NATIONAL CONFERENCE RECOMMENDATIONS

South Sudan Land Policy and Administration

March 2020

Report By: National Dialogue Steering Committee
1. Introduction

The South Sudan National Dialogue conducted a Technical Workshop on Land Policy and Administration in South Sudan from February 24th to February 25th. The workshop covered a range of land issues from which this Paper fleshes out policy ideas under several sections.

Section 2 begins with the historical context of land ownership from a generic African perspective. Section 3 provides a brief background to the prevailing land policy and administration in South. It also highlights the impacts of sound land policy and administration on individual land owners and society as a whole. In Section 4, the Paper examines the nature of land ownership both in indigenous countries (such as South Sudan) and settlor countries (such as Canada), having regard to the fact that historical differences in the process of state formations in indigenous and settlor countries organically give rise to the land ownership being vested in communities and Government respectively. Section 5 examines the classification of land ownership in South Sudan into public, communal and private lands. The section is followed by a brief commentary or the attendant limitations of each form of land ownership.

Section 6 examines the application of the concept of eminent domain as a way by which the Government can acquire additional land from indigenous communities for public use, public safety or national security reasons while Section 7 deals with requisite legal procedures in the process of registering lawfully acquired landed property. Section 8 meanwhile recommends that the Government should take reasonable steps not only to deal with communal border issues but also on demarcating internal or tribal borders as they stood on January 1, 1956. Section 9, meanwhile, deals with various land policy suggestions/recommendations. It also deals with the imperatives of developing a sound land policy and administration in South Sudan. Section 10 underscores policy challenges relating, especially, to the physical demarcation of ethnic and administrative boundaries as they stood on January 1, 1956 while Section 11 concludes the discussion.

In general, the paper seeks not only to examine the existing land laws and policies with the view to developing a more effective national land policy and an efficient administration. It also seeks to create a more equitable land distribution policy and management in the Republic of South Sudan.

2. Historical Context
Republic of South Sudan
National Dialogue Steering Committee

National Conference Recommendations

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From a customary African legal perspective, land is deemed to be a God’s gift to the community as whole. It is also considered to be a sacred heritage that is transmitted by ancestors and as a thread that binds the living and dead as well as the posterity. For this reason, the community is a custodian of land. Each generation holds land in trust for the next generation. Every family has a right to land, in an amount that is sufficient in acreage for its quartering and economic well-being.¹

In modern context, the aim of public administration and management of land is to ensure that land is distributed fairly. The most formal public entity is the government, a body whose sole responsibility and authority is to make binding decisions on behalf of the people under its jurisdiction. For this reason, the State establishes land laws, policies and administration. The central place of the State springs from the idea that order is necessary and that chaos are inimical to a justice, fairness and well-ordered society. Thus, every society, whether it is large or small, powerful or weak, must create for itself a framework of legal principles within which to develop and prosper. These conditions require good governance and an effective land policy and administration. it is for this reason that land policy and administration is an essential aspect of good governance, for good governance is central to the delivery of appropriate, effective and efficient land regulation and management in the country.

In this respect, the instrumentality of the State to create laws and prudent policy through legislation and subordinate legislation is necessary for sustainable land policy and administration system in South Sudan. This also means that the rule of law and by law—rather than rule by elites or ad hoc responses to circumstances—is critical. South Sudan is, however, institutionally challenged and is not in place to handle many of the current nagging land issues unless serious steps are taken towards a more coherent, efficient and effective land management and regulation.

3. Land Administration and Management in South Sudan

From the workshop, it was clear that most participants believe, and rightly so, that acquisition of land in South Sudan is associated with malpractices. That is because the current land management in South Sudan is fraught with corrupt land dealings. These includes but are not limited to extra-judicial collection of land fees;

overlapping issuance of land titles or parcels to multiple purchasers; arbitrary allocation of land, particularly in urban areas; legitimation of mass land theft; and the Government’s inability to manage interactions between competing tenure holders especially among land owners and users.

In South Sudan, land management and administration is founded on the principles of decentralization, participation and transparency for the benefit of all the people of South Sudan. Article 41 (2) of the Land Act, for instance, states that prior to any decision relating to land, whether it is located in an urban or rural area, land administration shall consult with local communities who would be affected by that decision. Furthermore, without prejudice to the rights of the Government of South Sudan on Land, each state Government shall be charged with the management and administration of land within its jurisdiction for the benefit of the people of the Republic of South Sudan in accordance with Schedule (C) of the Constitution and the Land Act, 2009.

In general, any form of land policy and administration impacts upon many facets of our day-to-day living. They determine the difference between what is property and what is land; who owns property in land; who may have access to land or the rights of individuals to land as well as what they can do with lands as tenants or land owners. It is worth noting that land ownership is unusual in the sense that a person can own it outright but still be limited in how it can be used. An effective land management and regulation is, thus, indispensable. It regulates one’s socio-economic life.

4. Acquisition of Land Tenure: Settlor versus Indigenous States

One of the most important policy issues that the workshop dealt with was the need for understanding the historical nature of state formation that tend to determine the entity in which land ownership is vested in each country. In this regard, the workshop emphasised that in settlor countries, such as the United States and Australia, for example, human settlement followed the declaration of sovereignty. That means that as soon as the government of a settlor country claimed to have discovered a terra nullius, it quickly moved to assert sovereign authority and ownership over the land. In indigenous societies, such as South Sudan and most African countries, however, the declaration of sovereignty followed human settlement.  

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A major public policy impact that inheres in the distinction between the order of human settlements in settlor and indigenous countries is that while the original land ownership in a settlor society is vested in the government, the original land ownership in indigenous societies was vested in native communities long before there was such a thing as a sovereign government. That is because prior to colonialism, ethnic communities in much of Africa were pure nations or states unto themselves. However, the imposition of colonial rule which created the system of sovereign states, by way of aggregating different ethnic groups together, undermined the ethnic purity in indigenous states. In predominantly settlor countries, the concept of *terra nullius* meant that the government owned the land. The title to land of native communities in settlor (often referred to as the ‘First Nations,’) was only seen as a burden on the government’s legal title to land.³

In Canada, for example, the original land ownership was and remains vested in the Crown. About 89% of the land is owned and held jointly between the federal and provincial governments at 41% and 48% respectively. The remaining 11% is privately owned, either by natural persons or juridical individuals—corporations. At the provincial level, the federal government only owns 4% of the land. This federal ownership is limited to Crown parks and reserves, Indian reserves and Canadian military bases, among a few others. The largest share of the federal land ownership is over territories which are held in trust for Aboriginal people.⁴

In countries such as South Sudan, however, over 90% of land is owned by ethnic communities. Even where the central government purports to own land in the forms of building infrastructure, much of the land remains communal until such time as the three stakeholders—the central government, state government and Traditional Authority—enter into a proper agreement declaring the limits of their proportional ownership or interests in land.


Under extant land laws in South Sudan, the acquisition of land tenure, whether for investment or personal use, is effected by means such as direct purchase, rental acquisition, inheritance, allocation by government or persons that are legally authorized to allocate land. This authority is particularly provided for from Articles 62 to 68, and from Articles 74 to 75, of the Land Act. Such an acquisition, use or transfer must be in the best interest of the public and/or community.

Acquisition of land should follow established procedures that are fair, just and equitable in circumstances. Before acquiring any piece of land, however, the potential owner should ensure that the land is free from any encumbrances.

In the event that land has been acquired extra-judicially, various extraordinary remedies for such deprivations can be found from Articles 78 to Article 82, and from Articles 84 to 87 of the Land Act. These remedies include but are not limited to court orders, compensation or restitution.

Restitution generally refers to the return of an unlawfully acquired property to a rightful owner. Land restitution specifically is the process of returning an unlawfully acquired piece of land or property to the rightful owner from whom it was taken. It could also mean giving appropriate compensation to an individual or a community whose land or property was taken by an individuals or government for whatever reasons and by whatever method insofar as its acquisition was extra-judicial.5

Article 82 (4) of the Land Act, however, recognizes the doctrine of *adverse possession* by allowing an occupier of an urban piece of land to obtain legal title if he or she has occupied a given piece of land without interruption for at least 30 years. This suggests that most owners of current informal settlements in Juba and other urban areas, do not have legal title or interests in the lands they adversely possess.6

### 5. Classification of Land Ownership in South Sudan

The Transition Constitution of South Sudan (TCSS) and the South Sudan Land Act have numerous provisions on the three classes or forms of land ownership in South Sudan. For instance, while Article 170 of the TCSS vests land ownership generally in the people of South Sudan, Article 171 of the same TCSS and Article 9 of the

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6 Ibid., at C-13.
Land Act classify land ownership in South Sudan into three main forms namely; the **public**, **private** and **community** lands, notwithstanding the provision of Article 171 (4) of the TCSS which vests absolute power of managing subterranean natural resources (such as petroleum, gas and solid minerals) in the government throughout the country.

Of the three regimes, public/state land ownership is favored by influential people in the government while communal land ownership is favored by ordinary peasants and traditional authorities as well as legal land tenure experts. Private ownership falls in between but is largely favored by investors.\(^7\)

**a) Public Land Tenure**

Public land generally refers to land held for public use, or that which is reserved or set aside for public programs and purposes, such as environmental protection.\(^8\)

Articles 171 (3) of the TCSS and 10 (2) of the Land Act define public land as all types of land held, acquired or owned by any level of public authority (ranging from the level of central government to the Boma level).

The definition of public land by Article 10 (2) of the Land Act is, however, much broader than that of Article 171 (3) of the TCSS. That is because this provision captures not only the definition provided for by the TCSS but also all types of lands transferred by any entity to the local, state and central government or any land acquired by way of reversion or surrender to the Government or land in relation to which no heir is legally entitled. Article 10 (2) (i) of the Land also provides that public land refers to any land that is not privately or communally owned.

Under Article 10 (2) of the Land Act, thus, the concept of public land also captures physical infrastructures such as roads, railways, airports, rivers, lakes, canals, wetlands and other water catchment areas and thoroughfare as may be prescribed by law, as long as no customary ownership has been established. It also includes wildlife and forest areas as well as recreational facilities that have been duly designated by law as public properties. Finally, the provision also states that this definition shall exclude any water systems such as swamps, steams, ponds or

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\(^7\) *Ibid.*, at A-5.

secondary rivers which are traditionally owned and managed by a community, insofar as such a community has agreed to be legally held accountable for its environmental use and consequences.

Understood from this perspective, this definition should settle once and for all the idea that there exists such a thing as a no-man’s land or *terra nullius*. The latter concept is often erroneously used to refer to the Aliab Dinka land of Ramciel. There is, however, hardly any such a thing as an unclaimed land in South Sudan. Against this backdrop, it should be clear that the government is the private owner of public land.\(^9\)

**(b) Community/Customary Land Tenure**

Occasionally, the phrase community is broadly used to describe groups of people, whether they are stakeholders, interest groups or loosely connected individuals with a joint interest. In this paper, the term “communal tenure,” refers to any territory held by, and in the name of, ethnic community, rather than by individuals singly (natural/corporate persons). This means that the group holds an exclusive collective rights, having the ability to use, regulate, use or transfer land or rights in land.\(^10\)

Article 4 of the Land Act defines customary or community land tenure system as a form of “unwritten land ownership practices in certain communities in which land is owned or controlled by a family, clan or a designated community leader.” Article 170 (5) of the TCSS, when read together with Section 12 and First Schedule of the Local Government Act, generally refers to community land as any territory that is historically held or customarily used by local communities as well as their members while Article 11 (1) and (2) of the Land Act defines community land as any territory held by communities exclusively on the basis of ethnic identity, residence or interest. This includes land lawfully registered in the name of group representatives within the meaning of Article 57 of the same Act. Pursuant to Articles 58 (2) and 16 (c) of the Land Act a community land may be registered

\(^9\) Ajo Noel Julius, “Land Ownership and Conflict of Laws in South Sudan” (2015) Sudan Tribune online at:  

\(^10\) Kirsten Ewers Andersen, “Common Tenure and the Governance of Property Resources in Asia: Lesson from Experience in Selected Countries” (2011) Land Tenure Working Paper 20,  
in trust in the name of the community, clan, a family, community leader or community association and may well be defined as land lawfully held, acquired, used or managed by a specific community for purposes such as forests, pasture or grazing areas, cultivation, shrines and such other purposes as may be recognized by law.

Community land displays special characteristics of the bundle of rights such as being socially **held, organically overlapping, inclusive, flexible** enough to allow an open access.\(^1\) An “open access” land tenure rights include but are not limited to pasture lands, hunting grounds, and recreational facilities, lakes, forests, rivers as well as empty territories. For instance, in most cattle keeping communities, for example, the concept of open access is normative. Communities allow outsiders to use their pasture land, water points, etc., with permission.\(^2\)

An important characteristic of community/customary land tenure system, thus, is that it inherently grants equal rights of access to community land as well as provides protection to all eligible members in the form of both freehold and leasehold. While freehold tenure is vested in the community, leasehold is vested in those whom the community allows limited access to the use of the land. For instance, Article 6 (5) of the Land Act guarantees and protects customary and historical seasonal access rights to land, provided that these access rights are regulated by respective states, taking into account the need to protect agricultural production and promotion of peace and harmony without undue interference or degradation of the primary interest in land.

While customary laws governing the use of community land in South Sudan have been in practice for centuries. The application of the relevant rules varies from one community to another within a specific geographical setting.

(c) **Private Land Tenure Regime**

While both public and communal lands are forms of collective land ownership, private land tenure exists generally as a form of land ownership by non-governmental land entities such as by a natural person or by corporate entity. When it is owned by a group of people who register it in their name, say, for

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\(^1\) Pienaar, “The Inclusivity of Communal Land Tenure…,” *supra* note 3 at 2.
purposes of investment, such land ownership is a form of private corporate ownership. Land can also be owned by an individual, whether for commercial or domestic use.\textsuperscript{13}

Both the TCSS and Land Act define private land as any piece of land held either by natural or juridical/corporate persons. If the titleholder is the original owner, then the person holds it by way of freehold/fee simple. If the titleholder is not the original owner, then the individual holds it by way of leasehold.\textsuperscript{14} Freehold ownership entitles the titleholder with an absolute ownership in the sense of having no restrictions as regards its use or occupation. Private land ownership in the form of leasehold tenure is, on the other hand, terminal in the sense that it is subject to certain conditions such as government regulations, payment of rent, etc. For instance, the Government may also restrict the use of such lands for agriculture or ranching purposes, and for such a specific time period subject to specified considerations such as payment of rent to the owner. Upon expiry, the land reverts to the owner or the leaseholder may apply for renewal or an extension of the lease.\textsuperscript{15}

Under Article 27 (5) the Land Act, foreigners may only hold land on the basis of leasehold tenure for a limited time period. Under this provision, this period cannot exceed 99 years. Article 170 (6) (b) of the TCSS defines private land tenure as an “investment land acquired under lease from the Government or community for purposes of social and economic development in accordance with the law.”

In countries such as Kenya, the procedure for acquiring private land tenure is by way of contract for the sale and purchase. While this process is subject to freedom of contract, Kenya provides special guidelines circumscribing the conditions of sale. These guidelines ensure that both parties to the contract as well as their legal representatives in the transactions play by the rules.\textsuperscript{16}

**(d) Commentary**

\textsuperscript{13} David A. Thomas, ““Why the Public Plundering of Private Property Rights is Still a Very Bad Idea” (2006) 41


\textsuperscript{14} Thomas W. Merrill, “Property and the Right to Exclude” (1998) 77 \textit{Neb. LRev.} 729-55; and


Generally, however, the community land regime is quite vulnerable. First, it is undermined by the recurring issue of overlapping land ownership. Overlapping land ownership occurs when a single piece of land is sold many times by the same vendor to multiple purchasers. This is frequent especially in Juba where it is often difficult to tell who the land owner is due to lack of effective registration system. This issue is further exacerbated by the fact that existing land laws and policies are not very clear in articulating the legal authority to oversee the acquisition and registration of land ownership. There is often very little that any duped purchaser can do in terms of obtaining legal redress.

Second, the greatest threat to community land regime is lack of clear internal boundaries between counties and states. While traditional communities do clearly know their actual borders, the economic and political significance that land has gained in recent past in South Sudan has incentivized political figures to grab lands not only for themselves but also from their neighboring communities. This occurs when those with political influence or wealth willfully annex their neighboring community lands to their own native counties. The net result has been one of enduring conflicts between neighboring communities.

Third and finally, community land regime is also threatened by the enduring jurisdictional conflict between the government and Traditional Authorities. As defined above, much of the land in South Sudan is subject to customary/community land regime. But Article 46 (a) of the Land Act provides that the Government has the authority to regulate land as well as allocate or alienate any public land with the approval of the relevant state ministry and in a manner that is consistent with the policies of municipal authority. In practice, however, government officials have interpreted this provision to mean that government can allocate or alienate any land (including community land. The term “government “here refers to any level of government—central, state and local. Consequently, much of the land that often ends up being alienated by the governments is community land.

That is why it is important to ensure that the scope of the government authority to allocate land is appropriately delineated and limited only to public land. Limiting government’s ability to alienate only public land is plausible in light of the fact that “the government” does not have enough land. This is because “the government does not possess original ownership rights in land in South Sudan. The people
Therefore, all land should be owned by the people of South Sudan, and manage by the government. Furthermore, as discussed above, the Land Act; the Local Government Act, the TCSS, etc., recognize the jurisdiction of Traditional Authorities not only in the governance structure but more importantly in terms of the management and allocation of communal land rights and interests in land.

For instance, under Article 15 (1) of the Land Act, Traditional Authorities have jurisdiction to allocate customary land rights for residential, agricultural, grazing or forestry purposes. The problem is that Article 15 (1) is internally limited by Articles 15 (5) and 27 (2) and (3) of the same Land Act, since both of these articles provide that the power of Traditional Authority to allocate customary land rights is exercisable concurrently with the government. This leaves it unclear “how rights of different levels of government and communities and individuals, are defined in land held by government or traditionally held by communities.”

It is even more ironic that in practice, Traditional Authority are victims of local and central governments’ overarching land control, notwithstanding the fact that, pursuant to Article 16 of the Land Act, the Traditional Authority can, on behalf of the community and as long as doing so is consistent with customary law and practices, elect to cancel a customary land right allocated to any entity. Furthermore, a major legal deficiency in granting Traditional Authority the power to cancel any permit to enjoy customary rights in land is found Article 44, 48, and 50 of the Land Act. These provisions consider Traditional Authority as part of the local government, just as Article 13 of the Local Government Act, County and Payam authorities constitute the Local Government. Furthermore, Articles 167 and 168 of the TCSS provide for an integrated role of Traditional Authorities into the governance structure, seeing it as an institution at the level of local government especially on matters that essentially affect community land or interest in land. Furthermore, Article 14 of the Local Government Act stipulates that local “Government Council shall be decentralized into administrative tiers and shall devolved authority into which the Traditional Authority of the Council shall be incorporated.”

This provision is riddled with self-contradiction because traditional authorities, which have little to no resources, are incorporated into the Local Governmental structures where their influence is bound to be overshadowed by the other levels of

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government. This overlap plays to the advantage of the upper ties of government which in practice have largely usurped powers of Traditional Authority. Such a state of affairs leaves the Traditional Authority with little to no authority to revoke land permits. In the event that they do, the likelihood of their decisions being overruled by those at the echelon of Local Government cannot be understated.

Part of the solution to the issue of concurrent or overlapping authority consists in defining and physically delineating internal borders. That is because in lieu of internal boundaries, the distinction between public land and community land, customary land as well as private land rights may continue to be usurped by government authorities. There is, therefore, a need for demarcating scope of land authority between the two levels of responsibility on land namely the government and Traditional Authority by way of internal border demarcation.

Embarking on defining and physically delineating internal borders is part of the requirement of Articles 6 (4) of the Land Act which states that “all lands traditionally and historically held or used by local communities or their members shall be defined, held, managed and protected by law….”. Furthermore, when read together with Article 6 (4), Article 11 (1) of the Land Act calls for the demarcation of customary/community land on the basis of a number of factors including but are not limited to ethnicity, residence or interests, whether the land is registered in the name of a specific community. Article 8 (5) of the Land Act operates to protect customary rights in land while Article 39 of the same Act requires that evidence shall be adduced to establish the existence of customary land rights in the event of any dispute between the community and the government respecting the level that has the power to allocate or alienate any land or interest in land. Without translating the provisions of Article 6 (4) and Article 8 (5) as well as Article 11 (1) of the Land Act into countrywide practical land policy programs, Article 39 would be rendered redundant.

In order to thoroughly carry out the exercise of internal border demarcation, an enabling piece of legislation is required. This legislation may be called Internal Boundaries Demarcation Act or any variations thereof. The legislation, which would be sunset in nature, would give more legal teeth to the existing land laws, policy and administration. It would also mitigate the problem of concurrent jurisdictions.

6. Can the Government Acquire Land for Public Use by way of Eminent Domain?
From the foregoing, it is self-evident that the central government in South Sudan does not have enough land for purposes developing public utilities and infrastructures such as parks, railroads, airports, farms etc. In order to enable the government to develop such facilities, which enable it to carry out its functions properly, reasonable policies must be adopted to allow the central government to acquire either private or communal land.

One of the least impairing ways by which the government may acquire private or public land for public purposes such as those listed above is by way of a method variously refers to as eminent domain, expropriation or condemnation, as commonly found Western countries, including some parts of the United States. Eminent domain simply refers to “the inherent power of the State to seize a citizen’s private property, expropriate property, or seize a citizen’s right in property with due monetary compensation, but without necessarily obtaining the owner’s consent.”

Eminent domain is fair if it is followed by “just compensation.” The latter is judicially considered to be any payment, which is consistent with the fair market value of the property that has been expropriated. Market value is a function of a number of factors such as the existing use of the property and the expected best use to which the property may later be put. Any property taken by way of eminent domain is, therefore, is for “government use or by delegation to third parties who will devote it to public or civic use, or in some cases, economic development.” That is why it is sometimes described as compulsory or mandatory or compulsory public purchase.

In the same way, governments in South Sudan can benefit from the idea and practice of “eminent domain,” if, in very rare but legally justifiable circumstances, they acquire any piece of land for public use, with the consent of communities, insofar as just compensation is given in return.

The danger of invoking eminent domain in the pretext of public interest is that land may be taken for improper purpose such as allocating it to business partners of public officials; given to friends or such other associates of those holding public offices.

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19 Forojalla and Galla, Eds., *Land Tenure Issues in Southern Sudan...supra* note 5 at B-6.
To keep such an improper purpose at bay, the approach to acquiring land by way of eminent domain should be not only one of extra caution but also one of very rare yet legally justifiable circumstances. This also means that any taking of private land by means of eminent domain without judicial authorization should always be considered improper and, thus, legally impermissible.

Invoking eminent domain with consent of Traditional Authority is, without further qualification, very important unless any further delays in exigent circumstances would lead to irreparable harm to public interests. Exigent or pressing circumstances permitting taking of land without community’s consent would, however, be an exception, not the rule. Respect for the due process of law is critical in light of the findings that “communities fear to entrust the power of land acquisition to GOSS and state governments because of the likelihood of marginalization of traditional leaders leading to an alienation of communities from the ancestral lands.”

Obtaining consent in the context of eminent domain can alleviate such fears or concerns.

In order to ensure that one owns the land to the exclusion of others, land ownership must be legally recognized by registering it in the name of the rightful titleholder and in a way that enables prospective buyers to conclusively identify who the register says the current owner is.

7. Land Registration Systems: Deed and Land Titles Registration Systems

Once duly acquired, land must be registered as required by the Land Act, under Articles 55 to 60. These provisions provide legal procedures in registering lawfully acquired land. According to Article 4 of the Land Act, registration involves a set of procedure for describing a parcel or plot of land by identifying the current titleholder as well as the form of ownership. South Sudan does not yet have a developed system of land registration. It can only learn and borrow from other countries.

There are many forms of land registration systems around the world. Whatever system a given jurisdiction adopts should reflect the nature of land ownership. Two registration systems are commonly used, namely; deed registration and land titles or Torrens registration systems.

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Deed registration system is common in most settlor societies in which ownership of land is vested in the Crown or government. “Under the deed registration system, individual establish ownership to land derivatively through their successors in title.”

To establish land ownership, theoretically, land owners should trace their titles to the original grant of any piece of land from the government or Crown for a specific time period. In Ontario, Canada, for example, it is necessary for any land owner to show a good root title by going back 40 years. In the context of South Sudan, this system may apply with modification since it works more effectively in a settlor country where the government holds the right to all lands.

Under the land titles (or Torrens system, which took its name after Sir Robert Torrens who first developed this system in South Australia), the state registers all lands within its jurisdiction by listing all those who own them as well as those who have adverse claims against such lands. This means that all that prospective purchasers need be concerned with is only who the register says owns the land, not with whether the current owner has a “good root of the title.”

Of these two methods, land title system is preferable in South Sudan, an indigenous country in which land ownership is vested in the people not in the government.

However, an effective registration system in South Sudan can work best if internal borders are physically demarcated. Demarcating internal borders is critical especially in the face of nagging concerns about improper and extra-judicial acquisition of land by government institutions (allegedly for public use); land grabbing or adverse possession. Registration should be harmonized countrywide. Furthermore, the workshop emphasized the need for a separate land tribunals or Small Land Claims Courts. This quasi-judicial body should be tasked with enforcing land laws and policies. They should have offices in all states, administrative areas and counties in order to effectively deal with land issues. The existence of these courts should not usurp the jurisdiction of traditional mechanisms for settling land disputes. They can operate complementarily. Traditional mechanisms, however, do not appear to be as effect as they used to be, having regard to the fact that land has gained both economic and political

24 Ibid.
25 Ibid.
significance. This often prompts politicians to complicate issues in the pursuit of their own interests.\textsuperscript{26}

Before effecting any land registration system, however, a countrywide land demarcation must be effected. This should follow wider consultations with various traditional leadership and communities. Where it is duly established that a community or individual land has been grabbed, there are various responses to cure or remedy such deprivations. These remedies include specific performance, return of grabbed land or restitution as discussed above.

8. The Task of Demarcating Internal Borders: \textit{De Jure} versus \textit{De Facto} Borders

One of the strongest themes that came out of the workshop was the need for demarcating South Sudan’s internal communal borders.

The significance of land and its central place in the economy was emphasized by three South Sudan regional conferences, under the auspices of the National Dialogue, between February 25, to August 31, 2019.

The Ghazel Regional Conference, which took place in Wau between February 25\textsuperscript{th} and March 2\textsuperscript{nd}, 2019, recommended that the Government should own land and manage it on behalf of the people.\textsuperscript{27} The Equatoria Regional Conference, which took place in Juba between August 26\textsuperscript{th} and August 31\textsuperscript{st}, 2019, placed a premium on the Government’s policy that “land belongs to the people.” The Conference added an interesting dimension to this idea by suggesting that “land belongs to the community” and that the Government is obligated, by virtue of its fiduciary responsibility, to protect it on behalf of the communities of South Sudan. The Conference further emphasized that the management and administration of the land should be in the hands of local government in collaboration with ethnic communities and that any damage to land must be compensated by allocating 10\% of net revenues to the communities whose land has been damaged.\textsuperscript{28}

The Upper Nile Regional Conference, which took place in Juba between May 20\textsuperscript{th} and May 25\textsuperscript{th}, 2019, recognized two types of land namely; rural and urban land. Rural land, the Conference resolved, is that which is owned by the community

\textsuperscript{26} Forojalla and Galla, Eds., \textit{Land Tenure Issues in Southern Sudan}...\textit{supra} note 5 at D-iv.
\textsuperscript{27} The National Dialogue: “Communiqué: The Bahr el Ghazel Regional Conference” (2019), Wau, South Sudan, From February 25\textsuperscript{th} to 2\textsuperscript{nd} March 2019, at 2.
\textsuperscript{28} The National Dialogue: “Communiqué: The Equatoria Regional Conference” (2019), Juba, South Sudan, from August 26\textsuperscript{th} to August 31\textsuperscript{st}, 2019, at 3.
whereas urban land refers to that land which is gazetted and its ownership is vested in the Government. The Conference also held that the Government has the authority to lease and/or distribute (urban) land to individuals and institutions. More importantly, the Conference made urgent calls upon the Government to immediately resolve land disputes between contesting ethnic groups. It also urged the Government to take steps to immediately demarcate internal borders as they stood on January 1st, 1956.29

While all these regional resolutions are critical, the call by the Upper Nile Region Conference for the demarcation of internal borders is instructive in insofar as developing a sound land policy and administration in South Sudan is concerned. This process must begin with the delineation of traditional ethnic boundaries countrywide. That way, border issues can be settled once and for all. This, as well, will make it easier for the state and central government as well as for oil companies to cooperate with traditional authorities on policies that can enhance regulation and management of land. The link to the 1956 ethnic boundaries can be found here.30

In order to demarcate South Sudan’s internal borders, the Government must rely on two sources of borders. These are de jure and de facto borders.

*De jure* borders refer to administrative boundaries whose existence and legality are recognized and affirmed by domestic and/or international law.31 In the case of South Sudan, *de jure* ethnic boundaries are those that were delineated by the British Colonial Government on January 1, 1956, and are, thus, the only boundaries recognized by the laws of South Sudan. Their boundary lines are subject to precise determination by means of physical demarcation. The legality of the 1956 ethnic or administrative boundaries have been affirmed time and again by both the Government and Opposition groups alike. They are also the basis for determining the boundaries between the Sudan and South Sudan.

*De facto*—better known as oral—borders, are domestic administrative boundaries that describe, in theory and practice, the territorial limits of a given area with

30 The 1956 ethnic boundaries can be found here: [http://www.bl.uk/onlinegallery/onlineex/maps/africa/largeimage136644.html](http://www.bl.uk/onlinegallery/onlineex/maps/africa/largeimage136644.html) (retrieved on February 12, 2020 at 10.30 PM).
respect to its neighbors. The existence of *de facto* borders may not be in conformity with, nor necessarily recognized, by the supreme law of the land or international law. Such borders are, nevertheless, informally understood as describing the geographical limits of a given community’s territory, having the capacity to allow a community as well as its neighbors to conduct themselves as if these boundaries are entirely legal.\(^{32}\)

It should be emphasized that in the event of any conflict or inconsistency between *de facto* and *de jure* borders, the latter must govern.

On matters of individual land disputes including issues of adverse possession, it is recommended that the matter should be settled judicially. This view does not prejudice any out-of-court settlement between petitioners and respondents, especially between original owners and current occupants. Such settlement should also be cognizant of the principle of adverse possession.

**9. Policy Suggestions and Recommendations**

A properly thought-out land policy is critical in the sense that it enables individuals and communities to make long term and short-term economic decisions on matters such as crop farming practices, animal rearing and other forms of economic investment structures.\(^{33}\)

For this reason, a sound land policy and administration must be animated by the imperatives of equitable and shared economic benefits. Some of the imperatives covered in the workshop are discussed below.

**(i) Vesting Land in the Community versus the People versus the Government**

In light of the three regional conferences resolutions on who should own and manage land in South Sudan, one of the most emotive issues that came out of the workshop was whether the ownership of land should be vested in Government, the communities or in the people.

\(^{32}\) *Ibid.*

\(^{33}\) Nyanthon Hoth Mai, Nhial Tiitmamer, and Augustino Ting Mayai, “Land Tenure in South Sudan: Does it Promote Climate Change Resilience” (2017) The Sudd Institute Policy Briefs, Feb. 23, online at: [https://www.academia.edu/31655293/Land_Tenure_in_South_Sudan_Does_it_Promote_Climate_Change_Resilience](https://www.academia.edu/31655293/Land_Tenure_in_South_Sudan_Does_it_Promote_Climate_Change_Resilience) (retrieved on February 11, 2020) at 6.
A good land policy and administration must underscore the implications of vesting land in one entity or the other. There is, for example, a distinction in vesting land ownership in the people versus the community. As used in this context, the term “community” refers to an organic (ethnic) community whereas the concept of “people” refers to all those residing in a particular place (e.g. anybody who own land and lives in Juba would be protected by the concept of the people in South Sudan). It stands to reason that vesting land in the community as opposed to people implies that those who have chosen to settle in an area other than their own place of nativity would be excluded from the idea of the community and would therefore not be entitled to enjoy the right to land or interests in land. The concept of people on the other hands seems to be inclusive. That is because anyone, regardless of their social background, is captured by the idea of people. This also means that vesting land in the people would be a more inclusive and would generally be an equitable way of protecting the right to land.

Similarly, the concept of government is an amorphous way of referring to a body that consists of three arms of government namely; the executive, the judiciary and the legislature. In a country such as South Sudan where institutions are weak and some government officials are not foresighted, the government can only benefit the few who run it. This suggests that vesting land ownership in the Government must be approached with extra caution for several reasons.

First when the Government has failed to act consistently as a surrogate of its people’s welfare, an argument can be made that the resultant system can only benefit the few over the many. Such a Government cannot be entrusted with the power to distribute land fairly and equitably.

Second, a public land policy that seeks to vest the ownership of land in the Government is impractical and unreasonable when construed from a historical perspective. In most settlor countries, the Government was the first to claim land ownership following the assertion of sovereignty over what was considered to be “terra nullius.” In indigenous countries, such as South Sudan, however, communities were the first to own the land before the assertion of sovereignty. This means that only the people, not the Government, actually own the land. Whatever amount of land that can be vested in the Government can only be a function of people or communities choosing to offer their land to the Government, not the other way around.
Third, Government can be staffed with people who care about their own self-aggrandizement.

It stands to reason that a sound land policy in South Sudan must vest land ownership neither in the community nor government but rather in the people. It must, however, be noted that the majority of attendants at the workshop preferred vesting land ownership in communities, not the government. In this regard, public opinion should not be ignored. That is because in certain circumstances, popular optics, not foresightedness, may animate public policy. In situations where popular resentment may manifest itself in anger and violence as is the case in South Sudan, the significance of popular optics cannot be ignored.

(ii) Surface and Subsurface Rights

Knowing the limits of one’s legal rights is important because one may also need to know whether that ownership includes subsurface rights and whether one is entitled to the rights to lease or sell the land to an oil or gas company for purposes such as exploration or extraction of minerals or gas below that land. If subsurface rights are excluded, then the question of what one’s rights would be in the event that the Government discovers a precious commodity beneath one’s land is critical.

In South Sudan, Articles 4, 6 (6) and 42 (g) of the Land Act provide that subterranean resources shall be vested in the Government of South Sudan.

The workshop emphasised that in the event that the government discovers a precious commodity beneath a private property, the government may have to pay both the cost of the land and fixtures as well as cost of relocation. Where one has sentimental attachment to the land, reasonable compensation should also be paid to the owner. Quantifying the value of sentimental attachment should involve relevant experts.

(iii) Seasonal Rights and Access

A sound land policy and administration must uphold the centuries-old practice in which South Sudanese communities have always shared their land with neighbors and other outsiders. Such a policy or law must thus take into account the need to protect agricultural production, community, peace and harmony, and without any undue interference in or degradation of the primary interest in land, as implied in Article 6 (5) of the Land Act. Under this system, members claim equal entitlement
to use or access it has historically been part of intercommunal relations in South Sudan.

(iv) **Gender Equity**

While it is reasonable that customary land policy and administration are maintained, one must be cognizant that most South Sudan’s customary laws and practice do not accord women equal access to land as men. Women’s rights to land tend to be guaranteed through their husbands or their male relatives.\(^{34}\) Furthermore, in light of the fact that 45%-50% of returnees’ households are headed by women and girls,\(^ {35}\) there is a need for a paradigm shift in terms of creating land policies that are equitable and sensitive to women’s rights to land. Such policies must be cognizant not only of traditional biases against women but also of the day-today realities of South Sudan.

(v) **Overlapping Land Ownership and Interjurisdictional Conflicts**

Overlapping land ownership occurs when a single piece of land is sold many times by the same vendor to multiple purchasers. This issue is exacerbated by the fact that existing land laws and policies are not very clear in articulating which administrative authority has jurisdiction to oversee the acquisition and registration of land ownership in South Sudan. In this regard, private land ownership, especially in Juba and other urban areas, is significantly undermined.

In order to resolve this, a sound land policy and administration should establish, to the exclusion of others, a single authority to oversee the management and regulation of land including registration. In this regard, efforts should be made to ensure that the existing interlocutory nature of various authorities on land is minimized as much as possible. Where concurrent powers cannot be avoided, the law must make it clear which authority must exercise superseding jurisdiction.

(vi) **Land Border Disputes**

The greatest impediment to an effective land policy and administration is lack of clear internal boundaries between counties and states in South Sudan. All existing maps that purport to show boundaries are not official. A good land policy must recognize which level of authority actually has jurisdiction over a given piece of land for purposes relating to decision-making about land policy or infrastructural

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\(^{34}\) Forojalla and Galla, Eds., *Land Tenure Issues in Southern Sudan...supra* note 5 at A-11-12.

development. A sound land policy obtains if and when internal borders have clearly been defined. For this reason, the Government should take reasonable steps to ensure that internal borders are demarcated.

(vii) **Alienation of Traditional Authority Over Land Management**

Over 90% of land ownership in South Sudan is under the control of ethnic communities which are led by traditional leadership. Yet Traditional Authority has significantly been undermined by the Government both at the central and state levels. As evidenced by the conflict between the Bari community and Government at Jebel Lado, organic communities are often times reluctant to allow urban development activities including infrastructural development out of concerns that the encroachment of government in community land without consultations. They consider such overreaching as part of government’s efforts to undermine their authority.

A sound land law or policy must be cognizant of the resentment that can arise when Traditional Authorities are alienated from decisions that substantially affect their customary rights in land.

(viii) **Crop and Animal Husbandry as Potential Backbone of the Economy**

South Sudan is blessed with an arable land that, along with cattle rearing industry, can robustly support a more sustainable economy in the country. Only these sectors can move the country away from dependency on oil. Furthermore, more than 78% of households in the country directly or indirectly subsist on land in the forms of cattle keeping and crop farming and/or both.\(^{36}\) But the country substantially remains dependent on oil as its major source of revenues. Yet oil is a finite resource. In order to diversify the economy, therefore, investment in agriculture and animal husbandry is indispensable. Oil proceeds should be used in fueling agricultural development besides creating service industry. In this respect, a sound land policy must ensure that South Sudan Government identifies and designates agricultural zones throughout the country. Only this would enable South Sudan not only to secure sufficient food production but also for exports. This can only be a function of a sound land policy and administration.

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\(^{36}\) Nyanthon Hoth Mai, Nhial Tiitmamer, and Augustino Ting Mayai, “Land Tenure in South Sudan: Does it Promote Climate Change Resilience” (2017) The Sudd Institute Policy Briefs, Feb. 23, online at: [https://www.academia.edu/31655293/Land_Tenure_in_South_Sudan_Does_it_Promote_Climate_Change_Resilience](https://www.academia.edu/31655293/Land_Tenure_in_South_Sudan_Does_it_Promote_Climate_Change_Resilience) (retrieved on February 11, 2020) at 5.
Environmental Conservation, Preservation and Wildlife Protection

The Republic of South Sudan boasts of being one of the two largest wildlife migration spectacles the worldwide. The country is endowed with a variety of wildlife species which include but are not limited to elephants, leopards, ostriches, antelopes, buffalos, tiang, lions, spotted oryx, zebras, kob just to mention but a few. These, in addition to the Sudd, the White Nile as well as the breathtaking beauty of the land and lush vegetation, can make South Sudan second to none on the continent if it properly invests in them.

A good land policy and administration must, therefore, factor into consideration this potential economic treasure. The conservation of the Sudd, which is one of the UNESCO’s World Heritage Sites requires concerted efforts from both the Government and communities alike. Furthermore, a sound land policy and administration must consider the fact that the Government is better at doing certain things than the private sector while the private sector is better at doing certain things than the Government. In certain circumstances a joint responsibility is required to ensure a more optimal outcome. The preservation of wildlife and republican parks is one good example for which a joint responsibility is imperative.

Alternative Land Dispute Resolution Mechanisms

South Sudan facing a myriad of land issues, ranging from individual disputes over a plot of land to overlapping jurisdictional conflicts. Relevant remedies to deprivations of land rights can be a blend of both customary and judicial principles. South Sudan “must address the question of which mode would be appropriate or applicable in the country, taking into considerations the centrality of land question and popular animosity towards Government control of land.”

While courts and other judicial bodies are often the resort of first instance in terms of resolving land disputes, we must not lose sight of alternative ways of resolving disputes over land. This includes mediation, arbitration and other forms of out-of-court settlement processes. These methods should involve negotiations followed by fair and just compensation.

Harmonized Land Registration System

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38 Forojalla and Galla, Eds., Land Tenure Issues in Southern Sudan...supra note 4 at B-7.
In order to have an effective land tenure system in South Sudan, fundamental changes in relation to the management and regulation of land must be undertaken without further ado. A centralized system of land registration must be effective countrywide. This will partly settle the issues of not only multiple ownership of the same piece of land that arises as a result of fraudulent transactions but also of land grabbing and communal conflicts of over land and borders.

(xii) Internal Borders Demarcation

The project of land policy and administration in South Sudan is probably the most important republican project since 2005. That is because land has gained both economic and political significance that can only be ignored at country’s peril. The inexorable accusations of land grabbing, border disputes and lack of coherent countrywide land policies, among others, adversely impact not only on individual land ownership and private investment. They also lurk behind the cycle of violence that South Sudan has had to endure since 2013. The significance of this project cannot, therefore, be understated.

Land laws, policy and administration in South Sudan cannot be effective without the demarcation of internal borders. According to Article 11 (1) of the South Sudan Land Act, “communal land shall be determined and demarcated based on ethnicity, residence, or interests and whether land is registered in the name of the community, lawfully held, managed or used by the community, lawfully transferred to the community or declared to be community land by law.” This Paper suggests that the Government of South Sudan should take all reasonable steps to physically demarcate internal borders.

(xiii) Internal Boundaries Demarcation Act

An enabling piece of legislation, which must be sunset in nature must be passed before embarking on the exercise of physically demarcating internal borders. The legislation may be dubbed as Internal Boundaries Demarcation Act. The Act must be passed by the Republican Legislature.

(xiv) Countrywide Land Claims Court/Land Tribunal

South Sudan land issues have become too frequent that the existing legal system is unable to deal with them. For this reason, an establishment of a Small Land Claims Court/Land Tribunal with situs in every county across the country is necessary. This court may deal with land disputes with the monetary sum of up to SSP 7 750
000 (USD25, 000). The goal is to reduce the magnitude of backlog of legal issues that have blighted South Sudan’s judicial system.

10. Challenges

(i) Challenges Relating to Physical Demarcation of Internal Borders

Part of this project required access to very critical information such as the 1956 ethnic border map. Furthermore, in order to effectively undertake the project of demarcating internal borders, retention of experts (such as cartographers) is indispensable. For this reason, the Paper urges the National Dialogue to seek further funding in the event that request for demarcating internal borders is approved by the Government.

(ii) Lack of Political Will on the Part of the Government

One of the most critical challenges to advancing an effective land policy and administration in South Sudan is lack of political will on the part of government officials. The existence of uncertainty on land policy has its winners. Among them are the wealthy and some government officials who though are able, remain neither willing nor ready to support any policy that would lead to equitable dealing with land issues.

11. Conclusion

This Policy Paper has endeavored to underscore the strengths and limitations of existing land laws and policies with the view to developing a more effective land policy and administration in the world’s youngest country. The fundamentals of a sound land policy and administration revolve around the issue of whether land is being divided equitably. Equitable division of land occurs when existing institutional arrangements are just and reasonable in circumstances, having regard to individual and collective interests. Such institutions, it seems, are almost non-existent in South Sudan.

Against this backdrop, the Paper examined the nature of land ownership both in indigenous countries (such as South Sudan) and settlor countries (such as Canada). It contended that historical differences in the processes of state formations in indigenous and settlor countries inherently gives rise to the land ownership being vested in the communities or in government.

The Paper also underlined that both the TCSS and Land Act envision a land tenure system consisting of public land, private land, and communal land. Furthermore,
depending on one’s status, there exist two contrasting views on land ownership in South Sudan namely; public/state ownership and communal land ownership. Public or state ownership is favored by most government officials while communal ownership is favored by ordinary peasants, Traditional Authorities and land tenure experts.

In addition, the Paper underscored that the economic and political significance that land has gained since 2005 has made land issues some of the most sensitive and explosive matters in the country. Not only has this led to an unprecedented level of land conflicts. It also means that land has suddenly become central to the ongoing civil conflict. These conflicts are further exacerbated by the absence of clear internal boundaries, leading to different communities, states and Central Government to claim jurisdiction over the right to own and allocate land or interest in land in certain areas.

More importantly, the Paper did not purport to provide definitive answers to these and other nagging land issues. Rather, it sought to ignite a conversation around current land issues with the view to underscoring the imperatives of a good land tenure policy and administration a priori.

Furthermore, in light of recent debates and resolutions that came out of the three Regional Conferences under the auspices of the National Dialogue, the Paper sought to encourage the debate on whether land ownership should be vested in the Government, communities or the people. Because the definition of a “community” excludes those who are not originally members of a particular ethnic community, the Paper argued that vesting land ownership in the community may not encourage an equitable distribution of land. It also argued that in a country in which the Government has not shown that it is a faithful surrogate of the people’s welfare, vesting land ownership in Government carries the risk of marginalizing ordinary citizens. This leaves, as the safest choice, the vesting of land ownership in the people. That is because anyone, regardless of their ethnic, place or birth or race, can become part of the people whenever and wherever he or she has lawfully taken up a permanent or temporary abode. But majority of people in the workshop argued for vesting land ownership in communities, not in government. Since popular optics can sometime be more important than foresightedness, it is important not to ignore public sentiments.

In addition, in view of the fact that the Government does not have enough land of its own because much of the land in South Sudan is vested in organic communities,
the Paper contended that, in rare but legally justifiable circumstances, the Government may invoke the doctrine of eminent domain as an instrument with which it can legally acquire private land from citizens or communities, for public purposes such as construction of railroads, airports, stadiums, sports complexes, public safety, etc., insofar as just compensation is given in return.

Finally, the Paper sought to propose the establishment of a countrywide registration system; demarcating of internal borders as they stood on January 1, 1956. Before embarking on this issue, the Government should pass an enabling legislation, which, this Paper proposes, should be dubbed as the *Internal Boundaries Demarcation Act* or some variations thereof. The Paper also proposes the creation of Small Land Claims Courts/Land Tribunals across the country to specifically handle land issues and subsequently mitigate the problem of backlog in our judicial system.