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## Securing Land Tenure & Agricultural Development in the Guinea Savannah: A Ghanaian Case Study

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# SECURING LAND TENURE & AGRICULTURAL DEVELOPMENT IN THE GUINEA SAVANNAH: A GHANAIAN CASE STUDY

*Michael S. Talbot\**

## INTRODUCTION

In 2009, a comprehensive study commissioned by the World Bank dubbed the Guinea Savannah “Africa’s Sleeping Giant.”<sup>1</sup> Covering some 600 million hectares, the Guinea Savannah ranges from Guinea Conakry on the west coast of Africa, east to South Sudan, as far south as Mozambique, and includes an estimated 400 million hectares of arable land in nearly two-dozen countries. Yet the World Bank reports that less than 10% of this area is being successfully used for agricultural production.<sup>2</sup> Simply put (and as will be explicated throughout this paper), the Guinea Savannah represents a substantial opportunity in the effort towards food security and poverty reduction – two of the foundational components of human rights promotion.

There are, of course, myriad reasons why the agricultural potential of the Guinea Savannah has gone largely unexploited; cultural, political, commercial, financial, and numerous other factors are at play. Nor is the Guinea Savannah a homogenous region, and the influence of individual factors inevitably varies as one travels the nearly 14,000 kilometers from Guinea Conakry to Mozambique. Throughout the continent there is substantial variation in both topography and culture. Yet, a central component of any effort to

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<sup>1</sup> MICHAEL MORRIS ET AL., AGRIC. AND RURAL DEV. UNIT, THE WORLD BANK, AWAKENING AFRICA’S SLEEPING GIANT: PROSPECTS FOR COMMERCIAL AGRICULTURE IN THE GUINEA SAVANNAH ZONE AND BEYOND (2009) [hereinafter MORRIS ET AL., AFRICA’S SLEEPING GIANT]; see also Michael Morris, et al., *A Breadbasket for Africa: Farming in The Guinea Savannah Zone*, SOLUTIONS, Apr. 2012, at 44 (providing a concise overview of the World Bank’s findings).

<sup>2</sup> MORRIS ET AL., AFRICA’S SLEEPING GIANT, *supra* note 1, ¶ 3.

promote agricultural development within the Guinea Savannah will necessarily entail a consideration of land tenure.

The central role of land tenure in agricultural development has been recognized by the World Bank<sup>3</sup> and serves as a major presumption of this note. Strong agricultural development is expected to promote food security and poverty reduction therefore enabling human rights promotion. This note demonstrates the significance of land tenure, but this is not intended to minimize the influence of other factors. Similarly, a case study of Ghana provided in the second half of this note should not be understood as indicative of the circumstances throughout the entire Guinea Savannah, but simply as an example of the difficulties involved in developing land tenure policy and law.

This note aims to examine the implications of various approaches to land tenure and their potential impacts on food security and poverty reduction. No single approach will be promoted because no single approach is without its shortcomings, and in a region as diverse as the Guinea Savannah there simply is no one-size-fits-all solution. The note is structured in order to provide a context that will establish the significance of the discussion, then examine some of the theories underlying the various approaches, and finally take a look at the application of these theories in the developing world.

Section I draws heavily from the World Bank's 2009 Competitive Commercial Agriculture for Africa (CCAA) study to demonstrate why the Guinea Savannah is ripe for agricultural development. The potential of internationally-traded commodity crops suited to the region (and already cultivated in parts of it) combined with access to regional markets could serve as a springboard to greater agricultural and economic development in the future.<sup>4</sup> After establishing themselves on what Jeffrey Sachs would call 'the first rung of economic development,'<sup>5</sup> the people of the

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<sup>3</sup> See *id.* ¶ 280.

<sup>4</sup> *Id.* ¶¶ 60, 88, 90.

<sup>5</sup> JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 73 (2005). Although many find fault with Sachs connecting development directly to the establishment of liberal free markets, this connection is widely accepted by the Bretton Woods institutions and is frequently a pre-condition for loan eligibility. See generally Nancy Holmstrom & Richard Smith, *The Necessity of Gangster Capitalism: Primitive Accumulation in Russia and China*, 51 Monthly Rev., Issue 9

Guinea Savannah might be able to build the momentum to move beyond the insecurity of subsistence farming.

In section II, the immediacy of the need for attention to land tenure is demonstrated through a discussion of the current land grab occurring throughout Africa. As commercial interests attempt to capitalize on the Guinea Savannah's potential for food production, timber, biofuels, and carbon offsetting, it becomes crucial for countries to examine their approach to land tenure.<sup>6</sup> As the potential for profits increases, commercial interests become more and more willing to tolerate the instability that accompanies uncertainty of tenure.<sup>7</sup> These land developers would prefer strong property rights, but it is not commercially viable for them to hesitate and risk losing out while others capitalize. Furthermore, the recognition of property rights enables long-term users to make rational decisions about use and alienation, encouraging stability. And a land grab that leapfrogs land tenure reform will only exacerbate problems.

Section III begins the theoretical component of this note, and examines the two primary approaches to land tenure. First, there is a consideration of the individual titling approach promoted most notably by Hernando de Soto.<sup>8</sup> Second, there is an examination of a more communitarian approach akin to the customary practices indigenous to many parts of the Guinea Savannah. Finally, there is a discussion of the potential for the hybridization of the two approaches. In this section, emphasis is placed on the potential each approach provides for agricultural and economic development, the

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(Feb.) 2000 (providing examples of criticisms against Sachs) *available at* <http://monthlyreview.org/2000/02/01/the-necessity-of-gangster-capitalism>; Warren Nyamugasira and Rick Rowden, *New Strategies, Old Loan Conditions: The Case of Uganda* (2002), <http://www.brettonwood.sproject.org/topic/adjustment/ugandaanalysis.pdf> (last visited Nov. 29, 2012) (critiquing specific conditions for obtaining loans in Uganda).

<sup>6</sup> See LORENZO COTULA ET. AL., INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT ET. AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENTS AND INTERNATIONAL LAND DEALS IN AFRICA 52–59 (2009), *available at* <http://pubs.iied.org/pdfs/12561IIED.pdf?>.

<sup>7</sup> As rates of returns increase, the need for long-term certainty decreases.

<sup>8</sup> See generally HERNANDO DE SOTO, THE MYSTERY OF CAPITAL (2000) (arguing that individual land tenure and other neo-liberal policies form the foundation of economic development).

appropriateness to the region, and any additional concerns, including the protection of vulnerable populations.

Section IV begins the shift from the theoretical to the applied, as consideration is given to the question of scale. The CCAA specifically addressed the question of whether the Guinea Savannah will benefit more from a large-scale fee system similar to that established in the Cerrado region of Brazil or a smaller fee approach like that of Northeast Thailand.<sup>9</sup> Both regions exemplify the potential impact of successful land tenure reform but they also reiterate the importance of tailoring the policy to the region. Given the centrality of the question of scale to formulating a coherent land tenure policy, it is worthwhile to briefly examine the experiences in Brazil and Thailand in an attempt to glean insight relevant to the Guinea Savannah.

Section V finally takes up the evaluation of land tenure in Ghana. This case study is structured according to a loose chronology and traces the development of land tenure in Ghana from the pre-colonial customary practices through the British colonial period to contemporary attempts to direct land use toward development. In these contemporary efforts, one can see both customary and colonial influences.<sup>10</sup> Consideration is given to both the abstract theoretical understanding of land tenure at each stage and the practical application as well as the bridge between them. All of this is colored by an understanding of land policy as reflective of the norms and values of a society—not only how a people see themselves presently but also what they aspire to be in the future. A brief conclusion sums up the central arguments of this note and highlights its main points. As is often the case, there may be more questions raised by this discussion than answered. The hope is that a careful consideration of the issues will lead to a conscientious approach to land tenure reform. If nothing else, the importance of land tenure policy warrants

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<sup>9</sup> MORRIS ET AL., AFRICA'S SLEEPING GIANT, *supra* note 1, ¶¶ 259–79.

<sup>10</sup> See JANINE M. UBINK, IN THE LAND OF THE CHIEFS: CUSTOMARY LAW, LAND CONFLICTS, AND THE ROLE OF THE STATE IN PERI-URBAN GHANA 67–69 (2008); see also CHRISTIAN LUND, LOCAL POLITICS AND THE DYNAMICS OF PROPERTY IN AFRICA 88–89 (2008); see also Kojo Sebastian Amanor, *Night Harvesters, Forest Hoods and Saboteurs: Struggles over Land Expropriation in Ghana*, in RECLAIMING THE LAND: THE RESURGENCE OF RURAL MOVEMENTS IN AFRICA, ASIA AND LATIN AMERICA 103–106 (Sam Moyo & Paris Yeros ed., 2005).

thoughtful action on the part of policymakers, stakeholders, and all others involved.

## I. “AFRICA’S SLEEPING GIANT”

The World Bank’s 2009 CCAA report provides a striking recognition of Africa’s potential for economic development. The report was the result of a collaborative effort between the World Bank; the United Nations’ Food and Agriculture Organization (FAO); the governments of Italy, Canada, and the United Kingdom; and numerous other development institutions. It connects economic development to agricultural development and recognizes great potential for the latter in the Guinea Savannah.<sup>11</sup> The CCAA report draws on field surveys of three representative countries within the region: Mozambique, Nigeria, and Zambia.

The CCAA report hopes to provide ideas for how countries within the Guinea Savannah might replicate the substantial agricultural development gains made in Brazil and Thailand during previous decades.<sup>12</sup> The report proposes that countries in the Guinea Savannah establish competitiveness in low-value commodities such as cassava, cotton, maize, rice, soybeans, and sugar by exploiting preferential access in local and regional markets.<sup>13</sup> This access is the result of both formal incentive programs and the practicalities of global logistics.<sup>14</sup> The authors of the CCAA report believe that by cultivating these low-value commodities and competing in regional markets, local producers will establish a foundation upon which they can later expand to higher-value commodities and a more global market.<sup>15</sup>

But this begs the question: Why the Guinea Savannah? Certainly this approach to agricultural development is not unique to Africa and has already been applied in Brazil and Thailand as well as elsewhere around the world. Furthermore, the fertility of the Guinea Savannah is neither a recent development nor a particularly unique

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<sup>11</sup> MORRIS ET AL., AFRICA’S SLEEPING GIANT, *supra* note 1, ¶ 354.

<sup>12</sup> *Id.* ¶ 5.

<sup>13</sup> *Id.* ¶¶ 116–118.

<sup>14</sup> *Id.* ¶¶ 123–125.

<sup>15</sup> *See id.* ¶¶ 83–90.

characteristic, so what makes the region ripe for agricultural development?

The CCAA report points to five factors that distinguish the Guinea Savannah: (1) steady economic growth suggests good prospects for demand in domestic markets; (2) recognition on the part of governments of the importance of agricultural development and their willingness to shape policy toward that end; (3) the strengthening of business interests in many African countries often associated with infrastructure development; (4) increased interest on the part of both domestic and foreign investors; and (5) the availability of technologies that improve crop yields and were not as widely available during the boom years in Brazil and Thailand.<sup>16</sup> Combined, these five factors constitute a perfect storm of potential for agricultural development:

(1) Farmers have a market that demands their product.<sup>17</sup>

(2) Farmers are incentivized to produce by government programs.<sup>18</sup>

(3) Farmers have improved access to markets as a result of improved roads, communication, and electricity, and rural populations have been empowered to take a more active role in development.<sup>19</sup>

(4) Farmers have the ability to obtain capital from both foreign and domestic investors, which they can then use to improve their abilities.<sup>20</sup>

(5) Farmers can take advantage of available technology to improve crop yield and quality.<sup>21</sup>

These are, of course, broad generalizations, and agricultural development in the Guinea Savannah is not without its hindrances as well. Among these are the following facts: (1) international

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<sup>16</sup> *Id.* ¶¶ 354–60.

<sup>17</sup> *Id.* ¶ 356.

<sup>18</sup> *Id.* ¶ 357.

<sup>19</sup> *Id.* ¶ 358.

<sup>20</sup> *Id.* ¶ 359.

<sup>21</sup> *Id.* ¶ 360.

competition is significantly more substantial than it was when Brazil and Thailand underwent their booms; (2) Africa has other priorities it needs to address separately from agricultural production, including HIV/AIDS and climate change, which not only distract from the attention required of agricultural production (and not without reason) but also have a direct impact on it; (3) that although policy makers have been vocal in their commitment to agricultural development, their actions have not always manifested those commitments; (4) the lack of follow-through is also present in donor organizations and has suffered particular stress during the recent economic downturn; and (5) the heterogeneity of the region and the potential for political instability or bureaucratic congestion could raise transaction costs and hinder economic activity.<sup>22</sup>

It is not necessary here to go into much more detail concerning the opportunities and obstacles noted in the CCAA report – the Guinea Savannah possesses the level of potential that the sobriquet of “Africa’s Sleeping Giant” suggests. The CCAA report presents a number of policy recommendations and interventions that the authors believe will assist the nations of the Guinea Savannah in capitalizing on this potential. These recommendations include increasing private and public investment, implementing public sector reform to promote good governance and stability, promoting awareness of potential social and environmental impacts in order to mitigate their effects, institutional reforms, and others.<sup>23</sup> But of the recommendations, the authors seem to suggest that land policy reform is of particular importance.<sup>24</sup> Consequently it is this initiative that is the focus of this paper; undoubtedly, the other initiatives have a significant role to play as well but ultimately clarity first requires focusing one’s attention.

## II. THE LAND GRAB

The urgency of examining land tenure systems in Africa is made apparent by a 2009 report funded by the FAO, the International Institute for Environment and Development (IIED), and the International Fund for Agricultural Development (IFAD). The authors of the report examined land acquisitions during the five years

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<sup>22</sup> *Id.* ¶¶ 362–69.

<sup>23</sup> *Id.* ¶¶ 370–71.

<sup>24</sup> *Id.* ¶ 374.



prior in five African countries including Ghana. All of these countries have territory within the Guinea Savannah, and have experienced activity described in the report as a “land grab.”<sup>25</sup>

The report illustrates several interesting features of the current land grab:<sup>26</sup> (1) there has been a substantial increase in the total area of land being transferred over the past five years, with nearly 2.5 million hectares of land transferred during that time; (2) there has been increased investment in land both in terms of number of projects and area of land dedicated to those projects; (3) large-scale fees make up a minority of claims to arable land often cultivated by small-fee holders, but there is growing demand for those areas; (4) there is some indication of a trend towards an increase in the size of individual acquisitions, with land allocations measured in the hundreds of thousands;<sup>27</sup> (5) a large percentage of land deals involve acquisition by private sector interests, though frequently with substantial support from the government; and (6) a substantial amount of the investment being made is derived from foreign sources.<sup>28</sup>

Given the existence of a land grab, the apparent question is why. What are the motivations driving this land grab? There are of course myriad factors involved but three seem to dominate:<sup>29</sup> climate change, shifting global dietary patterns, and financial gain.<sup>30</sup> First, the environmental concerns involved with climate change have provided an impetus for substantial investment in the research and

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<sup>25</sup> COTULA ET AL., *supra* note 6, at 99–101.

<sup>26</sup> Of course, records of land deals in developing countries are not always available or reliable so the observations made by the report should be treated with caution. They serve as indicators of general trends without the sort of statistical precision one might expect in other circumstances.

<sup>27</sup> This particular trend tends to be more localized in countries like Madagascar, Ethiopia, and Mali and is less pervasive throughout the continent.

<sup>28</sup> COTULA ET AL., *supra* note 6, at 99.

<sup>29</sup> Based on the author’s personal observation during three and a half years in the Sahel, there seems to be a strong argument that the demand for timber constitutes a fourth factor. Although this influence has been around for some time, global population spikes have led to increased demand for both domestic use as well as export. Considering the rapid desertification that is occurring in the Sahel and the gradual intrusion of the Sahara south, there is good reason for residents of the Guinea Savannah to be concerned.

<sup>30</sup> COTULA ET AL., *supra* note 6, at 52–59.

development of alternative energy sources.<sup>31</sup> Among the most promising of these are biofuels made from agricultural products which previously had been used almost exclusively for food consumption.<sup>32</sup> Consequently, a sharp increase in the demand for agricultural products has brought with it an increased demand for arable land. Additionally, concerns about climate change have led to an increased interest in maximizing the carbon offsetting value of land, a use that is not necessarily aligned with maximizing food or fuel production.<sup>33</sup>

Second, the explosion of the global population has heightened the demand for food production.<sup>34</sup> Although there is no need for concern that a Neo-Malthusian catastrophe is around the corner, rapid increases in population and consumption will necessarily put stress on production rates that are increasing at a much steadier rate. Portions of the Guinea Savannah already experience challenges in meeting the nutritional needs of the population without having to compete with wealthier consumers. The challenge is further exacerbated by the fact that substantial portions of the world's population are in the process of shifting from a predominantly vegetarian diet to a more Western-style diet, heavily supplemented with animal protein.<sup>35</sup> Animal protein is not an efficient use of agricultural inputs because the amount of land needed to sustain livestock is disproportionate to the amount of sustenance it can provide.<sup>36</sup> This shift in dietary patterns has magnified the effect of the population explosion and substantially increased the demand for arable land.<sup>37</sup>

Third, due to the increased demand for arable land brought about by concerns of climate change and food production, the world

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<sup>31</sup> *Id.* at 54–56.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 58.

<sup>34</sup> *Id.* at 53.

<sup>35</sup> U.N. ENV'T PROGRAMME, THE ENVIRONMENTAL FOOD CRISIS: THE ENVIRONMENT'S ROLE IN AVERTING THE FOOD CRISES 17 (Christian Nelleman et al. eds., 2009), *available at* [http://www.grida.no/files/publications/FoodCrisis\\_lores.pdf](http://www.grida.no/files/publications/FoodCrisis_lores.pdf); *see also* CTR. FOR STRATEGIC & INT'L STUDIES, A CALL FOR A STRATEGIC U.S. APPROACH TO THE GLOBAL FOOD CRISIS 4–5 (2008).

<sup>36</sup> *See* U.N. ENV'T PROGRAMME, *supra* note 35, at 17.

<sup>37</sup> COTULA ET AL., *supra* note 6, at 54.

experienced a sharp increase in the monetary value of such land.<sup>38</sup> Given that the demand for arable land is likely to continue to rise, many now consider land acquisition to be a solid financial investment. The global food shortage of 2007 and 2008 saw the price of many staple food products skyrocket throughout the world and made it abundantly clear that increased demand and generous rates of return on land investment are reliable expectations.<sup>39</sup>

There are also disincentives to land acquisition as a form of investment, not least of which is the danger inherent in insecure tenure. If a potential investor is not able to determine who owns a particular parcel of land, he will be unable to acquire it except via adverse possession or government intervention. If a potential investor is not assured of the parcel's ownership, he will risk answering a competing claim at a later point and losing any investments. And these concerns are heightened when an investor attempts to assemble a large-scale fee out of several adjoining fees—one problematic title can have repercussions throughout the area. These concerns not only disincentivize land acquisition but also lead to a lower value for the transfer.

Yet insecure land tenure and other disincentives, including political instability and corruption, are likely to only hinder land acquisition. At some point the potential benefits of investment in arable land will outweigh the risks, and the land grab report seems to indicate that this point is fast approaching.<sup>40</sup> Several consequences are likely to result: First, landowners who do not currently have secure tenure are vulnerable to being dispossessed of their land.<sup>41</sup>

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<sup>38</sup> *Id.* at 56–58.

<sup>39</sup> Derek Heady & Shenggen Fan, International Food Policy Research Institute, *Anatomy of a Crisis: The Causes and Consequences of Surging Food Prices*, IFPRI DISCUSSION PAPER 00831, at 15–16 (2008), available at <http://www.ifpri.org/sites/default/files/pubs/pubs/dp/ifpridp00831.pdf>. In the United States, the price of agricultural land has seen double-digit annual growth since 2005, demonstrating the rapid growth in demand for arable land. Cynthia Nickerson et al., *Trends in U.S. Farmland Values and Ownership*, U.S. DEPT. OF AGRIC. ECON. INFO. BULL., Feb. 2012, at 34, available at [http://www.ers.usda.gov/media/377487/eib92\\_2\\_.pdf](http://www.ers.usda.gov/media/377487/eib92_2_.pdf).

<sup>40</sup> See COTULA ET AL., *supra* note 6, at 99–102.

<sup>41</sup> George C. Schoneveld et al., *Center for International Forestry Research, Towards Sustainable Biofuel Development: Assessing the Local Impacts of Large-Scale Foreign Land Acquisitions in Ghana* § 4.2 (forthcoming 2010), available at

Second, those who do possess secure tenure are unlikely to receive full value compensation for alienation of their titles.<sup>42</sup> And third, disputes over titles are likely to lead to increased conflicts in courts and elsewhere.<sup>43</sup>

Among the recommendations proffered by the land grab report, an emphasis on land tenure reform is again notable. The authors indicate a need to address the usefulness of various land tenure policies.<sup>44</sup> The most prominent approaches to land tenure either involve the establishment of an individual titling system or the recognition of customary communitarian land rights.<sup>45</sup> These two systems are explicated and examined in the following section.

### III. COMPETING PARADIGMS

The majority of the literature on land tenure reform tends to focus on two core approaches. The first involves the establishment of individual titles to parcels of land that are made fully alienable.<sup>46</sup> The approach draws heavily from a Western understanding of land tenure and claims to be forward looking in so far as it is intended to promote economic development.<sup>47</sup> The second approach focuses on communal land use and draws primarily from traditional approaches to land tenure common in Africa.<sup>48</sup> In this regard a communal tenure approach could be described as backward looking in so far as it is reflective of the history and culture of a society rather than aspirational.

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<http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/schoneveld.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> See Amanor, *supra* note 10, at 110–15.

<sup>44</sup> See COTULA ET AL., *supra* note 6, at 15.

<sup>45</sup> See Franklin Obeng-Odoom, *Land Reforms in Africa: Theory, Practice, and Outcome*, 36 HABITAT INT'L 161, 162–63 (2012), available at [http://procasur.org/extractive-industries/wp-content/uploads/2012/07/Land-reform-in-Africa-Theory-practice-outcomes\\_Obeng-Odoom.pdf](http://procasur.org/extractive-industries/wp-content/uploads/2012/07/Land-reform-in-Africa-Theory-practice-outcomes_Obeng-Odoom.pdf).

<sup>46</sup> *Id.* at 162.

<sup>47</sup> KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* 139–40 (2006); Obeng-Odoom, *supra* note 45, at 162.

<sup>48</sup> Obeng-Odoom, *supra* note 45, at 163.

*A. INDIVIDUAL TITLING APPROACH*

The individual titling approach draws on the premise that economic development is based on access to credit. In his book *The Mystery of Capital*, Peruvian economist Hernando de Soto attempts to connect the recognition and protection of property rights with poverty reduction through economic advancement.<sup>49</sup> This is a neoliberal approach that derives the brunt of its force from the notion that property is more secure when only one person has a valid legal claim to it.<sup>50</sup>

As de Soto sees it, substantial resources are used to protect land when tenure is not secure.<sup>51</sup> The allocation of resources to this end is understandable given the importance of land for subsistence. Consequently, landowners will leave able-bodied individuals at home to protect property limiting their ability to engage in economic activity.<sup>52</sup> Similarly, farmers expend significant resources to demarcate boundaries and fence plots in order to prevent encroachment by neighbors. For instance, in Ghana private security guards have become ubiquitous because of the need for someone to watch over property during the owner's absence.<sup>53</sup> The protection of current possessions is prioritized over the pursuit of new avenues for wealth production. This is an inefficient use of resources. An individual titling approach argues that this inefficiency can be remedied by the recognition and enforcement of individual ownership.<sup>54</sup> If an individual has formal title that he realistically expects the government will enforce, then he can redirect resources towards wealth production.<sup>55</sup>

Furthermore, individual land titling provides an incentive for investment in the land leading to enhanced productivity.<sup>56</sup> If tenure is not secure, farmers are less likely to invest in their land because it will increase loss if property is seized. Investment might even increase the likelihood of seizure because it makes the land more attractive. And if the land is intended for communal use, the farmer

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<sup>49</sup> See generally DE SOTO, *supra* note 8.

<sup>50</sup> *Id.* at 39–67; DAM, *supra* note 47, at 134–141.

<sup>51</sup> See DE SOTO, *supra* note 8, at 61–62.

<sup>52</sup> DAM, *supra* note 47, at 138.

<sup>53</sup> Obeng-Odoom, *supra* note 45, at 164.

<sup>54</sup> DE SOTO, *supra* note 8, at 61–62.

<sup>55</sup> DAM, *supra* note 47, at 135.

<sup>56</sup> DE SOTO, *supra* note 8, at 49–51.

might fear that any new investments will be reaped by someone else.<sup>57</sup>

By establishing an individual titling system, states can also create new access to capital to be used for investment.<sup>58</sup> With secure title a poor farmer can obtain credit by using land as collateral.<sup>59</sup> Additionally, individually titled land can be fully and easily transferred. This means a poor farmer can have access to money in times of need by liquidating all or part of his property.<sup>60</sup> And because the title of the land is both secure and transferable, its value will increase regardless of how it is used.<sup>61</sup>

Despite the arguments of de Soto and other neoliberal economists, this approach is foreign to many parts of the developing world, including most of Africa.<sup>62</sup> Applying such a foreign system without alteration is likely to present substantial challenges.<sup>63</sup> Since transition to individual land tenure is generally shepherded by the political and social elite, the process usually solidifies their positions.<sup>64</sup> Vulnerable groups<sup>65</sup> have less opportunity to assert their claim to property and consequently are less likely to have it formally recognized.<sup>66</sup> Capital seems to be more myth than mystery for many non-elites. Customary systems can be far from egalitarian,<sup>67</sup> but they generally provide protection for vulnerable populations through mechanisms such as kinship networks.<sup>68</sup>

Transition to an individual land tenure system can be daunting. Determining ownership, demarcating parcels, and establishing a reliable registration system require enormous effort and expense. In addition, transition can bring to the surface latent disputes that need

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<sup>57</sup> *Id.* at 62.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 56–58.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Obeng-Odoom, *supra* note 45, at 167–68.

<sup>63</sup> *Id.*; see also Amanor, *supra* note 10, at 116–17.

<sup>64</sup> Obeng-Odoom, *supra* note 45, at 167.

<sup>65</sup> For example, women, rural and urban poor, ethnic minorities, etc.

<sup>66</sup> Obeng-Odoom, *supra* note 45, at 167; George A. Sarpong, *Improving Tenure Security for the Rural Poor: Ghana – Country Case Study* 17 (FAO, LEP Working Paper No. 2, 2006), available at <http://ftp.fao.org/docrep/fao/010/k0783e/k0783e00.pdf>.

<sup>67</sup> Obeng-Odoom, *supra* note 45, at 167.

<sup>68</sup> *Id.* at 163.

to be litigated or otherwise resolved, placing a further drain on resources.<sup>69</sup>

### B. COMMUNAL LAND TENURE

Traditional land use in much of Africa<sup>70</sup> conceptualizes land as property of the whole community.<sup>71</sup> Members of the community are permitted to use the land, and the community has a mechanism to safeguard against exploitation; likewise, communal land tenures possess mechanisms that steward the land for the benefit of all.<sup>72</sup>

It is important, however, to distinguish communal land use from open access.<sup>73</sup> Hardin warned against the danger of open access leading to a “tragedy of the commons.”<sup>74</sup> With open access there is no ownership of the land so all are able to exploit its resources. With little incentive to preserve the land for future use, overexploitation seems inevitable.<sup>75</sup> But communal land is different in that the

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<sup>69</sup> See Amanor, *supra* note 10, at 106–17.

<sup>70</sup> It is dangerous to be too precise at this point as the specific details of communal land arrangements can vary greatly. The structure of traditional Ghanaian land use is taken up later.

<sup>71</sup> Obeng-Odoom, *supra* note 45, at 163; Lennox Kwame Agbosu, *Land Law in Ghana: Contradiction between Anglo-American and Customary Conceptions of Tenure and Practices* 11 (Land Tenure Ctr., Working Paper No. 33, 2000) [hereinafter Agbosu, *Land Law in Ghana*] available at <http://ageconsearch.umn.edu/bitstream/12796/1/ltcwp33.pdf>.

<sup>72</sup> Obeng-Odoom, *supra* note 45, at 163.

<sup>73</sup> The distinction has been explained in great detail in the writings of Nobel Laureate Elinor Ostrom. See generally ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (James E. Alt & Douglass C. North, eds., 1990) [hereinafter OSTROM, *GOVERNING THE COMMONS*] (explaining how mechanisms can emerge in the use of shared resources that avoid overexploitation associated with open access); ELINOR OSTROM ET AL., *RULES, GAMES, AND COMMON-POOL RESOURCES* (1994) (further developing the distinction between common pool resources and open access so as to minimize the threat of overexploitation).

<sup>74</sup> See generally Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243–45 (1968) [hereinafter Hardin, *The Tragedy of the Commons*]. In fairness, Hardin later narrowed the scope to what he would call the “tragedy of the *unmanaged* commons.” Garrett Hardin, *The Tragedy of the Unmanaged Commons*, 9 *TRENDS IN ECOLOGY & EVOLUTION* 199 (1994) (emphasis added).

<sup>75</sup> See generally Hardin, *The Tragedy of the Commons*, *supra* note 74.

community owns it. Members of the community have the right to access the land and exclude outsiders.<sup>76</sup> The community has a vested interest in preventing overexploitation and ensuring future fertility.<sup>77</sup> Communities develop systems to allocate land use within the community such as rotating plots or maintaining ancestral homesteads.<sup>78</sup> Communities also establish criteria for non-member access when it is in the community's interest.<sup>79</sup> Decisions about admissions of non-members or allocations within the community are based on internal conflict-resolution systems such as councils of elders or chieftainships.<sup>80</sup>

Communal land tenure has the notable advantage of being organic. Because it is the result of social interactions over generations, it developed in a way that reflects the norms and values of the community.<sup>81</sup> In much of Africa, kinship and social relationships are of paramount importance, and communal land tenure both reflects and reinforces these values.<sup>82</sup> Communal land tenure resonates with the community by reflecting its social norms and thereby legitimizes land ownership. These cultures view a community's claim to land as more legitimate, and that legitimacy enhances the tenure's security.

Additionally, the organic nature of these systems often includes built-in safety nets to protect against catastrophic events.<sup>83</sup> A widow might be taken in by her husband's family, an orphan might be adopted by extended family members, or an HIV positive individual might be cared for by the community as a whole. This is not to suggest that acts of generosity do not occur within individual tenure systems, but in such societies, they tend to be just that—acts of generosity. In communal land systems, the significance of kinship and social relationships underlying communal tenure also provides mechanisms that do not require altruism.

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<sup>76</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 13.

<sup>77</sup> *Id.*

<sup>78</sup> See generally OSTROM, GOVERNING THE COMMONS, *supra* note 73.

<sup>79</sup> UBINK, *supra* note 10, at 83.

<sup>80</sup> *Id.*

<sup>81</sup> Obeng-Odoom, *supra* note 45, at 163.

<sup>82</sup> *Id.*

<sup>83</sup> Obeng-Odoom, *supra* note 45, at 163; Agbosu, *Land Law in Ghana*, *supra* note 71, at 9–14.



But for each advantage of communal tenure systems, there is a readily available counterpoint. Even if communal titles have greater legitimacy and security, their communal ownership also makes them difficult to transfer. Secure tenure might limit the wasting of resources on claim protection and create an incentive to invest in future productivity, but without transferability it does not provide the access to credit required for investment.<sup>84</sup> If land cannot be transferred it cannot be used as collateral, and inalienability further reduces its value.<sup>85</sup>

Similarly, although communal land tenure provides social safety nets these societies are often far from egalitarian.<sup>86</sup> Although the community provides for widows, orphans, and HIV positive individuals in the event of catastrophe, these individuals are rarely given much autonomy.<sup>87</sup> Maintaining traditional systems is unlikely to shift power dynamics; meaning vulnerable populations are apt to retain their position. But, as discussed above, individual land tenure is no more likely to shift the positions of elite and vulnerable populations; even if individual tenure promotes autonomy in theory, it rarely does so in application.<sup>88</sup> Moreover, individual tenure systems do risk undermining social networks that protect vulnerable populations.<sup>89</sup>

#### IV. QUESTION OF SCALE

There is an additional consideration to examine before evaluating land tenure policies in Ghana—What scale of agricultural production is most conducive to economic development? Specifically, Is it better to have large or small farms?

The answer to this question depends on numerous factors, both internal and external.<sup>90</sup> The requirements of specific crops, regional fertility level, and availability of skilled workers impact a country's agricultural potential.<sup>91</sup> On a larger scale, the demands of global

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<sup>84</sup> See DE SOTO, *supra* note 8, at 56–58.

<sup>85</sup> *Id.*

<sup>86</sup> Obeng-Odoom, *supra* note 45, at 163.

<sup>87</sup> See Agbosu, *Land Law in Ghana*, *supra* note 71, at 10–11.

<sup>88</sup> See Sarpong, *supra* note 66, at 17.

<sup>89</sup> See Obeng-Odoom, *supra* note 45, at 163.

<sup>90</sup> MORRIS ET AL., AFRICA'S SLEEPING GIANT, *supra* note 1, ¶¶ 12–20.

<sup>91</sup> *Id.* ¶¶ 9, 15–16.

capital, logistical issues of transporting goods to market, and the requirement that the origin of certain products be traceable will affect agricultural development.<sup>92</sup> The scale of farms must align with these factors in order to maximize economic development.<sup>93</sup> For example, if a crop requires intensive labor and the local population is capable of managing it, then small-scale farming would be ideal. On the other hand, if there is limited available transportation for delivering goods to market, then a larger farm might benefit from an economy of scale that would allow it to transport goods in a more cost-effective way.<sup>94</sup> Similarly, if the end user needs to know the precise origin of the goods,<sup>95</sup> then large-scale farms will be more capable of tracking product movement.<sup>96</sup> The size of farms is not the only contributing factor; large farms hire workers when mechanization is impossible,<sup>97</sup> small farms form cooperatives to capitalize on economies of scale,<sup>98</sup> and technology makes traceability requirements easier to satisfy. However, farm size remains one of the most significant influences on a country's potential for agricultural development.

The predominant determinant of farm size, and one on which a government has substantial influence, is the size of plots. If large fees are possible then large farms become possible. Policymakers impact the size of fees through the implementation of land tenure and regulatory systems—some encourage the consolidation of parcels into large fees while others incentivize retaining smaller fees or dividing larger ones.<sup>99</sup> To take the two approaches discussed above as examples, the ease of transferability associated with individual titling systems allows one to compile a number of adjacent parcels and establish a large farm. Community-based tenure systems, on the other hand, maximize output by dividing land into smaller parcels

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<sup>92</sup> *Id.* ¶¶ 12–20.

<sup>93</sup> *See id.*

<sup>94</sup> *See id.* ¶ 19 (noting that “economies of scale are found in the plantation crops and among highly perishable commodities that must be processed and/or shipped quickly”).

<sup>95</sup> For example, to satisfy regulatory requirements intended to prevent the intrusion of genetically modified crops into food stores or to enable the identification of public health threats.

<sup>96</sup> *See* MORRIS ET AL., AFRICA'S SLEEPING GIANT, *supra* note 1, ¶ 16.

<sup>97</sup> *See id.*

<sup>98</sup> *See, e.g., id.* ¶ 224.

<sup>99</sup> SCHONEVELD ET AL., *supra* note 41, §§ 4.1–4.2.

overseen by small farmers.<sup>100</sup> Policymakers should consider the correlation between land tenure systems and farm size when shaping the future of their countries. Two examples of rapid agricultural development presented in the CCAA report demonstrate the potential for both large- and small-scale approaches.<sup>101</sup> The Cerrado region of Brazil followed a path marked by large-scale farms, and Northeast Thailand established agricultural prosperity with small-scale farms.<sup>102</sup> Either approach can be effective in the appropriate circumstances. Since scale is a significant factor in agricultural development, tailoring farm size to the specific circumstances can impact the rate of that development.

In Brazil, the availability of credit and marketing services along with the government's promotion of mechanization resulted in the dominance of large farms.<sup>103</sup> In Thailand, an emphasis on land titling for small farmers meant that small-scale farms fueled the agricultural development.<sup>104</sup> While both countries saw a marked increase in income levels and decrease in food costs, in Thailand, the small-scale approach had a greater impact on overall poverty levels.<sup>105</sup> After a detailed discussion of the merits and challenges of large- and small-scale farming, the CCAA report concludes that, with a few exceptions, the Guinea Savannah does not require a large-scale approach.<sup>106</sup> Given the nature of the crops, the focus on regional markets, and the fertility of the land, the region is not likely to disproportionately benefit from large-scale farming.<sup>107</sup> In light of the poverty reduction achieved through a small-scale approach in Thailand, the CCAA report suggests that policymakers apply the Thai approach to the Guinea Savannah.<sup>108</sup> By limiting the ability to transfer or concentrate property as well as creating regulatory

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<sup>100</sup> Thomas Sikor & Daniel Müller, *The Limits of State-Led Land Reform: An Introduction*, 37 WORLD DEV. 1307, 1310–11 (2009).

<sup>101</sup> MORRIS ET AL., AFRICA'S SLEEPING GIANT, *supra* note 1, ¶¶ 12–20.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* ¶ 12.

<sup>104</sup> *Id.* ¶¶ 12–20.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* ¶ 14.

<sup>107</sup> For example, the Guinea Savannah would not benefit from economies of scale that large-scale farming provides. *Id.* ¶¶ 14–18.

<sup>108</sup> *Id.* ¶ 14.

incentives for small farms, policymakers can emulate the success of Thailand.<sup>109</sup>

## V. GHANA: A CASE STUDY

We turn now to an examination of the situation in Ghana. What is the current state of its land tenure system? How is that approach likely to shape the country's agricultural development in the coming years? Can policymakers implement systems that will exploit the agricultural potential of the Guinea Savannah?

### A. PRE-COLONIAL LAND TENURE

The customary land tenure system in Ghana fell within the communal paradigm.<sup>110</sup> With slight variation among ethnic groups, the predominant model was based on kinship relationships.<sup>111</sup> The intertwining of social and familial relationships with land tenure permitted effective cultivation, while avoiding overexploitation.<sup>112</sup> Pre-colonial Ghanaian societies achieved this without the more formalized land interests seen in Western cultures.<sup>113</sup>

In most ethnic groups, access to communal land depended on membership in the group, with outsiders excluded by default.<sup>114</sup> Furthermore, land access was not connected to social status and each member had equal right to use the land.<sup>115</sup> In theory at least, access

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<sup>109</sup> While it is true that agricultural development is the result of numerous influences in addition to a country's land tenure system, it is equally true that the approach to land tenure can have consequences in areas distinct from agriculture. Land tenure systems can impact vulnerable populations including women, ethnic minorities, and people living with HIV/AIDS. Similarly, land tenure policies can affect the environment through agriculture. In an interrelated world, policymakers cannot focus exclusively on agricultural development. Decisions aimed at development must remain cognizant of the impact on other areas.

<sup>110</sup> UBINK, *supra* note 10, at 42–43; Agbosu, *Land Law in Ghana*, *supra* note 71, at 11.

<sup>111</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 10–11; *see also* UBINK, *supra* note 10, at 42–43.

<sup>112</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 11.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 9–14.

<sup>115</sup> *Id.*

to land was tied exclusively to community membership.<sup>116</sup> It is tempting to analogize this approach to the Western concept of joint tenancy, where each individual owns the property as a whole and has the right to enjoy the whole, but the administration of land use in pre-colonial Ghana resulted in quite a different system. However, one may perhaps more usefully conceptualize this framework as something akin to a land trust intended to be used for the benefit of the community as a whole, including future generations.

But in order to ensure that land use aligns with community interests, an administrative system is required; decisions must be made about who will cultivate which parcel, when to permit outsider access, and whether alienation serves the interest of the community. Land administration demonstrates distinct differences among ethnic groups in Ghana.<sup>117</sup> In Ashanti and Akan communities, land administration was grafted onto political authority.<sup>118</sup> The same person or group of people making political decisions (frequently a chief or council of elders) also made decisions about land use.<sup>119</sup> In contrast, among the Ewe and other non-Akan communities, political authority was separate from land administration and family heads were the decision makers.<sup>120</sup> In other groups, religious leaders made decisions about land use.<sup>121</sup> Yet, in all cases, whomever made decisions was expected to promote the benefit of the community as a whole.<sup>122</sup>

Safeguarding mechanisms assured decisions were made accordingly. The decision to permit use by outsiders or sell land, for example, would require approval by a council of elders.<sup>123</sup> These safeguards had varying degrees of formality and were enforced by social and kinship networks. People understood that the land belonged to the community or the community's ancestors and expected their leaders to act accordingly. The concept of stool lands found among the Ga-Mashie and other ethnic groups exemplifies this

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 14–16.

<sup>118</sup> *Id.* at 11–12.

<sup>119</sup> *Id.* at 14.

<sup>120</sup> *Id.* at 14–15.

<sup>121</sup> *Id.* In some cases these religious leaders also exercised political theory but just as often did not.

<sup>122</sup> LUND, *supra* note 10, at 48–49; UBINK, *supra* note 10, at 42.

<sup>123</sup> See, e.g., UBINK, *supra* note 10, at 43–44.

conceptualization of land tenure.<sup>124</sup> In these communities, a chief or political leader occupies a wooden.<sup>125</sup> Similar to the idea of a throne in a monarchy or the Chair of St. Peter in Roman Catholic tradition, an individual might occupy the stool but the authority exercised is vested within the position and associated with the stool itself.<sup>126</sup> The stool, as explained by Agbosu, “is believed to embody the spirits of the ancestors and the souls of the body politic subject to the jurisdictional authority of the person occupying it.”<sup>127</sup> Consequently, allodial title belongs to the community—past, present, and future—and the chief is responsible for administering it accordingly. Again, the analogy to a land trust seems useful, if not exact.

The efficacy of the traditional approach to land tenure in Ghana is evidenced by the complex society that existed prior to colonization. When Westerners arrived on the coast of what would become Ghana, they found an intricate system of groups engaged in trade and interaction throughout West and North Africa.<sup>128</sup> These groups managed to cultivate both the agricultural potential and mineral resources of the region.<sup>129</sup> The literature indicates that this remains the *de facto* approach to land tenure in a large part of Ghana, even if formal *de jure* property laws suggest a more Western approach.<sup>130</sup> This inconsistency of *de facto* and *de jure* tenure constitutes one component of the challenge facing policymakers. Yet, it should not be assumed that the circumstances of pre-colonial West Africa are identical with present-day Ghana or that an approach that has been useful in the past will be equally efficacious in the modern era of globalization. As Ubink points out, a romanticized view of traditional customary land use is challenged by the realization that population growth, increased land value, and reduction in new frontiers has led to the commodification of land.<sup>131</sup>

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<sup>124</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 14.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 14 n.42. *But see* UBINK, *supra* note 10, at 44–46 (suggesting some chiefs believed they had a right to collect rent on stool lands).

<sup>127</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 14 n.42.

<sup>128</sup> *Id.* at 11.

<sup>129</sup> *Id.*

<sup>130</sup> *See* LUND, *supra* note 10, at 46; *see also* UBINK, *supra* note 10, at 99–102.

<sup>131</sup> UBINK, *supra* note 10, at 17–18; *see also* Kojo Sebastian Amanor, *Tree Plantations, Agricultural Commodification, and Land Tenure Security in Ghana*, in LEGALISING LAND RIGHTS: LOCAL PRACTICES, STATE

This commodification threatens the administration of customary land and results in a distinct lack of tenure security.<sup>132</sup>

### B. THE BRITISH INFLUENCE

Interaction with Western colonial powers altered land tenure in West Africa, and the system in Ghana was inevitably shaped by British influence.<sup>133</sup> Even before the Gold Coast was officially declared a British protectorate in 1874, administrative authorities applied English statutory law to local land tenure issues.<sup>134</sup> Yet, fully alienable property established by formal title was a foreign notion to indigenous populations, and its application led to substantial confusion during the British colonial period.

Traditional land use was enforced via kinship networks, and elaborate ceremonies memorialized significant land transfers. These ceremonies assured recipients that the transfer would not be forgotten and their rights challenged.<sup>135</sup> Yet the concept of property ownership separate from possessory interest was completely foreign. That ownership could be vested in something as innocuous as a piece of paper seemed unfathomable. Consequently, when illiterate chiefs and community leaders transferred title under the colonial system it is doubtful they comprehended the ramifications of the action.<sup>136</sup> At best, traditional communities viewed the deed as a memorialization of an agreement to permit use rather than an instrument of divestment.<sup>137</sup>

Merchants and other elites were familiar with English property law and often mediated conveyances between local communities and Western interests.<sup>138</sup> However, these conveyances were framed by European property law and artificially interjected the concept of

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(Janine M. Ubink et al. eds., 2009).

<sup>132</sup> See Amanor, *supra* note 10, at 131.

<sup>133</sup> See Victor Essien, *Sources of Law in Ghana*, 24 J. BLACK STUDIES 246 (1994) (discussing the interplay between colonial and customary influences in contemporary Ghanaian law, both property and otherwise).

<sup>134</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 24.

<sup>135</sup> *Id.* at 16.

<sup>136</sup> *Id.* at 23.

<sup>137</sup> *Id.* at 16–18.

<sup>138</sup> *Id.* at 18–19.

individual ownership into the land tenure system.<sup>139</sup> Unsurprisingly, myriad conflicts arose as the problems of a dual tenure system emerged without an adequate means of mediation.<sup>140</sup> One person would claim the right to use a parcel of land based on the purchase of paper title, while another person claimed the same land as member of the community that traditionally cultivated it.<sup>141</sup> Conflicts became so widespread that a West African Land Committee was established in 1912.<sup>142</sup> Although the Committee's final report was never officially published, it determined that some 36,000 square miles of land had been transferred from customary ownership within the colony.<sup>143</sup> The colonial administration claimed authority over an area that included less than 25,000 square miles.<sup>144</sup> The discrepancy was almost certainly due to duplicate claims and multiple conveyances. Mass confusion resulted in countless disputes that were resolved within a legal framework that disadvantaged indigenous communities.<sup>145</sup>

Some have argued that the initial transfers of land from communal ownership were not valid under English property law.<sup>146</sup> They argue that because the ownership of land was vested in the community as the whole, chiefs did not have the authority to divest the community of land but merely to oversee its administration.<sup>147</sup> Claims of authority were irrelevant because the sale of land under color of title is still invalid.<sup>148</sup> But this would mean that stool lands could never be transferred short of a unanimous decision by the community as a whole, and even then the interest of future generations would be ignored. Yet, making communal land entirely non-transferable does not comport with traditional notions either. Some representative of the community must have the authority to

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<sup>139</sup> See LUND, *supra* note 10, at 104–07.

<sup>140</sup> See *id.*; see also Charles U. Ilegbune, *Concessions Scramble and Land Alienation in British Southern Ghana (1885-1915)*, 19 AFR. STUD. REV. 17, 17 (1976); see also Amanor, *supra* note 10, at 110–15.

<sup>141</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 19.

<sup>142</sup> Ilegbune, *supra* note 140, at 17.

<sup>143</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 19.

<sup>144</sup> *Id.*

<sup>145</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 19; Ilegbune, *supra* note 140, at 17.

<sup>146</sup> Agbosu, *Land Law in Ghana*, *supra* note 71, at 21.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*



alienate it.<sup>149</sup> For all practical purposes, the argument is moot; no serious policymaker would suggest voiding all land transfers away from communal ownership, it is simply not realistic. Instead the modern state of Ghana must face the hodgepodge legacy of its colonial past and develop a coherent strategy for minimizing and resolving disputes. Ghana's attempts, both successful and otherwise, are taken up in the next section.

### C. THE POST-INDEPENDENCE MILIEU

Following independence in 1957, the Gold Coast, now Ghana, faced the challenges of a nation emerging from colonial rule. Self-rule was far from easy, and sorting out an effective and efficient land tenure system was essential to establishing a solid foundation for stability and future growth.

In 1962, the Land Registry Act required all private transfers to be in writing and registered.<sup>150</sup> A Lands Commission was established by the 1969 Constitution and tasked with overseeing the registration of titles and administration of public lands.<sup>151</sup> A few years later the Ghanaian legislature extended the registration requirement to include conveyances of communal land.<sup>152</sup> Attempts to enforce the new requirement included increased power for the Lands Commission, but ultimately fell flat.<sup>153</sup> The statute was later repealed, but the attempt to regulate land transfers did not stop, and in 1980 the Lands Commission began requiring property owners to obtain its consent prior to any alienation.<sup>154</sup> Six years later, persistent in its attempts to regulate land use, the Lands Commission began requiring the registration of all title of ownership, not simply transference deeds.<sup>155</sup> The Lands Commission then aggressively campaigned to register all titles with unimpressive results; from the

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<sup>149</sup> See *id.* at 16–17.

<sup>150</sup> Land Registry Act, No. 122 (1962) (Ghana).

<sup>151</sup> THE CONSTITUTION OF THE REPUBLIC OF GHANA, ch. 21.

<sup>152</sup> Conveyancing Decree, NRC 175 (1973) (Ghana).

<sup>153</sup> KASIM KASANGA & NII ASHIE KOTÉY, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, LAND MANAGEMENT IN GHANA: BUILDING ON TRADITION AND MODERNITY 22–23 (2001), available at <http://pubs.iied.org/pdfs/9002IIED.pdf>.

<sup>154</sup> Lands Commissions Act § 3(1), No. 401, (1980) (Ghana).

<sup>155</sup> Land Title Registration Law, PNDCL 152 (1986) (Ghana).

program's implementation in 1986 until 2006 only 42,000 applications for title were filed and less than 30% of those were successfully registered.<sup>156</sup>

The Ghanaian government viewed colonial administrative mechanisms as its only tool for sorting out its land tenure issues but applied this tool disingenuously. As a result, individual titling became further entrenched in the Ghanaian system.<sup>157</sup> It had become apparent, however, that a complete shift to this approach was not practical. Perhaps it was for this reason that the 1992 Ghanaian Constitution formally recognized customary communal land tenure within areas identified as "stool lands."<sup>158</sup> Additionally, an Administer of Stool Lands was created to ensure rents were paid to the communities for the use of stool lands. This recognition marked a shift away from an approach exclusively focused on individual titling. Unfortunately, this recognition would again be muted as emphasis returned to title registration over the coming decade.<sup>159</sup>

In 1999, the Ghanaian government admitted the shortcomings of its land tenure system and committed itself to reform that would solidify tenure security.<sup>160</sup> Three years later, details of the Ghanaian plan focused again on title registration;<sup>161</sup> the Ghanaian government had doubled down. The government tasked the Land Administration Project (LAP) with comprehensive reform of the country's land tenure system and oversight of the numerous agencies involved.<sup>162</sup> Notably, this plan extended title registration (as opposed to deed registration) to the whole country rather than merely the initial

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<sup>156</sup> KELSEY JONES-CASEY & AMANDA KNOX, WORLD RES. INST. FOCUS ON LAND IN AFRICA BRIEF: GHANA, LESSON 4: LAND ADMINISTRATION AT A CROSSROADS 2 (2011), *available at* [http://landportal.info/sites/default/files/ghana\\_brief4\\_landesa.pdf](http://landportal.info/sites/default/files/ghana_brief4_landesa.pdf).

<sup>157</sup> *See generally* L.K. Agbosu, *Land Registration in Ghana: Past, Present and the Future*, 34 J. AFR. L. 104 (1990) [hereinafter Agbosu, *Land Registration in Ghana*].

<sup>158</sup> THE CONSTITUTION OF THE REPUBLIC OF GHANA, ch. 21.

<sup>159</sup> *See generally* Agbosu, *Land Registration in Ghana*, *supra* note 157.

<sup>160</sup> MINISTRY OF LANDS AND FORESTRY, REPUBLIC OF GHANA, NATIONAL LAND POLICY, at i (1999).

<sup>161</sup> *Id.* at 5–6.

<sup>162</sup> MINISTRY OF LANDS AND NATURAL RES., REPUBLIC OF GHANA, LAND ADMINISTRATION PROJECT PHASE TWO: PROJECT IMPLEMENTATION MANUAL, at ii (2011), *available at* <http://www.ghanalap.gov.gh/privatecontent/File/LAP%202%20PIM.pdf>.

handful of districts to which it had previously applied.<sup>163</sup> This resulted in a rush to register titles, and Ghanaians inundated the Land Register with claims that had to be validated to prevent fraud.<sup>164</sup>

In the past few years, the government has attempted to streamline transitional oversight by creating a new Lands Commission that has assumed responsibility for title registration, land surveying, valuation, and administration.<sup>165</sup> Numerous non-governmental organizations as well as bilateral and multilateral government collaborations are providing the resources required for such a comprehensive initiative.<sup>166</sup> With boots on the ground and financial backing, policymakers are hoping that the initiative will achieve greater success than that realized in the 1980s.

For the time being, the Ghanaian government intends to pursue a land tenure system modeled on the de Soto approach. Although communities are permitted to register land within Ghana's system, there are significant barriers in place.<sup>167</sup> The result is a de facto shift towards individual titles.<sup>168</sup> But the long-term effects of this shift are far from clear. Many criticize these policies as further disadvantaging vulnerable populations or creating dangerous environmental impacts.<sup>169</sup> These critiques are worthy of

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<sup>163</sup> MINISTRY OF LANDS AND FORESTRY, *supra* note 160, at 3 (1999).

<sup>164</sup> See Theodora Mantebea Mends & Johan De Meijere, *A Study of the Institution of the Customary Land Tenure System in the Supply of Property Rights for Urban Development: An Example of Accra, Ghana*, Remarks at 5th FIG Reg'l Conference: Promoting Land Administration and Good Governance (Accra, Ghana, March 8-11, 2006) (explaining the substantial burden placed on the Land Commission by rapid urbanization and the inability to align registration with predetermined plans).

<sup>165</sup> Lands Commission Act, No. 767 (2008) (Ghana).

<sup>166</sup> For example, Millennium Development Authority (MiDA), International Land Systems (ILS), and Medeem Institute.

<sup>167</sup> See generally Peter Kuntah-Mensah, Tex. A&M Univ.- Corpus Christi, *On the Implementation of Land Registration in Ghana*, Remarks at 5th FIG Reg'l Conference: Promoting Land Administration and Good Governance (Accra, Ghana, March 8-11, 2006) (discussing the practical challenges of complying with registration requirements and the particular difficulty they present to traditional communities), available at [http://www.fig.net/pub/accra/papers/ts14/ts14\\_03\\_kuntumensah.pdf](http://www.fig.net/pub/accra/papers/ts14/ts14_03_kuntumensah.pdf).

<sup>168</sup> See generally *id.*; Mends & Meijere, *supra* note 164; Agbosu, *Land Registration in Ghana*, *supra* note 157.

<sup>169</sup> See generally Sikor & Müller, *supra* note 100; Obeng-Odoom, *supra* note 45.

consideration and warrant policy alterations in their own right, but the present question is whether these policies lead to agricultural development and poverty reduction. Certainly, the consensus among most global policymakers is that individual land titling will lead to these outcomes; however, not everyone is so confident.<sup>170</sup>

#### D. LOOKING FORWARD

The Ghanaian government seems committed to the de Soto approach. The previous failure of this approach has been explained as the result of poor implementation—previous efforts lacked the resources necessary for proper implementation. The current strategy places renewed emphasis on a comprehensive effort to register ownership throughout the country.<sup>171</sup> Partner institutions that hope to spur future development have provided the substantial resources required for this undertaking.<sup>172</sup> The Ghanaian government views this enormous project as a prerequisite for development, and, consequently, has made it a priority.<sup>173</sup>

However, it is unclear how the legacy of communal land tenure will affect this undertaking. Although the Ghanaian Constitution officially recognizes communal land,<sup>174</sup> such land is given little thought otherwise. Based on Ghana's experience during the colonial period, there is little reason to believe that a dual tenure system will not persist—that community land will remain the de facto tenure system while individual titling will serve a largely de jure function. The resulting insecurity will not create a scenario in which the country can capitalize on its agricultural opportunity. International developers will be less interested, and those who do invest will refuse to pay full value for insecure title. Likewise, local interests will be

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<sup>170</sup> Peter Rosset, *Tides Shift on Agrarian Reform: New Movements Show the Way*, 7 BACKGROUNDER, WINTER 2001, available at <http://www.foodfirst.org/fr/node/58>.

<sup>171</sup> Although it does not focus specifically on land tenure, the World Justice Project's 2011 Rule of Law Index casts doubt on the ability of the Ghanaian government to enforce regulations generally. Although it compared relatively well among Sub-Saharan nations, Ghana scored only 0.50 for regulatory enforcement, ranking it 44 out of 66 countries worldwide. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 63 (2011).

<sup>172</sup> See discussion, *supra* note 166 and accompanying text.

<sup>173</sup> See discussion, *supra* notes 30–32 and accompanying text.

<sup>174</sup> THE CONSTITUTION OF THE REPUBLIC OF GHANA, ch. 21.

undermined and vulnerable groups ignored during the ensuing land grab. The whole process will likely be characterized by conflict. In the end, Ghana will have a system of large-scale agriculture. GDP will almost certainly increase but do very little to alleviate poverty. The elite will enjoy the benefits of agricultural development while basic human rights are put in jeopardy.

While Ghana's attempt to replace community tenure suggests a negative outcome, returning to the pre-colonial communal system seems equally naive. A hybrid system appears inevitable at this point.<sup>175</sup> This does not mean, however, that a hybrid system must take the hodgepodge form of the colonial era. A review of that period indicates that the disorder was due to failure to systematically integrate the two approaches.<sup>176</sup> By making a strong push towards nationwide individual titling, the Ghanaian government aims to replace one approach with another and in so doing ignores the lessons of its past. Not only will complete replacement fail, it is likely to hamper any potential for development. On the other hand, a conscientious integration of the two approaches offers the opportunity to recognize the normative values of the communal approach while preparing to enter the global market.<sup>177</sup>

Ghana can put the same effort toward securing communal land that it is currently doing for individual land. If title is established for communities, then that land will be available for agricultural development. The security of the title will increase the value of the land and provide the communities with access to credit in order to develop it further. With secure tenure as the crux of most development models (including de Soto's), the resulting limitations

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<sup>175</sup> See KASANGA & KOTEY *supra* note 153, at 27.

<sup>176</sup> *Id.*

<sup>177</sup> The specific details of such a system are beyond the scope of this article, but for an examination of how one might integrate customary land tenure into Ghana's statutory system see Joseph Blocher, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 YALE HUM. RTS. & DEV. L.J. 166 (2006). For an interesting example of the use of communal tenure systems in oil palm farming see Edwin A. Gyasi, *The Adaptability of African Communal Tenure to Economic Opportunity: The Example of Land Acquisition for Oil Palm Farming in Ghana*, 64 AFR. 391 (1994). For a neutral description of four possible approaches to public land, including those discussed in this paper, see Paul K. Asebere, *Public Policy and the Emergent African Land Tenure System: The Case of Ghana*, 24 J. BLACK STUDIES 281, 285–87 (1994).

on transferability are less significant. Of course, the land is still transferable even if traditional administration makes it more difficult. But given the CCAA's preference for small-scale agriculture within the Guinea Savannah, the need to assemble large tracts of land is not present—meaning that transferability is even less of a concern. A hybrid system that institutionalizes both communal and individual title accompanied by a strong administrative system is likely to be Ghana's best hope for taking advantage of its position as part of "Africa's Sleeping Giant."

### CONCLUSION

The example of Ghana demonstrates the complex situation of land tenure throughout the Guinea Savannah. Nearly all countries within the region have experienced the imposition of Western conceptualizations of property law through colonial influences. Yet, rarely have individual tenure systems completely usurped the place of customary law. Consequently, most of the Guinea Savannah faces varying amalgamations of both individual and communal land. Mass confusion and conflict frequently result, creating a quagmire for agricultural development. If these countries wish to capitalize on their potential, then policymakers must first manage to unravel the Gordian knot of their disorderly land tenure systems. Without doing so, they will have difficulty providing the security necessary to replicate the prosperity of Brazil or Thailand.

Western-styled individual tenure systems do not resonate with the normative values of the region and consequently fail to provide the level of capital de Soto suggests. Conversely, traditional communal tenure systems ignore the impact of two centuries of colonial influence. Policymakers must, as a practical matter, pursue a hybrid model that incorporates elements of both the individual and communal approaches. By structuring the current hodgepodge into an organized system, policymakers can minimize conflicts. Additionally, the stabilization of tenure systems will increase land value and strengthen the countries' potential for agricultural development in a way that alleviates poverty and establishes a foundation for human rights.