

Memo

To: Dr. Jeanette Carter
From: Caleb Stevens, Esq.
CC:
Date: 4/5/2011
Re: Liberia's International Legal Obligations with respect to Land Reform

I. Question

What are Liberia's international legal obligations with respect to land reform?

II. Short Answer

Liberia's international legal obligations with respect to land reform fall into two broad categories: International human rights law and international investment law. The international human rights law obligations center on five principal areas: (1) right to property, (2) right to adequate food, (3) limits on forced evictions, (4) indigenous land rights, and (5) prohibition on racial discrimination. Regarding international investment law, land reform efforts must be mindful of Liberia's bilateral investment treaties.

III. Analysis

A. The Sources of International Law

There are generally speaking five accepted sources of international law: (1) treaty, (2) custom,¹ (3) general principles, (4) judicial decisions, and (5) academic writings.² What follows focuses on treaties, while drawing upon some international judicial and quasi-judicial bodies relating to the application and interpretation of relevant treaties.

Liberia's international legal obligations with respect to land reform fall into two broad categories: International human rights law and international investment law. Liberia has

¹ Custom requires sufficient state practice and *opinio juris* (i.e. the state practice must follow from the state's view that such practice is required by international law).

² Statute of the International Court of Justice, Article 38(1) ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

ratified³ several human rights treaties relevant to land reform: Convention on the Elimination of All Forms of Racial Discrimination (“CERD”);⁴ International Covenant on Economic, Social, and Cultural Rights (“CESCR”);⁵ and the African Charter on Human and Peoples’ Rights (“Banjul Charter”).⁶ With respect to international investment law the relevant treaties are bilateral investment treaties.

B. International Human Rights Law

International human rights law is relevant to land reform in Liberia in five principle areas: (1) right to property, (2) right to adequate food, (3) limits on forced evictions, (4) indigenous land rights, and (4) prohibition on racial discrimination.

a. Right to Property

There is a general right to property under international human rights law, which encompasses land ownership. The Universal Declaration of Human Rights, a non-binding international legal instrument but often used as evidence of customary international law, provides that “[e]veryone has the right to own property alone as well as in association with others” and “[n]o one shall be arbitrarily deprived of his property.”⁷ Article 14 of the Banjul Charter contains a right to property which can “only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”⁸ The Banjul Charter also states, “[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.”⁹ The right to property thus places limits on the state’s ability to exercise the eminent domain power. This power cannot be exercised arbitrarily but rather in accordance with “appropriate laws,” which should only permit eminent domain in the public or community interest.

³ An important distinction must be made regarding ratification. Ratification at the international level (i.e. consent to be bound in the international plane) is distinct from ratification requirements under a state’s domestic law. For example, the US Constitution requires Senate ratification of all treaties signed by the Executive before they can have the force of law. But if the US ratifies a treaty on the international plane prior to ratifying the treaty pursuant to domestic law, the US still has an international legal obligation to comply with the treaty. This is why states frequently undertake the domestic ratification process prior to, or simultaneous with, ratifying the treaty at the international level. *Generally* Anthony Aust, *Modern Treaty Law and Practice* (2000). In addition, states with a dualist system require implementing legislation for a treaty to have the force of law at the domestic level. Liberia is a dualist system and Article 34(f) of the Liberian Constitution empowers the Legislature “to approve treaties, conventions and such other international agreements negotiated or signed on behalf of the Republic.” Liberia’s ratification of the above treaties at the international level does not mean it has gone through the necessary domestic steps to give them the force of law in Liberia. Regardless, they still impose international legal obligations on Liberia, even with respect to land reform, because a bedrock rule of treaty law is “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Vienna Convention on the Law of Treaties, art. 27 (1969).

⁴ Liberia acceded to CERD on November 5, 1976.

⁵ Liberia signed the CESCR on April 19, 1967 and ratified it September 22, 2004. Liberia has neither signed nor ratified the Optional Protocol granting the Committee on Economic, Social, and Cultural rights jurisdiction to hear complaints regarding a State Party’s violations of the CESCR.

⁶ The African Charter on Human and Peoples’ Rights entered into force on October 21, 1986.

⁷ Universal Declaration of Human Rights, Article 17.

⁸ African Charter on Human and Peoples’ Rights, art. 14.

⁹ *Id.* at art. 21(2).

b. Right to Adequate Food

In certain circumstances the right to adequate food under the CESCR is violated if people are rendered landless by a state's actions. General Comment 12 of the Committee on Economic, Social, and Cultural Rights on the right to adequate food states that in some cases honoring this right requires "feeding oneself directly from productive land or other natural resources."¹⁰ If a government arbitrarily dispossessed people of their land, this would constitute a violation of the right to adequate food, "especially if the land was their primary means of feeding themselves."¹¹

c. Limits on Forced Evictions

Evidence of both general principles and customary law on forced evictions can be found in the Basic Principles and Guidelines on Development-Based Evictions and Displacement ("Principles"). The Principles direct states to provide ample time for public notice and comment on eviction plans and to "explore fully all possible alternatives to evictions."¹² Importantly, evictions cannot be carried out if they will make the evicted persons homeless.¹³ Adequate substitute housing must be provided if necessary "to the maximum of [the state's] available resources."¹⁴

Furthermore, the CESCR generally prohibits forced evictions. According to Article 2(1) of the CESCR, states must use "all appropriate means" to ensure the right to housing, including "refrain[ing] from forced evictions" General Comment 7 of the Committee on Economic, Social and Cultural Rights states, "[F]orced evictions are prima facie incompatible with the requirements of the [CESCR]."¹⁵

d. Indigenous Land Rights

The Banjul Charter, Article 21, provides, "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."¹⁶ By referring to "people" the Banjul Charter protects communal property rights.¹⁷

As a matter of customary international law, there is evidence that indigenous peoples have a right to secure access and title over their traditional lands and natural resources.¹⁸ The

¹⁰ Committee on Economic, Social and Cultural Rights, General Comment 12, para. 12.

¹¹ Commission on Human Rights, Preliminary Report of the Special Rapporteur on the Right to Food, Jean Ziegler, para. 27, UN Doc. A/56/210 (Jul. 23, 2001).

¹² Basic Principles and Guidelines on Development-Based Evictions and Displacement, paras. 37-38.

¹³ *Id.* at para. 43.

¹⁴ *Id.*

¹⁵ Committee on Economic, Social and Cultural Rights, General Comment 7, para. 1 (1997), referencing General Comment 4 (1991).

¹⁶ African Charter on Human and Peoples' rights, art. 21.

¹⁷ Richard Kiwanuka, *The Meaning of People in the African Charter on Human and Peoples' Rights*, 82 Am. J. Int'l L. 80 (1988).

¹⁸ *E.g. Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, para. 118, Judgment of March 29, 2006 ("The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation

Committee on the Elimination of Racial Discrimination has called “upon State parties to . . . ensure . . . that no decisions directly relating to [indigenous peoples’] rights and interests are taken without their informed consent.”¹⁹ This includes decisions directly relating to their land rights. The Committee was even more explicit when it called “upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources” If indigenous people have been deprived of their traditional lands “without their free and informed consent,” States parties are “to take steps to return these lands and territories” to them or, if this is not possible, to provide “just, fair and prompt compensation.”²⁰

The International Labor Organizations Convention 169 provides for similar protections of indigenous land rights. Although Liberia has not ratified ILO Convention 169, at least one commentator has argued it evidences a customary rule protecting indigenous land rights.²¹ Article 7(1) states that indigenous peoples “shall have the right to decide their own priorities for . . . the lands they occupy or otherwise use, and to exercise control, to the extent possible over their own economic, social and cultural development.”²²

Future evidence of a customary law protecting indigenous land rights can be found in the 2007 UN General Assembly declaration on indigenous land rights. Article 26 states, “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”²³ States are called upon to grant legal recognition of these indigenous land rights.²⁴ The term “lands” in the declaration “covers the total environment of the areas which the peoples concerned occupy,” and so includes forest resources.²⁵ It does not cover subsurface resources as it is limited to areas that indigenous peoples occupy or “otherwise use.”²⁶ This is confirmed by Article 15 which expressly permits a state to retain ownership of subsurface resources provided relevant indigenous peoples are consulted.²⁷ Finally, “adequate procedures” must be in place to resolve land claims.²⁸

Liberia’s Community Rights Law is a step in the right direction towards ensuring indigenous peoples are consulted regarding the use of their traditional forest resources, but in light of the treaty and customary protections afforded indigenous peoples their role under the Community Rights Law should be strengthened. And a proposed law recognizing community land should consider this aspect of international human rights law as well.

with their traditional lands and natural resources, not only because they are their main means of survival, but also because the [sic] form part of their worldview, of their religiousness, and consequently, of their cultural identity.”).

¹⁹ Committee on the Elimination of Racial Discrimination General Comment 23, p. 122-23, para. 40, Doc. A/42/18, adopted on August 18, 1997.

²⁰ *Id.* at para. 5.

²¹ Seth Korman, *Indigenous Ancestral Lands and Customary International Law*, Hawai’i L. Rev. 391, 444-45 (2010).

²² ILO Convention 169, art. 7(1).

²³ UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly Resolution 61/295 on September 13, 2007, art. 26.

²⁴ *Id.*

²⁵ *Id.* at art. 13(1).

²⁶ *Id.*

²⁷ *Id.* at art. 15(2).

²⁸ *Id.* at art. 14(3).

e. Prohibition on Racial Discrimination

i. Racial Qualification for Citizenship

The Liberian Constitution Article 27 states, “only persons who are Negroes or of Negro descent shall qualify by birth or by naturalization to be citizens of Liberia.”²⁹ CERD Article 1(3) provides:

Nothing in this Convention may be interpreted as affecting in any way the legal provisions of Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.³⁰

Thus, State Parties may do as they please with respect to citizenship so long as they do not “discriminate against any particular nationality.” Article 5(d)(iii) prohibits distinctions based on “race, colour, or national or ethnic origin” as to the “enjoyment of” “[t]he right to nationality.”

In 1974, the Committee interpreted these provisions as prohibiting Sierra Leone from limiting citizenship to only persons of “Negro African descent.”³¹ The Committee reasoned that, in interpreting CERD holistically,³² its purpose is to eliminate racial discrimination defined as any distinction based on race, color, descent, or national or ethnic origin.³³ In General Comment No. 30 the Committee reiterated emphatically its position taken in 1974, “the deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality.”³⁴ The Sierra Leonean Citizenship Act of 1973, declared by the Committee to be incompatible with Sierra Leone’s obligations under CERD, is very similar to Article 27 of the Liberian Constitution. Citizenship by birth is permitted, “[p]rovided that his father, mother or any of his grandparents was born in Sierra Leone and is or was a person of Negro African descent.”³⁵ However, persons whose parents are not of ‘negro African descent’ may become citizens by naturalization if certain requirements are met.³⁶ If Sierra Leone’s less restrictive citizenship law, which permits naturalization of non-blacks, was found to be in violation of CERD, then certainly Liberia’s more restrictive citizenship law is in violation.

It seems rather clear that Liberia is not in compliance with its obligations under CERD,³⁷ and one of three actions must be taken to bring it back into compliance: (1) withdraw from the

²⁹ Constitution of Liberia, art. 27 (1986).

³⁰ CERD, art. 1(3) (1966).

³¹ Drew Mahalic & Joan Gambee Mahalic, *The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination*, 9 Hum. Rts. Q. 74, 80 (1987) (citing Committee on the Elimination of Racial Discrimination, 10th Sess. (204th mtg.) at 43-48, UN Doc. CERD/C/SR.204 (1974)).

³² *Id.*

³³ *Id.*

³⁴ Committee on the Elimination of Racial Discrimination, General Comment 30: Discrimination Against Non Citizens, para. 14 (Oct. 1, 2004).

³⁵ Sierra Leone Citizenship Act, Section 2 (2006).

³⁶ *Id.* at Section 8(1).

³⁷ Not only is Liberia in non-compliance with respect to its citizenship law, it has also failed to submit a single report to the Committee pursuant to Article 9 of the Convention, which requires an initial report within one year of

Convention, (2) amend the Convention, or (3) amend the Constitution. A reservation is not a viable option for two reasons. First, a reservation to a treaty may only be submitted “when signing, ratifying, accepting, approving or acceding to a treaty”³⁸ Second, even if a reservation covering Liberia’s citizenship law were possible at the present time, such a reservation would probably run afoul of Article 20(1) of the Convention, which prohibits reservations “incompatible with the object and purpose of” CERD.³⁹ Given that the Committee has stated that the purpose of CERD is to eliminate racial discrimination and a citizenship law like Sierra Leone’s, and by extension Liberia’s, is incompatible with that purpose, such a reservation would probably be objected to by two thirds of the State Parties. If two thirds of the State Parties object to a reservation then it is deemed incompatible with the Convention’s object and purpose.⁴⁰ It is not surprising therefore that no State Party has submitted a reservation covering a citizenship law similar to Liberia’s and Sierra Leone’s.

Liberia may withdraw from CERD using the denunciation mechanism laid down in Article 21. A denunciation must be sent in writing to the UN Secretary-General and takes effect one year after receipt.⁴¹ Amending CERD to allow for a citizenship law similar to Liberia’s is very unlikely, not only for the reason of incompatibility with the Convention’s object and purpose as argued above, but also because it would almost certainly require agreement of the State Parties.⁴² The remainder is that either Liberia must withdraw from CERD or amend its citizenship law—the foregoing discussion reveals the incompatibility of the two.

ii. Racial Qualification for Property Ownership

Article 5(v) of CERD provides:

State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . the right to own property alone as well as in association with others.⁴³

Although I have not been able to find any Committee documents directly on point, there is material indirectly supporting the proposition that a statute or constitutional provision prohibiting non-black citizens from owning land would violate Article 5(v) of CERD. The Committee has interpreted Article 5(v) as prohibiting restrictions on the alienation and ownership of land by indigenous peoples.⁴⁴ Consequently, Fiji and Tonga submitted reservations on their respective laws that “prohibit[] or restrict[] the alienation of land by the

the treaty’s entry into force for the State Party and every two years thereafter. Report of the Committee on the Elimination of Racial Discrimination, A/65/18 (2010), p. 126.

³⁸ Vienna Convention on the Law of Treaties, art. 2, Section 1(d) (1969).

³⁹ CERD, art. 20(1).

⁴⁰ *Id.*

⁴¹ *Id.* at art. 21.

⁴² *Id.* at art. 23 (“The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request [for revision of the Convention]”). Article 39 of the Vienna Convention on the Law of Treaties states the general rule regarding amending treaties, “A treaty may be amended by agreement between the parties.”

⁴³ CERD, Article 5(v) (1969).

⁴⁴ Committee on the Elimination of Racial Discrimination, General Comment 23 (Aug. 18, 1997).

indigenous inhabitants.”⁴⁵ Additionally, Lebanon, during its reporting presentation to the Committee in 1998, expressly noted that its quota system for foreign ownership of property applied “to all foreigners and did not constitute a refusal to sell goods or services on racist grounds.”⁴⁶ A law prohibiting non-black citizens from owning land would almost certainly be considered a refusal to sell a good on racist grounds.

Perhaps I have been unable to find Committee documents directly on point because the “ordinary meaning” of Article 5, “in light of the object and purpose” of CERD,⁴⁷ seems to clearly prohibit the denial of land ownership based on race. Therefore, the Committee may have never felt the need to elaborate on this issue.

C. International Investment Law

Liberia has entered into a few bilateral investment treaties. According to the United Nations Conference on Trade and Development, as of June 1, 2010, Liberia is bound by bilateral investment treaties with Belgium, Luxembourg, France, Germany, and Switzerland. The treaties with France and Switzerland impose obligations related to compensation for expropriating foreign-owned assets as well as treating foreigners as favorably as nationals.⁴⁸ For example, the bilateral investment treaty between Liberia and France provides in Article 5, “Measures of dispossession that could be taken shall give rise to immediate, adequate, and effective compensation the amount of which shall correspond to the actual value”⁴⁹ Proposals for land law reform should recommend ensuring consistency between Liberia’s bilateral investment treaties and its domestic investment law. The current Liberian investment law provides for “fair and adequate compensation” defined as “fair market value.”⁵⁰ This standard should perhaps be tweaked in light of Liberia’s obligations under its bilateral investment treaties.

In addition, Liberia’s bilateral investment treaties with France and Switzerland have equitable treatment clauses. The treaty with France states:

Each of the Contracting Parties undertakes to ensure on its territory just and equitable treatment, conforming to the principles of international law, of investments of nationals and companies of the other Party This treatment shall be at least equal to that

⁴⁵ Reservations of Fiji and Tonga to CERD, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en.

⁴⁶ Committee on the Elimination of Racial Discrimination, 52d Sess., Summary Record of the First Part (Public) of the 1259th Meeting, CERD/C/SR. 1259, para. 21 (Apr. 1, 1998).

⁴⁷ Vienna Convention on the Law of Treaties, art. 31 (1969).

⁴⁸ Luke Eric Peterson & Ross Garland, *Bilateral Investment Treaties and Land Reform in Southern Africa*, Rights & Democracy 12, 14 (June 2010).

⁴⁹ Convention Between the Government of the French Republic and the Republic of Liberia on the Encouragement and Mutual Protection of Investments, signed on March 23, 1979 and entered into force on January 22, 1982 [hereinafter “French Convention”]. See also Treaty of Peace and Commerce Between the Swiss Confederation and the Republic of Liberia, art. 6, signed on July 23, 1963 and entered into force on September 22, 1964 (“indemnité effective et adéquate conformément au droit international.” [effective and adequate compensation in conformity with international law.]).

⁵⁰ Investment Act of 2010, Section 7.2

which is accorded to the most favored nationals and companies of each Contracting Party.⁵¹

Even though the above provision, like all bilateral investment treaties, is specific to the nationals and companies of the other State Party, any law covering foreign companies would be one of general applicability. Therefore, the Land Commission must be mindful of this requirement in proposing new land laws.

IV. Conclusion

Liberia has international legal obligations with respect to land reform under international human rights law and international investment law. The international human rights law obligations are: (1) right to property, (2) right to adequate food, (3) limits on forced evictions, (4) indigenous land rights, and (5) prohibition on racial discrimination. The international investment law obligations are based on Liberia's bilateral investment treaties.

⁵¹ French Convention, Article 3 (“Chacune des Parties contractantes s’engage à assurer sur son territoire un traitement juste et équitable, conformément aux principes du droit international, aux investissements des nationaux et sociétés de l’autre Partie Ce traitement sera au moins égal à celui qui est accordé par chaque Partie contractante aux nationaux ou sociétés de la nation la plus favorisée.”).