University of Pretoria

Faculty of Law

State Complicity in business-related human rights abuses: Analysing the State's failure in protecting Land rights in Africa

Student Name: Lihle Mabuza

Student Number: u21815454

Course: Human Rights and Democratisation in Africa (MPhil)

Supervisors: Dr Abiola Akiyode-Afolabi & Dr Sâ Benjamin Traoré

Date: 29 October 2021

DECLARATION

I, Lihle Mabuza the bearer of student number u21815454, declare that this dissertation is my original work. Due acknowledgment has been given and reference made to all sources referred to in the course of my writing (whether printed, online or other sources) according to the requirements of the Faculty of Law. I did not make use of another student's work with the intention of submitting it as my own. I did not allow anyone to copy my work with the aim of presenting it as their own.

Signature: LEM

Date: 29 October 2021

DEDICATION

To Babe Lomkhulu Sifiso Mabuza

Ayachubeka ema-graduation Mshengu.

It's only the beginning!

ACKNOWLEDGEMENT

I would like to express my gratitude to the European Union through the Global Campus of Human Rights and the Royal Norwegian Embassy in Pretoria, South Africa for funding the Master's in Human Rights and Democratisation in Africa.

I also acknowledge and thank the Centre for Human Rights for granting me this academic opportunity.

Thank you to my supervisors Dr Abiola Akiyode-Afolabi & Dr Sâ Benjamin Traoré for their guidance.

Special appreciation to my family and friends for their unwavering encouragement and support.

Contents

Chapter 1: Introduction

1.1. Background

Africa continues to be the foremost destination for foreign direct investment (FDI) from the West. According to the Regional trends-World Investment Report, the major investments on the continent include mining, agriculture, timber processing and energy.[1] Notably, land is and has historically been the resource at the heart of these investments in Africa.[2] African governments have equally been under pressure to develop their economies and as such have opened up their resources to all forms of FDI thereby causing huge commercial pressure on land and other natural resources, resulting in large-scale land acquisitions by foreign corporations.[3] This trend commonly known as land grabs is not a new phenomenon, because land grabs in Africa date back to pre-colonial times and evolved during colonial rule but they have risen once again, in the post-colonial state, in what has been termed the new scramble for Africa.[4] For instance since the global food crisis of 2007/2008, and in the midst of the economic downturn, many developed economies have seen and used FDI in Africa as a way of economic recovery.[5]

Land grabs are characterised by complex relations, amongst numerous actors and African states play the role of a mediator between the different prospective and existing investors (transnational corporations), and citizens whilst at the same time trying to pursue its national developmental goals.[6] Most research around land grabs has concentrated on the influence of foreign investors, however, it must be acknowledged that land grabs cannot occur without, and are facilitated by states. Therefore, the role of states or governments cannot be ignored.[7]

---

[1] Regional Trends- World Investment Report 2020 29-33 https://www.tralac.org/documents/news/3845-world-investment-report-2020-ch-ii-regional-trends-africa-unctad/file.html (accessed 25 October 2021).
[2] Africa Faith & Justice Network (AFJN) "Multi-national corporations' land Grabbing in Africa' 16 November 2010 https://afjn.org/multi-national-corporations-land-grabbing-in-africa/ (accessed 08 August 2021).
[3] As above.
[4] GF Amin & IM Jaha 'Land Grabs in Africa: Economic imperialism?' (2016) at 19.
[5] AFJN (n 2).
[6] A Tsunga 'The African experience of land grabs and human rights violations by powerful big businesses' 2017 12 https://www.civicus.org/documents/reports-and-publications/SOCS/2017/essays/the-african-experience-of-land-grabs-and-human-rights-violations-by-powerful-big-businesses.pdf (accessed 15 August 2021).
[7] T Kachika 'Land grabbing in Africa: A review of the impacts and possible policy responses' October 2010 9 http://mokoro.co.uk/land-rights-article/land-grabbing-in-africa-a-review-of-the-impacts-and-the-possible-policy-responses/ (accessed 15 August 2021).

While the states facilitation of FDI is important to drive economic development, the current model impacts negatively on land rights in the communities where these investments occur. Research from various countries across the continent such as Democratic Republic of Congo (DRC), Ethiopia, Ghana, Madagascar, Mali, Mozambique, Senegal, Sudan, Tanzania and Zambia show that land grabs are a serious challenge for rural populations in Africa resulting in the violations land rights of these populations.[8] Land deals in these countries account for millions of hectares which are being sold or leased to foreign investors. Most of these investors come from India, China, Malaysia, South Korea, Indonesia and Gulf States. However there has also been an emergence of interregional investment from South Africa, Libya and other African countries.[9] Therefore, the aim of the research is to highlight the role of states in the phenomenon of land grabs.

1.2. Problem statement

1.2.1. General nature of the problem

Since the rebirth of democracy in the early 1990s (after the end of the cold war) populations in Africa have been unable to secure their land rights because of the wave of capitalist programmes initiated by the Brentwood's institutions and facilitated by African governments such as the structural adjustment programmes (SAPs).[10] These programmes and policies gave preference to foreign investors on African resources such as land, and subordinated peoples' rights to not only keep the land but also to maintain their cultural way of living.[11] Compounding this inability to assert their rights over their land were the new policies initiated by African governments to ensure their countries provide competitive incentives for investment following the global economic down turn highlighted above.[12] The role of business, Brentwood institutions such as the IMF continues to increase in Africa with the current desperate economic order. As a result, land deals in the form of development –agreements for example— result in continued grabs in Africa with massive displacements of populations and the subordination of land rights which are viewed as a necessary evil and consequence of 'development'.[13]

---

[8] Kachika (n 7) 8.
[9] E Steinbruck 'Foreign Land Acquisitions' 2013 6 https://www.academia.edu/7954891/FOREIGN_LAND_ACQUISITIONS_IN_AFRICA_OPPORTUNIY_OR_LAND_GRABBING_THE_CASE_OF_THE_DEMOCRATIC_REPUBLIC_OF_CONGO (accessed 15 October 2021).
[10] Amin & Jaha (n 4) 195.
[11] AFJN (n 2).
[12] Amin & Jaha (n 4) 195.
[13] AFJN (n 2).

The agreements that African countries enter into with foreign investors are purported to be "legal" because there is documentation (development agreements) and certain procedures are undertaken to make them happen.[14] However, as a result of these deals facilitated by African states, the land rights of citizens are violated and in the same vein breaching the states domestic, regional and international human rights obligations as provided in various human rights instruments.[15] Further, in the face of these violations, the power of corporations has not been matched the same level of the obligations.[16]

1.2.2. Magnitude of the problem

With the level of underdevelopment in most African countries receiving foreign investors, business operations not only take place in countries that have weak national laws to manage the power and influence of the 'investors' but also law reform varies as the state is complicit.[17] Some of these companies have economic power that far exceeds whole nations in Africa.[18] These unequal power relations that exist between countries and these corporations have translated into situations whereby those who hold the power have the ability to manipulate or intimidate the systems to ensure that these companies operate with impunity when it comes to their human rights violations. This has severe implications national sovereignty and consequently on the rights of citizens involved.[19]

There is a clear impunity gap on the accountability mechanisms for business/commercial interest and the state is complicit in these actions.[20] For this paper, complicity is used in a multi-disciplinary sense where the state is seen as being at the centre of violations by corporations through state facilitated actions and/or silence.[21] Jackson states that complicity in this regard takes many forms which include aiding, abetting, procuring, advising, facilitating, soliciting and generally help an actor such as a corporation to acquire an asset, secure a transaction and generally get what they want from another actor.[22] Thus, while for instance, there have been numerous claims that the land deals are

[14] Kachika (n 7) 15.
[15] As above.
[16] Tsunga (n 6) 1.
[17] AFJN (n 2).
[18] Tsunga (n 6) 1.
[19] Kachika (n 7) 58.
[20] Tsunga (n 6) 2.
[21] M Jackson *'Complicity International'* (2015) 10-12.
[22] As above.

contracted between communities and the foreign investors themselves, these situations fall within the definition of state complicity because such deals are still facilitated by the state in a way that leaves communities with little to no option but to accept the consequent human rights violations resulting from the terms in the agreements. It can be argued that the magnitude of the problem, the violation of land rights in Africa as a consequence of foreign investments is such that the state has used its power to effect land dispossessions on behalf of corporations- thus state complicity.[23]

1.2.3. General extent/ impact of the problem.

The extent and impact of the problem has manifested itself in various ways on the continent. For instance, in Mali, the government backed land investments which resulted in the loss of land and livelihoods for communities.[24] The compensation that was given was not enough as it did not match permanent loss to land pushing communities into insecurity.[25] In Tanzania, the former President was accused of enticing citizens to set aside land for investors with promises that it would result in improvement in the quality of life.[26] The governments of Ethiopia and Ghana have also been blamed for coercing traditional leaders into signing deals that they do not understand with unknown investors.[27] For most states such as Ghana, they get enticed by the promises of certain incentives in these deals which include food security, electricity, and jobs for the community however these are not fulfilled and the state does not take adequate action to change the situation.[28]

Furthermore, Cameroon continues to be a country that attracts commercial interest because of its fertile soil and high rainfall.[29] The state finalised deals in Nguti sub-division that transferred over 1 million hectares to private companies for the oil palm plantations.[30]The local populations were not consulted and informed by the government of the repossession of their land and their cooperation and participation was demanded.[31] They were not informed of procedures to secure their dispossession nor provided with alternative ways of making a living.[32] In Zambia, the state also

[23] Kachika (n 7) 8.
[24] As above.
[25] Kachika (n 7) 10.
[26] Kachika (n 7) 8.
[27] As above.
[28] AFJN (n 2).
[29] S Batterbury & F Ndi '*Land grabbing in Africa'* in JA Binns; K Lynch & E Nel (eds.) The Routledge Handbook of African Development (2018) at 576.
[30] As above.
[31] Batterbury and Ndi (n 29) 77.
[32]As above.

facilitated the displacement of thousands of families in favour of a mining investment which is the second biggest mining investment in Africa.[33] The families lost their livelihoods as they could not undertake agricultural activities hence their right to their culture, way of life, dignity and other rights such health and education were violated.[34] The impact of the problem was compounded by the fact that these communities did not have access to justice as they were left in poverty and the state had been complicit in the whole process so it had acted as a barrier to the actualisation of their rights.[35]

In addition to the above, there have been concerns pertaining to the truth and transparency of the land grabs because states has been evasive about access to information regarding the contracts that they sign.[36] Of paramount importance is that these contracts concluded by governments are silent on the responsibilities or obligations of investing companies/ countries.[37] Even though, it has been proven that communities who have been infiltrated by corporates are actually doing worse off than before their involvement, the state has failed to take immediate action or precautionary measures for future deals.[38] In essence the violation of land rights generally and land grabs in particular have showcased the failure of African states to hold corporations accountable through its explicit/ implicit actions which has had direct impact on citizens.

In 2011 the Human Rights Council adopted the United Nations Guiding Principles (UNGPs) which were aimed at ensuring that states and businesses are conscious of their roles with respect to human rights.[39] According to Pillar 1 of the UNGPs, the state bears the primary obligation to ensure that human rights are respected, promoted, protected and fulfilled within their jurisdiction.[40] This includes taking the necessary measures 'to prevent, investigate, punish and redress private actors abuse' failing to which is considered a breach to their international human rights law obligations.[41] However, the aforementioned examples not only prove that the state has failed to protect its citizens but has played a central role in the abuses of their rights.

---

[33] K Sikombe 'Ordinary Zambians grapple with land grabbing' *DW (*Lusaka) 06 October 2015 https://www.dw.com/en/ordinary-zambians-grapple-with-land-grabbing/a-18764494 (accessed 28 October 2021)
[34] As above.
[35] As above.
[36] L Cotula 'Land deals in Africa' 2011 1 https://pubs.iied.org/sites/default/files/pdfs/migrate/12568IIED.pdf (accessed 23 September 2021).
[37] Tsunga (n 6) 11.
[38] Cotula (n 36) 2.
[39] United Nations Guiding Principles on Business and Human Rights (UNGPs) 2011.
[40] As above.
[41] As above.

1.3. Aim of the research

There has been a clear indication that states have been involved in activities that go against their human rights obligations thus making them complicit in the land rights abuses by corporate companies. In this regard, this research aims to demonstrate the nature, level and impact of state complicity of African states by highlighting their participation in land grabs in favour of business corporations in the name of FDI.

1.4. Research questions

To address the problem, the research will answer the following research questions:

I. What are the regional and international obligations of African states with respect to the land rights of rural populations in the face of foreign investment/business activities in their jurisdictions?

II. Have African states met their obligations in protecting land rights in the face of foreign investment/business activities in their jurisdictions?

III. What factors are responsible for the states' complicity and failure to protect the rights in the face of foreign investment/business activities in their jurisdictions?

IV. What are the implications of the states' failure to protect land rights of in their jurisdiction?

1.5. Methodology

Methodologically, the research is qualitative and data is collected through desktop review, analysis and discussion of primary and secondary sources of data. Data is analysed by identifying common trends around state complicity and protecting land rights in Africa.

Primary sources relied upon include international, regional and national laws on land rights and business. Secondary sources include books, journal articles, and reports by the government and

non-governmental organisations, conference papers, commentaries and unpublished dissertations and thesis including internet based materials from relevant webpages.

Notably the research is inherently but mildly characterised by a comparative component of the different legal systems in Anglophone and Francophone Africa. Further the research is descriptive and takes a multi-disciplinary approach in discussing the various normative, conceptual and underlying themes such as the on the meaning of land, land use, land rights and states complicity in the African context (customs and traditions) that go beyond the legal framework. The study is also prescriptive in the sense that it provides recommendations after the final conclusions thereby achieving its aim.

1.6. Limitations of the study

The study has several limitations owing to its nature as a mini-dissertation.

First in terms of scope, it focuses on and discusses common trends in some Africa countries and therefore does not go into the details of each countries dynamics. Secondly it is not based on purely legal theories or perspectives as it takes a multi-disciplinary approach. However, it does take into account the fact that it is foundationally based on international human rights law in the African context. In terms of the violation of land rights, the study focuses on land grabs from rural populations. This is because land grabs in rural areas are the most dominant form of land rights violation through business transactions in Africa.

Lastly the study is limited in that it does not provide statistical data in terms of the impact of the violations of land rights on rural populations. However, as stated above it does provide sufficient descriptive data on research questions.

1.7. Conclusion

This research discusses the role of the state in land grabbing in Africa or rather its failure in protecting land rights in Africa.

As seen above, the first chapter has addressed the issue of land which is and has historically been the resource at the heart of investments in Africa. Due to this, Africa has seen a rise in the

phenomenon of land grabs at the hand of foreign investors and national government threatening the land rights of citizens on the continent. The chapter therefore explains the general extent of land grabs, magnitude and impact. This is followed up by the aim of the research, the research questions and methodology.

The second chapter sets the background for the discussion on state complicity as a form of failure/breach of the human rights obligations which will be discussed later. In this regard, it begins with highlighting the international, regional and domestic obligations of states with respect to land rights by drawing attention to the states obligations to respect, promote, protect and fulfil land rights. This is followed by analysing specific cases that have been adjudicated by the African Commission pertaining to rights enshrined African Charter on Human and Peoples' Rights that touch on land. Through this analysis, one is able to see the ways in which the states are complicit in violating its obligations.

The third chapter builds on the previous chapters by tracing land rights in Africa in the pre-colonial, colonial and post-colonial era. It highlights the state's central role in the evolution of land rights during each period and how land grabs manifested at each stage tracing its nature from the pre-colonial African traditional state to the current colonial post-colonial state.

The fourth chapter addresses the concept of land grabs by interrogating the definitions by various scholars. This is followed by analysing the various methods in which land grabs manifest in Africa and the reasons behind their existence. This is done through analysing the role of the state and the implications thereof.

Chapter five ends with highlighting a few cases of community resistance against land grabs. To this end, it leads to the formation of recommendations for protecting land rights in Africa.

Chapter 2

2. International, regional and national obligations of states with respect to land rights in Africa

2.1. Introduction

The chapter discusses the international, regional and to an extent domestic obligations with respect to lands rights in Africa. It answers the first research question regarding the international, regional and domestic obligations of states with respect to land rights. Therefore, the chapter sets the background for the discussion on state complicity as a form of failure/breach of the human rights obligations discussed in the subsequent chapters. Bearing in mind the limitation stated in chapter 1, this chapter specifically focuses on the obligations to prevent land grabs in Africa. In terms of structure, the chapter starts with the international norms and standards as set in the various International Treaties such as the International Covenant on Civil and Political Right (ICCPR), The International Covenant on Economic Social and Cultural Rights (ICESCR), the International Convention of the Elimination of all forms of Discrimination against Women (CEDAW) as well as the norms and standards that have attained the status of International law in the Universal Declaration of Human Rights (UDHR). Thereafter, the chapter discusses the regional obligations as set in the African Charter on Human and Peoples' Rights and its protocols. Due to the difference that exists within national laws, domestic obligations will be interrogated by assessing the trends of state complicity amongst African states.

Thematically, the chapter highlights the question of land grabs in Africa from a human rights perspective and specifically presents an analysis of the obligations of states in response to political arguments of 'the national good and economic necessity' made by several governments and business leaders. This is predicated on the basis that land grabs are a human rights violation that affects internationally recognised and guaranteed rights which cannot be superseded, overtaken or in any way prevailed over by domestic public policy or law.[42]

[42] Art 14 Vienna Convention on the Law of Treaties (1969)

2.2. International obligations

'Land is not a mere commodity but an essential element for the realization of many human rights' [43]

OHCHR

2.2.1. Normative framework

The Vienna Declaration and Programme of Action (VDPA) states that 'while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'.[44] In this regard, the state bears the primary duty to ensure that it stays true to all obligations that it has signed up to. The Vienna Convention on the Law of Treaties captures this aspiration as a legal obligation for all states under article 14 "to be bound by a treaty is expressed by ratification".[45] At international level human rights obligations of states are contained in the various United Nations Treaties including the UDHR[46] which is the foundation of international human rights law.[47] Most African states which are members of the African Union are also parties to the core UN human rights treaties and as such are subject to the obligations set therein.[48]

While the various treaties elaborate specific civil, political, economic, social and cultural rights, the right to land as an individual and collective right is not specifically defined or expressed.[49] However, it is important to note that human rights are supposed to improve the lives of people in various forms (including from codification, legal incorporation and political prioritisation to resource allocations,

[43] Office of the High Commissioner for Human Rights (OHCHR) 'Land and Human Rights: Standards and Application' 2015 3 https://www.ohchr.org/documents/publications/land_hr-standardsapplications.pdf (accessed 07 September 2021).
[44] VDPA para 5.
[45] Art 14 Vienna Convention on the Law of Treaties (1969)
[46]OHCHR 'International human rights treaties' https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx (accessed 25 October 2021).
[47] See F Viljoen International Human rights law in Africa (2018) 519 discusses the important difference between human rights as abstract norms and international human rights law as contained in treaties that express these norms and create obligations for states.
[48] See (n 47).
[49] OHCHR (n 43) 3.

implementation and monitoring) therefore the issue of land cannot be seen as a separate issue[50] because access to land is a condition for an adequate standard of living.[51] In light of this, most human rights treaty bodies have linked and interrelated land rights to the enjoyment of specific substantive human rights in the respective instruments.[52] References to land are linked to the right to property, food, equality, IDPs as well as indigenous peoples particularly in relation to non-discrimination and the rights to adequate housing, food, water, health, work, freedom of opinion and expression, and self-determination, as well as the right to participate in public affairs and cultural life.[53] Wickeri and Kallan argue that 'even though the right to land under international law is not precisely defined, it cuts across the enjoyment of all civil, political, economic, social and cultural rights human rights such that its existence is implicit in all the rights contained in the international bill of rights.[54] This underlays the principles that "all human rights are universal, indivisible and interdependent and interrelated".[55]

Normatively, human rights in the context of land have been elaborated under the governance of land tenure as protective of interrelated factors such as land access, use and transfer.[56] Thus based on the international human rights jurisprudence, secure land tenure and access to land are a precondition for the intersectional enjoyment of various rights as discussed below: [57]

- I. *The right to adequate housing*[58]

The right to adequate housing is predicated on availability, accessibility and affordability of housing. This manifests differently in the urban and rural areas. The developing jurisprudence by the Committee on Economic Social and Cultural Rights (CESCR) argues that land provides space that can be used for production purposes. It serves as a space for shelter and other house related activities such as gardens and domestic work (whether formal or informal).[59] Therefore, when land as a productive resource is lost, it has negative implications because it could affect income thus

[50] P Wisborg 'Human Rights against Land Grabbing? A Reflection on Norms, Policies, and Power' (2013) 26 *J Agric Environ Ethics* at 1200.
[51] Report of the Special Rapporteur (SR) on the right to food at the 65th session of the United Nations General Assembly (UNGA) (2010) 3.
[52] OHCHR (n 43) 3.
[53] As above.
[54] E Wickeri & A Kallan 'Land rights in international human rights law' (2015) 1-12 https://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf (accessed on 25 October 2021).
[55] VDPA (n 44).
[56] OHCHR (n 43) 6.
[57] SR (n 51) 4.
[58] Art 25 UDHR, Article 11 International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966).
[59] Draft General Comment (GC) 26 on land and economic, social and cultural rights (2021) para 9.

jeopardising other rights which are important for social security such as food, healthcare or social services which require resources.[60]

- II. *The right to adequate food*[61]

Access to land use are preconditions for the right to adequate food. Article 11(2) of the ICESCR makes a connection between the utilisation of natural resources (such as land) and freedom from hunger.[62] In this regard, access to productive resources is important particularly for groups such women, indigenous peoples and peasants who depend on the land for their food.[63]

- III. *The right to safe drinking water* [64]

Access to land that has other natural resources such as water is necessary to meet the daily needs of communities. Therefore, this right can be violated when land access and use is restricted.[65] While the right to water is not substantively and expressly provided for, like the right to land itself, it is implicit in other rights such as the right to the highest attainable standard of health and the right to food.[66]

- IV. *The right to take part in cultural life*[67]

Land has a special significance because certain communities have spiritual or religious connections to it which serves as a basis for their social life.[68] The definition of culture is vast as it encapsulates certain religious and spiritual connections with ancestral land. Communities depend on the land for their traditional practices therefore land serves as a space for cultural and religious practices which are done as an expression of their cultural life.[69]

- V. *The right to health*[70]

The right to health umbrellas all the other rights discussed above in the sense that they constitute the underlying determinants of the rights as elaborated under general comment 14.[71] In this regard, it can be argued that the right to land is intertwined with the right to health based on the fact that the

[60] As above.
[61] Art 11 ICESCR (1966).
[62] Draft GC26 (n 59) para 10.
[63] Same as above.
[64] ICESCR (n 59)
[65] Draft GC26 (n 59) para 11.
[66] Same as above.
[67] Art 15 ICESCR.
[68] GC26 (n 59) para 12.
[69] Same as above.
[70] Art 12 ICESCR.
[71]General Comment (GC) 14 on the right to the highest attainable standard of health (2000) para 4.

normative content of both rights are aggregated by housing, water, food, culture and adequate standard of living.[72] Furthermore, both rights interlink in the sense that a violation of one is a violation of the other in many instances. For example pollution from mines negatively impacts on the quality of soil and air there by violating the right to land use on the one hand and the rights to physical and mental health on the other hand. Therefore, the right to health is strongly implicit of the right to land such that the absence of its express provision does not take away its existence and the attendant state obligations.[73] In other words, the right to health, through its underlying determinants creates obligations on states to respect, protect and fulfil land rights.[74]

2.2.2. Asserting land rights through minimum core obligations

As discussed above, land rights and the attendant state obligations are implicit in other rights such as house, food, water, culture and health.[75] States obligation with respect to land rights are also elaborated through the minimum core obligations criteria. In extrapolating the general nature of states obligation the CESCR states that the minimum core obligation of all rights is to ensure that at the very least all or a significant number of individuals in the state are not deprived of essential foodstuffs, water, housing and shelter, basic education and basic healthcare.[76] Notably the minimum core obligation of all rights under the ICESCR relate to the respect of land rights. From this premise it can be argued that land right form the minimum basis for respecting, protecting and fulfilling all rights under international law.

2.2.3. Nature of States obligations with respect to land rights

The nature of states obligations under international human rights law is elaborated under general comment 3.[77] As argued above, the minimum core obligation of rights under international law can relate to land rights. By extension, it can be argued that nature of states obligations with respect to land rights follow from the substantive rights from which land rights are implicit and therefore derived.[78] The basic and general nature of these obligations is threefold to: respect, protect and fulfil.

---

[72] GC14 (n 71) para 2.
[73] As above
[74] GC14 (n 71) para 4.
[75] Draft GC26 (n 59) para 9.
[76] General Comment (GC) 3 on the nature of states obligations (1990) para 10.
[77] GC 3.
[78] As above.

States have an obligation to respect land rights. In this regard, the state is expected to refrain from forced evictions or any practice that would arbitrarily prevent people from accessing, using or controlling land, defining the notion of "public purpose" in law and respecting customary land tenure systems.[79] This may require that the state revise its laws including those related to international investments so that there is no ambiguity about dispossession.[80]

The state has an obligation to protect the way that people access, use and control land. In this regard, they must prevent third parties such as individual, groups, corporation and other entities from interfering with how citizens enjoys these rights.[81] This would mean that they adopt the necessary legislation to regulate said parties to ensure that they do not participate in forced evictions, land dispossession, pollution of natural resources. In addition to this, the state must make rules to govern how natural resources are accessed to prevent discrimination and concentration of resources.[82]

The state has an obligation to provide and facilitate the access, use and control of land to those who may not have it especially for groups who depend on the state for it.[83] This would mean that there should be agrarian reform for citizens who live in poverty due to lack of access to land, allocation of public lands for marginalised groups, supporting customary and collective tenure systems as well as restitutions of land and natural resources to groups who would have been arbitrarily deprived of this land.[84] The state must also ensure that the legal frameworks in the country are sufficient to ensure that issues pertaining to land are transparent, participatory and inclusive.[85] In this regard, the state must ensure that tenure systems are broad and equitable distributions of land but also go further in ensuring that the tenure is secure especially in relation to marginalised and disadvantaged groups in society.[86] States have to facilitate sustainable use of natural resources unities to strengthen long-term conservation of resources but also ensure that ecological sustainability based especially for resources-based livelihoods. Furthermore, this must be followed by support for common rights, needs, and customary practices of citizens.[87]

---

[79] FIAN International 'Human Right to Land: Position Paper' 2017 https://www.fian.org/fileadmin/media/publications_2017/Reports_and_Guidelines/FIAN_Position_paper_on_the_Human_Right_to_Land_en_061117web.pdf (accessed 13 September 2021)
[80] As above.
[81] As above.
[82] As above.
[83] As above.
[84] As above.
[85] As above.
[86] As above.
[87] As above.

In light of the above, it is therefore important for the state not to deprive people access to productive resources which they depend on for survival. Furthermore, the state should ensure that private entities do not interfere with this access and thus strengthen access and utilisation of resources to ensure livelihoods (land, water, grazing or fishing grounds).[88] In 2011, the United Nation Human Rights Council adopted the United Nations Guiding Principles (UNGPs) stipulating the relationship that states must have with business entities also known as the respect, protect and remedy principles.[89] The first pillar of the UNGPS is predicated on the fact that states have a duty to protect human rights and therefore established foundational principles to ensure that this happens. Therefore, the state must protect against human rights abuses that take place in their territory by business entities.[90] These obligations do not mean that states are responsible for violations done by private actors but it means that they breach their human rights obligations when they fail to take the necessary steps to prevent these abuses.[91]

2.3. Regional obligations

2.3.1. Regional normative content and nature of obligations from the African charter

At regional level, human rights are contained in the African Charter on Human and Peoples' Rights and its protocols under the umbrella of the African Union. As with the UN human rights system, land rights under the Charter are not expressly provided. However, land rights are argued to be encapsulated in Article 14 which states that 'the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'.[92] Article 14 has been interpreted to include (i) protection from arbitrary deprivation of property; (ii) equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land especially by women; (iii) adequate compensation for public acquisition, nationalisation or expropriation; (iv) equitable redistribution of land through due process of law to redress historical and gender injustices; (v) recognition and protection of lands belonging to indigenous communities and (vi) peaceful enjoyment of property and protection from arbitrary eviction.[93]

[88] SR (n 51) para 25.
[89] United Nations Guiding Principles (UNGPs)
[90] As above.
[91] As above.
[92] Art 14 African Charter on Human and Peoples Rights (1981)
[93] Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) para 5.

In light of the expansive interpretation of article 14, the Charter guarantees certain protections against arbitrary deprivation of land.[94] In this regard, states must ensure equitable access to resources such as land to citizens but more especially to marginalised and disadvantaged people.[95] Furthermore, there should not be any discrimination against anyone in terms of being able to access land. If there is any exploitation that must take place on indigenous lands, the state has to ensure that there is informed consent by communities.[96]

Most importantly, this Article guarantees that the state shall protect the right to property and will protect its enjoyment from the interference of third parties and/or its own agents.[97] Furthermore, public interest should be interpreted in a way that there are legitimate public interest objectives such as economic reform or measures designed to achieve greater social justice.[98] The state should also establish by law the terms and conditions for acquisition, nationalisation or expropriation if it must be done in the public interest.[99] And all of this must be done in an environment that is predicated on transparency and participation when it comes to any acquisition. In addition, states must also ensure that there is adequate compensation should there be acquisition of property. The compensation must be related to market value.[100]

Land rights have also been elaborated by the Working Group on Extractive Industries, Human Rights and Environment in Africa. Created on the concern among others that, African people are being dispossessed of their land in areas where gas, oil and minerals are discovered without any benefit to them, the Working Group interpreted land rights under article 21.[101] In this regard, it has stated that land should also be understood in the context of the "right to free disposal of wealth and natural resources" to which land fall within. In elaborating the nature of states obligation under article 21, the Working Group has stated that states must give legal guarantees to live on, access and use land, vegetation, water sources and other resources that they require for their survival.[102] In this regard, it must provide legal frameworks which guarantee ownership over land and other natural resources. In addition, there should be legal and institutional safeguards to limit foreign economic exploitation by

[94] As above.
[95] As above.
[96] As above.
[97] As above.
[98] As above.
[99] As above.
[100] As above.
[101] State Reporting Guidelines
[102] As above.

stipulating the percentage of foreign ownership and ensure meaningful benefits from the operations of MNCs in extractive industries.[103] Further, states are obligated to refrain from expropriation, however, if it must take place there must be information and procedural safeguards to ensure that people are not arbitrarily and forcibly removed from their land.[104] With respect to disposal of land, there should be inclusion in the decision making process characterised by participation of affected peoples as well as representation especially women. This must also be strengthened by providing redress mechanisms for expropriation, resettlement and other interference to the use of land.[105] This must include recovery of property and compensation which is under girded by procedural and legal standards to provide information and transparency on all issues including labour and environmental standards.[106]

The Working Group has also highlighted that this Article 21 is also integral to Article 14 of the Charter because the ability to live on, develop or use land should not depend on whether this entitlement is given by custom or formal laws. This means that people should be able to use these resources in a way that is sustainable and improves their standard of living.[107]

Under the African human rights system, states have the same nature of rights to respect, protect and fulfil as already discussed above.

2.3.2. Jurisprudence of the African Commission on obligations of states on land rights and state complicity

Under the African human rights system, the African Court and the African Commission, are responsible for enforcing the rights enshrined in the Africa. With respect to land rights and the nature of states obligations, the jurisprudence at regional level has been developed by the African Commission through several cases as discussed below. Notably, the African Court decided on the Ogiek case where it also reiterated principles in the Endorois case.[108] As such this part focuses on the

[103] As above.
[104] As above.
[105] As above.
[106] As above.
[107] As above
[108] R Roesch 'The Ogiek Case of the African Court on Human and Peoples' Rights: Not So Much News After All?' 16 June 2021 https://www.ejiltalk.org/the-ogiek-case-of-the-african-court-on-human-and-peoples-rights-not-so-much-news-after-all/ (accessed 28 October 2021)

developed jurisprudence of the African Commission. The cases show the complicity that Sstates are involved in thus undermining their obligations.

First, it must be noted that only a few cases make it to the Commission therefore the number of cases showcased is minimal to what happens at national level. Of the four cases, three cases relate to Kenya. Even though this does not depict the diversity of the continent, it can be quite indicative of the trends on the continent looking at the cases that have been tested at the regional level.

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Endorois case) the complainants claimed that Government of Kenya forcibly removed the Endorois from their ancestral land (in Lake Bogoria) 'without proper prior consultation, adequate and effective compensation'.[109] Prior to being moved the Endorois claim that they had established a sustainable livelihood linked to their ancestral land where they were situated.[110] This case was particularly peculiar because it was dealing with indigenous groupings. From the onset, the Commission had determined that land plays a significant part in the lives of indigenous peoples. In this regard, the survival of their particular way of life is dependent on their traditional lands and natural resources.[111]

The *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (SERAC case) was concerned about the environmental degradation in Ogoniland caused by the Shell Corporation in collusion with the Nigeria Government.[112] Whilst *Nubian Community in Kenya v Kenya* (Nubian case) dealt with discriminatory practices against the Nubian community and *Sudan Human Rights Organisation and Another v Sudan* (Sudan case) dealt with human rights violations in the Darfur region of Sudan.[113] The common trends were as follows:

a. The lack of provision of land titles

In the Endorois Case, the Commission recognised that certain groups face dispossession from their land because states require a formal title for recognition. In this regard they face dispossessions and must therefore have special protection to ensure their survival in line with their traditions and customs.[114] The Commission has therefore stipulated that these traditional lands constitute as

[109] M Killander & C Heyns Compendium of key human rights documents of the African Union (2016) at 223.
[110] As above.
[111] As above.
[112] Killander & Heyns (n 109) 320.
[113] Killander & Heyns (n 109) 305 & 330.
[114] Killander & Heyns (n 109) 229.

'property under the Charter and as such there must be measures in place to protect these "property rights."[115]

In this regard, the Commission speaks to the issue that indigenous peoples should be given *de jure* ownership. Access or *de facto* ownership of land is not compatible with international law because this would keep vulnerable groups susceptible to violence and dispossession by the state or third parties.[116] A legal framework that merely gives communities the opportunity to only use land and does not guarantee control without interference is challenging. The fact that land use can be taken away by the state or other parties is not helpful.[117]

In light of the above, indigenous peoples have a specific form of land tenure which is a challenge because legal systems do not acknowledge their communal rights.[118] This was the basis under which Kenya was complicit in violating their land rights when they removed them from their traditional lands. Furthermore, the state merely recognised de facto rights which only acknowledges the use of the land leaving them at the discretion of the state which evicted them after many years of being on the land.[119]

Indigenous peoples have a recognised claim of ownership to ancestral land in international law even if there is not title deed. However, it is important for a title to be given so that it is not just respected and recognised in practice but must also be guaranteed in law.[120] It also ensures permanent use and enjoyment which the state has a responsibility of giving a title to territory for this. Hence by not issuing this title, the state is complicit in undermining land rights which happened in the Ogoni case where the lack of security of tenure was not guaranteed by the Nigerian government thus violating their rights as a people.[121] However, the Commission added, in the Sudan case, that it does not matter whether people have title deeds or not. But when people cannot get their livelihoods from something that they had possessed for generations then it is a violation of Article 14.[122]

b. Forcibly removing people from their land

[115] As above.
[116] As above.
[117] As above.
[118] As above.
[119] As above.
[120] As above.
[121] Killander & Heyns (n 109) 327.
[122] Killander & Heyns (n 109) 332.

According to the Commission, "forced eviction" means the permanent removal against the will of individuals, families or communities from the homes they occupy without the provision of, and access to, appropriate forms of legal or other protection".[123] In the Endorois case, the Government encroached on the land through expropriation and denial of land ownership. Encroachment into land is not a violation under Article 14 of the Charter but it must be done under two conditions: (i) 'in the interest of public need or in in the general interest of the community' and (ii) 'in accordance with appropriate laws'. In this regard, it must be decided whether the encroachment is justified based on the two standards.[124] This must also be based on proportionality, so taking the land must be proportionate and necessary for the benefits that must come.[125]

The Commission found that moving the Endorois over a game reserve did not meet the threshold and was disproportionate.[126] It must also be noted that the threshold for public interest is higher in indigenous land as opposed of how it would be if it was private property. This was similar to the Nubian case, where Kenya was also guilty of violating Article 14 of the Charter because the Nubian had been evicted from Kibera without notice nor alternative housing.[127] It was said that these evictions were carried out without following due process and in disregard (not in accordance with law) of human rights obligations. Furthermore, there was nothing showing that it was done in public interest.[128]

In the Ogoni case people were also removed from their land thus affecting Article 14 of the Charter. This had further implications on the right to family in Article 18 as well as Article 16 on the right to the highest attainable standard of mental and physical health which was directly violated by the government.[129] The Nigerian government violated the bare minimum requirement of not destroying housing. But the state not only destroyed houses, it also obstructed efforts by citizens to rebuild. It also carried out, sponsored and tolerated practices that undermined the resources that they needed for their survival.[130] By violating this right, the Nigerian government ultimately forcibly evicted people.

[123] As above.
[124] Killander & Heyns (n 109) 230.
[125] As above.
[126] Killander & Heyns (n 109) 231.
[127] Killander & Heyns (n 109) 229.
[128] As above.
[129] Killander & Heyns (n 109) 327.
[130] As above.

In the Sudan case, the Commission held that forced eviction by government forces is a violation to Article 14, 16 and 18.[131] Evictions by non-state actors of which the state fails to protect amounts to cruel, inhuman and degrading treatment. In this case, the state carried out evictions by forces and militia removing people from their villages and homes with the support of the state.[132] This conduct went against the principle of human dignity. Irrespective of what the external circumstances may be (Darfur Region engulfed in armed conflict), the Commission held that it is the duty of the state to protect life and property.[133]

c. Failure to recognise the rights of peoples

In the Endorois case, Kenya did not want to recognise the rights of the Endorois as a peoples. This is because at that point Kenya did not recognise group rights. But the Commission has highlighted that the Charter recognises the rights of peoples therefore they should benefit from the provisions of the Charter that protect collective rights.[134] Furthermore, the Ogoni as peoples depended on their land and farms for survival. These were destroyed by the government. This affected individuals as well as the life of the Ogoni society as whole thus violating their rights as peoples.[135]

d. Lack of consultation

Forced evictions are also considered to be a violation because forced evictions cannot be considered as act that takes place in accordance with the law.[136] The same principle of 'according to the law' has to be tested against consultation and compensation. Consultation means that there should consent given and failure to do this is a violation. In the SERAC case, the government did not involve the Ogoni communities in the deals that they had with the oil consortium which were decisions that affected the development of Ogoniland.[137] Similarly, the Endorois were denied effective participation of the decision to be removed or shape the policies of the game reserve. The community consultations with community representatives were not conducted in a way that allowed them to contribute on matters pertaining to the life of the community.[138] Environment and social impact assessments were also not carried out to assess how the change would affect the Endorois thus continuing the violations.

[131] Killander & Heyns (n 109) 331.
[132] As above.
[133] As above.
[134] Killander & Heyns (n109) 225.
[135] Killander & Heyns (n109) 328.
[136] As above.
[137] Killander & Heyns (n109) 327.
[138] Killander & Heyns (n109) 229.

e. Lack of compensation for loss of property

In the Endorois case, the removal of people from their land should not be a denial of their survival as a peoples. They were denied an opportunity to participate in the profits of the game reserve therefore there has been no benefit enjoyed by the community.[139] Furthermore, restitution and compensation was not given to them. The money which had been given to certain people was not enough. The state also failed to prove that the Endorois benefitted from economic activities such as tourism and mining in the area and failure to guarantee a reasonable share in the profits of the game reserve (or other adequate forms of compensation) is also a violation to the right to development.[140]

In the Nubian case, the community was not compensated or given alternative housing after their eviction. Similarly, the Ogoni community was denied an opportunity to benefit from the land that they were on. To this end, they did not get any material benefits.[141] The state had a duty to protect citizens through appropriate legislation from dangerous acts by private partners. The Commission acknowledged that the Government of Nigeria facilitated the destruction of Ogoniland and failed to protect people from interfering with the enjoyment of their rights.[142] The government left its citizens at the mercy of private companies thus affecting their well-being.

From the cases above, it is clear that states have been complicit and have failed to protect land rights which has also affected numerous other rights.

2.4. Principles of land rights

Based on the above discussion, I contend that land rights constitute different interrelated entitlements, freedoms and privileges attached to land. These entitlements and freedoms include entitlement to access to land, entitlement to secure tenure, ownership of land, freedom to use land within the allowable human rights framework, freedom to transfer land and entitlement to protection from dispossession of land such as land grabbing. Each of these freedoms and entitlements requires the state for the attendant laws and policies.

---

[139] Killander & Heyns (n 109) 234.
[140] As above.
[141] Killander & Heyns (n 109) 327.
[142] Killander & Heyns (n 109) 327.

2.5. National obligations

Various countries / jurisdictions recognise some form of land rights. In this regard, people may enjoy certain land rights and property rights that they access, use and control.[143] For this purpose there are certain processes to register land with certain land tenure systems which fall within various layers of traditional, customary rules and laws. However, it is found that these rights may not necessarily entail a human right to enjoy land or property. [144] Due to the varying national laws in Africa it is not necessary to elaborate further in this section. These laws will be subject to further investigation (upcoming chapters) in trying to understand whether states protect land rights adequately.

2.6. Conclusion

The chapter has highlighted the international and regional obligations of states pertaining to land rights in Africa. Prominently the chapter highlighted the fact that even though land rights are not expressly provided for in the various international and regional human rights instruments, they are implicit in the different substantive rights and through these rights provide adequate protection in terms of creating obligations for states. Furthermore, the chapter has reflected on several cases by the African Commission to show how the obligations by states have been tested with respect to land rights.

The existence of land rights as seen through other substantive rights means that all land transactions, including those based on FDI are subject to the norms and standards set by international human rights law and therefore all derogations fall within the ambit of these norms and standards. With this lens set, the proceeding chapters discuss land grabs in Africa as a breach of international and regional human rights obligations occasioned through state complicity.

[143] OHCHR (n 43) 3.
[144] OHCHR (n 43) 7.

Chapter 3

3. Protection of land rights in Africa: past, present and the uncertain future

3.1. Introduction

Building on chapter two, this chapter answers the second research question on the whether African states have met their obligations with respect to land rights in Africa in the face of FDI. The chapter does this by tracing land rights in Africa during three stages of the continent history. These are the pre-colonial, colonial and post-colonial era. In particular it highlights the states central role in the evolution of land rights during each period. Furthermore, the chapter highlights how land grabs manifested at each stage tracing its nature from the pre-colonial African traditional state to the current colonial state. In this regard the chapter sets the stage for the discussion of the present failure of states to prevent land grabs and the complicity in actually facilitating them.

3.2. Historical evolution land rights in Africa

3.2.1. Land rights in pre-colonial Africa

'I conceive that land belongs to a vast family of which many are dead, few are living and countless members are still unborn'.[145]

Nigerian chief

In pre-colonial Africa, land was governed based on the customary law of the area and people that inhabited it. While these law principles were different, there are several commonalities have been identified by numerous scholars.[146] In pre-colonial times, land was seen as an abundant resource to be used by all. Due to the ritualistic relationship that community members had with the land, land-lord

[145] J Pottier ''Customary Land Tenure' in Sub-Saharan Africa Today: Meanings and contexts" in C Higgins &J Clover 'From the Ground Up: Land rights, conflict and peace in Sub-Saharan Africa' (2005) at 58.
[146] J Ubink, A Hoekema, & J Assie Legalising land rights: Local practices, states responses and tenure in Africa, Asia and Latin America (2010) 8-18.

type authorities did not exist.[147] On the contrary, leaders were assigned for the spiritual management of the land but did not allocate land nor rule over men.[148]

Pottier argues that during this time land rights were not defined as they were hardly questioned.[149] They were exceptions in areas with dense populations such as some parts of East and Central Africa due to high soil fertility as well as West Africa where there was an economic vibrancy.[150] Conversely, most of sub-Saharan Africa had low population density (in 1750 Africa had 2.5 people per square kilometre) [151] and limited movement therefore limited contestation.[152]

The "lack" of rights drew some anthropologists to argue that the concept of land tenure is a colonial concept which cannot be used in pre-colonial Africa. "Tenure" in the African context was guaranteed as it was based on social identity.[153] It was dominated by kinship therefore family ties were important.[154] More importantly it was understood as a communal asset because there was vested interest in the same property for use[155] and communities did not differentiate on the purpose of land.[156] It is also argued that these rights hardly clashed if the land was used for subsistence (inclusive of development) therefore disputes about land were minimal/insignificant as witnessed through the expansion of land by the Ituri in the DRC.[157] Furthermore, land could not be sold as it was seen as a gift and could not be appropriated.[158] The fact that land could not be alienated by sale and only acquired by membership signifies the fact that land was more of a social component than a transition of wealth.[159]

While land rights were was relatively protected in pre-colonial times, it was during this period that land grabs actually started. Chiefs and other traditional leaders gave out huge areas of land to

[147] Pottier (n 145) 57.
[148] Same as above.
[149] As above.
[150] As above.
[151] S Takauechi 'The evolution of land policy in African state building'(2014) https://www.routledge.com/State-Building-and-Development/Otsuka-Shiraishi/p/book/9780415709750 (accessed 24 October 2021)
[152] Pottier (n 145) 58.
[153] WJ du Plessis 'African Indigenous Land Rights In A Private Ownership Paradigm' (2011) 49 http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812011000700003 (accessed 18 October 2021)
[154] Takauechi (n 151) 4.
[155] du Plessis (n 153) 51.
[156] Pottier (n 145) 58.
[157] As above.
[158]du Plessis (n 153) 57.
[159] As above.

white prospectors in exchange of trinkets without consulting their subjects.[160] To legitimise these transactions they were made sign concessions of hundreds of years in the English language which they could not even understand.[161] Some of these concessions were made in the name of creating a protectorate to prevent the Arab slave traders from 'taking their subjects'. Ironically it was some of the traditional leaders themselves that facilitated the slave trade.[162] Thus, in the same way that the post-colonial states facilitates land grabs today, the pre-colonial (African traditional state) facilitated land grabs back then. Hence, the surcharge of land grabs in Africa can be said to have started with the pre-colonial traditional state and has continued today by evolving with the political economy of history.[163]

3.2.2. Land rights in colonial and post-colonial Africa

'Does the white man understand our custom about land? How can he when he does not even speak our tongue? But he says that our customs are bad; and our own brothers who have taken up his religion also say that our customs are bad. How do you think we can fight when our own brothers have turned against us? The white man is very clever. He came quietly and peaceably with his religion. We were amused at his foolishness and allowed him to stay. Now he has won our brothers, and our clan can no longer act like one. He has put a knife on the things that held us together and we have fallen apart.'

Chinua Achebe- Things fall apart

I contend that the violations of land rights witnessed in Africa today cannot be separated from its colonial past and we are witnessing those signs. The challenge lies in the fact that the old order refuses to die and thus prevent a new one from emerging.

Colonialism changed the lens in which land rights were understood. This is primarily based on the fact that it shifted land to new uses by creating an appetite for imported goods which could only be met through exploitation.[164] This obviously had an impact because people started evaluating their land according to these new uses which reflected "use and gain" hence leading to land battles.[165] Pottier argues that the consequences are still evident today. The terminology of 'customary land tenure' shows

[160] S Alpern 'What Africans Got for Their Slaves: A Master List of European Trade Goods) 1995 22 *History in Africa* at 11.
[161] S Touval 'Treaties, Borders, and the Partition of Africa' 1966 7 *The Journal of African History* at 382.
[162] Alpern (n 160) 7.
[163] Touval (n 161) 286.
[164] Pottier (n145) 59.
[165] As above.

a social engineering that allowed western concepts to prevail.[166] This meant that European legal traditions came into force in the colonial area establishing three judicial regimes which are state law in Africa today.[167] These include:

- *'English Common Law in countries such as Kenya, Malawi, the United Republic of Tanzania, Uganda and Zambia, which incorporates principles of divided rights of ownership and the separation of what is owned from the physical substance of the land itself;*
- *Roman Dutch Law in countries including Lesotho, Namibia, South Africa, Swaziland and Zimbabwe, whose development, like Old English Law, draws from precedent, and which does not recognize divided rights of ownership;*
- *Laws in countries drawing from Civil Law Traditions, covering countries such as Burkina Faso, Mauritania, Côte d'Ivoire, Mali, Madagascar, the Niger, Senegal and much of French-speaking Central Africa, which do not rely heavily on judicial precedent, relying more on a deductive approach flowing from the concept of an ultimate owner of land ("dominium"), retained by the state"[168]*

These legal systems caused disruptions hence the connection that people had with the land was not recognised.[169] This was broken and stunted by the colonial ideology of private ownership which was further perpetuated by postcolonial governments.[170] Colonialism brought a real estate market with property, law, contract and a common law way of looking at property.[171] And if land was not owned by a private person, the rights were then vested in a political unit of that region or to the colonial government.[172] These regions were then ruled by traditional rulers because the colonial project demanded that there should be rights and authorities over land.[173] In most of the British colonies in Africa, land outside of town and white settler places were labelled as "native reserves" where customary tenure was maintained.[174] Due to this need for land to be owned, the colonisers held land under communities hence it was communally owned under "native affairs". For instance, in Congo, the Belgians stated that:

---

[166] As above.
[167] J Nelson 'A survey of indigenous land tenure in sub-Saharan Africa' 2021 https://www.fao.org/3/y5407t/y5407t0d.htmaccesses (accessed 18 October 2021)
[168] As above.
[169] du Plessis (n 153) 58.
[170] Same as above.
[171] Same as above.
[172] Pottier (n 145) 59.
[173] As above.
[174] R Home 'History and Prospects for African Land Governance: Institutions, Technology and 'Land Rights for All' (2021)10 Land 5. https://doi.org/10.3390/land10030292 (accessed 15 October 2021)

'According to Congolese native law, individual land ownership does not exist; there is only collective ownership. The land belongs to the clan, a community made up of family groups consisting of all the descendants – living and dead – of a common ancestor, and in theory, all the generations to come.'[175]

NIGERIA

White settlers were perhaps not as prominent in West Africa as it was in Southern Africa. When Southern Nigeria was created in 1900 a, Native Lands Acquisition Proclamation allowing the Governor to make all States acquisition. The same was given to the Governor of Northern Nigeria in 1910 through the Northern Nigerian Land and Native Rights Proclamation.[176]

After independence in 1960, the Land Use Act (1978) was enacted ending private ownership of land in Nigeria. Land is therefore given through certificate of occupancy. However, all mining is still under the Federal Government. The notion of these certificates is a colonial legacy.[177]

In all these systems the colonial authorities still exerted much power and influence even on customary practices hence they enhanced the power of the state over land.[178] Customary land could be appropriated without compensation from the 'natives' on the basis of need by the state. Need was interpreted to mean activities of public interest such mining or forestry.[179] The same remains because numerous countries on the continent who became independent actually believed that nationalising land in Africa would actually help in removing this dualism and create a unified system which would benefit peasants.[180] Whilst others actually tried to make one system which would make common and statutory law paramount. Others tried to move this dualism by nationalisation land and conversion from freehold land into lease land.[181]

ZAMBIA

When Zambia became a British Protectorate in 1924, its laws and policies followed a similar pattern to what was happening in East and Southern Africa. When it became independent in 1964, it inherited four types of land state land (formerly crown land), freehold land, reserves and trust

[175] Pottier (n 145) 59.
[176] Home (n 174) 9.
[177] As above.
[178] Du Plessis (n153) 58.
[179] Home (n 174) 9.
[180] As above.
[181] As above.

land.[182] But when it became a one party state in 1975, all land was vested on the President on behalf of the people. In this regard, freehold was made into lease hold. As such all land transactions had to go through the President for consent.[183] The Lands Act of 1995 allowed the Land Commissioner to convert customary land into 99 years leases. This however, worsened inequality because it concentrated the land into the hands of the elite and foreigners. Occupiers of this land could be labelled as squatters and could be evicted.[184]

Just like the colonial regime, the current state remains with power over communal land which it has exerted to take the land under the 'state' and allocate it to its own interests. Similarly, it has perpetuated the colonial concept that communal is associated with stagnancy therefore allowing administrators to expropriate under the guise of development.[185] Even today, lands which are sparsely populated like in the Kalahari are often ignored because they are not 'developed' as per the standards of government. This is why in most African states a dual system exists because there are formal laws and those used by the majority of the peoples. The difference between these two systems is deep with dire consequences for the citizens.[186]

The colonial regime could expropriate land for the good of the colony and also created a new type of authority-a traditional structure to rule over land.[187] This authority often emerged from nowhere and given power with little accountability. They were ruthless when it came to exhorting labour and little pay.[188] This created a social class of elites while most remained in the margins. This perpetuated rights to land in Africa to be based on social groupings and allegiance to traditional authorities and some of the people who suffer the most are marginalised groupings. Grazing land for pastoralists faces danger because these groupings lack what is called 'state sanctioned legitimacy' snd low social status and thus unable to secure their land rights.

As alluded to earlier, the colonial regime has always supported the notion of land rights where communal rights would eventually die out to be replaced by individual rights. The irony is that land rights have now been equated to property rights which is viewed as the highest form of protection. In

[182] Home (n 174) 10.
[183] As above.
[184] As above.
[185] du Plessis (n 153) 58.
[186] As above.
[187] Pottier (n 145) 61.
[188] As above.

this regard, numerous jurisdictions across the continent are moving towards this direction, however, the land under customary tenure is mostly legally undocumented in sub-Saharan Africa. In Nigeria, it is estimated that only 3% of the land is suspected to be registered with the government at all levels.[189]

3.2.3. The current situation: post-colonial Africa

'Path dependence- the influence of the past on the present and future'[190]

Douglas North

As seen from above, the situation of land rights in Africa remains precarious. National laws are usually based on European legal systems which emphasise the concepts around individual property rights ignoring the fact that land relations amongst communities are far more complex[191] because customary land tenure remains dominant. Numerous countries across the continent have laws that recognise some form of community-based tenure system- Africa has the highest number of countries that have statutes that recognise it- [192] but there is little recognition for indigenous peoples and communities to specifically control specific lands.[193] Implementation of the laws remain a challenge[194] because governments do not respect these forms of ownership at times.[195]

The lack of respect for land rights is not new as highlighted above. The post-colonial state has continued practices as discussed above and the 21st century has witnessed the greatest threat to land rights –land grabs, yet. It may be recalled that colonial regimes decimated land rights when land was needed for commercial purposes and the same rings true today. The continent has witnessed large amounts of land being sold/leased or concessioned to business, corporation and foreign capital[196] and this will be elaborated upon in the following chapter.

---

[189] Home (n 173) 9.
[190] S Msimang 'How Apartheid Endures' 2021 https://www.foreignaffairs.com/reviews/review-essay/2021-10-19/how-apartheid-endu4es (accessed 24 October 2021)
[191] T Kachika 'Land grabbing in Africa: A review of the impacts and possible policy responses' October 2010 21 http://mokoro.co.uk/land-rights-article/land-grabbing-in-africa-a-review-of-the-impacts-and-the-possible-policy-responses/ (accessed 15 August 2021).
[192] International Institute for Environment and Development (IIED) 'Securing land rights in West Africa' 2014 https://www.iied.org/securing-land-rights-west-africa (accessed 08 August 2021).
[193] Rights and Resources Organisation 'Who owns the land in Africa Factsheet' October 2015 https://rightsandresources.org/wp-content/uploads/FactSheet_WhoOwnstheWorldsLand_web2.pdf (accessed 21 October 2021)
[194] IIED (n 192).
[195] Kachika (n 191) 24.
[196] C Zambakari 'Land Grab and Institutional Legacy of Colonialism: The Case of Sudan' (2017) 18 *Consilience* at 198.

Due to the commodification of nature and the privatisation of land being on the increase, globalisation has affected international trade in the sense that it has decreased restrictions and therefore influenced markets.[197] Land has become one of the commodities which is subject to these markets. In this regard, land is now viewed as a commodity ignoring the social context in which it exists thus fostering land grabs[198] African governments still use this notion to allow large-scale land transactions (land grabs).[199] Millions of peoples in Africa have been deprived of land through colonial –era settler practices of foreign interest under the justification of modernising economies. This lies in colonial principle of accumulation through dispossession. In this regard, land rights continue to be skewed by historical practices.[200]

States have control over land laws and the institutions that govern them. And they remain at the centre of this phenomenon called land grabs. The next chapter will focus on this threat and how path dependence manifests on this issue.

3.3. Conclusion

The chapter has shown the evolution of land rights over time. It is clear that states have not managed to break away from their colonial legacy. To this end, the post –colonial state still exhibits traits of the colonial government. This is witnessed through the existence of legal pluralism with respect to land. With many African peoples living in traditional land, the law has traces of the colonial 'native affairs' with a statutory system for 'the settlers'.

Even though land grabs are understood in different way today, it must be acknowledged that the first land grabs took place when black Africans were dispossessed by colonialists.[201] Therefore there are systematic challenges that have been inherited from colonialism. The next chapter will delve deeper into the phenomenon of land grabs which is the greatest threat to land and show how states are still conjugal with business interests at the detriment of their human rights obligations to their citizens.

---

[197] YAE Elhadery & F Obeng-Odoom 'Conventions, Changes, and Contradictions in Land Governance in Africa: The Story of Land Grabbing in North Sudan and Ghana' (2012) 59 *Africa Today* at 68.
[198] Africa Faith & Justice Network (AFJN) "Multi-national corporations' land Grabbing in Africa' 16 November 2010 https://afjn.org/multi-national-corporations-land-grabbing-in-africa/ (accessed 08 August 2021).
[199] Home (n174) 13.
[200] HL Sauti & ML Thiam 'The Land-Grabbing Debacle: An Analysis of South Africa and Senegal' (2018) 41 *Ufahamu: A Journal of African Studies* at 86
[201] Sauti & Thiam (n 200) 89.

Chapter 4

4. The nature of land grabs and state complicity in Africa

4.1 Introduction

The previous chapter has shown how land rights in Africa have evolved through time. It has therefore been proven that states remain at the centre of the violation of these right. To this end, the post-colonial still exhibits colonial practices with respect to land which is why the continent faces the greatest threat to this rights in land grabs. This chapter elaborates on the concept of land grabs by interrogating the definitions by various scholars. This is followed by analysing the various methods in which land grabs manifest in Africa and the reasons behind their existence. Furthermore, this chapter examines the role of the state to understand whether it is fulfilling its obligations and what are the implications in that regard.

4.2. Conceptualising land grabs in Africa

The meaning of land grabs is not without its contestations. Two views dominate the discourse with one hand viewing land grabs as negative and a violation of rights and other viewing it as positive and necessary for economic development.[202]

Those that view land grabs as positive argue that it is necessary in light of the need for economic development. In this regard, some have diplomatically termed it as 'land deals', 'commercial pressures on land' or 'large scale land acquisition'.[203] These terms have been used to give it a neutral stance because there is no consensus on a single definition or interpretation.

The issue of land grabs is a convergence of numerous fields such as economics, politics, anthropology and sociology therefore there are many approaches to it.[204] Other definitions strictly look at it from a foreign perspective stating that it is large scale, cross border transaction done by

[202] Africa Faith & Justice Network (AFJN) "Multi-national corporations' land Grabbing in Africa' 16 November 2010 https://afjn.org/multi-national-corporations-land-grabbing-in-africa/ (accessed 08 August 2021).
[203] ACE van der Wulp 'The role of the state in facilitating land grabs in Ethiopia' August 2013 5 https://edepot.wur.nl/272710#:~:text=The%20state%20emerges%20in%20the,time%20pursuing%20its%20own%20interests (accessed 15 August 2021).
[204] H Twomey 'Displacement and dispossession through land grabbing working paper series 101' July 2014 27 https://www.rsc.ox.ac.uk/files/files-1/wp101-displacement-dispossession-land-grabbing-mozambique-2014.pdf (accessed 28 September 2021).

transnational corporations (TNCs) or foreign governments.[205] Other definitions look at the notion of social injustice: controlling land disproportionate in size to the land holding in the region.[206] Whilst others focus on the justifications of land deals such as 'evaluation of land ownership that can serve as sites for fuel and food production if the future price strikes'.[207]

Various actors in the different levels: global, national or local have defined it differently because it happens in different realities. According to Borras et al, it is an 'explosion of (trans) national commercial land transactions and land speculation around the large-scale production and export of food and biofuels'.[208] But van der Wulp argues against this notion of defining land grabs as a transnational phenomenon because land grabs are perpetuated by various actors whether foreign or domestic.[209] Furthermore, they argue that it takes place for numerous reasons as opposed to the belief that it is for agricultural production therefore a definition based solely on agricultural production is general and does not account for the different contexts to which land grabs takes place.[210]

Alternatively, Hall argues that the term 'land grabs' is only effective for activism because it eliminates the opportunity to scrutinise the differences in legality, structure and outcomes of land deals and does not fully address the role of domestic elites, governments and partners in this.[211] It is perhaps for this reason that Kachika makes an attempt to differentiate between land grabs and state sponsored land grabs' highlighting that these are land grabs whereby the state uses its power to carry out land dispossessions[212]. Therefore, it is arguable that the definition of land grabs must consider the different actors, land use, resources and reasons. Furthermore, in understanding the complexity of land issues, it is therefore important that the definition allows for the space to discuss the importance of states in these "land acquisitions". [213]

---

[205] As above.
[206] As above.
[207] H Twomey (n 204) 15.
[208] Y Jin Bae 'A displaced community's perspective on land-grabbing in Africa: The case of the Kalimkhola community in Dwangwa, Malawi' (2019) 18 *Land* at 190.
[209] van der Wulp (n 203) 10.
[210] As above.
[211] R Hall 'Land Grabbing in Southern Africa: the many faces of the investor rush' (2011) 38 *Review of African Political Economy* at 196.
[212] Kachika T 'Land grabbing in Africa: A review of the impacts and possible policy responses' October 2010 62 http://mokoro.co.uk/land-rights-article/land-grabbing-in-africa-a-review-of-the-impacts-and-the-possible-policy-responses/
[213] van der Wulp (n 203) 11.

Consequently, it is argued that land grabbing should not be seen as mere acquisition but must also take into consideration ownership rights as well as user rights. It must also highlight the notion of control grabbing because states act as mediators who decide what should happen with the land and its various resources.[214] This basically expresses the fact that this phenomenon is not limited to just land but it refers to access to land and the important resources that it possesses.[215] The issue of access therefore creates a power struggle between several actors about who can use the resources within that territory, how to use it and the purpose of use.[216] Therefore the use of control grabbing helps in explaining the fact that certain actors can therefor decide how the land is used.

In response to these debates, Steinbruck contends that there are five issues that separate land acquisitions and land grabs. He asserts that land grabs (i) violate human rights, (ii) contravene the principle of Free, Prior and Informed Consent (FPIC), (iii) disregard social, economic and environmental impacts, (iv) not based on transparent contracts with clear binding commitments on employment and benefit-sharing and (v) avoids democratic processes in planning, oversight and participation.[217] The presence of one of these equates to a land grabs.

Considering the above, and for the purposes of this paper, land grabbing is defined as 'taking possession of land for commercial and industrial production in a way that does not met human rights standards and norms thereby violating the land rights of owners and consequently disadvantaging them.[218] This is in conjunction with the notion that capital accumulation is at the centre of these grabs therefore land grabs are also understood as accumulation by dispossession/ displacement of local communities.[219]

---

[214] International institute for environment and development (IIED) 'Securing land rights in West Africa' December 2014 https://www.iied.org/securing-land-rights-west-africa (accessed 08 August 2021).
[215] As above.
[216] As above.
[217]E Steinbruck 'Foreign Land Acquisitions' 2013 6 https://www.academia.edu/7954891/FOREIGN_LAND_ACQUISITIONS_IN_AFRICA_OPPORTUNIY_OR_LAND_GRABBING_THE_CASE_OF_THE_DEMOCRATIC_REPUBLIC_OF_CONGO (accessed 15 October 2021)
[218] As above.
[219] Y Jin Bae (n 208).

4.3. The nature and process of land grabs in Africa

4.3.1 Purchasing/ leasing of land

Land grabs manifest through the purchasing or the leasing of large tracts of land by foreign companies for various reasons.[220] These purchases differ because with respect to land grabs, investors are resource seeking as opposed to market seeking by using the land for resource repatriation for food or energy and not necessarily for export.[221] Ethiopia is one of the countries that have been targeted for biofuel. In this regard, the state has finalised deals with German companies in Oromia State and Benshangul Gumuz State for 13 000 hectares and 80 000 hectares respectively for the production of biofuel.[222]

4.3.2. Displacement and dispossession of communities

Displacement and dispossession manifests differently in urban and rural settings. In urban areas, citizens are forcibly evicted under what is known as 'development-induced displacement' for purposes such as infrastructure development, city beautification, and land allocation for public purpose to private developers.[223]

The City of Johannesburg in South Africa has been known to move informal settlement dwellers from land that is deemed unsuitable for development.[224] The City has also relocated people from inner city buildings on the basis of health and safety to peripheral townships away from the means of livelihood that attracted them to the city in the first place. The reason behind these displacements was to attract commercial investment back into the city.[225] To this end, the City conducted evictions affecting 25 000 families who were removed without notice, consultation nor alternative accommodation thus rendering them homeless.[226] This went against Section 25 and 26 of the Constitution which requires the state 'to take reasonable legislative and other measures'[227] towards realising this right (the right of access to adequate housing) and prohibit arbitrary evictions as well as

---

[220] E Aryeetey & Z Lewis 'African Land Grabbing: Whose interests are served' 25 June 2010 https://www.brookings.edu/articles/african-land-grabbing-whose-interests-are-served/ (accessed 21 October 2021).
[221] As above.
[222] Kachika (n 212) 60.
[223] M van eerd & B Banerjee 'Evictions, acquisition, expropriation and compensation, practices and selected case studies Working Paper 1' February 2013 15 https://www.researchgate.net/publication/308376326_Evictions_acquisition_expropriation_and_compensation_practices_and_selected_case_studies (accessed 22 October 2021)
[224] As above.
[225] As above.
[226] As above.
[227] Sec 25 South African Constitution

take appropriate measures to enable citizens ' to gain access to land on an equitable basis'[228] and adopt legislation to ensure security of tenure or comparable redress to people whose tenure is insecure as a result of past racially discriminatory laws or practices.[229]

Furthermore, the courts in South Africa made a landmark judgement in 2000 in the Grootboom case that the state should 'devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.[230] In this regard, the programme should include reasonable measures 'to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.[231]

Similarly in Sudan, the Unregistered Land Act (1970) and the Civil Transaction Act (1984) strengthened the hand of the state with regards to land at the detriment of rural communities who were under customary tenure. These Acts empowered the Government to expand its agricultural farming and to use force in safeguarding its land. To this end, land was taken from communities for investors.[232]

In the Abyei region (border state between Sudan and South Sudan), the land was shared between Ngok Dinka and seasonally by Missiriya (who grazed their cattle in the dry season).[233] This was similar to what was happening with the Baggara pastoralists who moved from Darfur (Western Sudan) through Kordofan (state in Central Sudan) and into Bahr Ghazal (Western South Sudan).[234]These communities were dispossessed of their land through violence. This also meant that traditional leaders were stripped of their powers over traditional land including water and grazing land which the aforementioned agro-pastoralists communities depended on. This left communities without land, jobs and access to basic services. [235]

4.3.3. Concession with traditional leaders

In all the land grabs taking place in West Africa, one cannot ignore the role of national elites. In this regard, this refers to the state and traditional authorities who enter into partnerships with foreign elites

[228]As above.
[229] van eerd & Banerjee (n 223) 15.
[230] As above.
[231] As above.
[232] C Zambakari 'Land Grab and Institutional Legacy of Colonialism: The Case of Sudan' (2017) 18 *Consilience* at 198.
[233] As above.
[234] As above.
[235] As above.

to facilitate these deals putting land at the hand of landholding capitalists at the disadvantage of local communities.[236] Chiefs can use their cultural and political power to influence land grabs and this has been the case in Ghana pertaining the bioenergy crop jatropha.[237]

In Ghana, 80% of the land is owned under customary tenure. In this regard, chiefs have various roles to play with respect to land such as (i) act as custodians of the land and (ii) interface with investors.[238] They therefore make decisions on land on behalf of the citizens. However, they have been known to negotiate deals that go beyond their mandate and solely benefit them as witnessed in Kpachaa and Kadelso.[239] The decisions are not supposed to be unilateral but they are entrusted to consult with the community on negotiations, request consent and get compensation. However evidence has shown that this has not been the case as they have sold land without notifying the community and also keeping the compensation.[240]

4.4. State complicity in land grabs in Africa

There is a growing body of literature that is situating the state at the centre of practices of land grabs, to enable a discussion on how internal factors and contexts play a role in shaping these land "deals".[241] ElHadary & Obeng-Odoom argue that there is tendency to paint TNCs as the villains of human rights violation with respect to land grabs however, it is equally important to highlight that the state and community forces also support capital to accumulate and dispossess weaker social classes.[242]

The state-centred analysis provides an approach that enables us to understand the limits of law in addressing displacement and dispossession.[243] In this regard, it is pertinent to underscore that the part of the purpose of law is to regulate state behaviour through norms and standards. In this regard, international law constructs norms of appropriate behaviour through treaties, principles and

[236] AY Gyapong 'Land grabs, farmworkers, and rural livelihoods in West Africa: some silences in the food sovereignty discourse' 2020 https://www.tandfonline.com/doi/full/10.1080/14747731.2020.1716922 (accessed 18 October 2021)
[237] A Ahmed, E Kuusaana & A Gasparatos 'The role of chiefs in large-scale land acquisitions for jatropha production in Ghana: insights from agrarian political economy' (2017) 75 *Land Use Policy* at 345.
[238] As above.
[239] As above.
[240] As above.
[241] As above.
[242] YAE Elhadery & F Obeng-Odoom 'Conventions, Changes, and Contradictions in Land Governance in Africa: The Story of Land Grabbing in North Sudan and Ghana' (2012) 59 *Africa Today* at 68.
[243] W Wolford; S Borra Jr; R Hall; R Scoones & B White 'Governing Global Land Deals: The Role of the State in the Rush for Land' 2013

codes of conduct with the sole purpose of influencing the State enabling them to promulgate (from international law) legislation to regulate State behaviours.[244]

Chapter 2 highlighted the international obligations that states undertake therefore international relations scholars argue that the way that international norms are adopted varies across different countries. In this regard, there needs to be processes that transition an international norm after its adoption to the domestic sphere through a process of internalisation. Internalisation becomes a tool/mechanism in which an adopted norm becomes a reality at the national level.[245] This process allows for the formalisation of a norm which should ideally render it implementable. Implementation therefore becomes a process whereby the commitment of the State is tested. However, the process of internalisation should not be interpreted as implementation.[246]

In view of the above, domestic contexts matter for institutionalisation which would perhaps explain why domestication differs in the various jurisdictions.[247] This is premised on the notion that the domestic context will always have variations of compliance and interpretation because international law is dependent on the implicit and explicit consent of states. Therefore, the transition of international law coming into force in a particular state can be a limitation particularly because national governments are the medium in which international law operates. [248]

Certain norms are institutionalised or implemented if there is a "cultural match" or normative context or localisation. They can mean different thing when they combined with pre-existing cultural and historical contexts.[249] Therefore in n analysing the state, it becomes important to understand why the State adopts and institutionalises norms thus the domestic context is vital on how norms are acted upon.[250] In light of this, there are critical stages that ensure international norms are taken in to the point that domestic practices, motivations and contexts help in analysing the States limits at times. This must be closely analysed through the lens of domestic political power and governance.

With this understanding, there is a clear indication that the correlation between institutionalisation and implementation in Africa is limited. Africa is usually seen as one country but

[244] As above.
[245] As above.
[246] As above.
[247] As above.
[248] As above
[249] As above.
[250] As above.

it is vital to also look at to look at land grabbing in its length and breadth.[251] Africa is different compared to other regions such as Latin America or Eastern Europe because most of the Land grabs are predominantly led by Government through leases or land-use rights determined by the land ownership structures in the various countries.[252] Almost half of the continent, approximately 20 countries in Africa are participating in land grabs. Countries such as Ethiopia, Kenya, Malawi, Mozambique, Mali, Sudan, Tanzania and Zambia have been involved in land deals or foreign land leases.[253]

Of great concern is that Africa has the highest number of countries which recognise rights of communities to own or control land. In this regard: Tanzania (75 percent), Uganda (67 percent), Zambia (53 percent), and Botswana (53 percent).[254] Furthermore other Sub-Saharan African countries also recognise community-based ownership or control of more than 25 percent of their countries' land area: Zimbabwe (42 percent), Namibia (41 percent), Liberia (32 percent), and Mozambique (26 percent). [255] This is particularly enlightening because most of the land in Africa is still under customary land tenure which is generally communal in nature. It is estimated that only 2-10% of land in Africa is under formal land tenure which is usually prevalent in urban areas.[256] Therefore if the State owns majority of the land, it plays a central role in the deals that take place in its jurisdiction pointing to the disjuncture between institutionalisation and implementation.

4.5 Pull and push factors of land grabs in Africa

4.5.1 Pull factors

The Neo-colonialist view attributes argues that land grabbing is driven by the international economy.[257] It is argued that former colonial powers are viewed as the grabbers because they exert power on developing States. On the other hand, the Utilitarian views land grabs as legitimate sales.[258] It does not contradict the neo-colonialist with respect to the drivers of land grabs mentioned above, however, it

[251] ElHadary & Obeng-Odoom (n 242) 70.
[252] Aryeetey and Lewis (n 220).
[253] ElHadary & Obeng-Odoom (n 242) 72.
[254] Rights and Resources Organisation 'Who owns the land in Africa Factsheet' October 2015 https://rightsandresources.org/wp-content/uploads/FactSheet_WhoOwnstheWorldsLand_web2.pdf (accessed 21 October 2021)
[255] As above.
[256] Aryeetey & Lewis (n 220).
[257] M Imam & Z I Momoh 'The Paradox in the Political Economy of Land Grabbing in Africa as Medium of Exchange and Its Implication on States' (2019) http://www.aijssnet.com/journal/index/636 (accessed 12 October 2021)
[258] As above.

justifies them because of (i) the impact of the global crisis such as food security and climate change, (ii) the financial crisis, (iii) globalisation (iv) liberal land markets and Foreign Direct Investment (FDI).[259]

In light of the above, FDI is the overarching pull factor for land grabs. According to Lay & Nolte, there are three factors that drive it.[260] It is no secret that the World Bank pushed African Governments to privatise land and focus on industrial farming. It also provided TNCS with guarantee for them to invest in the sector which exacerbated the land rush.[261] The main targets particularly for agricultural-related purchase include Cameroon, DRC, Madagascar, Mali, Somalia, Sudan, Tanzania and Zambia.[262]

Hall argues that African countries are finally getting what they sought after which is Foreign Direct Investment (FDI) through these so called land deals. Unfortunately instead of uniting nations into economic growth and development it is actually fragmenting communities and their Governments.[263] Even the UN FAO has described it as a neo-colonial mechanism/system by foreign companies and investors to get Africa's resources.[264] This is driven by tourism, biofuel production and agriculture. In recent times, it started with the food crisis of 2007-2008 and was exacerbated by the crash of financial markets in 2008.[265] Some of the pull factors are discussed below:

a. Agriculture

Due to the fact that food increased during the food crisis of 2007-2008, there was also an increase in the price of farmlands. It is estimated that the price increased by 16% in Brazil and 31% in Poland. Furthermore, there was a general loss of confidence in the global food market so countries wanted to secure food for themselves.[266] To this end, investors began looking for cheaper farmlands as there

[259] As above.

[260] J Lay & K Nolte "Determinants of foreign land acquisitions in low- and middle-income countries" (2017) 18 *Journal of Economic Geography* at 67.
[261] Rights and Resources Initiative "The Southern Times' How land grabs hurt Africa" 20 May 2013 https://rightsandresources.org/blog/the-southern-times-how-land-grabs-hurt-africa/ (accessed 21 October).
[262] Aryeetey & Lewis (n 220).
[263] As above.
[264] As above.
[265] Hall (n 211) 212.
[266] Aryeetey & Lewis (n 220).

was a perception that Africa has a lot of unused land which would be available. This was coupled by the fact that the continent has a good climate and cheap local labour.[267]

China, Gulf States, India and South Korea are some of the States driving Land grabs for agricultural purposes amidst their growing populations.[268] Countries such as Saudi, the UAE and South Korea do not have arable land so they bought/leased land in Africa in an effort to rectify that.[269] These are the countries with high tech agricultural sectors but very little cultivatable land.[270] China and Saudi Arabia amongst other are instigators of land grabs because they need land to grow their staple foods.[271] So rich countries are using developing countries to manage their domestic needs when it comes to food.[272]

Subsequently, the World Bank produced a report titled "Rising Global Interest in Farmland" in 2010 focusing on how land in Africa was underutilised.[273] To this end, it reported that there was low productivity and there could be room to actually intensify. It also advocated for land deals that could shift land rights from "less to more efficient producers". This positions was informed by its market-based land and agricultural reforms over the past thirty years.[274]

Institutions such as the World Bank view this phenomenon of land grabs in the positive because land acquisitions were alleged to be beneficial for development. They are purported to be good for rural development and poverty alleviation through employment and compensation for sold land.[275] Land grabs were encouraged under the guise of increased productivity, growth and food security.[276] The argument is that farmers can be integrated into business ventures and taxes generated can be good for the national economy.[277]

The continent did expect that there would be benefits for them. This includes employment for local communities and infrastructure development.[278] It was also expected that these land deals would help in GDP growth and greater revenue for Government, increase in the standard of living

[267] As above.
[268] As above.
[269] Steinbruck (n 217) 9.
[270] Lay & Nolte (n 264) 68.
[271] Rights and Resources Initiative (n 265).
[272] As above.
[273] Hall (n 211) 199.
[274] As above.
[275] Gyapong (n 236) 344.
[276] As above
[277]As above.
[278] Aryeetey & Lewis (n 224).

for communities, technology transfers, capital and market access.[279] However it has been discovered that companies will use their own labour force and will not share their expertise nor technology.[280]

Yet on the other hand, there are concerns that most of the food produced is sold for export thus threatening self-sufficiency and food security.[281] Furthermore, the land that is taken is usually taken for very little money so as to make it a sound investment particularly in countries where land is state owned. And due to the exportation of food means that farmers are at the mercy of international markets which can put them at risk.[282] These States would rather outsource the production of food as opposed to buying at the world market which is unstable in terms of pricing.[283] Furthermore, there is a creation of unequal power relations between States and Investor States as well as the companies therefore causing countries to lower their standards in an attempt to attract foreign investors as well removing competition from other countries.[284]

b. Biofuels

More and more countries are trying to move away from the dependence on gas or oil to biofuels.[285]They are leasing land in Africa in an effort to grow crops like soya, palm oil and sugarcane that can be used to produce these bio fuels. Numerous countries as well as TNCS are investing in this area as Africa has the best conditions to grow these crops.[286] Despite the fact that the need for biofuels seems to be decreasing however, it has been reported that oilseed crop account for 60% of acquired land in Africa, 13% sugarcane with biofuels as the biggest driver for these crops.[287]

c. Logging

A lot of land is also being taken because of the logging sector. Africa has the second largest forests in the world. With its rare and expensive wood, it is an investment destination for companies [288]

[279] As above.
[280] Rights and Resources Initiative (n 265).
[281] Gyapong (n 240) 344.
[282] Gyapong (n 236) 344.
[283] Steinbruck (n 217) 9.
[284] Gyapong (n 236) 344.
[285] Steinbruck (n 217) 11.
[286] As above.
[287] European Parliament: 'Addressing the Human Rights Impacts of Land Grabbing' 2014 https://www.europarl.europa.eu/RegData/etudes/STUD/2014/534984/EXPO_STU(2014)534984_EN.pdf (accessed 14 October 2021)
[288] Steinbruck (n 217) 11.

d. Mining

The mining sector is a key driver for land grabs for various resources or minerals such as gold, uranium, copper or diamonds. The extractive industries require land to take place and land is being taken for this purposes.[289] As stated in chapter 1, mining one of the largest investment in Africa.

e. Water

Water is one of the drivers as well. There is a correlation between land grabs and water rights acquisitions.[290] Investors will buy land for the purpose of securing water.

4.5.2 Push Factors

There is a diversity of stakeholders who are involved in land grabs in Africa. However, Middle Eastern countries such as Saudi Arabia, Qatar, Kuwait, Abu Dhabi are some of the biggest investors.[291] They are pushed to invest in African countries based three reasons: organisational choice, maximum profit making through low-cost production locations and the choice between internalising production or getting a license as a foreign producer.[292]

a. Energy

Western companies are some of the biggest instigators of land grabs in Africa. In this regard, the UK, USA and Norway rank as 1st, 2nd and 4th external land grabbers on the continent.[293] About 60% of the land acquired by these countries is invested into biofuels so that they are able to meet the growing demand for energy in their regions.[294]

b. Climate Change

Norwegian companies are also leading in planting trees in Mozambique, Tanzania and South Sudan for their carbon credit schemes.[295] These are schemes which allow companies to invest in environmental projects so that they can balance their own carbon footprint.[296] These are usually done

[289] As above.
[290] Steinbruck (n 217) 9.
[291] Aryeetey & Lewis (n 220).
[292] Lay & Nolte (n 264) 69.
[293] G Chelwa 'The land grabs in Africa you do not hear about' 2015 https://africasacountry.com/2015/11/the-land-grabs-in-africa-you-dont-hear-about (accessed 21 October 2021).
[294] As above
[295] As above.
[296] D Clark 'A complete guide to carbon offsetting' *The Guardian* (London) 16 September 2011 at 1 https://www.theguardian.com/environment/2011/sep/16/carbon-offset-projects-carbon-emissions

in developing countries designed to reduce future carbon dioxide emissions. The trees are therefore planted to soak carbon dioxide from the air.[297]

c. Conspicuous consumption/ Land speculation

There are also numerous hedge funds taking money from pension funds and investing in land so that they can make future profits when the price of land goes up in the future.[298] This is devastating because these companies just acquire land without using it at the expense of local communities.

4.6. Implications of land grabs in Africa

Numerous organisations such as the UN, FAO and the World Bank have been trying to push for more regulation to decrease the number of people being dispossessed through the elaboration of guidelines.[299] The reality is that land grabs on the continent are on the rise and the ramifications will include an increase in the number of those dispossessed and displaced. This is a concerning for the future in light of the fact that approximately 60% of people in Africa depend on land for their livelihoods.[300] But the implications of this phenomenon are already evident.

4.6. 1. Loss of access to land

When land grabs take place, people lose access and control over the land and related resources that they need for their well-being. In this regard, the loss also affects the land rights associated with it.[301] This creates a challenge around land control and ownership as well individual and community land rights because it is only through land ownership that communities have stronger rights but they now have to deal with various restrictions and dispossession.[302]

4.6.2. The livelihoods of peasants

Land grabs are challenging because they threaten the recognition and history of family farms. Family farming contributes significantly to the rural way of life in most African countries.[303] Furthermore, small holder farmers and pastoralists are affected by land grabs because governments usually classify

[297] As above.
[298] Chelwa (n 293)
[299] Twomey (n 204).
[300] As above.
[301] European Parliament (n 287) 44.
[302] H Ghebru 'Women's Land rights in Africa' 2019 46 https://doi.org/10.2499/9780896293649_04 (accessed 08 August 2021).
[303] Gyapong (n 236) 342.

their lands as "idle" or "vacant".[304] The World Bank described the Guinea Savannah Zone as empty lands that need to be harvested without taking into account the relevance of shifting cultivation, fallow systems and pastoralism.[305] These "vacant" lands are used by communities for other purposes such as forests for food, transit ways for herders. Even though these are viewed as secondary uses of land, they are necessary for the livelihoods of numerous communities.[306]

4.6.3. Marginalisation of women

Marginalisation of women around land cannot be overlooked because land grabs exacerbate the predicament of women when they are denied their land right.[307] Women account for 60% of small scale farmers[308] therefore land grabs are more dangerous for them especially because they are taking place in a time where there are various discussions around the land rights for women especially in Africa. Therefore this phenomenon is deepening the corrosion around the rights of women in this area.[309]

Additionally, often the proposed land use (whether for energy or mining) does not correspond to the needs of women.[310] Furthermore, when companies meet with communities they are more likely to be marginalised during consultations and they are the least unlikely to get employed or enjoy an increase in income through the changing of use of land by corporations. Also when land changes hands women are usually denied their land rights.[311] This is mainly due to the fact that their situation with regards to land ownership remains precarious.[312]

4.6.4. Labour redundancy

The promises of the absorption of rural labour when these grabs take place does not guarantee jobs due to the lack of matching skills or suitability of the labour to the business (agri-business) models.

[304] Twomey (n 204).
[305] Gyapong (n 236) 342.
[306] European Parliament (n 291) 45.
[307] Gyapong (n 236) 350.
[308] Ghebru (n 302) 48.
[309] Kachika (n 212) 63.
[310] As above.
[311] Gyapong (n 236) 350.
[312] Kachika (n 212) 63.

Even though these deals may include clauses on local employment, there are no guarantees because there are no mechanisms to check and some of these agreed frameworks are voluntary.[313]

4.6.5. Violations of human rights

It has been established that land is a resource linked to various rights. On the right to food, most land grabs destroy wholly or partly the ability for communities to produce their own food and ensure adequate nutrition. This also applies to water bodies which people use for fishing and water and forests which are used for fruits.[314] Furthermore, land grabs also violate the right to housing. In this regard, numerous families and communities are forcibly evicted by public or private forces. This in turn has an effects on the highest attainable standard of mental and physical health.[315]

Due to the spiritual connection that people have with the land, and due to the evictions many spiritual and cultural sites have been destroyed thus impacting the right to a cultural life.[316]It also affects peoples' right to water because during these grabs people can lose access to water and its sources. Sometimes even the availability of water is compromised when water streams are channelled to other places or they are contaminated by pollution due to business activity.[317]

The pollution that also comes from some of the projects responsible for land grabs such as the extractive industry can actually compromise the right to health.[318] It also deprives the community the opportunity to decide how to derive their income therefore violating the right to work. This affects people who depended on the land for work, also the work "promised" during land deals is often not enough for livelihoods.[319]

4.6.6. Conflict

There are social dimensions which affect land ownership in Africa and these include class, religion, gender and ethnicity.[320] Due to these issues land rights can be a source of conflict. In East Africa

[313] Gyapong (n 226) 350.
[314] European Parliament (n 287) 28.
[315] As above.
[316] As above
[317] As above.
[318] As above.
[319] As above.
[320] U Bob 'Land-related conflicts in Sub-Saharan Africa' 2012 https://www.accord.org.za/ajcr-issues/land-related-conflicts-in-sub-saharan-africa/ (accessed 03 October 2021)

(particularly in Kenya, Tanzania. Uganda, Rwanda), it has been highlighted that land has been at the centre of conflict between ethnic groups in the region.[321]

Since land is secured at different levels whether community level or household level, each level has its own complexities. In addition, there are complications attributed to economic and political forces, availability of land and the quality of the land that is available.[322] This is triggered by the competition for land activated by these grabs. Furthermore, the legal disregard for customary rights has also historically caused conflict and civil war. [323]

4.6.7. Insecurity and Poverty

Most host countries sit on the brink of insecurity and poverty which leads to shortages and conflict.[324] There is a certain level of recklessness that is being questioned of the state as to how they can lease land to Qatar in Kenya when the country suffers from food insecurity.[325] This is the reason why protests erupted in Madagascar when the Government entered a deal with DAEWOO whilst the county suffered high food insecurity levels and poverty.[326] In Nigeria, some of these actions of the Government are more likely to lead to high unemployment rates, youth unrest, crime and terrorism.[327]

4.7 State complicity at national level

Irrespective of the push and pull factors, it must be acknowledged that there remains numerous reasons why investors find the Africa as a plausible place to grab land.

African Governments have been partnering with foreign investors in the processes of land grabs. The questions have been asked though if this a case of corrupt African governments or is it searching for economic development opportunities.[328] However, it has been argued that countries looking for FDI target countries with water and land resources but with institutions that are ambiguous in their effectiveness.[329] It has been argued that there are a few African countries which

[321] As above.
[322] As above.
[323] L Wily "Compulsory Acquisition as a Constitutional Matter: The Case in Africa" 2018 Journal of African Law
[324] Aryeetey & Lewis (n 220).
[325] As above.
[326] As above.
[327] As above.
[328] As above.
[329] As above

have strong and independent democratic institutions hence this would explain why they enter into such deals.[330]

In the World Governance index pertaining to property rights, sub-Saharan Africa has ranked lower than other regions on various categories such as voice and accountability, political stability, regulatory quality, rule of law and control of corruption, and government effectiveness[331].

4.7.1. Constitutions

Weak governance has implications on institutionalisation and implementation of human rights norms and standards. Firstly the issue begins with the proliferation of constitutions in jurisdictions in Africa especially since a lot of people on the continent depend on land for their livelihood.[332]

There are two sets of people who are affected by land grabs mostly, the untitled urban poor and customary landholders. As mentioned before, only 10 % of the land in Africa is defined as private property.[333] In this regard, 2.6 million hectares of the continent is deemed as national, state, government or public land meaning that the state has a share in one way or the other.[334] To this extent, only a few jurisdictions actually differentiate customary land from national or public land.[335] We can therefore contend that most customary land can be deemed as state owned or public or un-owned.

The constitutional position on land is very important. Generally the constitution is one of the documents that citizens will engage with pertaining to any subject. Furthermore, constitutions are also not easy to change and thus give a certain level of predictability.[336] This section therefore looks at how the issue of governance makes a state complicit in abusing land rights of citizens and this issue starts with the constitutions. Every constitution finds the need to specify its power and its limitations.

Africa comprises of 55 countries with each having their own constitution. Most of the constitutions are fairly new with the exception of a few adopted prior to 1990 (Botswana, Liberia, Mauritius, Tanzania and Sao Tome and Principe).[337] This is important to note because a new wave of constitutionalism took place in Africa at the end of numerous civil wars thus ushering in multi-party

[330] As above.
[331] As above.
[332] L Wily 'Compulsory Acquisition as a Constitutional Matter: The Case in Africa' (2018) 62 *Journal of African Law* at 79
[333] As above.
[334] Wily (n 323) 78
[335] As above.
[336] Wily (n 323)
[337] As above.

democracy.[338] Wily therefore argues that since 1990 there has been efforts in in bridging the legal pluralism in countries. Alternatively, Enemark et al still view these constitutions as a continuation of western ideals.[339] As established above, the fact that customary land still remains a pariah in most African states begs numerous questions.

SOUTH AFRICA

South Africa was a Dutch and a British colony. In terms of land, the 1913 Natives Land Act (subsequently renamed the Bantu Land Act and the Black Land Act) characterised land relations until 1994. Under this Act most black South Africans could not own land. As such they were forced to live in reserves which comprised of 7% of the land.[340]

Land rights were only recognised for white people. In this regard, land rights were often disregarded for black people. At the advent of democracy in 1995, laws based on racial ownership were changed and reformed to a certain extent. Land redistribution regimes were enacted whereby the State could buy land for individuals based on a willing seller and willing buyer regime. Furthermore, the Communal Land Tenure Act (2004) recognised communal land ownership.[341]

The regimes however have failed to adequately address racial inequalities in land ownership. The issue of land reform remains highly debated topic in South Africa.[342]

It must be noted that there are more people under customary tenure in Africa and the numbers differ moving from 0.1% to 86% of land area in various countries meaning that 10 % is actually registered in terms of deeds.[343] Only a few countries actually differentiate between customary and public land. Most countries acknowledge that the public land is occupied by its citizens under customary law but they do not view this as private property belonging to those people. [344]

[338] As above.
[339] S Enemark; H Træholt & Galland Garcia de Quevedo, Daniel 'Land administration, planning and human rights' 2014
[340] R Home 'History and Prospects for African Land Governance: Institutions, Technology and 'Land Rights for All' (2021)10 *Land* 7. https://doi.org/10.3390/land10030292 (accessed 15 October 2021)
[341] As above.
[342] As above.
[343] Wily (n 323) 79.
[344] As above.

Security of tenure is the governance strategy that is most cited as responsible for land grabs. The issue of tenure has been seen as the sole reason behind weak governance because rights have not been clearly defined in most jurisdictions and thus leads to weak governance.[345]

It is therefore prudent to look at the constitutional conceptualisation of land governance because the constitutional outlook of property in Africa is a sign of the state and how it relates to land and resource dependence.[346]

Most African constitutions do not pronounce against landlessness even though they do mention access to land as a principle. Chad and DRC state that 'private property is sacred and inviolable" whilst Morocco and Mauritania state that the state may limit property "if the exigencies of economic and social development of the country necessitate it".[347]

Equatorial Guinea and Guinea Bissau distinguish between public property and public property. But São Tomé and Príncipe and Egypt distinguish communal lands as cooperative property.[348] In most cases where land is in state hands, constitutions will give citizens the right to hold, bequeath and inherit but they are unable to sell or transfer it as seen in Mozambique. Ghana's constitution also states that land ownership is characterised by a social obligation to serve a larger community.[349]

The greatest debate will always be around the notion of human rights vs public interest. Currently, little is said in questioning whether land grabs are actually necessary.[350] These governance instruments do not question as whether they need to happen in the first place. So, the effect of land grabs is to assume that they are unavoidable which should be seen as alarming.[351]

There are 17 countries where ultimate title belongs to the state inclusive of surfaces, water, minerals and forests to a certain extent.[352] Wily argues that land acquisition within states is one matter which is elaborated on in Africa. To this end, countries with a common law heritage mention such as The Gambia, Ghana, Lesotho, Nigeria, Sierra Leone, Zambia and Zimbabwe except Uganda, Tanzania and Kenya where they are tackled in land law.[353] Anglo-francophone Mauritius and Seychelles are

[345] As above
[346] Wily (n 323) 80.
[347] As above.
[348] Wily (n 323) 83.
[349] As above
[350] Wily (n 323) 84.
[351] As above.
[352] As above.
[353] As above

limited on the details and this may be explained by the fact that they have large foreign land ownership.[354]

The issue of public purpose always comes up when it comes to acquisition. But some francophone countries such as Chad, Mali and Madagascar and Ethiopia do not have a legal procedure for constitutionally done acquisitions.[355] Conversely, 20 countries do not mention the issue of public purpose. To this end, Mauritania and Cameroon only mentioned public purpose in their preambles.[356] 8 Anglophone constitutions are specific. The Gambia states 'necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning, or the development…'[357]

The greatest issue however, does lie in the fact that constitutional pledges allow for these measures to be undertaken under the guise of economic development if they necessitate expropriation. This is in 11 of the new constitutions adopted since 1990.[358] DRC protects the rights of foreign investors' use of land. Eswatini also states that compulsory acquisition "may not be used to undermine or frustrate an existing or new legitimate business undertaking of which land is a significant factor or base".[359]

Should land be grabbed, many poor people in Africa are limited in terms of court processes. The processes are not inclusive from the very beginning.[360] Most of the time what is termed as inclusive is merely telling those affected that the land they are on will be taken making these processes insufficient. This is based on the fact that they are not seen as lawful owners to begin with especially those untitled land holders.[361]

The overlap between public and customary land overlaps quite hectically in Africa. 36 constitutions in the continent refer to customary land as public or state owned and in cases where the land itself is not owned, the resources are such as the minerals, waters or forests.[362] In Malawi, Namibia, Ghana and

[354] Wily (n 323) 85.
[355] As above.
[356] Wily (n 323) 87.
[357] As above.
[358] Wily (n 323) 88.
[359] As above.
[360] As above.
[361] As above.
[362] Wily (n 323) 95.

Rwanda lands already vested in the government are referred to as public lands. In Malawi and Namibia this is specified as including communal and customary lands respectively.[363]

In these jurisdiction communities find themselves not as owners of customary type of land. In DRC, the government has "permanent sovereignty" over forests.[364] "Natural resources" are public land under the constitutions of Ethiopia, Niger, Tunisia, and South Sudan. It is only land that is granted property status that is usually constitutionally protected. Some constitutions such as Benin, Botswana, Comoros and Ivory Coast do not indicate tenure categories at all. Others such as Liberia, Libya, Malawi and Rwanda only differentiate between public and private lands. [365]

Algeria, Egypt, Equatorial Guinea, São Tomé and Príncipe, Madagascar and Morocco recognise lands belonging to a cooperative. Namibia specifies that family land can be registered as with only a few other countries. So customary land is not seen as the property of communities and hence their land rights are unprotected.[366]

Only 11 countries Angola, DRC, Ethiopia, Equatorial Guinea, Eswatini, Ghana, Kenya, Mozambique Uganda, South Sudan Zambia)constitutionally single out customary or community lands as a special category of landholding which gives them protecting just like statutorily protected property.[367] The lack of constitutional provision does not necessarily equate to a lack of protection as seen in Burkina Faso, Botswana, Sierra Leone and Tanzania. Other protections can be seen through South Africa's constitution which has made land an issue of restitution. [368]

KENYA

Kenya had a white settler community. At that time, a Crown Lands Ordinance (1902) was proclaimed meaning that 'all public lands in the Protectorate . . . including all lands occupied by native tribes'. Later the colonial administration gave individuals (white individual) leases for 999 years.[369]

[363] As above.
[364] Wily (n 323) 96.

[365] Wily (n 323) 97.
[366] As above
[367] Wily (n 323) 85.
[368] As above.
[369] Home (n 340) 9.

Post-independence land regimes did not change much in because the framework was not changed much but the President just created beneficiaries through land-buying private companies led by politicians who would benefit from former settler own companies.[370]
In 1970, the Trust Land Act moved Tribal Trust Land to local authorities (counties) which was registered as private land or set aside for public purpose. It is the new Constitution of 2010 put land back into the hands of the people and put the security of tenure under three regimes namely public, private and community. The Community Land Act 2016 gives rights to communities, however there is criticism that there is no political will to make this kind of system work.[371]

There are changes in Anglophone eastern, and southern countries. And it is clear that certain changes can be seen through regional and language lines but overall protection in customary land across Africa remains very precarious especially without constitutional protection.[372]

Numerous institutions and organisations have elaborated on guidelines and governance solutions actually in an effort to alleviate risk of land grabs. But ultimately, the fact that the guidelines only promote prevention by merely stating the violations of dispossessions yet they continue to 'create a checklist of how to destroy and dispossess peoples responsibly' is problematic.[373] Therefore, these guidelines are there to provide a response once displacement and dispossession has started.[374]

The greatest issue with land grabs is predicate on the fact that states sign deals/development agreements which make them unable to act against the actions of the business. This means they cannot enact laws against the things that they have signed. This has been very prevalent with Brettonwoods institutions but also Bilateral Investment Treaties (BITs).[375]

Due to this urgent need for FDI, states proactively look for investments and have to make certain concessions to attract investors. This begs the question as to whether these deals supercede their obligations.

[370] As above.
[371] As above.
[372] Wily (n 323) 101.
[373] Hall (n 211) 212.
[374] As above.
[375] Hall (n 215) 212.

4.7.2. Land administration

This is also a problem because most land is owned by the Government which means that deal can actually take place without the knowledge of those who use the land leading to dispossession.[376]

It has been argued that African Governments lack an authoritative land regime that makes it easier for foreign investors to purchase land.[377] Numerous issues arise:

Lack of clarity in administration (Inter-governmental relations)

Different government agencies have the ability to sign deals in some countries. In Mali, certain contracts were signed by the Department of Agriculture whilst others by the Department Habitant, Land and Urbanisation.[378] Whichever authority signed the contract should be empowered to fulfil the needs of the contract. But if it's signed by a national government, it is expected that it will be fulfilled by a lower government? And where does it fall with respect to planning and budgeting.[379]

Contracts

Due to the inefficient institutions, it also has impacts on the contracts that are signed by states. These states sign away long tracts of land for a specific amount of time but the benefits for the host country seem to be limited.[380] Most of the contracts contain land that is owned or managed by the state and which we have established is usually under customary land tenure.[381]

The contracts trigger numerous issues;

i. They involve the leasing of land but at times can also fully transfer ownership of the land.[382]
ii. Some of the contracts are signed even before the land is determined because the land allocation is sometimes dependent on the feasibility study.[383] These studies are usually performed by the investor and at times is not clear whether the government has influence over the site selection. At times, the state does not have the requisite expertise to actually scrutinise the feasibility studies done by investors.[384]

[376] Aryeetey & Lewis (n 220).
[377] L Cotula 'Land deals in Africa' 2011 15 https://pubs.iied.org/sites/default/files/pdfs/migrate/12568IIED.pdf (accessed 23 September 2021)
[378] As above.
[379] Cotula (n 377) 21.
[380] As above.
[381] As above.
[382] Cotula (n 377) 22.
[383] As above.
[384] Enemark et al (n339).

iii. As seen, some countries give long leases which range from 50 – 99 years. The challenges with long leases is that if people are dispossessed, they lose touch with the land for centuries thus losing touch with their livelihood strategies and agricultural practices.[385]

iv. The time frame of these contacts, especially the long term ones, are not based on a national strategy. Often, they are not predicated on national needs nor is the amount of time informed by a return on investment for the investor.[386] This means that it is unclear what they should achieve on both sides for mutual benefit.

These limitations actually affect the way that the government plans for their land thus allowing the investor to just choose what they want at the detriment of communities. In this regard, the state does not ensure that it has the requisite skills to actually negotiate deals but most importantly, deals that align with national priorities and tangible benefits for its citizens

Lack of promulgation of protection laws

Customary rights are hardly recognised nor protected in national law. In countries such as Cameroon and Ethiopia, customary rights are not legally recognised.[387] On the other hand, countries that recognise these rights usually consider occupants of the land to have user-rights on land that is owned by the state. Meaning that the state still has authority to make decisions on the land and actually signs in the case of transactions.[388] This ultimately means that people continually live under the threat of dispossession.

The role of traditional leaders

There is a contestation between the role of government and traditional leaders when it comes to land control. It has been argued that formal land administration regimes were imposed on traditional structures without clear roles.[389] In this regard, you find that the formal systems lack social legitimacy amongst communities. At the same time, the role of traditional leaders remain questionable because these leaders are accused of deepening social divisions and class formations with respect to land.[390]

---

[385] As above
[386] Cotula (n 377) 22.
[387] Kachika (n 212) 63.
[388] As above.
[389] A Ahmed, E Kuusaana & A Gasparatos 'The role of chiefs in large-scale land acquisitions for jatropha production in Ghana: insights from agrarian political economy' (2017) 75 *Land Use Policy* at 345
[390] As above.

In South Africa, there is conflict between traditional institutions and elected local government structures to allocate and manage land.[391] Women are always at the back of the line. Furthermore, there is this move towards commercial agriculture through these grabs for wealth accumulates thus creating a new class which is able to buy out smaller farmers and thus increase landlessness increasing inequality.[392] Whilst at the same time, land is held by elites, civil servants and politicians.

Furthermore, in instances customary rights (where they are seen as legit and functioning) there are many people who feel secure in these regimes that they may not deem it necessary to seek a formal title.[393] However it has been established that there are fundamental issues to this stance.

Lack of land reform

Land reform has been a continued goal for most governments in Africa and has actually taken place but not to the extent that it is needed because there land hold pattern based on discriminatory practices governments have had to resolve.[394] Land reform is a necessary process to address issues of the past but the challenge has always been how to balance social, economic and political land reform imperatives.[395] Land reform is there to ensure specific priority groups have land but this is not happening and there is a belief that land is reserved for a certain few.

Lack of transparency

These land deals are premised on a lack of transparency. This can therefore easily lead to corruption and unfair negotiations.[396] It may also be noted that there are unfair power relations between African States and foreign investors.[397] This is particularly important when dealing with countries that are not politically stable nor do they respect the rights of their citizens. Also these states may not have the necessary institutions to actually enforce what has been agreed upon in the contracts.[398]

---

391 As above
392 Hall (n 215) 212
393 As above.
394 Aryeetey & Lewis (n 220).
395 As above.
396 Aryeetey & Lewis (n 224).
397 As above.
398 As above.

This creates an environment for corruption and deals that do not maximize public interest. It fosters misinformation which can be harmful for the host country and the investor.[399]

Lack of consultation

In Madagascar, in a particular deal managed the investors managed to consult with local. The problem was that the consultation was budgeted for two weeks. During this time, communities had to create the groups/ associations that they were supposed to negotiate with.[400] This basically cast doubt as to how this short frame would actually ensure informed and inclusive consultations and decision making.[401]

There is also generally very little information that communities are afforded when it comes to these projects. Things such as the extent and the money expected from the project.[402] If they do not get the necessary support from the government /NGOS, they could be exploited to agree to unfavourable deals.

Rule of law

States are responsible for compliance with international human rights standards when it comes to the law. If there is a violation, rights holders should be able to seek redress from a competent court or any other mechanism as instituted by the State. [403]

However, it has been noted that in countries, there has been a lack of transparency in decision making when it comes to land. Laws have been implemented in a way that undermines laws, policies and programmes ultimately decimating the rule of law. [404]These include forced evictions.

However, the greatest challenge has been the co-existence of statutory law and customary law without the appropriate coordination. Examples have been seen where land used by pastoralist is viewed as "waste land" and given way during expropriation despite pastoralists tenure being recognised under customary law.[405]

---

[399] As above.
[400] Cotula (n 377) 22.
[401] As above.
[402] As above.
[403] Office of the High Commissioner for Human Rights (OHCHR) "*Land and Human Rights: Standards and Application*" 2015 17 https://www.ohchr.org/documents/publications/land_hr-standardsapplications.pdf accessed 07 September 2021
[404] As above.
[405] As above.

Non-discrimination and equality.

The way that land is used and accessed is still discriminatory to women based on marriage, inheritance, legal capacity or access to financial and other resources.[406] But this discrimination goes beyond this and other groups are also discriminated on other grounds. These grounds may hamper their ability to access certain resources due to this.[407] This discrimination takes place formally and substantively.

The solution to these issues does lie in rethinking land administration. Land administration is not a new discipline but has evolved into securing land rights and has many important functions in society through the support of governance, and rule of law, alleviation of poverty, security of tenure, management of land disputes and improvement of land-use and implementation.

Land administration is an objective of national policy to ensure development, social justice and equity. This is why it is problematic when states sign contracts that are not clear on the overall objective because according to Enermak et al land administration must be predicated on poverty reduction, sustainable development and equity. In this regard, land policies should be shaped in this manner.

This is where you see that land administration is linked to human rights. This is because human rights principles should be prevalent in land administration so that all persons can enjoy their human rights.

There has to be a holistic approach to land administration which has human rights hence tenure rights should be predicated on human rights meaning that land is seen as an important component of various substantive rights. The way that land administration is done must be fit for purpose therefore meet the needs of society and must improve with time.

The approach of a democratic government should be able to plan and regulate land for public purposes for the betterment of society. Land policy should strike a balance between the ability manage land (by landowners) and the government to regulate for the betterment of the future (sustainable development and environmental resilience).

Systems of land administration are critical for human rights enforcement because of the power of land administration and planning. Planning has foundational and procedural dimensions.

[406] OHCHR (n 403) 10.
[407] OHCHR (n 403) 10.

If these dimensions are taken into account, they present an opportunity of securing human rights in land administration. Through planning citizens can be able to participate which is important in countries with democratic institutions. Human rights can help in bringing concrete ideas based on fairness and social justice. This would mean that all people are equally considered in decision-making processes.

4.6. Conclusion

This chapter has highlighted the various definitions of land grabs with some scholars advocating for a neutral approach to the subject matter. However, the chapter has shown that these "large scale land acquisitions" are predicated on the belief that land grabs are an important path for development and economic growth thus perpetuating a narrow view of land predicated based on an economic outlook at the detriment of other dimensions.

This chapter has also attempted to draw attention as to why land grabs should be categorised as a human rights violations due to their nature and implications. More importantly, it emphasised the role of the state by highlighting the importance of the domestic context in the institutionalisation and implementation of international and regional norms. To this end, the chapter looked at the various ways in which the state has been complicit in violating land rights which will be used as a basis for recommendations in the next chapter.

Chapter 5

5. Resistance and the future

"***If we sell that bush we have sold our life… We don't admire anything more than the land we live in***"

Al Haji (Sierra Leonan Farmer)

5.1 Introduction

The chapter highlights community resistance against land grabs. Communities across the continent have emerged and fought for their land rights in the midst of states and corporate pressure. To this end, the chapter looks at forms of community resistance in Mozambique. This is followed by recommendations that states can undertake in protecting land rights. These are not exhaustive but add a different dimension to the discussion.

5.2 Community resistance

Mozambique is one of the countries that has been targeted for land grabs. However, the farmers in Xai Xai have managed to form a resistance against these practices. The community resistance has managed to stop various projects. It started with the ProSAVANA project which was a Brazil-Japan initiative, and was alluded to be the largest land grab in Africa. The project was set to use 35 million hectares of land. Farmers managed to actively resist foreign companies and the government from taking their land. Another form of resistance was evident with Wanbao Africa Agriculture Development Limited (WAADL). When the company got its concession, it immediately went into the land of framer and started working paving roads and irrigation ditches destroying farmers' crops in the process. The company had not consulted the community nor given a warning as well conduct an environmental impact assessment, as required by Mozambican law.

Armed with the law that recognises land rights for peasants, the farmers conducted a protest to the company offices as well as those of the state governor to present a petition for their land rights to be respected. The farmers got a response and the project was halted.

5.3 Recommendations

a. Create legitimate processes

The state should be able to distinguish between what is legitimate and what is legal because the two are not the same. Even though land grabs can be deemed 'legal' does not mean that they are authentic. In acknowledging that there are gaps in land administration in most states, it is necessary that due process is followed with regards to the 'acquisition of land'. Without these, communities remain under the threat of dispossession and displacement.

States should institute free mechanisms where individuals or communities are able to learn more and also interrogate acquisitions. These mechanisms should permit for the access on information pertaining to the legal processes that have been undertaken, records of discussions, the agreements and decisions.

States must be pro-consensus when dealing with communities and refrain from coercing communities and causing divisions. In this regard, Free Prior and Informed Consent should not be approached as a principle only related to indigenous communities but should apply to all.

Articulate the rights of vulnerable groups

States must analyse the plight of disadvantaged groups such as women, children and indigenous populations regarding land right. Various systems do not allow women to own land independently so there is discrimination against the inheritance of land by women. Customary rights are therefore seen as a form of excluding women in communal property. States must undergo land reform that takes into consideration the articulation of women's rights so that they are represented when negotiations on deals and discussions about compensation take place.

States should show that it has considered other options when doing land deals. There must be further interrogation an introspection on whether these land grabs necessary?

Desist from the 'creation of new poverty'

States must be cognisant of how land grabs are creating a new poverty because when peoples are removed from their land they have to find alternative ways of making a living. In this regard, some may not possess the requisite skills to start new jobs. It has been reported that most of the time compensation does not cover even 20% of losses made due to land grabs hence compensation should entail compulsory resettlement and rehabilitation of livelihood.

In light of this, states should consider development agendas at international, regional and domestic levels. Land grabs undermine the Sustainable Development Goals and Agenda 2063

amongst others. If states are aligned to these, then their policies should be directed at reducing poverty. Therefore, consideration should be given as to whether land grabs meet these developmental goals particularly in view of the fact that communities are usually worse off after land grabs.

Reform colonial titling systems

More emphasis must be put into land governance and administration. States must reform colonial titling systems and find better ways to protect the rights of rural populations. This includes the recognition of communal lands as well as acknowledging social dimensions of land. Land should not only be viewed as an economic commodity but should be acknowledged as an entity linked to identity, religion, culture. These considerations should be addressed and land rights of rural population should be secure irrespective of formal title deeds.

Taxation regimes

States should impose land tax on foreign investors to deter them from conspicuous consumption. If these lands are better used by communities it is not logical to allow investors hold on to them in the hope that they will increase in value in the future. In this regard, states should link the commercial purpose of the land to the duration that investors hold the land. Use of land must correlate with the commercial activity and taxed accordingly. Once the activity has seized then the land should be given back to the state.

Cooperation of African states

States through the African Union (AU) and other sub-regional bodies should collaborate to deal with land grabs in Africa.

Bibliography

Articles

Aryeetey, E & Lewis, Z 'African Land Grabbing: Whose interests are served' (2010)

Bob, U 'Land-related conflicts in Sub-Saharan Africa' (2012)

Chelwa, G 'The land grabs in Africa you do not hear about' (2015)

Cotula, L 'Land deals in Africa: What is in the contracts?'(2011)

Clark, D 'A complete guide to carbon offsetting' *The Guardian* (London) 16 September 2011

Du Plessis, WJ 'African Indigenous Land Rights In a Private Ownership Paradigm' (2011)

Eerd, M & Banerjee 'Evictions, acquisition, expropriation and compensation, practices and selected case studies' (2013)

Gyapong, AY 'Land grabs, farmworkers, and rural livelihoods in West Africa: some silences in the food sovereignty discourse' (2020)

Imam, M & Momoh, ZI 'The Paradox in the Political Economy of Land Grabbing in Africa as Medium of Exchange and Its Implication on States' (2019)

Kachika, T 'Land Grabbing in Africa: A Review of the Impacts and Possible Policy Responses' (2010)

Krantz, L 'Securing Customary Land Rights in Sub-Saharan Africa' (2015)

Ndi, FA 'Land Grabbing, Local Contestation, and the Struggle for Economic Gain: Insights From Nguti Village, South West Cameroon' (2017)

Msimang, S 'How Apartheid Endures' (2021)

Nelson, J 'A survey of indigenous land tenure in sub-Saharan Africa' (2021)

Roesch, R 'The Ogiek Case of the African Court on Human and Peoples' Rights: Not So Much News After All?' 16 June 2021

Steinbruck, E 'Foreign Land – Acquisitions in Africa Opportunity or Land Grabbing? The Case Of The Democratic Republic Of Congo' (2013)

Takauechi, S 'The evolution of land policy in African state building' (2013)

Tsunga, A 'The African experience of land grabs and human rights violations by powerful big businesses' (2017)

Twomey, H 'Displacement and dispossession through land grabbing in Mozambique: The limits of international and national legal instruments' (2014)

Ubink, J; Hoekema,A & Assie, J 'Legalising land rights: Local practices, states responses and tenure in Africa, Asia and Latin America' (2010)

van der Wulp, CE 'The role of the state in facilitating land grabs in Ethiopia' (2013)

Wickeri, E & Kallan, A 'Land rights in international human rights law' (2015)

Van de Wulp, ACE 'The role of the state in facilitating land grabs in Ethiopia' 2013

Sikombe, K 'Ordinary Zambians grapple with land grabbing' *DW (*Lusaka) 06 October 2015

Books

Batterbury, SPJ & Ndi, F 'Land grabbing in Africa' in Binns, JA; Lynch, K & Nel, E (eds.) *The Routledge Handbook of African Development* (Routledge 2018)

Amin, GF & Jaha, *IM Land Grabs in Africa: Economic imperialism?* (2016)

Jackson, M *Complicity International* (2015)

Killander, M & Heyns, C *Compendium of key human rights documents of the African Union* (Pretoria University Law Press 2016)

Pottier, J 'Customary Land Tenure' in Sub-Saharan Africa Today: Meanings and contexts' in Higgins, C & Clover, J *From the Ground Up: Land rights, conflict and peace in Sub-Saharan Africa* (2005)

Viljoen, F *International Human rights law in Africa* (Oxford University Press 2018)

Journals

Ahmed, A; E Kuusaana & A Gasparatos 'The role of chiefs in large-scale land acquisitions for jatropha production in Ghana: insights from agrarian political economy' (2017) 75 *Land Use Policy*

Alpern, S 'What Africans Got for Their Slaves: A Master List of European Trade Goods) 1995 22 *History in Africa*

Bae, YJ 'A displaced community's perspective on land-grabbing in Africa: The case of the Kalimkhola community in Dwangwa, Malawi' (2019) 18 *Land* at 190.

ElHadary, YAE & Obeng-Odoom, F 'Conventions, Changes, and Contradictions in Land Governance in Africa: The Story of Land Grabbing in North Sudan and Ghana' (2012) 59 *Africa Today*

Golay, C & Biglino, I 'Human Rights Responses to Land Grabbing: a right to food perspective' (2013) 34 *Third World Quarterly 9*

Gilbert, J 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) 18 *International Journal on Human Rights* 18

Hall, R 'Land grabbing in Southern Africa: the many faces of the investor rush' (2011) 38 *Review of African Political Economy* 128

Home, R. 'History and Prospects for African Land Governance: Institutions, Technology and 'Land Rights for All' (2021) 10 *Land* 292

Kleemann, L; Lay, J; Nolte K; Ott, K; Thiele, R & Vogel-Kleschin, L 'Economic and Ethical Challenges of "Land Grabs" in Sub-Saharan Africa' (2013) 67 *Kiel Policy Brief*

Sauti, L & Lo Thiam, M 'The Land-Grabbing Debacle: An Analysis of South Africa and Senegal' (2018) 41 *Ufahamu: A Journal of African Studies*

Touval, S 'Treaties, Borders, and the Partition of Africa' 1966 7 *The Journal of African History* at 382.

Wisborg, P 'Human Rights against Land Grabbing? A Reflection on Norms, Policies, and Power' (2013) 26 *J Agric Environ Ethics*

Wily, LA 'Compulsory Acquisition as a Constitutional Matter: The Case in Africa' (2018) 62 *Journal of African Law*

Zambakari, C 'Land Grab and Institutional Legacy of Colonialism: The Case of Sudan' (2017) 18 *Consilience*

Zoomers, A; Van Noorloos, F; Otsuki, K; Steel, G &Van Westen 'The Rush for Land in an Urbanizing World: From Land Grabbing Toward Developing Safe, Resilient, and Sustainable Cities and Landscapes' (2017) 92 *World Development*

Reports

Chasukwa M 'An investigation of the political economy of land grabs in Malawi' Working Paper by Land Deal Politics Initiative (2013)

European Parliament 'Addressing the Human Rights Impacts of 'Land Grabbing'' (2014)

European Parliament 'Land grabbing and human rights: The involvement of Europeancorporate and financial entities in land grabbing outside the European Union (2016)

FIAN 'The Human Right to Land' (2017)

Ghebru, H 'Womens Land Rights in Africa' in ReSAKKS Annual Trends and Outlook Report (2019)

Report of Special Rapporteur on the right to food at the 65th session of the United Nations General Assembly (UNGA) (201)

Regional Trends- World Investment Report (2020)

Non –binding instruments

Committee on Economic, Social and Cultural Rights 'Draft General Comment 26 on Land and economic, social and cultural rights' (2021)

Committee on Economic, Social and Cultural Rights General Comment 14 on the right to the highest attainable standard of health (2000)

African Commission on Human and Peoples Rights 'Pretoria Declaration on Economic, Social and Cultural Rights in Africa' (2004)

United Nations 'Guiding Principles on Business and Human Rights (2011)

Office of the High Commissioner for Human Rights (OHCHR) 'Land and Human Rights: Standards and Applications' (2015)

Webpages

Africa Faith & Justice Network (AFJN) 'Multi-national corporations' Land Grabbing in Africa' (2010)

International Institute for Environment and Development 'Securing land rights in West Africa' (2014)

Rights and Resources 'Who Owns the Land in Africa? Formal recognition of community-based land rights in Sub-Saharan Africa' (2015)

Treaties

African Charter on Human and Peoples Rights (1981)

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

International Covenant on Civil and Political Rights (ICCPR) (1966)

Vienna Declaration and Programme of Action (VDPA) (1993)

Vienna Convention on the Law of Treaties (1969)

Universal Declaration of Human Rights (UDHR) (1948)