force. However, the pressure exerted by international law in this area is arguably becoming more powerful in its potential influence on domestic law. *See supra* Part II.B.

⁷⁰ A nation may vest all title in the State, pursuant to socialism, cultural custom, or other ideologies, yet still have a free land market economy. For example, if Mozambique allowed use rights to be freely transferred without governmental supervision, a free market to land would effectively be created, with the government maintaining only the control of the granting of those use rights at 50-year intervals. It would technically own the land, but the exchanged use rights might have near-freehold value. Zanzibar's 1992 Land Tenure Act vests land title in the President, yet imposes no restrictions on the right to sell the “interest in the land.” WILY AND MBAYA, *supra* note 64 at 304. Moreover, even nations with completely private land markets typically retain some notion of sovereign supremacy over land. For example, customary international law recognizes the right of sovereign nations to expropriate property for public use if justly compensated. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS §712 (1987).

Finally, international law typically focuses more on the issue of property expropriation without just compensation rather than on limitations on alienability.⁷¹

This Part will evaluate whether Mozambique is in compliance with current property rights recognized in treaties and customary international law, and concludes that alienability is gradually becoming an essential component of the right to own property.

A. The Right to Property in International Law Treaties

Early efforts in the international human rights movement to create binding human rights obligations often included the right to own property. Despite these efforts, only two treaties to which Mozambique is a party are relevant in determining whether Mozambique has committed to respect property rights: the UN and Banjul Charters.

1. The United Nations Charter

Mozambique became a member of the United Nations in 1975,⁷² soon after gaining independence. The UN Charter does not enumerate property rights; however, it does define Mozambique's general obligations to ensure and protect human rights, declaring in Article 1 that one of the purposes of the United Nations is to promote and encourage respect for human rights.⁷³ It further specifies, in Article 56, that all members "pledge themselves to take joint and separate action in cooperation with the [UN] Organization for the achievement of the purposes set forth in Article 55,"⁷⁴ which outlines the UN's commitment to development and human rights. Article 55 sets forth

⁷¹ *See id.* In this respect, Mozambican law is nominally satisfactory but disappointing in practice. The Mozambican Constitution states its doctrine of eminent domain, "Expropriation may only take place on grounds of public need, use or interest, as defined by law, and there shall be just compensation." MOZAM. CONST. Art. 86 §2. *See also* Lei 19/97 Art. 18 §1(b), which describes expropriation as a revocation of the use right. Because a private land market does not exist, the determination of just compensation is consequently problematic. This Note does not address the relationship between alienability and takings, but recognizes that the right to be paid for one's land may in theory be related to the right to sell it.

⁷² United Nations, *List of Member States* (2003), at <http://www.un.org/Overview/unmember.html>.

⁷³ UN Charter, Art. 1 §3 ("To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion").

⁷⁴ *Id.* Art. 56.

the UN's mission to promote "higher standards of living, full employment, and conditions of economic and social progress and development," and to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."⁷⁵ The Mozambican government is certainly committed to development,⁷⁶ and it likely sees its decision to restrict alienability as furthering this first Article 55 goal.⁷⁷ But the question remains whether the right to private land ownership qualifies as one of Article 55's unspecified human rights or fundamental freedoms. Nations like Mozambique are obligated under Article 56 to promote rights without concrete certainty as to what those rights are.

That the right to own property was one of the goals of the United Nations would become clear through subsequent efforts to declare basic human rights. The Universal Declaration of Human Rights was proclaimed by the General Assembly in 1948, and explicitly announced the right to own property as an international human right in Article 17: "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."⁷⁸ Arguably, the Universal Declaration formally states rights already conceived when Article 55 of the UN Charter was written; however, as a General Assembly recommendation, the Charter is not legally binding.⁷⁹ The Declaration by its own text describes its principles as normative, not obligatory – a "common standard of achievement for all peoples and all nations."⁸⁰ It

⁷⁵ *Id.* Art. 55(a) and (c).

⁷⁶ See generally *Action Plan for the Reduction of Absolute Poverty (2001-2005) (PARPA)* (2001), available at http://poverty.worldbank.org/files/Mozambique_PRSP.pdf [hereinafter *PARPA*].

⁷⁷ Land use is an essential element of the development process, and the necessity of land privatization in African development is hotly debated. See *supra* Part III.B. The broader question of whether Mozambique has sufficiently cooperated with the UN in development is a separate issue beyond the scope of this Note.

⁷⁸ Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).

⁷⁹ The Office of the High Commissioner for Human Rights concedes that GA recommendations are not legally binding, but asserts that "the impact of a General Assembly recommendation may be particularly strong in the case of a text adopted unanimously, by consensus or without dissenting vote. Since the early days of the Organization, this has been true of several resolutions, including the one proclaiming the Universal Declaration of Human Rights in 1948." Office of the High Commissioner for Human Rights, *General Assembly and Human Rights*, at <http://www.unhchr.ch/html/menu2/2/ga.htm>.

⁸⁰ Universal Declaration, *Supra* note 78 pmb1.

further explains that the rights declared therein would only become universally recognized through subsequent efforts.⁸¹ While the document as a whole is not binding, many individual rights enumerated therein have become enforceable under customary international law,⁸² and are therefore legally binding upon all states.⁸³

The Cold War and Marxist-Leninist opposition to private property curtailed the promising breadth of the Article 17 property right.⁸⁴ The vagueness of Article 17 is reflected by the Restatement of Foreign Relations Law of the United States, which comments that there is “wide disagreement among states as to the scope and content of that right, which weighs against the conclusion that a human right to property generally has become a principle of customary law.”⁸⁵ As a result, alienability never became a universal human right enforceable under Article 56 of the Charter.

However, according to the Restatement, “All states have accepted a limited core of rights to private property, and violation of such rights, as state policy, may already be a

⁸¹ *Id.* (“...every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...”).

⁸² *See, e.g.,* RESTATEMENT, *supra* note 70 §701 comment d (1987) (“*Human rights obligations under United Nations Charter.* Almost all states are parties to the United Nations Charter, which contains human rights obligations. There has been no authoritative determination of the full content of those obligations, but it is increasingly accepted that states parties to the Charter are legally obligated to respect some of the rights recognized in the Universal Declaration.”).

⁸³ *Id.* at Part 7 Introductory Note (“Few states would agree that any action by a state contrary to any provision of the Declaration is, for that reason alone, a violation of the Charter or of customary international law. On the other hand, almost all states would agree that some infringements of human rights enumerated in the Declaration are violations of the Charter or of customary international law.”).

⁸⁴ McFadden, *supra* note 68 at 28-29 (Article 17 “marks the zenith of international law’s protection of a universal right to private property. Affected by the same experiences of colonialism, imperialism, and foreign capital that helped to destabilize the property component of the international minimum standard and driven by a commitment to socialism in one or more of its many forms, a number of states found themselves increasingly unwilling to accept an international legal obligation to uphold the institution of private property.”).

⁸⁵ RESTATEMENT, *supra* note 70 § 702 comment k.

violation of customary law.”⁸⁶ Article 17 may contribute somewhat to this universally-recognized core of rights,⁸⁷ but its terms are vague. “Property” might mean all or only some of the bundle of property rights, and it might or might not include land or other immovable property.⁸⁸ Also, despite implications deeply rooted in Western property vocabulary, the verb “to own” is not necessarily synonymous with possession of alienability rights.⁸⁹ But because the dominant influence of Western authors shaped international lexicography, socialist contributors to international discussion probably insisted that ownership terminology be avoided, fearing that it might imply a right to sell. Partially due to the capitalist-socialist ideological conflict, and also due to disagreement over which covenant to include it in,⁹⁰ property rights are conspicuously absent from the International Covenant on Civil and Political Rights (ICCPR)⁹¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹² This absence is discouraging given that the covenants are commonly referred to as the “International Bill of Human Rights” and were designed to give legally binding character to the rights enumerated in the Universal Declaration.⁹³

Consequently, there is no binding international treaty promulgated by the United Nations specifically requiring Mozambique to adhere to a defined property right.⁹⁴

⁸⁶ *Id.*

⁸⁷ *See supra* notes 79, 81-83 and accompanying text.

⁸⁸ For example, Mozambicans can sell fruit, but cannot sell freehold title to land. Therefore, even if ownership language is used in international human rights documents, the “right to own property” arguably does not entail private land markets unless it specifies immovable or fixed property.

⁸⁹ “Ownership” may refer simply to possession of some of the rights in the property bundle. For example, Mozambicans purchase land use rights and therefore “own” those rights to the land.

⁹⁰ R. Andrew Painter, *Property Rights of Returning Displaced Persons: The Guatemalan Experience*, 9 HARV. HUM. RTS. J. 145, 167-68 (1996).

⁹¹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 53 (*opened for signature* Dec. 16, 1966, *entered into force* Mar. 23, 1976).

⁹² International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49 (*opened for signature* Dec. 16, 1966, *entered into force* Jan. 3, 1976).

⁹³ McFadden, *supra* note 68 at 29.

⁹⁴ Other treaties to which Mozambique is a party help define the right to property as understood in customary international law, but do not define a universal property right. *See supra* Parts II.A.3 and II.B.

Articles 55 and 56 of the UN Charter merely require that Mozambique cooperate in promoting and encouraging human rights. The “right to own property” asserted in the Universal Declaration is highly influential and may have some contributory effect on customary international law, but it is not legally binding of its own force.

2. *The Banjul Charter*

In the decades that followed the Universal Declaration, regional covenants also enumerated property rights, but not with the “right to own” language used in the Universal Declaration. The American Convention, for example, declares the right to the “use and enjoyment” of property,⁹⁵ and the European Convention requires state parties to respect the right to “enjoyment” of property.⁹⁶

The Organization of African Unity (OAU) used more vague language in the African Charter on Human and Peoples’ Rights (the Banjul Charter), adopted in 1981 and ratified by Mozambique in 1989.⁹⁷ Article 14 states, “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”⁹⁸ This vague “right to property” language, and the allowances for encroachment in the “general interest of the community,” left the alienability question unresolved. The omission of the “right to own” phrase used in the Universal Declaration was necessary

⁹⁵ American Convention on Human Rights, Article 21(1), Organization of American States Doc. OEA/Ser.L/V/II (signed 1969, entered into force 1978) (“Everyone .has the right to the use and enjoyment of his property.”).

⁹⁶ First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 009, Art. 1 (1952) (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.”).

⁹⁷ Banjul Charter on Human and People’s Rights, Organization of African Unity Document CAB/LEG/67/3/Rev.5 (1986); Institute for Human Rights and Development in Africa, *Ratification of African Charter on Human & Peoples’ Rights*, available at http://www.africaninstitute.org/eng/afSystem/afcharter/african_charter_ratif.php.

⁹⁸ *Id.* Art. 14. Article 14’s placement in the African Charter avoided the controversy over whether the right to property should be included as a civil right or an economic right (which frustrated attempts to include property rights in the UN Human Rights Covenants) because “the right is located at the midway point of a detailed list of rights, acting quite literally as a link between civil-political and economic-social-cultural rights.” Painter, *supra* note 90 at 168 & n.98.

due to fundamental differences between the customary African conception of land rights⁹⁹ and Western land “ownership,” which implied private land markets. The drafters of the Banjul Charter also had to consider the various land tenure systems of fledgling African governments struggling with poverty, warfare, and instability following decolonization, many of which imposed restrictions on land alienability.¹⁰⁰ These new governments needed flexibility to bolster their struggling economies, not pressure from capitalist societies during a time of fierce ideological debate.

Notwithstanding the vagueness of the right to property in Article 14, the Banjul Charter is a legally binding human rights treaty, and Mozambique is bound to guarantee the “right to property” even though its scope is unclear. The current interpretation of this vague right is consequently left to customary international law.

3. *Other Treaties*

Mozambique has signed several other treaties that refer to property rights, but in none of them did Mozambique specifically agree to adhere to a uniform land use standard.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) declared a “right to housing” to be protected without racial distinction.¹⁰¹ Mozambique acceded to this Convention in 1983.¹⁰² The right to housing implies a use right to land that Mozambique’s Land Law clearly grants to all parties.¹⁰³ Because the right to housing does not carry with it alienability rights, Mozambican use rights technically comply with CERD.

⁹⁹ See *supra* note 14.

¹⁰⁰ See *supra* Part I.D.

¹⁰¹ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 660 U.N.T.S. 195, Art. 5(e)(iii).

¹⁰² Office of the United Nations High Commissioner for Human Rights, *International Convention on the Elimination of All Forms of Racial Discrimination New York, 7 March 1966, Ratifications and Reservations* (2004), at <http://www.ohchr.org/english/countries/ratification/2.htm>.

¹⁰³ Even if an applicant does not have rights to land based on customary usage or good-faith occupation, she would still be able to request a land use right from the State under Lei 19/97, Art. 12 and could construct housing thereon.

In 1997,¹⁰⁴ Mozambique also acceded to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which arguably suggested the existence of an inherent right to own property. It declared that state parties should ensure “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for valuable consideration.”¹⁰⁵ The terms “ownership” and “disposition,” and reference to transfers by gift or for consideration, clearly imply that alienability is a part of the right to own property as understood by CEDAW. But although this language is far-reaching, the whole provision is qualified by its *comparative* value: it only creates the duty to grant to women “the same rights” enjoyed by men. It therefore only imposes on Mozambique the legal obligation to respect gender equality in land issues, not to broaden the scope of protected property rights for both genders.¹⁰⁶ But while not requiring alienability on its face, the inclusion of alienability terminology in this provision suggests that the drafters of CEDAW considered alienability to be a part of the human right to property, which could be interpreted to have some impact on the status of alienability rights under customary international law.

Finally, the Convention Relating to the Status of Refugees, to which Mozambique acceded in 1983,¹⁰⁷ declares that member States must give refugees “treatment as favourable as possible” regarding the “acquisition of movable and immovable property.”¹⁰⁸ While immovable property has clear reference to land rights, “acquisition”

¹⁰⁴ Division for the Advancement of Women, Department of Economic and Social Affairs, *States Parties* (2004), at <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

¹⁰⁵ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, A/Res./34/180, Art. 16 §1(h).

¹⁰⁶ Even though gender discrimination may still be problematic in practice, gender equality legally trumps customary law according to the Land Law. *See supra* note 41. Since, as written, the Land Law denies alienability to both men and women alike, it complies with CEDAW.

¹⁰⁷ Office of the United Nations High Commissioner for Human Rights, *Convention Relating to the Status of Refugees* (2002), at <http://www.unhchr.ch/html/menu3/b/treaty2ref.htm>

¹⁰⁸ Convention Relating to the Status of Refugees, G.A. Res. 429 (V), 189 U.N.T.S. 137 Art. 13 (“The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of

does not necessarily involve a private market.¹⁰⁹ Moreover, the phrase “as favourable as possible” raises the same contention raised against CEDAW, viz., the treaty merely aims to improve the rights of a disadvantaged party, not to define a universal property right.

In sum, aside from the UN Charter, which imposes a duty to cooperate with the UN in promoting human rights, and the Banjul Charter, which imposes a vague “right to property,” no other treaty can be read to impose upon Mozambique any specific duty to grant private property rights. Although Mozambique has signed several other human rights treaties, in none of them did Mozambique commit to respect an alienability right *per se*. It must therefore be concluded that Mozambique is in full compliance with its current obligations regarding property rights as explicitly delineated under human rights treaties, except insofar as international customary law has modified the meaning of the property right in the UN and Banjul Charters.

B. Mozambique’s Compliance with International Customary Property Law

The full scope of Mozambique’s obligations with respect to property rights are consequently defined in the ambiguous realm of customary international law,¹¹⁰ and several human rights documents indicate a recent shift.¹¹¹ After decades of avoidance, ownership and alienability language began to creep back into the international definition of property in the 1990s, suggesting gradual recognition of a fundamental human right to

movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property”).

¹⁰⁹ It does not specify the scope of property rights acquired or from whom they may be acquired; refugees returning to Mozambique can certainly acquire use rights to land. Lei 19/97 Art. 12(a) or (c).

¹¹⁰ Customary international law has two components: state practice and *opinio juris*. RESTATEMENT, *supra* note 70 §102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

¹¹¹ These documents reflect state practice that may be motivated by *opinio juris*. State practice may be demonstrated through actions undertaken in cooperation with other states. *Id.* at §102 comment b. *Opinio juris* is the sense of legal obligation encouraging these patterns of state practice. *Id.* at comment c. NGOs and other entities using “mobilization of shame” tactics argue that the fundamental human right to property should include more extensive rights. The moral high ground of this position may be the motivating force persuading states to consent to adopt a more liberal grant of property rights. For arguments of organizations in favor of land privatization, see *supra* notes 169-173 and accompanying text.

sell land. After briefly summarizing the status of customary international law during the Cold War, this Part will review several recent documents suggesting that alienability is becoming an essential component of the right to property.

1. *Property in Customary International Law Before the 1990s*

While many rights defined the Universal Declaration may have acquired customary international law status, the property right remained unclear. Since many socialist regimes had nationalized land, state practice defied any suggestion that Article 17 had much effect on customary international law.¹¹² The only other document that may have contributed somewhat to the definition of property rights is CEDAW, which included ownership and alienability among the list of property rights that must be granted equally to men and women, but whose force in developing a concrete definition of fundamental property rights is qualified by its merely comparative requirements.¹¹³

But despite the vagueness of property rights, definitions of property terminology may have become more precise. As discussed, textual ambiguity weakened whatever impact Article 17 may have had on the definition of property rights under customary international law.¹¹⁴ However, categorical avoidance of the phrase “right to own property” during the Cold War¹¹⁵ may have clarified that ambiguity. Because international documents shied away from ownership language, “to own” became more clearly associated with the private market camp of the competing ideologies. The simultaneous avoidance of ownership terms along with alienability terms (e.g. transfer by sale, lease, mortgage, etc.) may have made them interchangeable. At a minimum, describing ownership as a fundamental component of property rights would have been, by subtle implication, somewhat suggestive of a more robust bundle of property rights. The “right to own” language of Article 17 may have consequently become more

¹¹² Moreover, the fact that capitalist nations didn’t insist on defining property rights during the Cold War may suggest that there is state practice demonstrating a contrary international norm of acquiescence to sovereign determinations. *See* RESTATEMENT, *supra* note 70 §102 comment b (suggesting that inaction and acquiescence can constitute state practice).

¹¹³ *Supra* notes 105-106 and accompanying text.

¹¹⁴ *Supra* notes 88-89 and accompanying text.

¹¹⁵ *Supra* notes 84-85, 90-92 and accompanying text.

entrenched in its connotation of possession of root title and the capacity to sell it without governmental restraint.

2. *Recent Human Rights Documents*

Since the end of the Cold War,¹¹⁶ several human rights documents promulgated by the UN and other organizations, in the context of delineating the rights of indigenous peoples, have described property rights more forcefully. Although no significant document has expressly promoted a basic human right to sell land, the recent shift towards more frequent usage of ownership terminology suggests that alienability may soon become part of customary international law.

a. *ILO Convention 169*

The International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, commonly referred to as Convention 169, was adopted in 1989 and entered into force in 1991.¹¹⁷ This highly influential document specifies the rights of indigenous peoples, including the right to control their own resources.¹¹⁸ Whether or not it is accurate to characterize Mozambicans as a whole as an indigenous people, it is important to recognize that Mozambique is comprised of

¹¹⁶ Although numerous nations still restrict alienability (e.g. the African nations enumerated *supra* Part I.D), the fall of the Soviet Union has obviously had a dramatic impact on the balance of power between capitalist and socialist ideologies in the international community.

¹¹⁷ International Labor Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No. 169 (1989, entered into force 1991) *reprinted in* 28 ILM 1382 [hereinafter Convention 169].

¹¹⁸ *Id.* pmb. (stating that it was “appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and *Recognizing* the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development...”); *see also id.* at Art. 13 (“1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. 2. The use of the term “lands” in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”)

numerous tribal affiliations,¹¹⁹ each of which should be recognized as a distinct indigenous group¹²⁰ that would be protected under Convention 169 if Mozambique signs it.¹²¹ The Convention explicitly recognizes “the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy,”¹²² and commits State parties to the Convention to “take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.”¹²³ In addition to ownership, it also explicitly recognizes land alienability rights: “1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected. 2. The peoples concerned shall be consulted whenever consideration is being given to their

¹¹⁹ In a nation of over 19 million inhabitants, there are dozens of ethnic groups, the largest of which is the Makhua with only about 3 million people. See Joshua Project, *Mozambique* (2005), at <http://www.joshuaproject.net/countries.php?rog3=MZ>.

¹²⁰ Convention 169 offers two definitions of indigenous peoples: “(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.” Convention 169 Art. 1. The second definition could include all Mozambicans as one indigenous group, in the sense that the group originally inhabited the country before colonization by Portugal. However, the definition of indigenous peoples has been described as only applying to minorities distinct from the dominant society of the country. See, e.g., World Bank, *World Bank Operational Manual, Operational Directive OD 4.20*, Article 3 (1991), available at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/0F7D6F3F04DD70398525672C007D08ED?OpenDocument>. But the first definition could also apply to each discrete tribal group within Mozambique, each of which would have a valid claim to the property rights outlined in the Convention. If the voice of the people reflects only a majority of these groups, each minority (e.g. those tribes that traditionally support Renamo) might be entitled to DDRIP protection. See *supra* note 53.

¹²¹ For a list of State parties to the Convention, see International Labor Organization, *Convention No. C169@ref was ratified by 17 countries* (2004), at <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.

¹²² Convention 169 Art. 14 §1.

¹²³ *Id.* Art. 14 §2.

capacity to alienate their lands or otherwise transmit their rights outside their own community.”¹²⁴ In interpreting these provisions as a departure from prior international treatment of property rights,¹²⁵ it is important to recognize that this recognition of rights of ownership and transmission is not merely comparative. When CEDAW secured ownership and transfer rights for women, it limited those rights to those already granted to men;¹²⁶ conversely, Convention 169 commits state parties to recognize indigenous rights, without mention of rights already granted to the rest of its citizens. By describing independent land ownership rights of indigenous peoples, Convention 169 implied certain fundamental human rights to land use to which indigenous peoples were entitled.¹²⁷

Convention 169’s status as customary international law is uncertain. Only 17 nations have ratified Convention 169.¹²⁸ This limited adherence is hardly evidence of significant state practice. Furthermore, various countries also voiced objections to the use of ownership terminology.¹²⁹ But the Convention has contributed immensely to

¹²⁴ *Id.* Art. 17 §1(1)-(2).

¹²⁵ Such an interpretation seems necessary, but alternate readings are plausible. In Art. 17 §1(1), the “transmission of land rights” could be limited to land use rights, not title. Moreover, in Art. 17 §1(2), although it specifically refers to the capacity to “alienate their lands,” even if this phrase necessarily includes the sale of root title, it merely requires that the peoples concerned be “consulted.” Mozambique could argue that it “consulted” with representatives from each tribal affiliation in the legislative history of the Land Law. However, the joint references to ownership, transmission, and alienation combine to create what appears more likely to be an explicit recognition that indigenous peoples should have nearly complete autonomy over their own lands. Moreover, Art. 17 §1(2)’s suggestion of sovereign decisions regarding alienation (here, meaning expropriation) of lands might be completely inapplicable to constitutional and statutory decisions to retain ultimate title vested in the government; rather, it is generally cited in reference to conflicts involving government projects to exploit natural resources on indigenous, community-owned lands. *See, e.g.,* International Labor Organization, *Main situations concerning indigenous and tribal peoples which ILO supervision has dealt with* (2003), at <http://www.ilo.org/public/english/indigenous/standard/super1.htm>.

¹²⁶ *Supra* notes 105-106 and accompanying text

¹²⁷ *But see supra* note 178.

¹²⁸ *Supra* note 121.

¹²⁹ S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8(2) ARIZ. J. INT. & COMP. L. 1, 28 (1991) (“Particularly problematic was use of the term “territories” in article 13(2) because

international standards for land rights for indigenous peoples, and it may have become enforceable under customary international law.¹³⁰ If so, and if its specific references to ownership and alienability have modified previous definitions of fundamental human property rights, Mozambique's alienability restrictions may conflict with this evolving standard.¹³¹

b. *UN Documents on the Rights of Indigenous Peoples*

The Draft United Nations Declaration on the Rights of Indigenous Peoples (DDRIP), last revised in 1994, also indicates a shift towards recognition of a universal alienability right. It expressed the core ideas of its predecessor, ILO Convention 169, concerning land use: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or

some governments believed the term might have open-ended implications of sovereignty for indigenous peoples in derogation of the sovereignty of the state."); *Id* at fn. 120 ("Several states also expressed difficulty with the use of the term "ownership" in article 14 to describe the character of the land rights recognized.").

¹³⁰ *See Id.* at 8-15, where Anaya argued in 1991 that "Convention No. 169 is properly viewed as reflecting a new and still developing body of customary international law," and interprets statements made to the United Nations Working Group on Indigenous Populations (which drafted the DDRIP, discussed in the next section) and to the ILO committee that drafted Convention 169 to generate enough international consensus to establish customary international law. In 1999, Professor Siegfried Wiessner claimed that customary international law had established that indigenous peoples had "a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used." Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 127 (1999).

¹³¹ On the other hand, the Land Law *would* comply with another property right established in Convention 169: that land uses that indigenous peoples are entitled to include "lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect." Convention 169 Art. 14 §1. The Land Law similarly recognizes land rights to fields left fallow by shifting cultivators and rights of way. *See supra* note 42.

used.”¹³² The DDRIP goes on to expressly delineate the property rights of indigenous peoples: the right to “own, develop, control and use” their lands.¹³³

This phrase of the DDRIP adds significantly to customary international law definitions of property rights. It does not expressly guarantee any alienability rights, but the ownership language used here may further connote alienability as an intrinsic element of the right to property. The separate mention of each of the verbs “own, develop, control and use” may reduce the lexicographical uncertainty over international definitions of these terms, and implies four discrete property rights. “Develop” is not ambiguous; “use” is one stick in the bundle; “control” may have specific reference to the exclusion right. But the word “own,” when used separately and distinctly from the others, must have its own meaning apart from mere use or control. If “own” is not redundant in this phrase, it would be difficult to ascribe any meaning to the word other than alienability, which is the most significant right not enumerated. The DDRIP thereby further solidified the aforementioned implication that ownership language in international documents carries with it the right to sell.¹³⁴ This clarification of distinct property rights was repeated by the Committee on the Elimination of Racial Discrimination (CERD) in 1997, which adopted the DDRIP’s “own, develop, control and use” phrase in its own General Recommendation No. 23, also on the rights of indigenous peoples.¹³⁵ Repetition of the

¹³² Draft United Nations Declaration on the Rights of Indigenous Peoples, E/CN.4/SUB.2/1994/2/Add.1, Art. 25 (1994) [hereinafter DDRIP].

¹³³ *Id.* at Art. 26 (“Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.”).

¹³⁴ *Supra* Part II.B.1.

¹³⁵ Report of the Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples*, G.A. A/52/18, Annex V, Art. 5 (1997) (“The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories...”)

same phrase by two separate UN committees suggests that these may be textual examples of a pervasive recognition of the distinction between ownership and use.

In addition, the DDRIP requires that indigenous peoples be given veto power in decisions on how to develop their lands.¹³⁶ On a local level, the Land Law provides for community participation in both the allocation and management stages.¹³⁷ But the DDRIP might also require that indigenous peoples be given the opportunity to participate in Mozambique's decision to continue State ownership of land. Even assuming that continued restrictions on alienability reflect the voice of the people, any one of Mozambique's tribal groups¹³⁸ could demand alienability rights under the DDRIP.

The DDRIP is still a work in progress, and several sticking points have prevented adoption by the General Assembly.¹³⁹ However, along with CERD's General Recommendation and in the same way as Convention 169, it may have already contributed significantly to customary international law.

3. Summary of Alienability under Customary International Law

The status of the right of land alienation under customary international law remains uncertain. Despite the Universal Declaration's initial guarantee of the right to

¹³⁶ DDRIP Art. 30 ("Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.")

¹³⁷ *Supra* notes 2, 40.

¹³⁸ *Supra* notes 53, 120.

¹³⁹ For a discussion on the role of the DDRIP in international law its progress as of 1999, see Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 101-04 (1999). The Working Group again convened in Geneva in late 2004; for current developments and draft reports, see Office of the United Nations High Commissioner for Human Rights, *Open-Ended Inter-Sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples*, at <http://www.ohchr.org/english/issues/indigenous/groups/groups-02.htm> (2004).

own property, there are still numerous states that do not allow private land markets,¹⁴⁰ signifying substantial state practice that could favor a contrary international norm of acquiescence to sovereign determinations. But in light of the reintroduction of ownership and alienability terminology in recent indigenous peoples' rights documents, customary international law may be in a period of transition. The definition of the word "own" is becoming increasingly interchangeable with possession of root title and the right to sell it. Both ownership and alienability have been described as a fundamental right of indigenous peoples. As a result, it may be accurate to characterize the property right as moving in the direction of free markets.

Where international law goes from here is uncertain. Perhaps because the movement for the rights of indigenous peoples happened to coincide with the end of the Cold War, it was the first time documents specifying property rights were promulgated without significant socialist opposition. If a final UN Declaration on the Rights of Indigenous Peoples is soon ratified,¹⁴¹ the objections and reservations submitted by various nations might help elucidate the current status of customary international law. The next human rights movement involving the specification of property rights for a particular group may provide additional guidance. Unless a future protocol to the ICCPR or ICESCR expressly guarantees a universal property standard, property rights will continue to be defined indirectly by customary international law, by inference from documents protecting certain groups. In the meantime, although Mozambique's Land Law fully complies with existing international norms,¹⁴² because of its prominent

¹⁴⁰ *Supra* Part I.D.

¹⁴¹ *See supra* note 139.

¹⁴² Mozambique's compliance with most aspects of property rights include women's rights, *see supra* note 41; rights of way and fallow fields for shifting cultivators, *see supra* note 42; and protection of rights for IDPs, *see* UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, princ. 28 § 3 (1998) ("Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons."). Mozambique allows IDPs who remain on the lands that they have occupied in good faith to obtain use rights to those lands, and alternatively allows other IDPs who return to their customary lands to

restriction on the alienability of the land itself, it may someday find itself in violation of international law.

III. A PRIVATE LAND MARKET IN MOZAMBIQUE?

Given that Mozambican land alienability restrictions may soon be in violation of international law, the question arises whether international standards would further the cause of human rights in Mozambique. This Part briefly considers the arguments for and against land markets as a development strategy in Africa. It argues that although land privatization in Mozambique would probably be a smooth process, the arguments against privatization may be powerful enough to justify postponing that transition.

A. Practicality of land privatization

If the Mozambican government were to put privatization on its agenda, modifying the current land tenure regime to accommodate a private land market would likely be a smooth process. Land use rights owned in Mozambique comprise a nearly-complete bundle of property rights. Borders have either already been set, or will be once disputes are resolved by local authorities;¹⁴³ it would therefore be prudent to await the substantial completion of the allocation process.¹⁴⁴ Privatization would then merely require that owners of these use right certificates be given uninhibited freedom to sell them without government interference.¹⁴⁵ The transition could be effected instantaneously by simply amending the Land Law, repealing those provisions that impose restrictions on the sale of use rights and on otherwise transferring, leasing or mortgaging land.¹⁴⁶ The government could still retain ownership of root title, retaining only the power to grant use right certificates at 50-year intervals.¹⁴⁷ Or use right certificates could be decreed to be equivalent to perpetual ownership of root title. Alternatively, the transition could be

obtain use rights based on customary use, with disputes to be resolved by local officials. Lei 19/97 Art. 12. Mozambican IDPs thus have both of the two avenues recommended by GPID for finding a place to settle.

¹⁴³ *Supra* notes 2, 40 and accompanying text.

¹⁴⁴ Tanner, *supra* note 2 at 39.

¹⁴⁵ For current restrictions on the sale of use rights, *see supra* notes 43-50 and accompanying text.

¹⁴⁶ E.g. Lei 19/97 Art. 3 and Art. 16 §2.

¹⁴⁷ As suggested *supra* note 70.

implemented gradually by offering holders of use right certificates the option of upgrading those certificates to a title deed, in exchange for a small fee. The government would thereby be able to increase revenue, while still retaining ultimate control over the land by reserving the basic regulatory powers of eminent domain and zoning regulations. Regarding any lands that remain unallocated and undisputed, the government might have to temporarily postpone granting new requests until the market stabilizes. However the process were implemented, most individually-held use rights would be smoothly converted into fee simple deeds.

Conferring alienability on community-owned use rights¹⁴⁸ might be more difficult. As observed in Russia in the early 1990s, privatization can present many problems when the privatized goods are not already held individually.¹⁴⁹ In Mozambique, for example, a fallow field claimed by a local community might be difficult to privatize if various members of that community disagreed over which family would be next in line to use that field. Such unallocated, community-owned rights should be assigned to individuals before privatization to avoid disputes. The Land Law could also be amended to provide for joint tenancy of such lands, with subsequent disputes to be resolved by local authorities.¹⁵⁰

¹⁴⁸ *E.g.*, rights acquired by communities based on customary use. Lei 19/97 Art. 12(a); *see* text cited *supra* note 44.

¹⁴⁹ These problems are characterized by Professor Michael Heller as a “tragedy of the anticommons.” Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623-624 (1998). In the well-known tragedy of the commons, too many owners have the right to use a certain resource without the right to exclude one another (e.g. not being able to find space on the lawn at a public park). In Professor Heller’s anticommons, too many owners hold the right to exclude others from a resource, so the resource will become underused: “private property emerges less successfully in resources that begin transition with the most divided ownership. In such resources, poorly performing anticommons property is most likely to appear and persist. In contrast, private property emerges more successfully in resources that begin transition with a single owner holding a near-standard bundle of market legal rights. In such resources, the transition from a socialist to a market economy occurs more smoothly.” *Id.* at 631. He explains that in Russia, cars were privatized overnight because car owners already held a nearly-complete bundle of rights. *Id.* at n. 53. On the other hand, grocery stores were not efficiently privatized because of uncertainty over ownership. *Id.* at n.53 & 634-35.

¹⁵⁰ Possibly by amendment to Lei 19/97 Art. 24.

Overall, privatization would likely be simple to administer. Furthermore, the new land market could quickly stabilize. Land already has some limited value, since land use rights are already transferable subject to government approval,¹⁵¹ and since there is evidence of a black market already at work.¹⁵² The removal of alienability restrictions might therefore result in a uniform upward¹⁵³ adjustment in the value land has already acquired. Since privatization appears to be a manageable and lucrative process, the possibility of freeing up the potential value of the right to sell seems initially appealing.

B. The ideological debate over privatization in African development

But despite the apparent benefits of privatization, there are also significant concerns. Besides Mozambique, various other African governments have placed limits on alienability,¹⁵⁴ and it should not be assumed that they have done so out of ignorance or in order to perpetuate tyranny. They may consider themselves justified by legitimate cultural norms; human rights activists accustomed to private land markets should recognize the cultural origins of customary African relationships with their land, rather than mischaracterizing them as simplistic or outdated. But perhaps more importantly, alienability restrictions may be calculated developmental decisions. This section argues that, contrary to Western assumptions that economic success is best achieved with a private land market, it is unclear whether such a transition would benefit Africa.

Customary African law conflicts with both capitalist and socialist principles. Colonialism first corrupted the balance of customary land tenure systems, where a market economy was previously unknown.¹⁵⁵ Tempted by the new European markets, greedy

¹⁵¹ *Supra* notes 47-50 and accompanying text.

¹⁵² *Supra* note 51.

¹⁵³ Assuming that the arguments are correct that some of the land's value is locked up due to current alienability restrictions. *See supra* notes 51 and 173.

¹⁵⁴ *Supra* Part I.D.

¹⁵⁵ As explained by M'Baye, *supra* note 12 at 154-55, "Market economy has ruined the system of collective and inalienable property. The introduction of money, by making it possible to transform a piece of land or cattle from the family's common herd into an easily hidden sum of money, placed temptation in the way of the manager of collective property... The colonial legislator put the idea of individual property in the peoples' minds." It is impossible to say whether African customary land law would have remained as

tribal leaders and poor individuals desperate to provide for their families broke from tradition sold their property for money.¹⁵⁶ Socialism, however, has had even greater effect on customary land law. For example, Frelimo's state enterprises disrupted the traditional land allocation more dramatically than Portuguese plantations had, leading to massive relocation of rural communities.¹⁵⁷ Given the conflict between these three systems in Africa, it can be difficult to ascertain the motives of a government's alienability restrictions. Arguably, the Land Law's semi-privatization process, the granting of use rights, was motivated by severe economic duress,¹⁵⁸ not to restore pre-colonial inalienability. Although Mozambique may justify its continued alienability restrictions as culturally motivated,¹⁵⁹ they may conflict with customary tenure, which originally recognized some alienability.¹⁶⁰

Despite Frelimo's renunciation of Marxism-Leninism, its continued alienability restrictions may plausibly be characterized as "socialist," to the extent that "socialism" is defined as the basic principle that individuals must sacrifice certain rights for the good of the collective.¹⁶¹ Some socialist principles are frequently incorporated in capitalist economies, since it is universally recognized that government should exercise at least

before had Europe not colonized Africa, or if it would eventually have adapted to accept free land markets. Arguably, had capitalist nations not colonized Africa, exploiting African resources and exporting slaves for cheap labor, it is possible that the current strength of their economies might not be nearly as significant, thus making less persuasive today's frequently-invoked empirical "proof" for the argument that *laissez-faire* economics is the best way to further economic development.

¹⁵⁶ M'Baye continues, *id.* at 154-55, "The principle of inalienability has lost its force for a greedy 'land chief,' or even for one simply overwhelmed by the cares of providing food and clothing for a large family. Faced with a buyer who is indifferent to the philosophical considerations of ancient Africa, he flouts the custom by selling a parcel of land or an ox."

¹⁵⁷ *Supra* notes 28-29 and accompanying text.

¹⁵⁸ *See supra* notes 31-32 and accompanying text.

¹⁵⁹ *Supra* notes 52-53 and accompanying text.

¹⁶⁰ *Supra* note 14.

¹⁶¹ LOUIS HENKIN, *THE AGE OF RIGHTS*, 189 (1990) ("There have been many socialisms and even more than one socialist idea; they have elements in common. Socialism worthy of the name would presumably include: a commitment to the welfare of the collective, to the interests of the society... to limitations on the free market, on individual capital, on private economic enterprise, on accumulation of private property.")

some measure of control over the allocation of resources and the national economy. Most governments nationalize education; many have socialized health care; even crime prevention by state-funded police is a fundamentally socialist principle. Arguably, so long as government maintains respect for the individual, it may legitimately limit what may otherwise be considered “natural” property rights for the good of the collective.¹⁶² Proponents of African socialism contend that government control over land is essential to coordinate a productive national economy and to provide for the basic economic needs of its citizens.¹⁶³ There is also the possibility that capitalism could be detrimental to development, actually accentuating poverty in Mozambique. Most Mozambicans are subsistence farmers;¹⁶⁴ if their land were privatized, many might sell it to the highest bidder and move to the city when times get tough.¹⁶⁵ Under customary law, alienability

¹⁶² Socialism does not necessarily conflict with the idea of basic human rights; *see id.* (“The commitment to the welfare of the collective need not preclude a hard core of respect for the individual; the human rights perspective... accepts a right to own property and not be deprived of it arbitrarily, but does not preclude limitations on the kinds of property owned, on some uses of property, or on kinds of economic activity... conflict between socialism and the idea of rights, then, is not inherent or inevitable, and some socialisms have combined socialist principles with deep attachment to individual rights.”)

¹⁶³ African Socialism presents moral arguments against capitalism, arguing that one individual should not have any more right than any other to land, and attacks as morally unjustifiable the “first in time” rule that is the foundation of freehold title. According to Nyerere, land is a God-given gift, and those who work the land should reap the benefits of their sweat, not landlords. He argued, “The foreigner introduced a completely different concept, the concept of land as a marketable commodity... Such a system is not only foreign to us, it is completely wrong. Landlords, in a society which recognizes individual ownership of land, can be, and usually are, in the same class as the loiterers I was talking about: the class of parasites.” Julius Nyerere, *Ujamaa: African Socialism*, available at <http://www.blackstate.com/nyerere.html>.

¹⁶⁴ *PARPA*, *supra* note 76 at 4.

¹⁶⁵ The Mozambican government has not explicitly justified its restrictions with reference to this potential problem. However, it appears that the government recognizes that land may not be used efficiently. It has suggested that low agricultural productivity is best explained by the lack of equipment and irrigation: “Almost all rural households have access to at least a plot of land to farm (*machamba*)... The poor and non-poor have approximately the same amount of land per household, but the non-poor tend to use more equipment (inputs) and to have more irrigated land than the poor. Nevertheless, the use of equipment and inputs is very low and this is reflected in *low levels of agricultural productivity* in the country. Land is not, therefore, a limiting factor for poor peasants, but rather their capacity (and therefore means of production)

consisted of rare instances of transfers in kind, usually within the community,¹⁶⁶ which would not result in land concentration. Under a modern free market regime, on the other hand, an investor could offer low prices to the neediest landowners and slowly buy off local communities, one family at a time. Considering that the overwhelming majority of Mozambicans depend on their land to survive,¹⁶⁷ many former landowners might be unable to find another means of sustaining themselves once they moved to the cities. This potential problem is not without precedent; land titling in Kenya has resulted in heightened inequality, landlessness, and rural-urban migration.¹⁶⁸

Despite these concerns, it is contended that privatization is nevertheless a superior system. The obvious argument is that socialist principles cannot be successfully implemented in practice, given the failure of communist regimes in the Soviet Union and Eastern Europe, and elsewhere. It is also asserted that commodified land would find its way into the hands of those who would use it most efficiently,¹⁶⁹ leading to overall agricultural growth.¹⁷⁰ Problems of distributive justice are justified on the theory that the benefits will “trickle down” to the poor.¹⁷¹ Thus, proponents of privatization in Africa¹⁷²

to work the land which they have, and achieve acceptable levels of productivity.” *Id* at 16. Its strategy for improving conditions for these poor farmers is therefore to supply equipment in order to improve their ability to work their land. However, the government must recognize that alternatively, in a free market system, poor farmers achieving low agricultural productivity might have to sell their land at low prices.

¹⁶⁶ *Supra* note 14.

¹⁶⁷ *Supra* note 164.

¹⁶⁸ Quan, *Land Tenure*, *supra* note 54 at 35, 37.

¹⁶⁹ *Supra* note 9.

¹⁷⁰ *See* Platteau, *supra* note 14 at 55 (arguing that efficiency gains would include more efficient crop choices and elimination of fragmentation and subdivision, as well as enhanced investment incentives).

¹⁷¹ Quan, *Land Tenure*, *supra* note 54 at 35 (“Free market theories predict that increased agricultural growth will follow, bringing benefits not only to those receiving title directly, but also to the poor as a result of more employment, cheaper food, and other ‘trickle down’ effects.”).

¹⁷² The World Bank has played a major role in land policy, initially recommending privatization as essential to development. For a historical summary of the World Bank’s position and recent re-thinking, *see id.* at 38; *see also* Julian Quan, *Reflections on the Development Policy Environment for Land and Property Rights* (draft) 4-5 (2003), available at

http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/africa_gen.htm

perceive customary tenure regimes as an obstacle, claiming that adherence to customary tenure depreciates the value that the land *could* have in a free market.¹⁷³ But not only do these arguments belittle African custom and downplay serious potential distributive concerns, but privatization might also not be as efficient as it is assumed to be. Land markets encourage land concentration even though economic theory predicts that smaller landowners are more efficient.¹⁷⁴ There is also empirical evidence that customary tenure may be just as capable of providing incentives to invest on one's land. For example, inheritable use rights at customary law, and endorsed in Mozambique,¹⁷⁵ can give to rights holders the same security and confidence to invest in land improvements as freehold title.¹⁷⁶ As long as there is an incentive for each landholder to maximize the value of the land, capitalism would have no inherent advantage over customary tenure.

Given the powerful arguments against privatization, the decision of whether or not to restrict alienability in Africa is clearly complicated. Combining development concerns with consideration for customary law, it is no surprise that many African nations have adopted various levels of alienability restrictions.¹⁷⁷ Countries like Mozambique are only likely to change their agendas if it is persuasively demonstrated that privatization in Africa would result in significant progress, or if regime changes result in new governments with different economic strategies. Or, as suggested by this Note, current regimes may eventually be coerced by international human rights law.

CONCLUSION

¹⁷³ See Quan, *Land Tenure*, *supra* note 54 at 35 (“Customary land management has been perceived as an obstruction to development, because of the *insecurity* of land rights deemed to be inherent under such arrangements, and the view that land is too strongly associated with non-monetary cultural values in Africa.”). Mozambique’s restrictions on alienability of root title have been specifically criticized for locking up some of the land’s value. See *supra* note 51 and accompanying text.

¹⁷⁴ Quan, *Land Tenure*, *supra* note 54 at 46. Thus, if the Mozambican government were to offer freehold title for sale, large tracts of land would be concentrated in the hands of wealthy foreign investors, which could result in less efficiency.

¹⁷⁵ Lei 19/97 Art. 22.

¹⁷⁶ Quan, *Land Tenure*, *supra* note 54 at 35.

¹⁷⁷ *Supra* Part I.D.

The international interpretation of human rights is in large part a result of ideological war. Capitalist democracies have emerged from the Cold War victorious, and are ready to impose their view of the “right way” upon the international community. The recent resurgence of ownership and alienability language in human rights documents reflects this Western influence. Third World countries like Mozambique may soon be pressured to alter their economic strategies because of international pressure to comply with what more influential nations have defined as “basic” human rights. But it is critical to recognize that the underlying assumption, that land alienability is a fundamental right that existed at natural law, may not be as universally acceptable as Western human rights activists believe.¹⁷⁸

Despite growing evidence that alienability is gradually becoming a part of customary international law, this Note concludes that alienability restrictions probably do not yet violate current standards of international law. The Mozambican Land Law of 1997 is in violation of no explicit provision regarding property rights in any treaty to which Mozambique is a party, and it is still too early to say whether the right to sell land is an essential characteristic of the human right to property under customary international law. But as Western ideals of private property rights are incorporated into international documents, alienability may become a central feature of the human right to property, pressuring nations like Mozambique to privatize their land.

¹⁷⁸ Convention 169 and the DDRIP seem to suggest that indigenous peoples have a fundamental right to alienability. *See supra* text accompanying notes 125-127 and 134-135. However, African customary law did not comprehend a private land market, *see supra* note 14, so it becomes difficult to prove that alienability of land existed at natural law. The universal applicability of human rights systems was strongly debated in the context of “Asian values” at a 1993 human rights conference in Vienna. A Chinese delegate argued, “The concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture, and values of a particular country... Thus, one should not and cannot think [of] the human rights standard and model of certain countries as the only proper ones and demand all other countries to comply with them...” Speech by Liu Huagiu, Head of the Chinese Delegation at the World Conference on Human Rights in Vienna (June 15, 1993), *quoted in* Micheal Davis, *Chinese Perspectives on Human Rights*, in *HUMAN RIGHTS AND CHINESE VALUES* 17 (Michael C. Davis ed., 1995).

This Note suggests that human rights activists rethink their interpretations of “fundamental” property rights, which risk imposing one culture’s values on another and may in fact hinder economic development. In the case of Mozambique, the influences of customary law, colonial exploitation, and Marxist-Leninism make it difficult to ascertain what Mozambicans believe to be fundamental land rights. Given that post-war democracy has kept Frelimo in power, the people may have willingly expressed their preference for alienability restrictions over alternative economic strategies.¹⁷⁹ Before alienability rights become a legally-binding standard, the international community should consider that citizens of countries like Mozambique might not desire the “right” to sell their land.

¹⁷⁹ In other words, the right to sell does not seem as appealing when it is accompanied by the possibility of more landlessness, urbanization and economic disparity. *See supra* notes 164-168 and accompanying text. Considering these potentially more dangerous deprivations of human necessities, it becomes necessary to prioritize the human rights to be protected. *See* Huagu, *supra* note 178 (continuing, “...for the vast number of developing countries, to respect and protect human rights is first and foremost to ensure the full realization of the rights to subsistence and development...”).