

Land grabbing and the implications for the right to development in Africa

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Summary: *The indispensability of land for agriculture and the extraction of the natural resources thereon to sustain industrialisation and economic growth processes across the world have orchestrated a significant change in patterns of land ownership and use in Africa where evictions and displacement of local communities from their ancestral lands have become legion as a result of persistent land grabbing. This situation has had a concomitant negative implication for the potential of local communities in Africa to develop socio-economically and culturally, with a corresponding negative impact on their right to development. It is not clear whether the right to development enshrined in the African Charter could be relied upon to achieve Africa's development prospects, particularly with the prevalence of land grabbing across the continent. Taking land as a major contributing factor to socio-economic and cultural development, we argue that land grabbing not only contravenes but also bars prospects of making the right to development a reality for*

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the peoples of Africa. Based on the doctrinal research methodology, we critically review the normative contents of the right to development in conjunction with other relevant provisions under the African Charter. We question whether the right to development affords prospects for socio-economic and cultural advancement in the face of land grabbing in Africa. Concerning the adverse impact of land grabbing, the article concludes that it is crucial for African states to re-think their right to development obligations and the land ownership and land use policy prerogatives relevant to protecting the livelihood sustainability interests of their peoples.

Keywords: *land grabbing; right to development; livelihood sustainability; local communities; human rights; natural resources; African Charter*

1 Introduction

One of the contemporary problems with which the African peoples have had to grapple in addition to other developmental challenges is the growing phenomenon of land grabbing for which we posit recourse to the law for pragmatic ways of redressing the problem. However, land grabbing is not novel to Africa. The practice dates back to the colonial era, sanctioned (albeit wrongly) by the European ‘scramble for Africa’ adopted at the Berlin Conference of 1885.¹ In *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*² the African Commission on Human and Peoples’ Rights (African Commission) noted the tragedy for the peoples of Africa who were alienated from their ancestral lands. Local and indigenous communities in South Africa, Zimbabwe and Kenya, among others, that accommodated a heavy white settler population remain dispossessed of their lands, which were forcibly taken away during the colonial era.³ It can thus be said that contemporary patterns of land grabbing are a colonial legacy.⁴

This article focuses on transnational land grabs following the 2007/2008 global financial crisis with its dire implications for local communities’ rights and interests in Africa. Over the last decade,

¹ R Home ‘Land, law and African land governance: introduction’ in R Home (ed) *Land issues for urban governance in sub-Saharan Africa* (2021) 2.

² (2001) AHRLR 60 (ACHPR 2001) para 56.

³ A de Man & CC Ngang ‘Colonial extraction of natural resources and the impact on the right to development in Africa’ in CC Ngang & SD Kamga (eds) *Natural resource sovereignty and the right to development in Africa* (2021) 109.

⁴ C Zambakari ‘Land grab and institutional legacy of colonialism: The case of Sudan’ (2017) 18 *Consilience: The Journal of Sustainable Development* 193.

extensive land grabbing has occurred across Africa, in response to the global food and energy security crises. Evidence from the wanton manner in which most of these investment ventures are executed suggests that they are principally tailored to benefit the home countries of investor companies, while considerably undermining Africa's development prerogatives. Land grabbing in Africa (also in other parts of the world) impacts adversely and obfuscates the right to development (RtD) and the ability of local communities to advance socio-economically and culturally. It generally orchestrates forcible evictions and displacement of local communities from their traditionally-owned and occupied lands in favour of large-scale agricultural projects by foreign multinational corporations.

The persistent displacement of local communities from their lands is antithetical to the ability to develop socially, economically and culturally, with simultaneous negative implications on development prospects for subsequent generations. The starting point to this argumentation is that land grabbing does not promote progress but rather perpetuates poverty and under-development. In this article we posit that land grabbing has the potential to blur and limit the relevant protections envisaged in the corollary rights provided for under articles 14, 21 and 22 of the 1981 African Charter on Human and Peoples' Rights (African Charter). Africa is referred to in this article as a unified entity, particularly with regard to the African Charter obligation contained in article 22(2) to collectively create the conditions and the enabling environment to achieve the RtD.

The article examines the implications of land grabbing for the RtD in Africa to illustrate that land constitutes an indispensable integral part of the common African heritage, which the peoples of Africa inherently are entitled to own, have control over and productively utilise or disposed of to the exclusive collective benefit of the peoples to whom it legitimately belongs as implicitly guaranteed under articles 21 and 22 of the African Charter. Land grabbing contravenes the land ownership rights and, thus, is counter-intuitive to the broader entitlement to socio-economic and cultural development guaranteed to the peoples of Africa.

Faced with the threat posed by land grabbing, we critically analyse the normative contents of article 22 in conjunction with articles 14 and 21 of the African Charter and, accordingly, question whether and to what extent it affords prospects for socio-economic and cultural advancement. First, a reading of article 22 suggests that its realisation and enjoyment are contingent on the equal enjoyment of the common heritage of mankind, which encompasses the wealth of natural resources, including land, which is essential for enabling

African peoples to develop socially, economically and culturally.⁵ Second, there is a normative substantive gap under international human rights law relating to the protection of land as a human right, which largely has been advanced only in the context of indigenous peoples under the United Nations (UN) Declaration on the Rights of Indigenous People. This normative gap leaves apparent confusion with respect to the protection of vulnerable non-indigenous local communities whose land rights are severely affected by land grabbing.

The article is the product of doctrinal research involving a review of existing literature, legal instruments and case law on the subject in advancing the argument that land grabbing has a negative implication for the RtD. The arguments are corroborated with actual examples of land grabbing to illustrate how the phenomenon adversely impacts livelihood sustainability for the peoples of Africa, necessitating their state governments to re-think their obligations relating to the RtD. This obligation essentially relates to how they handle land ownership and land use policy prerogatives.

We begin the analysis by situating land rights within the broader framework of sovereign ownership over natural resources in Africa. We further examine land grabbing and how it impacts the RtD in Africa. We then debunk the win-win narrative in land grabbing and propose an RtD governance framework as a suitable catalyst to promote and ensure the win-win advocacy narrative. The last part sums up the arguments into a logical conclusion and suggestions on the ways forward.

2 Land rights in the context of sovereign ownership over natural resources

2.1 The intrinsic value of land as a natural resource

Land essentially is portrayed under international human rights law as a natural resource with intrinsic value particularly because it constitutes the primary means of subsistence around which development activities revolve. Home advances the argument for good land governance on the basis that '[...]and is the single greatest resource in most countries. Access to land, security of tenure as well as models for land management have significant implications for

⁵ CC Ngang 'The right to development in Africa and the common heritage factor in ensuring its realisation' (2020) 45 *Journal for Juridical Sciences* 29.

development and touch all aspects of how people live and earn a living'.⁶ International human rights instruments (including the African Charter) only cursorily guarantee land rights and, more so, do not define the normative contents of the right to land. Article 19 of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (Declaration on the Rights of Peasants) incorporates the right to natural resources as including all lands, among others, on which local communities depend for their advancement and socio-economic and cultural development. It suggests that the right to land and other natural resources must be understood in a holistic manner as inextricably interconnected and interrelated.⁷

The right to land presupposes freedom and entitlement which, on the one hand, guarantee the liberty to retain pre-existing access to, maintenance and use of land as a means of ensuring adequate standards of living. It also guarantees entitlement to dignity and identity, which in most African societies defines and qualifies participation in cultural life. Freedom also guarantees the right not to be unlawfully evicted from one's land, as this often happens when land grabbing takes place, resulting in displacements that disrupt the livelihood of local communities. The entitlement aspect guarantees tenure and a management system that promotes equitable access to and the sustainable governance of land in a manner that is consistent with aspirations for socio-economic and cultural development.

Article 17 of the Declaration on the Rights of Peasants reinforces the right to land, which embodies equitable access that must be achieved without discrimination and which, accordingly, forbids states from interfering either directly or indirectly with the individual or collective enjoyment of land rights. In the event of an unlawful dispossession, the right to restitution would apply.⁸

In Africa, land symbolises a source of income, wealth and prestige, a source of livelihood security, capital wealth and a primary factor of production. In a sense, land ownership constitutes a leeway out of poverty given that access to it is instrumental in enabling rural households to generate a sustainable income. This can be either by freely disposing of the land or utilising it as a means of production such as farming. The Declaration underscores the relevance of natural resources as a constitutive source of subsistence to the extent of these

6 Home (n 1) 2.

7 SM Suarez 'The right to land and other natural resources in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' (FIAN 2015), https://www.fian.org/fileadmin/media/Publications/Peasants_Rights/PeasantsRights_right_to_land.pdf (accessed 15 February 2022).

8 As above.

forming a major factor in socio-economic and cultural development. The Declaration provides in article 12:

The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The notion of sovereignty over natural resources is captured in article 21 of the African Charter, which guarantees the right to permanent ownership, control, use and free disposal of natural wealth and resources. Article 21(1) stipulates that '[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.' The right to natural wealth and resources and, by implication, the right to land under article 21(1) of the African Charter, is a collective entitlement and an indispensable means of sustenance, from which the peoples of Africa are entitled to jointly reap exclusive benefits. Natural wealth and resources are construed as incorporating land and its appurtenant resources. It implies that the peoples of Africa are entitled to the exclusive ownership of their lands, of which they may under no circumstances be deprived of.

The African Charter further provides in article 21(3) that '[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation'. The cited provision obtains from the spoliation remedy (*mandament van spolie*) principle in Roman-Dutch law, which guarantees the corporeal right to property and, therefore, forbids any unlawful dispossession of anyone's property in contravention of which a court order may be issued in the form of a restitutory interdict obligating the dispossessor to return the property.⁹ By this, article 21(2) lays down the rule that in the event of land dispossession without due legal process, the dispossessed peoples are entitled to either the lawful recovery of their land or the payment of adequate compensation or to both forms of redress. In applying article 21, the African Commission and the African Court on Human and Peoples' Rights (African Court) respectively ordered the Kenyan government in the *Endorois* and *Ogiek* cases (involving the dispossession of the indigenous communities of their ancestral lands) to restitute the land and to pay adequate compensation to the dispossessed peoples (*Centre for Minority Rights Development (Kenya) & Others v Kenya*;¹⁰

9 V Mhungu 'Dispossessed and unimpressed: The *mandament van spolie* remedy' (2015) *De Rebus* 36-38.

10 (2009) AHRLR 75 (ACHPR 2009) para 298.

African Commission on Human and Peoples' Rights (Ogiek Community v Republic of Kenya).¹¹

Any derogation from the right to land ownership, as often occurs in the event of land grabbing, triggers a simultaneous negative impact on the RtD of the peoples of Africa. Despite the glaring commitment of African states to the African Charter, to protect fundamental rights and freedoms, in tandem with the African Commission jurisprudence on land rights, and the question of ownership of natural resources, the prevailing realities on the ground across the continent, particularly in the context of land grabbing, are contradictory and very concerning. This growing concern requires a thorough investigation into whether and to what extent the peoples of Africa can legitimately assert their right to socio-economic and cultural development when land grabbing occurs.

The Preamble to the Revised African Convention on Nature and Natural Resources (Revised African Convention) provides that 'the natural environment of Africa and the natural resources with which Africa is endowed are an irreplaceable part of the African heritage and (therefore) constitute a capital of vital importance to the continent and humankind as a whole'. It adds that the duty and responsibility repose on state parties to 'harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour'. The Convention enshrines the duty of African states to either individually or collectively ensure the enjoyment of the RtD. Ensuring that developmental and environmental needs are met in a sustainable and equitable manner underpinned by articles III(2) and (3) of the Revised African Convention suggests the need to give significant attention to the protection of land rights with the hope of striking a balance between developmental and socio-environmental needs.

2.2 Component entitlements of the right to development

At the international level the normative nature and contents of the RtD remain controversial,¹² despite being recognised universally and construed as imposing an obligation (albeit non-binding) for its realisation. In spite of the controversy, which is premised on the

¹¹ Appl 6/2017 para 226.

¹² S Jha 'A critique of right to development' (2012) 4 *Journal of Politics and Governance* 17-22; S Marks 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 137; A Sengupta 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 837.

lack of interpretational precision or political consensus on the exact nature, meaning and status of the right,¹³ the RtD is predicated on certain core elements that inform an understanding of its normative purpose. This includes the fact that the human person is the subject of development and is entitled to a certain material possession of proprietary rights necessary for facilitating participation in and contribution to the processes for development. The proprietary right includes entitlement to land ownership, which African states are obligated to protect through appropriate national development policies that aim at the constant improvement in human well-being.¹⁴

For Sengupta,¹⁵ the conceptual value of the RtD is premised not only on its inalienability as a human right but essentially as a composite vector entitlement. Through this approach, all other human rights and fundamental freedoms can be realised in their entirety through a particular process of development that is rights-based and focuses on maximising the human productive potential. Clearly, the RtD postulates as a foundational right for the realisation of other rights in the development context¹⁶ and, thus, provides the regulatory framework that allows African peoples to utilise their material possession of land among other natural resources in pursuit of their socio-economic and cultural development and livelihood sustainability entitlements.

The Declaration on the Right to Development (DRtD) of 1986 outlines its usefulness and relevance to the extent that any derogation thereof must be seen as and considered a violation not only of the right but also other associated entitlements. Realisation of the RtD in its universal, indivisible, interdependent and mutually-reinforcing nature is predicated on the sovereign ownership, control and use of natural wealth and resources as well as the equitable distribution of the benefits thereof, for collective well-being. It implies that a contravention of the component right to land would constitute a violation of the RtD. Similar to the Declaration on the Rights of Peasants, article 1 of the DRtD stipulates:¹⁷

¹³ Marks (n 12); Sengupta 2002 (n 12) 837.

¹⁴ Declaration on the Right to Development Resolution A/RES/41/128 adopted by the UN General Assembly on 4 December 1986, art 2(3).

¹⁵ A Sengupta 'The human right to development' (2004) 32 *Oxford Development Studies* 180-184; Sengupta (n 12) 846-852.

¹⁶ SAD Kamga 'The right to development in the African human rights system: The *Endorois case*' (2011) 44 *De Jure* 383.

¹⁷ Our emphasis.

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental rights can be fully realized ... [it] implies the full realization of the right of peoples to self-determination ... the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The emphasis on the right of peoples to self-determination and full sovereignty over their natural wealth and resources is of primary importance to the discussion here in the sense that without the qualifying entitlement to natural wealth and resources, the RtD would not be achieved. While the DRtD considers the human person in their individual capacity and peoples in their collective capacity as subjects of the RtD with the mandate to benefit from it (article 2(1)), it equally foregrounds the normative duty of states to protect and to promote the RtD such that a duty would strengthen states' national development policy strategies, while also obligating states to remove unnecessary obstacles to development (articles 5 and 6(3)) such as land grabbing.

It is worth reiterating that in the African context, the RtD poses no controversy in its reading and understanding as a legally-binding collective right on account on its recognition and protection in the African Charter which guarantees protection of the African common heritage as a prerequisite for its realisation.¹⁸ Because colonial rule authorised dispossession of the peoples of Africa of their land and natural wealth and resources, as the African Commission observed in the *SERAC* case,¹⁹ it became necessary under the post-colonial dispensation to guarantee legal protection of the common heritage, which is considered indispensable for the realisation of the RtD. For Kamga and Fombad the drivers of the RtD in Africa are diverse.²⁰ These include the practices of powerful actors such as nations, multinational corporations and institutions that impact on human rights; factors that are external to developing countries, which advance the rules that govern world markets generally criticised as being inequitable; the pervasive influence of international economic organisations that continue to espouse the agenda of neo-liberalism; and the corresponding decline in domestic autonomy, which limits the ability and potential of African states to independently decide

18 African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity in Nairobi, Kenya on 27 June 1981, OAU Doc CAB/LÉG/67/3 rev. 5; 1520 UNTS 217 art 22(1).

19 *SERAC* (n 10) para 56.

20 SAD Kamga & CM Fombad 'A critical review of the jurisprudence of the African Commission on the right to development' (2013) 57 *Journal of African Law* 3.

their own economic, social and cultural development policies, particularly with regard to sovereignty over natural resources.

The African Charter remains the pioneer treaty instrument that enshrines a legally-binding and enforceable provision on the RtD.²¹ The next part discusses the relevant provisions of the African Charter that embody the implicit right to land.

3 Implied right to land and the right to development in the African Charter

3.1 Article 14 on the right to property

Although the African Charter does not provide for the right to land, the property right in article 14 extends to and includes land. Article 14 guarantees the right to property but with the proviso that it may be 'encroached upon in the interest of public need or the general interest of the community and in accordance with the provisions of appropriate laws'. Problematically, the African Charter makes no mention of compensation; whether prompt, effective or adequate, the absence of which has an adverse implication on the right to property. Even in instances where a private property is encroached upon in the public interest and in accordance with applicable laws, the owner of the property, in principle, is entitled to at least some form of compensation. Notwithstanding the conceptual shortcoming of article 14, in Africa there is an implicit right to land, which can accurately be read into article 21 of the African Charter, discussed above.

3.2 Article 22 on the right to development

Consistent with the African vision to promote fundamental human rights, and sustainable development, article 22 of the African Charter guarantees to the peoples of Africa the right to economic, social and cultural development that takes into account their freedom and identity and equality in the enjoyment of the common heritage. The common heritage principle is linked to the human rights framework,

21 W Scholtz 'Human rights and the environment in the African Union context' in A Grear & LJ Kotze (eds) *Research handbook on human rights and the environment* (2015) 407.

particularly within the framing of the RtD²² in article 22, which stipulates:

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

The RtD obtains from the understanding that its realisation is predicated on the equal enjoyment of the common heritage. While the common heritage may be understood to incorporate all natural resources, it is logical to admit that land is the principal heritage that is commonly shared among the peoples of Africa and, therefore, epitomises an inevitable determinant for the realisation of the RtD,²³ more so because both entitlements are of the same nature, guaranteed to be enjoyed collectively by the peoples of Africa. Article 22 highlights the multifaceted character of the RtD in terms of it being a composite entitlement comprising economic, social and cultural rights and a vehicle for the realisation of civil and political rights as stipulated in the Preamble to the African Charter.

Unlike the DRtD, which defines the RtD as an entitlement allocated both to individuals and to groups of peoples, article 22 of the African Charter provides that the RtD can only be claimed by a collective and not by individuals. The nature of the RtD as a collective entitlement correlates with the common heritage principle, which grants to the peoples of Africa communal ownership of their lands. With the understanding that only peoples can assert the RtD in Africa, it is imperative that development decision making relating to the disposal of land inevitably involves the peoples whose RtD would be affected in the process.²⁴ Given the value of land as a factor of production for development, it is appropriate that its ownership and the resources thereon are attributed to the collective of African peoples as the ultimate beneficiaries. They must be equipped with the potential to utilise the same in a way that improves their socio-economic and cultural circumstances. Hence, the peoples of Africa are entitled to own, control and determine the kind of development undertaken on their lands.

22 K Balsar *The concept of the common heritage of mankind in international law* (1998) 323; Ngang (n 5) 28-50.

23 Ngang (n 5) 29.

24 A Sengupta 'Right to development as a human right' (2001) 36 *Economic and Political Weekly* 2528.

The understanding of land as a common heritage implies that it is an inalienable entitlement that will for all times be available to successive generations and, thus, necessitates recognition and protection under the law. By implication, if and when the right is contravened, redress may be sought in a court of law on the basis of which matters relating to land claim as a component of the RtD have been the subject of focus in a number of cases both before the African Commission and the African Court.²⁵ Although the African Commission did not uphold the RtD in the *SERAC* case, for example, it nevertheless, as Kamga and Fombad note, reiterated its normative content in conjunction with the concomitant obligation on the African states to individually or collectively protect the RtD of their peoples.²⁶

Article 22 also embodies the right to ensure that development is undertaken freely, without foreign interference or constraints, and with the ability of the peoples of Africa to define their own development models in a manner that is consistent with their livelihood priorities and socio-economic and cultural development exigencies. Despite the associated legal guarantees and protection, with the increasing phenomenon of land grabbing across Africa, the unanswered fundamental question is how the RtD could be explored to sustain prospects for development on the continent. In other words, it entails examining how and to what extent land grabbing impacts on the realisation of the RtD in Africa.

4 The contemporary problem of land grabbing in Africa

Although Africa may have seen a whirlwind of development models since the 1980s, including the World Bank's Structural Adjustment Programme²⁷ and the New Partnership for African Development,²⁸ they have had considerable mixed outcomes with none that has sufficiently addressed the issues of poverty and misery that characterised the rationale for adherence to the RtD.²⁹ With the increasing pressure exerted by contemporary forms of land grabbing

25 Kamga (n 16) 381-391.

26 Kamga & Fombad (n 20) 2.

27 M Thomson et al 'Structural adjustment programmes adversely affect vulnerable populations: A systematic-narrative review of their effect on child and mental health' (2017) 38 *Public Health Review* 3.

28 NEPAD was adopted at the 37th session of the Assembly of Heads of State and Government in Lusaka, Zambia, in 2001.

29 PB Matondi et al 'Introduction: Biofuels, food security and land grabbing in Africa' in PB Matondi et al (eds) *Biofuels, land grabbing and food security in Africa* (2011) xi.

(either for food, biofuel, climate change or green grabbing) African states have the legal obligation, as stated in article 22(2) of the African Charter, to ensure the realisation of the right to socio-economic and cultural development. Accordingly, states are obligated to adopt adequate national development policies, including land policies that guarantee exclusive collective benefits and constant improvement in the living standards of their peoples.³⁰

Despite no unanimous definition of land grabbing, a generally-accepted view is that the practice involves the appropriation of large swathes of land in Africa, often by transnational companies with the aim of securing benefits in food supply and energy security.³¹ The phenomenon needs to be understood in the context of competing power relations – the desire to capture or control land and its associated resources in order to control the benefits of its use. As to whose benefit and for what purposes land grabbing takes place, it usually is the acquirers who decide and generally not in the interests or to the benefit of the dispossessed.

Land grabbing occurs in two ways. On the one hand, it occurs when host governments solicit foreign investors to boost agricultural productivity, eco-tourism and increase economic growth and development needs; also, when governments forcefully appropriate land from local communities and lease them to foreign investors under the pretext of creating opportunities for development.³² In either of these cases, the state assumes the role of land broker, which has raised significant governance and regulatory concerns.³³

Since the outbreak of the 2007-008 global financial crisis, there has been an increase in the demand for land in Africa by foreign corporations, including multinational corporations either for the production of food or biofuel crops.³⁴ It is reported that as of 2012,

30 Art 2(3) Declaration on the Right to Development Resolution (n 14).

31 O de Schutter 'The green rush: The global race for farmland and the right of land users' (2011) 52 *Harvard International Law Journal* 504; L Cotula et al 'Land grab or development opportunity? Agricultural investment and international land deals in Africa' (FAO 2009) 17.

32 Friends of the Earth International 'Land, life and justice: How land grabbing in Uganda is affecting the environment. Livelihoods and food sovereignty of communities' (2012) 5, <https://www.foei.org/resources/publications/publications-by-subject/food-sovereignty-publications/land-life-and-justice> (accessed 13 February 2022).

33 W Wolford et al 'Governing global land deals: The role of the state in the rush for land' (2013) 44 *Development and Change* 180.

34 For details, see B Yang & J He 'Global land grabbing: A critical review of case studies across the world' (2021) 10 *Land* 1; JCN Ashukem 'A rights-based approach to foreign agro-investment governance in Cameroon, Uganda and South Africa' LLD thesis, North-West University, 2016 66; Land Matrix 2022, <https://landmatrix.org/list/deals> (accessed 17 September 2022).

over US \$14 billion has been invested in agribusiness in Africa.³⁵ Although we acknowledge that these investment ventures are not of the same scale as some have been abandoned or failed and others heavily criticised, there is a common understanding that these investments have occupied and are occupying vast portions of customary land previously used by rural communities to sustain themselves economically, socially and otherwise. The World Bank reports that out of the 56 million hectares of land under negotiations globally in 2009, 32 million hectares were in Africa.³⁶ According to the Land Matrix,³⁷ there are 774 land deals on 306162556,35 hectares of land in Africa. Out of this number, 542 deals have effectively been concluded for 12171039 hectares of land.³⁸ There are also some 63 pending land deals, while 169 of the deals are reported to have failed.³⁹ The land grabbing trend and the extent to which the phenomenon is being perpetuated across Africa is raising increasing concerns, including, in particular, the negative impact it has on the RtD in Africa

4.1 How land grabbing impacts on the right to development

Land grabbing is a contemporary practice of the twenty-first century that has fundamentally changed the power dynamics in the land ownership patterns, which has increasingly become detrimental to the rights, freedoms and livelihood of local, peasant and indigenous populations in Africa. It defines the changing patterns of access to, ownership of, control over and use of land and the products generated from it.⁴⁰ The phenomenon of land grabbing, thus, is explained and should be understood in the context of the unsettled land governance regimes in most, if not all, of Africa, which regimes are characterised as weak and affording little or no protection to the land rights of local communities. Axiomatically, land grabbing affects customary land tenure systems and peoples' possession of the land as a natural resource and a means of livelihood⁴¹ and, consequently, impacts the RtD. It is considered in this regard as inimical to human

35 A Buxton, M Campanale & L Cotula 'Farms and funds: Investment funds in the global land rush' (IIED 2012), <https://pubs.iied.org/sites/default/files/pdfs/migrate/17121IIED.pdf> (accessed 17 September 2022); S Narula 'The global land rush: Markets, rights, and the politics of food' (2013) 49 *Stanford Journal of International Law* 110.

36 K Deininger et al 'Rising global interest in farmland: Can it yield sustainable and equitable benefits' (World Bank 2009) xiv.

37 This is an independent land-monitoring initiative that promotes transparency and accountability in decisions over large-scale land acquisitions.

38 Land Matrix (n 34).

39 As above.

40 Matondi et al (n 29).

41 De Schutter (n 31).

rights, in general, and the RtD, in particular, and, accordingly, necessitates a re-thinking of land ownership rights as fundamental to the equal enjoyment of the African common heritage.

It may be necessary to applaud the urge to revamp and strengthen Africa's agricultural expansion as epitomised and facilitated by the Comprehensive Africa Agriculture Development Programme (CAADP). The practice of land grabbing associated to agriculture-led development dispossesses and simultaneously plunges large proportions of the African populations into hunger and excruciating poverty.⁴² While it is important to acknowledge the underlying rationale of the CAADP, it has instead contributed to hindering the actualisation of the RtD insofar as land and land rights are concerned. This is done through the CAADP's failure in regulating the processes to prevent land grabbing or in safeguarding local communities that eventually become evicted, displaced and dispossessed of their customary lands in favour of large-scale agro-business ventures or through their complicity in many instances of land grab as the host states of these investments.⁴³

In the Tana Delta region of Kenya, for example, more than 25 000 people were evicted from their ancestral land for the Mumias sugar cane project,⁴⁴ thereby subjecting the local community to destitution, deprived of the means of subsistence. Generally, land grabbing results in the destruction of natural ecosystems and systematic displacements of local communities, despite the economic justification attributed to it and, accordingly, it raises ethical, human rights and environmental concerns especially as they are often shrouded in shady deals owing to the power imbalances involved in the negotiation processes. Evidence from the practice suggests that land deals usually are not transparent and inclusive, as local communities often do not participate in the negotiation processes and vital information between the parties often remains undisclosed.⁴⁵ This practice constrains the participatory approach that underpins the RtD.

42 AF Odusola 'Land grabs in Africa: A review of emerging issues and implications for policy options' International Policy Centre for Inclusive Growth Working Paper 124 (2014) 2.

43 For details, see Ashukem (n 34).

44 FIAN 'Land grabbing in Kenya and Mozambique: A report on two research missions and a human rights analysis of land grabbing' (2014), https://www.fian.org/fileadmin/media/publications_2015/2010_4_Landgrabbing_Kenya_Mozambique_e.pdf. (accessed 5 February 2022).

45 Wolford et al (n 33).

Because land grabbing is facilitated by the misconception of underutilised or unoccupied arable agricultural lands in Africa,⁴⁶ 'the very notion of reserve (land) more or less automatically renders such land, by definition, available, amendable to, and appropriate for (social) transformation into global granaries or new oil wells'.⁴⁷ This qualification makes it possible for African states and governments, in their territorial sovereignty capacity as the principal legal authorities and administrators of land, to appropriate vast tracts of land belonging to local communities for state purposes or to lease these out to foreign investors. Prioritising global market demands for land and its appurtenant resources has significantly shifted the development paradigm in Africa to one that is premised on satisfying foreign corporate interests over the socio-economic and cultural development exigencies of local communities.

Given the centrality of land both as a natural resource and a human right entitlement, while considering its indispensability for the RtD, it is argued that the existing legal framework that is supposed to regulate land grabbing in Africa is premised on exceptionally weak land governance systems and, thus, raises fundamental concerns about the land question on the continent. Coupled with the dire consequences for local communities, the land question is whether Africa, in most instances, is compromised by the inability to conceptualise sustainable alternatives for development other than merely depending on the land for sustenance. Although African state governments generally impose the requirement for land certification as a way of ensuring the security of tenure, it is important to point out that a deed of title can only be obtained with respect to prior ownership of land.

Ownership of land does not cease to exist, even where the land is not registered in the sense that local communities generally have established systems for recognising legitimate and rightful ownership. Any deprivation of land rights premised on the lack of a registered land title amounts to a violation of the human right to property. Kagwanja is of the view that land rights on the continent have traditionally been protected through customary laws and community management systems that recognise the land rights of

46 K Deininger 'Challenges posed by the new wave of farmland investment' (2011) 38 *Journal of Peasant Studies* 217.

47 T Kachika 'Land grabbing in Africa: A review of the impacts and the possible policy responses (2010), <http://www.oxfamblogs.org/estafrica/wp-content/uploads/2010/11/Land-Grabbing-in-Africa.-Final.pdf> (accessed 13 January 2022).

members of the community, especially the vulnerable.⁴⁸ As stated earlier, although not explicitly enshrined in the African Charter or ancillary treaty instruments, there indeed is an inherent right to land for the peoples of Africa, which needs to be harnessed and explored for the realisation of socio-economic and cultural development.⁴⁹

The protection of land rights in Africa, however, remains a subject of controversy particularly with the compounding problem of land grabbing that has increasingly deprived and displaced local communities from their traditionally-owned and occupied lands. As established above, land ownership is relevant in determining sovereignty over land, and the resultant developmental exigencies of local communities for whose exclusive benefit the disposal of land is envisaged. Land ownership, thus, is central to the realisation of the RtD, and secured land rights are pivotal to and play a catalytic role in enhancing economic growth, ensuring poverty alleviation and promoting inclusive socio-cultural development. Yet, the indispensability of land for developmental purposes, owing to the practice of land grabbing, has led to a significant drift in land ownership and land use patterns, raising genuine concerns with regard to the impact on the RtD guaranteed to the peoples of Africa.

The change in ownership and use of land is characterised by and predicated on the notion of statutory land rights which, as indicated above, threatens the protection of customary land rights leading to unlawful evictions and displacement of local communities in favour of large-scale agricultural investments, in contravention of articles 14, 21 and 22 of the African Charter. Although the dispossession and displacement of local communities from their ancestral lands could be analogous to the colonial and post-independence eras, contemporary forms and practices of land grabbing have increasingly exacerbated and amplified the suffering of rural communities and altered prospects and the extent to which the peoples of Africa could be expected to pursue their socio-economic and cultural development objectives. Over the years, issues of security of (customary) land rights and other related rights-based interests have come to the fore in Africa through the intrusion of foreign agricultural investments that have systematically deprived the poor and vulnerable people of

48 J Kagwanja 'Land tenure, land reform, and the management of land and natural resources in Africa: Examining benefits and costs of alternative land rights regimes is vital to a successful land rights reform agenda' in E Ngwani (ed) *Land rights for African development: From knowledge to action* (2006) 3-5.

49 T Ngaïdo 'Reforming land rights in Africa' (2020) 15 *International Food Policy Research Institute – AfricaConference Briefs* 1-6; Ngang (n 5); C Lund 'Land rights and citizenship in Africa' (2011) 65 *Nordiska Afrikainstitutet, Uppsala – Discussion Paper* 9-12.

their rights to own and use land under diverse customary practices. In Cameroon, for example, the Herakles palm oil project evicted 14 000 locals, while in Ethiopia the Saudi Star rice project displaced over 70 000 locals from their land.⁵⁰

Similar large-scale displacements also took place in Uganda, involving the Kalangala palm oil project that caused the eviction and displacement of some 20 000 people from their lands in the Amuru district for sugar cane production.⁵¹ According to a 2003 report by the Food and Agricultural Organisation (FAO), an additional 120 million hectares of arable farmland would be needed to produce more food crops to feed the world's growing population by 2030.⁵² This estimation is supported by a 2009 World Bank report, which indicates that two-thirds of the land will have to be sourced from Africa. The fact that the Guinea Savannah region of Africa constitutes 'one of the world's largest underused land reserves'⁵³ suggests that land grabbing is not likely to decline any time in the foreseeable future. Admittedly, Africa will continue to serve for an undetermined period as the production base of the much-needed food supply to meet the dietary needs of the fast-growing global population, which is projected to increase to 9 billion by 2050.⁵⁴ By this is meant that Africa's socio-economic and cultural development as well as livelihood exigencies would stagnate as local communities increasingly face violent and forcible evictions from their lands in favour of large-scale agricultural developments, which generally do not benefit them, but rather the foreign investors and their home countries.

While land grabbing often is seen from the viewpoint of the perpetrator as a means to promote economic development in terms of opening up avenues for mega projects and, by justification, job prospects, we argue on the contrary that it rather is a vehicle for underdevelopment in Africa. Land grabbing constitutes, in part, a huge impediment to the socio-economic development and advancement of African peoples. In effect, practices of land grabbing

50 S Narula 'The global land rush: Markets, rights, and the politics of food' Paper presented at the International Conference on Global Land Grabbing II, 17-19 October 2012, Cornell University, Ithaca, New York.

51 G Martinielo 'The accumulation of dispossession and resistance in Northern Uganda' Paper presented at the International Conference on Global Land Grabbing II, 17-19 October 2012, Cornell University, Ithaca, New York (2012) 4; NAPE 2012: 11.

52 FAO 'World agriculture towards 2015/2030: An FAO perspective' (Rome 2003); N Alexandratos & J Bruinsma 'World agriculture towards 2015/2030: The 2012 revision' ESA Working Paper 12-03 (Rome), <http://large.stanford.edu/courses/2014/ph240/yuan2/docs/ap106e.pdf> (accessed 16 January 2022).

53 K Deininger et al *Rising global interest in farmland: Can it yield sustainable and equitable benefits?* (2011) 2.

54 Deininger et al (n 53) xiv.

neither improve livelihood for local communities, nor contribute to eradicating poverty, nor provide equal opportunities for the use and ownership of land and its resources, nor enhance their freedoms in land grabbing decision-making processes, nor maximise the potential for the protection of human rights, generally, and the RtD, in particular.

Taking Sen's conception of development as freedom,⁵⁵ it is plausible to argue that land grabbing not only disinherits the peoples of Africa of invaluable material possession for sustenance and a means of production in creating development, but also deprives them of the liberty to own, control and gainfully utilise their lands. Even though the African Charter states that the RtD is only attainable with due regard to the freedom and identity of the peoples of Africa and their collective enjoyment of the common African heritage, which incorporates land and all the appurtenant resources thereon, its effective realisation seems to be illusory in the face of the increasing threat of land grabbing. While the peoples of Africa are yet to be fully educated on the relevance of maximising their common heritage to accelerate socio-economic and cultural development, the land is shrewdly being taken away from them, often with the complicity of their governments, which paradoxically are obligated, as enshrined in article 22(2) of the African Charter, to provide the requisite protection and the means to ensure that the RtD is fulfilled.

Based on empirical studies conducted in 14 African countries, Deininger et al present the extent to which land grabbing constraints realisation of the RtD:⁵⁶

It was surprising that in many cases the nature and location of lands transferred and the ways such transfers are implemented are rather *ad hoc*-based more on investor demands than on strategic consideration. Rarely are efforts linked to broader development strategies (of the African people), careful consideration of the alternatives, or how such transfers might positively or negatively affect broader social and economic goals.

The fact cannot be ignored that the tacit pressure by foreign investors on African state governments to accept foreign agricultural investments is creating more development prospects for the investors' countries than for African countries that harbour investment projects. For example, investors in biofuel crops in Africa are more intent on meeting the energy security needs in the United States and European markets than in African markets. The scramble to grab as much land

55 A Sen *Development as freedom* (1999).

56 Deininger et al (n 53).

in Africa through shady, non-transparent and exclusionary deals concluded without the effective participation of local communities in the decision-making processes, is increasingly transforming the patterns of socio-economic and cultural entitlements that the peoples of Africa are legitimately guaranteed to enjoy. This creates a scenario of asymmetrical friction and tension, wherein foreign investors and local communities have to compete over land ownership, control and use.

Besides the deprivation of land rights, land grabbing also exacerbates the socio-economic conditions of rural Africans. It leads to food insecurity where land previously used to produce food crops are diverted to the production of agrofuel crops such as palm oil and sugar cane.⁵⁷ Indeed, Africa is facing another and more sinister scramble for its resources, this time from multinationals and the Chinese, with devastating implications for the ability and potential of the peoples of Africa to develop themselves socially, economically and culturally.

4.2 Win-win advocacy in transnational land deals?

Although some commentators such as Von Braun and Meinzen-Dick, and the 2010 Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (PRAI) of the FAO, the International Fund for Agricultural Development (IFAD), the United Nations Conference on Trade and Development (UNCTAD) and the World Bank have advocated a win-win in transnational land deals,⁵⁸ others posit that the power imbalance and divergent interests underpinning these deals rule out the possibility of a win-win situation.⁵⁹ Prevailing realities illustrate that one of the lingering effects of land grabbing is the increasing dispossession of local communities of their land and the benefits that accrue therefrom. PRAI has been criticised for orchestrating transnational land deals that under certain conditions would lead to *de facto* alienation of permanent sovereignty over natural resources in Africa.⁶⁰ PRAI, therefore, cannot be a useful regulatory guide for safeguarding a win-win situation in transnational land deals for the following reasons:

57 SPJ Batterbury & F Ndi 'Land grabbing in Africa' in JA Binns et al (eds) *The Routledge handbook of African development* (2018) 575. Also see Ashukem (n 34).

58 C von Braun & R Meinzen-Dick 'Land grabbing by foreign investors in developing countries: Risks and opportunities' (2009) 13 *IFPRI Policy Brief* 1-9.

59 D Teklemarian 'Transnational land deals: Towards an inclusive land governance framework' (2015) 42 *Land Use Policy* 782.

60 O de Schutter 'How not to think of land-grabbing: Three critique of large-scale investments in farmland' (2011) 38 *Journal of Peasant Studies* 249.

First, it is underpinned by Western ideologies of land rights and, therefore, does not reflect existing African land governance realities wherein for some communities, such as indigenous peoples, the land is revered as a communal heritage to which their livelihood and lifestyles are inseparably connected. It is noted that PRAI indeed is a 'neo-colonial theft of poor peasants' livelihoods'⁶¹ meant to syphon Africa's natural resources through practices that legitimise what is unacceptable, that is, foreign companies seeking to take control over vast portions of lands in Africa. Second, PRAI is only principles, which cannot replace or be used in place of existing human rights instruments. As principles, they confer no obligations or rights on the parties to the often non-inclusive and non-transparent land deals. Third, PRAI is biased in its approach to transnational investment, which targets fragile African countries with insufficiently developed legal institutions and enforcement mechanisms.⁶²

Accordingly, we argue that land ownership rights, particularly for local communities in Africa, can only most effectively be accomplished within the RtD governance framework. A proposed rights-based model on how development and the processes thereof ought to be pursued across Africa in accordance with the normative prescriptions enshrined in the African Charter and ancillary instruments.⁶³ The RtD governance is defined as an integrated rights-based model, grounded in popular participation, liberty of action in making development choices, the advancement of human capabilities for the sustainable management of Africa's resources, and upholding the African identity and value systems within a legal framework that guarantees genuine accountability and equitable redistribution for improved collective well-being.⁶⁴ The model provides a suitable framework wherein land governance could be framed in an equitable, responsive and accountable manner that safeguards ownership rights and assurance of substantive benefits in the event that the peoples of Africa freely dispose of their land.

61 CA Castellaneli 'A critique of the principles for responsible agricultural investment' (2017) 16 *Mercator-Revista de Geografia da UFC* 1-11.

62 Von Braun & Meinzen-Dick (n 58) 9.

63 CC Ngang *The right to development in Africa* (2021) 266-289; CC Ngang 'Towards a right-to-development governance in Africa' (2018) 17 *Journal of Human Rights* 107.

64 Ngang (n 63) 115.

5 Conclusion

Article 22(2) of the African Charter obligates states and governments to create the conditions and enabling environment for the exercise of the RtD. With the imperative to redress the problem of endemic poverty in Africa, there is a need to explore various means aimed at building development support systems that take into account the needs and aspirations of the peoples of Africa. However, if doing so entails taking away extensive portions of land from the peoples of Africa, it contravenes the fundamental purpose of their RtD. Land grabbing, despite its economic justification, is of the nature to dispossess the peoples of Africa of their lands, which is an indispensable component of the common African heritage and under no circumstances should be taken away as prohibited by law. We have argued that land grabbing is inimical to the RtD and, thus, constitutes an obstacle to its realisation. The prevalence of land grabbing across Africa undermines prospects for sustainable livelihood and a better standard of living for the peoples of Africa.

Even as article 21 of the African Charter guarantees sovereignty over natural resources, the caveat contained therein cannot be overlooked, which allows the peoples of Africa to freely dispose of land in the instance where, in doing so, they will reap exclusive benefits. Consequently, where the peoples of Africa choose to freely dispose of their land, the requirements of effective participation in the decision-making processes and prior informed consent obtained through a comprehensive consultation that reflects the views and aspirations of the entire community concerned must be satisfied. In the absence of this, the taking of land from the peoples would amount to land grabbing and, therefore, contravene their RtD. We have demonstrated that the prevalence of land grabbing in Africa is facilitated and sustained by complex governance difficulties and the lack of a functional model for development that protects the interests of the peoples of Africa.

Given the context of the human-dominated phenomenon of land grabbing that adversely implicates the RtD, we have demonstrated and argued that the RtD governance framework constitutes a suitable remedy for redressing the range of development challenges currently confronting Africa, which is exacerbated by land grabbing. The framework in our view would provide the envisaged win-win scenario that PRAI has failed to achieve. Of significance is the requirement to advance the productive capabilities of the peoples of Africa and equip them with the capacity and the potential to sustainably manage their lands for socio-economic and cultural development purposes.

This obligates African state governments to vigorously move beyond political rhetoric and genuinely commit to protecting land rights. A crucial factor in realising the RtD is integral to the common African heritage entitlement but, unfortunately, remains an unfulfilled promise to the peoples of Africa. As land grabbing has proven to be detrimental to the socio-economic development and advancement of the peoples of Africa, therefore, it is crucial in our view for African states to re-think their right to development obligations and the land ownership and land use policy prerogatives relevant to protecting the livelihood sustainability interests of their peoples.