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# Recognition of Customary Tenure Rights in International Law

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws programme  
30 higher education credits

Supervisor: Radu Mares

Semester: HT12

“Buy land, they’re not making it any more”  
Mark Twain

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## I. Table of abbreviations

<b>ACHPR</b>	The African Commission on Human and Peoples' Rights
<b>African Charter</b>	The African Charter on Human and Peoples' Rights
<b>African Commission</b>	The African Commission on Human and Peoples' Rights
<b>CEMIRIDE</b>	Centre for Minority Rights Development
<b>Endorois case/Endorois decision</b>	Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003,
<b>FAO</b>	Food and Agriculture Organization
<b>FDI</b>	Foreign Direct Investment
<b>Framework</b>	The United Nations "Protect, Respect and Remedy" Framework
<b>Guiding Principles</b>	Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic Social And Cultural Rights
<b>IFAD</b>	International Fund for Agricultural Development
<b>IFC</b>	International Finance Corporation
<b>IMF</b>	International Monetary Fund
<b>NGO</b>	Non-Governmental Organisations
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>Saramaka Case</b>	Saramaka People v. Suriname, Judgement (IACtHR, 12 Aug. 2008)
<b>Special Representative</b>	Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>Voluntary Guidelines on Tenure</b>	The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
<b>Working Group on Indigenous Peoples</b>	African Commissions Working Group of Experts on Indigenous Populations/Communities.

## II. Summary

A tenure system is the way in which ownership of, or rights to, land is regulated. Such systems can be determined by statutes, agreed precedents or by customary norms. In Sub-Saharan Africa, pluralistic legal systems consisting of traditional customary law as well as received law are common. Although immensely important in practice, as roughly 90 percent of the people of poor rural Africa access land through customary tenure mechanisms, the customary systems have consistently been disregarded when adopting received legal systems.

As the rate of investments in land in Sub-Saharan Africa increases, issues concerning customary tenure rights holders are recognised by the international community. Questions are raised regarding who actually has rights to the lands subject to recent transfers. This paper examines the extent to which customary tenure rights are recognised in international law. Through examination of various instruments of international human rights law, as well as cases from relevant adjudicatory bodies, the current status of customary tenure rights in international law is distilled. This paper will argue that States have a duty under international law to recognise and respect customary tenure rights. The focus of this paper is Sub-Saharan Africa, and these conclusions are, of course, affected by this focus, as regional instruments as well as decisions have been studied.

Although the principal subject of this paper is the recognition of customary tenure rights in international law, the context is hunger, poverty and human rights. This paper argues that extreme poverty and hunger is intimately linked to tenure insecurity. Furthermore, it will pose tenure rights as a human rights issue by presenting numerous connections between internationally recognised human rights and tenure rights. The principal issues of this paper are consequently examined with regard to this context.

In addition to examining international human rights law, certain instruments of soft law that are relevant to tenure rights will be examined. As the recent increase in land investments is largely driven by private business', the UN Guiding Principles on Business and Human Rights are reviewed in the context of tenure rights issues addressed in this paper. Moreover, the Voluntary Guidelines on Tenure, a recent multiparty initiative to regulate tenure rights globally is reviewed. This paper argues that these instruments represent a shift in the attitude of the international community towards demanding equitable recognition and respect for customary tenure rights.

In conclusion, this paper argues that developments in international human rights law as well as internationally recognised soft law display substantial support for demands on recognition and respect for customary tenure rights. However, it also offers numerous examples of practices "on the ground" in Sub-Sahara Africa, that hardly conform to these trends in the doctrine and practice of international human rights law.

## 1. Introduction

Hunger is the most serious risk to health worldwide, endangering the lives of more people than AIDS, malaria and tuberculosis combined.<sup>1</sup> For years, international organisations such as the IMF and the World Bank have been actively promoting investments in agriculture in the developing world. Cash injections to restart stagnant agrarian economies have been identified as a possible solution to the low agricultural output and food shortages of developing countries.<sup>2</sup> In recent years, but perhaps for other reasons, there has been a veritable boom in investments in the arable land of developing countries, with Africa as the main target of investors.<sup>3</sup>

However, investments in land in Sub-Saharan Africa are raising some serious legal as well as developmental concerns. This paper will address one key concern relating to such investments - the recognition of customary tenure rights. Africa is a continent with a complex legal landscape and, as land transfers in Sub-Saharan Africa have increased to reach staggering proportions, serious concerns over tenure issues have come to the attention of the international community. To frame it in the most simplistic way, people are questioning who actually has rights to the land subject to these enormous transfers. As it turns out, roughly ninety percent of the poor people of rural Africa access land through customary tenure mechanisms, although these claims have historically been ignored by the received formal law of most African nations.<sup>4</sup> Moreover, is it reasonable that Sudan, a country targeted by the Gulf investors portrayed in this paper, will be exporting food grown by foreign investors while the UN World Food Programme feeds 5,6 million of its people?<sup>5</sup> This paper will examine such discrepancies, and how they are treated in modern day international law.

### 1.1. Purpose and research questions

The principal purpose of this paper is to examine land rights issues in connection to recent trends indicating a significantly increased interest in land-based investments in the developing world. This paper focuses on Sub-Saharan Africa, which is also the principal focus of investors pursuing this new trend in agricultural investments.<sup>6</sup>

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<sup>1</sup> United Nations World Food Programme (No date) Hunger - What is hunger [Online], World Food Programme, Available: <http://www.wfp.org/hunger/what-is>, [Accessed: 11 October 2012]

<sup>2</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 35.

<sup>3</sup> Deininger, Klaus & Byerlee, Derek, 2011, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, The International Bank for Reconstruction and Development/The World Bank, Preface page XIV.

<sup>4</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 1.

<sup>5</sup> Blas, Javier, *Foreign Fields: Rich states look beyond their borders for fertile soil* [online], Financial times, Available: <http://www.ft.com/intl/cms/s/0/8de8a3e0-6e17-11dd-b5df-0000779fd18c.html#axzz2Ek34A2HR>, [Accessed: 13 December 2012]. Please note that the figures presented refer to statistics from 2008.

<sup>6</sup> Deininger, Klaus & Byerlee, Derek, 2011, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, The International Bank for Reconstruction and Development/The World Bank, Preface page XIV.

This is not a case study, it will not focus on any investment in particular, nor will it fully examine this phenomenon on a country basis. The principal research question of this paper is concerned with the recognition of informal land rights and will adopt a generalist approach to this question. It purports to examine the extent to which such informal rights, more specifically customary tenure rights, are recognised and respected in international law.

Recognition of customary tenure rights as a topic is ill suited for an isolated study. This paper will treat these issues in a specified context, land acquisitions, which requires quite extensive elaborations on corollary issues and conditions. Hence, this paper will address this topic in the context of agricultural investments in Sub-Saharan Africa. Such investments can be initiated by foreign direct investments as well as domestic initiatives, the former being perhaps the most prevalent driving force. Investments in land are also a principal catalyst to the rapid recent development of this matter in international law and practice.<sup>7</sup> As the context of this paper is largely concerned with business initiatives, some attention will be given to business' responsibilities with regard to land rights.

In addition, this paper will pose land rights as a human rights issue. It will argue that numerous internationally recognised human rights are, in certain respects, intimately connected to land rights.

In conclusion, this paper asks to what extent informal tenure rights, more specifically customary tenure rights, are recognised in international law. This will be examined in the context of a recent spike in land investments in Sub-Saharan Africa. Furthermore, this paper will highlight the importance of equitable recognition of informal tenure rights, and connections between these issues and human rights. Thus, as a corollary issue, human rights violations in connection to land rights will be examined.

## **1.2. Method and limitations**

As mentioned above, the questions posed in this paper are context specific. Thus, the method employed in answering these research questions is largely dependent on this context as well. The investment trend examined is largely a recent phenomenon, and reliable statistical data is thus scarce. Consequentially, the availability of authoritative published works is limited. Thus, this paper largely relies on selected reports by international institutions, in addition to substantial amounts of news coverage.

Within the specific context provided above, this paper has a generalist approach to its principal research questions. As the topic is largely situated in international law, arguably in transient state, a country specific approach would not yield satisfactory results. Instead, country specific examples are employed to illustrate problems "on the ground", rather than to answer the principal research questions in general.

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<sup>7</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 34.

Issues relating to business and human rights cannot be excluded in a context sensitive paper on this subject. However, the principal research questions concerns land rights and is by nature primarily connected to States' duties, not the responsibilities of private entities.

Researching this topic is an endeavour with certain limitations. Perhaps most importantly, the regulation of these matters is severely fragmented. There is no single comprehensive framework, and access to authoritative sources providing a comprehensive treatment of the subject matter is limited. However, when considering non-binding international instruments, guidelines and recommendations, considerably more material becomes available. This paper does not purport to have taken all such material into account, it is based upon recent agreements and recommendations produced only by certain organisations and institutions. The rationale behind this digest is to highlight some of the more recent and widely recognised trends in this field.

### **1.2.1. Disposition**

Chapter 2 will contextualize the issues treated in this paper. Land rights issues are intimately related to poverty and hunger, which will be summarily treated in this section. Moreover, this chapter will examine investments in land, and recent trends in this sector. It will thus provide important context to the issues treated in subsequent chapters.

Chapter 3 is an introduction to a reoccurring example in this paper, Ethiopia. Used to illustrate events "on the ground", Ethiopia will be an intermittent focal point in an otherwise generalist presentation.

Chapter 4 will examine land rights in Africa. The legal systems of Sub-Saharan Africa are, in many respects, different from Western legal systems when it comes to land rights. Examining these systems will provide an overview of the "legal landscape", a necessity for understanding the remaining sections.

Chapter 5 treats international human rights law. Apart from a brief introduction, this exposition is strictly related to the geographic and contextual nature of the issues examined in this paper.

Soft law instruments of certain relevance to tenure rights are treated in Chapter 6. The social (or human rights) responsibilities of business' will be addressed in this context. This chapter will also examine the Voluntary Guidelines on Tenure<sup>8</sup>, a recent initiative to regulate the principal issues of this paper.

Concluding statements and answers to the research questions outlined in section 1.1 will be presented in Chapter 7.

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<sup>8</sup> The full title of these Guidelines is The Voluntary Guidelines on the Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.



### 1.2.2. Delimitations

Due to the contextual nature of this paper, delimitations abound. This section will provide some principal delimitations, although further specifications of these will surely follow throughout this paper. As this paper is primarily concerned with land rights, it will focus on law and jurisprudence relating to international law. It will not treat other instruments regulating land investments, such as IFC guidelines<sup>9</sup> or International Investment Agreements. The Voluntary Guidelines on Tenure are, of course, an exception to this delimitation motivated by their specific normative standing. Although guidelines and standards for investments are widely available, they are of limited use in answering the principal research questions of this paper.

### 1.2.3. Definitions and terminology

This paper treats a contentious issue. Thus, the terminology employed is at times fraught with various connotations. Throughout this paper, references are made to land acquisitions. For the purposes of this paper, this includes not only traditional purchases but also leasing. In fact, many developing countries have highly regulated land markets, and outright purchases are not always possible. In addition, the State, in some instances, owns all land and only offers leasing opportunities to investors. Thus, long-term leasing offered through the public sector is perhaps the most common form of “acquisition” referred to in this paper.<sup>10</sup> Suggestive terminology, such as “landgrabbing” and similar expressions that are sometimes employed within this field of research, will be consciously avoided in this paper.

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<sup>9</sup> United Nations Global Compact (No date), *Human Rights and Business Dilemmas Forum - Community relocation* [Online], Available <http://human-rights.unglobalcompact.org/dilemmas/community-relocation/>, [Accessed: 13 December 2012].

<sup>10</sup> Deininger, Klaus & Byerlee, Derek, 2011, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, The International Bank for Reconstruction and Development/The World Bank, page 72.

## 2. Background - Land Rights and the Right to Food

This section will provide some background to the issues treated in this paper. In attempting to contextualize tenure rights issues, poverty and hunger need to be addressed. The connection between these overarching issues and tenure rights will receive some initial treatment below, and reoccur at numerous occasions throughout this paper.

In addition, this section will examine the rapidly increased interest of recent years in the land of developed countries. Who buys land, and for what reasons, are important questions in understanding the significance of tenure issues such as those examined in this paper. This trend is a key driver behind the tenure rights reforms in modern day Africa examined in this paper.<sup>11</sup>

### 2.1. Poverty, hunger and the Millennium Development Goals

As explained in the introduction to this paper, the issues treated in this paper are intimately connected to poverty, hunger and global development. This section will briefly examine poverty and hunger in Africa today. It will treat not only the current state of hunger and poverty, but also overarching themes such as the Millennium Development Goals, which relate directly to the legal issues discussed in this paper. Moreover, it will examine some of the recent developments, such as the commoditization of food markets, and land in developing countries, as these are important drivers behind the very development that this paper examines.

Eradicating extreme poverty and hunger is the first of the eight Millennium Development Goals.<sup>12</sup> The signing nations have, in the United Nations Development Declaration<sup>13</sup> recognised their; “collective responsibility to uphold the principles of human dignity, equality, and equity at the global level”<sup>14</sup>. The Millennium Development Goals has committed nations to a global partnership in reducing poverty, introducing eight key targets to be achieved by 2015. The Millennium Development Goals constituted a landmark achievement as they are both quantified and time-bound, stressing the importance of the collective ambition to reduce global poverty.<sup>15</sup>

The percentage of people living on less than 1,25 USD a day in Sub-Saharan Africa has seen a significant decrease since the World Bank began monitoring poverty trends in 1990. However, 47 percent of the population of this region was still living on less than 1,25 USD a day in 2008.<sup>16</sup> During 2006-2008, an estimated 27 percent of the population

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<sup>11</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 34.

<sup>12</sup> United Nations Development Programme (No date), *The Millennium Development Goals* [Online], Available: <http://www.undp.org/content/undp/en/home/mdgoverview.html>, [Accessed: 13 December 2012].

<sup>13</sup> United Nations Development Declaration, 18 September 2000, A/RES/55/2.

<sup>14</sup> *Ibid.*, Article 2.

<sup>15</sup> United Nations Development Programme (No date), *The Millennium Project - About MDGs - What they are* [Online], Available: <http://www.unmillenniumproject.org/goals/index.htm>, [Accessed: 13 December 2012].

<sup>16</sup> United Nations, 2012, *The Millennium Development Goals Report 2012*, United Nations, page 6.

of Sub-Saharan Africa was also undernourished. The recent food and financial crisis hit the small countries of Sub-Saharan Africa the hardest, marked by a sharp incline in the number of undernourished people in 2008. This is largely due to the extensive food import dependency of small African countries.<sup>17</sup>

In 2010, 32 percent of the children of Sub-Saharan Africa were moderately to severely underweight. Poverty is major determinant of undernutrition of children, linking the two components – poverty and hunger – of this Millennium Development Goal together.

It appears that a startling percentage of the worlds' population do not have access to sufficient food today. Moreover, when considering the increase in world population, production needs to increase even further. In order to sustain a 40 percent increase in population by 2050, production needs to rise by 70 percent. Raising food consumption to an average of 3 130 kcal per person per day by this time would require the production in developing countries to double.<sup>18</sup>

In Africa, poverty is predominantly rural, with more than 70 percent of the poor people living in rural areas and depending on agriculture.<sup>19</sup> Thus, hunger and poverty are intimately linked to agricultural development, one of the overarching themes of this paper. This paper will argue that fair and equitable land rights are a prerequisite for sustainable agricultural development. If agricultural development is key to eradicating poverty and hunger, it could thus be argued that fair and equitable treatment of land rights is also instrumental to eradicating extreme poverty and hunger.

## 2.2. The financial and food crises

A speculative frenzy in food commodities in 2008 caused a spike in food prices in Sub-Saharan Africa, causing the number of “food insecure” people to surge to a staggering one billion globally.<sup>20</sup> This particular event started, some claim, with the commoditization of foodstuffs in the Goldman Sachs Commodity Index in 1991. This was the first proper financial product deriving its value from food and agricultural produce.<sup>21</sup> It was the start of commoditization of food on a massive scale, amounting to 317 billion USD invested in commodity index holdings by 2008.<sup>22</sup> This paper is not about the financial markets, but in the context of food security, they deserve mentioning. The fundamentals of financial markets in terms of food security is that imaginary food

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<sup>17</sup> United Nations, 2012, *The Millennium Development Goals Report 2012*, United Nations, page 12.

<sup>18</sup>Deininger, Klaus & Byerlee, Derek, 2011, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, The International Bank for Reconstruction and Development/The World Bank, page 14.

<sup>19</sup> International Fund for Agricultural Development , (No date), *Rural Poverty in Africa* [online], International Fund for Agricultural Development, Available: <http://www.ruralpovertyportal.org/region/home/tags/africa> [Accessed: 16 December 2012].

<sup>20</sup> Frederick Kaufman, 2010, *The Food Bubble - How Wall Street starved millions and got away with it*, Harpers Magazine, 2010, page 28.

<sup>21</sup> Ibid., page 27.

<sup>22</sup> Ibid., page 32.

bought anywhere affects the price of real food everywhere.<sup>23</sup> Thus, food prices fluctuating due to financial turmoil affects the *de facto* levels of food insecurity.

The boom in commodity prices had, beside from increasing food insecurity for millions of people, some more permanent effects. One such effect, of significant importance to this paper, was to convince certain food-import dependent countries that they needed to reconsider policies in order to reduce the vulnerability such dependence had proved to cause.<sup>24</sup> The role of these countries, as investors in large-scale agriculture in Sub-Saharan Africa, will be elaborated on below.

### 2.3. Increased interest in the land of developing countries

In 2011, the World Bank, in collaboration with the International Bank for Reconstruction and Development, provided an overview of the global interest in farmland.<sup>25</sup> This report concludes that such interest is increasing, in particular with regard to land in developing countries.<sup>26</sup> Prior to the food crisis of 2008, treated above, the average annual expansion of global agricultural land was less than 4 million hectares. One year later, even before the end of 2009, large scale farmland deals amounting to roughly 56 million hectares were announced. Africa appears to be the main target of investors, representing 70 percent of these deals.<sup>27</sup> But the truth is that no one actually knows how much land is actually being transferred, as there is no central registry and national transparency is often wildly insufficient. For the year 2010, Oxfam<sup>28</sup> published an estimate of as much as 227 million hectares of land being transferred.<sup>29</sup> This paper will not investigate the amount of land being transferred any further. What has been presented will surely be enough to convey the notion that this is an occurrence that will affect a significant number of people.

Unfortunately, reports indicate that “investors in farmland are targeting countries with weak laws, buying arable land on the cheap and failing to deliver on promises of jobs and investments”.<sup>30</sup> The 2011 World Bank Report also expresses serious concern about

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<sup>23</sup> Frederick Kaufman, 2010, *The Food Bubble - How Wall Street starved millions and got away with it*, Harpers Magazine, page 33.

<sup>24</sup> Deininger, Klaus & Byerlee, Derek, 2011, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, The International Bank for Reconstruction and Development/The World Bank, page 1.

<sup>25</sup> Deininger, Klaus & Byerlee, Derek, 2011, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, The International Bank for Reconstruction and Development/The World Bank.

<sup>26</sup> *Ibid.*, Preface page XIII.

<sup>27</sup> *Ibid.*, Preface page XIV.

<sup>28</sup> Oxfam is an international organization with headquarters in the United Kingdom working to eradicate poverty. In this context, the figures provided are purely for argumentative purposes and are as such to be taken at face value.

<sup>29</sup> Pearce, Fred, 2012, *The Landgrabbers - The New Fight over Who Owns the Planet*, Introduction page IX.

<sup>30</sup> Blas, Javier, *World Bank warns on 'farmland grab'* [online], Financial times, Available: <http://www.ft.com/cms/s/0/62890172-99a8-11df-a852-00144feab49a.html?ftcamp=rss#axzz2Ek34A2HR>, [Accessed: 13 December 2012].

the “ability of local institutions to protect vulnerable groups from losing land on which they have legitimate, if not formally recognised, claims.”<sup>31</sup>

Thus, the World Bank has in this report recognised the often incoherent and weak legislative setting that is the core subject of this paper. The inclination of investors to target countries with weak laws implies that we may come to witness a “race to the bottom”, with States attracting investors by disregarding unregistered tenure rights.<sup>32</sup> Such inclinations have also been identified by the World Bank:

The focus of investor interest on countries with weak land governance increases the risk that investors acquire the land essentially for free and in neglect of local rights, with potentially far-reaching negative consequences. Such failure to value land at its true opportunity cost could result in projects that, while desirable from the investors’ point of view, may not yield social benefits.<sup>33</sup>

Some additional key concerns regarding large-scale investments, outlined in bullets below, have been confirmed by recent case studies.

- Failure to recognized and properly compensate for the land rights of local communities.
- Insufficient national capacities in management of large-scale investments. This may lead to inadequate participatory consultations and agreements.
- Investor proposals that are incoherent with broader development agendas, or simply technically nonviable, leading to investors encroaching on local land to satisfy their bottom lines.
- Conflicts over affected resources that result in negative distributional effects.<sup>34</sup>

For the purposes of this paper, perhaps the most important of these concerns is the failure to recognise, protect and adequately compensate spoilage of local communities’ land rights. However, as investments in the land of developing countries is an overarching theme of this paper, the other concerns expressed by the World Bank are certainly relevant to the overall portrayal of land investments that this paper intends to provide.

### **2.3.1. Who buys land, and why?**

Before looking into the demand side of land investments in Sub-Saharan Africa, the international policies advocating such investments deserve mentioning. Originating in economic liberalisation policies popularised in the 1980s, international institutions such as the IMF and the World Bank have been actively promoting investments in agriculture

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<sup>31</sup>Deininger, Klaus & Byerlee, Derek, 2011, Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?, The International Bank for Reconstruction and Development/The World Bank, Overview page XXXII.

<sup>32</sup>Ibid., Overview page XXXII.

<sup>33</sup> Ibid., page 55.

<sup>34</sup> Ibid., Overview page XXXIII.

in the developing world. The focus has been on injecting cash, mainly through foreign direct investments, to restart stagnant agrarian economies.<sup>35</sup>

The World Bank has, in its 2011 Report, identified three broad groups of actors on the demand side of land investments.<sup>36</sup> For the purposes of this essay, the supply side is, naturally, represented by developing countries in Sub-Saharan Africa. These countries also satisfy the majority of investment demand.<sup>37</sup>

As mentioned above, some governments have become concerned about their inability to provide food from domestic harvests in the wake of the recent food crisis. Such investors include, amongst others<sup>38</sup>, Saudi Arabia. They will serve as the principal example of this category of investors. They have no permanent rivers or lakes, low and unreliable rainfall and none of the other prerequisites for large-scale farming. Capital from the oil boom, however, is abundant. Following the recent food crisis, and the export constraints employed by food exporting countries such as India, Ukraine and Argentina, food security is now a priority of the Saudi Arabian Government.<sup>39</sup> In the words of the deputy minister of agriculture in Saudi Arabia, “the food crisis gave alarms for all countries to look for places to secure supplies of agricultural goods”<sup>40</sup>. To secure such supplies, these states are now looking to the developing world, where there is often both arable land and water, but insufficient capital.<sup>41</sup>

Financial entities are a second group that has shown an increased interest in the arable land of developing countries. The recent financial crisis has led financial entities to look for alternate investments in an insecure financial environment. Some have found land-based investments to possess certain attractive attributes. According to the World Bank such attributes “include the likely appreciation of land, the scope to use it as an inflation hedge, and the projection of secure returns from land far in the future, something of great importance for pension funds with a long horizon.”<sup>42</sup> Land markets are generally quite illiquid, but this does not discourage certain investors from speculating in land, trying to find undervalued assets in this emerging market.<sup>43</sup> Thus, as a means for

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<sup>35</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 35.

<sup>36</sup> Deininger, Klaus & Byerlee, Derek, 2011, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, The International Bank for Reconstruction and Development/The World Bank, page 2

<sup>37</sup> *Ibid.*, preface page XIV.

<sup>38</sup> The United Arab Emirates, Libya, South Korea and China has also pursued investments in recent years according to Blas, Javier, *Foreign Fields: Rich states look beyond their borders for fertile soil* [online], Financial times, Available: <http://www.ft.com/intl/cms/s/0/8de8a3e0-6e17-11dd-b5df-0000779fd18c.html#axzz2Ek34A2HR>, [Accessed: 13 December 2012].

<sup>39</sup> Blas, Javier, *Foreign Fields: Rich states look beyond their borders for fertile soil* [online], Financial times, Available: <http://www.ft.com/intl/cms/s/0/8de8a3e0-6e17-11dd-b5df-0000779fd18c.html#axzz2Ek34A2HR>, [Accessed: 13 December 2012].

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Deininger, Klaus & Byerlee, Derek, 2011, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, The International Bank for Reconstruction and Development/The World Bank, page 2.

<sup>43</sup> *Ibid.*, page 2.

portfolio diversification and a hedge against inflation, land investments have become popular with private-sector investors in recent years.<sup>44</sup>

The third group of investors identified by the World Bank in its 2011 Report is traditional agricultural or agro-industrial operators or traders. Such entities have found incentives in the current market climate to invest in land, integrating existing enterprises forwards or backwards.<sup>45</sup>

This section has provided some answers to the questions “who buys land, and why?”. The international trade in food commodities is, naturally, far more complicated than this section has conveyed. Some further questions regarding international food trade, and food security, will be discussed throughout this paper.

#### **2.4. Investing in the land of developing countries**

This paper has offered little more than background in terms of land investments in Sub-Saharan Africa. The desirability of such investments is a contentious topic, surely an excellent subject for a paper of its own. Despite the obvious limitations of this paper in relation to this topic, some experiences from such efforts will be offered. This is not a complete account of the merits of foreign direct investments in agriculture, it is merely to contextualize the principal research questions of this paper.

Successful projects show that significant benefits can be derived from investments in agriculture on the land of developing countries. This, however, requires that the investments are economically viable and respect existing rights. Benefits can, in these cases materialise principally as; provision of public goods and social services, often through community development funds into which part or all of the compensation for land is deposited; job generation and indirect employment due to the project; access to technology and markets for existing smallholder producers or payment of taxes to local or central government.<sup>46</sup>

However, “many investments, not always by foreigners, failed to live up to expectations and, instead of generating sustainable benefits, contributed to asset loss and left local people worse off than they would have been without the investment.”<sup>47</sup> In fact, case studies have confirmed that, in many cases, benefits were lower than anticipated or did not materialise at all.<sup>48</sup>

Although the principal research question of this paper is the recognition of customary tenure rights, the practice of business’ need review in order to convey a somewhat comprehensive picture of problems associated with the recent increase in land acquisitions in the developing world. The following sections will summarise the legal

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<sup>44</sup> Center for Human Rights and Global Justice, Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment, pages 3-4.

<sup>45</sup> Deininger, Klaus & Byerlee, Derek, 2011, Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?, The International Bank for Reconstruction and Development/The World Bank, page 2.

<sup>46</sup> Ibid., page 71.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

landscape businesses are faced with with regard to land rights, under the headlines Legal risks and Operational risks. The purpose of this exposition is to expose some issues that business' are faced with when investing in land in Sub-Saharan Africa. In addition, it will provide the foundation for a concluding discussion on the role of business in development issues relating to land rights, which will be presented in the concluding statements of this paper.

#### **2.4.1. Legal risks**

When investments involve relocation of communities, as is often the case in large-scale agricultural investments, corporations are exposed to a myriad of legal requirements.<sup>49</sup> Some stem from national law, some are inshrined in international law as explained below. As this paper will show, international law reforms and development has introduced responsibilities to respect the customary land rights endemic to the Sub-Saharan region. The question is, of course, how this relates to business.

According to the Guiding Principles on Business and Human Rights, treated in chapter 6 below, business enterprises should treat the risks of being complicit in human rights abuses as:

a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.<sup>50</sup>

This paper will adopt the views of the Special Representative in this regard. Not complying with international human rights law will surely expose business' to certain legal risks. However, as this is not directly pertinent to the principal research question of this paper, it will not be examined further.

#### **2.4.2. Operational risks**

In addition to legal risks as outlined above, investing in agriculture in Sub-Saharan Africa is an endeavour fraught with operational risks. In fact, the World Bank found that actual farming had commenced in no more than 21 percent of the land affected by the land they surveyed in the 2011 report referred to earlier in this paper. Some key factors contributing to low implementation rates are large risks, unrealistic objectives, price changes, inadequate infrastructure, technology and institutions.<sup>51</sup>

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<sup>49</sup> United Nations Global Compact (No date), *Human Rights and Business Dilemmas Forum - Community relocation* [Online], Available <http://human-rights.unglobalcompact.org/dilemmas/community-relocation/>, [Accessed: 13 December 2012].

<sup>50</sup> Human Rights Council, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, Guideline 23, page 21.

<sup>51</sup> Deininger, Klaus & Byerlee, Derek, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, preface page XIV.



Perhaps the most notorious examples of operational risks is the acquisition of a large tract of land in Madagascar by Daewoo Logistics in 2008. In this instance, the acquisition caused intense public outrage amongst the Malagasy people.<sup>52</sup> This eventually led to a coup d'état in Madagascar.<sup>53</sup> As the deal collapsed, the substantial initial investments made by Daewoo Logistics were rendered worthless.<sup>54</sup>

Ethiopia, the subject of some closer examination in this paper, can provide an additional example of the operational risks connected to land investments. The Gibe III dam project in southern Ethiopia is an excellent example of how reputational risks are manifested in sensitive projects linked to agricultural investments. In this case, environmental and human rights organisations have launched a massive campaign to stop the construction of the dam, claiming that it threatens the land and livelihood of some 500,000 indigenous people in Ethiopia and Kenya.<sup>55</sup>

In addition to the manifestations of risk exemplified above, numerous operational risks linked to land-based investments in developing countries can be envisioned. For instance, community protests as those instigated by the Gibe III Dam project can affect investments directly in the form of work disruption and delays. In addition, such protests can impact on the health and safety of employees as well as cause damages to assets linked to the investments. Such implications foster needs to employ additional security personnel, as well as legal costs derived from these events.<sup>56</sup>

Moreover, the legal, reputational and operational risks outlined in this section may cause investors to back out of projects. One well known example of this is the withdrawn investment of the Norwegian Pension Fund from a gold mining operation due to "grossly unethical conduct" exposed by a report.<sup>57</sup> Such risks can be further exacerbated in the agricultural sector due to the sensitive nature of food insecurity in developing countries. Exporting food from nations where millions are starving is hardly uncontroversial, as expressed by one Chinese trade official "There are so many people starving in Africa... Can you ship the grain back to China? The cost will be very high, as well as the risk."<sup>58</sup>

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<sup>52</sup> BBC News, 2009, Madagascar leader axes land deal [Online], Available: <http://news.bbc.co.uk/2/hi/africa/7952628.stm> [Accessed: 13 December 2012].

<sup>53</sup> Blas, Javier, World Bank warns on 'farmland grab' [online], Financial times, Available: <http://www.ft.com/cms/s/0/62890172-99a8-11df-a852-00144feab49a.html?ftcamp=rss#axzz2Ek34A2HR>, [Accessed: 13 December 2012].

<sup>54</sup> BBC News, 2009, Madagascar leader axes land deal [Online], Available: <http://news.bbc.co.uk/2/hi/africa/7952628.stm> [Accessed: 13 December 2012].

<sup>55</sup> United Nations Global Compact (No date), *Human Rights and Business Dilemmas Forum - Community relocation* [Online], Available <http://human-rights.unglobalcompact.org/dilemmas/community-relocation/>, [Accessed: 13 December 2012].

<sup>56</sup> Ibid.

<sup>57</sup> United Nations Global Compact (No date), *Human Rights and Business Dilemmas Forum - Community relocation* [Online], Available <http://human-rights.unglobalcompact.org/dilemmas/community-relocation/>, [Accessed: 13 December 2012].

<sup>58</sup> Blas, Javier, Foreign Fields: Rich states look beyond their borders for fertile soil [online], Financial Times, Available: <http://www.ft.com/intl/cms/s/0/8de8a3e0-6e17-11dd-b5df-0000779fd18c.html#axzz2Ek34A2HR>, [Accessed: 13 December 2012].

In conclusion, there are substantial operational risks to consider when investing in land in developing countries. It could be argued that compliance with the standards reviewed in this paper could mitigate such risks by legitimising investments. Such arguments will be pursued further in the concluding statements of this paper.

### 3. Dilemmas in context: Ethiopia

Conditions on the ground in African States differ significantly, both in terms of law, politics and practice. As stated with regard to the purpose of this paper, the generalist approach is preferable, despite these limitations. This section will provide some factual context for the dilemmas that this paper addresses. It will examine Ethiopia, one of the forerunners in attracting land investments. Some celebrate the success of Ethiopia in attracting investors and achieving an impressive growth rate, others claim that it has been at the expense of the rights of its indigenous peoples.

#### 3.1. Ethiopia's land tenure system and policies

Ethiopia is the second most populous country in Africa.<sup>59</sup> Roughly 29 percent<sup>60</sup> of the 85 million inhabitants (2010)<sup>61</sup> live below the poverty line. More than 80 different groups of peoples are registered officially, the Oromo and Amhara being by far the most prevalent. Ethiopia has, in an African context, a unique history, signified by uninterrupted independence apart from a brief Italian occupation between 1936 and 1941. The current administration has a Marxist-Leninist past, but promotes a market-economy.<sup>62</sup>

Ethiopia is one of the highest performing economies in Sub-Saharan Africa, exhibiting impressive growth since 2007. Nevertheless, poverty is still widespread and Ethiopia ranks 174th<sup>63</sup> of 187 countries on the United Nations Human Development Index. Despite impressive growth, the average per capita income is still less than half the average of the Sub-Saharan region.<sup>64</sup>

Smallholder farmers are the largest poor group in Ethiopia. Farmers, and herders alike, are vulnerable to droughts, which have increased in frequency.<sup>65</sup> Some key causes of rural poverty in Ethiopia have been identified by IFAD:<sup>66</sup>

- An ineffective and inefficient agricultural marketing system

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<sup>59</sup> SIDA, (No date), *Lär känna Etiopien* [online], SIDA, Available: <http://www.sida.se/Svenska/Lander--regioner/Afrika/Etiopien/Lar-kanna-Etiopien/>, [Accessed: 13 December 2012].

<sup>60</sup> International Fund for Agricultural Development, (No date), Rural Poverty in Ethiopia, [online], International Fund for Agricultural Development, Available: <http://www.ruralpovertyportal.org/country/home/tags/ethiopia> [Accessed: 13 December 2012].

<sup>61</sup> SIDA, (No date), *Landfakta - Etiopien* [online], SIDA, Available: <http://www.sida.se/Svenska/Lander--regioner/Afrika/Etiopien/Landfakta/> [Accessed: 13 December 2012].

<sup>62</sup> SIDA, (No date), *Lär känna Etiopien* [online], SIDA, Available: <http://www.sida.se/Svenska/Lander--regioner/Afrika/Etiopien/Lar-kanna-Etiopien/>, [Accessed: 13 December 2012].

<sup>63</sup> United Nations Development Programme, Ethiopia - Country Profile: Human Development Indicators [online], United Nations Development Programme, Available: <http://hdrstats.undp.org/en/countries/profiles/ETH.html>, [Accessed: 13 December 2012].

<sup>64</sup> International Fund for Agricultural Development, (No date), Rural Poverty in Ethiopia, [online], International Fund for Agricultural Development, Available: <http://www.ruralpovertyportal.org/country/home/tags/ethiopia> [Accessed: 13 December 2012].

<sup>65</sup> Ibid.

<sup>66</sup> The International Fund for Agricultural Development is a specialized agency of the United Nations, dedicated to eradicating poverty in developing countries.

- Underdeveloped transport and communications networks
- Underdeveloped production technologies
- Limited access of rural households to support services
- Environmental degradation
- Lack of participation by rural poor people in decisions that affect their livelihoods.<sup>67</sup>

However, Ethiopia possesses some traits that indicate potential for agricultural development on a massive scale. According to IFAD, no more than 25 percent of the arable land of Ethiopia is cultivated. Moreover, such cultivation is dominated by low-yielding subsistence farming with limited inputs.<sup>68</sup>

According to the Ethiopian constitution, all land is state owned. However, the *de facto* tenure rights system is a complex mixture of traditional customary systems and the received law of modern Ethiopia. The nature of this state owned land has thus been a divisive issue.<sup>69</sup> The pluralistic legal landscape of Sub-Saharan Africa is an intricate matter, and will be treated in greater detail, albeit in more general terms, in a separate section below.

The traditional systems employed to settle tenure rights issues in the contentious Gambella region, which is subject to particular focus in this chapter, have not been recognised by the Government<sup>70</sup>, despite a provision in the constitution stating that “Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands.”<sup>71</sup>

Conspicuously, the Government have implemented a formal land tenure system including titling of land on behalf of smallholders in some regions, albeit not in the Gambella region.<sup>72</sup> The Ethiopian constitution and federal legislation provide protection from expropriation and the right to compensation.<sup>73</sup> However, these provisions only apply only to land where the rights holders have formal title.<sup>74</sup> How these inconsistencies affect the people of rural Ethiopia will be examined below, using the Gambella region as an example.

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<sup>67</sup> International Fund for Agricultural Development, (No date), Rural Poverty in Ethiopia, [online], International Fund for Agricultural Development, Available: <http://www.ruralpovertyportal.org/country/home/tags/ethiopia> [Accessed: 13 December 2012].

<sup>68</sup> Ibid.

<sup>69</sup> Human Rights Watch, 2012, *Waiting Here for Death - Forced Displacement and “Villagization” in Ethiopia’s Gambella Region*, 2012, Human Rights Watch, page 70.

<sup>70</sup> Ibid., pages 71-72.

<sup>71</sup> Constitution of the Federal Democratic Republic of Ethiopia [Ethiopia], 21 August 1995, Article 40 (5).

<sup>72</sup> Human Rights Watch, 2012, *Waiting Here for Death - Forced Displacement and “Villagization” in Ethiopia’s Gambella Region*, 2012, Human Rights Watch, pages 70-71.

<sup>73</sup> Constitution of the Federal Democratic Republic of Ethiopia [Ethiopia], 21 August 1995, Article 40 (4), 40 (8) and 44 (2).

<sup>74</sup> Human Rights Watch, 2012, *Waiting Here for Death - Forced Displacement and “Villagization” in Ethiopia’s Gambella Region*, 2012, Human Rights Watch, page 72.

### 3.1.1. Eagerness to provide land to foreign investors

Faced with widespread poverty and stagnated development, the Government of Ethiopia, under the late Meles Zenawi, has focused on attracting foreign direct investments in agriculture. The rationale employed by the Government of Ethiopia is largely consistent with the international advocacy for foreign direct investment as a formula for rural development, as outlined above.

Between 2008 and January 2011, coinciding with the increased interest in land emanating from the food crisis, Ethiopia has leased at least 3.6 million hectares of land to foreign and domestic investors. This is an area equivalent to the Netherlands. The Government, owning all land<sup>75</sup>, has created a land bank for agricultural development composed of land available to investors. In January 2011, the land bank offered an additional 2.1 million hectares of land to investors.<sup>76</sup> The accommodating policies of the Government are by no means a secret, following a 2008 visit by Saudi Arabian delegates, then prime minister Meles Zenawi said: "We told them [the Saudis] that we would be very eager to provide hundreds of thousands of hectares of agricultural land for investment."<sup>77</sup>

In addition to an overall welcoming approach towards foreign investors, Ethiopia has created a favourable climate for investors. The booming horticultural industry of Ethiopia aptly illustrates this. Initiated with an aggressive push of the Ethiopian government in 2004, the industry grew to 65 million USD in exports by 2006/2007. Indian businesses dominating the market in horticultural products have in some cases relocated to Ethiopia due to the favourable conditions. This climate has been created through offering land at USD 13 per hectare per year, compared to USD 6,500 in India, in addition to not imposing any custom duties on investors, compared to a variable rate of 6-9 percent in India. The wage rate is USD 20 per month, compared to USD 58 in India and an estimated USD 190 in China,<sup>78</sup> creating a combination conducive to large-scale investments initiated by foreigners.

### 3.1.2. The Gambella region

A focus on the Gambella region of Ethiopia can highlight some issues deriving from the development policies of the Ethiopian government. In this region, 42 percent of total area of land has been awarded to investors or is marketed for lease.<sup>79</sup> The Gambella

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<sup>75</sup> Utrikespolitiska Institutet, (No date), *Landguiden - Etiopien - Jordbruk och fiske* [online], Utrikespolitiska Institutet, Available: <http://www.landguiden.se/Lander/Afrika/Etiopien/Jordbruk-Fiske.aspx>, [Accessed: 13 December 2012].

<sup>76</sup> Human Rights Watch, 2012, *Waiting Here for Death - Forced Displacement and "Villagization" in Ethiopia's Gambella Region*, 2012, Human Rights Watch, page 3.

<sup>77</sup> Blas, Javier, *Foreign Fields: Rich states look beyond their borders for fertile soil* [online], Financial times, Available: <http://www.ft.com/intl/cms/s/0/8de8a3e0-6e17-11dd-b5df-0000779fd18c.html#axzz2Ek34A2HR>, [Accessed: 13 December 2012].

<sup>78</sup> International Monetary Fund, 2008, *The Federal Democratic Republic of Ethiopia: Selected Issues*, 2008, International Monetary Fund, page 36.

<sup>79</sup> Human Rights Watch, 2012, *Waiting Here for Death - Forced Displacement and "Villagization" in Ethiopia's Gambella Region*, 2012, Human Rights Watch, page 3.

region, situated in southwestern Ethiopia, is warm and covered with high quality soil. There are abundant water supplies stemming from the White Nile watershed, forest cover and other natural resources. In addition, population density is relatively low by Ethiopian standards. Nevertheless, the region is home to some 300,000 people, 229,000 of whom live in rural areas. This area is the home of the Nuer and the Anuak, who will be the focus of this section, together with Highlander Ethiopians, Majengeres, Opos and Komos.<sup>80</sup>

The Anuak settled in the Gambella region approximately 400 years ago. They traditionally rely on shifting cultivation for their livelihood and their cultural identity is intimately connected to the land they live on.<sup>81</sup> By contrast, the Nuer are agro-pastoralists who have lived in the Gambella region since the late 19th century. Their way of life is dependent on their cattle, and they have little experience living in sedentary settlements.<sup>82</sup>

The Ethiopian government, however, considers land in the Gambella to be “unused” or “under-utilised”, and is now offering it to investors, foreign as well as domestic.<sup>83</sup> This coincides with a large scale villagization process in the Gambella region, affecting 225,000 people, as well as Ethiopia nationally, resettling some 1.5 million people in total.<sup>84</sup> According to the Government of Ethiopia, the fact that these resettlements are carried out in the very same areas that the government is offering to international investors is completely coincidental.<sup>85</sup>

Furthermore, the Ethiopian government claim that the resettlements are all conducted on a voluntary basis with the full consent and participation of the affected inhabitants. However, in a 2012 report by Human Rights Watch<sup>86</sup> based on over 100 interviews conducted on site in Ethiopia<sup>87</sup>, reveals contrary information. In fact, virtually all the villagers interviewed by Human Rights Watch described their move as an involuntary, forced process.<sup>88</sup> The report describes forced displacements, arbitrary arrests and detentions, beatings, rapes and other sexual violations. The process has, according to the report, denied the residents their rights to food, education and adequate housing.<sup>89</sup>

As already mentioned, the provisions of the Ethiopian constitution and federal law are not applicable on lands that are not possessed with formal title. As titling initiatives are yet to reach the Gambella region, the Nuer, Anuak and other peoples of this region possess no such titles. There are no provisions in Ethiopian federal law that regulates procedures of compensation or expropriation when land is accessed and owned through

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<sup>80</sup> Human Rights Watch, 2012, *Waiting Here for Death - Forced Displacement and “Villagization” in Ethiopia’s Gambella Region*, 2012, Human Rights Watch, page 15.

<sup>81</sup> *Ibid.*, page 16.

<sup>82</sup> *Ibid.*, pages 16-17.

<sup>83</sup> *Ibid.*, pages 17-18.

<sup>84</sup> *Ibid.*, pages 19-20.

<sup>85</sup> Pearce, Fred, 2012, *The Landgrabbers - The New Fight over Who Owns the Planet*, Introduction pages 12-13.

<sup>86</sup> Human Rights Watch, 2012, *Waiting Here for Death - Forced Displacement and “Villagization” in Ethiopia’s Gambella Region*, 2012, Human Rights Watch.

<sup>87</sup> *Ibid.*, page 9.

<sup>88</sup> *Ibid.*, page 28.

<sup>89</sup> *Ibid.*, page 25.

customary norms. According to Human Rights Watch, the populations of Gambella have not been offered neither compensation, alternative resettlement options, nor avenues for redress.<sup>90</sup>

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<sup>90</sup> Human Rights Watch, 2012, *Waiting Here for Death - Forced Displacement and "Villagization" in Ethiopia's Gambella Region*, 2012, Human Rights Watch, pages 72-73.

## 4. Land rights in Sub-Saharan Africa

Requirements on investments, and obligations imposed on business and other investors, cannot be dealt with separately from the duties of States under international law. This section will examine the legal “landscape” in which all subsequent queries will be situated. In order to understand legal issues deriving from the transfer, or registration, of land in Sub-Saharan Africa, one needs to be familiar with the tenure rights systems of the region.

A tenure system is the way in which ownership of, or rights to, land is regulated. Such systems can be determined by statutes, agreed precedents or by customary norms. In the developed world, where there is functioning rule of law, tenure rights are extensively regulated. By contrast, the developing world has seen relatively little effective regulation of tenure, having relied heavily in customary regimes for solving issues relating to land rights.<sup>91</sup> Tenure rights are not part of a coherent international system, and the very foundations of such rights differ between regions. Naturally, the systems depicted below are not the only ones that regulate these issues in Sub-Saharan Africa. This chapter purports only to emphasise some of the principal differences between European, or Western, tenure rights and African tenure rights systems.

### 4.1. The pluralistic legal landscape of Africa

Prior to examining the tenure rights systems of Africa, certain premises need to be clarified. Post-colonial Africa has a pluralistic legal landscape. There is one legal system, consisting of two separate sets of rules, received law and customary law.<sup>92</sup> This paper will assume that the endemic legal systems, and perhaps the customary systems of indigenous people in particular, have vested legitimate rights in people, irrespective of recognition by inherited systems.<sup>93</sup>

However, the customary rights require the support, by implementation or otherwise, of national law to exist as legal tenure regimes in Africa today. In order for the holders of customary tenure rights to be granted access or compensation in accordance with such rights, national recognition is often required. As the received law is often what is practiced in national courts, and adhered to by authorities, support in this system is essential to the effectiveness of claims under customary regimes. By contrast, until very recently, the limited reach of imported tenure regimes on the ground in Africa has been the principal precondition for the very existence of customary tenure rights. As the governments have exercised little authority over actual tenure disputes in rural Africa, locals have been left to settle matters under customary law, in accordance with local traditions.<sup>94</sup> However, as markets in land have emerged in Africa, international as well

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<sup>91</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 1.

<sup>92</sup> McAuslan, Patrick, *Legal Pluralism as a Policy Option: Is it Desirable? Is it Doable?* [online], Available: [http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief\\_land-04.pdf](http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief_land-04.pdf) [Accessed: 16 December 2012].

<sup>93</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 20.

<sup>94</sup> *Ibid.*, page 20.



as national interests have trended more towards settling disputes in accordance with received law.

#### 4.2. Defining customary tenure rights

Customary tenure systems are ways of organising ownership or rights to land, dictated by community adherence to particular practices. The essential element in detecting customary tenure systems is community adherence. More often than not, but not necessarily, these systems have foundations in ancient customs and rules. This is certainly true of the customary tenure systems of indigenous peoples,<sup>95</sup> which will be examined further in this paper.

One important aspect of customary tenure rights regimes is the commons<sup>96</sup>. Collective ownership, or more specifically tracts of land that are directly owned in individual shares by all members of a community, is an essential component of the African style customary tenure regimes. By contrast, the “communal domains” are under the jurisdiction of the community (under customary law), but the property types are a mix of private ownerships, in groups or by single individuals, and “commons”.<sup>97</sup>

That customary tenure regimes exist and have been utilised in regulating land ownership and access in Africa hardly needs further review. As inherited legal systems have come to dominate official land registries, however, these rights have come to exist primarily as subsidiary rights. The increased interest in the land of developing countries has contributed to directing international attention to this situation, as investors and governments alike have been forced to address ownership issues related to land.

In Sub-Saharan Africa, the subject of this paper, customary tenure rights are often no more than permissive rights. This land, constituting the basis of the livelihoods of hundred of millions of Africans, is often classified as government or public land, meaning that the access to land can be swept away at any time in favour of reallocation to other private or public interests.<sup>98</sup>

The concept of customary tenure is a reoccurring theme throughout this paper, in various African as well as international contexts, and providing a succinct definition suitable for the entirety of this paper is not possible. Hence, customary tenure is, for the purposes of this paper, to be understood as a tenure regime dictated by community adherence to certain norms and practices. More often than not, this will not be put down in writing, nor be implemented in national law. The extent to which these regimes are recognised in national and international law and thus constitute binding obligations on states and business’ are subject to examination throughout this paper.

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<sup>95</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 15.

<sup>96</sup> This is intermittently referred to as communal property, common property or commons.

<sup>97</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 15.

<sup>98</sup> *Ibid.*, page 1.

### 4.3. The importance of equitable recognition of customary tenure

In Africa, over 90 percent of the rural population access land through customary tenure mechanisms.<sup>99</sup> The rapid urbanisation and de-agrarianization of Africa is expected to plateau, with a still poor rural majority left behind.<sup>100</sup> Land accessed under customary tenure regimes amount to staggering current and future rental real estate and production values when assessing the already lucrative and rising values of pasture, forest and woodlands.<sup>101</sup> This, of course, does not include resources captured by the extractive industries, which are deliberately omitted in this paper. Income derived from logging, agribusiness and outright leasing and transfer fees for these large tracts of land are rarely if ever directed towards the holders of customary land rights. If the opposite was to be, the incomes of land could provide the poor of Africa with a capital base that could help them immensely in escaping poverty.<sup>102</sup>

There is, according to numerous vulnerability assessments, a strong correlation between poverty and tenure insecurity.<sup>103</sup> Thus, equitable recognition of customary tenure rights may prove instrumental in eradicating poverty and hunger.

### 4.4. Why are customary rights to land not recognised?

Some argue that denying customary land as private property is a core contributor to insecurity and poverty in Africa.<sup>104</sup> This section will examine the root causes of this denial, attempting to answer the question posed in the headline of this subsection; why are customary rights to land not fully recognised in the national laws of Sub-Saharan Africa?

As this paper will show, a change in attitude towards customary tenure rights, in Africa as well as globally, can be discerned. This, however, is not the subject of this particular section. In this context, the reasons why these rights have not always been recognised is the primary concern. If almost all the rural poor of Africa access land through these customary law mechanisms<sup>105</sup>, how can it be that the rights to this property has been vested in others?

Firstly, the centralisation of power in states, colonial as well as postcolonial, has surely contributed. The authority over land formerly vested in indigenous regimes has been weakened and suppressed if not completely disqualified. The rationale behind the disregard for customary rights in this process surely varies, albeit some argue that with regard to Africa, the focus of this paper, misdirected paternalism and incomprehension

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<sup>99</sup> Alden Wily, Liz, 2006, *Land Rights Reform and Governance in Africa - How to make it work in the 21st century?* United Nations Development Programme, 2006. Page 1.

<sup>100</sup> Ibid., page 17.

<sup>101</sup> Ibid., page 11.

<sup>102</sup> Ibid., page 1.

<sup>103</sup> Ibid., page 18.

<sup>104</sup> Ibid., page 7.

<sup>105</sup> Ibid.

of customary tenure systems has contributed. In addition, administrative as well as political convenience have both been factors.<sup>106</sup>

The property that has suffered the worst is perhaps the commons, tracts of land commonly owned, managed and utilised in many customary tenure systems. Such usage does not fit well with a Western-centric notion of private property. In addition, commonly owned land is often unoccupied and not always visibly used at all times. This has resulted in 20th century governments overlooking such customary rights, claiming the property on behalf of the government, making them subject to subsequent allocations to investors and others.<sup>107</sup>

The customary norms regulating land ownership and access in Sub-Saharan Africa are often intricate and differ significantly between regions and cultures. Understanding these norms, from a Western legal perspective, is not uncomplicated. Nor is conforming these rights to a western-style legal system easy, and any attempt at implementation of these rights is thus precarious. The difficulties in recognition and implementation of customary rights need be recognised to convey a balanced depiction of these issues. Nevertheless, it must also be kept in mind that the drivers outlined above have resulted in the almost uniform denial of customary land rights as having the attributes of private ownership. Thus, these rights have, if recognised at all in national law, come to form an inferior class of land rights at the disposal of the primary rights holders. More often than not, customary tenure rights are incorporated as mere permissive rights, existing only as long as the government allows.<sup>108</sup>

#### 4.4.1. Reforms

Despite the somber message conveyed by the previous sections, reform seems to be on the horizon. This paper examines such change by observing the legal development in a number of international contexts. In short however, change can be discerned, especially in South America where the traditional land rights of indigenous peoples have seen significant legal reinforcements in several States recently.<sup>109</sup> In Asia and the developed world, supreme courts have delivered rulings in favour of more equitable treatment of customary rights, indicating a change in attitude as well. These decisions concur that customary tenure rights are indeed private property rights, thus granting them the right to be respected and upheld until formally extinguished.<sup>110</sup> In Africa, where there are still hundreds of millions hectares of customary commons accessible to the rural poor<sup>111</sup>, change does seem to take hold. These reforms, which this paper will examine further, could effectively remove the legal insecurity of some 500 million people in rural Africa, two-thirds of whom are poor or very poor.<sup>112</sup>

However, contrary reports indicate that much progress is limited to formal reforms, with little effect on the ground in local communities. Far too often commitments are not

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<sup>106</sup> Ibid., page 8.

<sup>107</sup> Alden Wily, Liz, *Land Rights Reform and Governance in Africa*, page 8.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid., pages 9-10.

<sup>110</sup> Ibid., page 34.

<sup>111</sup> Ibid., page 9.

<sup>112</sup> Ibid., page 10.

fulfilled, sometimes policies and legislation are not even finalised. Thus, tenure security remains little changed on the ground. Some claim that this is largely due to political reluctance to constrain private sector access to rural lands.<sup>113</sup>

This paper argues, like many, that reforms in recognition of customary tenure law are essential to the development of Sub-Saharan Africa. Whichever path towards development is chosen, be it FDI-driven agro-industrial large scale farming or subsidised small-holder empowerment, fair and equitable land rights regimes are essential to success.

#### **4.5. Implementation of customary tenure rights in national law**

As current trends in legislation turn towards recognition of customary rights in national law, different methods are used for customary landholders to register their land rights.<sup>114</sup> This section will highlight some instances of such development in Sub-Saharan Africa.

The development in recent years, in combination with experiences derived from former titling initiatives, has rendered opportunities for customary landholders in some countries to register their rights “as is”, i.e without conversion to imported forms of tenure such as freeholds or leaseholds. Numerous instruments of national law now recognise customary land rights as private property, equal in legal force to other rights acquired under the imported legal systems employed in most African states. In some cases, customary tenure rights are recognised as private property rights irrespective of registration. In Uganda, Tanzania and Mozambique, this has been entrenched in national law. This is also the case, albeit with some limitations, in South Africa, Botswana, Namibia and Ghana amongst others. In Ethiopia, the subject of some further elaboration above, customary tenure rights are also a legal fact of sort. Several other countries, including Lesotho, Malawi, Niger, Benin, Mali, Guinea and Cote d’Ivoire are moving towards these positions on the recognition of customary tenure rights in national law.<sup>115</sup>

Titling initiatives have been attempted numerous times on the African continent, most notably in Kenya. The Kenyan initiative, having existed for more than fifty years, failed to replace customary norms, and there is little evidence that it actually contributed to more progressive farming practices as intended.<sup>116</sup>

#### **4.6. The Endorois case**

Being a landmark decision on customary land rights in Africa, The Endorois case<sup>117</sup> is of importance to a number of issues that are treated below. This paper argues that the Endorois decision is key to understanding the state of human rights law, particularly

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<sup>113</sup> Alden Wily, Liz, *Land Rights Reform and Governance in Africa*, page 11.

<sup>114</sup> *Ibid.*, page 10.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, page 9.

<sup>117</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, henceforth referred to as the Endorois case.

concerning land rights, in Africa today. For that reason, it deserves some special attention, in particular in outlining the key merits of the case as the rationale employed by the African Commission will be a reoccurring theme below.

The case was decided by the African Commission on Human and Peoples' Rights. The factual background to the decision can be summarised as follows. The Endorois are a traditionally pastoralist<sup>118</sup> community of some 60,000 people, who have lived in the areas surrounding Lake Bogoria in Kenya for centuries.<sup>119</sup> Despite a confrontation with the Masai three hundred years ago, the Endorois have been accepted as the *bona fide* owners of the areas in question.<sup>120</sup> At the time of Kenya's independence, in 1963, the British Crown passed their claim on this land to the respective County Councils. Under a provision in Kenyan national law, the land was held on trust by the County Councils on behalf of the Endorois community. This, however, did not constrain the Endorois' use of, or access to, the land around Lake Bogoria.<sup>121</sup>

From 1973 onwards, the Government of Kenya started gazetting the land in question, creating the Hannington Game Reserve. In their communication to the African Commission, the complainants argued that their access and use of their ancestral lands had been compromised, thus infringing their rights to these lands.<sup>122</sup>

The area surrounding Lake Bogoria is, according to Endorois lore, the birthplace of the Endorois community, and represents significant religious and cultural value to the Endorois people. In addition, the area is fertile, providing green pasture and medicinal salt licks for the raising of cattle which the Endorois have traditionally tended to.<sup>123</sup>

Centre for Minority Rights Development (CEMIRIDE) together with Minority Rights Group International, submitted the complaint to the African Commission, on behalf of the Endorois community. The complaint alleged that the Government of Kenya was in violation of international law and the African Charter on Human and Peoples' Rights<sup>124</sup>. The Endorois complaint includes violation of numerous human rights, effectively stressing the correlation between land rights and human rights. The African Commission found that the forceful eviction of the Endorois from their ancestral land had interfered with the religious freedom of the Endorois, enshrined in Article 8 of the African Charter. This stresses the importance of access to certain land in the freedom to practice religion under the African Charter.<sup>125</sup> The connection between the religious practices of the Endorois and the land surrounding Lake Bogoria in Kenya is not a unique occurrence. A multitude of religions endemic to Sub-Saharan Africa vest

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<sup>118</sup> Human Rights Watch, 2010, *News - Kenya: Landmark Ruling on Indigenous Land Rights* [online], Human Rights Watch, Available: <http://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>[Accessed: 13 December 2012].

<sup>119</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 3.

<sup>120</sup> *Ibid.*, paragraph 184.

<sup>121</sup> *Ibid.*, paragraph 5.

<sup>122</sup> *Ibid.*, paragraph 3.

<sup>123</sup> *Ibid.*, paragraph 6.

<sup>124</sup> Henceforth referred to as the African Charter.

<sup>125</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 173.

significant importance in land, thus making land rights issues central to human rights such as the freedom of religion.

In the Endorois case, the African Commission decided on whether or not to uphold the customary land rights of the Endorois over the received law of the Kenyan constitution. The Endorois claimed, under Article 14 of the African Charter, that they had property rights pertaining to their ancestral land, the possessions attached to it, and their cattle.<sup>126</sup> The African Commission concluded that the rights offered to the Endorois under the trust statutes of Kenyan law were not in accordance with internationally accepted norms<sup>127</sup>, which the African Commission found obliged States to grant indigenous people holding customary land rights full property titles.<sup>128</sup>

By forcing the Endorois community to resettle on lands of inferior quality, the Government of Kenya severely endangered the pastoralist way of life of the Endorois. By doing so, the African Commission found that the Government of Kenya had violated the cultural rights of the Endorois, guaranteed under Article 17 of the African Charter.<sup>129</sup>

When evicted from their ancestral land, the Endorois never received adequate compensation in the opinion of the African Commission. The African Charter, in Article 21, obliges the State causing such spoliation to provide restitution and compensation.

In one respect in particular, the Endorois case was a landmark decision. The African Commission, the first international tribunal to do so<sup>130</sup>, found the actions of the Government of Kenya to be in violation of the Endorois' right to development under Article 22 of the African Charter.<sup>131</sup> The African Commission concluded that it was the responsibility of the State to create conditions favourable to the development of the Endorois community. In the process of development that ensued the creation of the Hannington Game Reserve, the Endorois were left out by not being provided adequate compensation and benefits.

In concluding their findings, the African Commission recommended that the Government of Kenya recognise the land ownership of the Endorois and restitute their ancestral land. In addition, they recommended that compensation be paid for all loss suffered.<sup>132</sup> The ruling in the Endorois may prove to significantly advance the rights of the indigenous peoples of Africa with regard to land rights.<sup>133</sup>

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<sup>126</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 174.

<sup>127</sup> Ibid., paragraph 206.

<sup>128</sup> Ibid., paragraph 209.

<sup>129</sup> Ibid., paragraph 251.

<sup>130</sup> Human Rights Watch, 2010, *News - Kenya: Landmark Ruling on Indigenous Land Rights* [online], Human Rights Watch, Available: <http://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>[Accessed: 13 December 2012].

<sup>131</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 298.

<sup>132</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, Recommendations page 80.

<sup>133</sup> Human Rights Watch, 2012, *Waiting Here for Death - Forced Displacement and "Villagization" in Ethiopia's Gambella Region*, 2012, Human Rights Watch, page 78.

## 5. International human rights law

This section will treat obligations under international human rights law. It will outline the scope of such obligations, as pertaining to land investments in general, and agriculturally oriented investments in particular.

Investing in land for agricultural purposes often involves relocation of communities, be it voluntary or involuntary. Such operations expose the corporations/investors or the initiating States to a multitude of legal requirements, on an international as well as domestic level. With regard to human rights, the requirements in question are principally derived from the International Bill of Human Rights: the Universal Declaration of Human Rights<sup>134</sup>, the International Covenant on Economic, Social and Cultural Rights<sup>135</sup> and the International Covenant on Civil and Political Rights<sup>136</sup>. These requirements will be examined below. In addition to the aforementioned instruments of international law, the African Charter on Human and Peoples' Rights is, given the geographical focus of this paper, of great importance.

### 5.1. The International Bill of Human Rights

The International Bill of Human Rights consists of a declaration as well as different covenants. It is important to notice that these instruments have different legal statuses, UN declarations being non-binding, whereas covenants are legally binding between the states that ratify or accede these documents. However, the moral force instilled in declarations such as the Universal Declaration of Human Rights is undeniable, and their importance can thus not be underestimated.<sup>137</sup>

In the first article of the Universal Declaration of Human Rights, the very foundation of all international human rights law is laid out, stating that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."<sup>138</sup> Unanimously adopted by the general assembly in 1948, this marks a turning point in history, the international community pledging to strive for respect for basic human rights globally.

With regard to land rights, the Universal Declaration of Human Rights contains one provision of particular importance, in article 17. It declares that everyone, alone as well as in association with others, has the rights to own property, and the right not to be arbitrarily deprived thereof.<sup>139</sup> However, as noted above this declaration contains no binding legal obligations and will thus not be treated further in this paper. However, the

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<sup>134</sup> Henceforth referred to as the UDHR.

<sup>135</sup> Henceforth referred to as the ICESCR.

<sup>136</sup> Henceforth referred to as the ICCPR.

<sup>137</sup> Office of the United Nations High Commissioner for Human Rights (No date), *International law - The International Bill of Human Rights* [Online], Available <http://www2.ohchr.org/english/law/>, [Accessed: 6 December 2012].

<sup>138</sup> United Nations, *Universal Declaration of Human Rights*, Paris, 10 December 1948. Article 1.

<sup>139</sup> *Ibid.*, Article 17.

significance of this statement cannot be underestimated and the spirit of this achievement should be kept in mind when reading this paper.

The International Covenant on Economic, Social and Cultural Rights is an integral part of the International Bill of Human Rights. It contains a number of provisions that are directly relevant to this context. Ethiopia, a country subject to certain scrutiny above, has acceded this covenant in 1993, and the Ethiopian government is thus liable to any claim of breaches with regard to these requirements.<sup>140</sup>

This paper argues that land rights are intimately connected to other human rights issues. This is true also for the requirements set forth in the ICESCR. The right to adequate housing, as outlined by article 11 of the ICESCR, is perhaps the most notable example of the connection between these requirements and land rights. Within the right to housing declared by the ICESCR lies a right to legal security of tenure. This includes protection against the forced evictions which regularly occur in the context treated in this paper.<sup>141</sup> Forced evictions are, in short, *prima facie* incompatible with the requirements of the ICESCR.<sup>142</sup> The Covenant is binding to the State parties, and they are thus required to refrain from carrying out forced evictions. Moreover, State parties are obliged to ensure that the law is enforced against its agents and third parties guilty of such infringements.<sup>143</sup>

The International Covenant on Civil and Political Rights complements the right not to be forcefully evicted.<sup>144</sup> Article 17.1 of the ICCPR declares that everyone has the right to be protected against arbitrary or unlawful interference with one's home.<sup>145</sup> In addition, the ICCPR requires States to ensure effective remedies for persons whose rights have been violated by actions such as forced evictions.<sup>146</sup> This covenant has also been acceded by Ethiopia in 1993.<sup>147</sup>

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<sup>140</sup> United Nations, *United Nations Treaty Collection - International Covenant on Economic, Social and Cultural Rights* [Online], Available: [http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg\\_no=IV-3&src=TREATY](http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-3&src=TREATY), [Accessed: 6 December 2012].

<sup>141</sup> United Nations, Office of the High Commissioner for Human Rights, The right to adequate housing (Art. 11 (1)) : . 12/13/1991. CESCR General Comment 4. (General Comments), paragraph 8 (a).

<sup>142</sup> *Ibid.*, paragraph 18.

<sup>143</sup> United Nations, Office of the High Commissioner for Human Rights, The right to adequate housing (Art. 11.1.): forced evictions: . 05/20/1997. CESCR General Comment 7. (General Comments), paragraph 8.

<sup>144</sup> *Ibid.*, paragraph 8.

<sup>145</sup> United Nations, International Covenant on Civil and Political Rights, 16 December 1966.

<sup>146</sup> United Nations, Office of the High Commissioner for Human Rights, The right to adequate housing (Art. 11.1.): forced evictions: . 05/20/1997. CESCR General Comment 7. (General Comments), paragraph 13.

<sup>147</sup> United Nations, *United Nations Treaty Collection - International Covenant on Civil and Political Rights* [Online], Available: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en), [Accessed: 6 December 2012].



## 5.2. The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous peoples was adopted in 2007.<sup>148</sup> This declaration confirms some key rights, including rights to land and resources. It bears significant relevance in the discussion on the tenure rights of indigenous peoples. Rodolfo Stavenhagen, then-UN Special Rapporteur on the situation of human rights and fundamental freedoms stated that this Declaration:

Must be a fundamental part of the discussion about future international standards relating to indigenous peoples, not only at the international level, but also in regional or specialized areas. Its adoption also gives a strong impetus to the clarification of emerging customary law concerning indigenous rights at the international level, and should similarly energize the processes of legislative reform and domestic court proceedings.<sup>149</sup>

According to the Declaration, States are required to provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of dispossessing indigenous peoples of their lands, territories or resources. States shall provide similar protection against forced population transfers which have the aim or effect of undermining any of their rights.<sup>150</sup> The Declaration clearly states that:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.<sup>151</sup>

In addition, the Declaration provides for customary rights to land being recognised and adjudicated.<sup>152</sup> When necessary, indigenous peoples shall have the right to redress, in forms of restitution of land, or when this is not possible, compensation for any losses suffered.<sup>153</sup>

On the principal topic of this paper, recognition of customary tenure rights, the Declaration on the Rights of Indigenous Peoples can hardly be misunderstood:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>154</sup>

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<sup>148</sup> Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

<sup>149</sup> United Nations, Implementation of General Assembly Resolution 60/251, A/HRC/4/40/Add.,1 paragraph 79.

<sup>150</sup> Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Article 8 (2)(b-c).

<sup>151</sup> *Ibid.*, Article 10.

<sup>152</sup> *Ibid.*, Article 27.

<sup>153</sup> *Ibid.*, Article 28.

<sup>154</sup> *Ibid.*, Article 26.

### 5.3. The African [Banjul] Charter on Human and Peoples' Rights

On October 21st 1986, the African Charter on Human and Peoples' Rights came into force.<sup>155</sup> This instrument of international law is specifically intended to protect the human rights of the peoples of the African continent. The following sections will treat some key provisions of the African Charter, with regards to land rights. The selection is solely made to highlight requirements that have been in particular focus in cases of contentious land investments.

#### 5.3.1. Religious freedom

Article 8 of the African Charter declares the right to “profession and free practice of religion”<sup>156</sup>. This section will explore the implications of the right to religious freedom with regard to land rights. It will argue that this right may be violated by resettlements and inappropriate land uses, as certain religious rituals endemic to Sub-Saharan Africa are intimately connected to land.<sup>157</sup>

Practice is central to religious freedom. This has been recognised by the African Commission in several cases.<sup>158</sup> Access to land may constitute an integral part in exercising ones religion. Even though some limitations, established by law, to these rights must be tolerated, such interference must be “proportionate to the specific need on which they are predicated”<sup>159</sup> and “reasonable”<sup>160</sup>. Furthermore, the African Commission has stated that such restrictions must be “as minimal as possible”<sup>161</sup>.

This rationale was further clarified by the decision in the Endorois case, where the African Commission found the forced evictions of the Endorois:

From their ancestral lands by the Respondent State interfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion.<sup>162</sup>

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<sup>155</sup> Organization of African Unity, *African Charter on Human and Peoples' Rights*, CAB/LEG/67/3/Rev 5, Nairobi 1981. Henceforth, this will be referred to as the *African Charter on Human and Peoples' Rights*, or simply: the *African Charter*.

<sup>156</sup> Article 8, *The African Charter on Human and Peoples Rights*.

<sup>157</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 166.

<sup>158</sup> Amnesty International and Others v. Sudan, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999), paragraph 76, also cited in Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 171.

<sup>159</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 172.

<sup>160</sup> *Ibid.*, paragraph 172.

<sup>161</sup> Amnesty International and Others v. Sudan, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999), paragraph 80.

<sup>162</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 173.

The interaction between religious freedom, which is clearly established in the African Charter, and property rights, is apparent when scrutinising the jurisprudence of the African Commission. As such, this illuminates but one example of the wide array of issues related to international human rights law that may be affected by land dispossessions.

### 5.3.2. The right to property

Article 14 of the African Charter guarantees the right to property. As this paper treats land dispossessions, Article 14 is, naturally, of paramount importance.

The African Commission has, in its jurisprudence, concluded that the idea of property in Article 14 encompasses land.<sup>163</sup> Furthermore, the African Commission has ascertained that the right to property stretches above and beyond the mere right to have access to one's land and to not have such land invaded and encroached upon.<sup>164</sup> In fact, in the opinion of the Commission, "Article 14 implies that owners have the right to undisturbed possession, use and control of their property however they deem fit."<sup>165</sup> Moreover, in the Endorois case, the African Commission cited international jurisprudence, namely the European Court of Human rights, stating that "property rights could also include the economic resources and rights over the common land of the applicants"<sup>166</sup>.

The African Commission has further elaborated on the requirements stipulated by Article 14, concluding that the article implies a "right to shelter or housing"<sup>167</sup>. It argues that, when reading Article 14 in conjunction with Articles 16 and 18(1), their combined effect must be the imposition of such requirements, albeit not expressly included in the African Charter.<sup>168</sup>

Having determined what is "property" according to Article 14, one has to determine who can possess property rights. The customary tenure and collective rights of indigenous communities do not fit well with modern, Western-centric notions such as formal titles and land ownership registration. The African Commission argues that "the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'".<sup>169</sup>

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<sup>163</sup> Malawi African Association and Others v. Mauritania, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), paragraph 128.

<sup>164</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), paragraph 54.

<sup>165</sup> Huri-Laws v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 225/98 (2000), paragraph 52.

<sup>166</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 186.

<sup>167</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), paragraph 60.

<sup>168</sup> Ibid., paragraphs 59-60.

<sup>169</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 187.

Affording formal recognition of property rights to indigenous communities based on customary tenure systems is not exclusive to the African Commission. The European Court of Human Rights<sup>170</sup>, as well as the IACtHR<sup>171</sup>, have both rendered similar decisions. The internationally recognised norm for implementation of such property rights is, according to the African Commission, no less than formal title. The IACtHR has clearly shown, according to the African Commission, that only legally formalised ownership of land complies with the standards of protection afforded by international law.<sup>172</sup> In the Endorois case, the African Commission summarises recognition of customary tenure rights under international law:

1. Traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title;
2. Traditional possession entitles indigenous people to demand official recognition and registration of property title;
3. The members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and
4. The members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.<sup>173</sup>

However, the recognition of customary tenure rights is not absolute, as Article 14 of the African Charter allows for encroachment of property rights, provided that such encroachment is “in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”<sup>174</sup>

These two conjunctive requisites for equitable encroachment have been subject to decisions by the African Commission.<sup>175</sup> In this context, it must be reiterated that forced evictions are not permitted under international law. As such, they can never satisfy the legality requirement of Article 14, as this encompasses not only national, but also international law. The United Nations Commission on Human Rights argue that forced evictions amount to gross violations of human rights, including the right to adequate housing.<sup>176</sup>

The public interest invoked by the State must meet higher standards when the property affected is the ancestral land of indigenous peoples rather than individual private

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<sup>170</sup> See Doğan and Others v. Turkey, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paragraphs 138-139.

<sup>171</sup> See The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

<sup>172</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraphs 205-206.

<sup>173</sup> Ibid., paragraph 209.

<sup>174</sup> Article 14, African Charter on Human and Peoples’ rights

<sup>175</sup> See for instance Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003.

<sup>176</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 218.

property.<sup>177</sup> This view is shared by the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights who, in 2005, stated that:

Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.<sup>178</sup>

In addition to the requirements of the two-pronged test, the African Commission has imposed a proportionality requisite in its jurisprudence.<sup>179</sup> Thus, the African Commission has argued that the limitations must be proportionate to a legitimate need, and the limitations should be the “least restrictive measures possible”<sup>180</sup>. When land dispossession has occurred by means of forced evictions, the proportionality requirement can never be satisfied.<sup>181</sup>

The legality requirement, “in accordance with the provisions of appropriate laws”, also contains requirements on consultation and compensation, according to the African Commission. The obligation to consult is more extensive when dealing with indigenous peoples.<sup>182</sup> The Commission has, once again, glanced at the decisions of the IActHR, and their decision in the Saramaka case<sup>183</sup>. In this case, the IActHR demanded that the State party abide by the following safeguards;

First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter “development or investment plan”) within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment.<sup>184</sup>

These requirements were subsequently upheld in the Endorois case, finding the Republic of Kenya in violation of Article 14.<sup>185</sup> The African Commission has looked to principles employed in the United Nations Declaration on Indigenous Peoples, as well as

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<sup>177</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 212.

<sup>178</sup> Ibid., paragraph 212.

<sup>179</sup> Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95 (1999), paragraph 42.

<sup>180</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 214.

<sup>181</sup> Ibid., paragraph 219.

<sup>182</sup> Ibid., paragraph 225-226.

<sup>183</sup> Saramaka People v. Suriname, Judgement (IActHR, 12 Aug. 2008)

<sup>184</sup> Ibid., paragraph 129.

<sup>185</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 228.

the principles of the IACtHR, when elaborating on the issue of compensation. Restitution is thus the primary form of compensation, and only when that is not, “for concrete and justified reasons”<sup>186</sup> possible can other forms of compensation be accepted. The State must then surrender alternative land of equal extension and quality. The procedure for selection of such land shall be performed in agreement with, and in accordance with the consultation and decision procedures of, the affected people.<sup>187</sup>

### 5.3.3. Cultural Rights

Article 17 (2) and (3) lay down cultural rights. Firstly, it ensures protection of the individual’s right to participate in cultural life. Secondly, it requires the State to promote and protect the traditional values of cultural communities.<sup>188</sup> The cultural rights of a community can be intimately linked to land rights, similarly to the religious rights treated above. The Human Rights Committee of the UN has observed:

That culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>189</sup>

The correlation between land rights and the cultural rights of, primarily indigenous, people has also been highlighted by the African Commissions Working Group of Experts on Indigenous Populations/Communities. In a report published in 2005, the working group declared that:

Dispossession of land and natural resources is a major human rights problem for indigenous peoples. They have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and large-scale development initiatives that tend to destroy their lives and cultures rather than improve their situation.<sup>190</sup>

In addition to labelling “land dispossession” a “major human rights problem”, the Working Group on Indigenous Peoples recognises the threat to cultural rights posed by land dispossession. The African Commission referred to this link in the Endorois case, revolving around ancestral lands surrounding Lake Bogoria in Kenya, when deciding that in restricting access to said lake, the State has “denied the community access to an

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<sup>186</sup> *Yakye Axa Indigenous Community v. Paraguay*, Judgement (IACtHR, 17 June, 2005), paragraph 149.

<sup>187</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm. No. 276/2003, paragraph 123.

<sup>188</sup> *Ibid.*, paragraph 241.

<sup>189</sup> Office of the High Commissioner for Human Rights, General Comment No. 23: The rights of minorities (Art. 27) : . 04/08/1994. CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments), paragraph 7.

<sup>190</sup> African Commission on Human and Peoples’ Rights, 2005, Report of the African Commissions Working Group of Experts on Indigenous Populations/Communities, 2005. The African Commission, page 20.

integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake.”<sup>191</sup>

#### **5.3.4. Free disposal of wealth and natural resources**

Article 21 of the African Charter states that:

- 1.All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
- 2.In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

The African Commission has, in a 2001 decision, declared that the natural resources contained within the traditional lands of indigenous peoples are vested, according to the African Charter, in these peoples.<sup>192</sup> This decision clearly indicates that indigenous peoples, as groups, can make claims under article 21 of the Charter.<sup>193</sup> According to the African Commission, the nature of the property or resources concerned constitute a decisive criteria when assessing the rights to such resources.<sup>194</sup> As this paper is primarily concerned with land acquisitions for agricultural purposes, and not the extractive industries, this is a stone that will be left unturned. The extractive industries are often separately regulated and any brief account of these regulations in this context would undoubtedly be left wanting. For the purposes of this paper, the essence of Article 21 will be read as the possibility for indigenous people, or any people inhabiting a certain region, to make claims on resources under Article 21.<sup>195</sup> If the State is found to be in violation of Article 21, the claimants may then be entitled to restitution as well as compensation.<sup>196</sup>

#### **5.3.5. The right to development**

Article 22 of the African Charter reads;

- 1.All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- 2.States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

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<sup>191</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 250.

<sup>192</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), paragraphs 56-58.

<sup>193</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 255.

<sup>194</sup> *Ibid.*, paragraph 257-268.

<sup>195</sup> *Ibid.*, paragraph 255.

<sup>196</sup> Article 21 (2), African Charter of Human and Peoples' Rights

The Endorois case was the first ever ruling of an international tribunal to find a violation of the right to development.<sup>197</sup> According to the African Commission, the right to development is both constitutive and instrumental, meaning that violations of procedure as well as substantial elements constitute violations of the right to development.<sup>198</sup> It further argues that the burden for creating conditions favourable to a peoples development rests on the State, not on the “peoples” themselves. In summary, the right to development formulated in the Endorois case requires fulfilment of the following five criteria;

1. *Equitability*
2. *Non-discrimination*
3. *Participation*
4. *Accountability*
5. *Transparency*

The overarching themes of the criteria above are equity and choice.<sup>199</sup> Notwithstanding the paramount importance of this aspect of the Endorois case, this paper will not treat the right to development to the extent it is not intertwined in land issues. As the Endorois case clearly shows, there is an intimate connection between land dislocation and the right to development according to the African Charter. However, this connection is not requisite for the occurrence of violations of the right to development. States can be in violation of Article 22 in situations when land is not concerned. Hence, recognising that land dislocation can contribute to, or perhaps constitute, a violation of the right to development will suffice for the purposes of this paper.

### 5.3.6. The rights of Peoples

Articles 20 to 24 of the Banjul Charter, provides for peoples to retain rights as collectives. For the purposes of this paper, the recognition of collective rights as an “essential element of human rights in Africa”<sup>200</sup> is an immensely important feature of the African Charter. This is reiterated in the Endorois case, as “the African Commission wishes to emphasise that the Charter recognises the rights of peoples.”<sup>201</sup> the ACHPR Working Group of Experts on Indigenous Populations/Communities, stated that:

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<sup>197</sup> Human Rights Watch, 2010, *News - Kenya: Landmark Ruling on Indigenous Land Rights* [online], Human Rights Watch, Available: <http://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>[Accessed: 13 December 2012].

<sup>198</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 277.

<sup>199</sup> United Nations, *The Endorois and their struggle for the realization of the right to development: NGLS interviews Wilson Kipsang Kipkazi of the Endorois Welfare Council and Lucy Claridge of the Minority Rights Group International* [Online], Available: [http://www.un-ngls.org/spip.php?page=amdg10&id\\_article=3607](http://www.un-ngls.org/spip.php?page=amdg10&id_article=3607), [Accessed: 7 December 2012].

<sup>200</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), paragraph 68.

<sup>201</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 155.



...as the African Charter recognises collective rights, formulated as rights of 'peoples', these rights should be available to sections of populations within nation states, including indigenous peoples and communities and the African Commission has indeed started to interpret the term 'peoples' in a manner that should allow indigenous people to also claim protection under Articles 19-24 of the African Charter.<sup>202</sup>

This paper does, largely due to the cases and specific situation it focuses, principally focus on the customary rights of the indigenous peoples of Africa. However, it must be kept in mind that "indigenous peoples" is, terminologically, subsidiary to "peoples." The rights enjoyed under the Charter, specifically articles 19-24, are not exclusive to "indigenous peoples."

In the Endorois case, the African Commission was forced to consider whether or not the complainants are, for the purposes of interpreting the African Charter, an indigenous people, and thus subject to certain protective measures. Peoples, as well as indigenous peoples are contentious terms. In fact, most African states deny the existence of indigenous peoples in Africa altogether, and only very few recognise them in national constitutions or legislations.<sup>203</sup> It is often argued, somewhat laconically, that "all Africans are indigenous"<sup>204</sup>. However, this paper will adopt the position of the African Commission that there are indigenous groups in Africa. Also, that these marginalised and vulnerable groups are in fact suffering even more than others as the rights treated in this paper are violated.<sup>205</sup>

In this context, some attention must be given to the principle of "self-identification". Some argue that, notwithstanding the fact that no African states have ratified ILOs Indigenous and Tribal Peoples Convention No. 169, this is part of international law and thus affects the interpretation of the African Charter.<sup>206</sup> According to the ACHPR Working Group of Experts on Indigenous Populations/Communities;

It could be argued that, irrespective of the fact that many African states do not recognise the existence of indigenous people within their territories and some take the view that the concept of indigenous people is not applicable in Africa, Article 1.2 of ILO Convention 169 of 1989 grants rights and protection to people identifying themselves as indigenous in Africa.<sup>207</sup>

The Commission notes that there is no universally accepted and unambiguous definition of this widely used concept. Nor is it reasonable to demand such a definition, due to the enormous diversity of indigenous cultures. This is also true for "peoples", the terminology employed by the African Charter. In placing a special emphasis on the

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<sup>202</sup> African Commission on Human and Peoples' Rights, 2005, Report of the African Commissions Working Group of Experts on Indigenous Populations/Communities, 2005. The African Commission, pages 112-113.

<sup>203</sup> Ibid., page 47.

<sup>204</sup> Ibid., page 60.

<sup>205</sup> Ibid., page 14.

<sup>206</sup> Ibid., pages 77-78.

<sup>207</sup> Ibid., page 112.

rights of peoples, the African Charter is both “innovative and unique”<sup>208</sup>. Corresponding human rights documents regularly employ significantly narrower definitions.<sup>209</sup>

The Commission notes, with respect to the difficulties inherent in the employed concepts, that:

while the terms “peoples” and “indigenous community” arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.<sup>210</sup>

However, the Commission noted that the term “indigenous” is “not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities”<sup>211</sup>.

This is the contextual background in which the African Commission has joined Erica-Irene Daes, chairperson of the United Nations Working group on Indigenous Populations, in advocating the modern day analytical understanding of the concept. In doing so, the Commission establishes the following four criteria for identifying indigenous peoples;

- 1.The occupation and use of a specific territory;
- 2.The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- 3.Self-identification, as well as recognition by other groups, as a distinct collectivity;
- 4.An experience of subjugation, marginalisation, dispossession, exclusion or discrimination.<sup>212</sup>

With regard to land rights and the first criteria above, the African Commission recognises the paramount importance of access to land. They emphasise that “the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.”<sup>213</sup>

The criteria and assumptions above have prevailed in cases such as the Endorois decision. This is, *de lege lata*, the way “peoples” is defined by the African commission. In the context of this paper, this constitutes an important demarcation of certain rights.

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<sup>208</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 149.

<sup>209</sup> Ibid., paragraphs 147-149.

<sup>210</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 148.

<sup>211</sup> Ibid., paragraph 149.

<sup>212</sup> African Commission on Human and Peoples’ Rights, 2005, Report of the African Commissions Working Group of Experts on Indigenous Populations/Communities, 2005. The African Commission, page 93.

<sup>213</sup> Ibid., page 89.

However, given the intricate nature of African land rights, this is not to say that only indigenous peoples may have legitimate claims on land. When discussing such claims, this paper refers at times to “indigenous peoples”, or solely “peoples”. This section is intended to illustrate that even such demarcations are sometimes fickle, and must be treated with great respect. Furthermore, no institutions are, or should be, static,<sup>214</sup> and the reasoning employed above may be modified by the African Commission in the future given new circumstances.

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<sup>214</sup> African Commission on Human and Peoples’ Rights, 2005, Report of the African Commissions Working Group of Experts on Indigenous Populations/Communities, 2005. The African Commission, page 111.

## 6. Soft law instruments relevant to tenure rights issues

This chapter will examine selected soft law instruments relevant to tenure rights issues. As these issues have been increasingly recognised by international institutions in recent years, numerous soft law instruments attempting regulation of tenure rights are available. This paper is primarily concerned with examining the state of recognition of informal tenure rights under international law, and the presentation below is thus limited to a few select instruments.

### 6.1. The Guiding Principles on Business and Human Rights

This paper has, thus far, focused on the requirements imposed on States under international human rights law. This section will address issues relating to the private entities investing in land. The land rush of recent years has sparked debates on the responsibilities of private corporations when operating in environments that are sensitive from a human rights perspective. Perhaps the most notable such development are The UN Guiding Principles on Business and Human Rights.

In the 1990s, the private sector expanded rapidly and transnational economic activity increased correspondingly. This development led to an increased awareness of the impact of business' on human rights issues. The United Nations did not fail to recognise the implications of the increased influence of business, and has since worked to address these issues.<sup>215</sup> However, regulating the practices of some 80,000 transnational enterprises, 800,000 subsidiaries and millions upon millions of national companies has not proven easy.<sup>216</sup>

Early initiatives attempting to impose human rights duties on companies directly under international law failed to achieve broad recognition. The Human Rights Council of the United Nations chose to establish a mandate for a Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises.<sup>217</sup> The Special Representative identified the lack of an "authoritative focal point"<sup>218</sup> as contributing to the inability to align efforts enough to actually move markets. As a solution to this issue, the Special Representative recommended that the Human Rights Council endorsed the "Protect, Respect and Remedy" Framework.<sup>219</sup>

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<sup>215</sup> Human Rights Council, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, page 3.

<sup>216</sup> Ibid., page 5.

<sup>217</sup> Ibid., page 3.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

### 6.1.1. The Protect, Respect and Remedy Framework and the Guiding Principles

The Protect, Respect and Remedy Framework was developed by the Special Representative during the first three years of his mandate.<sup>220</sup> The Framework rests on three pillars:

the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing in the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial.<sup>221</sup>

The Human Rights Council, as the first UN intergovernmental body ever to take a substantive policy decision on these issues, unanimously welcomed the Framework in accordance with the recommendations of the Special Representative.<sup>222</sup>

States bear the primary responsibility for preventing and addressing human rights issues, including those that are corporate-related. The first pillar of the framework recognises this principle of international law, but concludes that “overall state practice exhibits substantial legal and policy incoherence and gaps, which often entail significant consequences for victims, companies and states themselves.”<sup>223</sup> The Special Representative notes that perhaps the most common gap is the failure to enforce existing laws. Such policy incoherence is addressed in the proposals made by the Special Representative, promoting corporate respect for human rights and prevention of corporate-related abuse through;

- 1.Striving to achieve greater policy coherence and effectiveness across departments working with business, including safeguarding the state’s own ability to protect rights when entering into economic agreements.
- 2.Promoting respect for human rights when states do business with business, whether as owners, investors, insurers, procurers or simply promoters.
- 3.Fostering corporate cultures respectful of human rights at home or abroad.
- 4.Devising innovative policies to guide companies operating in conflict-affected areas; and
- 5.Examining the cross-cutting issue of extraterritoriality.<sup>224</sup>

International human rights law does not generally impose obligations to respect human rights on companies. The wording of the Framework, claiming that companies have the “responsibility” to respect human rights, acknowledges this as fact.<sup>225</sup> This standard of conduct is recognised in virtually every voluntary and soft-law instrument. According to the Special Representative, “a company’s responsibility to respect applies across its

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<sup>220</sup> Human Rights Council, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, page 3.

<sup>221</sup> United Nations, The UN “Protect, Respect and Remedy” Framework for Business and Human Rights [Online], Available: <http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf> [Accessed: 14 December 2012], page 1.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid., page 2.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

business activities and through its relationships with third parties connected with those activities - such as business partners, entities in its value chain, and other non-State actors and State agents.<sup>226</sup> The responsibility to respect encompasses all internationally recognised rights.<sup>227</sup> For the purposes of this paper, the recognition of corporate responsibilities in relationships with third parties, as well as the inclusion of all internationally recognised rights are of utmost importance. The implications of the Framework with regard to land rights will be treated further below. It will be argued that the development in international law concerning recognition of customary tenure affects the responsibilities of corporations in tandem with the duties of States.

To ensure compliance with the responsibility to respect, access to effective remedy is of paramount importance. Access to remedy can be achieved through judicial, administrative, legislative or other appropriate means. The state responsibility to protect includes taking appropriate steps to ensure access to effective remedy.<sup>228</sup>

The Protect, Respect and Remedy Framework has been endorsed by a variety of NGOs, Governments, business enterprises and associations, civil society and workers organizations, national human rights associations and investors. In the work of major international institutions, such as the OECD, the Framework has contributed to the development of separate initiatives.<sup>229</sup>

Based on the three pillars of the Framework, the Special Representative has introduced a set of Guiding Principles on Business and Human Rights. These principles are not a silver bullet targeted at business malpractice with regards to human rights. The Special Representative explains that;

The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.<sup>230</sup>

#### **6.1.1.1. State responsibilities**

Although this section is primarily to deal with business and human rights, some attention must be awarded to the State responsibilities imposed by the Guiding Principles.<sup>231</sup> The focus of these principles is the State duty to protect against human rights abuses by third parties. Hence, the implications of these responsibilities differ from those examined above.

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<sup>226</sup> United Nations, The UN "Protect, Respect and Remedy" Framework for Business and Human Rights [Online], Available: <http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf> [Accessed: 14 December 2012], page 2.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> Human Rights Council, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, page 4.

<sup>230</sup> Ibid. page 5.

<sup>231</sup> United Nations, The UN "Protect, Respect and Remedy" Framework for Business and Human Rights [Online], Available: <http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf> [Accessed: 14 December 2012], Page 1.

Guiding Principle number 1 establishes a standard of conduct for Governments, based on the State duty to protect against human rights abuses by third parties. It recognises that States are not per se responsible for human rights violations by private actors. However, it argues that States may be found in violation of obligations under international law if failing to take appropriate steps to prevent, investigate, punish and redress abuse by private actors. Notably, States do generally have discretion with regard to these steps.<sup>232</sup>

Principle number 2 recommends that States clearly set out the expectation that all business enterprises domiciled in their territory, or otherwise under their jurisdiction, respect human rights throughout their operations. Whilst not currently required under international law, the Special Representative identifies significant policy reasons for such regulation of extraterritorial activities.<sup>233</sup> Investments in the land of developing countries are often driven by multinational or transnational companies with domicile in significantly more robust legal environments than the target countries offer. Hence, regulation of the extraterritorial activities of investors can contribute significantly in addressing human rights violations related to land issues.

Principle number 3 addresses operational issues relating to the national policy environment in the context of business and human rights. For the purposes of this paper, perhaps the most important part of this principle is the commentary on environments conducive to respect for human rights. The Special Representative identifies the fallacy of assuming that businesses invariably prefer, or benefit from, inaction.<sup>234</sup> As treated above, weak or non-existent protection of customary tenure rights constitute perhaps one of the most pressing problems with regard to land rights in Sub-Saharan Africa. This paper will argue that even though investors, sadly, target countries with weak policy environments<sup>235</sup>, such investments often fail to generate equitable benefits or to succeed at all.<sup>236</sup> The special representative specifically argues that "... greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises."<sup>237</sup>

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<sup>232</sup> Human Rights Council, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, Principle 1, pages 6-7.

<sup>233</sup> Ibid., page 7.

<sup>234</sup> Ibid., page 8.

<sup>235</sup> Blas, Javier, *World Bank warns on 'farmland grab'* [online], Financial times, Available: <http://www.ft.com/cms/s/0/62890172-99a8-11df-a852-00144feab49a.html?ftcamp=rss#axzz2Ek34A2HR>, [Accessed: 13 December 2012].

<sup>236</sup> Deininger, Klaus & Byerlee, Derek, 2011, *Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?*, The International Bank for Reconstruction and Development/The World Bank, page 71.

<sup>237</sup> Human Rights Council, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, page 8.

### **6.1.1.2. Corporate responsibilities**

The Guiding Principles, in Principle 11, introduces a global standard of conduct for all business enterprises, regardless of where they operate. In addition to acting in compliance with national laws and regulations protecting human rights, businesses are thus expected to respect human rights. The Special Representative identifies some key sources of international human rights law, including the International Bill of Human Rights, that companies are to respect. In addition to these internationally recognised benchmarks, the Special Representative notes that businesses may need to consider additional standards, such as instruments protecting the rights of indigenous peoples and other vulnerable groups.<sup>238</sup> It should be noted that the issue of responsibilities promoted by the Guiding Principles is distinct from issues of liability and enforcement discussed elsewhere. This paper will argue not only that imposing such responsibilities on businesses is desirable, but also that they are to consider regionally accepted human rights instruments, such as the African Charter. Relying solely on UN instruments is an inadequate solution to the peculiar dilemmas of the African continent.

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<sup>238</sup> Human Rights Council, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, Principle 12, page 13-14.



## 6.2. The Voluntary Guidelines on the Governance of Tenure

In May of 2012, a landmark agreement was struck between representatives of numerous nations, corporations and NGOs alike.<sup>239</sup> The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security<sup>240</sup> are the result of an inclusive participatory process, involving States, government institutions, civil society, private sector, academia and UN agencies. José Graziano da Silva, Director-General of the FAO, spoke of these guidelines saying that:

giving poor and vulnerable people secure and equitable rights to access land and other natural resources is a key condition in the fight against hunger and poverty. It is a historic breakthrough that countries have agreed on these first-ever global land tenure guidelines. We now have a shared vision. It's a starting point that will help improve the often dire situation of the hungry and poor.<sup>241</sup>

This paper examines land rights, focusing on the often indigent peoples of Sub-Saharan Africa. Eradicating poverty and hunger is, as explained above, the first of the Millennium Development Goals established by the United Nations. The Voluntary Guidelines on tenure are consistent with, and draw on, this important framework.<sup>242</sup> In this respect, the Voluntary Guidelines concur with the widely held belief that investments in agriculture are essential to improving food security.<sup>243</sup>

The Voluntary Guidelines on Tenure is a set of far-reaching guidelines that aim “to promote food security and sustainable development by improving secure access to land, fisheries and forests and protecting the rights of millions of often very poor people.”<sup>244</sup> Although not legally binding, these guidelines are of paramount importance in the process of achieving a far-reaching and equitable land rights system.

### 6.2.1. Key provisions of the Voluntary Guidelines on the Governance on Tenure

This section will treat the key provisions of the Voluntary Guidelines on Tenure, divided into subsections treating guidelines for States and business. The guidelines are

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<sup>239</sup> Food and Agriculture Organization, 11 May 2012, Media centre - Countries adopt global guidelines on tenure of land, forests, fisheries [Online], Available: <http://www.fao.org/news/story/en/item/142587/icode/>, [Accessed: 14 December 2012].

<sup>240</sup> Henceforth referred to as The Voluntary Guidelines on Tenure.

<sup>241</sup> Food and Agriculture Organization, 12 May 2012, Countries adopt global guidelines on tenure of land, forests, fisheries, Rome, Food and Agriculture Organization, Available: <http://www.fao.org/news/story/en/item/142587/icode/>, [Accessed: 11 October 2012].

<sup>242</sup> Food and Agriculture Organization, 2012, Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, Food and Agriculture Organization, Preface page VI.

<sup>243</sup> Food and Agriculture Organization, 2012, Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, Food and Agriculture Organization, Guideline 12.1, page 20.

<sup>244</sup> Food and Agriculture Organization, 11 May 2012, Media centre - Countries adopt global guidelines on tenure of land, forests, fisheries [Online], Available: <http://www.fao.org/news/story/en/item/142587/icode/>, [Accessed: 14 December 2012].

voluntary,<sup>245</sup> and legally non-binding<sup>246</sup>. They affirm that implementation of the Guidelines should be consistent with obligations under existing human rights law instruments.<sup>247</sup> Guideline 2.3 further clarifies the intended usage of the Guidelines;

These Guidelines can be used by States; implementing agencies; judicial authorities; local governments; organizations of farmers and small-scale producers; of fishers, and of forest users; pastoralists; indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned to assess tenure governance and identify improvements and apply them.<sup>248</sup>

In essence, the Voluntary Guidelines on Tenure are to be used by any participant in land related transactions who wishes to abide by the notion of responsible investment upheld by the international community.

### **6.2.1.1. The State responsibility to recognise, respect and protect legitimate tenure rights**

Guideline 3.1 declares the responsibilities of States with regard to tenure rights. The foundation of these responsibilities is the duty to;

Recognize and respect all legitimate tenure rights holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure rights holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others, and to meet the duties associated with tenure rights<sup>249</sup>.

In addition, States should protect tenure rights holders from the arbitrary loss of their rights. In this context, the Voluntary Guidelines explicitly mention protection from forced evictions inconsistent with national and international law. The sentiment of the African Commission, The European Court of Human Rights and other international human rights law institutions<sup>250</sup> agree that forced evictions are in violation of international law.

The Voluntary Guidelines imposes upon States the responsibility to recognise existing legitimate tenure rights, not currently protected by formal national law. Such protection includes providing the holders of all forms of tenure with a degree of tenure security.<sup>251</sup> This includes, according to Guideline 5.3, the recognition, promotion and protection of

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<sup>245</sup> Food and Agriculture Organization, 2012, Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, Food and Agriculture Organization, Guideline 2.1 page 2.

<sup>246</sup> Food and Agriculture Organization, 11 may 2012, Media centre - Countries adopt global guidelines on tenure of land, forests, fisheries [Online], Available: <http://www.fao.org/news/story/en/item/142587/icode/>, [Accessed: 14 December 2012].

<sup>247</sup> Food and Agriculture Organization, 2012, Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, Food and Agriculture Organization, Guideline 1.1, page 1.

<sup>248</sup> Ibid., Guideline 2.3, page 2.

<sup>249</sup> Ibid., Guideline 3.1 (1), page 3.

<sup>250</sup> E.g. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 218.

<sup>251</sup> Food and Agriculture Organization, 2012, Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, Food and Agriculture Organization, Guideline 4.4 page 6.

customary tenure rights.<sup>252</sup> Thus, the Voluntary Guidelines reinforces the notion of customary tenure rights as legitimate, fully enforceable land rights. Remembering the trust arrangement rejected by the African Commission in the Endorois case, tenure security is an integral part of an effective tenure rights regime.

Recognition, protection and promotion of customary tenure rights is further promoted in Guideline 7.1. Special attention is given to gathering rights, and other subsidiary rights that may exist in the customary tenure systems of, for instance, Sub-Saharan Africa.<sup>253</sup> The Guidelines recommend an inclusive consultative process, with the participation of indigenous peoples and other communities with customary tenure, when allocating or recognising formal title to land.

The practices concerning collectively owned, used and managed land, sometimes referred to as commons, have been explained in chapter 4. The Voluntary Guidelines has addressed these issues as well, in recognising such practices and recommending that they as well be recognised and protected in land allocation processes.<sup>254</sup>

#### **6.2.1.2. Private entities - Respect and due diligence standards**

With regard to business enterprises and other non-state actors, the Voluntary Guidelines lay down “a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others.”<sup>255</sup> The reference to business due diligence may be interpreted as being inspired by the UN Guiding Principles on Business and Human Rights. The due diligence regime of the Voluntary Guidelines is indeed similar to that of the Guiding Principles. Both instruments promote risk management systems to prevent address adverse impacts on human rights.<sup>256</sup> The Guiding Principles on Business and Human Rights are far more elaborate on the matter of due diligence standards. However, as the Voluntary Guidelines expressly require respect for legitimate tenure rights<sup>257</sup>, whereas the Guiding Principles merely sets forth a minimum standard of respect for internationally recognised human rights such as the International Bill of Human Rights,<sup>258</sup> the standards of the Voluntary Guidelines may prove to be more pertinent to the context of this paper. However, the scope of the Guiding Principles, and the due diligence standards set forth in this instrument, are subject to interpretation, and may also be applied to tenure rights issues.

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<sup>252</sup> Food and Agriculture Organization, 2012, Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, Food and Agriculture Organization, Guideline 5.3, page 8.

<sup>253</sup> Ibid., Guideline 7.1, page 11.

<sup>254</sup> Ibid., Guideline 8.3 page 12.

<sup>255</sup> Ibid., Guideline 3.2, page 4.

<sup>256</sup> See Voluntary Guideline 3.2 and UN Guiding Principle 17.

<sup>257</sup> Food and Agriculture Organization, 2012, Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, Food and Agriculture Organization, Guideline 3.2, page 4.

<sup>258</sup> Human Rights Council, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, Principle 12, page 13-14.

### 6.2.1.3. Transfers and other changes to tenure rights and duties

Some customary tenure regimes of Sub-Saharan Africa have remained unchanged since time immemorial. Only recently, as foreign investors have become interested in the land of less developed countries, have land rights issues been widely recognised. It can be argued that whether or not a subsistence-farmer, or pastoralist, with limited or no access to financial institutions and markets, has formal title to land is perhaps not the most pressing development issue of today. This may be true, until land rights are challenged, or even transferred. The increased interest in land in recent years has led to land transfers on an unprecedented scale. Transfers of land are, to some extent, what brings attention to the existing difficulties emanating from the tenure systems of Sub-Saharan Africa. Hence, the effort of the Voluntary Guidelines to introduce equitable principles for the transfers and reallocations of land is of paramount importance to the core issue of land rights.

The Voluntary Guidelines emphasise the importance of fair and transparent lease and sale markets for land.<sup>259</sup> States are required to “take measures to prevent undesirable impacts on local communities, indigenous peoples and vulnerable groups that may arise from, *inter alia*, land speculation, land concentration and abuse of customary forms of tenure”<sup>260</sup>. These substantial duties on States clearly emphasise the need for States to increase their awareness of land transfer issues, and to align national regulation of land use with a broader development agenda.<sup>261</sup> Furthermore, the Voluntary Guidelines expressly recognises the importance of small-scale producers for national food security and social stability, and the subsequent need to protect their rights in tenure markets.

The section on transfers included in the Voluntary Guidelines contains a number of suggestions on investment models that are believed to yield equitable benefits. All parties to the Voluntary Guidelines represent certain special interests, which certainly contribute to their opinion on preferability of different investments options. The models promoted in the Voluntary Guidelines on Tenure are the result of a compromise between such interests, and will thus, for the purposes of this paper, represent a balanced and relatively unbiased suggestion as to preferable investment models.

The Voluntary Guidelines on Tenure concur with the commonly held opinion that responsible investment, both private and public, is essential to improving food security.<sup>262</sup> State support directed to existing smallholders and smallholder sensitive investments are advocated, in recognition of the significant share of national food security provided by these producers.<sup>263</sup> Furthermore, investments should be conducted in a transparent fashion,<sup>264</sup> respecting legitimate tenure holders and human rights obligations.<sup>265</sup> Safeguarding the interests of legitimate tenure holders could be

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<sup>259</sup> Food and Agriculture Organization, 2012, Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, Food and Agriculture Organization, Guideline, 11.1, page 19.

<sup>260</sup> Ibid., Guideline 11.2, page 19.

<sup>261</sup> Ibid., Guidelines 11.1-11.2, pages 19-20.

<sup>262</sup> Ibid., Guideline 12.1.

<sup>263</sup> Ibid., Guideline 12.2.

<sup>264</sup> Ibid., Guideline 12.3.

<sup>265</sup> Ibid., Guideline 12.4.

achieved through imposing certain approval mechanisms with regard to substantial land transfers, or introducing ceilings for such transactions.<sup>266</sup> Moreover, States should “consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors”<sup>267</sup>.

In essence, the Guidelines promote a smallholder sensitive participatory and transparent process. This model will be subject to further analysis in the concluding statements offered in this paper.

Restitution and compensation also requires some brief attention in this section. The Voluntary Guidelines suggest that states should consider, given the national context, providing restitution for the loss of legitimate tenure rights.<sup>268</sup> When possible, restitution should be provided in the form of return of the original parcels or holdings. If such assets cannot be returned, prompt and just compensation in the form of money, and/or alternative parcels or holdings should be provided.<sup>269</sup>

As with any commoditized asset, fair and equitable valuation of land is fundamental to achieving an equitable outcome when the asset is traded. The Voluntary Guidelines declare that it is the responsibility of the State to ensure that appropriate systems for valuation of land are used in all relevant contexts.<sup>270</sup> Furthermore, policies taking into account non-market values, e.g social, cultural, religious spiritual and environmental values, are recommended.<sup>271</sup> The Voluntary Guidelines promote transparency in the valuation of tenure rights, including providing public access to sale prices and other relevant information.<sup>272</sup>

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<sup>266</sup> Food and Agriculture Organization, 2012, Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, Food and Agriculture Organization, Guideline 12.6.

<sup>267</sup> Ibid., Guideline 12.6.

<sup>268</sup> Ibid., Guideline 14.1 page 25.

<sup>269</sup> Ibid., Guidelines 14.2 page 25.

<sup>270</sup> Ibid., Guideline 18.1, page 30.

<sup>271</sup> Ibid., Guideline 18.2, page 31.

<sup>272</sup> Ibid., Guideline 18.3 page 31.

## 7. Concluding statements

This paper has shown that customary tenure systems are the most important mechanisms for accessing land in poor rural Africa. Roughly 90 percent of the rural poor in Africa access land through these mechanisms. In an environment where land access is essential to survival, to individuals as well as to entire cultures, the extent to which customary tenure systems have been overlooked in national as well as international law is frankly surprising. Regardless of how well these systems fit with the Western-centric notions imported along with the inherited legal systems of postcolonial Africa, this blatant disregard for ancient rights cannot be condoned.

From the evidence presented in this paper, it is clear that investments in the land of developing countries have increased to reach staggering proportions. Expressing concerns about unbridled transfers of land in sensitive legal and political environments, such as those in Sub-Saharan Africa, seems reasonable. This paper has offered examples of investments in land leading to civil unrest and, perhaps more importantly in the context of this paper, increased poverty and hunger. Nevertheless, there seems to be significant consensus in the international community that investments in agriculture are perhaps necessary in promoting the agricultural development required to feed an increasing population globally. Recent initiatives, such as the Voluntary Guidelines on the Responsible Tenure of Land, Fisheries and Forests in the Context of National Food Security, focus on small-holder sensitive solutions. Experience from past initiatives indicate that large-scale agricultural or agro-industrial projects are not the preferable *modus operandi* for investments in land. This is certainly true for the populations affected by investments, and perhaps also for investors, as such projects have dissatisfactory success rates. The principal theme of this paper, however, is not the desirability of investments in land as such. The opinions offered above are the extent to which this paper will take a stand on this issue.

Increased interest in land-based investments may, as outlined in this paper, be beneficial from a development perspective. However, investing in the land of developing countries raises some questions that have until recently remained unanswered. These questions can be posed simplistically, like; Who owns Africa; or as this paper has done, to what extent are the customary tenure systems employed in Africa recognised in international law?

Recent trends in international law indicate that change is on the horizon. The United Nations, along with other powerful international institutions, have recognised this issue and their policies are inching towards equitable recognition of customary tenure rights. Moreover, international adjudicators in the developed and the developing world alike, have decided in favour of customary rights holders on a number of occasions.

The African Commission on Human and Peoples' Rights belong to those international institutions that have taken a progressive stand on this matter. In the Endorois decision, the African Commission has argued intently for the recognition of customary tenure rights as fully valid property rights. The Endorois decision is an illustrative example of the interconnectedness of land rights and other fundamental human rights issues, and has been employed as such throughout this paper.

Despite Governments arguing that there are no indigenous peoples in Africa, this paper has adopted a contrary opinion, shared as it would be shown by the African Commission and others. Vulnerable indigenous groups, such as the Endorois community in Kenya, are an integral part of the issues discussed in this paper. Their way of life, and hence the indigenous cultures as such, is often intimately linked to the land they have traditionally used and inhabited. This is true for more sedentary farming communities as well as pastoralists, sharing the common trait that not only the land used for housing is an important asset. The commons, tracts of land that are collectively owned and managed under numerous customary tenure regimes, is perhaps the land that is most severely encroached upon. Tragically, this land is often a prerequisite for the survival of indigenous cultures. Depriving these peoples of access to, or equitable compensation for the loss of, such land is a violation of their ancestral rights.

With regard to the extent of recognition of customary tenure rights in international law, the principal research question of this paper, the evidence presented above provide a rather unambiguous answer. Using, once again, the words of the African Commission to summarise the subject matter of this paper;

1. traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title;
2. traditional possession entitles indigenous people to demand official recognition and registration of property title;
3. the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and
4. the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.<sup>273</sup>

Thus, in the African context that is the focus of this paper, customary rights to land shall be respected regardless of legal titles, and restitution shall be offered in case of loss of such rights.<sup>274</sup> However, this paper also shows that practices on the ground are often far from compliant with the principles employed in non-binding, international law. Access to adjudication and remedy in these matters is limited, and the progressive forces of the international community have yet to achieve complete recognition of these principles. Thus, the answer to the principal research question is clear yet open-ended. Recent trends in international law clearly turn towards an equitable system for recognition of customary tenure rights, but *de facto* implementation is still wildly insufficient.

Ethiopia has been used to illustrate the situation on the ground in countries where foreign investments in land are made. Having examined trends in international law, it could be argued that the practices of the Ethiopian government, as outlined in above, are in violation of international law. This paper is not a case study, it has not examined the investments in the Gambella region in any greater detail. Highlighting the situation in

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<sup>273</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/2003, paragraph 209.

<sup>274</sup> Ibid.

Ethiopia was solely for illustrative purposes. It is an example of practices, on the ground, in the region this paper examines. In this capacity, the situation in Ethiopia supports the argument that land rights are intimately connected to fundamental human rights issues. Furthermore, this example indicates that the situation on the ground is, in some cases, far from the aspirations of the international community as expressed above.

With regards to economic viability and the allusive beneficial effects on development, the 2011 Report by the World Bank offers some alarming information. It states that:

In Ethiopia, many project proposals, even in regions with more advanced governance, only vaguely indicate intended land uses and lack key information, such as the value of the investment and the type of production. Moreover, checks on economic viability do not exist.<sup>275</sup>

In light of what has been reviewed considering the overall desirability of investments, such data is hardly encouraging.

As the developments examined in this paper are largely investment-driven, the role of business' in land investments has been examined as well. The United Nations Guiding Principles on Business and Human Rights indicate a change in perspective in international law, towards increased corporate accountability. As the principles are not legally binding, they naturally do not impose any actual duties. However, clarifying such responsibilities can be of significant importance in and of itself. Corporations are exposed to a multitude of legal and operational risks when pursuing land-based investments in the developing world. One such risk is principally reputational, and the Guiding Principles on Business and Human Rights are important in this respect. International frameworks that clarify the responsibilities of corporations and States alike provide a yardstick to be used for assessing their practices in public. That such yardsticks are fair, balanced and equitable is essential when demanding broad adherence. Multi-stakeholder participatory processes, such as those described in this paper, are highly conducive to such results.

In conclusion, land rights are intimately linked to core human rights issues on the African continent. In particular with regard to indigenous cultures, the two appear inseparable. Having examined decisions by the African Commission and other relevant international tribunals in conjunction with applicable instruments of international law, this paper argues that customary tenure rights shall be recognised and respected. Granted that such rights are respected, and equitable compensation offered in cases of dispossession, land-based investments can contribute to eradicating hunger and poverty in Sub-Saharan Africa. By contrast, failure to recognise customary tenure rights could seriously undermine any such aspirations.

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<sup>275</sup>Deininger, Klaus & Byerlee, Derek, 2011, Rising Global Interest in Farmland – Can it yield sustainable and equitable benefits?, The International Bank for Reconstruction and Development/The World Bank, page 60.



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