

# Local rights and global land hunger

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A human rights-based approach in a context of large-scale land acquisitions



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Academic Year: 2010-2011

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*Large-scale land acquisitions: a gate to development?*

*Photo: Karin Tengnäs, Kenya*

*To those women and men who recognise the inherent dignity and equal rights of all, and who advocate for secure land rights of African women.*



## **Acknowledgements**

I would first and foremost like to express my deep gratitude to the Inter-European University Center and the University of Luxembourg and in particular to Harlan Koff and Jean-Paul Lehnert. Mr. Koff's excellent supervision and encouragement together with Mr. Lehner's support made this dissertation become reality.

I would also like to express my sincere appreciation to all those people in Kenya, who happily received me with open arms - sometimes with very short notice - and who provided invaluable inputs to the dissertation, among them John Ndiritu, Åsa Jonsson, Clarissa Augustinus, Njeri Muhia, Agnes Kabajuni, Urban Jonsson, Magdalena Andersson, Chris Abir, Zipphora Mugonyi and many residents of Yala Swamp and Kakamega. Violet Shibutse kindly assisted me with all arrangements in Kakamega and her company made the journey back to Nairobi a real pleasure. Petronella "Betty" Buziega and her family's hospitality, warmth and "ingokho" made the stay in Kakamega unforgettable. I also wish to thank Benita Nordin and Lilian for their kindness and hospitality in Nairobi.

Rolf Härnö, Christiaan Lemmen, Augusta Molnar, Cathy Farnworth, Charity Kabutha, Esther Mwangi, Nina Strandberg and Samuel Egerö provided assistance and encouragement for which I am very grateful.

A planned trip to Ghana did not materialise. To Isaac B. Karikari, Godfrey Mitti, David Sumbo and Rene Dogbe I would like to say that I hope our roads will cross in Ghana one day.

I sincerely appreciate the inspiration and backup I got from my parents and sister. Pieter-Jan Hamels was very helpful with facilitation of collecting literature, and he also provided other valuable support.

Finally, I would like to give my best wishes to Janet A. Alusa and her sisters and brothers in Kakamega, who do an incredible job for protecting local women's land rights.



## Acronyms

ACORD	The Association for Cooperative Operations Research and Development
AIDS	Acquired Immune Deficiency Syndrome
ARN	The Agriculture and Natural Resources Program
Art.	Article
AU	African Union
AWID	Association for Women's Rights in Development
CBO	Community Based Organisation
CEDAW	Convention on the Elimination of all Discrimination Against Women
CLEAR Women	The Centre For Land, Economy & Rights of Women
COHRE	Centre On Housing Rights and Eviction
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
Dr	Doctor
EIUC	European Inter University Centre
Et al.	Et alia
EU	European Union
FAO	Food and Agricultural Organization
FIAN	FoodFirst Information and Action Network
FIG	International Federation of Surveyors
GLTN	Global Land Tool Network
GROOTS	Grassroots Organizations Operating Together in Sisterhood
Ha	Hectare
HIV	Human Immunodeficiency Virus
HRBA	human rights-based approach
i.e.	id est
ICCPR	International Covenant on Civil and Political Rights
ICSECR	International Covenant on Economic, Social and Cultural Rights
IDS	Institute of Development Studies
IFAD	International Fund for Agricultural Development
IFPRI	International Food Policy Research Institute
IIED	International Institute for Environment and Development
ILC	International Land Coalition
ITC	The Faculty of Geo-Information Science and Earth Observation
Km	Kilometre
LBDA	the Lake Basin Development Authority
NEMA	Kenya's National Environmental Management Authority
NGO	Non-Governmental Organisation
no.	Number
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights

p.	Page
pp.	Pages
REPA I	The Rights, Equity and Protected Area Program I
REPA II	The Rights, Equity and Protected Area Program II
RRI	Right and Resources Initiative
SLOGIN	the Strengthening Local Governance in Natural Resource Management
SNV Netherlands	Netherlands Development Organisation
STDM	Social Tenure Domain Model
TARDA	Tana River Development Authority
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nation
UNCHS	United Nations Centre for Human Settlements
UNCTAD	United Nations Conference on Trade and Development.
UNDP	United Nation Development Programme
UNECE	United Nations Economic Commission for Europe
UN-HABITAT	The United Nations Human Settlements Programme
US	The United States
USAID	United States Agency for International Development
vs.	Versus
WB	World Bank
WHO	World Health Organisation

## **Abstract**

The global competition over African land is at an historical peak. Some call it “win-win opportunities”, others “land-grabbing”, violating the International Covenant on Economic, Social and Cultural Rights. Firstly, this dissertation explores the impact of large-scale land acquisitions on local livelihoods and rights, with a particular focus on African women. On this topic, the study concludes that local impacts depend on multiple factors, displaying a huge diversity between countries and individual investments. Despite new employment opportunities, cases generally illustrate severe negative impacts, i.e. loss of land, food scarcity and insecure employment conditions.

Many African countries have initiated land reforms. The traditional systems, under which land is frequently governed, are commonly transformed into formal tenure systems. Secondly, the dissertation explores the impact of these formalisation processes, especially on women. While there is a risk that discriminatory practises and biases make women’s already fragile rights even weaker, some cases show that a formal right to land can enhance tenure security for women, by allowing for enforceable claims.

Land governance, and its mutually reinforcing relation to human rights, is of vital importance for turning large-scale land acquisitions into development opportunities while protecting local rights. Thirdly, the dissertation explores the human rights-based approach (HRBA) as a normative framework and analytical and operational tool in relation to large-scale land acquisitions. The study concludes that a HRBA adds strength and legal substance to the principles of participation and inclusion; openness and transparency; accountability and the rule of law, and equality and non-discrimination. Such addition promotes good land governance. By empowering the rights-holders and enhancing the capacity of the duty-bearers (governments, corporations, and traditional authorities), international development cooperation may lead to greater and more gender balanced inclusion of civil society in negotiations of large-scale land acquisitions, increased capacity of civil society to scrutinise these deals, greater adherence of duty-bearers to the rule of law and new policies and procedures ensuring the protection of local rights and livelihoods. This is especially important in African countries with large amounts of land and weak legal and institutional capacity to protect rights, especially those of women.



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# Introduction

## 1.1. Overall objective and research questions

The dissertation recognises land as a vital resource for livelihood and for the fulfilment of a number of human rights, such as the right to property<sup>1</sup>, health<sup>2</sup>, an adequate standard of living, including food, clothing and housing<sup>3</sup>, equality and non-discrimination<sup>4</sup> and freedom to economic, social and cultural development<sup>5</sup>. It focuses on a Sub-African context where there is an increasing commercial pressure for land and where land law and policy reforms have risen high on the agendas. The challenge of securing local land rights is an issue that urgently must be addressed, in order to ensure human rights, prevent conflict and reach social, economic and environmental sustainable development. This is especially relevant for women, whose rights often are marginalised due to historical injustices and contemporary biases. Therefore, the two overall objectives of the dissertation are to (i) *explore the impact of a global growing competition for land and processes of formalising land rights, on local livelihoods and rights of African populations in general and of African women in particular* and to (ii) *explore the implications of a human rights-based approach (HRBA) as a normative framework and analytical and operational tool for international development cooperation, to promote the respect, protection and fulfilment of local human rights and land rights in a context of global land hunger*.

More specifically, the following questions will be examined:

- i. What development opportunities and risks do the global commercial pressure on land, in terms of large-scale land acquisitions, bring for rural African populations' livelihoods and rights in general and those of women in particular?

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<sup>1</sup> Art. 17 UDHR, 1948.

<sup>2</sup> Art. 12 ICESCR, 1976.

<sup>3</sup> Art. 11 ICESCR, 1976., Art. 25 UDHR, 1948.

<sup>4</sup> Art. 3 ICESCR, 1979., Art. 3 ICCPR, 1979., Art. 2 UDHR, 1948.

<sup>5</sup> Art. 1 ICESCR, 1979., Art. 1. ICCPR, 1979., Declaration on the Right to Development, 1986.

- ii. How is the security of land rights of African populations in general and those of women in particular, affected by the corresponding formalisation of land rights in Africa, and by the interplay between this development and customary tenure?
- iii. What is the scope and rationale of a HRBA and which are its main principles?
- iv. What is the importance of these principles in relation to large-scale land acquisitions, and how can they be linked to a legal human rights framework?
- v. What is the implication of a HRBA as an analytical and operational tool for international development cooperation aiming to secure human rights in a context of land and large-scale land acquisitions?

## 1.2. Background

Demonstrating the “age of crisis<sup>6</sup>” in terms of food injustice and resource constraints, the number of hungry people passed one billion for the first time in 2009<sup>7</sup>. Secure rights and access to land is crucial in this context<sup>8</sup>. Access to land is a fundamental basis for human shelter, food production and other economic activities for millions of people. Secure land rights can increase people’s access to public services and sources of credit, and encourage investments in improved dwellings and in the land itself. Land rights are furthermore linked to social and political status and participation, and to a sense of self-esteem, confidence, security and dignity<sup>9</sup>. Access to land and tenure security is therefore not only a direct factor in the alleviation of hunger and rural poverty<sup>10</sup>, but it is also closely linked to civil and political as well as social, economic and cultural human rights. At the same time, it is estimated that some 200 million people in rural areas, (almost 20% of the world’s poor), lack sufficient access to land for a living. Challenges

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<sup>6</sup> Oxfam, 2011, p. 7.

<sup>7</sup> FAO, *1.02 billion people hungry*, at <http://www.fao.org/news/story/0/item/20568/icode/en/> (consulted 07 June 2011).

<sup>8</sup> FAO, *Access and Tenure of Natural Resources*, at <http://www.fao.org/nr/tenure/lt-home/en/> (consulted 06 May 2011)., UN-HABITAT, 2008, p. 2., UNDP: Initiative on Legal Empowerment of the Poor.

<sup>9</sup> UN-HABITAT, 2008, pp. 3, 13., Deininger et al., 2011, p. xiii., Englert & Daley, 2008, p. 1., Ikdaahl et al., 2005, 1., FAO, *Access and Tenure of Natural Resources*, at <http://www.fao.org/nr/tenure/lt-home/en/> (consulted 06 May 2011).

<sup>10</sup> FAO, *Access and Tenure of Natural Resources*, at <http://www.fao.org/nr/tenure/lt-home/en/> (consulted 06 May 2011).,

in providing secure land rights are evident in urban and peri-urban areas. In 2005, an estimated 934 million people lived without secure tenure in informal settlements in urban areas of developing countries. This figure is projected to increase to 1,5 billion by 2020 and 2 billion by 2030<sup>11</sup>.

Increasing poverty and issues such as population growth, land use conversion, environmental degradation, natural disasters and conflicts are some of the growing challenges to secure land rights<sup>12</sup>. A rapidly growing challenge is also the recent “rediscovery of the agricultural sector”<sup>13</sup>. Although large-scale expansion of crop land historically has happened in each of the world’s major regions, the recent competition over access and use of land is at a historical peak globally. Non-transnational cooperation (TNC) actors, such as governments (domestic and foreign) have, in addition to more traditional private investors, developed an enormous interest in land acquisitions<sup>14</sup>, especially in the Sub-Saharan Africa<sup>15</sup>. Food and Agricultural Organisation (FAO) estimates that in the last three years (stated 2010), 20 million hectares have been acquired by foreign interests in Africa<sup>16</sup>. The size of a single acquisition can be very large. Some examples are a 452 000 hectares biofuel project in Madagascar, a 150 000 hectares (ha) livestock project in Ethiopia and a 100 000 irrigation project in Mali<sup>17</sup>.

Spawned by the world food crisis on one hand and the broader financial crisis on the other, a main factor underpinning the competition for land is the demand for food and other industrial raw materials as a source of security<sup>18</sup>. Food importing countries with land and water constraints but rich in capital, such as the Gulf States, are at the forefront of new investments in farmland abroad. Countries with large populations and food security concerns such as China, South Korea and India are also seeking opportunities

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<sup>11</sup> UN-HABITAT, 2008, p. 13.

<sup>12</sup> UN-HABITAT, 2008, p. 2.

<sup>13</sup> Deininger et al., 2011, p. xxv.

<sup>14</sup> Whitehead in Tsikta and Golah, 2010, p. vii., Deininger et al., 2011, pp. 10, 16., Odeny et al, 2010, pp. 5, 8-10., Cotula et al., 2009, pp. 3-4., Cuffaro & Hallam, 2011, pp. 2-5.

<sup>15</sup> Deininger et al., 2011, p. xv., Odeny et al., 2010, pp. 5, 8-9.

<sup>16</sup> Odeny et al, 2010, p. 9., Graham et al., 2009, pp. 5, 20.

<sup>17</sup> IIED: Briefing, 2009, p. 1., Cotula et al., 2009, p. 4.

<sup>18</sup> Deininger et al., 2011, p. 1., Cotula et al., 2009, p. 4., GRAIN: Briefing, 2008, pp. 2-9.

to produce food overseas<sup>19</sup>. Another main factor is the demand for biofuel feedstock as a result of policies and mandates of key consuming countries, such as those within the European Union (EU)<sup>20</sup>. Six European countries are among the biggest investors in terms of outward foreign direct investment stock in agriculture: in descending order they are Italy, Norway, Germany, Denmark, the United Kingdom and France<sup>21</sup>. It is estimated that two thirds of the biomass needed to reach the goal of 2020 of the EU will come from Africa<sup>22</sup>. Domestic development goals put additional pressure on the land. In for example Kenya, *the Kenya Vision 2030* states that a goal for 2012 is to put 0.6-1.2 million ha. of arid and semi-arid lands under irrigation, next to the at least 1 million additional ha. of idle land in existing farming areas which will be put into productive agricultural use<sup>23</sup>.

As a response to the current developments, most Sub-Saharan countries have moved towards open trade regimes and market-determined exchange rates. To protect local rights but also to create an enabling environment for investment, many countries have also initiated land reforms. The traditional norms and values under which land is predominantly governed, is commonly transformed into formal tenure systems<sup>24</sup>. A concern is that most women do not hold secure rights to the land from which they derive their own and their family's livelihood, although they carry out a vast majority of the work in agriculture smallholder production, producing about 60-80 per cent of all food grown in African countries<sup>25</sup>. Within a context of formalisation processes of land, their already fragile land rights risk to become further eroded<sup>26</sup>.

Literature has however primarily focused on processes and discourses of production, trade, investment on national and multi-national levels, and less on impacts of

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<sup>19</sup> Von Braun & Meinzen-Dick, 2009, p. 1., Hallam, 2009, pp. 2-3.,

<sup>20</sup> Deininger et al., 2011, pp. 11, 15., GRAIN: Briefing, 2008, p. 9., Cotula et al., 2009, p. 5., Odeny et al., 2010, pp. 5-10, 36-37.

<sup>21</sup> Graham et al., 2009, p. 18.

<sup>22</sup> Nidhi Tandon, Speaker at the African Women's Land Rights Conference, 2011, Nairobi.

<sup>23</sup> Kenya Vision 2030, p. 44.

<sup>24</sup> AUC, AfDB & ECA, 2010, pp. 24-25., Englert & Daley in Englert & Daley, 2008. p. 4., referring to Platteau (2000)., Deininger et al., 2011, p. 23., Cotula et al., 2009, pp. 5, 59. Participants at the African Women's Land Rights Conference, 31 May 2011, Nairobi.

<sup>25</sup> Daley, 2011, p. 4., Palmer, Fricška, et al., 2009, p. 38.

<sup>26</sup> Palmer in Englert & Daley, 2008, p. ix.

globalisation at the level of local communities and their members. Few studies have paid attention to the gender dimension of globalisation, and even fewer studies have dealt with the interconnection between globalisation, land tenure and gender<sup>27</sup>. During a workshop by FAO and OXFAM in 2003 on “Women’s Land Rights in Eastern and Southern Africa” an urgent need for further research into both the dynamics of customary tenure and the impact of land tenure privatisation policies on women’s right to land, was identified<sup>28</sup>. At the Women’s Land Rights Conference in 2011, organised by OXFAM, Action Aid and the Association for Cooperative Operations Research and Development (ACORD), the implication of land law and policy reforms were highlighted, next to the challenges of large-scale land acquisitions, or land grabbing, and their impacts on women’s human rights and livelihoods<sup>29</sup>.

Many national and international actors have recently recognised the issue of an increasing global interest in land and the challenges of secure and equitable land rights. Several African states have adopted land legislation which recognises equal land rights for women and men. The African Union (AU) officially launched the *Framework and Guidelines on Land Policy in Africa*, in 2010, with the purpose of promoting and supporting the implementation of national land policy reforms among member states<sup>30</sup>. In 2010, the *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* was launched by the WB, International Fund for Agricultural Development (IFAD), FAO and other organisations dealing with land issues<sup>31</sup>. FAO has also led the global initiative of developing the *Voluntary guidelines on responsible governance of tenure of land and other natural resources*<sup>32</sup>. Other initiatives are International Food Policy Research Institute (IFPRI)’s five *Key elements for a code of conduct for foreign land acquisitions*<sup>33</sup> and the *Minimum Human Rights*

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<sup>27</sup> Moyo & Yeros, 2005, p. 1., Tsikata in Tsikata & Golah, 2010, p. 2 (also referring to Pape (2002), Khor (2002), Pearson (2002), Jaggar (2001) and Bee (2002)., Fiona & Mackenzie in Tsikata & Golah, 2010, p. 35., Josephine Kamel, Speaker at the African Women’s Land Rights Conference, 2011, Nairobi.

<sup>28</sup> Englert & Daley in Englert & Daley, 2008, pp. 1-2.

<sup>29</sup> African Women’s Land Rights Conference, 30 May – 2 June 2011, Nairobi.

<sup>30</sup> AUC, AfDB & ECA, 2010, pp. 1-2.

<sup>31</sup> FAO, IFAD, UNCTAD & the World Bank Group, 2010.

<sup>32</sup> FAO, no year indicated.

<sup>33</sup> Von Braun & Meinzen-Dick, 2009.

*Principles Applicable to Large-Scale Land Acquisitions or Leases* by Olivier de Schutter, United Nation (UN) Special Rapporteur on the Right to Food<sup>34</sup>.

In 2011, the resolution on *Sustainable urbanisation through equitable access to land, housing, basic services and infrastructure* was adopted at the 23<sup>rd</sup> Governing Council of The United Nations Human Settlements Programme (UN-HABITAT). The resolution will, according to the Ambassador of the International Advisory Board of the Global Land Tool Network (GLTN), give “a chance for the poorest of the poor – women, youth, vulnerable groups – to be heard when we are talking about land issues”<sup>35</sup>. According to Clarissa Augustinus, Chief of the Land & Tenure Section at UN-HABITAT, the resolution provides for a foundation to work with governments, and improves the credibility of introducing the issue of secure land rights on the agenda<sup>36</sup>. Moreover, there are a number of other organisations active in the field, lobbying for secure land tenure for local populations in general and for women in particular<sup>37</sup>. There are also a number of development processes of various pro-poor and gender-sensitive tools dealing with land, such as the *Social Tenure Domain Model* driven by the GLTN, UN HABITAT and International Federation of Surveyors (FIG)<sup>38</sup> and the *Gender Evaluation Criteria For Large-Scale Land Tools* by GLTN, the Huairou Commission and others<sup>39</sup>.

What has also gained momentum among local and national organisations as well as UN agencies is the use of human rights perspectives on gender and privatisation of land rights, as well as on programme strategies<sup>40</sup>. A number of studies have been carried out concerning the human rights-based approach to development, as a normative framework for the process of development. Yet, there is no recognized academic consensus concerning the preconditions for and consequences of establishing an integrated human

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<sup>34</sup> De Schutter, 2009.

<sup>35</sup> GLTN, 2011.

<sup>36</sup> Interview with Clarissa Augustinus, Chief of the Land & Tenure Section, UN-HABITAT, Nairobi, 20 May 2011.

<sup>37</sup> Among some important international organisations are ILC, RRI, Care, Oxfam, ActionAid, SNV Netherlands Development Organisation, GRAIN, COHRE and CLEAR.

<sup>38</sup> Lemmen, 2010., ITC, UN-HABITAT et al. : The Social tenure Domain Model, information sheet.

<sup>39</sup> UN-HABITAT et al., 2007-2008.

<sup>40</sup> Blomley et al., 2009, p. 1., Ik Dahl, 2005, p. 1., Ik Dahl in Englert & Daley, 2008, p. 40., Sano, 2010, 4.

rights and development paradigm<sup>41</sup>. Assumptions prevail but evidence is meager<sup>42</sup>. There is also a lack of analysis relating to the challenges of applying a HRBA in the field of natural resources management<sup>43</sup>, but some indicate that the approach could be of importance in relation women's land rights<sup>44</sup>.

### **1.3. Method**

#### **1.3.1. Research process and choice of method**

A literature review was carried out and contacts with knowledgeable persons on the topic were initiated, to develop an understanding of the contemporary issues of land, to increase the knowledge on current activities of national and international actors, and to place the dissertation within the already existing body of research<sup>45</sup> (Annex 1). Based on an assessment of what strategies would be most effective to obtain further information<sup>46</sup>, qualitative research methods deriving from the discipline of social science were selected. Such methods are appropriate for conducting research within the field of human rights<sup>47</sup>, and they also seek to deliver understanding of social phenomena<sup>48</sup>, including actions, outcomes, conditions and processes<sup>49</sup>.

#### **1.3.2. Secondary data (literature)**

Secondary data has primarily been used for the study, such as books, official published documents, organisational documents, academic output, journal articles and research reports<sup>50</sup>. Various tools of collection, multiple sources of evidence and as recent material as possible, were used to ensure the credibility of the data<sup>51</sup>. Moreover, attention was paid to the quality of evidence and the validity of the arguments

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<sup>41</sup> Ik Dahl in Englert & Daley, 2008, p.40, referring to Alston and Robinson 2005, Nyamu-Musembi & Cornvall 2004, Scheinin & Suksi 2005., Savitri Goonesekere, no year indicated, bullet no. 7 in the *introduction*.

<sup>42</sup> Sano, 2010, p. 4.

<sup>43</sup> Blomley et al., 2009, p. 7.

<sup>44</sup> Ik Dahl in Englert & Daley, 2008, p. 40., Ik Dahl et al., 2005, p. vii., OHCHR, 2006, p. 18., UNDP, 2006, p. 17.

<sup>45</sup> Marlow, 2001, pp. 50-51. Walliman, 2010, p. 57.

<sup>46</sup> Denzin & Lincoln, 2000 p. 20-22.

<sup>47</sup> Coomans et al., 2009, pp. 19-24.

<sup>48</sup> Frankfort-Nachmias, 1996, p. 8., Johannessen & Tufte, 2003, p. 76.

<sup>49</sup> Coomans et al, 2009, pp. 19, 25.

<sup>50</sup> Walliman, 2010, p. 69, 79, 82.

<sup>51</sup> Walliman, 2010, pp. 71, 85., Yin, 2003, p. 36.

themselves, since some research may be conducted in order to put emphasis on a particular message, such as those who wish to achieve a particular target<sup>52</sup>.

A main part of the literature was found at the libraries of the Danish Institute of Human Rights, of University of Luxembourg and of University of Halmstad. Secondary data was also collected through Google and Google scholars and directly from the web sites of various organisations and research institutes. Furthermore, the online catalogue of open access journals (<http://atoz.ebsco.com/home.asp?Id=K12598>), the EBSCOhost Electronic Journals Service (<http://ejournals.ebsco.com/home.asp>), and the International Office of Cadastre and Land Records (<http://www.oicrf.org/>) were used. An assessment was carried out over the appropriateness of the tools of data collection<sup>53</sup>. For example, material from websites of known organisations and institutions was prioritised, and the search engine specialised in material within the field of human rights was seen as particularly important to explore.

Key words which were used alone and in various combinations while searching for data were *land*, *(secure) land rights*, *land administration/governance*, *land tenure*, *tenure security*, *land acquisitions*, *land-grab*, *large-scale land acquisitions*, *human rights*, *gender*, *women*, *(human) rights-based approach* and *pro-poor approach*.

### **1.3.3. Primary data (field research)**

Field research was used as a core strategy of primary data collection<sup>54</sup>. The combination of primary and secondary data enabled triangulation<sup>55</sup>, i.e. data could be put into a larger context of research. The primary data was mainly collected through interviews in Nairobi, Yala Swamp and Kakamega in Kenya, during the period 18<sup>th</sup> of May to 2<sup>nd</sup> of June 2011 (Annex 1). The interviews were semi-structured<sup>56</sup> and open questions were used<sup>57</sup>, following an interview guide (Annex 2). While the themes guiding the interview questions to a large extent were the same for all stakeholders, the precise questions

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<sup>52</sup> Walliman, 2010, pp. 84-85.

<sup>53</sup> Frankfort-Nachmias, 2003, pp. 165-166.

<sup>54</sup> Frankfort-Nachmias, 1996, p. 281.

<sup>55</sup> Denzin & Lincoln, 2000, p. 444 (referring to Flick 1998, Silverman 1993).

<sup>56</sup> Kvale, 1997, p. 13., Johannessen & Tufte, 2003, p. 96.

<sup>57</sup> Walliman, 2010, pp. 98-99., Kvale, 1997, p. 94., Johannessen & Tufte, 2003, p. 98.

varied slightly based on the area of their expertise<sup>58</sup>. The usage of open-ended questions allowed the respondent to freely answer in their own style and content, and describe what they personally perceived as meaningful<sup>59</sup>, and allowed the researcher to pose follow-up questions to gain a deeper understanding of the subjective experience of the respondent<sup>60</sup>.

As a measure of collecting primary data, the four-day long “African Women’s Land Rights Conference, 2011” arranged by OXFAM, ActionAid and ACORD was also attended. The conference provided an excellent opportunity to get acquainted with the latest research concerning African women’s land rights and to interact with a large number of local, regional and international experts on the topic (Annex 3).

#### **1.3.4. Case studies**

A number of case studies were used to illustrate the theoretical findings. A visit to Yala Swamp in Kenya, where large tracts of land has been acquired for agricultural purposes by foreign stakeholders, provided important primary data. The selection of the *intrinsic case studies*<sup>61</sup> used for the dissertation was not based on an attempt to do any statistical generalisations<sup>62</sup>, but rather on an appropriate linkage between the cases and the theoretical framework and on an interest to study the particularities of the cases in-depth<sup>63</sup>. Because of the complexity of each case, no claim is made to give a full-fledged picture of every single detail. The cases have rather been summarised as accurately as possible. These summaries are perceived to be valid and reliable enough to illustrate some implications of large-scale land acquisitions or of formalisation processes on local rights and livelihoods.

#### **1.3.5. Ethics**

The editorial rules of European Inter University Centre (EIUC) were followed, and ways to ensure the rights and welfare of persons that were part of the study were paid

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<sup>58</sup> Johannessen & Tufte, 2003, p. 98.

<sup>59</sup> Silverman 2005:113, 154, Trost 2005:14, Ejvegård 2003:47, Walliman, 2010, p. 98., Marlow 2001:158, Frankfort-Nachmias, 1996, p. 254.

<sup>60</sup> Marlow 2005:158 Silverman 2005:110, Frankfort-Nachmias, 1996, p. 254.

<sup>61</sup> Denzin & Lincoln, 2000, pp. 437, 439.

<sup>62</sup> Johannessen & Tufte, 2003, pp. 73-74.

<sup>63</sup> Johannessen & Tufte, 2003, p. 56.

attention to<sup>64</sup>. Only individuals who gave their “reasonable informed consent”<sup>65</sup> participated in interviews, based on the belief that informed individuals are best able to promote and protect their own well-being. Prior interviews, the purpose of the dissertation was presented, and all aspects that could have an impact on the individuals’ decision to participate were disclosed, such as the public availability of the dissertation. An opportunity for the respondent to pose questions to the researcher was given in order to ensure complete comprehension<sup>66</sup>. In relation to the right to privacy names of participants representing an organisation or an institution has been kept, with the consent of the individual. The principles of anonymity and confidentiality were observed in cases where a local individual has been interviewed, through deleting the identity of the respondent, and simply call him or her for “man”, “woman”, “youth” “employer” etc<sup>67</sup>.

#### **1.4. Concept definitions**

A number of key concepts of importance for the common understanding of the subject matter relate to land<sup>68</sup>. *Land* is defined as “the surface of the Earth, the materials beneath, the air above and all things fixed to the soil<sup>69</sup>”. Land is however also recognised as a vital resource for African livelihood and for the fulfilment of a number of human rights<sup>70</sup>, and as a core element of people’s ethnicity and origin (identity), cultural and religious practises, social and political status and participation, and sense of self-esteem, confidence, security and dignity<sup>71</sup>. As expressed by a local Kenyan: “land is the mother of life. Everything you need you get from it<sup>72</sup>”. The dissertation acknowledges however

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<sup>64</sup> Frankfort-Nachmias, 1997, p. 76., Walliman, 2010, pp. 42-43.

<sup>65</sup> Frankfort-Nachmias, 1997, p. 84.

<sup>66</sup> Frankfort-Nachmias, 1997, pp. 82-85., Walliman, 2010, pp. 47-48.

<sup>67</sup> Frankfort-Nachmias, 1997, pp. 88-89., Walliman, 2003, pp. 49-50.

<sup>68</sup> Frankfort-Nachmias, 1997, pp. 27, 29., Tufte, 2002, pp. 34, 39, 41., Walliman, 2010, p. 67.

<sup>69</sup> Eurogeographics, 2005, slide 16.

<sup>70</sup> Such as the right to property (Art. 17 UDHR, 1948), health (Art. 12 ICESCR, 1976), an adequate standard of living, including food, clothing and housing (Art. 11 ICESCR, 1976., Art. 25 UDHR, 1948), equality and non-discrimination (Art. 3 ICESCR, 1976., Art. 3 ICCPR, 1976., Art. 2 UDHR, 1948) and freedom to economic, social and cultural development (Art. 1 ICESCR, 1976., Art. 1. ICCPR, 1976)., Declaration on the Right to Development, 1986.

<sup>71</sup> UN-HABITAT, 2008, pp. 3, 13., FAO, *Access and Tenure of Natural Resources*, at <http://www.fao.org/nr/tenure/lt-home/en/> (consulted 06 May 2011).

<sup>72</sup> Statement by a man during an interview with a local watchdog group focusing on land grabbing, 26 May 2011, Kagamega, Kenya.

that the meaning of land and the way land is governed varies greatly between, and even within, countries depending on for instance their political history and land user systems.

There are in general multiple categories of land in an Sub-African setting, i.e. *public*, *communal* and *private*, as defined in Kenya. Public land is held in trust by the state on behalf of the people. Communal land is in turn held and used by a community, such as pastoralists. Private land is held by an individual, whether customary or formally.

*Land rights* in an African context are generally not restricted solely to registered rights, and especially not to individual property rights. Land rights must rather be seen as a continuum and overlapping, ranging from various rights of use (including grazing, cropping, and accessing water resources), to conditional or full rights (including selling the land, leasing it and controlling the use of the land)<sup>73</sup>. *Land tenure* is in turn associated with a range of property rights to the land and “each of these rights may be considered as a stick in the “bundle of rights”<sup>74</sup>”. Land tenure is defined as “the nature of and manner in which rights and interests over various categories of land are created or determined, allocated and enjoyed”<sup>75</sup>. The concept of land rights is used synonymously with the concept of land tenure.

Most African countries are characterised by a *multiple/dual system of customary tenure* and *formal tenure*. Customary tenure is the predominant form across the continent, and is based on traditional practises, and social, religious and cultural norms. Customary tenure “often involves a complex set of arrangements for allocating land and resources, and well-established dispute resolution mechanisms. The rights can be held by individuals and groups and, while the rights are not documented, they are well understood by members of the community”<sup>76</sup>. Formal tenure is defined as the “legal regulation and registration of land rights”<sup>77</sup>, including the provision of a title or a certificate, that govern people’s right to use, control and transfer land. *Land tenure*

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<sup>73</sup> Global Land Tool Network., *FAQs: Why emphasize the continuum of land rights?*, available at <http://www.glttn.net/en/faqs.html#19> (consulted 5 July 2011).

<sup>74</sup> Mitchell, 2011, p. 4.

<sup>75</sup> AUC, AfDB & ECA, 2010, p. xiii.

<sup>76</sup> Mitchell, 2011, p. 4.

<sup>77</sup> Ikdahl et al., 2005, p. 5.

*security* and *secure land rights* is defined as (i) the degree of confidence that land users will not arbitrarily be deprived of the rights that they enjoy over land and the economic benefits from it, (ii) the certainty that an individual's rights to land will be recognised by others and protected in case of specific challenges and (iii) the right of all individuals and groups to effective government protection against forced evictions<sup>78</sup>.

Many African countries have initiated *land reforms*, including “comprehensive restructuring or redesign of at least three components of the land system; namely its property structure, use and production structure, and the support services in infrastructure<sup>79</sup>”. By referring to *processes of formalising land rights* and *regularisation processes*, the dissertation refers to the transformation of customary tenure into formal tenure systems.

*Land management* refer to the issue of putting land resources into efficient use<sup>80</sup> while *land administration* is defined as “the structure and processes for the determination, archiving and delivery of land rights, and the systems through which general oversight on the performance of the land sector is managed<sup>81</sup>”. *Land governance* is defined as the “process by which decisions are made regarding access to and use of land, the manner in which those decisions are implemented and the way that conflicting interests in land are reconciled”<sup>82</sup>. *Good governance* incorporates the principles of participation, transparency and accountability, ensures that political, social and economic priorities are based on a broad consensus in society and that the voices of the populations are equally heard in decision making over the allocation of development resources<sup>83</sup>. In relation to land, good governance places all decisions on land upon respect for fundamental human rights and ensures transparent decision-making processes and equal participation of all relevant stakeholders in land matters. Good land governance also

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<sup>78</sup> UN-HABITAT, 2008, p. 5.

<sup>79</sup> AUC, AfDB & ECA, 2010, p. xiii.

<sup>80</sup> Global Land Tool Network., *Land Management, Administration and Information*, available at <http://www.gltn.net/en/land-management-administration-and-information.html> (consulted 5 July 2011).

<sup>81</sup> AUC, AfDB & ECA, 2010, p. xiii.

<sup>82</sup> Global Land Tool Network., *Finding Common Definitions: Other terms*, available at <http://www.gltn.net/en/finding-common-definitions.html> (consulted 7 July 2011).

<sup>83</sup> Governance for Sustainable Human Development., *A UNDP policy document. Good Governance – and Sustainable Human Development*, available at <http://mirror.undp.org/magnet/policy/chapter1.htm#b> (consulted 5 July 2011).

ensures the equal legal recognition and protection of a range of rights connected to land, including customary rights, as well as intermediate forms of tenure, and the equitable distribution of benefits deriving from land<sup>84</sup>.

*Large-scale land acquisitions*, or *(trans)national commercial land transactions*<sup>85</sup>, refers to the agreements of purchase or lease created between public or private investors (foreign or domestic) for taking possession of and/or controlling a large scale of land for commercial or industrial agricultural production<sup>86</sup>. *Land grabbing* relates to the “distributional aspects of the phenomenon and its impacts on the political economy and the local and national populations’ right to resources for both today and the future”, and the “abusive practises in the process of acquiring the land<sup>87</sup>”.

The importance of distinguishing between land rights and *human rights* is recognised, although they are interrelated. Human rights is defined in the text of the dissertation. The wording *rights* refer to both land rights and human rights. Regarding the *human rights-based approach*, some development agencies use the concept of *rights-based approach*. The dissertation merely uses the former version, based on the recognition that the *human rights-based approach* presents a more explicit normative statement<sup>88</sup>.

Finally, a key concept of the dissertation is *disadvantaged*. In a context of land rights and a global land hunger, women are identified as a disadvantaged group due to the “constraints and systemic discrimination they generally face in relation to their access to, ownership of and control of land, including the level of legal protection of their land rights<sup>89</sup>”. Next to the “relative income poverty<sup>90</sup>” and “general physical vulnerability vis-à-vis men, as manifested in direct gender-based and sexual violence<sup>91</sup>”, women also frequently face discrimination in socio-cultural and political relations, “most

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<sup>84</sup> Palmer, Friccka et al., 2009, p. 11.

<sup>85</sup> Odeny et al., 2010, p. 8., foot note 4, referring to Borras & Franco, 2009, Towards a Broader View of the Politics of Global Land Grab.

<sup>86</sup> Odeny et al., 2010, p. 8.

<sup>87</sup> Odeny et al., 2010, p. 8.

<sup>88</sup> Seppänen, 2005, pp. 16-18.

<sup>89</sup> Daley, 2011, p. 50.

<sup>90</sup> Daley, 2011, p. 53.

<sup>91</sup> Daley, 2011, p. 53.

particularly in relation to their role in decision-making and their ability to freely exercise both “voice” and “choice” in decisions that affect their lives and livelihoods”<sup>92</sup>.

### **1.5. The scope of the dissertation**

The chapters principally follow the research questions, in order to clearly demonstrate what information has been used for interpretation and analysis for each question.

Chapter 2 elaborates on some of the risks and opportunities of large-scale land acquisition for African populations’ rights and livelihoods, particularly for women. Chapter 3 presents a brief historical overview over the customary tenure and the regularisation processes during the colonial era. The chapter also explores the impact of the current land law and policy reforms on land rights and livelihoods of African rural populations in general and of women in particular. Chapter 4 elaborates on the role of transparency, accountability and participation in relation large-scale land acquisitions. The relation between land governance and human rights is explored, and the HRBA as a normative framework is presented, including the linkage between its core principles, and a legal human rights system. A particular focus is put on the principle of equality and non-discrimination in relation to women’s land rights. Chapter 5 explores the benefits and challenges of the HRBA as an analytical and operational tool. Chapter 6 summarises the findings and gives suggestions for further research.

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<sup>92</sup> Daley, 2011, p. 52.

## 2. The impact of large-scale land acquisitions

There is little reliable evidence on the details of large scale land-deals, and on the magnitude of the gendered implication of the interest of national and international investors in land<sup>93</sup>. The opinions about the development are divided, but two main schools of thoughts can be identified. One promoted primarily by the WB, IFAD and the UN puts emphasis on the need for development in rural areas and the fiscal inability of the governments of the developing countries to provide the necessary infusion of capital. Large-scale commercial land acquisitions are seen as a win-win situation with benefits for both the host country and the investors<sup>94</sup>. Proponents of these investments list possible development opportunities for local communities as;

- Increased employment opportunities
- Development of rural infrastructure and poverty-reducing improvements
- New agricultural practises
- Increased production of food crops that can supply local and national consumers in addition to overseas consumers.

However, a common recognition is that in many cases where large-scale land acquisition has taken place, impacts have not been encouraging<sup>95</sup>, especially for women<sup>96</sup>. The second school of thought promoted by organisations such as Campesina, GRAIN and Food First, is concerned by the scale, the terms and the speed of land acquisitions, and draws parallels to a new form of colonialism. GRAIN has noted that “it should be abundantly clear that behind this rhetoric win-win deals, the real aim of these contracts is not agricultural development but simply agribusiness development<sup>97</sup>”. With some deals involving hundreds of thousands of hectares, the large-scale land

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<sup>93</sup> Land Rights Research & Resource Institute, 2010, p. 21., Graham et al., 2009, p. 19., Deininger et al., 2011, p. xxv, Tsikata in Tsikata & Golah, 2010, p. 2., Fiona & Mackenzie in Tsikata & Golah, 2010, p. 35., Cotula et al., 2009, p. 3., von Braun & Meinzen-Dick, 2009. p.1., IIED, 2009, p. 1., Hallam, 2009, p. 3.

<sup>94</sup> Von Braun & Meinzen-Dick, 2009, p. 2., Dr Gaynor Paradza, Speaker at the African Women’s Land Rights Conference, Nairobi, 2011., Land Rights Research & Resource Institute, 2010, p. 13., ILC, Oxfam Novib et al., 2011, p. 1.

<sup>95</sup> Deininger et al., 2011, pp. xiv, 23., Odeny et al., 2010, pp. 36-37. Nihdi Tandon and others at the African Women’s Land Rights Conference, Nairobi, 2011.

<sup>96</sup> Dr Gaynor Paradza, Speaker at the African Women’s Land Rights Conference, Nairobi, 2011.

<sup>97</sup> Graham et al., 2009, p. 22.

acquisitions have been dubbed “land grabs”<sup>98</sup>. Because land is directly connected to a number of human rights, “land grabbing has been identified as is a violation of the Covenant on Economic, Social and Cultural Rights”, by drawing references to the “multiple threats of severe human rights impacts on land grabbing for the displaced and adjacent population in terms of economic, social, cultural, civil and political rights”<sup>99</sup>. Risks with these land-grabs are more specifically perceived to be;

- Dispossession of land with no or little compensation
- Relocation of people
- Local and national instability
- Livelihood change
- Land tenure change
- Food security challenge
- Increased rates of HIV and AIDS
- Increased resource conflict
- Increased gender differential
- Gender based violence

Finally, there is a third school of thought – “a middle way” – which sees the painting of the picture as either black or white as a huge simplification. The extent to what international land deals bring opportunities or further marginalise people rather *depends* on their terms and conditions<sup>100</sup>, and they display a huge diversity between countries and even between individual projects. The local impact is linked to a number of influencing factors, such as;

- The roles and identities connected to the land and social hierarchies

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<sup>98</sup> Dr Gaynor Paradza, Nidhi Tandon and Josephine Kamel Youssef, speakers at the African Women’s Land Rights Conference, Nairobi, 2011., IIED Briefing, 2009. p. 1., Alden Wily, 2011, p. 2., von Braun & Meinzen-Dick, 2009., Cuffaro & Hallam, 2011, pp. 2-4., Land Rights Research & Resource Institute, 2010, p. 13., Odeny et al., 2010.

<sup>99</sup> Odeny et al., 2010, p. 6.

<sup>100</sup> Dr Gaynor Paradza, Speaker at the African Women’s Land Rights Conference, Nairobi, 2011., Interview with John Ndiritu, Senior Programme Manager, The Swedish International Development Cooperation Agency, Nairobi, 19 May 2011., Deininger et al., 2011, pp. xxv., Cotula et al., 2009, pp. 6, 100-102., IIED Briefing, 2009, pp. 1-4.

- The legal framework of the investment and the institutional capacity of the host country
- The contract
- The procedure of the investment (including issues of governance and corruption)
- The distribution of costs and benefits
- The location of the investment
- The properties of the natural resource/crop

This third school of thoughts argues that deals must be assessed in light of the often complex overall context they are part of, including these influencing factors<sup>101</sup>, in order to determine what the outcome will be.

## **2.1. Some factors determining the local impact of large-scale land acquisitions**

### **2.1.1. The roles and identities connected to the land and social hierarchies**

The social relations connected to land, such as gender, labour, class, ethnicity and kinship, and the intersection between them in various ways, play a role in the differentiation of impacts of globalisation<sup>102</sup> and of large-scale land acquisitions. They provide important information about various power-relationships and the origin of inequitable distribution of the benefits of resources. Although gender inequalities existed before globalisation, scholars of sustainable development has noted that globalisation has added pressure to social inequalities between men and women, which in turn has led to more inequitable distributions of resource benefits, at the expense of women<sup>103</sup>. Depending on their access to and control of land and other productive assets, their level of participation in decision-making and socio-economic activities, employment opportunities and conditions, and their food security, men and women within the same household, as well as male- and female headed households, are affected differently by the environmental and socio-economic transformations resulting from the

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<sup>101</sup> Cutola et al, 2009, pp. 6, 102.

<sup>102</sup> Tsikata in Tsikata & Golah, 2010, p. 20.

<sup>103</sup> Buckingham, 2011.

growing global pressure on land<sup>104</sup>. Women as a group are not homogeneous and their individual experiences of the increasing demand for land differ according to their status and position in their families, clans, communities and societies, their relative age and wealth, marital status, and educational level. Yet, special attention needs to be given to the gendered impact of the increasing commercial pressure on land due to the general vulnerability of women as a group<sup>105</sup>.

The dimension of land-labour relations have also been seen as particularly important to explore. In some cases, people have established their connection to land through their labour, i.e. how much work they have done on the land. This way to claim land has sometimes also enabled women to increase their control over land outside the power of the male household<sup>106</sup>.

Ethnicity is another very important issue in an African context playing a crucial role in determining the impact of large-scale land acquisitions. Ethnicity is not only linked to the origin of a person which is often connected to a specific geographical area, but is also closely linked to cultural and religious traditions connected to land, as well as to the organisation of livelihoods, such as farming or pastoralism.

#### **2.1.2. The legal framework and the domestic institutional capacity**

A crucial area of concern is the broader legal context in which the land deal takes place<sup>107</sup>. On one hand, the land deals are subject to host countries laws and regulations on the admission of foreign investors, incentives for foreign investment, property law and laws relating to the potential impacts of the investment on the local community. On the other hand, the land deals are also subject to international law<sup>108</sup>. However, international treaties may compound imbalances in individual deals. For example, investment treaties between home and host countries usually protect investment against adverse host government action and strengthen the legal value of individual contracts by

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<sup>104</sup> Dr Gaynor Paradza, Speaker at the African Women's Land Rights Conference, Nairobi, 2011. Rossi & Lambrou, 2008, p. 4.

<sup>105</sup> Daley, 2011, pp. 8-9.

<sup>106</sup> Tsikata in Tsikata & Golah, 2010, pp. 20-28.

<sup>107</sup> IIED Briefing, 2009, p. 2., Nidhi Tandon, Speaker at the African Women's Land Rights Conference, Nairobi, 2011.

<sup>108</sup> Cuffaro & Hallam, 2011, pp. 8-9.

making their violation a breach of international law. They also give investors direct access to international arbitration in case of disputes with the host government and potential for substantial compensation for host state breaches of contracts or treaties<sup>109</sup>. These specific and enforceable sets of rights enjoyed by the investors tend to out rule the rights of the host government to regulate economic activity within their borders, or the legal devices available for local people to protect their land rights under for instance human rights law<sup>110</sup>.

Hence, the overall balance depends to a large extent on the strength of the host countries national regulatory systems. In an ideal world, the domestic governments should be able to regulate business transactions by appropriate legislation and implementation in for example environmental protection laws, workers' rights and safety, consumer rights, pensions, financial rules and auditing<sup>111</sup>. A problem is however that not only countries with a fair amount of non-forested and non-cultivated land with agricultural potential have attracted interest. Investors are also attracted to countries where hunger, vulnerability to climate changes and extreme poverty are far away from being solved<sup>112</sup>, and where the environment often characterized by weak state capacity and lacking legal or procedural mechanisms for protecting local rights<sup>113</sup>. An increasing number of countries have developed progressive laws and procedures that seek to increase local voice and benefit, also for women, but gaps between theory and practice - between statute books and reality on the ground - can be immense. These gaps are visualised through for instance governance issues and corruption, and may result in major costs for local populations<sup>114</sup>. While local populations may challenge government land allocations, national as well as international institutions are likely to offer little comfort, raising real concern about the capacity of local institutions to protect for example

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<sup>109</sup> IIED Briefing, 2009, p. 3.

<sup>110</sup> IIED Briefing, 2009, p. 3., Cuffaro & Hallam, 2011, pp. 8-9., Nidhi Tandon, Speaker at the African Women's Land Rights Conference, Nairobi, 2011.

<sup>111</sup> Cuffaro & Hallam, 2011, pp. 8-9.

<sup>112</sup> GRAIN Briefing, 2008, pp. 10-11.

<sup>113</sup> Cuffaro & Hallam, 2011, p. 8., Cutola et al., 2009, pp. 5-7., Deininger et al., 2011, pp. xiv, xxv, xxxii, xxxiii-xxxiv.

<sup>114</sup> Deininger et al., 2011, p. xiv., Cutola et al., 2009, p. 7.

women from losing land on which they at least might have legitimate claims although not formally recognized<sup>115</sup>.

### **2.1.3. The contract itself**

As a result of legal and institutional challenges, the role of the specific international investment contracts of the land deal becomes critical. Investment contracts basically identify the key elements of the bargain and they have the propensity to become the legal code for the investment<sup>116</sup>. Contracts of land deals are however complex and differ hugely among countries and even projects. Although more work is needed to identify trends and contractual practises, a number of challenges can be highlighted, which threatens the balance of a deal. One area of concern has been the lack of transparency, and of checks and balances in relation to contract negotiations. This creates a breeding ground for corruption and for deals that do not maximise the public interest. Many contracts lack robust mechanisms to monitor or enforce compliance with investor commitments. They often fall short in guaranteeing benefits to local populations and promoting models to improve livelihoods. They also frequently fail to ensure smallholder participation in production activities and to balance food security concerns in both home and host countries<sup>117</sup>.

### **2.1.4. The procedure of investment**

Related to these concerns is the question of who is deciding on what issues, and how costs and benefits are shared. In many African countries, the government tends to play a big role in allocating land through leasing rather than purchasing, and with a duration ranging from short term to 99 years. One reason is that the state formally owns all or much of the land in many African countries, for example in Zimbabwe and Ethiopia<sup>118</sup>. Therefore, the extent to which governments take into account local interest in land is a key. A problem is however that host governments sometimes contractually commit themselves to providing land before any consultations with local “land users” has taken place. Public or communal land held under customary tenure is in this context

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<sup>115</sup> Deininger et al., 2011, p. xxxii., Alden Wily, 2011, p. 9., IIED Briefing, 2009, p. 3.

<sup>116</sup> Cuffaro & Hallam, 2011, p. 9.

<sup>117</sup> Cutola et al, 2009, p. 7., IIED Briefing, 2009, p. 2.

<sup>118</sup> IIED Briefing, 2009, p. 2., Roselina Muzerengi, Speaker at the African Women’s Land Rights Conference, Nairobi, 2011.

particularly sensitive. In cases where the local populations actually have been consulted, the accountability of the local leaders may in turn be an issue<sup>119</sup>. Moreover, it is important to note that the “local leaders” are generally men and the “land users” are women. The systematic discrimination women generally face in socio-economic and political relations becomes particularly obvious in the consultation processes with local populations, where the possibility to “freely exercise both voice and choice in decisions that affect their lives and livelihoods” is very limited<sup>120</sup>. In other words, “women are not party to these negotiations and are not in a position to prevent land leases”<sup>121</sup>. In some communities in Ghana, the only female traditional leader is the *magazia* and she does not even have the authority to intervene in land matters<sup>122</sup>. However, there are examples where local chiefs now are working with advocacy of women’s land rights, and there also examples in Kenya where the male village elder, has been complimented by a female elder<sup>123</sup>.

#### **2.1.5. The distribution of costs and benefits**

While large-scale land acquisitions may have the potential to boost the domestic economy, the economic equilibrium of the investment is an area of concern. Research has shown that land fees and other monetary transfers in many cases are not the main host country benefit. The host country’s main benefit is seen in the form of investor commitment on investment level, employment creation and infrastructure. However, it has been established that these commitments tend to “lack teeth” in the overall structure of documented land deals<sup>124</sup>. Moreover, deals may not be made on equal terms between the investors and the local communities even though some of the land-lease agreements make provisions for investment in rural development<sup>125</sup>. A risk is also that the benefits which actually are brought down to rural community level are inequitably distributed between advantaged and more disadvantaged groups, such as women. An example are

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<sup>119</sup> IIED, 2009, p. 2.

<sup>120</sup> Daley, 2011, p. 7.

<sup>121</sup> Wandia, 2009.

<sup>122</sup> Lundkvist, 2007, p. 14.

<sup>123</sup> Participant from Zambia at the African Women’s Land Rights Conferences, Nairobi, 30 May 2011., Interview with Violet Shibutse, Grassroot woman leader and Focal point for GROOTS Kenya in Kakamega, Kakamega, 28 May 2011

<sup>124</sup> Cutola et al., 2009, pp. 6-7., IIED, 2009, p. 3., Hallam, 2009, p. 5.

<sup>125</sup> Von Braun & Meinzen-Dick, 2009, p. 2.

cases where investors issue compensation for land loss, which in practise primarily goes to the man as “the head of the household” since he is the one registered on the land.

#### **2.1.6. The location of the investment**

That foreign as well as domestic investors tend to focus on higher value lands where most productive land is likely to already be claimed by farmers, herders or hunters is a concern of many African countries<sup>126</sup>. In for instance Mali, where only a relatively small area of suitable land has been allocated, investor interest has focused on the more fertile lands of the Office du Niger area<sup>127</sup>. In Kenya, the land which is suitable for agricultural production is about 20 %. The rest is arid or semi-arid land. The “high-potential” land is primarily found in the central parts and along the coast, which also are the most densely populated areas. Consequently, local rights and livelihoods of residents and land users in these areas are potentially at risk (see for instance 2.2.2)<sup>128</sup>. However, the fact that these areas are densely populated may also serve as a protection of the population, since large-scale investors will find it more difficult to move them<sup>129</sup>.

#### **2.1.7. The natural resource and the specific crop**

One important feature influencing the impact of large-scale land acquisitions is the bio-physical, economic, strategic and social properties of certain natural resources. Because these properties determine the technologies, capital and social relations of the exploitation, they also determine the impact on local livelihoods. An assessment of the proprieties of a particular natural resource and the mode of its exploitation provide an important dimension to the understanding for globalisation, land and resource tenures and their implication for gendered livelihoods. A case study in Ghana noticed for instance that mangrove, as plant species involved local knowledge and as its capital requirements were quite moderate, facilitated local populations to extensively participate in mangrove harvesting. This was compared to gold mining, where the level of needed capital requirements and technology requiring special competences which

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<sup>126</sup> Cuffaro & Hallam, 2011, p. 7.

<sup>127</sup> IIED, 2009, p. 2.

<sup>128</sup> Interview with Zipporah Mugonyi, Deputy Provincial Director of Agriculture, Provincial Commissioner Office, Kakamega, 25 May 2011.

<sup>129</sup> Interview with Zipporah Mugonyi, Deputy Provincial Director of Agriculture, Provincial Commissioner Office, Kakamega, 25 May 2011.

were not to be locally found, excluded many local people from participating in its exploitation<sup>130</sup>.

In a similar way, the specific type of crop provides an important dimension to the understanding of land and the implication of new investments for men and women respectively. The transformation from growing “cash-crops”, such as sugarcane, to “food-crops” such as maize, has in some cases made the security of the woman as well as the food security of rest of the family very vulnerable. Due to inequitable sharing of benefits within the household, cash-crops has turned out to be an income-generating activity benefiting primarily the man, with a result of daily worsening struggle for the woman to get enough food for the survival of the family. Other occasional consequences are increased physical and psychological harassment and sexual abuse. There are also examples where men have gained vast amounts of money, gone to celebrate and returned to the family infected with HIV<sup>131</sup>.

## **2.2. Understanding large-scale land acquisitions through case studies**

While it is possible to make a range of valid and important yet general points about the impact of large-scale land acquisitions, the exploration of case studies is important to build a fine-tuned understanding of the nature and extent of local impacts. Such understanding enables appropriately designed policies and mechanisms to be developed, to maximise potential benefits of land deals. For this reason, three case studies of Yala Swamp and Tana River in Kenya, and Kilwa in Tanzania will be presented, serving to illustrate some local impacts of recent large-scale land acquisitions in these two countries.

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<sup>130</sup> Tsikata in Tsikata & Golah, 2010, pp. 17-19.

<sup>131</sup> Interview with Violet Shibutse, Grassroot woman leader and Focal point for GROOTS Kenya in Kagamega, Kakamega, 28 May 2011., Discussions at the African Women’s Land Rights Conferences, Nairobi, 30 May 2011.

### 2.2.1. Dominion Farm Ltd in Yala Swamp, Kenya

In 2003, Dominion Farms Ltd, a subsidiary of Dominion group of Companies based in Edmond, Oklahoma, in the United States of America, made its appearance in Yala Swamp – one of the largest and most important riparian and floodplain wetlands in Kenya. The swamp is held by the Siaya and Bondo County Councils as trust land on the behalf of the government. It is estimated that the total population of the two counties is approximately half a million people, primarily belonging to the



ethnic group of Luo. The initial proposal was that Dominion would engage in rice production in a part of the Swamp covering about 2.300 ha (“Area 1”), later added to by an “Additional Area” of 3.700 ha through a lease agreement with both the Siaya and Bondo County Councils. The lease was eventually expanded to cover the entire swamp, which is estimated to be about 17.500 ha. The land was leased for a period of 25 years with a possibility to be prolonged<sup>132</sup>. Approximately 3.500 ha are currently in production, primarily of rice but also of other products such as maize and fish. There are also ongoing processes of expanding the production to biodiesel, in cooperation with Total<sup>133</sup>. A major goal of Dominion Farms Ltd is to “positively impact the community surrounding the farm and enrich the lives of rural Kenyans. Dominion is especially committed to supporting the youth and the women of Kenya in their quest for economic advancement. In a land where poverty and disease run rampant, the young people crave a better future. Dominion recognizes this desire to break from the past and has created a

<sup>132</sup> Odeny et al., 2010, pp 21-22., Kinaro, 2008, pp. 9-10., Interview with Chris Abir, Director of Dominion Farms LTD, Siaya, 25 May 2011.

<sup>133</sup> Interview with Chris Abir, Director of Dominion Farms Ltd, Yala Swamp, 25 May 2011.

variety of venues for individuals to realize their potential - even in an impoverished environment<sup>134</sup>.

The investment of Dominion Farms Ltd was initially praised for reversing the poor infrastructure left behind by the Lake Basin Development Authority (LBDA), who previously had reclaimed the “Area 1” on behalf of the Kenyan Government and made some attempts to use the land for agricultural activities. The new investment was given a ray of hope that its commercial farming would fight severe poverty, diseases and ignorance, through promises of jobs, schools, clinics and an upsurge of the local economy in general<sup>135</sup>. Perceived positive outcomes were thus relating to the enhancement of a number of social and economic rights, such as the right to work (Art. 6 ICESCR), the right to education (Art. 13 ICESCR) and the right to an adequate standard of living (Art. 11 ICESCR), which in turn is interdependent and interrelated to civil and political human rights. Local politicians and evangelical pastors organised massive demonstrations in favour of the investment<sup>136</sup>.

The entry, expansion and development of the activities by Dominion Farms Ltd however also caused severe opposition. While the government and local authorities were in approval of the company’s activities many people in the community together with a number of environmentalists and NGOs have been against the large-scale project<sup>137</sup>. Local governance and management of the investment are core elements of the opposition. A study showed that many respondents from the local communities have indicated that they haven’t understood the whole transition process of change of governance of the wetland, and that issues of land ownership of the swamp still remain controversial and unsolved. Many put the blame on the local political leaders who are accused of allegedly colluding with the investor, and perceive them as the net beneficiaries of the investment, though at the expense of the “grassroots” communities. An inadequate all-inclusive participatory approach in the management of the Yala

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<sup>134</sup> Dominion Farm Ltd, at <http://www.dominion-farms.com/community.html> (consulted 07 June 2011)

<sup>135</sup> Odera Omolo, Leo., *Dominion Farms in Yala Swamp to reduce Kenya’s national rice import bus by 90 000 tons annually*, 2006, at [http://www.jaluo.com/wangwach/1106/Leo\\_Odera\\_Omolo112306.html](http://www.jaluo.com/wangwach/1106/Leo_Odera_Omolo112306.html) (consulted 05 June 2011)., Odeny et al., 2010, p. 22.

<sup>136</sup> Odeny et al., 2010, p. 22.

<sup>137</sup> Omambia Kinaro, 2008, pp. 10-11.

Swamp and a lack of forum and feedback mechanisms between key stakeholders have created feelings that despite the community being a key stakeholder, its members are not adequately empowered to participate in decision-making regarding the wetland<sup>138</sup>. In 2007, the case of Yala Swamp was presented at the Peoples' Tribunal during the World Social Forum. A petition was directed to the president of Kenya and demanded to provide for full participation in the Environmental Impact Assessment of all Yala Swamp residents who could potentially be affected by Dominion Farm projects, and to take immediate action to clarify issues of land ownership, resolve land disputes and issue title deeds to Yala Swamp residents<sup>139</sup>. The "Global Response" in turn organised international letter-writing campaigns to support local communities that have engaged in struggles to stop environmental destruction and human rights violations of indigenous people<sup>140</sup>. Media articles and other reports are drawing references between the investment and so-called "land-grabbing"<sup>141</sup>.

One concern is the Memorandum of Understanding between Dominion Farm Ltd and Bondo and Siaya counties and its lacking references to those who lived on the "Additional Area". It is argued that there should be provisions for these occupants, including those who may be referred to as "squatters"<sup>142</sup>. From a human rights perspective, this is important to ensure for example the right to an adequate standard of living, including food and housing (Art. 11 ICESCR) and the right to property (Art. 17 UDHR) on a non-discriminatory basis (Art. 3 ICESCR and Art. ICCPR). It is recognised that there are families who had been on the area for generations, but the majority of them lack titles to prove their claims of the land. Furthermore, some of those who actually did have titles were allegedly offered prices for their land in 2004 corresponding to less than the market price. Several among those who refused,

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<sup>138</sup> Omambia Kinaro, 2008, pp. 27-29, 36-40, 46.

<sup>139</sup> Odeny et al., 2010, pp. 25-26.

<sup>140</sup> Palmer, 2007., Cultural Survival, *Background information for Kenya: Project*, 2010, at <http://www.culturalsurvival.org/take-action/kenya/2/background-information> (consulted 05 June 2011)., KWF Members, *Yala Swamp Action Alert*, 2007, at [http://www.jaluo.com/wangwach/200703/Paula\\_Palmer031407.html](http://www.jaluo.com/wangwach/200703/Paula_Palmer031407.html) (consulted 05 June 2011).

<sup>141</sup> Interview with Chris Abir, Director of Dominion Farms Ltd., Siaya, 25 May 2011., Odeny et al., 2010.

<sup>142</sup> Odeny et al., 2010, p. 24, referring to Analysis of Memorandum of Understanding, Dominion Farm Ltd. vs. the County Council of Bondo and the County of Siaya, James Torore Makori, Jubilee Insurance Exchange, Nairobi, 2008.

experienced flooded fields and destroyed crops. Dominion Farm Ltd is suspected to be behind these floods, as “a way of pushing people away”<sup>143</sup>. Another study did however not come across anybody evicted and without compensation but found complaints regarding the size of the compensations<sup>144</sup>. According to Art. 13 of the General Comment no. 7 of the Committee on Economic, Social and Cultural Rights (CESCR) on the Right to Adequate housing in relation to forced evictions<sup>145</sup>, State parties should ensure an adequate compensation for any property, both personal and real. The human rights framework does not explicitly state what an adequate compensation is, but the General Comment no. 7 recalls the Art. 2.3 of the ICCPR, which requires State parties (including Kenya) to ensure “an effective remedy” for persons whose rights have been violated and the obligation upon the “competent authorities (to) enforce such remedies when granted”<sup>146</sup>.

Another concern, raised by Action Aid Kenya and the Kenya Land Alliance is that the company, in effect, has privatised parts of the swamp and public roads, blocked lake access to over 200 fishermen and impeded the access to schools, markets and health clinics<sup>147</sup>. Thus concerns are raised over the same human rights that the investment initially was seen as capable of boosting. Among some locals, there is a perception that they have been disposed of the land to which they freely could access for grazing, fishing and water collection, and that the limited access to the swamp has led to a degradation of the standard of living<sup>148</sup>.

The impact of the investment seems however to be divergent, relating to a number of factors such as age, gender, employment, and previous direct benefit from the swamp which in turn relates to physical location<sup>149</sup>. On one hand, the loss of access to the swamp has made some people more vulnerable to hunger and poverty, with few options

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<sup>143</sup> Odeny et al., 2010, p. 24.

<sup>144</sup> Omambia Kinaro, 2008, p. 28.

<sup>145</sup> CESCR, *The right to adequate housing (Art.11.1): forced evictions*. General Comment 7, 1997.

<sup>146</sup> CESCR, *The right to adequate housing (Art.11.1): forced evictions*. General Comment 7, 1997.

<sup>147</sup> Odeny et al., 2010, p. 24.

<sup>148</sup> Omambia Kinaro, 2008, pp. 24-28., Interviews with local men, women and youth at Yala Swamp, 25 May 2011.

<sup>149</sup> Omambia Kinaro, 2008, p. 28., Interviews with local men, women and youth at Yala Swamp, 25 May 2011.

for alternative livelihood activities. Among the most vulnerable are for instance elderly, both men and women, who cannot access gainful employment at the farm, and people whose traditional skills in making products made from the swamp resources could no longer be put in use<sup>150</sup>. Within a human rights framework, this infringes upon the principle of equality and non-discrimination<sup>151</sup> in relation to the right to freely pursue an economic, social and cultural development<sup>152</sup>. Furthermore, it infringes upon the provisions of Art. 8. of the Declaration on the Right to Development, which explicitly recognises the equality of opportunity to development for all, including employment and fair distribution of income<sup>153</sup>.

Moreover, it seems like communities who traditionally had direct uses of the wetland are expressing more resentment than those who lived further away, who put more emphasis on the positive impacts including for example general improvements of roads and electricity, new employment opportunities, resulting in diversified sources of income and opportunities for credits/loans that may be put into other economic ventures to enhance their livelihoods<sup>154</sup>. Dominion Farms Ltd is said to have provided over 1000 locals with employment, primarily women. Many of these women have the main responsibility for their families, including orphans due to HIV/AIDS. To provide these women with employment opportunities is seen as a means to strengthen their economic position and rights<sup>155</sup>. In terms of human rights, this may be a positive measure to enhance equal opportunity for development for both women and men. The majority of the women are casually employed, and earn 200 Kenyan shilling per day (07-17), with one hour of self-provided lunch. The salary covers a medical insurance, but not clothes for protection to use at the farm<sup>156</sup>. As part of its social corporate responsibility, Dominion has also initiated many other programmes, including support to the local

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<sup>150</sup> Omambia Kinaro, 2008, p. 32.

<sup>151</sup> Art. 2 UDHR., Art. 3 ICESCR., Art. 3. ICCPR.

<sup>152</sup> Art. 1. ICESCR., Art. 1 ICCPR.

<sup>153</sup> 41/128 Declaration on the Right to Development.

<sup>154</sup> Omambia Kinaro, 2008, pp. 28, 34., Interviews with local men, women and youth at Yala Swamp, 25 May 2011., Interview with two youth working at Dominion Farms Ltd, Yala Swamp, 25 May 2011.

<sup>155</sup> Interview with Chris Abir, Director of Dominion Farms Ltd., Yala wamp, 25 May 2011.

<sup>156</sup> Interview with in total five employees at Dominion Farm Ltd., Yala Swamp, 25 May 2011. Interview with Chris Abir, Director of Dominion Farms Ltd., Yala wamp, 25 May 2011.

health clinic and scholarships for orphans<sup>157</sup>. References to, for instance, the promotion of the right to health (Art. 12 ICESCR) and the right to education (Art. 13 ICESCR) can be drawn. Among some youth, the “youth camp” at the rice field, which was installed by Dominion in 2010 and which provides training in life skills, agriculture and more, is highlighted as a positive outcome of the investment<sup>158</sup>.

However, alongside the benefits with societal improvements and increased number of employment opportunities, an issue is the uncertainty of employment, which impedes on livelihood security. The programme director of Dominion says that (i) they pay attention to the ability of people with HIV/AIDS to work, (ii) the employees are provided with social support through a councillor, including training in how to save money and (iii) there is a mediator between the employees and the company available to receive complaints. Yet, some employees argue that there is little support available when falling sick, and that there is no workers’ association. One person working for the company mentions that if someone took the lead of such an association, that person would have to leave soon after<sup>159</sup>. An issue is also the health risks connected to the work<sup>160</sup>. It has been stated that “in the rice fields, women can be seen armed with sticks to chase away the birds which prey on the cereal. According to the villagers, they have to stand in the mud from dusk to dawn for miserable pay and even remain there when the plantation is sprayed with pesticides...villagers claim that even the cattle are destroyed by contaminated water<sup>161</sup>. This raises real human rights concerns for Art. 7 of the ICESCR which recognises “the right of everyone to the enjoyment of just and favourable conditions of work”, including in particular “safe and healthy working conditions<sup>162</sup>”. Dominion has acknowledged that the use of aerial spray has caused some tension in the area, but has also been quick to point out that they are using recommended chemicals and that they, as a health precaution, do so when most

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<sup>157</sup> Dominion Farm Ltd, at <http://www.dominion-farms.com/community.html> (consulted 07 June 2011)., Interview with a boy who said he has a scholarship from Dominion Farm Ltd, 25 May 2011.

<sup>158</sup> Interview with two youths working at the Dominion Farm Ltd, Yala Swamp, 25 May 2011.

<sup>159</sup> Interview with Chris Abir, Director of Dominion Farms Ltd, Yala Swamp, 25 May 2011, respectively with in total five employees at the farm, Yala Swamp, 25 May 2011.

<sup>160</sup> Omambia Kinaro, 2008, pp. 34-35.

<sup>161</sup> Odeny et al., 2010, p. 23.

<sup>162</sup> Art. 7. ICESCR, 1976.

employees are not in the farm. The impact on both humans and the environment remain however controversial<sup>163</sup>.

### 2.2.2. The Qatar-deal and Mumias in Tana River in Kenya

In December 2008, rumour revealed that Kenya would receive a 2,4 billion loan of United States Dollars, and provide in exchange 40 000 ha of land to Qatar to grow food. While reliable information about the deal is very scarce, a concern is that this plantation will take place in the middle of the Tana River, a delta located in coastal Kenya. The delta is one of the most fertile agricultural areas in the country, and provides home to approximately 200 000 inhabitants from several ethnic groups;



among them the Bantu ethnic groups Pokomo, Munyoyaya, Malakote and Mijikenda, who engage in farming, and Cushites; Orma, Wardei and Somali, who are mainly pastoralists. Some of the farmers also engage in small-scale fishing in the rivers and numerous ponds. The pastoralist communities live primarily in the hinterland of the district, around areas where there is water and pastures, and move their cattle to the Tana River Delta during the dry season. Nearly all land in the Tana Delta districts is trust land, and an overwhelming majority of the land users lack titles to their ancestral land. For the Kenyan government many people are considered as “squatters” although they might have lived in the same place for generations<sup>164</sup>.

When the aforementioned deal with Qatar became known, the residents of the delta had just won a court injunction concerning another large-scale land acquisition, by Kenya’s largest sugar company Mumias<sup>165</sup>. This company had been granted a licence to turn the

<sup>163</sup> Omambia Kinaro, 2008, pp. 34-35.

<sup>164</sup> Odeny et al., 2010, pp. 18-20.

<sup>165</sup> Ausseil, Francois., *Land rights disputes rage on Kenya river*, in Gulf Times, 2009, at <http://www.gulf->

wetland into sugarcane plantation for “eco-friendly” bio-fuels, and the injunction temporarily halted the decision<sup>166</sup>. While the local government was welcoming the prospect of this investment and increased employment opportunities, massive opposition from environmentalists and development campaigners argued that the arable land should not be used for non-food crops, especially in a region susceptible to food shortages<sup>167</sup>. A number of campaigns have been initiated to stop the sugar factory from being built, and to have the most sensitive parts of the delta declared as a protected area, in order to avoid “an ecological and social disaster<sup>168</sup>”. When Kenya’s National Environmental Management Authority (NEMA) revealed to have approved the irrigation scheme in 2008 to the benefit of the sugar companies, villagers and fishermen expressed concerns about their access to the communal land, and the loss of livelihoods that had not been adequately addressed. Pastoralists who bring 60 000 cattle from as far afield as the Somali and Ethiopian border regions to graze in the delta also protested and disrupted public hearings on the project<sup>169</sup>. The land deal has also received world-wide media attention<sup>170</sup>. The critical issues of loss of land and livelihoods with no compensation, displaced people and lack of sustainability, raise real concern for the right to an adequate standard of living, including food and housing (Art. 11 ICESCR), the right to not be arbitrarily deprived of property (Art. 17 UDHR), the right to self-determination and to freely pursue an economic, social and cultural development (Art. 1 ICCPR and Art. 1. ICESCR)<sup>171</sup> and the right to be adequately compensated for any

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[times.com/site/topics/article.asp?cu\\_no=2&item\\_no=304040&version=1&template\\_id=39&parent\\_id=21](http://times.com/site/topics/article.asp?cu_no=2&item_no=304040&version=1&template_id=39&parent_id=21) (consulted 07 June 2011).

<sup>166</sup> The Tana River Delta Website, *Proposed projects for the delta (Sugercane plantations – Mumias and Mat International)*, at <http://www.tanariverdelta.org/tana/g1/projects.html> (consulted 07 June 2011).

<sup>167</sup> Rice, Xan., *Wildlife and livelihoods at risk in Kenyan wetlands biofuel project*, in The Guardian, 2008, at <http://www.guardian.co.uk/environment/2008/jun/24/biofuels.wildlife> (consulted 07 June 2011).

<sup>168</sup> Green.View., *Slippery when wet. Kenya plants sugarcane; America uproots it*, in The Economist, 2008, at [http://www.economist.com/node/11652396?story\\_id=11652396](http://www.economist.com/node/11652396?story_id=11652396) (consulted 07 June 2011), referring to the two NGO’s *Nature Kenya* and *The Royal Society for the Protection of Birds*,

<sup>169</sup> Rice, Xan., *Wildlife and livelihoods at risk in Kenyan wetlands biofuel project*, in The Guardian, 2008, at <http://www.guardian.co.uk/environment/2008/jun/24/biofuels.wildlife> (consulted 07 June 2011).

<sup>170</sup> See for example the articles in the Guardian, 2008., the Reuters, 2008., BBC News, 2010., the Bloomberg, 2010., the Economist, 2008 and Wetlands International, 2008 as listed in the bibliography.

<sup>171</sup> Compare to a ruling by the African Commission on Human and People’s Rights on 4 February 2010, where the commission condemned the expulsion of the Endorois people, a traditional pastoralists community, from their land in Kenya by the government for tourist development. The commission found that the eviction, with minimal compensation, violated the rights as an indigenous people to property, health, culture, religion and natural resources. It ordered Kenya to restore the Endorois to their historic

property<sup>172</sup>. In June 2009, Kenya's High Court however ruled in favour of the developers<sup>173</sup>, and the activities of Mumias have continued.

Tana Delta is also being target for several other controversial agricultural developments. While some, primarily farmers, raise positive outcomes such as increasing employment opportunities urgently needed in an area where there are few immediate jobs available<sup>174</sup>, others raise severe negative impacts. A letter to the Prime Minister, dated 31 January 2011, as a response to Tana River Development Authority (TARDA)'s allocation of land for food production states; "it is already one year ever since we received your letter, but now we write to inform you that due to your lack of action TARDA grabbed our land and forcefully evicted us from it. We are aware that TARDA obtained title deed to the land in question illegally and un-procedurally in April 2009, this was followed by a legal action being taken against TARDA and the case is still in court. Following the evictions TARDA forced us to settle in a remote and uninhabitable area 4,5 kilometres (km) away from our original home. We feel that TARDA is depriving us of our rights of good health, shelter and education. Almost all our children have dropped out of school because the school we had actually participated in its establishment is now 7,5 km away, we had water wells and boreholes in our former village but now we are forced to consume stagnant water from the TARDA water outlet trench and we fear for our health as the water has chemicals from the agricultural fields<sup>175</sup>".

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land and to compensate them. This is the first ruling to determine who are indigenous peoples in Africa and what are their rights to land. See Human Rights Watch., *Kenya: Landmark Ruling on Indegenous Land Rights. African Human Rights Commission Condemns Expulsion of Endorois People for Tourism Development*, at <http://www.hrw.org/en/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights> (consulted 4 July 2011).

<sup>172</sup> CESCR, *The right to adequate housing (Art.11.1): forced evictions*. General Comment 7, 1997.

<sup>173</sup> The Tana River Delta Website, *Proposed projects for the delta (Sugercane plantations – Mumias and Mat International)*, at <http://www.tanariverdelta.org/tana/g1/projects.html> (consulted 07 June 2011).

<sup>174</sup> Wildlife Direct. *Tag Archives: Bedford Biofuels. Public hearing for jatropha biofuels in Tana River Delta*, 2011, at <http://arochakenya.wildlifedirect.org/tag/bedford-biofuels/> (consulted at 07 June 2011).

<sup>175</sup> Dolla & Gedi, 2011.

### 2.2.3. BioShape Tanzania Ltd. in Kilwa

Projects involving plantation of sugar cane to produce biofuel is something that also has attracted several investors to Tanzania. One example is the company BioShape Tanzania Ltd, originally a foreign company but now registered in Tanzania<sup>176</sup>, which searched for farmland in Tanzania in 2006. At that time, its parent company, Bioshape Holding B.V. was developing its Dutch and Belgium power plants, and it concluded that it would be beneficial to produce its own Pure Vegetable Oil. “Because a number of shareholders already had business interests in Tanzania, it made sense to pick this country for these activities”. After a team of experts identified a number of possible locations, the choice fell on the Kilwa district, in the South East of Tanzania“. Currently, BioShape Tanzania Ltd possesses 81 000 hectares of ground on which 400 plantations of 200 ha. each will be established. These plantations will be designed to operate without diminishing the regions bio-diversity<sup>177</sup>.



As for its entry and exit in Kilwa, studies suggest that the company has followed all the required procedures to get permission for the land, including interacting with Tanzania Investment Centre<sup>178</sup>. However, a recent study shows uncertainties in terms of the local understanding of the actual agreement. Some village leaders and villagers claim that they indeed approved the request from the company through the Village Assemblies but that what they approved was an agreement that they were “lending” the land to the investor. This “contract” obliged BioShape to return a certain percentage/acreage of land after every year or two upon failure to utilise it. While the local villagers are

<sup>176</sup> Land Rights Research and Resource Centre, 2010, pp. 42-43.

<sup>177</sup> BioShape Tanzania Ltd, available at <http://bioshape.phpwebhosting.com/en/node/73>, consulted at 12 June 2011.

<sup>178</sup> Land Rights Research and Resource Centre, 2010, p. 43, also referring to Riziki Silas Shemdoo & Iddi Ramadhani Mwanyoka 2010, p. 20

convinced that the agreement was legally binding, and even more powerful than the investor's "derivative title", they don't have a copy of the contract as it has been claimed to be taken two years ago by the lawyer who came with the investor, who promised them it would be returned upon being typed and printed. Also in other villages of the Kilwa district, there are issues of unsigned agreements or agreements not making any references to returning the land, leaving it up to the Tanzanian authorities to engage with BioShape in regard to any entitlement breach. Moreover, next to confusions over the real size of the land-acquisition, there are also uncertainties regarding the actual type of land that was acquired. Some studies indicate that the land was already planned to be used for farming, others that a significant amount of forestland has been truncated for the sake of the investor<sup>179</sup>. However, officials at the District Land Officers and village leaders as well as villagers themselves indicate that the land that has been allocated to the Bioshape Tanzania Ltd actually wasn't used for any meaningful human activity anyway, besides local hunting and illegal lumbering. Hence, it is noted that letting it go has not done any harm to the communities. It has even been said that the allocation of the land to the investor was a relief to the communities as it used to be home to wild animals and vermin which were a threat to both people's lives and crops<sup>180</sup>. As will be illustrated in the end of the chapter, this view is however not shared by all.

BioShape is generally regarded as having paid compensation for the land fairly adequately and procedurally, as recognised in Art. 13 of OHCHR's General Comment no. 7<sup>181</sup>. However, there are concerns in some villages about the sustainability of the compensation. For example, in some villages, constructions has not been finished since the funds for compensation has ran out and there is no back-up plan among the villagers. The issue of sustainability also rise in relation to the many initiatives of BioShape as part of their corporate social responsibility. These include for example the construction of a maternity ward for 42 beds at a hospital, the construction and

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<sup>179</sup> Land Rights Research and Resource Centre, 2010, pp. 43-46, also referring to Shemdoe & Mwanyoka 2010, p. 26.

<sup>180</sup> Land Rights Research and Resource Centre, 2010, pp. 43-46, also referring to Shemdoe & Mwanyoka 2010, p. 26.

<sup>181</sup> CESCR, *The right to adequate housing (Art.11.1): forced evictions*. General Comment 7, 1997.

furnishing of classrooms, the provision of electricity and internet for computer classes, the establishment of a vegetable garden and the initiation of a school kitchen for the preparation of daily lunch for about 200 pupils. As a matter of fact, many of these social projects had halted in 2010, as BioShape had closed the office in the district. Both the district and village officials as well as villagers consulted reported that the company had stopped its operations in Kilwa, but no one really seem to know if it was a permanent or a temporary event<sup>182</sup>.

While a highlighted positive outcome of the investment is the provision of 1750 new employment opportunities, promoting the right to work (Art 6 and 7 ICESCR), a significant portion of the labour force that was involved in farming food crops has been transferred to the biofuel company, raising concerns about the right to food (Art 11 ICESCR) instead. This significant drop in food production is perhaps the most severe negative effect of the entrance of BioShape's investment in the area<sup>183</sup>. Although some chose not to blame BioShape for the low food crop yields but rather believe that biofuels can be an important catalyst that regenerates the agricultural sector, villagers speak about a resulting "BioShape hunger". As a local woman states; "we are desperate for food. Nowadays food comes from the city to be sold in the village and not vice versa as before. We could not afford to buy food because the wages we are paid were very little. We do not produce our own food as before because our land has been taken over by foreign companies under privatisation policy to produce biofuel farms. Everybody is talking of hunger as a consequence of mabadiliko ya hali ya hewa (climate change) but for me our reason is that we are farming in unproductive lands. Increased biofuel production has resulted in massive deforestation and has severe implications for our food security, as energy crops replace our normal land uses. Please tell the government we do not like this behaviour of biofuel farms<sup>184</sup>".

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<sup>182</sup> Land Rights Research and Resource Centre, 2010, pp. 42-43, 49-52.

<sup>183</sup> Land Rights Research and Resource Centre, 2010, pp. 42-43, 49-53.

<sup>184</sup> Land Rights Research and Resource Centre, 2010, pp. 52-53, referring to Jimwaga, Albert., 2010.



### 3. The impact of formal and customary land tenure

As a response to the global growing pressure for land for production of food and biofuels, a large number of African countries, including Ghana, Tanzania, Rwanda and Mozambique, have completed the review and assessment of the performance of their land sectors and formulated new policies for reform. Many other countries, for example Kenya and Uganda, are currently undertaking comprehensive reviews of their land policies. Central to this exercise is the conviction that past policies, many of which have been *ad hoc* or sector specific, have failed to resolve the fundamental problems underlying sustainable development of the land economy<sup>185</sup>. Central to this exercise is also the challenge of a pluralistic tenure system that characterise the majority of the African countries. While there is a statutory/formal system including provisions for housing, land, inheritance etc. deriving from the colonial era, land is predominantly still held under customary tenure, i.e. traditional norms and values<sup>186</sup>. Many national and local systems are made up of a multiplicity of overlapping and sometimes contradictory rules, laws, customs, traditions, perceptions and regulations that govern people's right to use, control and transfer land<sup>187</sup>. As a result of this diversity and complexity of tenure, many reforms seek to transform customary tenure into more formally recognised systems, and promote privatisation of land rights. The objective is both to protect local land rights and prevent conflict, and to increase incentives for land-related investments and make the land transfers easier<sup>188</sup>. An understanding of land tenure as well as the broader livelihood of poor rural people in an African context thus means an understanding of the formal legal system on one hand, customary law, social conventions and norms on the other, but also an understanding of the influences deriving from the global market. The interaction between these three institutions consequently determines the African women's land rights<sup>189</sup>. Because the interplay between custom and formal tenure adds an important dimension to the understanding of

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<sup>185</sup> AUC, AfDB & ECA, 2010, pp. 24-25.

<sup>186</sup> IFAD Policy, 2008, p. 7., Englert & Daley in Englert et al., 2008, p. 3.

<sup>187</sup> IFAD Policy, 2008, p. 6.

<sup>188</sup> Deininger et al., 2011, p. 23., Cutola et al., 2009, p. 5. Participants at the African Women's Land Rights Conference, 31 May 2011, Nairobi.

<sup>189</sup> Tsikata in Tsikata & Golah, 2010, p. 24., IFAD Policy, 2008, p. 40.

the impacts of the commoditisation of land, a brief historical overview over the dual development of the two systems will be presented.

### **3.1. Historical overview**

In pre-colonial East Africa, one can generally speak about two strands of customary land tenure; the socio-political organisation (feudal or non-feudal) and (ii) the land use system (nomadic pastoralists or settled cultivators). In the feudal system, land tenure was defined by a feudal authority that controlled access to land and allocated land to those under its control. Security of tenure consequently depended on the relation with the feudal authority (primarily chiefs or kings). For non-feudal, settled cultivators, land relations were defined by the use and investment of labour. Cultivators had rights to the benefits of the land resulting from their labour, but when no longer used, the land returned to the community. In the arid and semi-arid areas occupied by pastoralists and agro-pastoralists, the land tenure was defined based on control over territory<sup>190</sup>.

In common for the communities was, and still is, the criticality of access to land. Generally, the custom allocation of land takes the *need* for a plot as its starting point. Security of tenure equals the secure right to manage and use the land, and its produce. Because the livelihood system is based on reciprocal bond within families, lineages and larger social units, secure access to land is linked to having membership in a community, and meeting the reciprocal obligations that comes with such a membership. For women, this may cause problems since their access and right to use are attached to their membership of communities through their relationships with the male members. In most communities, the woman loses her membership to the birth-community once married and become a member of her marriage community instead. A woman's access and right to use is thus also dependent on the sustainability of the marriage. Despite the major challenge of the patriarchal nature of many traditional communities, women used to be assured of access rights that were nearly as secure as those of men. Because a woman married into a community, her access to land for use was assured during and beyond the life of her husband. Since all the community members effectively only had the rights of access and use the land, there was little difference in reality between the

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<sup>190</sup> Ochieng Odhiambo, 2006, pp. 9-12.

rights between men and women. Divorces were rare but whenever they occurred, the woman would return to her home and claim the same rights of access and use through her father or brothers. Customary institutions were available to protect the rights of the woman as a member of the community, whether of her parents or of the husband. In a contemporary context with increasing population, scarcity of land and deepening poverty, this reality however no longer holds true. As protective customary systems and institutions have collapsed, the traditions that denied women direct access to land have persisted, with the result that a woman can no longer be guaranteed access to land through her male kin<sup>191</sup>. The colonial history that more or less all African countries faced during the 19<sup>th</sup> and 20<sup>th</sup> century played a crucial role in this evolution of discriminatory practises against women in terms of land rights.

Land regulation during the colonial period was generally based on a distinction between law and custom, where law was perceived to be the written rules and custom the unwritten norms of the native population. Customary tenure was often seen as being both static and an obstacle to development. The negative perceptions of customary tenure contributed to the colonial statutory regimes establishing that native land did not have the status as private property<sup>192</sup>. The dichotomous perception of law and custom resulted in ascribing civilising qualities and state power to Western law. Many colonial land policies thus aimed to transform existing customary African land tenure systems into forms of land holding and registration processes deriving from European practices<sup>193</sup> as well as formalising rules guiding transfer of rights between Africans through marriage, divorce, inheritance or other means<sup>194</sup>. For example, Belgium started land registration in Congo in 1886, Germany established a *Grundbuch* in Togo in 1888, France introduced a system of land registration in Madagascar in 1897 and Great Britain designed the *mailo* system in Uganda in 1900<sup>195</sup>. In Tanzania, the colonial government proposed, on the eve of independence in the 1950s, the Individualisation, Titling and

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<sup>191</sup> Ochieng Odhiambo, 2006, pp. 9-12.

<sup>192</sup> Ik Dahl et al., 2005, p. 6., Englert & Daley in Englert & Daley, 2008, p. 4, referring to Alden Wily 2006, p. 2.

<sup>193</sup> Englert & Daley in Englert & Daley, 2008, p. 5, referring to Alden Wily, 2006, pp. 7-8., Ochieng Odhiambo, 2006, p. 5., Odeny et al., 2010, p. 17.

<sup>194</sup> Ik Dahl et al., 2005, pp. 5-6.

<sup>195</sup> Ik Dahl et al. p. 9 referring to Shipton 1989.

Registration System of Land, which aimed to transform customary lands into individual, equal privately-owned lands. As in many other countries, this created severe opposition and the proposal was never translated into law<sup>196</sup>. The most well-known and systematic process of formalization land tenure was pursued in Kenya, where privatisation of land tenure through individual registration and titling was introduced by British officials, through the Swynnerton plan of 1954<sup>197</sup>. The result was mainly increased conflict, greater asset inequality, a pluralistic tenure system and manipulation of the process by an elite to its own advantage<sup>198</sup>.

Many of the land reforms during the colonial era had in common that they almost exclusively registered land in the names of males, and that wealthier and more powerful people were able to use their knowledge and influence to receive larger and better holdings than other less advantaged. Women were excluded from the formal decision-making processes concerning allocation and transfer of land between African populations. Moreover, many colonial regimes allied themselves with local “authorities”. While local male chiefs were empowered to allocate land between the locals, women were frequently established to be under guardianship of fathers, husbands or elder brothers. The formalised customary marriage and divorce rules established that the husband, through his marital power, held property on behalf of the family. In the event of divorce, the woman was entitled to keep what was seen as her property: mainly the bride price, often in terms of cattle and cooking utensils. As regards women’s access to land in the event of death, it was held that daughters did not inherit on an equal basis with their brothers and that widows could not inherit<sup>199</sup>. The rationalisation of customary practises through the state court interpretation and written codification, was thus highly discriminatory against women<sup>200</sup>.

After independence, a number of countries continued with land tenure systems inherited from the departing colonial state, with consequences of dispossession by the state of

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<sup>196</sup> Land Rights Research and Resources Institute, 2010, pp. 9-10.

<sup>197</sup> Englert & Daley in Englert & Daley, 2008, p. 5., Ik Dahl et al., 2005, p. 9.

<sup>198</sup> Benjaminsen & Holden et al., 2006., p. 2.

<sup>199</sup> Palmer in Englert & Daley, 2008, pp. x-xi. Englert & Daley in Englert & Daley, 2008, pp. 1-5., Ik Dahl et al., 2005, pp. 6-9.

<sup>200</sup> Ik Dahl et al., 2005, pp.6-7.

“large tracts of land from peasants and pastoralists under the banner of a vaguely defined political-cum-legal term “public interest” as in Tanzania<sup>201</sup>, or redistribution of land in favour of the ethnical group of Kikuyu, contributing to the current political sensitivity of land between many ethnic groups, as in Kenya. During the 1960s and 1970s the policy emphasis on land redistribution increased, followed by the Structural Adjustment Programmes which came onto the development agenda in Africa in the early 1980s. These programmes were primarily based on an assumption that a dynamic rural sector in terms of higher rates of investment and increased agricultural productivity would follow the introduction of registered titles and individual private property. The privatisation of land tenure resulted in the narrowing of recognized rights to a single - usually male - person. During the 1990s, the of land tenure privatisation broadened, with an increasing emphasis on the importance of securing existing rights, and the possible benefits of communally held land and customary tenure. Titling and registration remained key components of the privatisation process but privatisation was no longer considered to be just a matter of individualisation. Instead, privatisation was referred to “the formalisation and regularisation of land rights via the registration of land interest in whatever context they customarily occur<sup>202</sup>”. In other words, it allowed for spouses, family, clan, village, community or any other customary social formation to be recognized as owner of private land rights. Despite the opening up for the possibility for rights to be held jointly, men however remain the primary beneficiary<sup>203</sup>. Moreover, despite the more inclusive approach of a dual tenure system in general, customary law has still in many reforms been neglected to the favour of formal law. There has been little investment in developing a jurisprudence of customary land tenure to define the content of these land rights or to redress discriminatory practises. “In this regard, customary land tenure has suffered the fate of customary law as a whole – it has been

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<sup>201</sup> Land Rights Research and Resources Institute, 2010, pp. 9-10., see also Ochieng Odhiambo, 2006, p. 3.

<sup>202</sup> Englert & Daley in Englert & Daley, 2008, p. 6.

<sup>203</sup> Englert & Daley in Englert & Daley, 2008, pp. 6-7, referring to Daley & Hobley 2005, pp- 8-13 and to personal comment of Alden Wily, 2006.

ignored by both legal scholars and political leaders, in spite of the fact that it continues to govern relations over land and natural resources for the vast majority<sup>204</sup>”.

### **3.2. Current processes of formalising land rights**

While continuously dealing with the issue of a pluralistic system of tenure, the rationale of the 21<sup>st</sup> century for formalising land rights seems to derive from a “re-recognition” of a direct link between the formalisation of property rights and economic productivity<sup>205</sup> influenced by the integration of the African countries into the global economic framework<sup>206</sup>. In 2000, the Peruvian economist Hernando de Soto published the book *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else*. According to De Soto, the main cause of poverty is the lack of access to formal property rights. More than 90% per cent of people in developing countries hold their land and business under informal arrangements, outside the formal economy. A corresponding formalisation of property rights would unlock the capital potential of their assets and lead to increased access by the poor majority to the benefits of capitalism. De Soto has formulated four stages to transform the “dead capital” into “live capital”, where poor people are seen as potential “heroic entrepreneurs”. The approach includes the integration of informal property arrangements into a single system that defines all property rights and that promotes the formation of capital. The ideas of de Soto have received worldwide attention, particularly among top politicians, including third world leaders, and officials in the international development industry, including some neo-liberal development agencies such as the World Bank and The United States Agency for International Development (USAID). The establishment of the *High Level Commission on Legal Empowerment of the Poor* in 2005 was also influenced by De Soto, demonstrated by its subtitle *Poverty Reduction Through Improved Asset Security, Formalisation of Property Rights and the Rule of Law*<sup>207</sup>. In line with De Soto, the WB has argued that broadly recognized property rights increase “the scope for exchange

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<sup>204</sup> Ochieng Odhiambo, 2006, p. 7.

<sup>205</sup> Some say that the recent market-based ideas behind the formalisation processes of land actually has moved back the international development agenda to where it was four decades ago, despite that failures of producing the anticipated efficiency results (Nyamu-Musembi, 2006, p. 7).

<sup>206</sup> Ochieng Odhiambo, 2006, pp. 6-7.

<sup>207</sup> Nyamu-Musembi in Englert & Daley, 2008, pp. 18-19., Benjaminsen & Holden et al., 2006, pp. 2-3.

with outsiders” and “provide a necessary, though by no means sufficient, condition for participation in a modern economy<sup>208</sup>”. In summary, advocates of this market-based approach to land rights identify benefits of transfer of customary tenure into a formally recognised system as;

- Enhanced tradability in domestic and international markets, and increase access to market
- Clarification of borders and prevention of conflict
- Increased land and livelihood security
- Increased level of investment in land and productivity (economic growth)

While supporters of De Soto emphasise the fundamentally sound idea of providing poor people with secure rights to their assets and the potential increase in asset value that the formalisation may bring<sup>209</sup>, critical voices accuse him of “breathing life into dead theories about property rights<sup>210</sup>”. Because a substantive discussion of inequality is left off the agenda, the approach is seen as ignoring the fact that a title spells both security and insecurity. Merely formalisation of land rights is described as being “synonymous with transformation and increased visibility of men’s control over land, and the simultaneously disappearance or invisibility of women’s established usage rights<sup>211</sup> and as the road to “reinforced male-centred tenure arrangements”<sup>212</sup>.

The critique may be based on the fact that despite major policy changes and practises brought about by the government and civil society, there has not yet been a significant positive impact on women’s access, ownership and control of land. Instead the result is increasing benefits for men being entitled to the land based on customary rights, while many unregistered family members, such as women, are rendered vulnerable<sup>213</sup>. A reason is that many gender-neutral laws are grounded on norms, values and practises that favour male land rights and livelihoods. This inherent gender bias may thus result

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<sup>208</sup> Deininger, 2003, p. 24.

<sup>209</sup> Benjaminsen & Holden et al., 2006., pp. 3-4.

<sup>210</sup> Nyamu-Musembi, 2006.

<sup>211</sup> Nyamu-Musembi, 2006, p. 21.

<sup>212</sup> Tsikata in Tsikata & Golah, 2010, p. 29.

<sup>213</sup> Nyamu-Musembi, 2006, p. 20., IFAD Policy, 2006, p. 6.

in de facto discrimination. Additionally, despite that many countries' development of law and policies putting explicit emphasise on women's equal rights to land, they coexist in practise with customary tenure systems, in which women are often insufficiently represented and in which women's rights to land often are "secondary, derivative and temporary, obtained through marriage, children or other relationships with men"<sup>214</sup>. Furthermore, already existing gender inequalities has affected women's ability to benefit from the commercialisation of land. Resources such as time, money and power are unevenly distributed. Women also face greater barriers than men to access services such as credit for start-up capital to engage in agricultural business, and to extension services when taking their products to the market. The eradication of discrimination against women through constitutional and legislative measures is therefore yet to be achieved in many countries.

While perceived risks with formalisation of land rights for women's rights thus are issues like land and livelihood insecurity, decreased control over the land, inequitable distribution of benefits and compensations and homelessness, it is nevertheless also recognised that there are cases where the provision of formal land rights to women *may* be an effective form of protective measure. Formal rights represent an enforceable claim instead of having to rely on government discretion and shifting policies<sup>215</sup>. Hence, the formalisation of land rights does not automatically increase or undermine secure land rights and livelihoods and there is consequently no straight answer to what the impact is. Effects on tenure and livelihood security will rather depend on factors like the source of insecurity, the legitimacy of the public authority that guarantees formal rights and the realisation of measures redressing discriminatory practises against women. Moreover, the impact of formalisation towards private titling will also depend on the category of land, and on who is the beneficiary of the land. While titling and registration of land rights may, in the best scenario, increase protection for some, such as women, it can cause insecurity for others, such as pastoralists, whose access to land might become more restricted. Hence, because of the complexity of land tenure in an African context, it is important to assess the local context of land reforms in greater detail in order

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<sup>214</sup> IFAD Policy, 2006, p. 5.

<sup>215</sup> Ikdahl in Englert & Daley, 2008, p. 44.

achieve knowledge about more specific impacts of the formalisation of land rights. For this reason, some experiences of land reforms in Kenya and Tanzania will be elaborated on and some concrete examples of impacts will be presented.

### **3.3. Experiences of land reform from Kenya and Tanzania**

#### **3.3.1. Land reform through new land policy and constitution in Kenya**

As a result of discriminatory practises, deprivation of local populations of their land and displacement, the struggle for independence in Kenya was more or less equal a struggle for land. Also after independence in 1963, the situation turned out to be “just a fight for land”, reaching its climax in the 1990s, when public pressure for political change increased. Economic inequalities among some ethnic groups, and long-standing bitter disputes over land also played a crucial role in the violence that followed the presidential elections in December 2007<sup>216</sup>. Kenya’s National Land Policy was signed in 2007 as a result of the dissatisfaction with the land policies and the legal framework for land among a broad coalition of NGO:s, Civil society organisations (CSO:s) and donors<sup>217</sup>.

Based on the National Land Policy, Kenya’s new constitution was signed into law in 2010. Through its broader scope of addressing both land rights security and gender equality, the constitution has been praised for seeking to rectify historical injustices that have continually faced the women of Kenya. Art. 60 (1) (f) of the new constitution provides for the elimination of gender discrimination in law, customs and practises related to land and property in land. Women are guaranteed equal treatment to men under the law and are able to own and inherit land. The hope is that the reform will end widespread discrimination against unmarried, widowed and divorced women<sup>218</sup>. Another perceived strength with the new constitution is that tenure holdings are classified into public, communal and private, and that it gives equal recognition to all

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<sup>216</sup> Hanson, 2008., Interview with John Ndiritu, Senior Programme Manager, The Swedish International Development Cooperation Agency, Nairobi, 19 May 2011.

<sup>217</sup> Bruce, 2009, p. 3.

<sup>218</sup> *Kenya: New Constitution Ushers in Women’s Land Rights*, Rights and Resources Initiative, 2010-2011, at <http://www.rightsandresources.org/pages.php?id=473> (consulted 12 June 2011)., *Press Statement: Gains Of Women In The Constitution.*, Federation of Women’s Lawyers, 2010. Available at <http://fidakenya.org/2010/11/press-statement-gains-of-women-in-the-constitution/> (consulted 5 May 2011).

tenure categories while also classifying land as a resource owned by all Kenyans<sup>219</sup>. A major change is the definition of community land, which is identified as being held by communities on the basis of ethnicity, culture or similar community of interest. By calling for recognition and protection of pastoralism as a legitimate land use, and reform to laws and policies impacting on pastoralism, the constitution may be seen as providing increased protection for pastoralist's communities<sup>220</sup>.

While one overall direction of the land reform in Kenya thus is to ascertain right and interest in land, the transformation of ownership from customary tenure to individual ownership through demarcation, survey and registration<sup>221</sup> is highly encouraged. The transformation is perceived as a requirement for economic growth and for providing landowners with the opportunity to raise capital for investment by mortgaging their land<sup>222</sup>. The opinions about benefits and risks of this transformation are however divided. In some cases, the formal recognition of land rights, backed up by the gender-sensitive land policy and constitution, have allowed women to legally claim their equal rights to private land in local tribunals and in the court. One example is the case of Janet A Alusa, who explicitly wishes to have her story and her name included in this dissertation. Ms. Alusa's husband passed away from Aids in 2004, and as too often, conflicts with the brothers in law and the stepsons arose, since they didn't want her to keep the house. The title was in the name of her deceased husband. Soon after the death of the husband, she was evicted from the house with her six daughters. As she refused to leave, she was physically and psychologically abused by the relatives. In 2005, a contact with a local grassroots organisation, advocating for women's land rights, gave Ms. Alusa the strength and knowledge to bring legal justice to the case. While the local chief did not recognise her legal right to the land, the District Officer did. Through the

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<sup>219</sup> Collins Odote, 2011, slide 9.

<sup>220</sup> Collins Odote, 2011, slides 10-11.

<sup>221</sup> Republic of Kenya. Ministry of Lands., *Land Adjudication and Settlement*, at [http://www.lands.go.ke/index.php?option=com\\_content&task=view&id=14&Itemid=29](http://www.lands.go.ke/index.php?option=com_content&task=view&id=14&Itemid=29) (consulted 20 May 2011).

<sup>222</sup> Bruce, 2009, p. 3.

marriage certificate<sup>223</sup>, she was able to claim the equal right between spouses to control the land and secure her tenure, as recognised by the National Land Policy. In 2009 the land was sold, but as Ms. Alusa was told by the authorities that they “assume no land has been sold”, she keeps her spirit high. The case is now pending at the High Court.

In terms of communal land, there are examples where the formalisation of land of pastoralists has had devastating consequences. One of the most well-known cases of formalisation in east-Africa is the establishment of group-ranches in Kenya, as a form of tenure that gave recognition to the customary tenure of, among other pastoralists, the pastoral Maasai<sup>224</sup>. Besides the objective of securing the land rights of the pastoralists, an objective was to provide a basis for local investment in ranch development by making it possible for the pastoralists to secure commercial loans using the titles as collateral. Critics argue however that the group ranches were a transitory measure to the attainment of the ultimate objective of individualisation. Rather than securing the interests of the pastoralists, a main objective was to integrate them into the national economy in the sense that this large portion of land was made accessible for individual ownership through market mechanisms. Critics argue that the policy thinking that enabled the passing of the legislation believed that common property led to overgrazing, inefficient use of resources and low levels of investment and herd off take by pastoralists. Those who promoted the implementation of the law were keen to see the emergence of modern ranching among the Maasai and other pastoralists. Indeed many group ranches were subdivided and individual titles have been issued. While some argue that this is an inevitable evolution in response to new notions of property relations and market forces, the measure has led to dispossession of a large number of peasants at the hands of the local elite. Many Masaai pastoralists have in fact sold off their land and moved into trading centres and into Nairobi in pursuit of “petty trade and menial jobs”<sup>225</sup>.

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<sup>223</sup> In this context it should be noted that a vast number of women are customarily married and therefore lack a formal marriage certificate. Moreover, an issue is the ignorance of both women and men about the equal rights between the spouses, or how to claim these rights.

<sup>224</sup> Note that this however was before the new constitution came into force. Against the new legal framework the outcome would perhaps be different.

<sup>225</sup> Ochieng, 2006, pp. 13-14, also referring to Rutten (1992).

### **3.3.2. Parallel recognition of gender equality and customary tenure in Tanzania**

Tanzania is an example of an African country which has been experimenting with more inclusive land registration policies since a longer period of time. The land policy reform that started in the early 1990s sought to address the position of customary land tenure. The National Land Policy of Tanzania specifies the recognition, clarification and securing of existing rights of customary land holders as one of its objectives. Unlike Kenya, freehold tenure does not exist (anymore) in Tanzania. The form of tenure that comes closest to ownership is a right of occupancy, which is a title to the use and occupation of land. While maintaining the dual land tenure system as established in the policy, the 1999 Land Act and Village Land Act provides for statutory or granted rights of occupancy on the one hand, and customary rights of occupancy on the other hand, with the difference that customary land rights are no longer “deemed” but now also “granted”<sup>226</sup>. Moreover, both the Land Act and the Village Land Act has been hailed as a triumph for the women’s rights movement in Tanzania, and customary practises that discriminate against women are prohibited<sup>227</sup>. As a result of the recognition of customary tenure on one hand, and women’s equal land rights on the other, the application of customary law has been widely debated in the land reform process, as well as in the second and third periodic report of Tanzania to the CEDAW Committee, and the Committee’s subsequent comments. It is particularly the relationship between the interest of communities as a whole and women’s individual rights within the community that has been the focus of these debates. While the discriminatory practises of custom are frequently highlighted, especially in rural areas, communal practises often co-exist with notions of individual or household rights, and the community may provide a security net for individuals, including women, through allocation of land and notions of care and responsibility. Nonetheless, the CEDAW Committee has recommended that the Tanzanian state take action to modify customary land and religious laws to comply with the constitution and the Convention, especially in rural areas where women often are prevented from inheriting and owning land and property<sup>228</sup>.

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<sup>226</sup> Ochieng Odhiambo, 2006, p. 8., Benschop, 2002, p. 109.

<sup>227</sup> Sundet, 2005, pp. 5, 11.

<sup>228</sup> Ik Dahl, 2005, pp. 37-39., Ik Dahl in Englert & Daley, 2008, pp. 48-49.

Gendered perspectives have however become less viable in debates on land law in Tanzania and today's debate on land focuses mostly on the facilitation of a market for land and the use of land as collateral. For the design and implementation of formalisation programmes, Tanzania has engaged in De Soto's Institute for Liberty and Democracy, to facilitate registration of land assets and enable small-scale enterprises' access to credit. A concern is that little attention has been paid to the potential gendered effect of the formalisation programme, where the issue of existing use and rights is formulated in a gender-neutral manner, and the demand for participation by women at all levels has not been sufficiently dealt with<sup>229</sup>. A concern is also the provisions of protecting existing land rights on one hand, and facilitate a market in land rights on the other. Regularisation of land rights through formal recognition to existing use should be seen as analytically different from increasing the ability to sell land. For example the right to use land does not necessarily entail the right to sell the land. A perceived risk with the possible tensions between the objectives is that commoditisation of land rights might lead to increasing insecurity, distressed sales and landlessness for the poor<sup>230</sup>.

While the experience of registration land assets has shown to differ between urban and rural areas, interviews carried out in Hanna Nassif settlement in Dar es Salaam showed that titling of land was perceived among the residents as a measure to reduce the insecurity of state expropriation without compensation. A woman expressed that "before you have a title, the government can take the area for any purpose, they can just change the use". Shifts from unregistered use with no or unclear formal legal status to registered rights can in other words be an appropriate measure to establish a relationship between the state and individuals, which may lead to better protection against government discretion and abuse of power - at least in urban settlements. However, issues like who will benefit in practise and who will not, remain. According to the Land Act, both names of the spouses should be on the document unless the parties do not explicitly require only one of them being registered as owner. Most women of the Hanna Nassif settlement were however not aware of the joint titling provision and some thought it was prohibited to put more than one name on the title. Recommendation to

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<sup>229</sup> Nyamu-Musembi in Englert & Daley, 2008, pp. 19-20., Ik Dahl, 2005, pp. 33-42.

<sup>230</sup> Ik Dahl in Englert & Daley, 2008, p. 45.

register in both names was also not recommended by local officials because, according to them, “the husband was already the owner” and the provision was therefore “not relevant”<sup>231</sup>.

In a context of large-scale land acquisitions, the decentralised land administration system in Tanzania, and the recognition of customary tenure, may be a measure to grant local communities larger possibilities to be included in processes, and promote the protection of their livelihoods and rights. To some extent, this seems to have been the case in Kilwa (2.2.3), where the villagers (although primarily men), despite some uncertainties in terms of the land and an arising food scarcity, at least had been involved in the negotiations. Yet, there are also devastating examples of how Tanzania’s land reform and decentralised system seem to have failed to protect the local population, both women and men. In 2009, Maasai pastoralists in Loliondo in Tanzania were evicted from eight villages bordering the Serengeti National Park. These villages were established and legally governed by the Land Law, which allowed them to utilize and manage the land. The eviction conducted by the Tanzania police Field Force Unit was supposedly an act to eliminate the pastoralists from the hunting block allocated to an Community Based Organisation (CBO) known as Ortello Business Cooperation in 1992. The pastoralists had allegedly invaded the private hunting block as well as degraded the environment in the area. The evictions were aimed at returning them back to their supposed villages and save the environment in one of the vital forests of the Game Control area. As a result of the eviction, more than two hundred Maasai homesteads were alleged to be burnt, people physically and sexually abused, more than 3000 people left homeless without food and other social basic needs and more than 50 000 cattle left with no grass and water. The Maasai communities in the Loliondo villages were concluded to be internally displaced persons, with many of their economic, social, cultural, civil and political human rights being put at stake, and the case is still pending<sup>232</sup>.

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<sup>231</sup> Ik Dahl in Englert & Daley, 2008, pp. 45, 53-56.

<sup>232</sup> 8 Villages unlawfully burnt out of their homes in Loliondo, Tanzania – part 1, 2009, at <http://www.youtube.com/watch?v=iqP2MRuJ4Ac> (consulted 15 June 2011)., *Voices from Loliondo*, 2011, at <http://www.youtube.com/watch?v=7knZOEVxO0k&feature=related> (consulted 15 June 2011)., Embassy of Denmark, Dar Es Salaam., *Embassy of Denmark focuses on evictions in Loliondo as ERETO*

#### 4. The HRBA as a normative framework

As has been elaborated in chapters two and three, women's rights risk to go unrecognised in the process of large-scale land acquisitions, especially in a context of multiple systems of tenure and weak protection of land rights due to governance issues or direct or indirect discrimination. The counter measure of domestic land reforms seeking to formalise land rights through titling and certification has evident potential to offer some protection to African women's tenure security, at least in a domestic setting. In a global context of competition for land, the formalisation of land rights may have a protective function in that it increases the local control over what is happening to the land. A formal right can furthermore be an effective form of protective measure by allowing for enforceable claims, which also enhances the likelihood for the right to be recognised by domestic and foreign investors. However, the perception of formal property rights being part of the solution to mitigate risk of large-scale land acquisition must be complimented with the due acknowledgement of all the issues that are raised by processes of property rights for women. Neither are legally protected rights a sufficient guarantee against dispossession of land<sup>233</sup>. With powerful economic interests in land dominating and with deficient regulating law and policies, there is still much work to do before secure land rights for all can be claimed to be fully realised and large-scale land acquisitions are turned into development opportunities, also for disadvantaged groups such as women.

Where large areas of land has been converted into commercial agriculture, issues like unequal and inequitable distribution of benefits, loss of land and evictions could possibly have been replaced by more positive outcomes if some crucial areas of concern were assessed and handled differently, such as the social hierarchies and power relations connected to land – in particular gender, the distribution of costs and benefits, the location of the investment and the particularities of the natural resource and the

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*is handed over*, at

<http://www.ambdaressalaam.um.dk/en/menu/AboutUs/News/EmbassyOfDenmarkFocusesOnEvictionsInLoliondoAsERETOIsHandedOver.htm> (consulted 15 June 2011)., FEMACT., *Tanzania: Loliondo report of findings*, FEMACT, in Pambazuka News, Issue 449, 2009, at <http://www.pambazuka.org/en/category/advocacy/58956/print> (consulted 15 June 2011)., Kachika, 2010, p. 48.

<sup>233</sup> Daley, 2011, p. 55, referring to Borras & Franco, 2010, p. 518.

particular crop, as discussed in chapter two, and the local context of land rights as elaborated on in chapter three. Lack of transparency, accountability and local participation impeding on the opportunities for development are some frequently recurring obstacles, both in the case studies presented in this dissertation and in general discussions regarding large-scale land acquisitions in reports and articles. For instance the International Institute for Environment and Development (IIED) states in a brief that “where international land deals are seen as a useful element of strategies to promote national and local development, a number of factors need to be in place: greater transparency, effective regulation, skilfully negotiated contracts, and robust social and environmental impacts assessments and management systems<sup>234</sup>”.

#### **4.1. Transparency, accountability and participation**

The lack of transparency surrounding large-scale land acquisitions, and the scarcity of information at all levels about the extent, nature and impacts of these investments is a primary concern for the protection of local people’s livelihoods and rights. Much available information is “anecdotal, probably exaggerated and difficult to verify”<sup>235</sup>, leaving doors open for a number of governance issues. It also limits the involvement of the local stakeholders in negotiating and implementing deals as well as the ability of locals to respond to new challenges and opportunities<sup>236</sup>. Enhanced transparency enables civil society to monitor implementation of investments, and hold governments as well as corporations accountable for their acts and omissions. Transparency is also a “very good prerequisite for effective corporate self-regulatory codes<sup>237</sup>” at the same time as it is a prerequisite for “free, prior and informed consent<sup>238</sup>” of the local communities concerned, which should be the standard to uphold. Although additional measures are needed to validate the benefits of transparency also for women and other marginalised groups, transparency is in general terms a key element to mitigate negative

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<sup>234</sup> IIED briefing, 2009, p. 4.

<sup>235</sup> Hallam, 2009, p. 3.

<sup>236</sup> Von Braun & Meinzen-Dick, 2009, p. 1.

<sup>237</sup> Cuffaro & Hallam, 2011, p. 11.

<sup>238</sup> Von Braun & Meinzen-Dick, 2009, p. 3., United Nations. Press release., *The UN Special Rapporteur on the Right to food recommends principles and measures to discipline “land grabbing”*. 11 June 2009, at <http://www.unhchr.ch/huricane/huricane.nsf/0/5A171ADA855BF615C12575D30010CEBF?opendocument> (Consulted 7 July 2011).

impacts of large-scale land acquisitions, and “there are grounds for urging governments in the investors’ home countries to set mandatory disclosure of (standardized) information on environmental impact, labour rights and human rights performance”<sup>239</sup>. In practise, the media as well as civil society play a vital role in making information available to the public<sup>240</sup>.

The importance of transparency is recognised in many guidelines, governance framework and code of practises. For example the principle no. 3 in the *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* states that processes for accessing land and associated investments should be “transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal, and regulatory environment”<sup>241</sup>. Critical voices argue however that the principle of transparency, as recognised in these instruments, generally respond to the demands of many transnational corporations for transparent land acquisition processes and a favourable investment climate<sup>242</sup>. Moreover, there are examples of “legal” and transparent investments that nevertheless dispossess farming, fishing, pastoral and forest communities. Transparency is therefore not a guarantee in itself to favourable outcomes for people living in poverty. While it is desirable, it should always be linked to the principle of accountability and the rule of law<sup>243</sup>.

The principle of accountability relates on the one hand to the possibility and capacity of local communities to hold investors (i.e. their own or foreign governments, corporations and other stakeholders) accountable for their actions and omissions through legal or procedural mechanisms. In countries with weak state capacity and lacking legal or procedural mechanisms for protecting local rights, the possibility for local populations

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<sup>239</sup> Cuffaro & Hallam, 2011, p. 11, also referring to Graham & Woods, 2006.

<sup>240</sup> Von Braun & Meinzen-Dick, 2009, p. 3.

<sup>241</sup> FAO, IFAD, UNCTAD & the World Bank Group, 2010.

<sup>242</sup> For example, the *Principles for Responsible Agricultural Investment and Respects Rights, Livelihoods and resources* states that “lack of transparency creates distrust and deprives relevant actors of the possibility to resolve minor problems before they escalate into large conflicts. On the other hand, greater transparency will also reduce transaction costs for all involved, thus benefiting host countries and investors alike through more efficient competition. Clarity in the regulations governing investment incentives and the way in which they are applied also makes it more likely that host countries can attract investors who will make tangible contributions to long-term development”.

<sup>243</sup> FIAN International, Focus on the Global South, et al., 2010, p. 4.

to hold someone accountable is however very limited. On the other hand, the principle also relates to domestic governments holding investors responsible. While government land allocations often are subject to the investor's compliance with the investment plans for the first years of the project, African governments have often conducted very limited continuous monitoring and sanctioning of investment performance throughout the lifespan of the projects<sup>244</sup>. Some reasons, as elaborated on in chapter two, are that the wording of the contracts may be too weak to be enforceable, and that international law often compounds imbalances to the disadvantage of the host country. Consequently, other measures to enhance the possibilities to hold stakeholders accountable may be needed.

A suggestion is internationally accepted codes of conduct for host governments and foreign investors. For such codes of conduct to be effective, it requires not only an application of international arrangements and laws in host countries that are targets of investment, which often have insufficiently developed legal institutions and enforcement mechanisms, but also an application of international arrangements and laws in the countries where the investment originates. For instance, many CSOs have pushed to make bribes a legal issue in the country where the corporation resides, rather than just in the country where bribes have been paid<sup>245</sup>.

There are already a number of international initiatives to provide regulatory frameworks for large-scale land acquisitions and investments in developing countries<sup>246</sup>, frequently based on the belief that these investments “offer tremendous opportunities for rural development if only the risks can be mitigated so as to create a “win-win” situation<sup>247</sup>. While some see these initiatives as a useful step in the right direction<sup>248</sup>, others argue that these principles and guidelines only “legitimise what is totally unacceptable: the long-term corporate (foreign and domestic) takeover of rural people's farmlands<sup>249</sup>. It is not yet clear whether these kind of efforts to link high standards of business practise

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<sup>244</sup> IIED Briefing, 2009, p. 3.

<sup>245</sup> Von Braun & Meinzen-Dick, 2009, p. 4.

<sup>246</sup> Some of these frameworks were listed in the introduction of the dissertation, see chapter 1.2.

<sup>247</sup> Daley, 2011, p. 47, referring to Borras & Franco, 2010, pp. 511, 513-515.

<sup>248</sup> Cutola, et al., 2009, pp. 20, 109.

<sup>249</sup> FIAN International et al., 2010, pp. 1-2.

with ethical behaviour in (trans)national land deals actually will produce truly pro-poor outcomes in a context where the primary aim of a land transfer not necessarily is to protect and advance the secure access to land and property interests of local women and men<sup>250</sup>. On the one hand, these initiatives are of a voluntary character. On the other, they are also very new in relation to the speed and scope of the development of large-scale land acquisitions. This evidently poses challenges to the civil society who has to decide on how to engage with stakeholders with divergent perspectives on the potential value of large-scale land deals to local development and potential opportunities for local people<sup>251</sup>.

One key aspect to ensure that land deals maximise the investment's contribution to development is thus the strengthening of the civil society's capacity to engage with stakeholders of large-scale land acquisitions and scrutinise the land deals, next to strengthening the capacity of the host-government to negotiate with investors<sup>252</sup>. This is in turn closely linked to the principle of participation, which is important in order to safeguard local rights, promote local ownership and sustainability<sup>253</sup>. In relation to negotiations leading to large-scale land acquisitions as well as processes of land rights formalisation, the inclusion of local stakeholders is also necessary in order for governments and investors to obtain accurate and relevant information about land rights and practises. Information on land, people and their rights is fundamental to effective land administration as well as to the determination of who will benefit and who will lose from programme or a commercial initiative<sup>254</sup>. In a formal setting, land rights are often registered in some way, which enhances the availability of information, but this does not necessarily mean that the information is correct. In a customary setting, information may instead be held unwritten within a community through collective memory and the use of witnesses<sup>255</sup>. Furthermore, the outcome of a large-scale land acquisition is to a large extent context-determined, based on for instance the social identities and roles

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<sup>250</sup> Daley, 2011, p. 48, referring to Borras & Franco, 2010, p. 510.

<sup>251</sup> Daley, 2011, p. 48.

<sup>252</sup> IIED Briefing, 2009, p. 4.

<sup>253</sup> AWID, 2002, p. 8.

<sup>254</sup> IFAD Policy, 2006, p. 12.

<sup>255</sup> FAO Land Tenure Studies 3, 2002, p. 13.

connected to the land. From a gender perspective, lacking participation in a context where there is entrenched socio-cultural and political discrimination against women, and where they are not fully included in decision-making, poses the challenge that “poorly-designed and over-simplistic “gender-sensitive” tools could be seen as harbingers of unwelcome foreign norms and end up being regarded as inappropriate to the local context<sup>256</sup>”. In other words, in a context of enhancing positive outcomes of large-scale land acquisitions, the rectification of discrimination against women is not only a legal issue but also an issue of mobilising local communities.

#### **4.2. The link to good governance of land and human rights**

A fundamental core of the obstacles to turn large-scale land acquisitions into development opportunities is consequently the issue of land governance, defined as for instance the way that competing interests in land are managed. The mutually reinforcing relationship between good governance and human rights means on one hand that human rights provide a set of values guiding political and social actors in their governance, and a set of performance standards against which these actors can be held accountable. Moreover, human rights norms and values inform the content of good governance effort, in terms of for instance the development of legislative frameworks and policies. On the other hand, good governance is a prerequisite for the respect and protection of human rights in a sustainable manner. The implementation of human rights relies on a conducive and enabling environment, including appropriate legal frameworks and institutions as well as political and administrative processes responding to the rights of the population<sup>257</sup>.

Land governance is therefore a major area of concern of human rights in a context of large-scale land acquisitions. Within the broader framework of sustainable natural resource management, the incorporations of the principles of transparency, accountability and participation, added to by the principle of equality and non-discrimination, is from a human rights-perspective seen as a useful entry point to issues

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<sup>256</sup> Daley, 2011, p. 49.

<sup>257</sup> OHCHR, 2007, pp. 1-2.

of governance, and issues of power and equity<sup>258</sup>. A HRBA in this context seeks to strive towards gender-equal sustainable development, and to balance liberalist and welfarist values and concerns. The approach has gained momentum as a measure to temper the impact of the free-market forces which over the past years have reinforced unequal distribution of resources and increased poverty<sup>259</sup>.

### **4.3. The scope and rationale of a HRBA**

The HRBA to development evolves from lessons learned from many years of development experience<sup>260</sup>. A milestone in the recognition between human rights and development was the adoption of the Declaration on the Right to Development by the UN General Assembly in 1986. The Conference on Human Rights in Vienna 1993 articulated the interdependency between respect for human rights and fundamental freedoms, democracy and development more explicitly. In 1997, reforms for mainstreaming of human rights across the entire UN system were introduced, with the aim to integrate human rights into development planning<sup>261</sup>. *The Draft Guidelines: A Human Rights Based Approach to Poverty*, developed by the OHCHR in 2001 on the request from the Chair of the UN Committee on Economic, Social and Cultural Rights, intends to “assist countries, international agencies and development practitioners to translate human rights norms, standards and principles into pro-poor policies and strategies<sup>262</sup>”.

The HRBA is not necessarily a rejection to former development approaches, especially those of empowering gender and development models<sup>263</sup>, but rather a compliment to other development theories and policies<sup>264</sup>. The approach provides a normative framework for national and international actors working within the field of development. The essential idea is that development interventions in all sectors and in all phases, whether of a legislative, administrative, policy or program structure, should

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<sup>258</sup> Blomley et al., 2009, pp. v, 16-17.

<sup>259</sup> Ikdahl et al., 2005, p. 13, referring to Frankovits, 2005., Ikdahl in Englert & Daley, 2008, p. 40.

<sup>260</sup> AWID, 2002, p. 2.

<sup>261</sup> AIV, 2003, pp. 8-9, 19., OHCHR, 2003, p. 1., HRBA Portal. Un Practitioner's Portal on HRBA Programming. *FAQ on HRBA*, available at [http://hrbaportal.org/?page\\_id=3386](http://hrbaportal.org/?page_id=3386) (consulted 4 July 2011).

<sup>262</sup> OHCHR, 2002, *preface*.

<sup>263</sup> AWID, 2002, p. 2.

<sup>264</sup> AWID, 2002, p. 2., Ikdahl et al., 2005, pp. 13, 15., Ikdahl in Englert & Daley, 2008, p. 40.

be explicitly guided by the human rights norms and principles set out in the UN Universal Declaration of Human Rights, the legally binding covenants, regional instruments and systems for the protection of human rights in Africa, Europe and America, as well as recommendations of international human rights bodies and mechanisms. This means for example that decisions that have been taken in the design and in the implementation of a program, as well as the institutionalisation of decision making procedures ought to reflect a direct commitment to human rights standards and principles<sup>265</sup>. Like the human development approach, greatly influenced by the economist Amartya Sen and the philosopher Martha Nussbaum, the HRBA puts emphasis on human agency, capabilities and entitlements as core factors in poverty alleviation, equality and development<sup>266</sup>. Moreover, the HRBA recognises the importance of empowerment as a prerequisite for enhanced social justice. The norms and values permeated in the framework of human rights have an inherent potential to empower, merely though introducing the concept of rights itself. By identifying so-called right-holders, the HRBA changes the situation of a beneficiary being a passive aid recipient to being an active subject, capable of claiming his or hers rights<sup>267</sup>. The introduction of right-holders, gives rise to legal obligations – duties – to respect, protect and fulfil the rights of others. The duty to respect prohibits the direct or indirect breach of the enjoyment of any human right. The duty to protect requires the duty-bearer to take measures that prevent third party from abusing the right, and the duty to fulfil requires the adoption of appropriate legislative, administrative and other measures towards the full realisation of human rights<sup>268</sup>.

The assessment of who is a rights-holder and who is a duty-bearer becomes central in the application of a HRBA. The Art. 1 of the UDHR states, “all human beings are born

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<sup>265</sup> Blomley et al., 2008, pp. 1-4. Regeringskansliet, 2010, pp. 11-13., HRBA Portal. Un Practitioner’s Portal on HRBA Programming. *FAQ on HRBA*, available at [http://hrbaportal.org/?page\\_id=3386](http://hrbaportal.org/?page_id=3386) (consulted 4 July 2011)., OHCHR, 2006, pp. 15-17., UNDP, 2006, pp. 12-18., Ikdahl in Englert & Daley, 2008, pp. 40-41., Säppänen, 2005, pp. 10-18., OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, 2002, p. 1., OHCHR, 2003., Kirkemann Boesen & Martin, 2007, p. 9.

<sup>266</sup> Ikdahl et al., 2005, pp. 13, 15., OHCHR, 2006, p. 7.

<sup>267</sup> OHCHR, 2002, pp. 1-2. AWID, 2002, p. 3., OHCHR, 2006, p. 15., Ikdahl et al. 2005, pp. 13-15., HRBA Portal. Un Practitioner’s Portal on HRBA Programming. *FAQ on HRBA*, available at [http://hrbaportal.org/?page\\_id=3386](http://hrbaportal.org/?page_id=3386) (consulted 4 July 2011)., Blomley et al., 2009, pp. vi, 1-4., OHCHR, 2003., Regeringskansliet, 2010, pp. 11-13.

<sup>268</sup> OHCHR, 2002, p. 2., Blomley et al., 2009, pp. vi, 1., OHCHR, 2003.

free and equal in dignity and rights” and Art. 29 (1) that “everyone has duties to the community in which alone the free and full development of his personality is possible<sup>269</sup>”. That all members of the human family have “equal and inalienable rights” is also recognised by the ICCPR as well as the ICESCR<sup>270</sup>. The preambles of the ICCPR and ICESCR moreover realise that “the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant<sup>271</sup>”. The African Charter on Human and Peoples’ Rights states in turn that “every individual shall have duties towards his family and society, the State and other legally recognized communities in the international community. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morally and the common interest”. Traditionally the human-rights framework has identified the state as the duty-bearer. Based on the aforementioned provisions, a duty-bearer can however also be other actors than the state. Within the framework of a HRBA the determination of who is a duty-bearer becomes relative to who is the rights-holder<sup>272</sup>.

The core of the HRBA is thus a focus on the linkage between the rights-holders and the duty-bearers, and on the empowerment of the former and on the accountability of the latter<sup>273</sup>. Since the incorporation of human rights to development programming, HRBA:s have however been operationalised in a variety of forms. One has been a strict legalistic approach in cases where “rights are clearly defined and have a high profile (such as with rights of the child, rights not to be tortured and so on)<sup>274</sup>”. The focus of this quite stringent form of a HRBA is thus primarily on the protection, respect and fulfilment of human rights as the end goal of development, and not so much on the process<sup>275</sup>. Within the natural resources arena, the emphasis on property rights (of land

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<sup>269</sup> UDHR, 1949.

<sup>270</sup> Preamble of the ICCPR, 1976., Preamble of ICESCR, 1976.

<sup>271</sup> Preamble of the ICCPR, 1976., Preamble of ICESCR, 1976.

<sup>272</sup> Interview with Urban Jonsson, Executive Director of the Owls & former Senior Human Rights Adviser to the Executive Director of UNICEF, 23 May 2011, Nairobi.

<sup>273</sup> Sano, 2010, 4 (footnote).

<sup>274</sup> Blomley et al., 2009, p. 1.

<sup>275</sup> Kirkemann Boesen & Martin, 2007, p. 42.

or forest) has been a way to advance the human rights-based agenda<sup>276</sup>. The protection of human rights may however be limited, because there is no explicit human right to land.

Rather than primarily focus on the protection, respect and fulfilment of human rights as the outcome, a broader and more holistic form of HRBA puts additional emphasis on the process to reach that outcome. This approach is explicitly recognised by *The Human Rights Based Approach to Development Cooperation. Towards a Common Understanding Among UN Agencies*<sup>277</sup>, a document deriving from the Interagency Workshop on a Human Rights based Approach in the context on UN reform in 2003 and launched to provide a common understanding of the HRBA and its implication for development programming. Adopted by a number of development cooperation agencies and organisations, the approach takes as a starting point the universality, interrelatedness, interdependency and indivisibility of human rights, and commonly focuses on, and operationalises, the core principles of;

- Participation and Inclusion<sup>278</sup>
- Accountability and the Rule of Law<sup>279</sup>
- Openness and Transparency<sup>280</sup>
- Equality and Non-discrimination<sup>281</sup>.

The number and order of the principles may vary slightly, but they are generally consistent and refer to the ethical impetus of ensuring justice and dignity for each individual<sup>282</sup>. From a human rights perspective, there are two main rationales for this form of HRBA. The *intrinsic* rationale acknowledges that it is the right thing to do, morally or legally. The *instrumental* rationale recognises that the approach leads to

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<sup>276</sup> Blomley, et al., 2009, p. 1.

<sup>277</sup> OHCHR, 2003.

<sup>278</sup> Ikdaahl et al., 2005, p. 12., AWID, 2002., Blomley et al., 2009, p. 12., OHCHR, 2002, pp. 2, 16-17., OHCHR, 2006, p. 17., Kirkemann Boesen & Martin, 2007, pp. 15, 42.

<sup>279</sup> Ikdaahl et al., 2005, pp. 12, 25-26., AWID, 2002., Blomley et al., p. 12., Kirkemann Boesen & Martin, 2007, pp. 15, 43., OHCHR, 2006, p. 17., OHCHR, 2002, p. 2.

<sup>280</sup> OHCHR, 2006, p. 17., Regeringskansliet, 2010, p. 13.

<sup>281</sup> Ikdaahl et al., 2005, pp. 12, 16-21, 26., Blomley et al., 2009, p. 12., Kirkemann Boesen & Martin, 2007, pp. 15, 42., OHCHR, 2002, pp. 2, 13-14.

<sup>282</sup> Kirkemann Boesen & Martin, 2007, pp. 15, 42.

better and more sustainable outcomes in terms of human development. The holistic approach of this form of HRBA is highlighted as beneficial in analysing and identifying inequalities which lie at the heart of development problems, and redress discriminatory practises and unjust distributions of power that impede development progress<sup>283</sup>. The principles also play a core function in reaching what was established in the Paris Declaration and Accra Agenda for Action as the “practical, action-oriented roadmap to improve the quality of aid and its impact on development<sup>284</sup>”. The importance of these principles in a context of large-scale land acquisitions has already been elaborated on in previous sections. Although they are often highlighted as particularly important for mitigating negative impacts of large-scale land acquisitions, explicit references between them and a human rights legal framework is rarely drawn. The added value of a HRBA is however that it can give strength and substance to these principles by linking them to a legally binding human rights framework.

#### **4.4. References to a legal human rights framework**

The Art. 19 of the UDHR and Art. 19 (2) of the ICCPR state that everyone has the right to freedom of opinion and expression, and including the right “to seek, receive and impart information and ideas”, through any media and regardless of frontiers<sup>285</sup>. According to Article 19 (3) of the ICCPR the right may be subject to restrictions but these “shall only be such as are provided by law and are necessary” for the respect of the rights and reputation of others (a) or “for the protection of national security or of public order (ordre public), or of public health or morals<sup>286</sup>”. Thus, according to a legal human rights framework, negotiations leading to agreements on large-scale land acquisitions should principally be conducted in full transparency. Based on the recognition that states as well as other duty bearers are answerable for the observance of human rights, and that they “have to comply with the legal norms and standards

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<sup>283</sup> OCHCR, 2006, p. 15.

<sup>284</sup> According to the Paris Declaration and the Accra Agenda for Action, it is “now the norm for aid recipients to forge their own national development strategies with their parliaments and electorates (ownership); for donors to support these strategies (alignment) and work to streamline their efforts in-country (harmonisation); for development policies to be directed to achieving clear goals and for progress towards these goals to be monitored (results); and for donors and recipients alike to be jointly responsible for achieving these goals (mutual accountability)”.

<sup>285</sup> Art. 19, UDHR, 1948., Art. 19 ICCPR, 1976.

<sup>286</sup> Art. 19 ICCPR, 1976.

enshrined in human rights instruments”<sup>287</sup>, it is the duty of all stakeholders involved in large-scale land acquisition to make reliable and valid information about the deals available. Where they fail to do so, “aggrieved rights-holders” are, according to the principle of accountability, “entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law”<sup>288</sup>. The principle of Rule of Law ensures in turn full equality and fairness to all parties before the law, and that there is no impunity for human rights violations<sup>289</sup>. Moreover, large-scale land acquisitions have to be conducted with the participation of the local communities whose access to land and outcomes from the land may be affected as a result of the investment<sup>290</sup>, based on the fact that “every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realised”<sup>291</sup>. The equal right of women to receive and impart information as well as to participate in decision-making in land matters is in turn recognised by the principle of equality and non-discrimination. The legal human rights framework establishes that “the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”<sup>292</sup>. It also establishes that all human beings are entitled to human rights “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”<sup>293</sup>.

The principle of equality and non-discrimination is one of the most basic tenets in the human rights framework, and adds weight to the necessity of assessing gendered impacts of large-scale large acquisitions. The principle recognises that power is

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<sup>287</sup> OHCHR, 2003.

<sup>288</sup> OHCHR, 2003.

<sup>289</sup> AWID, 2002, p. 8.

<sup>290</sup> United Nations. Press release., *The UN Special Rapporteur on the Right to food recommends principles and measures to discipline “land grabbing”*. 11 June 2009, at <http://www.unhchr.ch/huricane/huricane.nsf/0/5A171ADA855BF615C12575D30010CEBF?opendocument> (Consulted 7 July 2011).

<sup>291</sup> OHCHR, 2003.

<sup>292</sup> Preamble of the ICESCR, 1976., Preamble of the ICCPR, 1976.

<sup>293</sup> Art. 2, ICESCR, 1976., Art. 2, ICCPR, 1976.

unequally distributed and that certain sectors of the population are systematically excluded from the development process, for example women<sup>294</sup>. By applying HRBA, a rationale for working towards more secure land for women becomes the inherent dignity, integrity and equality of each individual, as an end in itself, rather than the contribution of women to poverty reduction<sup>295</sup>. This challenges the “equal economic efficiency”<sup>296</sup> as being the common rationale for working towards more secure land rights for women, i.e. that women qualify for more secure land rights because they “often contribute more to the welfare of their families than men, and supposedly attribute greater importance to food security than men”<sup>297</sup>. From a human rights-perspective, all human beings and individuals should be due equal rights and equality of treatment under the law, “in their own right”<sup>298</sup> and the human rights standards are to be met even if the outcomes might be economically more expensive or less productive<sup>299</sup>.

Furthermore, the principle of equality and non-discrimination is particularly important considering that many of the international initiatives of formulating guidance and regulatory frameworks for large-scale land acquisitions so far “contain little at all from a gender perspective”<sup>300</sup>. International Land Coalition takes as an example the *Minimum Human Rights Principles Applicable to Large-Scale Land Acquisitions or Leases*” by Olivier de Schutter, UN Special Rapporteur on the Right to Food, where the word “gender” is mentioned once under Principle 9, and the gender analysis is limited to the preamble’s acknowledgment of the importance of recognising other use rights on land such as grazing and gathering wood as crucial sources of livelihood for women<sup>301</sup>. By adding an emphasis on the principle of equality and non-discrimination, greater inclusion of gender onto the agenda of tools, procedures and measures for handling large-scale land acquisitions may thus be promoted.

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<sup>294</sup> Blomley et al., 2009, pp. 2, 12.

<sup>295</sup> Ikdaahl et al., 2005, p. xi.

<sup>296</sup> Ikdaahl et al., 2005, p. xi.

<sup>297</sup> Englert & Daley in Englert & Daley, 2008, p. 8.

<sup>298</sup> Englert & Daley in Englert & Daley, 2008, p. 9.

<sup>299</sup> Ikdaahl et al., 2005, p. xi.

<sup>300</sup> Daley, 2011, p. 48.

<sup>301</sup> Daley, 2011, p. 48, referring to the de Shutter, 2009.

In terms of the legal recognition of women's land rights *per se*, a dilemma is that the "protection for women's rights to land, housing and property in national legal systems and customary law and traditions are simultaneously reflected and challenged in international human rights law<sup>302</sup>". A main reason is that there is no human right explicitly recognising the right to land. Nevertheless, the bundle of rights under the international human rights system, which reveals that women have the right to be free from discrimination, the right to an adequate standard of living, the right to food, the right to health, the right to adequate housing, the right to enjoy financial independence and to earn a livelihood and therefore the right to own, manage, enjoy and dispose of property, go some distance in securing women's rights to land, housing and property, although somewhat indirectly<sup>303</sup>. While the UDHR technically is not a legally binding instrument, its provisions constitute important general principles of international human rights law which support women's claims to land, housing and property as human rights<sup>304</sup>. Art. 17 (1) and (2) establish the equal right to property by stating that; everyone has the right to own property alone as well as in association with others", and; "no one shall be arbitrarily deprived of property"<sup>305</sup>. Art. 25 (1) UDHR establishes both the right to an adequate standard of living, including housing and the right to security in the event of a lack of livelihood, and women's right to land can be read into the article on the basis that it is essential to an adequate standard of living and to women's security when unemployed, widowed or lacking livelihood<sup>306</sup>.

The ICCPR, the ICESCR and the CEDAW codify and build upon many of the provisions in the UDHR, and are accorded more legal weight than the UDHR to those States which have ratified them. The ICCPR does not explicitly codify the right to land, housing and property for women, but Art. 26 contain an important anti-discrimination provision that protects women's rights to be free from discrimination with respect to an adequate standard of living including food and housing. The article states that all people are entitled without discrimination to the equal protection of the law. Therefore, law

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<sup>302</sup> UNCHS, 1999, p. 21.

<sup>303</sup> UNCHS, 1999, p. 21.

<sup>304</sup> UNCHS, 1999, p. 22.

<sup>305</sup> Art. 17, UDHR, 1948.

<sup>306</sup> UNCHS, 1999, p. 22.

which discriminates against women in regards of using, renting, owning or inheriting land, housing or property would constitute a violation of women's human rights under ICCPR. This means that any state Party to the Covenant which has such law, is in violation of its legal obligation under ICCPR<sup>307</sup>.

The ICESCR can be seen as providing a framework which allows women to claim more specific rights to housing and to access to land. For example, Art. 11 (1) of the ICESCR recognizes the right of everyone to an adequate standard of living including housing, and the Committee on Social Economic and Cultural Rights has commented the article in paragraph 8 (e) of the General Comment No. 4 by explicitly including access to land as an element of the accessibility to housing. The Committee states that "within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement"<sup>308</sup>.

The principle of equal rights of women and men is most comprehensively elaborated in the CEDAW. The convention codifies women's rights to non-discrimination and contains a number of provisions which explicitly protect women from discrimination in relation to land, housing and property. Under Art. 15 (1) and 15 (2) State Parties are obliged to accord "to women equality with men before the law" and "a legal capacity identical to that of men and the same opportunities to exercise that capacity". In particular, State Parties should give women "equal rights to conclude contracts and to administer property..." Further, Art. 15 (3) states that "all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void". The Committee on the Elimination of Discrimination Against Women has commented on Art. 15 by stating that "When a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole

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<sup>307</sup> Art. 26. ICCPR, 1976., UNCHS, 1999, p. 23.

<sup>308</sup> UNCHS, 1999, p. 24., CESCR, *The right to adequate housing (Art.11 (1))*. General Comment 4, 1991.

owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman's ability to provide for herself and her dependents”<sup>309</sup>.

Also Art. 16.1 explicitly protects women's rights to land, housing and property by laying down that States Parties shall take “all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women”: (h) “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration”. The Committee on the Elimination of Discrimination Against Women notes that the rights provided in Art. 16.1 (h) overlap with and complement those in Art. 15 (2). The right to own, manage, enjoy and dispose of property is central to a women's right to enjoy financial independence, and is in many countries critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family. The Committee also suggests that countries undergoing agrarian reform or redistribution of land, should carefully observe the rights of women to share such redistributed land on equal terms with men, regardless of marital status<sup>310</sup>.

The African Charter on Human and People's Rights contain a number of provisions which, in their totality, can be interpreted as recognising for women the right to be free from discrimination with respect to land, housing and property. These provisions can be used to challenge laws and juridical decisions which restrict or deny women's rights, in access to and control over land, housing and property<sup>311</sup>. Art. 14 guarantee the right to property, and according to the Art. 18.3, the state should ensure the protection of the rights of a woman as stipulated in the international declarations and conventions. Art. 22 states that “all peoples shall have the right to their economic, social and cultural

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<sup>309</sup> Art. 15, CEDAW, 1979., CEDAW, *Equality in marriage and family relations*. General Recommendation 21, par. 7, 1999., UNCHS, 1999, pp. 23-24.

<sup>310</sup> Art. 16, CEDAW, 1979., CEDAW, *Equality in marriage and family relations*. General Recommendation 21, par. 25-27, 1999., UNCHS, 1999, p. 23-24.

<sup>311</sup> UNCHS, 1999, pp. 25-26

development<sup>312</sup>”. Noteworthy is the provision of Art. 14 which also states that the right to property “may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate law<sup>313</sup>”. This is an example where human rights law may pose challenges to women’s secure land rights. Women are traditionally not in the position to decide whether the dispossession of land is in the “public need” or “community interest”, nor are they protected by the “appropriate law”.

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<sup>312</sup> The African Charter on Human and Peoples’ Rights, 1961.

<sup>313</sup> The African Charter on Human and Peoples’ Rights, 1961.



## **5. The HRBA as an analytical and operational tool**

The HRBA brings important elements such as gender equality and non-discrimination, participation, transparency, accountability, capacity building and empowerment into one coherent framework. Simultaneously, it adds an explicit focus on the incorporation of human rights norms and values, and on the interrelation between rights-holders and duty-bearers. The HRBA therefore has the potential to enrich and enhance development initiatives to promote African local populations' land rights and human rights, in particular those of women. The analysis of both right-holders and duty-bearers is essential. It determines the main stakeholders whose issues, may it be deprivation and discrimination or neglect of obligations, need to be addressed in a holistic manner<sup>314</sup>. By focusing on the linkage between the right-holders and the duty-bearers, development actors are encouraged to use “multiple entry points<sup>315</sup>” in their programming.

A remaining challenge is however the translation of the fundamental, but yet abstract values and principles of a HRBA into practise, in order to actually protect local population's rights while realising equal and equitable development opportunities of large-scale land acquisitions. A challenge is also the unintended outcomes that may follow the operationalisation of a HRBA as a result of increased pressure on political leaders and changed power relations between the right-holders and duty-bearers. The extension from using the approach as a normative framework to also use it as an analytical and operational tool, within a context of global competition for land, is perceived to be important to further explore. Who are the stakeholders, how can interventions be designed and what are the challenges of operationalising a HRBA in this context, are some critical questions. When elaborating on these questions, some practical references will be drawn from two programmes carried out by Care International in Ghana and Uganda respectively. Although these programs are not explicitly operating within a context of large-scale land acquisitions, their experiences of applying a HRBA to promote natural resource management and governance at a local, regional and national level are valuable.

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<sup>314</sup> Kirkemann Boesen & Martin, 2007, p. 21.

<sup>315</sup> Blomley et al., 2008, p. 4.

As one of the largest non-profit agencies working in international development, Care International made a fundamental review of their overall programme approach in 2002 and adopted a HRBA across the organisation and in particular with regard to its field based activities. Care Denmark, as part of Care International, followed this move within a context of a strong programme focus on agriculture and natural resources management, in collaboration with Care in Uganda and Ghana<sup>316</sup>. Care Uganda runs the *Rights, Equity and Protected Area Program (REPA I)*, which was prolonged in 2008 to a REPA II running until 2013. In summary, the programme objectives are (i) to improve the livelihoods of natural resource dependant households, (ii) that natural resources should be conserved through equitable and sustainable management and (iii) that good governance impacting the use and management of natural resources and the livelihoods of poor households should be achieved with the effective participation of civil society and poor communities<sup>317</sup>. Care Ghana runs the *Agriculture and Natural Resources Program (ARN Programme)*, which among other things focuses on unsustainable natural resource use and inequalities in the sharing of forest harvesting. The programme objectives includes for instance (i) an organised, effective and equitable local management of natural resources benefiting poor natural resources' users, and (ii) the establishment of effective networks of Ghanaian civil society institutions representing, coordinating and advocating for the natural resources concerns and rights of the poor rural families at local, regional and national level<sup>318</sup>.

### **5.1. Assessing the local context and identifying stakeholders**

As has been emphasised throughout the dissertation, impacts of large-scale land acquisitions as well as of processes of formalising land rights is largely dependent on the local context, which therefore carefully needs to be assessed. To this assessment, the application of a HRBA adds value by allowing a more explicit focus on, for instance, power divisions and distribution of resources. This allows for developing appropriate interventions that promote equality and equitability<sup>319</sup>. In line with a HRBA, the

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<sup>316</sup> Blomley et al., 2008, p. 29.

<sup>317</sup> Care International in Uganda, 2011, p. 1.

<sup>318</sup> Hill, 2009, p. 7.

<sup>319</sup> Blomley et al., 2008, p. 3.

assessment of the local context comprises the analysis of the problem, including what human rights are at stake. It also comprises the analysis and identification of stakeholders, i.e. right-holders and duty bearers.

#### **5.1.1. To understand the baseline human rights situation**

A key aspect of the context analysis is the understanding for the baseline human rights situation at the country level<sup>320</sup>. This can be measured in at least three ways; human rights in principle (as they are laid out in national and international legal document), human rights in practise (as they are enjoyed by individuals and groups in the nation state), and human rights according to official statistics. The sources for covering these three areas are important and data may be collected through, for instance, international and domestic legally binding instruments, surveys, narrative reports and official statistics. If available and trustworthy, national sources of information are of particular importance<sup>321</sup>. Hence, in relation to large-scale land acquisitions, the assessment of the local context includes the identification of what human rights related to land are not yet fully realised. The assessment provides an understanding for how the ideal situation should be for the people deprived of their rights according to international human rights standards. The assessment also point to the relevant national legal and policy framework where some of the main deviations occur, i.e. where the structural causes of human rights violations appear to be<sup>322</sup>.

Next to the identification of what right are at stake and of whom (i.e. right-holder), the assessment includes the identification of the duty bearers. This requires an assessment of the extent to which the duty-bearers are capable of protecting, respecting and fulfilling their legal human rights obligations as established by their country's international and domestic commitment<sup>323</sup>. Thus, indicators separately measuring the capacity of the duty-bearer to meet these three dimensions of duties need to be developed, as well as indicators measuring the capacity of individuals and groups to

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<sup>320</sup> Kirkemann Boesen & Martin, 2007, p. 19., UNDP, 2006, p. 6.

<sup>321</sup> UNDP, 2006, pp. 6-10.

<sup>322</sup> Kirkemann Boesen & Martin, 2007, pp. 21-22., UNDP, pp. 5-6.

<sup>323</sup> Kirkemann Boesen & Martin, 2007, pp. 21-22., UNDP, pp. 5-6.

claim their rights, and the level of engagement between the rights-holders and the duty bearers<sup>324</sup>.

#### **5.1.2. Who is a rights-holder and who is a duty-bearer in a context of land?**

In a context of land, the question of who is defined as a right-holder and who is defined as a duty-bearer becomes crucial and deserves special attention. There are several reasons for this. Firstly, as elaborated on in chapter two of the dissertation, large-scale land acquisitions often take place in environments characterized by weak state capacity and lacking legal or procedural mechanisms to protect local rights and take account of local interests, livelihoods and welfare. In an environment of weak (or in some cases collapsing states), the use of a universal human rights' frameworks may seem to have little relevance<sup>325</sup>. While the state remains a duty-bearer also in such context, there may be other powerful actors who play a role in relation to the rights-holders who also should be identified as duty-bearers.

Secondly, as explored in chapter three of the dissertation, a challenge of most African countries is the dual system of tenure, with formal law and customary law running parallel with one another. Next to the formal institutions, claims and norms enforced by local customary institutions or governments play a crucial role in terms of securing land rights. The role of these individuals, groups and communities as "agents of development"<sup>326</sup> should not be underestimated. As land rights are determined by the interplay between these two tenure systems, it may in relation to women's secure land rights, be argued that "strategies to support and promote women's land rights must be suited and responsive to the situation on the ground. Where existing customary institutions can be used as a vehicle for this, why not use them? Equally, where existing customary institutions have become weakened, why not pursue alternative strategies...taking a hard-line and principled position on the merits of a particular approach is likely to be less effective than taking a positive, pragmatic approach which looks at the situation on the ground as it is and asking "what now can we do to maximise the gains for women?" In sum, this is about "evidence-based policy-making"

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<sup>324</sup> UNDP, 2006, pp, 5, 13-15.

<sup>325</sup> Blomley et al., 2009, p. 3.

<sup>326</sup> Blomley et al., 2009, p. 3.

in the first instance, and then identifying what works best to achieve the desired result<sup>327</sup>. Hence, in a context of natural resource (land) management, and in particular community-based natural resource management, the duty-bearer may be a village committee, a community institution or a traditional structure such as chieftaincy, elders' group or religious order<sup>328</sup>.

Third, the linear view of rights and enforcement of these rights runs the risk of neglecting duty bearers such as private sector organisations and development agencies, including NGO:s<sup>329</sup>. This is of particular importance in a context of large-scale land acquisitions, since many of the stakeholders involved are not necessarily the governments but also (trans)national corporations and private investors.

Consequently, to effectively use a HRBA to protect local land rights and human rights in a context of large-scale land acquisitions, a pragmatic strategy must be adopted. While the primary duty bearer remains to be the state-actors, other duty-bearers of non-state actors, such as bilateral and multilateral donors, private contractors, corporations, customary institutions and authorities, and development actors, including NGO:s, must also be recognised as potential collaboration partners<sup>330</sup>.

#### **5.1.3. Operating with rights-holders and duty-bearers**

After having carefully assessed the local context and identified rights-holders and duty-bearers, international development cooperation agencies should formulate their objectives in direct or indirect relation to human rights norms and standards when designing their interventions. While guided by the values and core principles of the HRBA, the interventions should point toward the linkage between the rights-holders and duty-bearers.

In the case of *REPA II* in Uganda, advocacy to target vulnerability as a structural issue primarily takes place within formal institutions, at central-Kampala level, at the level of local governance, and with the Uganda Wildlife Authority and the National Forestry

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<sup>327</sup> Daley, 2011, p. 51, referring to Daley & Englert, 2010, pp. 98-100.

<sup>328</sup> Blomley et al., 2009, p. 9.

<sup>329</sup> Blomley et al., 2009, p. 3.

<sup>330</sup> OHCHR, 2003., AWIF, 2002, p. 3., Kirkemann Boesen & Martin, 2007, p. 11.

Authority<sup>331</sup>. The focus on the rights-holders and the duty-bearers is expressed in the programme through a collaborative approach with priority given to information, awareness, and access to authorities and knowledge about local government decisions<sup>332</sup>. A dialogue based on respect and perceptions of mutual interest between CBO:s and CSO:s, and the authorities governing land issues has been promoted. By training so-called community monitors to act as brokers between communities and authorities, the community members have been sensitised about their rights on one hand, and leaders alerted to the concerns of the populations in rights matters on the other. Progress has been made in terms of institutionalising accountability of the duty bearers. The improved channels of communication and collaboration, and the enhanced transparency of decision-making at a closer distance to the target groups is perceived to open up a democratic space<sup>333</sup>. In summary, the capacity building of rights-holders to monitoring duty bearers at local level in conjunction with the more centralised policy advocacy work on a higher level is seen as an effective approach<sup>334</sup>.

In the case of *the ANR Program* in Ghana, the program works collaboratively with relevant local institutions to assist rural communities in leading their own sustainable development<sup>335</sup>. Platforms at community, district, regional and national level, through which effective claims over land and other natural resource tenure can be made to local and national duty bearers, are supported by operating with local civil society partners as right-holders. At the local level, the programme supports the primary land holders and users to make legitimate claims against non-state duty bearers, such as traditional authorities, and hold them accountable for their actions. At the national level, duty-bearers include state actors like the Forestry Commission<sup>336</sup>. Using the HRBA as a tool for collaboration strategies has lead to increased community interaction and allowed for

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<sup>331</sup> Sano, 2010, pp. 9-10.

<sup>332</sup> Sano, 2010, p. 14.

<sup>333</sup> Sano, 2009, pp. 10-11, 13-16.

<sup>334</sup> Sano, 2010, p. 13, referring to Status Report to Ministry of Foreign Affairs, Copenhagen, as regards progress under the Strengthening Local Governance in Natural Resource Management (SLOGIN), 2009., and to Care 2007, SLOGIN Project Document.

<sup>335</sup> Hill, 2009, p. 7

<sup>336</sup> Blomley et al., 2009, p. 9.

the development of channels through which claims can be contested at different levels<sup>337</sup>.

## **5.2. The use of a HRBA in designing interventions**

When formulating programme objectives and procedures, as well as when assessing the potential and real impacts of an intervention, the HRBA can be used as an analytical tool, facilitated by the “HRBA model of impact analysis<sup>338</sup>” (Figur 1). By taking the perspectives of the main entries of work according to the approach; capacity building and empowerment, the model provides for an understanding of the linkage between (i) “impulses” influencing policies, behaviour and methods, (ii) “processes” representing schedules of implementation and action and (iii) wider outcomes/”impacts” of intended or unintended change<sup>339</sup>. The model reveals that internal and external impulses (including from those which monitor policies and activities of governments and corporations) influence, capacitate and alert the duty-bearers and right-holders, which results in various processes of action. In a context of large-scale land acquisitions, the impulses may, on behalf of the duty-bearers, result in processes of developing new policies and procedures ensuring the protection of local rights and livelihoods, in changed governance measures and in new models of collaboration with for instance the civil society. On the behalf of the right-holders, the impulses may in turn result in processes of knowledge enhancement, in organisational development and capacity building, in direct actions of claiming rights and in the formation of new channels of interaction. Taking the processes together, the impacts may be changed values and principles of land governance and altered power balances on one hand, securer land rights and more gender balanced inclusion of civil society in negotiations of large-scale land acquisitions but also more sustainable and politically accepted large-scale land acquisitions<sup>340</sup>.

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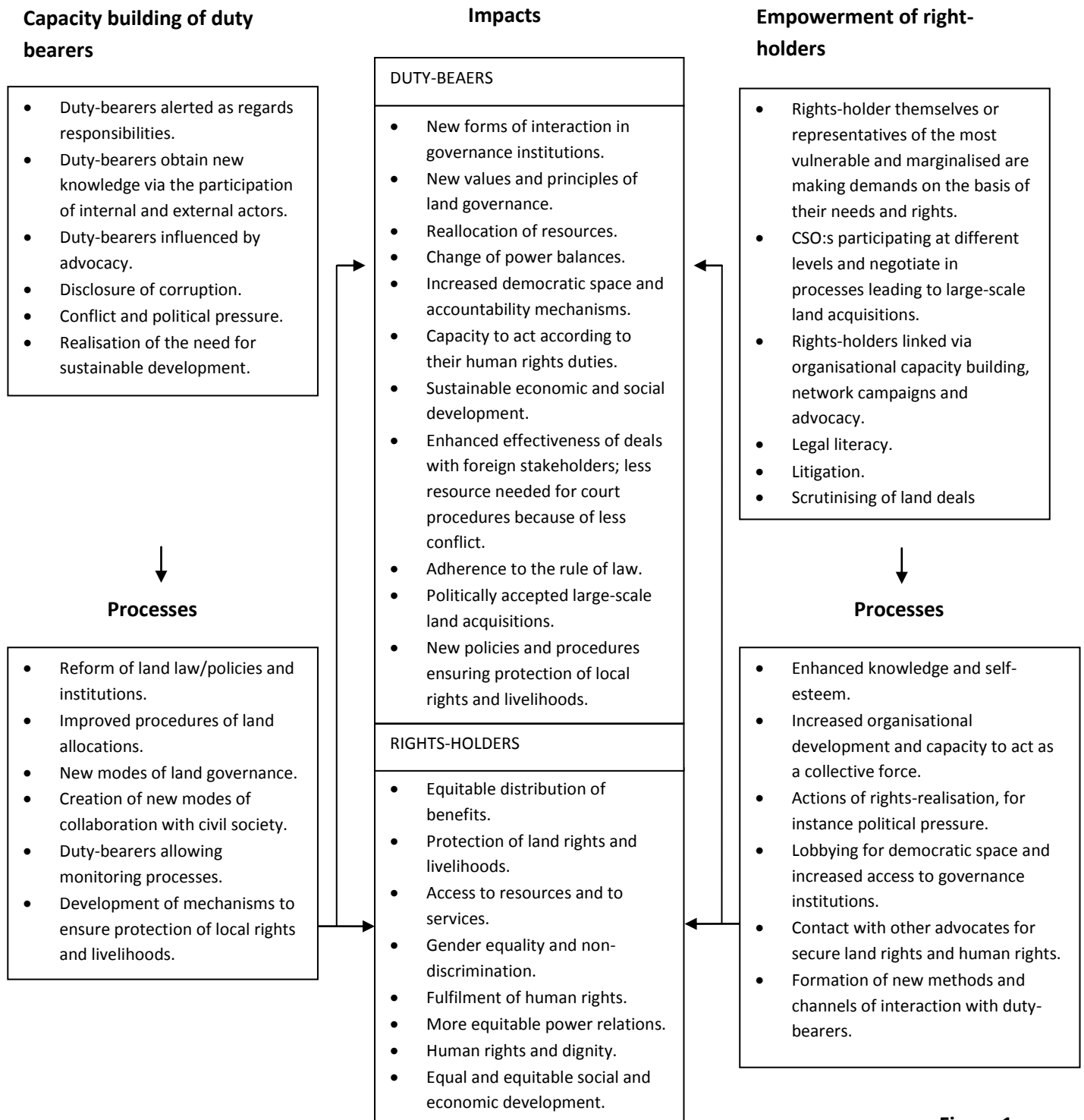
<sup>337</sup> Blomley et al., 2008, p. 3.

<sup>338</sup> Sano, 2010, pp. 11-14.

<sup>339</sup> Sano, 2010, p. 11.

<sup>340</sup> Ideas drawn from Sano, 2010, pp. 11-12.

## ***HRBA Model of Impact in a context of large scale land acquisitions***



**Figure 1.**

*Note: Sano, 2010, presents a “model of impact analysis” based on what he perceives as the two main entries of work in a HRBA; accountability and empowerment. While the model used in this dissertation derives from the idea of Sano, it has been modified according to the findings of the dissertation, with the aim to protect local rights and livelihoods in a context of large-scale land acquisition.*

### 5.3. Challenges with operationalising a HRBA

Based on the idea of the “model of impact”, the HRBA may provide “a suite of interventions that can support groups to make key claims on services and rights, and ways in which duty-bearers can be made more accountable<sup>341</sup>” in a context of large-scale land acquisitions. Operationalising a HRBA within a context of land or other natural resources may however provoke a number of challenges that need to be assessed and dealt with.

In the REPA I, the HRBA was more explicitly pronounced and the approach was seen as affirming “the importance of systematic identification of the fundamental, or “root” causes of vulnerability and of commitment, wherever possible, to help confront such causes in our work<sup>342</sup>”. In the evaluation of REPA I it was however recognised that whilst the HRBA in many ways had superseded the needs-based approach, the approach was a move too far from addressing the immediate needs, and from the priorities of the most poor. The REPA II therefore adopted a more pragmatic approach and the promotion of the principles of the HRBA were synthesised with the immediate needs of the poorest population<sup>343</sup>. As a result, the strategy of REPA II is to carefully use service delivery “to build aspects of sustainability, and to leverage long-term commitment from Uganda duty bearers<sup>344</sup>”. The REPA II has a stronger emphasis on indirect methods on making right claims, i.e. through awareness raising, through monitoring organisations and through various sorts of representatives<sup>345</sup>. Nonetheless, it still focuses on enhancing the capacity of the communities, the civil society organisations and the government, in order to ensure that private and public duty bearers at all levels to fulfil their responsibilities as regards the use and management of natural resources in Uganda<sup>346</sup>. In other words, when operationalising a HRBA, there may be a need to work in tandem on the immediate social and economic well-being of poor and marginalised

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<sup>341</sup> Blomley et al., 2008, p. 3.

<sup>342</sup> Sano, 2010, p. 6, referring to REPA I Programme Document, p. 31.

<sup>343</sup> Sano, 2010, pp. 7-8.

<sup>344</sup> Sano, 2010, p. 8, referring to REPA II, 2008, p. 9.

<sup>345</sup> Sano, 2010, p. 8.

<sup>346</sup> Care International in Uganda, 2011, p. 1.

group, next to the promotion of improved “social position” of rights-holders, and of an “enabling” environment relating to public, private, civic and social institutions<sup>347</sup>.

Many of the immediate social and economic needs can often be linked to more specific human rights, such as the right to health, food or housing. Instead of talking about a synthesis between a “needs-based approach” and a HRBA, one could rather speak about a combination of an outcome-focused HRBA and a process-focused HRBA (see 4.3). While the former focuses on clearly defined human rights as an outcome (corresponding to needs), the latter focuses on the power relation between right-holders and duty-bearers and the structural causes behind injustices and negative impacts of large-scale land acquisitions.

Another challenge of operationalising a HRBA is the on-going monitoring and evaluation of the adherence to the human rights values and principles. A challenge is also to monitor and evaluate the impacts of an intervention. There is an important conceptual and methodological difference between human rights indicators on the one hand and indicators for measuring the application of the principles of a HRBA on the other, as not only the human rights outcome is of concern but also the process used to obtain the outcome.

Based on the experiences of implementing a HRBA in Uganda and Ghana, other challenges that programming of HRBA may have to assess and deal with are;

- Putting pressure on duty-bearers vs. collaborating with them.
- A reality of limited time and budget vs. the long-term endeavour of attacking root causes of social injustice and discrimination.
- The perception that human rights is something individualistic and western vs. a context where emphasis is put on the public and the collective, such as regards land in Africa.
- Translating a “universal” concept into sustainable interventions, adapted to the local context.

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<sup>347</sup> Blomley et al., 2008, p. 5.

- The conflicts that may be provoked as a result of changed power relations between rights-holders and duty-bearers, and of the opening up of a democratic space.
- The meaning of concepts, for instance empowerment vs. advocacy. Should the programme support disadvantaged groups to claim their rights, or support groups who can represent and channel claims made on behalf of the disadvantaged<sup>348</sup>?
- Adopting and implementing pro-equal and non-discriminatory approach to secure African women's land rights in a context where there is little information available about the gendered impacts of globalisation and large-scale land acquisitions, and where there are complex discriminatory practises against women, formally/informally, directly/indirectly and perhaps also invisibly within the development cooperation agency itself.

Finally, while a HRBA is perceived to contribute to more equitable and sustainable development, a major challenge is yet to find space and resources for the approach in countries with weak state capacity and low level of good governance, and where an immense need for economic development is dominating - particularly within the agricultural sector. There are many powerful actors on the international arena with large amount of capital, who do not have a primary interest of taking on a HRBA for the purpose of the good for the people. For an African government, it may seem more interesting and even more relevant to collaborate with these stakeholders to boost the economic development, than to collaborate with less powerful development cooperation agencies who only make life more complicated by bringing issues of human rights, equitable and equal distribution of benefits, transparency and accountability onto the agenda. Nonetheless, it is predominantly in the countries with large amount of "available land", which suffers from global power injustices on the one hand, and which are characterised by internal land governance issues on the other, that local rights are at greatest risk and a HRBA may be needed the most.

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<sup>348</sup> Sano, 2010, p. 22.



## 6. Final comments

This dissertation positioned itself in contexts of growing global land hunger by domestic and foreign investors, and of land law and policy reforms as a measure to secure local land rights but also as a measure to unlock the capital potential of land. By exploring the impacts of large-scale land acquisitions in a context of a dynamic pluralistic tenure system, the conclusion is drawn that the matter is hugely complex. Local impacts of large-scale land acquisitions depend on multiple factors, such as the social identities and hierarchies in relation to land, and the terms and conditions of the investment. Despite some positive outcomes such as new employment opportunities, reality shows that these cannot merely be “used as an excuse<sup>349</sup>” for investments. One has to pay attention to issues such as who is employed and under what conditions, as well as whether the employment opportunities are in the interest of local men and women. Moreover, cases illustrate some severe negative impacts, i.e. loss of land and livelihoods and food scarcity. Due to historical injustices and contemporary direct and indirect discrimination, land rights and livelihoods of women run a particular risk to go unrecognised in a context of large-scale land acquisitions. At the same time, the “idle” and “marginal” land often provides a vital basis for the livelihood of them and their families. In relation to the responding land reforms, and formalisation processes of land rights, the dissertation draws the conclusion that there is a risk that discriminatory practices and biases make women’s already fragile rights even weaker. However, the conclusion is also drawn that a formal right to land can enhance tenure security for women in some situations, by allowing for enforceable claims. This can also enhance the likelihood that the right is recognised by domestic and foreign competitors for land. To summarise this section, a continuous in-depth assessment and responsive measures on a case-by-case basis is absolutely vital in order to promote development opportunities of large-scale land acquisitions in a context of a dual system of tenure and of weak legal and institutional mechanisms to protect women’s land rights. There is still a long way to go before land rights can be claimed to be secure for all, and large-scale

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<sup>349</sup> Interview with Agnes Kabajuni, Programme Officer of Women & Housing Rights Africa, COHRE, Nairobi, 24 May 2011.

land acquisitions are turned into development opportunities, also for the most disadvantaged.

The dissertation recognises an urgent need for change in practises related to large-scale land acquisitions, to protect human rights, prevent conflict and reach sustainable development. That the investments are properly negotiated, that benefits are equally and equitable distributed and that practises are sustainable should not only be in the interest of local people involved, but also in the interest of investors and host-governments, if these investments are not to become “politically unacceptable”<sup>350</sup>. Moreover, changed practises should also be in the interest of other development actors, as we are approaching a “crisis era” where access to land is crucial for us all. The decisions made now will have major repercussions on the livelihoods and food security of many people for decades to come, and today’s choice must therefore be based on strategic thinking about the future of agriculture, the place of large and small-scale farming, and the role and nature of outside investment<sup>351</sup>. Because of the transnational character of large-scale land acquisitions, no institutional mechanism will alone ensure positive outcomes of the investments. A combination of international law, government policies, and the involvement of civil society, the media, and local communities is needed to minimise the threats of loss of land and livelihood, and related human rights violations, and realise the equitable and equally distributed benefits of the investments<sup>352</sup>.

In order to protect the rights in a situation of global land hunger, a crucial area of concern is improved land governance, i.e. the development of, for instance, land law and policy reforms enhancing secure and equitable access to, and control over, the land on which most locals depend for their livelihoods. The study concludes that a HRBA adds strength and legal substance to the principles of participation and inclusion; openness and transparency; accountability and the rule of law, and equality and non-discrimination. Such addition promotes good land governance. By empowering the rights-holders and enhancing the capacity and willingness of the duty-bearers (governments, corporations and traditional authorities), international cooperation

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<sup>350</sup> von Braun & Meinzen-Dick, 2009, p. 4.

<sup>351</sup> IIED Briefing, 2009, p. 3.

<sup>352</sup> von Braun & Meinzen-Dick, 2009, p. 4.

development may lead to for example (i) more gender balanced inclusion of civil society in negotiations of large-scale land acquisitions, (ii) increased capacity of right holders to scrutinise land deals, (iii) greater adherence of duty-bearers to the rule of law and (iv) new policies and procedures ensuring the protection of local land rights and livelihoods. In the long run, this will enhance the equal and equitable development opportunities of large-scale land acquisitions, and make them more sustainable and politically acceptable. Through the incorporation of the fundamental values of freedom, equality, justice and dignity for all, the HRBA can act as a balancing mechanism to a neo-liberalistic discourse. In this sense, the HRBA can act as a tool to bridge policies of economic development on one hand, and policies on social development on the other, and thus contribute to greater policy coherence.

The dissertation recognises the need for further research on the implications of a HRBA as an analytical and operational tool within the field of natural resources. In relation to the monitoring and evaluation of HRBA programming, there are some instruments already developed to monitor and evaluate land tools, such as the *Gender evaluation criteria for large-scale land tools* by UN-HABITAT and others<sup>353</sup>. This instrument may be beneficial in the monitoring and evaluating of the core human rights principle of equality and non-discrimination. The HRBA may in turn give increased substance to the tool by placing it in a wider and more holistic context. It is possible that there also are other tools, providing a framework for monitoring and evaluating the core principles of the HRBA. The dissertation acknowledges a need for further research on this topic.

The dissertation also calls for further research undertaking an **explicit** gender perspective while assessing the local impacts of large-scale land acquisitions, and of domestic land reforms and formalisation processes. The dissertation also calls for further research undertaking such perspective while assessing the implication of a HRBA in relation to land governance. Enhanced knowledge on these issues is vital to develop measures to realise equal and equitable development opportunities of large-scale land acquisitions and to ensure the protection, fulfilment and promotion of human rights on a non-discriminatory basis.

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<sup>353</sup> UN-HABITAT et al., 2007-2008.



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### **Maps**

Map 1: Available at [http://wildclaws.com/kenya\\_safaris.html](http://wildclaws.com/kenya_safaris.html) (consulted 8 July 2011).

Map 2: Available at [http://wildclaws.com/kenya\\_safaris.html](http://wildclaws.com/kenya_safaris.html) (consulted 8 July 2011).

Map 3: Available at <http://athaia.org/tanzania-map.html> (consulted 8 July 2011).

## Interviews

Group interview with 16 members from local Watchdog group, dealing with cases of land, and land grabbing. The members also represented other functions such as community health workers, members from a food security project, members from orphans and vulnerable children, para-legal group, the Land Dispute Tribunal in the District and a student. Kakamega, 25 May, 2011.

Interview with Agnes Kabajuni, Programme Officer of Women & Housing Rights Africa, COHRE, Nairobi, 24 May 2011.

Interview with Chris Abir, Director of Dominion Farms LTD, Siaya, 25 May 2011.

Interview with Clarissa Augustinus, Chief of the Land & Tenure Section, UN-HABITAT, Nairobi, 20 May 2011.

Interview with in total two women (among one working at the farm), four men (among one working at the farm), two youths (both working at the farm), one girl (working at the farm) and one schoolboy receiving financial support from Dominion Ltd, Kakamega, 25 May, 2011.

Interview with John Ndiritu, Senior Programme Manager, The Swedish International Development Cooperation Agency, Nairobi, 19 May 2011.

Interview with Urban Jonsson, Executive Director of the Owls & former Senior Human Rights Adviser to the Executive Director of UNICEF, Nairobi, 23 May 2011.

Interview with Violet Shibutse, Grassroot woman leader and Focal point for GROOTS Kenya in Kakamega, Kakamega, 28 May 2011

Interview with Zipporah Mugonyi, Deputy Provincial Director of Agriculture, Provincial Commissioner Office, Kakamega, 25 May 2011.

## **Speakers and participants at the African Women's Land Rights Conference, 30 May – 2 June 2011, Nairobi**

A participant from Zambia who spoke about experiences of local chiefs working with advocating women's land rights. 30 May 2011.

Dr. Gaynor Paradza, on *Gender perspectives on the impact of "land grabbing"*. 31 May 2011.

Josephine Kamel, Pan African Climate Change Justice Alliance (PACJA), on *the gendered impacts of land grab as a response to climate change e.g. REDD initiatives and other carbon trading. Do the global negotiations at UNFCCC or national policies offer opportunities?* 31 May 2011.

Nidhi Tandon, on *Large Land Acquisition Phenomenon, drivers and regulatory frameworks*. 31 May 2011.

Roselina Muzerengi, Zimbabwe on *Sharing on the impact positive and/or negative for women where there are new land laws*. 30 May 2011.

There were a number of other speakers and participants who contributed with information to increase the researcher's understanding of the subject matter.

## **Annex 1 Personal communications**

### **Communications through e-mail:**

Agneta Ericsson, Marketing Manager, the Swedish mapping, cadastral and land registration authority  
Andy White, Coordinator, Rights and Resource Initiative  
Augusta Molnar, Director, Country/Regional Programs, Right and Resource Institute  
Cathy Farnworth, Independent consultant  
Cécile Ndjebet, Cameroon Ecology, Cameroun  
Charity Kabutha, Independent consultant  
Chiara Selvetti, Property Rights Adviser, Investment Climate team, Policy Division, Department for International Development (DFID)  
Christiaan Lemmen, Social Tenure Domain Model  
Christine Dahm, Secrétaire Générale, Cercle de Coopération des ONG de développement, Luxembourg  
David Sumbo, Program Coordinator, CARE Gulf of Guinea  
Edmund G. C. Barrow, Head, Ad-Interim, Ecosystem Management Programme, International Union for Conservation of Nature (IUCN).  
Erik Norman, Swedish International Cooperation Development Agency (Sida)  
Esther Mwangi, Centre for International Forestry Research (CIFOR)  
Frank Pichel, Regional Manager, International Land Systems (ILS)  
Godfrey Mitti, Senior Programme Coordinator for the Agriculture and Natural Resources, Care International in Ghana  
Habtemariam Kassa, Consultative Group on International Agricultural Research (CGIAR)  
Helena Bjuremalm, Swedish International Cooperation Development Agency (Sida)  
Helena Thorfinn, Swedish International Cooperation Development Agency (Sida)  
Henk Hobbelink, GRAIN  
Henrik Alffram, Human rights lawyer, Rights house  
Isaac B. Karikari, Manager for the Land Team, Millennium Development Authority Office (Mida), Ghana  
Jaco Mebius, First Secretary, Environment, Water and Sanitation, Embassy of the Kingdom of the Netherlands  
James Murombedzi, UNDP in Monrovia, Liberia  
Jessica (surname unknown), Oxfam America  
Johan Helland, Royal Norwegian Embassy, Addis Abeba  
John Febian Olweny, Programme Officer, Agriculture and Culture, Royal Danish Embassy in Kampala  
Kate Dalrymple, Land Equity International  
Kristian Fevejle Andersen, Governance Advisor, ActionAid International Tanzania  
Kwame Tenadu, Licensed Surveyors Association of Ghana  
Lars Bo Kirketerp Lund, First Secretary, Governance and Political Issues, Royal Danish Embassy in Dar Es Salaam  
Lina Bornegrim, former student at Gävle University  
Margret Vidar, Law Enforcement Gaming Network (LEGN)  
Mary Saunders, Supporter Relations, Oxfam GB  
Mayra Gomez, Senior Expert - Women & Housing Rights, Centre on Housing Rights & Evictions (COHRE)

Meaza Ashenafi, African Women's Rights Observatory Officer, African Center for Gender and Social Development, United Nations Economic Commission for Africa, Addis Ababa, Ethiopia  
 Natalie Couchman, Supporter Relations, Oxfam GB  
 Nina Strandberg, Swedish International Cooperation Development Agency (Sida)  
 Paolo Grobbo, Food and Agroecological Organisation (FAO)  
 Pekka Seppälä, Adviser, Department for Development Policy, Finnish Ministry of Foreign Affairs  
 Peter Bogh Jensen, Fuldaemgtig / AFR, Danish Ministry of Foreign Affairs  
 Rene Dogbe, Millennium Development Authority Office (Mida), Ghana  
 Samuel Egerö, Head of Development Co-operation, Embassy of Sweden in Bangladesh  
 Shewit Emmanuel, Department for International Development (DFID)  
 Tommy Österberg, Senior Technical Adviser, Department for International Services, Lantmäteriet.

### **Personal meetings:**

John Ndiritu, Senior Programme Manager, Embassy of Sweden  
 Åsa Jönsson, Human Settlements Officer, Land, Tenure and Property Administration Section, Shelter Branch, Global Division, United Nations Human Settlement Programme (UN-HABITAT)  
 Clarissa Augustinus, Chief, land & Tenure Section, Shelter Branch, United Nations Human Settlement Programme (UN-HABITAT)  
 Njeri Muhia, Chairperson Economics Department at Egerton University & Chairperson Kenya Red Cross Egerton/Njoro Sub-Branch  
 Agnes Kabajuni, Programme Officer, Africa Regional Office, Centre on Housing Rights & Evictions (COHRE)  
 Urban Jonsson, Executive Director of the OWs & former Senior Human Rights Adviser to the Executive Director of UNICEF.  
 Magdalena Andersson, Teamleader for the twinning project between Lantmäteriet and Ministry of Foreign Affairs.  
 Petronella (Betty) Buziega, Community Health Worker in Kakamega and in charge of the women leadership program of the grassroots organisation.  
 Benita Nordin, Ministry of Lands, Kenya  
 Chris Abir, Director, Dominion Farms Ltd  
 Zipporah Mugonyi, Deputy Provincial Director of Agriculture, Kakamega, Kenya  
 Janet A. Alusa, member of the local Watchdog group in Kakamega.  
 Rolf Härnö, CARE Denmark  
 Cercle de Coopération des ONG de développement, Luxembourg  
 Ssenkaali Mulondo, Area Programme Manager, ACORD North-Sudan  
 Grace Loumo, Executive Director, Action for Women and Awakening in Rural Environment Uganda  
 Maitri Morarji, Programme Officer, Wellspring Advisors  
 Juliet Nakato Odoi, Policy Advocacy Officer, ACORD Uganda  
 Rene Tammema, CEO, Moringa Productions Ltd  
 Odenda Lumumba, National Coordinator, Kenya Land Alliance  
 Two women (among one working at the farm), four men (among one working at the farm), two youths (both working at the farm), one girl (working at the farm) and one schoolboy receiving financial support from Dominion Ltd, Kakamega.  
 16 members from local Watchdog group in Kakamega, dealing with cases of land, and land grabbing. The members also represented other functions such as community health workers, members from a food

security project, members from orphans and vulnerable children, para-legal group, the Land Dispute Tribunal in the District and a student.

**Communications through telephone:**

Håkan Sjöholm, Consultant, ORGUT.

Ann-Katrine Myles,



## Annex 2 Interview guide

**Note: Different versions, although very similar, were developed for different NGO:s, CBO:s, authorities and organisations. This is a summary of these versions.**

*General information:*

- Which NGO, CBO, organisation, authority? Promoting what, how, why?

*During the past years, a number of challenges to secure land rights have emerged, such as population growth, urbanization, environmental degradation and natural disasters. For both financial reasons, food security reasons and a demand for biofuels, the interest in access and use of land has grown in many parts of the world (including a local national interest).*

- How has the issue of secure land rights changed the past 5-10-20 years in an African/Kenyan context?
- How has this particular organisation experienced this development of a global growing interest in land and its impact on African countries? Benefits and disadvantages? What has been Kenya's response, if any?
- What is the impact of the aforementioned development on local people's livelihoods, and local land rights (in particular those of women)? Benefits and disadvantages? For who?

*Many African countries have initiated land reforms, with registration of land rights (individually or collectively) as well as institutional changes as a result. Land ownership has in some countries been transformed from customary tenure to individual ownership through demarcation, survey and registration. About 8 million hectares of land in Kenya were registered after adjudication and consolidation processes were completed (according to the web site of the Ministry of Lands).*

- How has the transformation of customary tenure into "formal tenure" (individually or collectively registered land rights) impacted local populations' land rights (in particular those of women)? Benefits and disadvantages - for who?
- What is the objective(s) with this transformation of land rights?
- What role does customary tenure play?
- How can women's tenure security be promoted in practice, in a context of both customary tenure and formal (individually registered) land rights?
- What role has and will human rights play increased tenure security for women?
- Human rights-based approach. Any thoughts?

*After two decades of work, Kenya has a new Constitution since 2010. Chapter four of The Constitution of Kenya 2010 speaks about human rights, and chapter 5 about the elimination of gender discrimination in law, customs and practices related to land and propriety in land. For instance, the Constitution establishes that "every person has the right, either individually or in association with others, to acquire and own property".*

- What is the implication of the new Constitution for local populations' land rights (in particular those of women)?
- Thoughts about the implementation? (Institutional/administrative changes to be made, challenges to overcome?

- How can women's tenure security be promoted in practice, in a context of both customary tenure and formal (individually registered) land rights?
- What role has, and will, human rights play in the work of the organisation?

*Many local, national, regional and international actors have recognized the challenges of increasing pressure on land, and the issue of secure and equitable land rights.*

- What relationships (formal/informal and financial) does the organisation have with other national and international NGOs and networks/supranational organizations such as the African Union/Donors?
- What is the implication of for instance the *Africa Land Policy Initiative* and other documents provided by African Union to promote and support the implementation of national land policy reforms among the member states?
- What is the importance of social movements? How can they promote women's tenure security? How has women and men's roles and identities been influenced?
- What is the role of International Cooperation agencies? How can and should they act to promote African women's tenure security?

#### **Version for UN-HABITAT and GLTN:**

*In for example the report *Secure Land Rights For All*, UN Habitat identifies several challenges to rural land, such as population growth, commercial interest, environmental degradation, natural disasters and urbanisation. The pressure on land, but also for land resources are increasing, both among national Governments and among other investors and organisations.*

- How has UN-Habitat experienced the growing interest in land in terms of impact on local people's livelihoods and land rights (in particular those of women)? Benefits and disadvantages? For who? (*economic development, employment opportunities...? Conflict, inequitable distribution of benefits/capital concentration, and loss of livelihoods/increased poverty?*)

*Many African countries, including Kenya, have initiated land reforms, with registration of land rights (individually or collectively) as well as legal and institutional changes as a result. Land ownership has in some countries have in some countries (again also in Kenya) been transformed from customary tenure to individual ownership through demarcation, survey and registration.*

- How has UN-Habitat experienced the recent land reforms (are they the same as promoted by GLTN?) and the "land formalisation" processes? Benefits and disadvantages? Securer land rights? For who (in particular women)? (*increased tenure security, protected customary rights, increased possibilities for land- related investments as a response to the liberalisation of the economy, facilitates land transfer, decreased poverty...?*)
- Context of a multiple tenure system.

*Good Urban Governance: Characterised by sustainability, subsidiarity, equity, efficiency, transparency, accountability, civic engagement and citizenship, and security. These principles are interdependent and mutually reinforcing.*

- Connection to HRBA-principles?

### **Social Tenure Domain Model and the Gender Evaluation Criteria**

*STDM is a “multi-partner software development initiative to support pro-poor land administration. The initiative is based on open source software development principles.*

- Information about the STDM. It can register all forms of land rights. How does it work actually? What are the features/underlying principles?
- Is there a connection between the STDM to the principles of a Human Rights-Based Approach (accountability, participation, transparency and non-discrimination)?

### **Connect HRBA with pro-poor tools?**

- How can a HRBA as a normative framework be combined with a more concrete pro-poor tool, such as STDM or the Gender Evaluation criteria?
- Can a HRBA be operationalised/implemented through these tools...?
- What role can human rights play in securing women’s land rights? What are the benefits and disadvantages with back up good governance principles with human rights, and use a HRBA which seeks to identify “rights-holders” and “duty-bearers”?





## **Annex 3 African Women's Land Rights Conference – 2011**

**“Advancing the Right to Land and Justice for women in Africa”**

**Red Court Hotel, Nairobi: 30<sup>th</sup> May to 2<sup>nd</sup> June 2011**

### **Goal and Objectives of the Workshop**

**Conference Facilitator: Janah Ncube**

The main goal of the workshop is ***to inform and re-energize the struggle for women's land rights as a fundamental human right and the basis for women's empowerment and protection in Africa.***

#### **Objectives:**

1. Sharing knowledge; case studies and testimonies and engaging in discussions drawing on the wide experience and empirical information on the status and new knowledge relating to Women's Rights to Land within the continent.
2. Learn from locations where women have been asserting their rights as well as places where rights remain under attack.
3. generate new ideas for taking the work forward, through collaborative efforts among the different movements in the continent
4. Look at the intersections between Sexual and gender based violence with women's land rights today
5. Identify gender sensitive mechanisms of resolving SGBV cases resulting from land conflicts.
6. Deepen the analysis on the question of protection and reparation mechanisms for victims and survivors of SGBV

#### **Expected workshop outcomes:**

1. Increase understanding of women's experiences of land rights and land use or the lack thereof
2. Increased commitment of land and feminists movements to women's land rights and to the implementation of actions that strengthen women's land and natural resources rights as a basis for improved livelihoods:
3. Contribute to a shaper understanding of women's land rights issues leading to practical recommendations for best practices and actions to advance Women's rights to land
4. Increased understanding of the intersection between women's land rights and violence against women and particular livelihoods challenges that women face in conflict and post conflict situations
5. New guidelines and approaches for reparation and compensation mechanisms understood and commitments made thereof by policy makers, women's and human rights organizations

**Day One: Monday, 30<sup>th</sup> May 2011**

TIME	TOPIC	RESPONSIBLE	
8.30 – 09.00	Registration of participants	Wilkister Oluoch	
Session 1: OPENING SESSION 09.00 – 10.20			
9.00 – 9.20	Opening and welcome remarks	Ousainou Ngum, ED, ACORD and Chris Kinyanjui AAI International Director- EASA	
9.20- 9.30	Guest Speaker	Dr. Margaret Rugadya; Programme Officer- Natural Assets; Ford Foundation	
9:30-09.50	Key note adress	Violet Shivutse: Groots Kenya	
09.50-10:10	Opening speech	Assistant Minister for Lands; Kenya, Honourable Gonzi Rai	
10.10-10.20	Background, Purpose of meeting Meeting culture and logistics/housekeeping	Emime Ndiokubwayo	
10:20-10.40	BREAK		
NB: In all sessions on the first three days we should have two basic questions in our mind and see outputs related to these. 1) What needs to be changed to advance African women’s land and other rights? 2) What can we do to bring about these changes? Day four will produce from these ideas clear recommendations and plans for action.			
Session 2: land sector reforms and women empowerment			
10:40–11.15	Land Reform and Women’s empowerment: constitutional, legal, policy and institutional instruments	Patricia Mbote, Strathmore University	
Parallel platforms: 11. 15 to 13.00			
Platform theme	Presentation/format	Speaker	Facilitator
Platform 1: AU Framework and Guidelines on Land Policy in Africa	Overview of the AU Framework and Guidelines on Land Policy in Africa: opportunities and challenges for Africa countries and progress in implementation	Dr Janet Edeme, African Union Commission	Catherine Gatundu
	Overview of the AU Framework and Guidelines on Land Policy in Africa from gender perspective	Mary Wandia, Oxfam	
Platform 2: impact of National level land sector	Sharing on the impacts positive and/or negative for women in countries where there are new land laws	- Sierra Leone, Christiana Momoh, ActionAid - Roselina Muzerengi: Zimbabwe	Janah Ncube

<b>frameworks and initiatives</b>	Constitutional Dispensations. What do we need to see regarding women's land rights?	- Kenya- Odenda Lumumba - South Africa & Brazil – Marc Wegerif	
	Enhancing women's Land Tenure security	Experiences from COLANDEF Ghana	
<b>Platform 3: Women Land rights in conflict situations</b>	Cases of post conflict resettlement and reparations issues; what are the experiences and how are women faring	- Grace Akulu - Jenefer Masis from G-10 coalition on Land Reform and Decentralization in Kenya	Emime Ndiokubwayo
<b>13:00-14:00 Lunch</b>			
<b>Session 3: <u>Agricultural policies, programmes, and investments</u></b>			
<b>14:00-14.40</b>	Overview of Agriculture investment policies and programmes in Africa today and their impact on women	Akinyi Nzioki	
<b>Parallel Platforms: 14.40 – 16.40 (with a tea break at 15.30)</b>			
<b>Platform theme</b>	<b>Presentation/format</b>	<b>Speaker</b>	<b>Facilitator</b>
<b>Platform 1: CAADP Framework and National Agriculture policies and programmes</b>	Lead presentation and discussions: The CAADP framework- opportunities	Presentation by COMESA	Emime Ndiokubwayo
	Analysis of CAADP and its potential to benefit women, a critique of the CAADP framework and its implementation in 6 countries.	Buba Khan	
	Country level analysis of Agriculture Investment Plans from a gender point.	Angela Wauye	
<b>Platform 2: Agriculture in conflict setting</b>	Presentations and discussions: Challenges and opportunities for land utilization in conflict and post conflict situations	Esther Obaikol/ Hellen Ndimu ULA,	Rose Obita
<b>16.40-17.30</b>	<b>Key conclusions and recommendations</b>		<b>Conference facilitator</b>

**Day 2: Tuesday, 31<sup>st</sup> May 2011**

<b>Session 4: <u>Land grabs, land conflicts, and women's already fragile rights to land</u></b>		
<b>9.00 – 09.40</b>	Large Land acquisition phenomenon, drivers and regulatory frameworks	Nidhi Tandon
<b>9.40-10.30</b>	Presentation on the gendered impacts of land grab as a responses to climate change e.g. REDD initiatives and other carbon trading. Do the	Josephine Kamel, Pan African Climate Justice Alliance (PACJA)

	global negotiations at UNFCCC or national policies offer opportunities?		
10.30-11.00	Break		
Parallel platforms: 11.00-13.00			
Platform theme	Presentation/format	Speaker	Facilitator
Platform 1: Impact of land based investments on women’s rights and the role of international instruments what can be done in pan African and global initiatives.	Gender perspective on the impact of “land grabbing”,	Gaynor Paradza	Patita (Fahamu)
	International processes for dealing with land governance: Principles for “Responsible Agricultural Investments”,	Catherine Gatundu/Sabine Pallas	
	“Voluntary Guidelines on the Responsible Governance of Tenure of Land and Other Natural Resources”		
Platform 2: Impacts of land dispossession through conflict and climate changes and what can be done.	Land grabbing in conflict (sometimes as cause of conflict) and post conflict situations	Kitete Rosamba DRC	IDP rep in Kenya- G10 coalition
	Practical experiences of communities using international instruments to defend their rights	Wilson Kipkazi	
13:00-14:00		Lunch	
Session 5: <u>Women’s land and natural resources rights struggles Learning from and about women’s struggles.</u>			
14:00-15.00	Plenary panel Cases from the region; how women responded, what worked, what challenges. - Examples of women’s creative farming systems that offer sustainable futures for us all - Learning from women’s land struggles in conflict and post conflict situations - Share experiences of women’s land rights struggles and movements - Learning from women’s land struggles on commercial farms.		Panel session  Panellist: Groots watchdogs, Hoairou Commission- Africa Rep, Women on Farms, G-10 Coalition, Mzoe Gondwe- COWFA Malawi, FONG Ghana.
15.00-15.30		Break	
13.30- 16.30	The role of African Court on Human and People’s rights in protection of Women’s rights		President of the African Court of Justice and Human Rights. Eunice Ndonga
	UN Women: Strategies and opportunities		Afwana Diane

<b>16.30-17.30</b>	Grassroots women's Caucus. - Specific issues for grassroots women that need greater attention. - How do we ensure space for and the leadership of grassroots women in land struggles?	Led by Hoairou Commission and Women's Land Link Africa
	Documentaries on Women's land rights issues cases and struggles	
	ILC Members meeting	

**Day 3: Wednesday, 1<sup>st</sup> June 2011 (two processes going on simultaneously. Field visit and conference on GBV)**

<b>Session 7 A: Practical experiences- field visits (NB: A more detailed programme for the visit will be provided separately and explanations will be given at the conference)</b>		
<b>Objective:</b> to learn from women's farming initiatives and land struggles. There will be at least three different groups going to different sites. With a debriefing afterwards and a sharing of pictures and impressions from the visits with the other delegates.		
<b>Trip 1:</b>	Women watch dogs: women coming together at community level in support of HIV affected women and children, ensure that assets and land stripped is returned, or that new dispossessions are not emerging- Gatundu and Nanyuki - led by GROOTS Kenya	Esther Mwaura, GROOTS Kenya
<b>Trip 2</b>	Post conflict Resettlement case, how are the women faring: Kikopey- resettlement area: invite a rep from that area to the conference. Led by Kenya Land Alliance.	Rebecca Wangui, Kenya Land Alliance

<b>Session 7B: Guaranteeing women's land rights and access to justice: Engendering reparation and bringing women into the reparation debate</b>			
<b>Key topics:</b>			
<ul style="list-style-type: none"> <li>- Women land rights and violence against women</li> <li>- Ending impunity on Sexual and Gender based violence and protecting women from violence</li> <li>- Reparation and compensation mechanisms</li> </ul>			
Time	Presentation/format	Speaker	Facilitator
<b>9.00 – 11.00</b>	<ul style="list-style-type: none"> <li>- Welcomes remarks and introduction to the session:</li> <li>- Recap of day 2 in linking also land rights and SGBV and perspectives for women empowerment:</li> </ul>	Emime Ndiokubwayo	
	<ul style="list-style-type: none"> <li>- Ending impunity on women's rights violation: defective legal mechanisms to deal with impunity</li> <li>- Accessing justice, the challenges and opportunities.</li> </ul>	<ul style="list-style-type: none"> <li>- Colonel Toussaint 2, Magistrate from DRC</li> <li>- Sibongile Ndashe, Inter Rights</li> </ul>	Emime Ndiokubwayo
<b>11.00-11.30</b>		<b>Break</b>	
<b>11.30-11.40</b>	Documentary on best practices on ending impunity on SGBV for the last 2 years in different communities by	Leone Sendegya-ACORD	FIDA Kenya
<b>11.40-1300</b>	Sharing experience on progress made in meeting different commitments by the	Urgent Action Fund, AWDF, Actionaid,	Sylvia- Action Aid SL

	organizing committee on MDG3 : <b>9.20-11.00</b> (15 minute each)	FAHAMU, MDG3 Fund and ACORD	
<b>13.00-14.00</b>	<b>Lunch</b>		
<b>14.00- 15.30</b>	Getting Justice; Reparation and compensation mechanisms for <b>victims</b> of SGBV in Africa: opportunities and challenges	<ul style="list-style-type: none"> <li>- Emime Ndiokubwayo</li> <li>- Betty Okero,</li> <li>- ICGLR: Nathan Byamukama or Hyacinthe and Goree Institute</li> </ul>	Rose Atim
<b>15.30-15.50</b>	<b>Break</b>		
15.50-1700	<ul style="list-style-type: none"> <li>- Discussions in Plenary</li> <li>- Group work: identification of gaps:</li> </ul>	Juliet Nakato and Lucie Nyamarushwa/Rose Atim Obita/Carol Kayira/Alice Buhinja	
<b>18.00 – 22.00</b>	<b>Launch event for the Oxfam Grow/Food Justice Campaign.</b>	<b>All invited. Dinner, Music, Unveiling the New Global Campaign and Report</b> (Details of the event will be provided separately)	

#### Day 4: Thursday 2<sup>nd</sup> June 2011

<b>Session 8:</b> Creative sessions working on difficult topics and new ideas for the future <b>Key questions</b> (all answered drawing from the presentations, discussions and field trips of the past days): <ul style="list-style-type: none"> <li>- What needs to change to strengthen women's land rights?</li> <li>- What needs to change to increase access to justice and reparations for women survivors of violence and conflict? Draw</li> <li>- Who are key targets to be influenced? Think national, pan African and Global.</li> <li>- Who are key allies?</li> <li>- What can we do to make it happen? What specific activities? At what levels; national, pan African, Global?</li> <li>- What can we agree to work on together to advance women's land and other rights?</li> </ul>		
<b>9.00 – 11.00 with tea break</b>	<b>Building from recommendations coming from sessions over previous days, to identify asks and actions.</b> <b>Group work on key questions</b>	Conference Facilitator
<b>11.00-13.00</b>	<b>Report back and clarifications</b>	
<b>13.00-14.00</b>	<b>Lunch</b>	
<b>14.30- 15.00</b>	<ul style="list-style-type: none"> <li>- <b>Way Forward</b></li> <li>- <b>Communiqué from the conference</b></li> <li>- <b>Wrap up</b></li> </ul>	<b>Members of Organising Team</b>
<b>15.00- 15.30</b>	<b>Workshop closing remark</b>	<b>Minster for Justice</b>