Land Commission

Memo

To: Dr. Jeanette Carter

From: Caleb Stevens

CC:

Date: 11/5/10

Re: Legal Basis for Public Land Assumption in Liberia

I. Question

What is the legal basis for the assumption that the Liberian government holds ultimate title in all land and is the original grantor of all interests in land?

II. Short Answer

Radical title provides a legal basis for the ultimate ownership part of the public land assumption, but it is not a legal basis for the original grantor part because available evidence demonstrates that native title was never extinguished in the Hinterlands. Therefore, although under the doctrine of tenure the Liberian government could be viewed as the holder of radical title it cannot be the original grantor of all interests in land.

III. Background

There are two parts to the public land assumption. The first is that the Liberian government holds ultimate title to all land within the territorial borders of Liberia.[1] The second part is that the Liberian government was the original grantor of all interests in land, whether fee simple, as Aborigines Land Deeds, or otherwise.[2] Consequently, all land that has not been deeded to a community, tribal group, individual, or organization is public land, including land held as customary tenure.[3] In other words, if the government has not granted

[1] G.A.S.H Engineering, Environmental Management Plan & Resettlement Management Plan, RP717, p. 32 (Aug. 4, 2008) (The "Government owns the land within the borders of Liberia . . . .").

[2] *Id.* ("[T]he Government of Liberia is the original granter of land in Liberia."); *see* Amos Sawyer, The Emergence of Autocracy in Liberia: Tragedy and Challenge 123 (1992) ("'[G]overnment-owned land' . . . was delimited to include all land within what the ACS considered to be the territorial limits of Liberia that had not been deeded to individuals or otherwise assigned.").

[3] World Bank, Liberia: Insecurity of Land Tenure, Land Law and Land Registration in Liberia, Report No. 46134-LR, p. 18, 26-27 (Oct. 22, 2008) [hereinafter "World Bank"]. Admittedly, the legal view that customary land is also public land does not comport with the views of rural communities. Liz Alden Wily, 'So Who Owns the Forest' 167 (2007) ("By tradition 'we own the land' was the common position. This contradicts the law which suggests that customary owners do not own the soil and that their overlord in law is indeed government. If this is so, it has not penetrated community thinking. The question 'who owns public land' produced the response

an interest in land then the government retains an interest in that land as public land. And even for those lands not deemed public land, such as land held in fee simple, the Liberian government retains ultimate title. However, the legal basis for this public land assumption is unclear. The purpose of this memorandum is to provide some clarity to the situation by exploring the legal basis for the public land assumption.

The constitutions of several African states contain provisions vesting ultimate ownership of land with the people or the State. For example, the Constitution of the Central African Republic proclaims, "The property and goods of persons as the heritage of the Nation are inviolable."[4] The Ethiopian Constitution puts it in much stronger terms, "The right to own rural and urban land as well as natural resources belongs only to the state and the people. Land is an inalienable common property of the nations, nationalities and people of Ethiopia."[5] Similarly, the Ugandan Constitution provides, "Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution . . . ."[6] By exploring the legal basis for the public land assumption, a determination can be made as to whether a provision similar to those above should be inserted in the Liberian Constitution. In other words, if there is no legal basis for the public land assumption then one must be created, or, alternatively, if there is a legal basis it may need strengthening.

IV. Analysis: English Common Law and Radical Title

a. Definition of Radical Title

If the public land assumption is approached through an English common law framework radical title could conceivably provide a legal basis for it. In states colonized by the British Empire state ownership of land is often traced to the feudal doctrine of tenure and radical title. Radical title in England "refers to the title automatically assumed by the Crown once lands were either acquired or conquered."[7] In *Mabo v. Queensland*, one of the leading cases in the area of indigenous land rights, the Australian High Court explained radical title as follows:

> The radical title is a postulate of the doctrine of tenure[8] and a concomitant of sovereignty. As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those

'government'. The understanding is however that community land is 'tribal land' and that this is distinct from public land.").

[4] Constitution of the Central African Republic, art. 14 (2004) ("La propriété et les biens des personnes ainsi que le patrimoine de la Nation sont inviolables.").

[5] Constitution of Ethiopia, art. 40(3).

[6] Constitution of Uganda, art. 237(1) (1995).

[7] Samantha J. Hepburn, Principles of Property Law 44 (2d ed. 2001).

[8] The doctrine of tenure is "[t]he rule that all land is held of the Crown, either directly or indirectly, on some type of tenure." Black's Law Dictionary (9th ed. 2009).

parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne.[9]

Once sovereignty is extended over a given land area the Crown, as the embodiment of the sovereign power, is vested with supreme authority over that land area. This is radical title or ultimate ownership of all land. The Crown has ultimate authority to grant or expropriate lands as it sees fit, for its beneficial ownership or for the benefit of another. An important distinction must be made between ultimate ownership and beneficial ownership. The former vests in the Crown as holder of radical title immediately upon extending sovereignty over a given land area. The latter only vests in the Crown if an affirmative decision is made to expropriate land for the Crown's beneficial use.

As will be shown in more detail below, the problem with the application of radical title to Liberia centers on the distinction between ultimate ownership and beneficial ownership. As ultimate owner of all land within the sovereign territory of Liberia, there is no doubt that the Liberian government could have extinguished native title, same as it can expropriate land held in fee simple. But in accordance with the doctrine of radical title, this requires an affirmative act on the part of the Liberian government. The public land assumption is predicated on the notion that beneficial ownership by the government was coterminous with the extension of sovereignty over present-day Liberia. In this way, the position can be held that the Liberian government is the original grantor of all land in Liberia, because once sovereignty was extended beneficial ownership by the state followed (i.e. all the newly acquired land was public land). So the argument goes, the indigenous people enjoying use and possession of public land, do so by a limited grant from the Liberian government who is the beneficial owner of that land. But this argument is not consonant with the doctrine of radical title and thus the original grantor part of the public land assumption fails.

b. Conquest, Cession, and Occupation

In the Nineteenth Century international law and English common law recognized three means of acquiring radical title: conquest, cession by treaty, and occupation of land that was terra nullius (no one's land).[10] If territory was occupied as terra nullius then English common law immediately applied to the whole of that territory because there were no competing legal systems in place.[11] In territory conquered or ceded the pre-existing laws remained in force until altered by the Crown.[12] This provided an opportunity for indigenous legal systems to continue their operation outside of English common law or be incorporated into it.[13] Indigenous property rights could be altered only if the Crown granted another an interest in the land or appropriated the land for its own use.[14] Under English common law "[a] mere change

[9] *Mabo v. Queensland*, 175 CLR 1, para. 50 (Aust. High Ct. 1992). A demesne is, "[a]t common law, land held in one's own right, and not through a superior." Black's Law Dictionary (9th ed. 2009).
[10] *Mabo*, *supra* note 9, at paras. 2, 32, 33.
[11] *Id.* at para. 35 (quoting Blackstone (37) Commentaries, Book I, ch. 4, pp. 106-08).
[12] *Id.*; *St. Catharines Milling and Lumber Co. v. R*, 13 S.C.R. 577, 580 (Canada S. Ct. 1887) ("In case of conquest the only test as to title of the conqueror is found in the course of dealing which he himself has prescribed. When he adopts a system that will ripen into law he settles the principle on which the conquered are to be treated.").
[13] *Mabo*, *supra* note 9, at para. 5.
[14] *Id.* at para. 52.

in sovereignty is not presumed as meant to disturb the rights of private owners," whether indigenous or otherwise.[15] Thus, Liberia's acquisition of indigenous lands would not have automatically terminated indigenous property rights unless done so in accordance with the fiction that the land was terra nullius.

Based on the historical record it seems the present-day territory of Liberia was acquired by a combination of cession and conquest.[16] Concerning occupation, in *Western Sahara* the International Court of Justice held that Spain could not have acquired Western Sahara through occupation because in the Nineteenth Century customary international law did not permit acquisition by occupation when the territory was "inhabited by tribes or peoples having a social and political organization."[17] The separate opinion of Vice-President Ammoun went even further, declaring that the "concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned."[18] Similarly, the Australian High Court in *Mabo* held that the use of terra nullius to justify occupation of land inhabited by "backward peoples" is predicated on "a policy which has no place in the contemporary law of this country" for "it is imperative in today's world that the common law should neither be nor be seen to be frozen in the age of racial discrimination."[19] Thus, both international law and English common law do not support the acquisition of territory in Liberia through occupation because at the time of colonization the territory in present-day Liberia was inhabited by various tribal groups with well-developed social and political structures.[20]

What remains is the acquisition of radical title by cession or conquest. Let us assume *arguendo* that the Liberian government was properly vested with radical title by cession or conquest consonant with English common law and international law at the time.[21] Indeed, this assumption is not entirely without legal support. In *Karmo v. Morris* the Liberian Supreme Court found that "[Liberia's] *title* [over tribal territory] was conveyed by deeds of cession and treaties. By this method our *rights* were established over a radius of about forty miles from the Atlantic littoral."[22] Although the Court does not mention radical title by name, this finding can be interpreted by adding 'radical' in front of title and 'sovereign' in front of rights. Such

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[15] *Tijani v. Secretary, Southern Nigeria*, 2 A.C. 399, 407-08 (Privy Council 1921).
[16] World Bank, *supra* note 3, at 17-18 (quoting paper prepared at GRC Data Reconciliation Workshop on Land and Property Rights in Liberia on May 25, 2007).
[17] *Western Sahara*, Advisory Opinion, 1975 ICJ 12, paras. 80-81 (Oct. 16, 1975).
[18] *Id.* at 86 (separate opinion of Vice-President Ammoun).
[19] *Mabo*, *supra* note 9, at paras. 41, 42.
[20] Sawyer, *supra* note 2, at 43-69; *see* Wily, *supra* note 3, at 62.
[21] The World Bank report notes that the indigenous peoples ceded land under duress, the parties did not agree on the meaning of the land sales, and as the Americo-Liberian settlers moved into the interior they did not purchase the land from the indigenous peoples. World Bank, *supra* note 3, at 17-18. However, the legality of acquiring indigenous lands by similar means in the US has never been seriously challenged. *See United States v. Michigan*, 471 F. Supp. 192, 206 (W.D. Mich. 1979) ("During the 18th and 19th centuries the United States typically dealt with the Indians by treaty, as co-sovereign nations. Typically also, the United States secured Indian lands on terms which were little short of conquest and carried out the treaty in such fashion as to complete the vanquishment."); *see also Johnson v. McIntosh*, 21 U.S. 543, 588 (1823) ("Conquest gives title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of the individuals may be, respecting the original justice of the claim which has been successfully asserted.").
[22] *Karmo v. Morris*, 2 Liberian Law Reports 317, 327 (Liberian S. Ct. 1919) (emphasis added).

an interpretation would make perfect sense within an English common law framework. By acquiring lands from the indigenous peoples through cession the Liberian government, as the Crown, acquired radical title or ultimate ownership over the ceded lands, which is a correlate of sovereignty. As the Liberian government acquired the Hinterlands through a combination of conquest and cession its radical title and sovereign rights would have expanded to include the newly acquired territory.

The Liberian government, as analogous to the Crown under English common law, could have altered the property laws of the newly acquired territory at its discretion. This was done in the Littoral[23] upon Liberia's inception as a colony of the American Colonization Society.[24] The colonial 'constitution' vested the Governor with the power to dispose of land acquired from the indigenous peoples.[25] By implication, all land newly acquired from the indigenous peoples was vested in the Liberian government and granted as fee simple, concessions, or otherwise by the Governor. This law continued with the foundation of the Republic of Liberia in 1847.[26] The 1847 Constitution imported prior laws, "not repugnant to this constitution," into the new Republic, which included the provision of the colonial 'constitution' deeming the Liberian government the original grantor of the land and vesting it with ownership of newly acquired lands until dispensed to others.[27]

The problem with this approach is the original grantor part of the public land assumption. The public land assumption holds that the Liberian government is the original grantor of *all land* in Liberia, including land held as customary tenure.[28] However, under English common law native title is not a result of an original grant from the Crown (or in the case of Liberia the Liberian government), but exists independent of the Crown.[29] A rather formalistic solution to this problem would be for the Liberian government to extinguish native title then reallocate lands to the indigenous peoples. In this way, the Liberian government could still be, technically speaking, the original grantor of lands reallocated to the indigenous peoples because once native title is extinguished then all that remains is the land granted by the Liberian government.

c. Extinguishing Native Title

However, when measured against the standard for extinguishing native title adopted in *Mabo*, it is not clear whether the early public lands laws effected an extinguishment. In *Mabo* the Australian High Court held, "[T]he exercise of a power to extinguish native title must reveal a clear and plain intention to do so."[30] A clear and plain intention to extinguish native title cannot be found in "a law which reserves or authorizes the reservation of land from sale for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native

[23] By 'Littoral' I mean to refer to the area under the sovereignty of the Republic of Liberia in 1848 plus the territory of Maryland Colony voluntarily annexed to the Republic in 1857. Wily, *supra* note 3, at 74-75.
[24] *Harmon v. Taylor*, 8 Liberian Law Reports 416, 430 (Liberia S. Ct. 1944) (Grimes, J., dissenting).
[25] *Id.* at 431-32.
[26] *Id.* at 432.
[27] *Id.*
[28] Wily, *supra* note 3, at 143 ("It may be fairly safely assumed that customary land is all rural land that is not under probated or registered entitlement (deeds).").
[29] *Mabo*, *supra* note 9, at para. 74.
[30] *Id.* at para. 75.

title . . . ."[31] This rule is not an exposition of well-established English common law, but rather culled from Canadian, US, and New Zealand case law.[32] Given the rule's foundation in US case law and that of countries which apply English common law, its application to the Liberian context is not unreasonable.

In applying the rule to the Littoral there is conflicting evidence as to whether there was a clear and plain intention to extinguish native title. On the one hand, the public lands laws mentioned above do not seem to have protected in any way indigenous interests in lands within the Littoral. Moreover, at the first post-independence assembly of Liberia's legislature in February 1848 the territory of the Republic was described as "purchased" from the indigenous peoples, without qualification or reservation.[33] Although omission does not necessarily constitute a clear and plain intention additional evidence supports extinguishment within the Littoral. During the Grebo War of 1875 president-elect James Payne responded to Grebo grievances with a "ruling that was essentially a restatement of Liberian government policy: . . . Grebo land was essentially government land that, according to law, could be made available to any Grebo or Liberian citizen upon proper application and payment of the appropriate fees."[34] As an affirmation of the law this is strong evidence that the Liberian government extinguished native title and extended the public lands laws to all land within the Littoral. On the other hand, the ACS entered into agreements with tribal kings that preserved their use and occupancy. For example, in 1825 the Bassa Kings wrote to the ACS:

> You agree by this document that the Colonization Society . . . will never disturb the Kings whose signatures are attached to this instrument, nor the people, in their quiet possession and use of the lands which they now occupy, or may hereafter require for building their towns or making plantations . . . ."[35]

It may be that regardless of such agreements, in accordance with its prerogative as holder of radical title, the Republic nullified these agreements and extinguished native title as evidenced by the public lands laws and the February 1848 legislative act. If this is the case, then the public land assumption remains sound, at least with respect to the Littoral, because under the doctrine of tenure the Liberian government would have ultimate ownership, or radical title, in all land and, as native title was extinguished, be the original grantor of all land.

Again, assuming *arguendo* that the Liberian government was vested with radical title by cession or conquest of the Hinterlands, the question is whether the original grantor part of the public land assumption is satisfied. The answer to this question depends on whether there was a clear and plain intention to extinguish native title in the Hinterlands. Here the evidence is much stronger than for the Littoral that native title was *not* extinguished by the Liberian government. In 1905 an Act Providing for the Government of Districts within the Republic Inhabited by Aborigines provided that "'each territory *inhabited* exclusively by an aboriginal

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[31] *Id.* at para. 76.
[32] *Id.*
[33] Wily, *supra* note 3, at 74.
[34] Sawyer, *supra* note 2, at 136 (citing Republic of Liberia [1875], "Report on the Grebo War").
[35] Wily, *supra* note 3, at 73.

tribe' would be regarded as a township."[36] The use of the word 'inhabited' suggests the land was reserved for continued use and enjoyment by the indigenous peoples.

In 1919 the Liberian Supreme Court in *Karmo* confronted the issue of whether the Liberian constitution governed the Hinterlands. The Court held that it did because Liberian sovereignty extended into the Hinterlands.[37] In discussing the extension of sovereignty into the Hinterlands the Court quoted US Supreme Court Justice Marshall in *Johnson v. McIntosh*:

> '[T]he original inhabitants were in no instance entirely disregarded; but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion,' [but] 'their rights to complete sovereignty as independent nations, were necessarily diminished.'[38]

By relying on *Johnson* it appears the *Karmo* Court viewed native title in the Hinterlands as not extinguished by the Liberian government. On the contrary, the native's were permitted "'to retain possession of it and to use it according to their own discretion . . . .'"[39]

Then at the conclusion of the 1923 Suehn Conference between Liberian government officials and tribal chiefs regulations were adopted concerning governance of the Hinterlands.[40] These regulations were precursors to The Revised Laws and Administrative Regulations of the Hinterland of 1949 ("1949 Hinterland Regulations"). Article 66(a) of the 1949 Hinterland Regulations provides: "Title to the territory of the Republic of Liberia vests in the Sovereign State . . . . [The tribes'] rights and interests in and to such areas, are a perfect usufruct and give them title to the land against any person or persons whomsoever."[41] By explicitly granting a usufruct (or use) right against all others the 1949 Hinterland Regulations plainly reserved native title.[42] Without access to the regulations enacted after the Suehn Conference I cannot determine whether native title was explicitly preserved as early as 1923. However, with minor changes the 1949 Regulations were reenacted in the 2001 Revised Rules and Regulations Governing the Hinterland of Liberia. Thus, the evidence strongly supports

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[36] *Id.* at 83 (quoting 1905 Act Providing for the Government of Districts within the Republic Inhabited by Aborigines) (emphasis added).
[37] *Karmo*, *supra* note 23, at 328.
[38] *Id.* at 325 (quoting *Johnson*, *supra* note 22, at 574).
[39] *Id.*
[40] Wily, *supra* note 3, at 84.
[41] The Revised Laws and Administrative Regulations of the Hinterland, art. 66 (1949).
[42] Much has been made of the word 'title' in the 1949 Hinterland Regulations and the absence of the word in the Aborigines Law of 1956. Wily, *supra* note 3, at 120-21; *see also* World Bank, *supra* note 3, at 27. From the standpoint of English common law, the use of the word 'title,' or its absence, does not change the fact that title in this context means a right to use and possess the land subject to the Liberian government's power of extinguishment. *Mabo*, *supra* note 9, at paras. 52-53 (employing the word 'native title' to refer to a right to occupy or use the land conditioned upon the Crown staying its powers of extinguishment); *cf. Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (quoting *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945)) ("Indian title, or 'the right of occupancy,' is a right 'to roam certain territory to the exclusion of any other Indians and in contra distinction to the custom of the early nomads to wander at will in the search for food . . .'"); *Johnson*, *supra* note 22, at 569, ("[T]he nature of the Indian title to lands [is] a mere right of usufruct and habitation, without power of alienation . . . ."). Because the Liberian Supreme Court in *Karmo* relied upon *Johnson*, by implication it endorsed this legal view of the word 'title.'

the conclusion that from at least 1949 the Liberian government preserved native title in the Hinterlands and therefore, in accordance with English common law, cannot be regarded as the original grantor of interests in these lands.

d. Objections to Applying Radical Title to Liberia

Nevertheless, radical title seems an inapt legal basis for the public land assumption. However, Title 15, Section 40, of the Liberian Code provides that "the common law and usages of the courts of England" "shall be, when applicable, considered Liberian law."[43] Because radical title is found within the English common law it could conceivably be incorporated into Liberian law.

There are at least three problems with this line of reasoning. First, radical title is part of the feudal doctrine of tenure discussed only within those states colonized by the British Empire and therefore is not "applicable" within the meaning of Title 15, Section 40. Second, when addressing the application of foreign law US courts have found that the public policy of some states is to protect its citizens, "whenever possible 'against' the 'unfairness' – if any – of 'anachronistic' foreign laws."[44] The importation of a feudal legal doctrine with a colonial history to Liberia, which avoided colonization by the British Empire, seems to be precisely the unfairness and anachronism Liberian courts must guard against when borrowing from the US and English common law. Moreover, analogizing the Liberian government or State to the Crown is faulty. The English common law provides that once the Crown grants an interest in land it may not revoke that interest without statutory authority.[45] The Crown is more analogous to the Liberian Executive, and the Crown's power to revoke interests in land is counterbalanced by the Legislature. Yet, the public land assumption is that the Liberian government or State is the original grantor and ultimate owner of land—not the Liberian Executive. Bestowing radical title upon the Liberian government as a unitary actor would nullify the legislative check built into the doctrine of tenure.[46] Finally, the American Colonization Society in 1827 issued a 'constitution' which stated, "The common law, as in force and modified in the United States, and applicable to the situation of the people, shall be in force in the settlement."[47] After the American Revolution the states abolished feudal tenures premised on radical title, and, as in Connecticut, the citizens "became vested with an

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[43] 15 Liberian Codes Revised § 40 (2006).

[44] *Gordon v. Eastern Air Lines, Inc.*, 391 F. Supp. 31, 34 (D.C.N.Y. 1975); *see also Vitatoe v. Mylan Pharmaceuticals, Inc.*, 696 F. Supp. 2d 599, 604-05 (N. D. W. Va. 2010) ("[A] court in West Virginia should decline to apply foreign laws that are "'contrary to pure morals or abstract justice, or unless enforcement would be of evil example and harmful to its own people.'").

[45] *Mabo*, *supra* note 9, at para. 74.

[46] I do not mean to suggest that I agree with the 2008 World Bank Report that applying radical title to the Liberian context "would presumably be unconstitutional . . . as contrary to the guarantee of property in successive Liberian Constitutions." So long as the statutory authority to revoke land grants is exercised in a manner consistent with Article 22 of the Liberian Constitution it would likely be constitutional. More to the point, although Australia operates upon the premise that the Crown is vested with radical title it still retains sufficient property protections. Australian Constitution Article 51(xxxi) ("The Parliament shall . . . have power to make laws . . . with respect to . . . the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws . . . ."); *Grace Brothers Pty. Ltd. v. Commonwealth*, 72 CLR 269, 291 (Aust. High Ct. 1946) ("The condition 'on just terms' was included to prevent arbitrary exercises of the power at the expense of a State or the subject.").

[47] World Bank, *supra* note 3, at 17.

allodial title to their lands [i.e. fee simple]."[48] Thus, radical title cannot form the legal basis for the public land assumption given that US common law was received into the fledgling Liberia and the US had rejected this feudal doctrine.[49]

V. Conclusion

There is a colorable argument that the English common law, with its notion of radical title, could support the public land assumption for territory within the Littoral. However, it fails as a legal basis for the public land assumption in the Hinterlands because the Liberian government never extinguished native title and thus the Liberian government, while vested with radical title through cession and conquest, cannot be regarded as the original grantor of indigenous land rights preserved in, *inter alia*, the 1949 Hinterland Regulations.

[48] Francis Hilliard, The American Law of Real Property, vol. 1, p. 60 (1838).
[49] World Bank, *supra* note 3, at 26-27.