

Middlesex University Research Repository

An open access repository of

Middlesex University research

<http://eprints.mdx.ac.uk>

Gilbert, Jérémie and Keane, David (2012) The new scramble for Africa: towards a human-rights based approach to large-scale land acquisitions in the Southern African Development Community (SADC) sub-region. In: Southern African Development Community land issues: towards a new sustainable land relations policy. Chigara, Ben, ed. Routledge, UK, pp. 144-168. ISBN 9780415587044. [Book Section]

This version is available at: <https://eprints.mdx.ac.uk/7246/>

Copyright:

Middlesex University Research Repository makes the University's research available electronically.

Copyright and moral rights to this work are retained by the author and/or other copyright owners unless otherwise stated. The work is supplied on the understanding that any use for commercial gain is strictly forbidden. A copy may be downloaded for personal, non-commercial, research or study without prior permission and without charge.

Works, including theses and research projects, may not be reproduced in any format or medium, or extensive quotations taken from them, or their content changed in any way, without first obtaining permission in writing from the copyright holder(s). They may not be sold or exploited commercially in any format or medium without the prior written permission of the copyright holder(s).

Full bibliographic details must be given when referring to, or quoting from full items including the author's name, the title of the work, publication details where relevant (place, publisher, date), pagination, and for theses or dissertations the awarding institution, the degree type awarded, and the date of the award.

If you believe that any material held in the repository infringes copyright law, please contact the Repository Team at Middlesex University via the following email address:

eprints@mdx.ac.uk

The item will be removed from the repository while any claim is being investigated.

See also repository copyright: re-use policy: <http://eprints.mdx.ac.uk/policies.html#copy>

THE NEW SCRAMBLE FOR AFRICA: TOWARDS A HUMAN RIGHTS-BASED APPROACH TO LARGE-SCALE LAND ACQUISITIONS IN THE SADC REGION

- *Dr Jérémie Gilbert and Dr David Keane**

Published in: Ben Chigara (ed.), *Southern African Development Community Land Issues: Towards a New Sustainable Land Relations Policy* (Routledge, August 2011)

<http://www.routledge.com/books/details/9780415587044/>

“...and that has increased; this unappeasable hunger for land.”

- JOHN B. KEANE, ‘THE FIELD’ (1965)

INTRODUCTION

Large-scale land acquisitions are a direct result of the vagaries of the global food market, seriously compromised by the 2007-2008 crisis which led to food riots in over twenty states.¹ In what has been labelled a ‘land grab’, there has been a sharp acceleration in acquisition of lands in Africa, and globally, by foreign investors in developing countries seeking to produce crops for export. This rush for land is being generated by several factors but reflects concerns of states for their food security, as well as the increasing demand for biofuels globally.² Generally, while large-scale land acquisitions have been predominantly associated with the recent strive to acquire land for food production, other forms of agribusiness are affected such as mining, petroleum, forestry and tourism. However the present chapter focuses on food as the central concern emerging from the phenomenon.

Investment in foreign farms is not new, but what distinguishes the recent acquisitions is their scale - worth up to US\$30 billion and involving some 20 million hectares of farmland in poor countries in Africa, Cambodia, Pakistan and the Philippines, according to the International Food Policy Research Institute.³ Africa is particularly touched, to the extent that the rush to acquire farming land has been referred to as the ‘new scramble for Africa’.⁴ This makes direct reference to the colonial ‘scramble for Africa’ when five European powers divided most of the land in Africa amongst themselves, with total disregard for the rights of the local populations.⁵ The first parallel is that foreign companies, investors and States are taking control of large areas of land, with the ‘scramble’ for food production and access to natural resources rather than political control. A further

* Senior lecturer in law, Middlesex University, London; lecturer in law, Middlesex University, London.

Comments: j.gilbert@mdx.ac.uk and d.p.keane@mdx.ac.uk

¹ Ama Biney, ‘Land Grabs: Another Scramble for Africa’, 448 *Pambazuka*, 17 September 2009, available at: <http://pambazuka.org/en/category/features/58809>

² Shepard Daniel and Anuradha Mittal, ‘The Great Land Grab: Rush for World’s Farmland Threatens Food Security for the Poor’, (Oakland Institute, 2009), available at: http://www.oaklandinstitute.org/pdfs/LandGrab_final_web.pdf

³ Ama Biney, *supra* n.1.

⁴ Thomas Pakenham, ‘The Scramble for Africa’, (London: Weidenfeld and Nicolson, 1991). Pakenham notes that the term ‘Scramble for Africa’ was apparently coined in 1884. Modern historians do not agree what period it covers, but he uses it to embrace the final hectic phase of partition, from 1876 to 1912 (p.xxvii).

⁵ *Ibid.*, xxiii.

parallel is the haste inherent in the word ‘scramble’; it should be recalled that in just half a generation Europe controlled virtually the whole continent of Africa, and it is feared that the contemporary process could be similarly swift.

A further distinguishing feature of large-scale land acquisitions is the involvement of governments. Foreign farming investment in the past was conducted by firms, but present acquisitions can also be governments. The complexity of the land deals is enhanced by the fact that “there is no single dominant model for financial and ownership arrangements but rather a wide variety of locally specific arrangements among governments and the private sector.”⁶ Foreign Direct Investment (FDI) is cited by host governments as the reason why they are inviting land acquisitions, with the bargaining power on the side of the investors, especially given the support of the host state or local elites.⁷ Hence the July 2009 meeting of the G8 promised a code of conduct based on principles of best practice to provide greater regulation, with support from the African Union.⁸ Grassroots protests are pointing to “neo-liberal policies of transnational corporations, the WTO and large-scale corporatisation of farming” as directly responsible for an alarming, unregulated process.⁹

The best-known example of a large-scale land acquisition was the proposed land lease by Daewoo Logistics Corporation in Madagascar of 1.3 million hectares, about half of Madagascar’s arable land, to grow half of South Korea’s corn, which received significant media attention.¹⁰ The project finally collapsed due to the heavy civil society backlash against the lease, causing the resignation of the country’s president.¹¹ But this is only the beginning, it seems. For example the Gulf states, “pioneers of this agri-colonialism”, have found that they can no longer rely on regional and global markets to feed their populations and have hastened to secure food supplies.¹² Qatar, with only one percent of its land suitable for farming, has purchased 40,000 hectares in Kenya for crop production. China has purchased 101,171 hectares in Zimbabwe in June 2008 and invested 800 million dollars in Mozambique to modernize agriculture for export rice production.

The chapter seeks a rights-based approach to large-scale land acquisitions. Section I will examine the right to food, and in particular the mandate of the Special Rapporteur on the Right to Food, Olivier de Schutter, who has produced a report examining the issues surrounding acquisitions with a proposed set of minimum principles for negotiations between states and corporations. Section II analyses the right to land as a human right, positing that the system of communal land ownership in the SADC region is endangered by the rush to generate FDI through land leases. It also raises the question of indigenous and pastoralist land rights. Section III examines the right to development, which is used as a justification for leasing lands. The section highlights the concurrent obligations on states to fulfil the right to development through recognition of interlinking rights of peoples to control decisions which affect their economic and social development. Section IV isolates transnational corporations as non-state actors who must be accountable for the process. The difficulties in the home-host state dynamic, and the potential extraterritorial jurisdiction of the International Covenant on Economic, Social and Cultural Rights, are mooted.

⁶ Lorenzo Cotula, Sonja Vermeulen, Rebeca Leonard and James Keeley, ‘Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa’, (International Institute for Environment and Development, with Food and Agriculture Organisation and International Fund for Agriculture Development, 2009), 35, available at: http://www.ifad.org/pub/land/land_grab.pdf

⁷ Ruth Meinzen Dick, International Fund for Agriculture Development, quoted in Ama Biney, *supra* n.1.

⁸ Ama Biney, *Ibid.*

⁹ See for example the Asian Peasant Coalition, www.asianpeasant.org

¹⁰ See for example BBC News, ‘Madagascar Leader Axes Land Deal’, 19 March 2009, available at: <http://news.bbc.co.uk/1/hi/world/africa/7952628.stm>

¹¹ *Ibid.*

¹² Ama Biney, *supra* n.1.

Overall the aim is to signal the alarming move towards large-scale land acquisitions in the SADC region, and the potential for human rights to provide a regulatory framework. It is suggested that the issue could galvanise the international movement towards non-state actor accountability, which has been evolving for several decades.

1. THE RIGHT TO FOOD

Colin Gonsalves writes: “there can be no more fundamental right for all people than the right to food.”¹³ It is a volatile issue that transcends hunger and involves nations and large corporations.¹⁴ The 2008 global food crisis has accelerated the process of large-scale acquisitions, with major food-importing and capital-exporting states losing confidence in the global market as a stable and reliable source of food.¹⁵ The right to food discourse has directly engaged with the question of large-scale land acquisitions through a recent report by the present UN Special Rapporteur on the Right to Food, Olivier de Schutter.¹⁶

The right is found in a range of international instruments and has its origins in Article 25 of the Universal Declaration of Human Rights (UDHR).¹⁷ That provision declared that everyone has the right to an adequate standard of living, “including food”. This proclamation was realised in the 1966 covenants, with the right to food considered an implied corollary of the right to life under the International Covenant on Civil and Political Rights (ICCPR).¹⁸ The right has its strongest legal basis in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁹ According to Article 11(1), states parties expressly recognize the right of everyone to an adequate standard of living “including adequate food”. Article 11(2) proclaims the “fundamental right of everyone to be free from hunger”, with Article 11(2)(a) requiring states “to improve methods of production, conservation and distribution of food”, in particular reforming agrarian systems to achieve the most efficient use of natural resources; and Article 11(2)(b) implementing “an equitable distribution of world food supplies”.

The Committee on Economic, Social and Cultural Rights characterises the provision as the human right to *adequate* food, and its General Comment 12 in 1999 sets out the Committee’s expectations for the fulfilment of this right.²⁰ The General Comment was the result of a request by Members States during the 1996 World Food Summit for a better definition and understanding of the

¹³ Colin Gonsalves, ‘The Right to Food’, (Delhi: Human Rights Law Network, 2004), 317.

¹⁴ *Ibid*, 310.

¹⁵ Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, ‘Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge’, UN Doc. A/HRC/33/13/Add.2., para.2.

¹⁶ *Ibid*.

¹⁷ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

¹⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. See further Smita Narula, ‘The Right to Food: Holding Global Actors Accountable under International Law’, 44 *Columbia Journal of Transnational Law* (2006), 691-800, at 706.

¹⁹ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

²⁰ Committee on Economic, Social and Cultural Rights, ‘General Comment 12: The Right to Adequate Food (Article 11)’, UN Doc. E/C.12/1999/5, 12 May 1999.

principles inherent in the right. It is premised on the belief that the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food.²¹

The right is realised when “every man, woman and child, alone or in community with others, has the physical and economic access at all times to adequate food or means for its procurement.”²² The concept of ‘adequacy’ is particularly significant as it underlines that the right must not be interpreted in a narrow restrictive sense, equivalent to a minimum package of calories, proteins and other nutrients. The meaning of ‘adequacy’ is determined by prevailing social, economic, cultural, climatic, ecological and other factors, which involves the idea of long-term availability and accessibility.²³ Thus the Committee considers that the core content of the right implies:

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.²⁴

The right to adequate food imposes three levels of obligations on states parties, the obligation to respect, protect and fulfil.²⁵ ‘Respect’ is negative in that states parties are obliged not to take any measures resulting in the prevention of access to adequate food. ‘Protect’ requires positive measures to ensure enterprises or individuals do not deprive individuals of their access to adequate food. ‘Fulfil’ is the widest obligation, meaning states must actively engage in activities intended to strengthen access to resources and means to ensure their livelihood, including food security. It also implies the direct provision of the right.²⁶ However the Committee recognises that the right “will have to be realized progressively”.²⁷

Violations of the right occur when a state party is unwilling to comply, and has demonstrated that every effort has been made to use all the resources at its disposal in an effort to satisfy these minimum obligations. The state has the burden of proof in this regard.²⁸ Examples include the “adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others”.²⁹ States must regulate the activities of the private business sector and civil society to ensure conformity with the right to food.³⁰ The right must be especially fulfilled for vulnerable population groups.³¹ The Committee emphasises the need for “the adoption of a framework law as a major instrument in the implementation of the national

²¹ *Ibid.*, para.5.

²² *Ibid.*, para.6.

²³ *Ibid.*, para.7.

²⁴ *Ibid.*, para.8.

²⁵ These three levels were developed by Asbjorn Eide in an influential study for the then UN Sub-Commission. See UN ECOSOC Sub-Commission on the Prevention of Discrimination and Protection of Minorities, ‘The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right’, UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987.

²⁶ General Comment 12, para.15.

²⁷ *Ibid.*, para.6.

²⁸ *Ibid.*, para.17.

²⁹ *Ibid.*, para.19.

³⁰ *Ibid.*, para.27.

³¹ *Ibid.*, para.28.

strategy concerning the right to food.”³² Effective judicial remedies at the national or international level must be provided.³³ The World Bank and International Monetary Fund (IMF) are included as addressees in the General Comment.³⁴

In 2002, the UN Special Rapporteur on the Right to Food elaborated the definition of the right as follows:

to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear.³⁵

In 2004, the Food and Agricultural Organisation (FAO) issued its Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.³⁶ These do not establish legally-binding obligations but rather act as a human rights-based practical tool addressed to all States.³⁷

The present Special Rapporteur, Olivier de Schutter, has issued a recent study on the question of large-scale land acquisitions, which proposes a series of principles and measures to ensure human rights standards are protected.³⁸ He signals that the right to food framework is important for the debate on large-scale land acquisitions or leases, arguing in terms of potential violations:

The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply-priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor.”³⁹

In using the language of violations, the Special Rapporteur is addressing all states and not only those that have ratified the ICESCR and have a concurrent obligation under Article 11. Thirteen out of the fifteen SADC states have ratified the Covenant; Angola, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Seychelles, South Africa, Swaziland,

³² *Ibid.*, para.29.

³³ *Ibid.*, para.32.

³⁴ *Ibid.*, para.41.

³⁵ Quoted in Food and Agricultural Organisation (FAO), ‘The Human Right to Adequate Food: Guiding Principles’, available at: http://www.fao.org/righttofood/principles_en.htm

³⁶ Food and Agricultural Organisation (FAO), ‘Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security’, 24 November 2004, available at: <http://www.fao.org/docrep/meeting/008/J3345e/j3345e01.htm>

³⁷ *Ibid.*, para.9.

³⁸ Olivier de Schutter, *supra* n.15.

³⁹ *Ibid.*, para.4. See also para.11.

United Republic of Tanzania, Zambia and Zimbabwe.⁴⁰ The Special Rapporteur's mandate expressly mentions cooperation with the Committee on Economic, Social and Cultural Rights, emphasising the link between his office and the rights and obligations under the ICESCR.⁴¹ However the 2000 Commission on Human Rights resolution that founded the mandate also recalls the UDHR, the Universal Declaration on the Eradication of Hunger and Malnutrition and the Rome Declaration on World Food Security and the Plan of Action of the World Food Summit, emphasising the universality of the Special Rapporteur's recommendations.⁴² Paragraph 2 of the resolution reaffirms "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food, and the fundamental right of everyone to be free from hunger".⁴³

Hunger is considered "an outrage and a violation of human dignity", requiring the adoption of urgent measures, while states are encouraged to "achieve progressively the full realization of the right to food", in line with the prevailing philosophy of the ICESCR.⁴⁴ The ICESCR distinction between the right to adequate food and the *fundamental* right to be free from hunger was repeated in Human Rights Council resolution 6/2, which extended the period of the Special Rapporteur's mandate.⁴⁵ Therefore the mandate quite clearly distinguishes between hunger and adequate food. The fundamental right of everyone to be free from hunger is granted to all persons and is an obligation on all states, through a link with the universal concept of human dignity. The obligation to progressively realise the right to adequate food falls on states that have ratified the ICESCR, however the thematic special procedures apply to all states and the Special Rapporteur's recommendations to realise this right need to be followed in the entire SADC region.

According to Smita Narula, there is a question as to whether the right to food could be said to a norm of customary international law, which has not been sufficiently analysed.⁴⁶ It would seem that an argument could be made that the fundamental right to be free from hunger has achieved this status, as indicated by its inclusion in the Millennium Development Goals which saw universal participation and support of states.⁴⁷ It is more difficult to extend this argument to the broader right to adequate food.

Nevertheless the right to food has been viewed as an essential means of upholding other rights. In particular, the African Commission's decision on the harm caused by Shell and the Nigerian government in Ogoniland emphasises that the right to food is implicit in the African Charter.⁴⁸ The African Commission found: "the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as

⁴⁰ UN Office of the High Commissioner for Human Rights, Table of Ratifications, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en

⁴¹ Special Rapporteur on the Right to Food, Overview of the Mandate, available at: <http://www2.ohchr.org/english/issues/food/overview.htm> See Human Rights Council, 'Mandate of the Special Rapporteur on the Right to Food', UN Doc. A/HRC/Res/6/2, 27 September 2007, para. 2(f).

⁴² Commission on Human Rights resolution 2000/10, 'The Right to Food', 17 April 2000.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, paras. 1 and 5.

⁴⁵ Human Rights Council, 'Mandate of the Special Rapporteur on the Right to Food', UN Doc. A/HRC/Res/6/2, 27 September 2007. The resolution notes that the fundamental right to be free from hunger is found in Millennium Development Goal No.1, which commits to halving the proportion of people who suffer from hunger by 2015.

⁴⁶ Smita Narula, *supra* n.18, 780.

⁴⁷ See Road Map Towards the Implementation of the UN Millennium Declaration, UN Doc. A/56/326, 6 September 2001.

⁴⁸ Comm. 155/96, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*.

health, education, work and political participation.”⁴⁹ The decision is significant in that the link to human dignity is attributed to the broader right to food, rather than freedom from hunger.

The Special Rapporteur’s study on large-scale land acquisitions can at a minimum be characterised as an authoritative interpretation of: States Parties’ obligations to uphold the right to adequate food under the ICESCR; universal obligations stemming from Article 25 UDHR and related declaratory instruments on the right to food; and international human rights standards. As well as presenting the potential for violations of Article 11, a number of conditions are proposed under which investments should be made. The study is therefore not *prima facie* against such acquisitions; it is arguing instead for a more structured approach which places human rights standards at the centre of negotiations between investors and states. If large-scale land acquisitions and leases are to benefit all of the parties concerned, and the study is quite certain that they can,⁵⁰ an appropriate institutional framework before the arrival of investors is essential. If States Parties wait until such investments arrive, this will make it less likely that such a framework will be implemented effectively. This is because large investors may gain sufficient influence to avoid regulation that would impact on their interests. Eleven minimum principles are given, which are addressed to investors, home states, host states, local peoples, indigenous peoples and civil society. They can be summarised as follows:

1. Negotiations leading to investment agreements must be transparent, with the full and effective participation of local communities whose access to land may be affected by the agreement;
2. Transfer of land-use or ownership can only take place with the free, prior and informed consent of the local communities. This is particularly relevant to indigenous communities given their historical experience of dispossession;
3. States should adopt legislation protecting land rights including individual titles or collective registration of land use in order to ensure full judicial protection;
4. Local populations should benefit from the revenues generated by the investment agreement;
5. Host states and investors should promote farming systems that are sufficiently labour-intensive to secure employment;
6. Modes of agricultural production must respect the environment and not accelerate climate change, soil erosion and depletion of freshwater reserves;
7. Obligations of the investor should be defined in clear, enforceable terms, with the potential inclusion of pre-defined sanctions which fully compensate for potential violations of terms;
8. A certain minimum percentage of the produce should be sold on local markets with the potential for increases dependent on international market prices;
9. Impact assessments on vulnerable groups should be conducted prior to the arrival of investors, notably women, ethnic groups and pastoralists or itinerant farmers;
10. Indigenous peoples’ right to land, as recognised under international law, will be upheld by obtaining their full, free and informed consent, in particular in relation to the exploitation of minerals, water or other resources; and
11. Labour rights of waged agricultural labourers will be respected and promoted, consistent with relevant ILO standards.⁵¹

⁴⁹ *Ibid.*, para.65.

⁵⁰ Olivier de Schutter, *supra* n.15, Conclusion, para.33.

⁵¹ *Ibid.*, Annex.

The study emphasises that all of these principles are based on contemporary human rights law, and while they are designed to inform current initiatives including efforts by regional and international organisations to frame further guidelines, states should not wait until these are adopted to act in accordance with existing human rights obligations. Home states are required to regulate the activities of investors abroad if host states are unable or unwilling to do so. The World Bank and its private sector arm, the International Finance Corporation, are bound by international human rights law and should make support for such large-scale investments contingent on compliance with these minimum principles.⁵² They are “not optional; they follow from existing international human rights norms.”⁵³

2. LAND RIGHTS AS HUMAN RIGHTS

As outlined in the introduction, one of the important impacts of the acquisition of land by foreign companies is on the right to land of local communities. On the surface, most of the lands that have been leased to foreign companies have thus far been State-owned lands.⁵⁴ However these lands are in fact customarily owned and used by local communities who are directly affected, since they are losing access and enjoyment of the lands they are living on. For most of the concerned communities, the land leases have meant losing their rights to use or own their lands from which they are usually evicted. These large-scale land acquisitions cause land expropriation, which in most situations has not given rise to compensation to smallholders given that they do not hold formal rights to the land they farm. While companies and governments are agreeing on long-term leases over agricultural lands, the local populations are being pushed off the plot in favour of foreign investors, in most situations without consultation or compensation.

While individual farmers are sometimes involved in the land leases, it is mainly the local communities, whose rights are poorly protected, that are affected. Generally, with some few exceptions, private land ownership tends not to be widespread in the SADC region (and the African continent). The World Bank estimates that across Africa, only between two and ten percent of the land is held under formal land tenure; this mainly concerns urban land.⁵⁵ Consequently, the governments have huge control over land ownership, and most of the lands allocated to land leases for food or biofuel production is formally in the hands of the state. However such lands are mainly used and controlled by customary land-holders. Despite the emergence of national legislation recognising land rights for local communities, large-scale land acquisitions are ignoring the existence of such rights. For example, recent studies have shown that lands allocated to investors in Tanzania and Mozambique ignored pre-existing land-use and claims.⁵⁶ Commonly using the smokescreen of state ownership, the land leases granted to foreign companies bypass the customary land rights of the local communities. One of the central issues in the SADC region has been the non-recognition, or the ignorance, of customary land-holders. This has happened either by allocation of State land that ignores customary rights (Madagascar) or the legal allocation of customarily-held land (Tanzania and Mozambique).

⁵² *Ibid.*, para.5.

⁵³ *Ibid.*, para.5.

⁵⁴ See IIED report, *supra* n.6.

⁵⁵ Klaus Deininger, ‘Land Policies for Growth and Poverty Reduction’, (Washington DC: World Bank, 2003).

⁵⁶ Emmanuel Sulle, ‘Biofuels, Land Access and Tenure, and Rural Livelihoods in Tanzania’, (Arusha: Tanzania Natural Resources Forum, and London: International Institute for Environment and Development), unpublished report (2009); and Isilda Nhantumbo and Alda Salomao, ‘Biofuels, Land Access and New Business Models for Rural Livelihoods in Africa – The Mozambican Case’, (Maputo: Centro Terra Viva and London: International Institute for Environment and Development), unpublished report (2009).

The general perception of foreign companies and government is that land in the SADC region (and in Africa generally) is abundant and available for food or agribusiness production. This viewpoint is counter to the fact that most of these lands are actually occupied and being used by land users, which are marginalised from formal land rights and access to the law and institutions recognising their right to these lands. The position often cited by both private investors and governments is that the concerned lands are not properly 'used' or, if they are, they are being used in an 'unproductive' fashion. This reference to the productivity of the land is not new, and is reminiscent of the 'agricultural argument'. Traditionally, the 'agricultural argument' implies that only cultivation of the land can be regarded as a 'proper' occupation of land, and only agriculture can be considered a basis of a real land tenure system.⁵⁷ From this perspective, the most affected communities are usually pastoralist or hunter-gatherers societies who are seen as epitomising the use of land in an 'unproductive' manner.⁵⁸ Potentially, the land deals could threaten the survival of local communities' customary land rights, as well as undermine customary land usage of the pastoralist livestock herders and indigenous peoples.

In many ways the continuing 'land grab' is undermining the current movement of land reforms which are finally starting to recognise the land of the local communities.⁵⁹ While there is a movement towards ensuring access to land and security of tenure, the land leases granted to foreign companies are hindering this evolution by undermining customary land rights of the local communities. The acquisition of lands by foreign companies is predominantly taking place in areas where local communities are suffering from a lack of secured land rights, which makes them vulnerable to dispossession. Hence, indirectly, the acquisition of lands by foreign companies is impacting negatively on the recognition and protection of the land rights of local communities. International human rights law can play an important role since most of the national legal frameworks in the SADC do not provide adequate recognition for customary land rights-holders.

Historically, international law has been a predominately negative force regarding customary land rights in Africa. During colonization, international law was used as a tool to justify the dispossession of communities by the colonial states.⁶⁰ However, with the more recent development of international human rights law, this approach has drastically changed. By focusing on the rights of individuals and also communities, international law has become more supportive of the promotion and protection of communities' rights to land, and also the recognition of their customary rights. Strictly speaking, land rights are not protected under international human rights law; as such there are no established human rights to land (with the exception of indigenous peoples and women). Nonetheless, several of the rights enshrined in the International Bill of Human Rights (UDHR, ICCPR and ICESCR) contain provisions which are tied to the respect of land rights. The UDHR and ICESCR protect the right to an adequate standard of living; the UDHR and ICCPR protect privacy and property rights. Access to land is also an important element to fulfil the right to adequate

⁵⁷ T. Flanagan, 'The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy', 22 *Canadian Journal of Political Science* (1989), 589; see also William Bassett, 'The Myth of the Nomad in Property Law', 4 *Journal of Law and Religion* (1986), 133.

⁵⁸ See J. Gilbert, 'Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights', 7:4 *Human Rights Law Review* (2007), 681-716.

⁵⁹ Generally on the importance of customary land rights in the land reforms process, see: Liz Alden Wily, 'Land Rights Reform and Governance in Africa: How to make it work in the 21st Century?', (Oslo: UNDP Drylands Development Centre & UNDP Oslo Governance Centre, 2006), Pauline E. Petersa and Daimon Kambewaa, 'Whose security? Deepening Social Conflict Over 'Customary' Land in the Shadow of Land Tenure Reform in Malawi', 45 *The Journal of Modern African Studies* (2007), 447-472; E. Lahiff, 'The Politics of Land Reform in Southern Africa', (Brighton: Sustainable Livelihoods in Southern Africa Research Paper 19, Institute of Development Studies, 2003); A. Chimhowu and P. Woodhouse, 'Customary vs Private Property Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa', 6(3) *Journal of Agrarian Change* (2006), 346-371.

⁶⁰ See Joshua Castellino and Steve Allen, 'Title to Territory in International Law', (Ashgate, 2003).

housing. In the words of the UN Special Rapporteur: “[l]and is often a necessary and sufficient condition on which the right to adequate housing is absolutely contingent for many individuals and even entire communities.”⁶¹ However the main recognition of land rights comes through the right to property.

Under the general universal framework, land rights are usually protected under the heading of property rights.⁶² While Article 17 of the UDHR does not specifically mentions land rights, it states that:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

The recognition that property can be held collectively, or “in association with others”, is an important statement in a system predominately dedicated to the rights of individuals. This collective aspect of the right to property is a vehicle for the recognition of local communities’ land rights, which are traditionally held collectively. While the right to property was not reproduced in any of the two Covenants, its content was included in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁶³ Article 5(d)(v) ICERD holds that States should guarantee: “the right to own property alone as well as in association with others.” On the basis of this provision, the Committee on the Elimination of Racial Discrimination (CERD) has developed an important jurisprudence regarding indigenous peoples’ land rights, including customary land rights.⁶⁴ The focus of this jurisprudence is non-discrimination, based on the idea that the non-recognition of indigenous peoples’ land rights could be discriminatory since it is based on the notion that their legal system is inferior to other land-holding systems. While such jurisprudence concerns indigenous peoples, the same argument could be extended to all traditional local communities whose land rights are based on customary land-holding systems. Of the fifteen SADC member states, only Angola has not ratified the ICERD.⁶⁵

The human rights approach to the right to property could be interpreted to mean that people have a right to possess legal title to lands which they have traditionally occupied. Arguably, the important focus on non-discrimination also supports the fact that governments should support customary land rights of both individuals and communities, since it would be discriminatory to recognise only ‘formal’ individual land rights. The rights to equality and non-discrimination are probably the most important rights which underlie the whole international human rights edifice. As such, the non-recognition of the customary land rights of local communities affected by the ‘land grab’ could be seen as violating some of the most fundamental principles of human rights law.

Another relevant aspect of international human rights law comes from the development of specific norms to protect minorities and indigenous peoples. While this aspect of international law would not be relevant to all rural communities, several of these communities who are especially

⁶¹ Commission on Human Rights, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, U.N. Doc. E/CN.4/2005/48 (March 3, 2005), para. 41.

⁶² Robert Plant, ‘Land Rights in Human Rights and Development, Introducing a New ICJ Initiative’, 51 *International Commission of Jurists Review* (1993), 17.

⁶³ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

⁶⁴ For example, see: Committee for the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure Decision 1 (68)—United States of America (Sixty-eighth session, Geneva, 20 February–10 March 2006). Generally, see Patrick Thornberry, ‘Combating Racial Discrimination: A CERD Perspective’, 5 *Human Rights Law Review* (2005), 239-69; and Patrick Thornberry, ‘Indigenous Peoples and Human Rights’ (Manchester University Press, 2002).

⁶⁵ UN Treaties Collection, Table of Ratifications, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en

marginalised find themselves in need of special measures of protection. International law has established a clear connection between the cultural rights of minorities and customary land rights. The Human Rights Committee has stated: “with regard to the exercise of the cultural rights protected under article 27, the Committee observes 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.”⁶⁶ The law in this area is directly engaged with customary land rights since it has been recognised as an important factor for indigenous peoples. For example, CERD highlights in its General Recommendation XXIII that States should: “... recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources”,⁶⁷ and additionally urges restitution or compensation where required. The view of the Committee is that the non-recognition of customary land rights would equate to a discriminatory practice on the part of the government.

The International Labour Organization’s Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169),⁶⁸ outlines the special rights of such peoples regarding activity on their customary lands. More precisely, Article 14 states that:

the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. ... Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

While most of the states in the SADC region have not yet ratified this Convention, the recently adopted Declaration on the Rights of Indigenous Peoples (2007) adopts similar or even stronger language.⁶⁹ Most of the states in the region voted in favour of the adoption of the Declaration which is by far the most explicit as to collective property rights. The Declaration notably states in its Article 26:

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. 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.

Another element of the Declaration is the affirmation of the right to Free, Prior and Informed Consent (FPIC) in article 32. This affirmation of FPIC is a notable development that is particularly relevant in the context of land acquisitions. FPIC is a composite concept which requires participation in decisions to lease or sell the lands of any indigenous communities living on the concerned lands. It implicates a process of consultations which have to be free from manipulation and coercion, respect traditional decision-making processes, and be held in sufficient time in advance of project execution with adequate information provided to enable informed decisions to be taken. In the end, FPIC

⁶⁶ Human Rights Committee (1994), General Comment No. 23: ‘The Rights of Minorities’ (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5.

⁶⁷ Committee on the Elimination of Racial Discrimination, General Comment XXIII: ‘Rights of Indigenous Peoples’, (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997).

⁶⁸ International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries, *entered into force* 5 September 1991.

⁶⁹ United Nations Declaration on the Rights of Indigenous Peoples, Human Rights Council, Report to the General Assembly on the First Session of the Human Rights Council, at 58, U.N. Doc. A/HRC/1/L.10 (2006).

means that the concerned communities have to give their consent before any development takes place on their traditional territories.⁷⁰ In the context of large scale land acquisitions in the SADC region, it means that before leasing or selling land governments have an obligation to obtain the consent of the concerned indigenous communities.

At the regional level, the African Commission on Human and Peoples' Rights is increasingly calling upon states to pay specific attention to the customary land rights of their indigenous populations.⁷¹ This is notably visible through the establishment of a specific Working Group on Indigenous Peoples/Communities, which has highlighted the importance of the recognition and promotion of customary interests.⁷² Importantly, in a recent decision against Kenya, the African Commission has clearly stated that governments should respect the customary land rights of indigenous communities, and that non-recognition of such customary land rights would be a violation of Article 14 protecting property rights.⁷³ This is the first legal decision directly related to customary land rights for indigenous peoples and could have important consequences for the SADC region. The concerned community was a pastoralist community, and as such the decision applies to the need to recognize customary land rights of pastoralist communities when land leases are signed between states and foreign companies.

3. INVESTMENT AND THE RIGHT TO DEVELOPMENT

One of the central justifications for the current movement of land grabs is that such large-scale land acquisitions promote development. Unquestionably, African leaders recognise that improvements in standards of living are predicated on greater and sustained economic development. This requires capital, of which direct private foreign investment provides a ready vehicle.⁷⁴ In turn the developed world relies on African raw materials to sustain high standards of living. Generally, the acquisitions are taking place within the context of increased Foreign Direct Investments (FDI) in Africa. Kwame Nkrumah describes current direct investment as taking the form and structure of neo-colonialism, meaning a nation state that is theoretically independent and sovereign but whose economic system, and therefore political system, is externally directed.⁷⁵ It implies increased impoverishment through a process described by Andre Gunder Frank as 'the development of underdevelopment'.

The study undertaken by IIED, FAO and IFAD highlights: "[T]rends in large-scale land acquisitions for agricultural investments must be placed within the broader context of expanding economic relations between Africa and the rest of the world."⁷⁶ In this regard, the argument put forward to defend land acquisitions in developing countries has often been that in the end it is a 'win-

⁷⁰ Marcus Colchester and Maurizio Farhan Ferrari, 'Making Free, Prior and Informed Consent Work: Challenges and Prospects for Indigenous Peoples', (Forest Peoples Programme, Moreton-in-Marsh, 2007).

⁷¹ Kealeboga N Bojosi and George Mukundi Wachira, 'Protecting Indigenous Peoples in Africa: An Analysis of the approach of the African Commission on Human and Peoples' Rights', 6 *African Human Rights Law Journal* 382 (2006).

⁷² Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/Communities, ACHPR/Res 51 (XXVII).

⁷³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003 (2010).

⁷⁴ Bobo Benjamin, 'Rich Country, Poor Country: The Multinational as Change Agent', (Westport, Connecticut: Praeger, 2005), 26.

⁷⁵ Cited in Bobo Benjamin, *Ibid.*

⁷⁶ IIED Report, *supra* n.6.

win' situation for both the investors and the host country.⁷⁷ The main focus is thus on the potential benefits that investment in the agricultural sector can bring to the host country. The investment of foreign corporations is seen as a way to support the growth of agriculture in developing countries, which finally will bring benefits to the general infrastructure as well as support for the dissemination of new agricultural technologies. As such, States, investors and intergovernmental organisations have usually been supportive of such investments which are seen as generating development for the region.

Legally, it is interesting to note that this simplified 'win-win' argument relies on the notion of development. In recent years, development has become an integral part of the human rights legal framework.⁷⁸ This is visible through the increased relevance and recognition of the right to development as a human right. The clearest expression of the rights-based approach to development is found in the UN Declaration on the Right to Development adopted in 1986.⁷⁹ Article 1 of the Declaration provides:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Focusing on the 'human aspect' of development, the Declaration affirms the rights of people to participate in the development decisions that affect their lives. Article 2(3) holds that States should: "formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom". The emphasis on the participation of people in the process of development is important in the context of large-scale land acquisitions. This means that when developments are taking place on their lands, the concerned communities should be consulted. Furthermore it implies that these communities should participate in land-use zoning, property rights reforms, and other decisions regarding the management of the natural resources found in these lands. Another angle of the human rights-based approach to development is access to the benefits of developmental projects by the local communities. The preamble of the Declaration recognises that development: "aims at the constant improvement of the well-being of the entire population and [...] all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom." The UN Special Rapporteur on the Right to Food has concluded that the human rights-based approach to development: "requires that States ensure the adequate participation of the local communities concerned by land leases or purchases, and that the decision-making process is fully transparent."⁸⁰

Legally, there has been some debate regarding the binding value of the Declaration, which some commentators argue represents guiding principles rather than strictly binding obligations.⁸¹ This position is not relevant in the context of Africa since the right to development is enshrined in

⁷⁷ See Oakland Report, *supra* n.2.

⁷⁸ See Philip Alston, 'Making Space for New Human Rights: The Case of the Right to Development', 1 *Harvard Human Rights Yearbook* (1988), 3; Daniel Aguirre, 'The Human Right to Development in a Globalized World', (Ashgate, 2008); and Koen de Feyter, 'World Development Law', (Intersentia, 2001).

⁷⁹ Declaration on the Right to Development, G.A. res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).

⁸⁰ *Ibid.*, para 5.2

⁸¹ For references, see: Russel Lawrence Barsh, 'The Right to Development as a Human Right: Results of the Global Consultation', 13 *Human Rights Quarterly* (1991), 322; Arjun Sengupta, 'On the Theory and Practice of the Right to Development', 24 *Human Rights Quarterly* (2002), 837.

the African Charter of Human and Peoples' Rights, to which all SADC States are a party, and which is therefore legally binding on the region.⁸² Article 22 of the African Charter states that: "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."

This reflects the rights-based approach to development inherent in the UN Declaration. Significantly, this article was central to the complaint of the Endorois pastoralist community in their case against Kenya before the African Commission on Human and Peoples' Rights.⁸³ The pastoralist community argued that Kenya had violated their right to development by its failure to adequately involve them in the development process taking place on their customary lands, as well as failing to ensure the continued improvement of the community's well-being. In this case, Kenya had allocated the land to tourism and mining. The Endorois also argued that their exclusion from the benefits emerging from the exploitation of their land violated their right to development. Finally, the Endorois highlighted that the government: "did not embrace a rights-based approach to economic growth, which insists on development in a manner consistent with, and instrumental to, the realisation of human rights and the right to development through adequate and prior consultation."⁸⁴

The African Commission found that Kenya violated the right to development of the pastoralist community. This case is being recognised as a landmark decision, since it is the first time that a violation of the right to development has been formally recognised, regionally and internationally. An important aspect of the decision is the emphasis placed on the state's obligation to ensure the participation and informed choice of the concerned communities before embarking on a developmental project. In the words of the African Commission, states have the duty: "to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community."⁸⁵ The Commission concluded: "the result of development should be empowerment of the Endorois community. It is not sufficient for the Kenyan Authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realised."⁸⁶ Finally, the Commission highlighted that governments bear "the burden for creating conditions favourable to a people's development."⁸⁷

While the case involved development taking place through tourism, mining and wildlife protection, the decision is evidently of relevance to large-scale land acquisitions. Any forms of development, including agribusiness, would fall under the obligations inscribed in Article 22 of the African Charter. The important lesson from this jurisprudence is that prior to leasing lands for development, States have a duty to ensure that the concerned local communities take part and benefit from the development. In the context of land deals between States and foreign investors, the right to development means that governments have the obligation to ensure the participation of directly affected peoples in the planning, approval and establishment of large-scale agricultural projects.

The human rights based approach to development is also based on the right to self-determination. More particularly, the rights of peoples to self-determination found in common Article 1 ICCPR and ICESCR includes the right not to be deprived of their own means of subsistence. In the case of land acquisitions this could be interpreted as meaning that rural local

⁸² See list of ratifications, available at: http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf

⁸³ *Endorois case*, *supra* n.73. The decision was adopted by the African Commission in May 2009 and approved by the African Union at its January 2010 meeting.

⁸⁴ *Ibid.*, para. 135

⁸⁵ *Ibid.*, para. 237

⁸⁶ *Ibid.*, para. 238

⁸⁷ *Ibid.*, para. 298

communities cannot be denied access to their traditional sources of food, medicine or fuel. States and other actors involved in land acquisitions have the obligation to ensure that the leasing of lands would not deprive local communities of their means of subsistence.

Overall, for large-scale land acquisitions the right to development framework works two ways. It provides a *prima facie* justification to governments who are entering into contracts with foreign corporations or governments. The pressing need for capital ensures that governments in the SADC region and throughout Africa are beginning to actively seek investment, citing development needs as justification. However the right to development is not enjoyed by governments; it is an individual human right. In the regional African system, the right to development is being understood as a dynamic in which projects undertaken by governments must conform to certain agreed standards for the improvements of the people they affect. This means that for land acquisitions, there is a third party to the contract between a government and a corporation; the users of the land. The comprehensive set of measures for the development of the people concerned reveals a series of obligations which governments must conform to, if they are not to violate the right.

The discussion has focused on host state obligations. The final section explores the rights and responsibilities of home as well as host states with regard to transnational corporations, as well as the growing internal and external regulation of non-state actors.

4. ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS

As highlighted throughout the chapter, transnational corporations (TNCs) are playing a central role in large-scale land acquisitions. The growth of TNCs has far exceeded expectations, with some fifty corporations controlling US\$4 trillion dollars by the turn of the century, leading to intense influence on world resources.⁸⁸ African states by contrast experienced general decline until the early 1990s, and while capital flows to the developing world increased from the 1990s, African states were generally not the beneficiaries. Many are still not even listed for consideration by TNCs for locational decisions for FDI, despite offering many attractions for investors.⁸⁹ There is a prevailing viewpoint that “Africa is the great exception to the defining and otherwise global economic trend of recent decades: steady improvement in people’s lives.”⁹⁰

While traditionally international human rights law has been concerned with the relationship between states and their citizens, its reach is changing and there are significant developments regarding the impact of human rights on corporations. The Special Representative of the UN Secretary-General (SRSG), Professor John Ruggie, has developed a framework that seeks to capture the responsibilities of various parties in the field of business and human rights. The three pillars of the SRSG’s framework are the following: first, the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; secondly, the corporate responsibility to respect human rights, which means to act with due diligence

⁸⁸ Bobo Benjamin, *supra* n.74, 12.

⁸⁹ *Ibid.*, 15.

⁹⁰ Clive Crook, ‘When Economic Development Just Isn’t Enough’, 34 *National Journal* (2002), p.2436, cited in Bobo Benjamin, ‘Rich Country, Poor Country: The Multinational as Change Agent’, (Westport, Connecticut: Praeger, 2005), 140. Crook points out that region by region, poverty has dropped everywhere, except in Africa where it continues to rise.

to avoid infringing on the rights of others; and thirdly, greater access by victims to effective remedy, both judicial and non-judicial.⁹¹

Using the three levels of protection identified in General Comment 12 - to respect, protect and fulfil the right to adequate food – the Special Rapporteur identifies the second level, to protect, as placing an obligation on states to prevent others, in particular private actors such as firms, from encroaching on the ability of individuals and groups to feed themselves.⁹²

These developments have impacted on the right to food, as evidenced in the Committee on Economic, Social and Cultural Rights' General Comment 12, which states:

Violations of the right to food can occur through the direct action of states or other entities insufficiently regulated by states. These include (...) failure to regulate activities of individuals or groups so as to prevent them violating the right to food of others, or the failure of a state to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organisations.”⁹³

According to Clapham, the Committee is here suggesting that non-state actors are capable of violating the right to food.⁹⁴ The General Comment further emphasises that “the private business sector [has] responsibilities in the realization of the right to adequate food.”⁹⁵ Thus the private sector, national and transnational, should pursue its activities within the framework of a code of conduct conducive to the respect of the right to adequate food, agreed jointly by government and civil society.⁹⁶ A similar approach has been taken with the right to water.⁹⁷ Furthermore the decision of the African Commission in the Ogoniland case, highlighted above, also held that the right to food gives rise to an obligation to protection from non-state actors, with the requirement in the decision that the Nigerian government: “should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.”⁹⁸

Narula notes that the right to food has been undermined by the state-centric system of rights obligations. She argues that the influence of TNCs on global access to the right to food has reached a level that necessitates obligations under international human rights law. These should be clearly defined in order to hold TNCs accountable, if the right to food is to be effectively realised.⁹⁹ There has been considerable discussion on the means of achieving this, with Clapham outlining the distinction between corporate responsibility and corporate accountability; the former refers to voluntary initiatives such as the UN Global Compact and Corporate Social Responsibility (CSR) self-regulation by TNCs, while the latter implies requiring TNCs to adhere to standards or face

⁹¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises UN Doc. A/HRC/8/5, 7 April 2008.

⁹² Olivier de Schutter, *supra* n.15., para.3.

⁹³ General Comment 12, *supra* n.20, para.19.

⁹⁴ Andrew Clapham, ‘Human Rights Obligations of Non-State Actors’, (Oxford University Press, 2006), 325.

⁹⁵ General Comment 12, *supra* n.20, para.20.

⁹⁶ *Ibid.*

⁹⁷ See further Andrew Clapham, *supra* n.94.

⁹⁸ Comm. 155/96, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, para.65, quoted in Andrew Clapham, *Ibid.*, 435.

⁹⁹ Smita Narula, *supra* n.18, 694.

sanctions.¹⁰⁰ Corporate responsibility was the initial tool favoured by campaigners throughout the 1990s, but this has since given way to a harder approach which seeks binding legal obligations on TNC activities. Corporate accountability has seen incremental gains, such as the successful use of the *Alien Tort Claims Act 1789* in the United States.¹⁰¹ In particular, where acts involved constitute international crimes, the appropriate international criminal law on complicity may be invoked.¹⁰² Thus tort law and criminal law are providing potential avenues for responsibility and redress.

Commentators are increasingly suggesting that corporations and businesses have to respect the Universal Declaration of Human Rights.¹⁰³ The Declaration is regularly referred to by corporations as being part of their remit. Yet there is no international jurisdiction to try a corporation. Nevertheless, they evidently bear certain international duties. Clapham writes: “The absence of an international jurisdiction to try corporations does not mean that transnational corporations cannot break international law.”¹⁰⁴ He signals the growing relationship between human rights agencies and businesses, concluding that a shift is underway towards human rights accountability in the private sector; “in fact, many of us imagine we are already there.”¹⁰⁵ By contrast Narula finds that “international legal accountability for TNCs remains virtually nonexistent”.¹⁰⁶

Host states in the SADC region can hold TNCs accountable for human rights standards under the ICESCR. Evidently, the Committee on Economic, Social and Cultural Rights has interpreted Article 11 as applying to non-state actors such as corporations, and states’ duties to protect the right to adequate food include private entities. Therefore it is reasonable to apply the Special Rapporteur’s minimum framework to acquisitions involving host states in Southern Africa and foreign enterprises, and indeed not to do so would represent a violation of the Covenant, as interpreted. SADC states that have ratified the ICESCR are required to implement the eleven principles in the context of land acquisitions, otherwise they could legitimately be held to be in violation of their obligations under Article 11. Those SADC states that have not ratified the Covenant should look to international human rights standards and African regional standards, which argue that the right to adequate food, implicit in the Banjul Charter, has universal application under the concept of protecting human dignity.

However can home states, for example South Korea or the Gulf states, also be held responsible for violations of the right to adequate food in the SADC region? In general home state liability for TNCs is not a settled question. In 2003, former Special Rapporteur on the Right to Food, Jean Ziegler, reported that governments have extranational obligations which extend to a duty to avoid actions which have a negative impact on the right to food for people in other states.¹⁰⁷ While the duty to protect the right to adequate food implies host state regulation of TNCs, as highlighted above in the de Schutter report, it can also require home state obligations, in that states have a duty to prevent violations by their companies and corporations operating abroad.¹⁰⁸ Hence Narula argues that the extraterritorial application of states’ obligations under the ICESCR to uphold the right to food has been expanded.¹⁰⁹ While morally laudable, this is problematic in terms of international law

¹⁰⁰ Andrew Clapham, *supra* n.94, 195.

¹⁰¹ *Ibid.*, 252.

¹⁰² *Ibid.*, 265.

¹⁰³ *Ibid.*, 264. Although Clapham emphasises that the complicity tests cannot substitute the corporation for the government, with the corporation responsible only for its own acts of assistance.

¹⁰⁴ *Ibid.*, 267.

¹⁰⁵ *Ibid.*, 270.

¹⁰⁶ Smita Narula, *supra* n.18, 750.

¹⁰⁷ UN Commission on Human Rights, ‘Report Submitted by the Special Rapporteur on the Right to Food in Accordance with the Commission on Human Rights Resolution 2002/25, UN Doc. E/CN.4/2003/54 (10 January 2003), p.29.

¹⁰⁸ Smita Narula, *supra* n.18, 725.

¹⁰⁹ *Ibid.*

in particular given that the ICESCR, unlike other treaties, has no provision specifying its jurisdictional scope.¹¹⁰

In sum, there are three problems: first, states are only responsible for human rights obligations in their own jurisdictions, or where they exercise ‘effective control’; second, despite advances, non-state actors are not full subjects of international law and the indirect regulation of TNCs by states is fraught with difficulties; third, states have obligations under multiple legal regimes, including international financial institutions.¹¹¹ Narula notes that “under international law, the home state is generally not liable for the conduct of non-state actors unless the non-state actors are *de facto* agents of the state.”¹¹² Citing the *Draft Articles on the Responsibilities of States for Internationally Wrongful Acts* (2001), non-state actors must be acting “on the instruction of, or under the direction and control of, that State in carrying out the [wrongful] conduct”.¹¹³ Her argument is that while an argument for the extraterritoriality of the ICESCR can be made where a state is exercising ‘effective control’, this concept is too narrow to realise the right to food given that it is primarily interpreted in relation to the exercise of control over armed forces.¹¹⁴

Yet according to the IIED, large-scale land acquisitions which have accelerated in the past year involve support from governments, or indeed “significant levels of government-owned investments”.¹¹⁵ There is certainly evidence that states such as Saudi Arabia and South Korea are in control of corporations that are buying or leasing land. Nevertheless removing this concept from its largely humanitarian framework to argue for extraterritorial jurisdiction of the ICESCR, even in cases of direct government acquisition of lands, is unrealistic. International human rights jurisprudence indicates that a state can exercise ‘effective control’ in situations of occupation or armed conflict, but “the majority of extraterritorial violations of the right to food under globalization are committed outside these limited scenarios.”¹¹⁶ Effective control does not extend to effective economic control, even in the case of government acquisition of land. To admit as much would be to recognise that this is indeed a situation of *de facto* colonisation akin to occupation, with obvious political difficulties.

There is considerable resentment at the unequal relationship and a perception that there can be no reciprocity between rich and poor nations.¹¹⁷ Bobo writes:

It is an unlikely proposition, as some observers of the African situation propose, that black Africa will be able to arouse any significant growth and development without the kind of assistance multinationals can offer. But whether black Africa will elect to maintain and/or expand the presence of multinational corporations in its economies may depend on how successful it is in finding solutions to the several problems that have emerged in its recent relationship with multinational firms.¹¹⁸

The paramount need to establish an equitable relationship between TNCs and the developing world has seen a strong movement towards accountability of non-state actors for human rights

¹¹⁰ *Ibid.*, 728.

¹¹¹ *Ibid.*, 726.

¹¹² *Ibid.*

¹¹³ Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001).

¹¹⁴ Smita Narula, *supra* n.18, 728.

¹¹⁵ IIED Report, *supra* n.6, 4.

¹¹⁶ Smita Narula, *supra* n.18, 734.

¹¹⁷ Bobo Benjamin, *supra* n.74, 29.

¹¹⁸ *Ibid.*, 28. He identifies in particular technology transfer, transfer pricing, taxation and conduct and ethics as being the greatest areas in need of regulation to move towards a more equitable relationship.

standards. Remarkably, five corporations control the global trade in grain, while ten corporations control thirty-two percent of the global commercial seed market.¹¹⁹

Imposing economic and social rights obligations on TNCs is a challenge, and to the extent that such bodies are held accountable, responsibility normally attaches to the host state.¹²⁰ Meanwhile home states, which provide extensive political and economic support, and in the case of land acquisitions are heavily involved in the transfers, remain largely beyond the regulatory sphere. In home states, a combination of soft law norms such as codes of conduct replace binding standards. Thus the focus must be on TNC regulation by host states, despite the economic inequality of arms. The state-centric nature of economic and social rights is undermining the full implementation of the ICESCR. The right to food requires accountability of TNCs, in the short term in host states, and in the long-term in home states.

The SADC region should implement the Special Rapporteur's eleven minimum principles, given that his mandate applies to all states in the region. Regulation of TNCs by host states is a growing area, and the region has an opportunity to use large-scale land acquisitions as a blueprint for forceful regulation and accountability of TNC activity. Thirteen SADC states can cite Article 11 ICESCR obligations in support of TNC regulation. The growing political nature of large-scale land acquisitions indicates that civil society is prepared to use these developments as a means of finally drawing real accountability of corporations from governments. A movement that has been evolving since the 1970s could crystallise around this issue.

CONCLUSION

A human rights based approach to large-scale land acquisitions is central to preventing exploitation. The discourse on neo-colonialism has been readily applied, with Biney describing the haste to acquire land as 'another scramble for Africa', fuelled by fears of global food insecurity. It is supposed that food will become the next major geopolitical commodity, after oil.¹²¹ The head of the FAO, Jacques Diouf, has also attached the label 'neo-colonialism' to the process, although the organisation has engaged in studies which also emphasise the potential benefits.¹²² Governments have had to defend their actions against these accusations, with the Ethiopian ambassador to Japan stating in the *Japan Times* that his government, while encouraging large-scale agricultural investment by Japan in the state, "has never been colonized...and neither would it succumb to any form of neo-colonialism".¹²³

The aim of the present chapter has been to analyse whether human rights law could act as regulatory framework to control the ever expanding large-scale acquisition of lands by foreign corporations and governments. As suggested throughout the chapter, this 'land grab' is touching on three fundamental human rights of the local rural communities: their right to food, right to land and right to development. Adopting the eleven minimum principles set out by the Special Rapporteur on the Right to Food, it is submitted that human rights law must play a central role in regulation and accountability of the state and non-state actors involved in the leases.

¹¹⁹ Smita Narula, *supra* n.18, 722.

¹²⁰ *Ibid.*, 751.

¹²¹ Ama Biney, *supra* n.1.

¹²² IIED Report, *supra* n.6.

¹²³ Abdirashid Dulane, 'No Land Grab in Ethiopia', *Japan Times*, 11 April 2010, available at: <http://farmlandgrab.org/12069>

The right to food is an evolving area of human rights law that distinguishes between the fundamental freedom from hunger, considered sufficiently basic to potentially constitute customary international law, and the broader right to adequate food. The combination of ICESCR obligations and settled international human rights standards ensures that host states are accountable for a regulatory framework governing land acquisitions. These standards apply to state and non-state actors. Non-state actors are increasingly coming under the remit of international human rights, and home states have a concomitant duty to hold corporate representatives responsible. At present, however, the primary responsibility is on host states to ensure TNCs do not violate the right to adequate food.

On the question of land rights, States' land reforms should prioritise the recognition of customary land rights of all local communities and provide adequate legal protection to such rights. In the case of pastoralist and hunter-gathering communities, states should recognize their use of the land as providing legal entitlement and reject the notion of 'unproductive' land usage. For indigenous peoples, states have the duty to ensure their free, prior and informed consent before undertaking any developmental project on their lands.

The right to development is raised as a defence by governments to justify land acquisitions, but the standards implied in the right to development are strongly weighted towards the benefit of peoples affected by large-scale investments. Negotiations leading to investment agreements must be transparent, with the full and effective participation of local communities whose access to land may be affected by the agreement. Local populations should benefit from the revenues generated by the investment agreement. Furthermore, impact assessments on vulnerable groups should be conducted prior to the arrival of investors, notably women, ethnic groups and pastoralists or itinerant farmers, as well as indigenous peoples.

Human rights law is proposing to act as a potential platform for negotiations between the local rural communities, governments, investors and corporations. By putting the right to food, land rights and the right to development to the fore of any land acquisition, this framework will ensure that local people benefit from the investment taking place in the region. There is evidence that civil society in the SADC and throughout Africa is organizing around opposition to what is perceived as neocolonial practices and policies, as evidenced in Madagascar. While the chapter has focussed on the SADC and Africa, large-scale land acquisition is becoming a global practice. Global opposition is evolving at a similar pace.