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Land Grabbing, Sustainable Development and Human Rights

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Abstract

Increasing investment in agricultural land by global corporations and investors from wealthy developed nations in poorer, less developed countries has significant human rights and environmental impacts. Proponents of such land deals argue that they provide opportunities for improvements in agricultural practices and generate employment which will benefit economic growth in host countries. But there is growing evidence that the phenomenon known as ‘land grabbing’ displaces poor and vulnerable populations and damages the environment which exacerbates poverty and food insecurity. This article explores the impact of land grabbing in Ethiopia and examines the human rights and sustainable development frameworks within which land grabbing takes place. This article argues that a human rights approach is fundamental to reconcile the sustainable development imperatives of economic development and environmental

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protection in the context of land grabbing. The article advocates an integrated human rights and sustainable development approach as a holistic framework for assessing the impact of land grabbing and for the development of policy and regulatory responses.

Keywords: Land grabbing, Food security, Environment, Sustainable development, Human rights, Ethiopia

1. INTRODUCTION

The term ‘land grabbing’ has become widely used to describe a trend that has triggered much international debate. It is described by Olivier De Schutter, the former United Nations (UN) Special Rapporteur on the Right to Food, as:

[A] global enclosure movement in which large areas of arable land change hands through deals often negotiated between host governments and foreign investors with little or no participation from the local communities who depend on access to those lands for their livelihoods.¹

Accurate information about large-scale land acquisitions is often hard to access, due to ‘high levels of secrecy around such deals’² but it is estimated that a very large proportion of such deals

¹ O. De Schutter, ‘The Green Rush: The Global Race for Farmland and the Rights of Land Users’ (2011) 52(2) *Harvard International Law Journal*, pp. 504-59, at 504.

² P. Messerli, et al, ‘The Geography of Large-Scale Acquisitions: Analysing Socio-Ecological Patterns of Target Contexts in the Global South’ (2014) 53 *Applied Geography*, pp. 449-59, at 449; R. Aertzki, et al, ‘What Drives the Global Land Rush?’ *IMF Working Paper, WP/11/251* (IMF, 2011), at p. 13.

relate to agricultural land in Africa.³ Some commentators see investment in land in developing countries as a positive trend and argue that investment in agriculture in African countries, in particular, will lead to improvements in food production which will reduce poverty and contribute to economic growth.⁴ Others have expressed concern about the negative impact of such developments on land rights, indigenous communities and the environment.⁵

The aim of this article is to explore how the human rights and sustainable development frameworks can be integrated to address problems at the intersection of human rights, environment and development in the context of land grabbing. We begin the analysis, in Section 2, with an overview of land grabbing, exploring in particular the advantages and disadvantages of land investments for host countries, using Ethiopia as a case study. Section 3 focuses more specifically on the impact of land grabbing on communities affected by such land acquisitions. What emerges clearly from this discussion is the extent of divergence between the demands of economic development, environmental protection and upholding human rights. Arguments in favour of large-scale land investment, which emphasize economic development, often subordinate environmental concerns and human rights to financial gains, the effects of which often include natural resource depletion, environmental destruction, human rights abuses and poverty for local communities. Conversely, environmental conservation approaches often

³ Oxfam Briefing Paper, 'Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land' (Oxfam, 2011), at p. 5; L. Cotula, 'The International Political Economy of the Global Land Rush: A Critical Appraisal of Trends, Scale, Geography and Drivers' (2012) 39(3-4) *Journal of Peasant Studies*, pp. 649-80, at 651.

⁴ See BBC News, 'Analysis: Land Grab or Development Opportunity?' *BBC*, 22 February 2012. Available at: <http://www.bbc.co.uk/news/world-africa-17099348>; World Bank, 'How Africa Can Transform Land Tenure, Revolutionize Agriculture and End Poverty' *World Bank Press Release*, 22 July 2013. Available at: <http://www.worldbank.org/en/news/press-release/2013/07/22/how-africa-can-transform-land-tenure-revolutionize-agriculture-end-poverty>.

⁵ See De Schutter, n. 1 above, at p. 524; Human Rights Watch (HRW), 'Waiting here for Death: Forced Displacement and "Villagization" in Ethiopia's Gambella Region' (HRW, 2012), at p. 3. Available at: <http://www.hrw.org/reports/2012/01/16/waiting-here-death>; S. Daniel & A. Mittal, 'The Great Land Grab: Rush for World's Farmland Threatens Food Security for the Poor' (Oakland Institute, 2009), at p. 13; B. Robertson & P. Pinstrip-Andersen, 'Global Land Acquisition: Neo-Colonialism or Development Opportunity?' (2010) 2(3) *Food Security*, pp. 271-83, at 275.

conflict with economic development and human rights concerns. An environmental conservation approach may, for example, dictate that access to particular areas such as wetlands or forests or particular natural resources, such as wild animals, on which local communities depend for their livelihoods, should be restricted in order to preserve the environment. Human rights approaches, in turn, often ignore environmental and economic concerns. Legal frameworks have been created and developed in international law for human rights, environmental protection and economic development, but these frameworks tend to operate in separate spheres. As Cordonier Segger and Khalfan argue, ‘a global tapestry of laws is being crafted – without weaving together the strands.’⁶ The development of sustainable development as a policy framework is an attempt to weave together the strands;⁷ the language of sustainable development has become dominant in international debates about development and the environment.⁸ However, critics of sustainable development argue that it has not been successful in balancing economic, environmental and social justice concerns. The argument presented here is that the principles of sustainable development are reinforced and complemented by international human rights law and that a combined sustainable development and human rights framework has the potential to more effectively balance economic development, social justice and environmental protection in the context of land grabbing. Section 4 reviews the core principles of sustainable development relevant to land grabbing and considers the extent to which those principles are reinforced by and overlap with international human rights law (IHRL). Section 5 critically assesses the extent to which sustainable development and international human rights law have been successful in

⁶ M-C. Cordonier Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices & Prospects* (Oxford University Press, 2004), at p. 1.

⁷ *Ibid*, at p. 3.

⁸ Most recently in the UN Secretary General’s High Level Panel of Eminent Persons Report on the Post 2015 Agenda, *A New Global Partnership: Eradicating Poverty and Transform Economies through Sustainable Development* (UN, 2013). Available at: <http://www.un.org/sg/management/beyond2015.shtml>.

balancing economic, social and environmental concerns, considers the advantages of a combined sustainable development framework and explores some suggestions for implementation of an integrated framework. [...]

2. LAND GRABBING: AN OVERVIEW

When you take someone's land, you take away the means to an entire family's livelihood, wellbeing and future.⁹

The potential for conflict between economic development, environmental protection and human rights is illustrated in the context of land grabbing. Foreign investment in land is not a new phenomenon, but the interest in agricultural land has recently seen a significant increase, in particular due to the spike in food prices in 2007-2008 and subsequent ongoing price volatility. The global food crisis of 2007-2008 was driven by interacting factors, including rising oil prices which led to an increase in agricultural costs; trade liberalisation in many developing countries, which resulted in lower subsidies, forcing many small scale farmers off the land; loss of farmland to urbanisation and the use of land for non-food agriculture such as horticultural products and biofuel, as well as increased speculation in agricultural products by banks, hedge

⁹ Per O. Metho from the Solidarity Movement for a New Ethiopia, in a statement at the United States Congressional Briefing on Land Grabs in Africa, 18 April 2013. Available at <http://ecadforum.com/2013/04/18/mr-obang-methos-statement-at-the-u-s-congressional-briefing-on-land-grabs-in-africa/>.

funds and sovereign wealth funds.¹⁰ These developments not only aggravated food insecurity in vulnerable states but also raised food security fears in more developed countries.¹¹ De Schutter suggests that ‘the global food crisis... convinced many governments and private commodity buyers that international markets... could not be trusted to provide a stable supply of food commodities’,¹² which sparked interest in investment in agricultural land to secure direct access to food in times of crisis.¹³ The possibility of continuing increases in global food and commodity prices has led foreign investors to enter the agricultural market in greater numbers.¹⁴

Growing interest in agricultural land investment has also been linked to changes in trading regulations of financial derivatives based on commodities,¹⁵ as well as increased demand for biofuels.¹⁶ All these factors are interlinked. For example, the growth of the biofuel industry is itself considered to be a major factor in the increase in food prices.¹⁷ Investors are drawn to African countries, in particular, for two main reasons: firstly, the availability of large areas of land that are seemingly uncultivated or vacant and can be acquired relatively cheaply; and, secondly, the presence of fragile or weak governance systems.¹⁸ Weak governance in the land sector includes lack of tenure security for local communities and lack of transparency regarding

¹⁰ UN Department of Economic and Social Affairs, *The Global Social Crisis: Report on the World Social Situation 2011* (UN, 2011), at p. 67-72; European Commission, ‘Causes of the 2007-2008 Global Food Crisis Identified’ *News Alert Issue 25* (EC, 20 January 2011).

¹¹ D. Rahmato, *Land to Investors: Large-Scale Land Transfers in Ethiopia* (Forum for Social Studies, 2011), at p. 1.

¹² O. De Schutter, ‘How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland’ (2011) 38(2) *Journal of Peasant Studies*, pp. 249-79, at 249.

¹³ C. Smaller & H. Mann, ‘A Thirst for Distant Lands: Foreign Investment in Agricultural Land and Water’ (IISD, 2009), at p. 7.

¹⁴ S. Sassen, ‘Migration is Expulsion by Another Name in World of Foreign Land Deals’ *Guardian*, 29 May 2013. Available at: <http://www.guardian.co.uk/global-development/poverty-matters/2013/may/29/migration-expulsion-foreign-land-deals>.

¹⁵ P. Woodhouse, ‘New Investment, Old Challenges. Land Deals and the Water Constraint in African Agriculture’ (2012) 39 (3-4) *Journal of Peasant Studies*, pp. 777-94, at 778.

¹⁶ O. De Schutter, ‘The Transformative Potential of the Right to Food’, Report of the Special Rapporteur on the Right to Food, Human Rights Council, UN Doc A/HRC/25/57, 24 January 2014, at p. 10.

¹⁷ Woodhouse, n. 15 above, at p. 778.

¹⁸ K. Deininger, et al., *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefit?* (World Bank, 2011), at p. 79.

land transactions, both of which facilitate land grabbing because local communities cannot effectively defend their proprietary interests.¹⁹ There is also concern that many states that invite investment in farm land are themselves food insecure, often with large populations dependent on food aid.²⁰

Ethiopia provides a useful example to aid our understanding of land grabbing, particularly in Africa. Perhaps best known for its susceptibility to drought, famine and political instability, it is also one of the poorest nations in the world.²¹ Although Ethiopia has made significant progress in the past five years in relation to achieving the UN Millennium Development Goals (MDGs),²² it remains one of the world's largest recipients of foreign aid and many Ethiopians still lack access to basic water, sanitation and health services.²³

According to Human Rights Watch (HRW), the government of Ethiopia has leased out an estimated 3.6 million hectares of land to investors since 2008.²⁴ Investments are negotiated between investors and the federal or regional governments.²⁵ For example, the Indian company Karuturi has been involved in floriculture in Ethiopia for a number of years, and has expanded its land holding to cultivate, rice, palm oil, maize, and sugar cane.²⁶ Similarly, Saudi Star, a company owned by a Saudi oil billionaire with ties to the Saudi Government, is reportedly

¹⁹ Aertzki, n. 2 above, at p.20.

²⁰ Robertson & Pinstup-Anderson, n. 5 above, at p. 272.

²¹ World Bank, *Ethiopia Overview* (World Bank, 2014). Available at: <http://www.worldbank.org/en/country/ethiopia/overview>.

²² See Millennium Declaration, UN Doc. A/RES/55/2, 18 September 2000.

²³ F. Horne et al., *Understanding Land Investment Deals in Africa: Ethiopia* (Oakland Institute, 2011), at p. 4; UN Country Team/ Government of Ethiopia, 'Assessing Progress towards the Millennium Development Goals: Ethiopia MDGs Report 2012' (December 2012). Available at http://et.one.un.org/index.php?option=com_content&view=article&id=14&Itemid=488.

²⁴ HRW, n. 5 above, at p. 3.

²⁵ Horne, n. 23 above, at p. 22.

²⁶ *Ibid*, at p. 23. It has been reported recently that Karuturi is in financial difficulty, see GRAIN, 'Karuturi, the Iconic Landgrabber, Flops' *GRAIN Media Release* (14 February 2014). Available at: <http://www.grain.org/article/entries/4885-karuturi-the-iconic-landgrabber-flops>

developing land along the Alwero River in the Gambella region in order to produce rice, primarily intended for export to Saudi Arabia.²⁷

At the same time as leasing out land to foreign companies, the Ethiopian government is engaged in relocating tens of thousands of indigenous people in a number of different regions, including Gambella, in a programme known as ‘villagization’.²⁸ According to the Ethiopian government, ‘villagization’ is voluntary; however, evidence gathered by HRW indicates that community resistance to relocation has been met with governmental intimidation, violence, arbitrary arrest, and detention.²⁹ The Ethiopian government insists that the primary aim of ‘villagization’ is to ensure that people in rural areas have access to schools, clinics and other facilities to improve their standard of living and to provide opportunities for social and economic development.³⁰ However, HRW also reports that the promised facilities often do not materialize and many communities have been relocated a long way from the land that they had previously cultivated without replacement land on which to grow food being made available.³¹ Relocation has also resulted in community excision from forests and rivers that provide access to necessary food sources, leaving many communities at risk of starvation.³² Some relocated villagers claim that they had been informed by government officials that the land was to be made available to investors who would grow cash crops. It can be difficult to gain access to details about land deals in Ethiopia due to lack of transparency about land deals on the part of the government and inaccuracy or unavailability of rural land records.³³ However, the patterns of known investment

²⁷ Home, n. 23 above, at p. 32.

²⁸ HRW, n. 5, at p. 20.

²⁹ Ibid, at pp. 28-38.

³⁰ HRW, n. 5 above, at p. 20.

³¹ Ibid, at p. 41.

³² Ibid, at p. 46.

³³ J. Plummer (ed), *Diagnosing Corruption in Ethiopia* (International Bank of Reconstruction and Development/World Bank, 2012), at p. 315.

reveal that investors are interested in the most fertile land with access to water for irrigation.

Arguably, it is not coincidental that the ‘villagization’ programme appears to be concentrated in those areas where land is leased to foreign investors.³⁴

3. THE IMPACT OF LAND GRABBING

Land grabbing has provoked a great deal of debate. Demand for land is driven, in the first place, by food importing countries that seek a buffer against future food price volatility and to provide food for their burgeoning populations.³⁵ Secondly, global agribusiness and agricultural commodity traders are extending their operations across more and more countries in search of lower production costs and higher profits.³⁶ Thirdly, financial institutions are interested in investing in land because of the potential to profit from rising land prices, as a hedge against inflation, and because of the possibility of profiting from agricultural investments in the longer term.³⁷ This section considers the various impacts of land grabbing on local populations affected by transnational land acquisitions.

Investment, Trade, Employment and Infrastructure

Foreign investment in agriculture is often promoted as providing opportunities for countries to revitalize agriculture to the benefit of local farmers by providing expertise, skills development, access to technology and connection to global markets.³⁸ Investment is also widely seen to be necessary to bring more land into production and to provide local employment opportunities. It

³⁴ Ibid, at p. 54.

³⁵ Robertson & Pinstrup-Anderson, n. 5 above, at p. 273.

³⁶ GRAIN, *The Great Food Robbery: How Corporations Control Food, Grab Land and Destroy The Climate* (Grain & Pambazuka Press, 2012), at p. 27.

³⁷ Deininger, n. 18 above, at p. 2.

³⁸ FAO, ‘The State of Food and Agriculture 2012: Investing in Agriculture for a Better Future’ (FAO, 2012).

is argued that as long as investments are properly managed, local communities and governments can benefit from increased tax revenues.³⁹ There is evidence from projects in East Africa and Sudan that foreign investment has led to increased agricultural production by providing access to markets.⁴⁰

However, it is vigorously debated whether land deals actually benefit local communities and whether the interests of communities are protected when such transactions are formed. A study of land acquisition contracts, for example, has concluded that land regeneration requirements⁴¹ are not generally included.⁴² The claim that land investments will generate jobs is also questionable. Labour requirements depend on crop choice and organization of production. Crops that require manual labour, such as commercial fruit and vegetable production, generate far more jobs per hectare than large-scale mechanized grain farming, for example.⁴³ Wage rates for agricultural labour are typically very low and employment is often seasonal and short-term.⁴⁴ Analysis of land investment in Ethiopia indicates that while some local people have been employed, labour is often brought in from other regions, which exacerbates competition for land and food resources such as fish and wildlife, conflict between communities, and pressure on infrastructure and ecological systems.⁴⁵

There is also concern that foreign investment in agriculture may, in fact, worsen food insecurity rather than provide a solution, by reducing the competitiveness of domestic production

³⁹ De Schutter, n. 1 above, at p. 520.

⁴⁰ M.A. Rakotoarisoa, et al, 'Why has Africa Become a Net Food Importer? Explaining Africa Agricultural and Food Trade Deficits' (FAO, 2011), at p. 62.

⁴¹ Includes for example, enforceable investor commitments relating to, timing, nature and quality of infrastructure provisions; clear terms giving the host state capacity to monitor compliance or sanction non-compliance; as well as express contractual obligations on job creation, use of local producers and supply chains to improve local livelihoods. See L. Cotula, *Land Deals in Africa: What is in the Contracts?* (IIED, 2011), at p. 26-27.

⁴² *Ibid*, at p. 26.

⁴³ *Ibid*, at p. 62.

⁴⁴ Home, n. 23 above, at p. 35.

⁴⁵ *Ibid*, at p. 37.

as a result of increased competition for land and labour.⁴⁶ This would increase production costs and ultimately raise the price of food for domestic consumers. Local producers may be further harmed if higher domestic prices lead to increased imports of cheaper food.⁴⁷ The Ethiopian government has provided a range of incentives for foreign investors to produce cash crops for export, including tax exemptions and grace periods for land rents.⁴⁸ This has been justified by government officials on the basis that land leases and exports provide them with the necessary resources to buy food on the global market.⁴⁹ However, it is questionable whether buying food on the global market and providing this as food aid to local populations is a better response to the problem of food insecurity in the long term than ensuring that food production meets local needs and supporting the development of domestic self-sufficiency.

The promise of infrastructure development is also emphasized as an advantage of investment in agriculture.⁵⁰ However, whether and how investment projects benefit local communities depends to a large extent on their design and management.⁵¹ Friends of the Earth (FOE) conclude that, '[p]oor contracts are marred by a lack of transparency, safeguards and monitoring; promises of jobs, schools and hospitals don't materialise.'⁵²

Food insecurity

⁴⁶ Rakotoarisoa, n. 40 above, at p. 62.

⁴⁷ Ibid.

⁴⁸ Home, n. 23 above, at p. 17.

⁴⁹ Ibid, at p. 37.

⁴⁹ Ibid.

⁵⁰ See Cotula, n. 41 above, at p. 25.

⁵¹ J. von Braun & R. Meinzen-Dick, "Land Grabbing" by Foreign Investors in Developing Countries: Risks and Opportunities, 13 *IFPRI Policy Brief* (IFPRI, 2009), at p. 3.

⁵² FOE, *Land Grabbing* (Friends of the Earth Europe). Available at: <http://www.foeeurope.org/land-grabbing> (accessed 13 January 2015).

The Ethiopian example demonstrates that land grabbing often involves the relocation of local communities in order to clear land for investors.⁵³ Foreign investors are usually more interested in growing cash crops for export than addressing local unemployment or food insecurity.⁵⁴ They favour fertile areas along river banks, which are not only ideal for cultivation but also provide access to water. Yet, many of the areas leased to foreign investors are also vulnerable to drought, flooding, and conflict.⁵⁵ In order to cope with such factors, farming practices in these regions have adapted. For example, in the Gambella region, farmers cultivate plots along the river as well as using shifting cultivation⁵⁶ on higher ground in case their riverside plots are flooded. Areas that have been left fallow as part of this pattern of shifting cultivation are often considered to be abandoned by the Government and made available to investors.⁵⁷ Forest clearing has further undermined food security as resources like nuts, seeds, fruit and wildlife provide sources of food when harvests fail. Large-scale commercial farming has reduced access to water sources and degraded water supplies as a result of agricultural runoff; this has also affected fishing, which is another source of food in times of scarcity.⁵⁸ In many cases where communities have been relocated to accommodate investors, replacement land has not been made available to farmers or has been made available at an inferior quality.⁵⁹ This pattern is being replicated in many parts of Africa and around the world where land grabbing is taking place.⁶⁰

⁵³ Cotula, n. 41 above, at p. 38.

⁵⁴ Ibid.

⁵⁵ Horne, n. 23 above, at p. 36.

⁵⁶ Shifting cultivation involves land being worked for a few years before moving on to another area, leaving land to lie fallow for a number of years.

⁵⁷ Horne, n. 23 above, at p. 43.

⁵⁸ Ibid, at p. 36.

⁵⁹ HRW, n. 5 above, at p. 45.

⁶⁰ See e.g., Guardian, 'International Land Deals: Who is Investing and Where – Get the Data' *Guardian* (27 April 2012). Available at: <http://www.theguardian.com/global-development/datablog/2012/apr/27/international-land-deals-who-investing-what>; T. Kachika, 'Land Grabbing in Africa' (Oxfam, 2011), at pp. 34-36 (in reference to Tanzania, Mali, Ghana, for example).

Environmental damage

Environmental damage resulting from large-scale industrial farming practices includes destruction of soil fertility, pollution of water sources, loss of biodiversity and draining of wetlands. Rural Cambodian farmers downstream from new industrial sugar plantations, for example, discovered their livestock and crops poisoned by chemicals.⁶¹ Large-scale farming of plant species foreign to the local environment, such as oil palm trees, changes the natural ecosystem and affects biodiversity in such areas, as demonstrated in West Africa where deforestation for new oil palm plantations has led to soil erosion and flooding in surrounding land.⁶² Environmental degradation forces local small scale farmers and pastoralists to leave their native lands. Some relocate to cities, while others clear forests or peat land to continue farming, thus perpetuating the cycle of environmental destruction.⁶³

Loss of culture

In impact assessments of land grabbing, the cultural importance of land to indigenous peoples is often overlooked. De Schutter observes:

[W]e have forgotten the cultural significance of land, and we reduce land to its productive elements—we treat it as a commodity, when it means social status and a lifeline for the poorest rural households.⁶⁴

⁶¹ S. Campbell, 'Special Report Revealed: the Bitter Taste of Cambodia's Sugar Boom' *The Ecologist* (13 April 2011). Available at: http://www.theecologist.org/News/news_analysis/847972/revealed_the_bitter_taste_of_cambodias_sugar_boom.htm

⁶² Slow Food, 'Impacts: The Social and Environmental Consequences of Land Grabbing...' *Slow Food*. Available at: http://www.slowfood.com/international/137/impacts?-session=query_session:42F9429318d5007932qo6507052A (accessed on 11 January 2014).

⁶³ FOE, n. 52 above.

⁶⁴ De Schutter, n. 12 above, at p. 273.

To many communities affected by land grabbing, land is closely bound with cultural identity and connected to a variety of cultural practices. Some land areas are considered to have spiritual significance; foods collected from particular areas have a place in traditional and spiritual ceremonies and plants and trees provide both food and medicines.⁶⁵ For indigenous communities, the loss of ancestral land strikes at the core of their very identity, adversely affecting their way of life.⁶⁶

Water insecurity

Land grabbing has significant implications for water insecurity due to the dependence of agriculture on the availability of fresh water. One of the principal considerations for investors acquiring land is often, therefore, access to water resources.⁶⁷ Increased interest in water is also driven by the impact of climate change, with rising temperatures and more frequent droughts likely to intensify the need for crop irrigation.⁶⁸ Variable practices occur in relation to water in land purchase or lease agreements across different countries. In some agreements, there is little or no consideration of the adverse impact of increased water extraction and no stated limitation on the use of water.⁶⁹ In others, specific provisions relating to water rights have been integrated and some land agreements make explicit provision for the payment of water fees.⁷⁰ However, such contracts may have an adverse impact on local users if the host government is legally

⁶⁵ Home, n. 23 above, at p. 42.

⁶⁶ Ibid.

⁶⁷ Woodhouse, n. 15 above, at p. 788;

⁶⁸ Smaller & Mann, n. 13 above, at p. 5. See also H. Turrall, et al, 'Climate Change, Water and Food Security: FAO Water Reports' (FAO, 2011), at p. 35.

⁶⁹ Woodhouse, n. 15 above, at p. 788.

⁷⁰ Cotula, n. 41, at p. 36.

obliged to ensure that water is made available to investors.⁷¹ This may require investors' water usage to be prioritized at the expense of the needs of local populations.⁷²

Unregulated water use may further lead to over-extraction and the draining of wetlands. Wetlands play an important role in helping to regulate river flows, serving as a buffer against floods and renewing groundwater. Evidence from the Gambella region reveals that a number of important wetland areas have been drained for agricultural use.⁷³ The adverse impacts of wetland draining and large-scale water extraction on downstream users seem to have been ignored in many of the land deals in Gambella. The implications for water insecurity are similarly concerning.⁷⁴

Land rights

In many African countries, land use and ownership is governed by customary land tenure systems with local communities rarely having formal land tenure rights. Formal ownership of land, especially in rural areas, is often vested in the government; farmers access land through local customary tenure systems which enjoy only weak legal protection.⁷⁵ This leaves farmers' proprietary rights vulnerable against investors who have negotiated with the government on the basis of formal law.⁷⁶ This is the situation in Ethiopia, where investors negotiate directly with the government to lease land.⁷⁷ Even where farmers' customary rights are protected by law, this is often subject to control by customary chiefs who may re-allocate land to foreign investors,

⁷¹ Ibid.

⁷² Ibid.

⁷³ Horne, n. 23 above, at pp. 45-6.

⁷⁴ Ibid, at p. 46.

⁷⁵ L.A. Wily, 'From State to People's Law: Assessing Learning-By-Doing as a Basis of New Land Law' in J.M. Otto & A. Hoekema (eds), *Fair Land Governance: How to Legalise Land Rights for Rural Development* (Leiden University Press, 2012), at p 85.

⁷⁶ De Schutter, n. 1, at p. 524.

⁷⁷ L. Cotula, 'Securing Land Rights in Africa – Trends in National and International Law' in Otto & Hoekema, n. 75 above, at p. 70.

depriving local populations who depend on the land for grazing or agriculture of their livelihood without access to legal remedies or compensation.⁷⁸

Ultimately, there is little evidence that the anticipated benefits of large-scale investment in farmland in Africa have actually materialized, while the potential disadvantages are disturbing. Indeed, land grabbing may likely exacerbate rural poverty in countries that are already stressed and result in a net transfer of wealth from the poor to the rich.⁷⁹

The next part examines the relationship between land grabbing and principles of sustainable development in international law.

4. LAND GRABBING, SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW

In the words of Christopher Weeramantry, former Vice-President of the International Court of Justice (ICJ), the notion of sustainable development ‘represents a delicate balancing of competing interests’.⁸⁰ There is growing agreement that the core principles of sustainable development encompass sustainable use of natural resources, common but differentiated responsibilities (CBDR), the precautionary principle, public participation, good governance and intergenerational equity.⁸¹ These core principles are predominantly derived from principles established in international law, particularly international human rights law (IHRL). We focus here on those aspects of sustainable development and IHRL most pertinent to land grabbing.

⁷⁸ Ibid, at p. 74.

⁷⁹ Oxfam, n. 3 above, at p. 6.

⁸⁰ C.G. Weeramantry, ‘Foreword’ in Cordonier Segger and Khalfan, n. 6 above.

⁸¹ See ILA, ‘Report of the Seventy-Fifth Conference’ (Sofia, 2012), pp. 821-79, at 3 and 14-35. See also D. French, *International Law and Policy of Sustainable Development* (Manchester University Press, 2005), at p. 53; ILA, ‘New Delhi Declaration of Principles of International Law Relating to Sustainable Development’ (2002) 2 *International Environmental Agreements*, pp. 209-16 [hereinafter, New Delhi Declaration].

The principle of sustainable use requires states to manage their natural resources in a sustainable manner, taking into account the needs of present and future generations.⁸² States have sovereignty over their natural resources, but limits are imposed by both IHRL and international environmental law (IEL). These include the obligation on states not to cause undue damage to the environment of other states and outside their territorial jurisdiction.⁸³ The principle of sustainable use goes hand in hand with the principle of equity and the eradication of poverty,⁸⁴ which calls for states to endorse fair and equitable utilization of resources amongst the population of the present generation, taking into account the rights of future generations in relation to those resources.⁸⁵ The obligations of states in relation to intra- and inter-generational equity further include a commitment to address poverty, as expressed, for example, in the MDGs.⁸⁶

The sustainable use and equity principles are complemented by IHRL, particularly the right to a sustainable environment. Although no international instrument explicitly recognizes such a

⁸² Principle 1.2, New Delhi Declaration, n. 81 above.

⁸³ Principle 1.1, *ibid.* This obligation is part of customary international law (CIL) as evident from Principle 21, Declaration of the UN Conference on the Human Environment, UN Doc. A/CONF.84/14 (1972) [hereinafter, Stockholm Declaration]; Principle 2, UN Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol I), (1992), [hereinafter Rio Declaration] and endorsed in the *Legality of the Threat and Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep, p. 266, at 241-2.

⁸⁴ The principle of equity ‘... refers to both inter-generational equity (the right of future generations to enjoy a fair level of common patrimony) and intra-generational equity (the right of all peoples within the current generation of fair access to the current generation’s entitlement to the Earth’s natural resources)’. See Principle 2.1, New Delhi Declaration, n. 81 above.

⁸⁵ Although the principle is not part of CIL, it is increasingly reflected in international instruments and judicial decisions. See e.g., Arts. 3 and 5, Rio Declaration, n. 83 above; Preamble and Art. 3(1), UN Framework Convention on Climate Change (UNFCCC) (1992) 31 ILM 851; Art. 2(1), UN Convention on Biological Diversity (UNCBD) (1992) 31 ILM 822; Preamble and Art. 15(7) UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD) (1994) 33 ILM 1328; *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)*, 30 July 1993, Supreme Court of the Philippines, (1994) 33 ILM 173, p. 185; *Nuclear Weapons*, n. 83 above, at para. 29 (ICJ recognized that ‘quality of life’ in relation to the environment also affected ‘generations unborn’).

⁸⁶ K. Bosselmann, *The Principle of Sustainability* (Ashgate, 2008), at p. 59. See also UN, ‘Millennium Development Goals and beyond 2015’, available at: <http://www.un.org/millenniumgoals/>.

right at present, there is clear recognition at regional level⁸⁷ and by UN human rights bodies that the full enjoyment of human rights depends on a healthy and sustainable environment.⁸⁸ The right has found expression in a significant number of national constitutions, which indicates that the right to a healthy and sustainable environment is increasingly widely accepted at state level.⁸⁹

Unsustainable resource exploitation undoubtedly impacts negatively on social and economic rights protected under the International Covenant on Economic Social and Cultural Rights (ICESCR).⁹⁰ The UN Committee on Economic Social and Cultural Rights (CESCR) notes that damage to the environment threatens not only the right to an adequate standard of living, including the rights to housing, food and water, but also the right to health.⁹¹ This clearly links to the intra-generational equity principle⁹² which at a minimum, requires that everyone should be provided with the necessities of life. In the land grabbing context, the principle requires that states consider the equitable use and distribution of their arable lands for the benefit of their current and future populations.

Displacement of communities as a result of land deals clearly has a detrimental effect on their ability to source food and water as well as housing with consequential impacts on health

⁸⁷ See e.g., Art. 24, African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1989) OAU Doc CAB/LEG/67/3 Rev 5; 1520 UNTS 217; (1982) 21 ILM 58 (ACHPR); Article 11, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (entered into force 16 November 1999) OAS Treaty Series 69 (1988); 28 ILM 156 (1989) (Protocol of San Salvador); Art. 1, Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) 2161 UNTS 447.

⁸⁸ Human Rights Council, 'Preliminary Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox', 24 December 2012, UN Doc A/HRC/22/43.

⁸⁹ D.R. Boyd, *The Environmental Rights Revolution* (UBC Press, 2012), at p. 47.

⁹⁰ International Covenant on Economic, Social and Cultural Rights (1996) 993 UNTS 3 (ICESCR). See UNHCHR, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Individual Report on the International Covenant on Economic, Social and Cultural Rights*, December 2013. Available at: <http://ieenvironment.org/2014/03/06/2014-mapping-reports/>.

⁹¹ Ibid.

⁹² Refers to 'the right of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources.' See Principle 2.1., New Delhi Declaration, n. 81 above.

and wellbeing. Without making alternative arrangements for members of those communities to grow food, have access to land for hunting or gathering or alternative water sources, such displacement ought to be considered a violation of the rights under the ICESCR as well as the principle of equity. Arguably, these rights are further infringed by investor farming practices which pollute and negatively impact on neighbouring landholders. Moreover, the long-term effect of polluting and destructive farming practices on the environment will affect the ability of future generations to feed and house themselves with the potential for violation of their right to an adequate standard of living. The principles of sustainable use, equity and the protection of rights under the ICESCR are thus mutually reinforcing.

The duty of states to ensure sustainable use of natural resources is also reflected in the protection provided for the rights of indigenous peoples to the natural resources in their lands, affirmed in Article 15 of the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries.⁹³ The UN General Assembly Declaration on the Rights of Indigenous peoples⁹⁴ specifically provides that indigenous peoples have the right to the land and resources which they have traditionally owned and occupied.⁹⁵ Displacement of indigenous communities of the kind taking place in Ethiopia, especially forced removal of communities, in our view, is a clear violation of the rights of these communities protected by international law.

⁹³ ILO Convention 169, 72 ILO Official Bull. 59, entered into force 5 Sept. 1991. Available at: <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>. The 22 ratifying states include only one African country.

⁹⁴ UNGA Res 61/295, UN Doc A/Res/61/295 (13 September 2007). Available at: <http://undesadspd.org/indigenouspeoples/declarationontherightsofindigenouspeoples.aspx>.

⁹⁵ Art. 26.

The ICESCR further supports sustainable development by highlighting the role of international cooperation for the realization of economic, social and cultural rights.⁹⁶ It is widely accepted that state parties are required to respect the rights protected under ICESCR in other states. This includes ensuring that their citizens or companies do not violate rights of persons abroad.⁹⁷ Investor states therefore arguably have an obligation to ensure that corporations incorporated in their jurisdiction that invest in land in host states do not engage in practices that encroach upon the rights of local populations, in particular their social and economic rights.

The CBDR principle⁹⁸ alternatively, recognizes that all '[s]tates and other relevant actors' are required to cooperate in their common global responsibility towards the environment,⁹⁹ but also takes into account that developed and developing countries have contributed to environmental degradation to varying degrees.¹⁰⁰ This principle acknowledges the different capacities of states to deal with environmental problems and the needs and interests of developing countries in particular.¹⁰¹ CBDR further provides that developed states should bear responsibility for taking the lead and assisting developing countries to achieve sustainable development.¹⁰² This responsibility ties in with IHRL, particularly the implementation of social and economic rights. For example, according to the CESCR, developed states have a duty to assist developing states to implement social and economic rights to at least a minimum standard.¹⁰³ CBDR also relates to the right to development as embodied in the UN Declaration on the Right to Development

⁹⁶ Art. 2.

⁹⁷ Cordonier Segger & Khalfan, n. 6 above.

⁹⁸ See e.g., Preamble and Art. 3, UNFCCC, n. 85 above; Arts. 4, 5, 6, UNCCD, n. 85 above. See also e.g., *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia* (15 June 2001) WTO Doc. WT/DS58/RW (Report of the Panel), at p. 102.

⁹⁹ Principle 3.1, New Delhi Declaration, n. 81 above.

¹⁰⁰ Principle 3.2, *ibid.*

¹⁰¹ Principle 3.3, *ibid.*

¹⁰² Principle 3.4, *ibid.*

¹⁰³ CESCR Poverty Statement, UN Doc. E/C. 12/2001/10 (10 May 2001).

(UNDRD).¹⁰⁴ The UNDRD recognizes the responsibility of states not only to act individually to implement the right within their territories, but also to act collectively, in partnership with other states, to create an environment that supports the realization of the right.¹⁰⁵ This is of fundamental importance to land grabbing in light of debates that foreign investment in land seldom delivers the benefits claimed. It is arguable that the international community has an obligation to take action to prevent foreign investment which has the effect of depriving local communities (present and future) of the opportunity for development.

The precautionary approach,¹⁰⁶ which is related to decision-making processes in situations of scientific uncertainty, can, in many circumstances, require that an Environmental Impact Assessment (EIA) be carried out. The ICJ in its 2010 judgement on the environmental dispute between Argentina and Uruguay expressly recognised EIAs as a practice that has attained customary international law status.¹⁰⁷ It has been argued that, [i]mplicitly, the language of the Court indicated that an environmental impact assessment is required by application of a

¹⁰⁴ UNGA, Declaration on the Right to Development, 4 Dec. 1986, UNGA res 41/128, UN GAOR 41st Sess, Annex, UN Doc A/Res/41/128 (1986) (UNDRD). Available at: <http://www.un.org/documents/ga/res/41/a41r128.htm>.

Although the UNDRD is not binding in international law, the principles embodied in it are arguably already part of international law as they reiterate and elaborate a number of rights already embodied in the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and the ICESCR, n. 90 above. See B. Ibhawoh, 'The Right to Development: The Politics and Polemics of Power and Resistance' (2011) 33(1) *Human Rights Quarterly*, pp. 76-104, at 82; I.D. Bunn, *The Right to Development and International Economic Law* (Hart, 2012), at pp. 82-3.

¹⁰⁵ Art. 4, UNDRD, *ibid*. See also HRC, 'Report of the high-level task force on the implementation of the right to development on its sixth session' (2010) UN Doc A/HRC/15/WG.2/TF/2/Add.2, at para. 16.

¹⁰⁶ 'A precautionary approach is central to sustainable development in that it commits States, international organizations and the civil society, particularly the scientific and business communities, to avoid human activity which may cause significant harm to human health, natural resources or ecosystems, including in the light of scientific uncertainty.' See Principle 4, New Delhi Declaration, n. 81 above. See also e.g., N.M. Sachs, 'Rescuing the Strong Precautionary Principle from Its Critics' (2011) 2011 *University of Illinois Law Review*, pp. 1285-1338, 1285 (arguing that the precautionary principle can provide a valuable framework for preventing harm to human health and the environment). Cf. C.R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005) (arguing that the goals of the precautionary principle should be promoted by other means). For a more general review, see e.g., J. Ellis, 'Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle' (2006) 17 *European Journal of International Law*, pp. 445-62, 445

¹⁰⁷ *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010, *ICJ Reports* (2010), at para. 204. It is worth noting that similar recognition was not given to the precautionary principle by the Court. However, see Separate Opinion of Judge Cançado Trindade, at paras. 62-96 and 103-113 (where Judge Trindade argues that the precautionary principle is a 'general principle of international environmental law').

precautionary approach, that is to say when there are risks that an activity may cause damage.’¹⁰⁸ The precautionary approach and EIA requirement are supported by a number of IHRL rights. For example, it is arguable that whenever rights to land and water are granted to foreign investors, there is a possibility that activities such as intensive farming and the introduction of foreign plant species may pollute or distort the native ecosystem or otherwise detrimentally affect the environment and the rights to water and housing of local communities. In such circumstances, a precautionary approach should be taken to ensure that both the environment and the rights of local communities are protected. This does not mean that no development should take place. One way of ensuring such an approach is to require EIAs to take place. In the context of land grabbing, what is required is proper investigation of the possible impact of the displacement of communities and the effect of new farming methods and crops before land deals are signed; the insertion of provisions safeguarding the environment and the rights of communities in land contracts; and ongoing monitoring of the activities of investors to ensure that their activities do not harm the environment and that the human rights of local communities are not infringed.

Two other mutually reinforcing sustainable development principles that are relevant to land grabbing are the principles of participation, access to information and justice,¹⁰⁹ and good governance.¹¹⁰ Not only does public participation assist the authorities in making better decisions

¹⁰⁸ B. Sage-Fuller, *The Precautionary Principle in Marine Environmental Law* (Routledge, 2013), at p. 89.

¹⁰⁹ The principle requires states to ensure that their individual citizens have, ‘...access to “appropriate, comprehensible and timely” information concerning sustainable development that is held by public authorities, and the opportunity to participate in decision-making processes, as well as effective access to judicial and administrative proceedings, including redress and remedy’. See J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law, 2004), at p. 402. This principle is an emerging norm reflected in various international instruments. See e.g., Principle 10, Rio Declaration, n. 85 above; Art. 6, UNFCCC, n. 85 above; Arts. 13 and 14(1), UNCBD, n. 85 above.

¹¹⁰ The concept of good governance is not part of CIL but operates as a policy tool. See e.g., N. Choudhury and C.E. Skarstedt, ‘The Principle of Good Governance’, *CISDL Draft Legal Working Paper* (CISDL, 2005), at p. 21.

by giving access to wider sources of relevant information, it also allows the public the opportunity to be involved in the decision-making process, which potentially increases public trust in government decision-making and contributes towards achieving the relevant public interest objectives.¹¹¹

The participation principle has a strong legal basis in IHRL. In terms of both the International Covenant on Civil and Political Rights (ICCPR)¹¹² and ICESCR, states are required to follow appropriate decision-making procedures for policy making, administration and law making in securing the rights guaranteed under the Covenants. The CESCR has given substance to such process rights and specifies that in formulating and implementing strategies in compliance with state obligations in relation to the right to food, governments must comply with the principles of accountability, transparency, and participation.¹¹³ The UN Food and Agriculture Organization (FAO) has developed the PANTHER framework, which draws on a range of human rights treaties in identifying the principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment, and the rule of law as essential to decision making in relation to the right to food.¹¹⁴ The interdependence of the right to food and other rights, such as freedom of expression,¹¹⁵ freedom of assembly and association,¹¹⁶ the right to receive information,¹¹⁷ and the right to take part in the conduct of public affairs,¹¹⁸ further

¹¹¹ Razzaque, n. 109 above, at p. 402 (footnotes omitted).

¹¹² ICCPR, n. 104 above.

¹¹³ CESCR, General Comment No. 12, The Right to Adequate Food (Art 11), 12 May 1999, E/C.12/1999/5, at para. 23.

¹¹⁴ C. Golay & M. Büschi, 'The Right to Food and Global Strategic Frameworks: The Global Strategic Framework for Food Security and Nutrition (GSF) and the UN Comprehensive Framework for Action (CFA)' (FAO 2012), at p. 15.

¹¹⁵ Art 19, ICCPR, n. 112 above; Art 13, ACHPR, n. 87 above.

¹¹⁶ Art 21-22, ICCPR, *ibid*; Art 10-11, ACHPR, *ibid*.

¹¹⁷ Art 9, ACHPR, n. 87 above.

¹¹⁸ Art 25, ICCPR, n. 112; Art 13, ACHPR, n. 87 above.

reinforce the applicability of these principles in the land grabbing context.¹¹⁹ There is evidence from Ethiopia, for example, that the government has not been transparent in land negotiations and has not provided local communities with any opportunity to participate.¹²⁰ In fact, resistance by local communities to relocation has reportedly been met with violence and intimidation.¹²¹ These actions violate a range of civil and political rights as well as social and economic rights of affected communities which underpin the principle of participation and access to information and justice.

Good governance requires the application of a range of widely recognized principles including the rule of law, transparency, accountability, effective management of public resources, control of corruption, citizen participation, and equity.¹²² Good governance is underpinned by a wide range of civil and political rights, including the rights to equality, freedom of speech, assembly and movement, which overlap with but may be more extensive than rights to participation and access to information and justice in environmental matters.

In the land grabbing context, there is a noteworthy tendency for investors to enter into agreements in countries characterized by weak governance.¹²³ Weak governance goes hand in hand with weak protection of civil and political rights.¹²⁴ Although the 1994 Ethiopian Constitution makes provision for the protection of a range of human rights, enforcement is poor and opposition to the government and its policies are not tolerated.¹²⁵ There are widespread

¹¹⁹ L. Cotula (ed), *The Right to Food and Access to Natural Resources: Using Human Rights Arguments and Mechanisms to Improve Resources Access for the Rural Poor* (FAO, 2008), at p. 18.

¹²⁰ HRW, n.5 above, at p. 3; Horne, n. 23, at pp. 30 -1.

¹²¹ HRW, n. 5 above, at p 32 - 38.

¹²² P. Glasbergen, 'Setting the Scene: The Partnership Paradigm in the Making' in P. Glasbergen, et al (eds), *Partnerships Governance and Sustainable Development: Reflection on Theory and Practice* (Edward Elgar, 2007), at p. 99.

¹²³ 'The Surge in Land Deals: When Others Are Grabbing Their Land', *The Economist* (5 May 2011).

¹²⁴ HRW, n. 5 above, at p. 30.

¹²⁵ Constitution of the Federal Democratic Republic of Ethiopia, Arts. 14 – 28. Available at <http://www.ethiopia.gov.et/web/Pages/Constitution> (accessed 17 January 2015).

reports of certain ethnic groups being targeted, including groups that have been moved from their traditional lands to make way for foreign investors.¹²⁶ Dissent is met with harassment, detention and imprisonment. In response to criticism of its policies by non-governmental organizations (NGOs) including HRW, the Ethiopian government passed the Charities and Societies Proclamation,¹²⁷ which subjects NGOs to strict control and outlaws many of their human rights activities.¹²⁸ In the absence of the ability to exercise basic rights of political dissent, there are few checks on government action in relation to land deals and a consequent failure of good governance.

The next part explores an integrated sustainable development and human rights approach as a holistic framework for assessing the impact of land grabbing and for developing policy and regulatory responses to those impacts.

5. INTEGRATING SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS APPROACHES TO ADDRESS THE CHALLENGES OF LAND GRABBING

The principle of integration is considered ‘a bedrock principle of sustainable development’.¹²⁹ It reflects the interdependence and interrelationship between various aspects of international law relating to sustainable development (e.g., economic, financial, social,

¹²⁶ Horne, n. 23 above, at p. 5

¹²⁷ Proclamation 621/2009. Available at <http://www.molsa.gov.et/English/Resources/Documents/Charities%20and%20Societies%20Proclamation.pdf> (accessed 18 January 2015).

¹²⁸ Horne, n. 23, at p. 7

¹²⁹ M.-C. Cordonier Segger & A. Newcombe, ‘An Integrated Agenda for Sustainable Development in International Investment Law’, in M.-C. Cordonier Segger *et al.* (eds.), *Sustainable Development in World Investment Law* (Kluwer Law, 2011), at p. 124.

environmental, and human rights), including consideration of the needs of present and future generations.¹³⁰ The integration of environmental protection with economic and social development makes the principle of integration a crucial aspect of sustainable development¹³¹ and highly relevant to land grabbing.

As ICJ Judge Weeramantry, in his separate opinion in the *Gabčíkovo-Nagymaros* case notes, the role of sustainable development is to reconcile the right to development with environmental protection.¹³² On the surface, the right to development and environmental protection might be thought to pull in opposite directions. What connects them, however, is human wellbeing. The ultimate aim of the right to development is human wellbeing, and a healthy and sustainable environment is a prerequisite for human wellbeing.¹³³ It is arguable, then, that a human rights perspective is crucial to reconciliation of the conflict between development and environment, and thus crucial to the concept of sustainable development.

5.1 EVALUATING THE SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS FRAMEWORK

One of the principal criticisms of sustainable development is that it implicitly supports the neo-liberal idea of competitive markets and that the development aspect often overwhelms concern for the other dimensions of sustainability. Critics assert that the assessment of sustainability is

¹³⁰ Principle 7.1, New Delhi Declaration, n. 81 above.

¹³¹ Cordonier Segger and Newcombe, n. 129 above, p. 124.

¹³² *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgement, 25 September 1997, *ICJ Reports* (1997) at p. 205.

¹³³ C. Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1 *Journal of Human Rights and the Environment*, pp. 7-22, at 22.

too often determined by economists who favour economic development over social development and environmental protection.¹³⁴

A related criticism of sustainable development is that its emphasis on economic growth ignores the limits imposed by finite resources.¹³⁵ While at first glance, the concept of sustainable development appears to disregard the possibility of limits, the principle of inter- and intra-generational equity, which is a fundamental aspect of sustainable development, does acknowledge the limits to development. The principle provides that:

The present generation has a right to use and enjoy the resources of the Earth but is under an obligation to take into account the long-term impact of its activities sustain the resource base and the global environment for the benefit of future generations of humankind. ‘Benefit’ in this context is to be understood in its broadest meaning as including, *inter alia*, economic, environmental, social and intrinsic benefit.¹³⁶

Thus, in order to sustain global natural resources and the environment for the benefit of present and future generations, limits must be placed on consumption and economic growth. Limits are necessary to avoid irreparably damaging the environment and exhausting the non-renewable resource base.¹³⁷ Such an outcome would deny both present and future generations, equitable access to the earth’s resources.

¹³⁴ J. Holder & M. Lee, *Environmental Protection, Law and Policy*, (Cambridge University Press, 2007) at p. 231; S. Coyle & K. Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart, 2004), at p. 208.

¹³⁵ Holder & Lee, n. 134 above, at p. 218. For further critique on sustainable development, see e.g., Bosselmann, n.86 above, at p. 4; Y. Pesqueux, ‘Sustainable Development: a Vague and Ambiguous “Theory”’ in N. Lesca (ed), *Environmental Scanning and Sustainable Development* (Wiley, 2011), at p. 6.

¹³⁶ Principle 2.2, New Delhi Declaration, n. 81 above.

¹³⁷ B. Liddle & F. Moavenzadeh, ‘The Sustainability Challenge for Climate Change: Balancing Inter- and Intra-Generational Equity’ in F. Moavenzadeh, et al (eds), *Future Cities: Dynamics and Sustainability* (Kluwer, 2002) at p. 195.

Even critics of sustainable development acknowledge that, in addition to being an accepted global directive at international level, sustainable development has indelibly shaped international law: it has become part of IEL, is found in a wide variety of international instruments, and it exerts a strong influence on practice.¹³⁸ Sustainable development is also directly and indirectly supported by international courts and tribunals, which have made an invaluable contribution through their jurisprudence to the implementation of sustainable development principles.¹³⁹

Although sustainable development is reflected in numerous international documents and in jurisprudence, its legal status remains uncertain.¹⁴⁰ Nevertheless, sustainable development has significant legal effect as a soft law principle that has gained ‘worldwide currency as a desirable objective for the management of global natural resources’.¹⁴¹ Moreover, it has potential to provide a framework for reconciling socio-economic development and environmental protection, which is widely recognized.¹⁴²

However, views on the extent to which sustainable development and its principles have been effectively implemented in practice are mixed. In the view of the ILA, ‘the overall conditions for sustainable development have worsened since 2002, environmentally, socially and in terms of the finance necessary to make the changes necessary’.¹⁴³ Although some progress has

¹³⁸ For e.g., UNFCCC, n. 85 above, UNCBD, n. 85 above, UNCCD, n. 85 above. See also P. Sands et al., *Principles of International Environmental Law* (3rd ed, Cambridge University Press, 2012), at p. 207.

¹³⁹ 2012 Sofia Report, n. 81 above, at pp. 4-14 (on sustainable development in international jurisprudence). See also *Iron Rhine (“Ijzeren Rijn”) Railway Arbitration (Belgium v. Netherlands)*, 24 May 2005, Award of the Arbitral Tribunal, at pp. 28-29; *Pulp Mills*, n. 107 above, at p. 52 and pp. 55-56.

¹⁴⁰ French, n. 81 above, at p. 36.

¹⁴¹ V. Nanda, ‘International Environmental Protection and Developing Countries’ Interests: The Role of International Law’, (1991) 26 *Texas International Law Journal*, pp. 497-519, at 498

¹⁴² *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, et al* Case No CCT 67/06; ILDC 783 (ZA) 2007, at para. 58.

¹⁴³ 2012 Sofia Report, n. 81 above, at p. 4.

been made in implementing sustainable development¹⁴⁴ as we accelerate efforts to achieve the MDGs by 2015, it is acknowledged that obstacles remain.¹⁴⁵ Impediments include lack of political will to implement substantive changes necessary to achieve sustainable development;¹⁴⁶ limited finances to support sustainable development commitments;¹⁴⁷ difficulties in ensuring the integration of the three pillars of sustainable development;¹⁴⁸ and approaches to implementation which prioritize the economic pillar to the detriment of both ecological sustainability and social justice.¹⁴⁹ In the context of land grabbing, the problem of the skewing of priorities towards economic development and the lack of integration of ecological sustainability and social justice emerges most clearly.

Although sustainable development continues to be controversial within the international community as to its scope and purpose, it is a concept that remains very much *en vogue*.¹⁵⁰ Arguably, the very tensions between economic development, social justice and environmental protection, inherent in the concept, keep the sustainable development debate alive and contribute to keeping the spotlight on efforts to ensure a balanced approach to its three pillars.¹⁵¹

Sustainable development and its principles comprise soft law, yet they are also policy objectives in a wider social and political context. Seen in this light, the status of the concept and

¹⁴⁴ Progress reported includes for example, the reduction of global poverty by half by 2010, significant gains in access to improved water sources and the advancement of women. See UNDESA, 'World Economic and Social Survey 2013: Sustainable Development Challenges' E/2013/50/Rev. 1 ST/ESA/344 (UN, 2013), at p. iii.

¹⁴⁵ *Ibid.*

¹⁴⁶ See e.g., 2012 Sofia Report, n. 81, at p. 3; W.M. Lafferty, 'Governance for Sustainable Development: The Impasse of Dysfunctional Democracy' in J. Meadowcroft, et al (eds), *Governance, Democracy and Sustainable Development: Moving Beyond the Impasse* (Edward Elgar, 2012), at pp. 312-3.

¹⁴⁷ P.J. Cooper & C.M. Vargas, *Implementing Sustainable Development: from Global Policy to Local Action* (Rowman & Littlefield, 2004), at pp. 192-5.

¹⁴⁸ G. Francis & S. Lerner, 'Making Sustainable Development Happen: Institutional Transformation' in A. Dale & J.B. Robinson (eds), *Achieving Sustainable Development* (UBC Press, 2011), at pp. 146-7.

¹⁴⁹ 2013 UNDESA Survey, n. 144 above, at p. iii.

¹⁵⁰ See ILA, 'Report of the Seventy-Fifth Conference' (Rio, 2008), at p. 2.

¹⁵¹ *Ibid.*, at p. 7.

many of the controversies surrounding it become less important. Rather, the focus shifts to how the sustainable development principles can be used most effectively as policy objectives and to maximizing their impact to achieve the overall goal of balancing economic, social and environmental concerns. This is demonstrated by the continued integration of sustainable development into the global political agenda, particularly the recent post-2015 UN Open Working Group Proposal for Sustainable Development Goals (SDGs).¹⁵² The central role of sustainable development in the post-2015 UN agenda indicates acceptance by the international community of its underlying principles and underlines their value in framing policy in the land grabbing context.

In light of our argument that the problems raised by land grabbing, and in particular the skewed priorities, must be addressed through a combined human rights and sustainable development framework, the next issue for consideration is how IHRL can contribute to balancing the three pillars of sustainable development. It is significant that the Stockholm Declaration,¹⁵³ one of the ‘first comprehensive statements of international concern with environmental protection’¹⁵⁴ and widely considered to have laid the foundation for the development of sustainable development as a global policy objective, makes use of the language of rights. Principle 1 of the Declaration states:

Man has the fundamental rights to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations.

¹⁵² According to the UN Open Working Group on SDGs, the SDGs ‘are action oriented, global in nature and universally applicable.’ See UN Sustainable Development Knowledge Platform, ‘Introduction to the Proposal of the Open Working Group for Sustainable Development Goals’ (19 July 2014), at para. 18.

¹⁵³ See n. 83 above.

¹⁵⁴ D.K. Anton & D.L. Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011), at p. 68.

The integration of sustainable development and human rights is present in more recent iterations. For example, the 2002 ILA New Delhi Declaration¹⁵⁵ consciously attempts ‘to bring together sustainable development with the rhetoric and substance of human rights’.¹⁵⁶ The preamble of that Declaration notes that ‘the realization of the international bill of human rights, comprising economic, social and cultural rights, civil and political rights and people’s rights, is central to the pursuance of sustainable development.’

Evidently, the protection of human rights was seen as integral to sustainable development from the outset, and the overlap and multiple links between sustainable development and IHRL are widely recognized.¹⁵⁷ Yet, will greater integration of the IHRL and sustainable development frameworks necessarily assist in balancing the economic, social and environmental objectives of sustainable development? If, as the discussion of land grabbing reveals, the current approach to sustainable development gives precedence to economic development, and the IHRL framework necessarily supports social development, the key question becomes whether a combined framework can provide enough support for ecological sustainability. It is important to consider in particular how a human rights approach could ensure that social and economic development do not overwhelm ecological sustainability.

Critics of current attempts to use human rights to protect the environment argue that a human rights approach will only provide protection for the environment to the extent that is useful to humans. A focus on human wellbeing, they continue, is more likely to have detrimental

¹⁵⁵ See n. 81 above.

¹⁵⁶ ILA, ‘Report of the Seventy-First Conference’ (Berlin, 2004), pp. 896-938, at 890.

¹⁵⁷ See Bosselman, n. 86, at p. 53.

consequences for the environment than to provide protection.¹⁵⁸ Other commentators contend that human rights promotion of and environmental protection are inextricably linked and complementary.¹⁵⁹ Judge Weeramantry notes:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.¹⁶⁰

Although the right to a healthy or sustainable environment is not yet fully accepted in IHRL, the past few decades have seen an ongoing process of ‘greening’ of human rights.¹⁶¹ This refers to the reinterpretation of a range of human rights to include environmental protection on the basis that a sustainable environment is necessary for full enjoyment of human rights. The development of IHRL is being driven by both human rights treaty bodies and human rights courts. The CESCR, for example, has made a significant contribution to the recognition of the importance of a healthy environment for the protection of a range of social and economic rights, including the right to an adequate standard of living (which encompasses the right to food and water) and the right to health,¹⁶² by its interpretation of the rights protected under the ICESCR.¹⁶³ Similar approaches can be seen in the jurisprudence of regional human rights bodies, such as the European Court of Human Rights (ECtHR) which has recognized that environmental damage

¹⁵⁸ Gearty, n. 133 above, at pp. 7-9; Coyle and Morrow, n. 134 above, at p. 211.

¹⁵⁹ See e.g., D. McGoldrick, ‘Sustainable Development and Human Rights: An Integrated Conception’ (1996) 45 *International Comparative Law Quarterly*, pp. 796-818, at 796.

¹⁶⁰ *Gabčíkovo-Nagymaros*, n. 132 above, at pp. 91-2.

¹⁶¹ See e.g., K. Hulme, ‘International Environmental Law and Human Rights’ in S. Sheeran & N. Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge, 2013), pp. 285 – 301, at 289.

¹⁶² Arts. 11 and 12, ICESCR, n. 90 above.

¹⁶³ See UNHCHR, n. 90 above, at para 16.

which impacts upon the health and wellbeing of individuals may infringe the right to private and family life.¹⁶⁴ The close connection between a healthy environment and the enjoyment of a wide range of human rights has become part of human rights discourse, which mobilizes opinion at both an international and national level and builds consensus about the importance of ecological sustainability.¹⁶⁵ Critics of a human rights approach often fail to acknowledge the impact of human rights discourse on environmental policy, both national and international.¹⁶⁶

A combined human rights and sustainable development approach also has the potential to make an important contribution to addressing poverty. The link between poverty, human rights and sustainable development is well expressed in the Report of the Office of the High Commissioner for Human Rights on Human Rights, Poverty Reduction and Sustainable Development:

It is now widely accepted that – on the one hand - poverty should not be seen only as a lack of income, but also as a deprivation of human rights, and – on the other hand – that unless the problems of poverty are addressed, there can be no sustainable development. It is equally accepted that sustainable development requires environmental protection and that environmental degradation leads directly and indirectly to violations of human rights.¹⁶⁷

¹⁶⁴ Council of Europe, *Manual on Human Rights and the Environment* (Council of Europe Publishing, 2012), at pp. 45-60.

¹⁶⁵ HRC, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean healthy and sustainable environment, John H. Knox: Mapping report, A/HRC/25/53*, 30 December 2013, at paras. 17-25.

¹⁶⁶ B.H. Weston & D. Bollier, *Green Governance: Ecological survival, Human Rights and the Law of the Commons* (Cambridge University Press, 2013), at pp. 87-97; Boyd, n. 89 above.

¹⁶⁷ Office of the High Commissioner for Human Rights, 'Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water – A Background Paper', World Summit on Sustainable Development, Johannesburg, 26 August – 4 September 2002. Available at <http://www.ohchr.org/Documents/Publications/HRPovertyReductionen.pdf>, at p. 1.

The impact of land grabbing demonstrates this point precisely. Land grabbing feeds into the cycle of poverty, environmental degradation and human rights abuses. Addressing it requires an integrated approach that recognizes that economic development is entwined with full recognition of human rights and a healthy and sustainable environment.

1. 5.2 IMPLEMENTING AN INTEGRATED SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS FRAMEWORK: SOME SUGGESTIONS

We have argued above that the integration of sustainable development and human rights (SD-HR) offers a holistic framework to address problems, such as land grabbing, that raise competing imperatives regarding development, environmental protection and human rights compliance. How, then, can the principles of an integrated SD-HR framework be implemented to redress an equal balance between the three pillars of sustainable development? We highlight promising developments in three areas, namely soft law, human rights litigation, and land rights.

Using soft law to rebalance sustainable development priorities

There are already a myriad of soft law measures in place relevant to land grabbing. These include the FAO Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries, and Forest in the Context of Food Security (FAO Voluntary Guidelines)¹⁶⁸ which has been praised for providing practical and progressive guidance on important land tenure issues,

¹⁶⁸ FAO, *Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries, and Forest in the Context of Food Security* (FAO, 2012).

particularly in the area of agricultural investment;¹⁶⁹ the Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council (UNHRC) in 2011;¹⁷⁰ the UN Special Rapporteur on the Right to Food's principles on large-scale land acquisitions;¹⁷¹ and schemes such as the Roundtables on Sustainable Palm Oil (RSPO)¹⁷² and on Sustainable Biomaterials and Biofuels (RSB).¹⁷³ These instruments are non-binding and thus vulnerable to the criticism 'that voluntary guidance can only go so far'.¹⁷⁴ Nevertheless, they represent positive achievements and provide guidance to corporations and governments with regard to sustainable agriculture, agricultural investment and land leases or acquisitions. With regard to the FAO Voluntary Guidelines, it has been noted that although the negotiations leading up to it were participatory and dynamic between more than 130 countries, the challenge is now for states to adapt the guidelines so that they can be implemented in accordance with national conditions and needs.¹⁷⁵ Efforts to transform non-binding international guidelines into national policies cannot be done by governments alone, but require the participation of a range of stakeholder, including local communities, NGOs and the business community.¹⁷⁶ National implementation measures can be supported by the sustainable development principles, particularly the principles of participation and good governance. The relevant SD-HR framework law and principles discussed above thus provide guidelines that can be used both in the creation and implementation of soft law relevant to land grabbing.

¹⁶⁹ L. Cotula, *The Great African Land Grab* (Zed Books, 2013), at pp. 101-102.

¹⁷⁰ UN, 'Guiding Principles on Business and Human Rights' (UN, 2011).

¹⁷¹ UNGA, 'Report of the Special Rapporteur on the Right to Food, Olivier De Schutter' UN Doc. A/HRC/13/33/Add.2, 28 Dec 2009, Annex, at pp. 16-18

¹⁷² RSPO, 'RSPO Principles and Criteria for Sustainable Palm Oil Production' (RSPO, 2013).

¹⁷³ RSB, 'Certification' (RSB). Available at: <http://rsb.org/certification/> (accessed on 13 January 2015). It is also worth noting that there are enforcement flaws in these certification schemes. See E.R.M. Fortin & B. Richardson 'Certification Schemes and the Governance of Land: Enforcing Standards or Enabling Scrutiny?' (2013) 10 *Globalization*, pp. 141-159.

¹⁷⁴ Cotula, n. 169 above, at p. 102.

¹⁷⁵ J.G. da Silva, 'Global Land Deal Guidelines Could Pave Way to World Without Hunger', *Guardian* (11 May 2012).

¹⁷⁶ *Ibid.*

Some commentators argue that in order to address the problems raised by land grabbing, international trade and investment law must play a role. Not only does this area of law have effective enforcement mechanisms, it is also the legal framework most relevant to resource exploitation.¹⁷⁷ As Cotula points out, '[g]iven the importance of international trade in shaping the land rush, it is somewhat surprising that the law regulating trade has received so little attention in "land grabbing" debates'.¹⁷⁸ Thus far, a comprehensive hard law framework directly relevant to land grabbing in the area of trade and investment does not exist. Development of hard law in this area would provide an opportunity for the international community to integrate the relevant SD-HR principles from the outset and thus avoid the danger of states individually putting the interests of corporations ahead of sustainable development and human rights in land negotiations. This would be an ideal opportunity for states jointly to create a level playing field and to break the cycle of rights violations, social injustice, skewed development and environmental damage.

Using human rights litigation to implement sustainable development priorities

One of the main advantages of an integrated SD-HR framework is that IHRL opens up possibilities for the legal enforcement of sustainable development principles in the absence of clear legal recognition of the concept. While the right to a healthy and sustainable environment itself is not widely protected in IHRL, there is clear acceptance of the need to protect the

¹⁷⁷ See comment by L.A. Wily in M. Tran, 'Negotiators Reach Consensus on Global Land Governance Guidelines' *Guardian* (14 March 2012). See also Cotula, n. 169 above, at p. 104.

¹⁷⁸ L. Cotula, Tackling the Trade Law Dimension of Land Grabbing *IIED Blog* (14 November 2013). Available at: <http://www.iied.org/tackling-trade-law-dimension-land-grabbing>.

environment in order to protect other human rights by human rights bodies within both regional and UN human rights systems.¹⁷⁹

The African regional human rights system is based on the African Charter on Human and Peoples' Rights (ACHPR),¹⁸⁰ which is exceptional among human rights instruments in making specific provision for a right to a sustainable environment¹⁸¹ as well as the right to development.¹⁸² The ACHPR also provides for the protection of civil and political rights as well as a number of social and economic rights.¹⁸³ The relatively wide scope of the African human rights system thus clearly facilitates claims that may arise from the negative impact of land grabbing, including environmental damage and impacts on health and wellbeing of affected communities.

The case law of the African Commission on Human and Peoples' Rights¹⁸⁴ has made an important contribution to the conceptual development of an integrated approach to environmental and other human rights. The *SERAC*¹⁸⁵ case was the first to be considered by the African Commission in which the right to a 'satisfactory' environment was at issue.¹⁸⁶ The communication was brought by two NGOs on behalf of the Ogoni people.¹⁸⁷ The factual background concerned serious environmental damage and associated human rights abuses arising

¹⁷⁹ 2013 Knox Report, n. 165 above, at para 17.

¹⁸⁰ ACHPR, n. 87 above.

¹⁸¹ *Ibid*, Art. 24.

¹⁸² *Ibid*, Art. 22.

¹⁸³ *Ibid*, Preamble; See E. Grant, 'Accountability for Human Rights Abuses: Taking the Universality, Indivisibility, Interdependence and Interrelatedness of Human Rights Seriously' (2007) 32 *South African Yearbook of International Law*, pp. 158-179, at p. 167.

¹⁸⁴ The African Commission monitors implementation of the ACHPR and is authorised to consider both individual and inter-State communications; Arts. 47 – 59, ACHPR, n. 87 above.

¹⁸⁵ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAC) v Nigeria* Communication 155/96, October 2001.

¹⁸⁶ The case is discussed in detail in K.S.A. Ebeku, 'The Right to a Satisfactory Environment and the African Commission' (2003) 3 *African Human Rights Law Journal*, pp. 149- 166.

¹⁸⁷ *SERAC*, n. 185 above, at para 51.

from the impact of oil extraction. The Complainants' argument was that the Nigerian Government had failed to protect, and was implicated in the violation of, multiple rights including the right to a 'satisfactory' environment, the right to health, and the right to life.¹⁸⁸

In upholding the complaints, it is noteworthy that the Commission did not focus on the right to a 'satisfactory' environment in isolation, but on the relationship between the environmental right and other rights and the impact of environmental destruction on a number of rights, including the right to health. The Commission interpreted both the environmental right and the right to health very broadly, imposing on the Nigerian State obligations to take steps 'to prevent pollution and ecological degradation, to promote conservation and to secure an ecologically sustainable development and use of natural resources'.¹⁸⁹ In the view of the Commission, the protection of the rights to health and environment also required the state to monitor or 'at least' permit the monitoring of threatened environments, to require environmental and social impact studies before approving industrial developments and to provide affected communities with information and opportunities to participate in decision making.¹⁹⁰

The subsequent *Endorois* case,¹⁹¹ was brought against the Kenyan State on behalf of a community that had been removed from its ancestral land to make way for a game reserve. The applicants alleged violation of a number of rights, including the right to culture,¹⁹² the right to property,¹⁹³ the right to dispose freely of their natural resources¹⁹⁴ and the right to

¹⁸⁸ Arts. 4, 16 and 24, ACHPR, n. 87 above.

¹⁸⁹ *SERAC*, n. 185 above, at para 53.

¹⁹⁰ *SERAC* n. 185, at para 55.

¹⁹¹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, Communication 276/03.

¹⁹² Article 7.

¹⁹³ Article 14.

¹⁹⁴ Article 21.

development.¹⁹⁵ The African Commission found the Kenyan government in breach of all the rights claimed.¹⁹⁶ It noted that even if the creation of a game reserve was a legitimate aim in interfering with the rights of the Endorois, there had not been provision for effective participation of the community in decision making, no environmental and social impact assessments had been undertaken and there was insufficient provision for compensation or benefit sharing.¹⁹⁷

The relevance of the *SERAC* and *Endorois* cases to the abuses arising from land grabbing is evident. Communities suffering the negative effects of land grabbing, including environmental degradation, loss of livelihoods and draining of wetlands, as happened in the Gambella region of Ethiopia, are able to bring similar claims as communities such as the Ogoni who were affected by oil extraction. Access to the African Commission and the African Court on Human and Peoples' Rights (ACtHPR)¹⁹⁸ is facilitated by a generous approach to standing which permits NGOs, including international NGOs, to raise issues before the Commission and Court.¹⁹⁹ The Commission recognizes the role of the media in drawing attention to human rights violations and

¹⁹⁵ Article 22.

¹⁹⁶ *Endorois*, n. 191 above, at para. 161.

¹⁹⁷ See E. Ashamu, 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission' (2011) 55(2) *Journal of African Law*, pp. 300-313, at p. 300.

¹⁹⁸ The African Court of Human and Peoples' Rights (ACtHPR) was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol on the African Court) OAU/LEG/AFCHPR/PROT (III), adopted by the Assembly of Heads of State and Government, 34th Session, 8-10 June 1998, and became operational in 2006.

¹⁹⁹ There are no restrictions on who can submit cases to the Commission: *locus standi* is extended to individuals and NGOs (Art. 55, ACHPR). See for example *SERAC*, n. 185 above; *Amnesty International v Zambia*, Communication 212/98. The same *locus standi* rules apply to the ACtHPR but the court is not permitted to consider a petition unless the State Party concerned has made a declaration accepting the jurisdiction of the court. All cases submitted to the court must pass through the Commission first (Arts 5 and 34 (6), of the Protocol on the African Court, n. 198 above).

allows media reports to be brought in evidence.²⁰⁰ This can significantly lower the otherwise steep evidentiary hurdles that claimants face.

Hence, few procedural obstacles prevent bringing claims of human rights violations resulting from land grabbing to the African Commission.²⁰¹ However, there are significant weaknesses in the system, including delays in finalizing cases and weak enforcement of judgments.²⁰² Since relatively few cases have been concluded, the jurisprudence of the Court remains undeveloped.

But regardless of identified weaknesses, there are a number of advantages to pursuing sustainable development goals via human rights claims before human rights tribunals. Firstly, it provides opportunities for the development of human rights law in support of sustainable development principles. This is apparent in the African cases discussed above, but also in the jurisprudence of the ECtHR, which has recognized the environmental dimension of a number of rights protected under the Council of Europe (COE) European Convention on Human Rights (ECHR),²⁰³ including the right to life, the right to private and family life and the right to a fair trial.²⁰⁴ The Inter-American Commission and Court of Human Rights have similarly held that activities destructive of the environment may breach the rights of indigenous communities, in

²⁰⁰ ACHPR, n. 87 above, Art. 56(4) specifically mentions that communications must not be ‘based exclusively on news disseminated through the mass media’ but this clearly implies that media reports may form part of the evidence. See *Sir Dawda K Jawara v The Gambia*, Communications 147/95 and 149/96.

²⁰¹ The jurisdiction of the ACtHPR is however optional and States may choose whether to accept direct access to the court (Art 34 of the Protocol). Ethiopia, for example, has not ratified the Protocol on the African Court and therefore does not accept the jurisdiction of the Court. See J. Harrington, ‘The African Court on Human and Peoples’ Rights’ in M. Evans & R. Murray (eds), *The African Charter on Human and Peoples’ Rights* (Cambridge University Press, 2002), at p. 305 and p. 318.

²⁰² In spite of the African Commission issuing a resolution in November 2013 calling on the Kenyan government to implement the decision in the *Endorois* case, no action has been taken. See African Commission on Human and Peoples’ Rights, *Resolution Calling on the Republic of Kenya to Implement the Endorois Decision*, 5 November 2013.

²⁰³ European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221 (ETS 5) (ECHR).

²⁰⁴ See Manual on Human Rights, n. 164 above.

particular.²⁰⁵ The jurisprudence of the regional human rights tribunals also indicates significant progress in development of procedural rights in environmental cases, as seen in the *SERAC* and *Endorois* cases.

Raising environmental issues in human rights cases also has a number of intangible advantages. Cases set precedents. Even where courts or tribunals are not formally obliged to follow their own decisions or those of other tribunals, a decision in one forum may have an effect on cases decided elsewhere. Cases such as *SERAC* may inspire national courts when deciding subsequent domestic cases. There is also growing evidence of cross-fertilization between courts and tribunals at the domestic, regional and international level and such decisions feed into an international dialogue between courts.²⁰⁶ Indeed, the ACHPR encourages such dialogue and provides that in exercising its functions, the Commission it to ‘draw inspiration from international law on human and peoples’ rights’.²⁰⁷ The *SERAC* case is particularly noteworthy for the extent to which the Commission engaged with the jurisprudence of other international human rights bodies.²⁰⁸ Such engagement with the jurisprudence of other tribunals assists in the development of IHRL, particularly the integration of sustainable development principles and environmental principles into human rights law.²⁰⁹ Since international and regional tribunals thus

²⁰⁵ See e.g., *Mayagna (Sumo) Awas Tigni Community v. Nicaragua* IACHR Series C No 79, (IACHR 2001) available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf (accessed 18 January 2015); *Maya Indigenous Communities of the Toledo District v. Belize*, Case No 12.053, Report No 40/04, IACHR., OEA/Ser.L/V/II.122 Doc.5.rev 1 at 727 (2004), available at <http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm> (accessed 18 January 2015).

²⁰⁶ A.M. Slaughter, ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal*, pp. 191 – 220 at 192.

²⁰⁷ Arts. 60 and 61, ACHPR, n. 87 above.

²⁰⁸ Grant, n. 183 above, at p. 163.

²⁰⁹ J. Harrison, ‘Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Disputes and the Development of International Environmental Law’ (2013) 25 *Journal of Environmental Law*, pp. 501-514, at p. 506.

develop, extend and refine international legal principles, litigation may also function as a substitute for treaty-making.²¹⁰

Litigation can also influence the behaviour of states and of private companies, who would prefer not to have their actions held up to scrutiny. Both governments and private actors, particularly large corporations, will be concerned about the implications of decisions for their operations and for future claims. This may encourage greater compliance.²¹¹ The focus on individual victims who have suffered harm because of the environmentally destructive activities of corporations or governments assists in building public support opposing such activities. Litigation attracts publicity and feeds into public dialogue around the importance of environmental protection, helping to build momentum at both national and international levels for stronger protection against practices such as land grabbing. And there is growing evidence that communities adversely affected by foreign investment in developing countries are indeed turning to human rights courts to protect their human rights to food, water and housing.²¹²

Clarifying land rights to protect communities from land grabbing

Land rights or the lack thereof lie at the heart of the impact of land grabbing on local communities. Proponents of foreign investment in agricultural land argue that such investment is necessary to bring land into production and to improve farming methods. However, land that governments present as vacant or underutilized may in fact be in use as part of a system of shifting cultivation and/or provide subsistence for local communities who do not have formal

²¹⁰ V. Lowe, 'The function of litigation in international society' (2012) 61 *International Comparative Law Quarterly*, pp. 209-22, at 214.

²¹¹ *Ibid*, at p. 213.

²¹² Cotula, n. 169 above, at p. 104 (footnote omitted).

tenure rights. A number of different solutions to the problem of weak land rights have been proposed. Formal land titling and registration is often recommended as a way to both protect local farmers, to create land markets, and to modernize agriculture.²¹³ Opponents of this approach have raised concerns about the imposition of western concepts of individual ownership on communities who have a tradition of communal tenure.²¹⁴ It is also argued that individual titling may result in conflict between members of communities that had in the past shared communal land.²¹⁵ Individual titling would also affect the ability of pastoralists and other groups like fishers to access land to make it possible for them to continue with their traditional way of life. There are also concerns that individual titling would exclude women and other vulnerable groups.²¹⁶

An alternative approach is to formally recognize existing community-based tenure systems and protect traditional patterns of land use through legislation.²¹⁷ This approach is however vulnerable to criticism that it may entrench discriminatory practices by excluding women and other minorities.²¹⁸ There is a growing consensus that any changes to land tenure systems should be based on a detailed assessment of specific local circumstances.²¹⁹ The SD-HR framework has the potential to ensure that the protection of human rights and the environment are given due consideration in the development of local approaches to land rights.

²¹³ O. De Schutter, 'The Emerging Human Right to Land' (2010) 22(3) *International Community Law Review*, pp. 303-34, at 316; F.F.K. Byamugisha, *Securing Africa's Land for Shared Prosperity* (Agence Française de Développement/World Bank, 2013), at p. 5.

²¹⁴ J. M. Otto & A. Hoekema, 'Legalising Land Rights, Yes, But How? An Introduction' in Otto & Hoekema, n. 75, at p. 9 (referring to community organizations, NGOs, academics and some politicians): De Schutter, n. 213 above, at pp. 306-17.

²¹⁵ Otto & Hoekema, n. 214 above, at p. 14; De Schutter, n. 213 above, at p. 317.

²¹⁶ Ibid, at p. 9; *ibid*, at pp. 316-8

²¹⁷ De Schutter, *ibid*, at p. 322.

²¹⁸ Otto & Hoekema, n. 214, at p. 21.

²¹⁹ *Ibid*, at p. 21. See also, Alden Wily, n. 67 above.

However, De Schutter contends that weak land rights are merely a part of a larger problem and that it is also necessary to reconsider the international preference for large-scale agricultural investment. He argues that the unfavourable comparison which is often made between the efficiency of industrial-scale corporate agriculture and the less productive smallholder system prevalent in most African countries is unwarranted. Longstanding neglect of agriculture by governments and the negative impacts of structural adjustment programmes both play a large part in low productivity of the smallholder sector. De Schutter warns against the commodification of land and over-reliance on international markets. He argues that a different model for agricultural investment is necessary to support small scale farmers, respect the rights of all land users, alleviate poverty, and address the food needs of local populations²²⁰ This proposal is supported by a number of studies that have concluded that small scale farming is both more efficient and more environmentally sustainable than intensive single commodity agricultural systems, while at the same time supporting vulnerable communities.²²¹

6. CONCLUSION

The recent report of the UN Secretary General's High Level Panel of Eminent Persons on the Post-2015 Development Agenda identifies a number of so called 'transformative shifts' as necessary drivers of the post 2015 agenda.²²² The first shift that is required is encapsulated in the expression 'leave no one behind'. According to the report, this requires that no person should be denied 'universal human rights and basic economic opportunities' and includes the ending of

²²⁰ De Schutter, n. 12 above, at p. 250.

²²¹ D. Hunt & M. Lipton, 'Green Revolutions for Sub-Saharan Africa?' *Chatham House Briefing Paper* (Chatham House, 2011), at p. 7; S. MacMillan & C. Seré, 'Back to the Future: Revisiting Mixed Crop-Livestock Systems' (International Livestock Research Institute, 2010), at pp. 15-16.

²²² High Level Panel Report, n. 8 above.

hunger and the achievement of ‘a basic standard of wellbeing’. The second shift identified involves putting sustainable development at the core of the post-2015 agenda, and in particular integrating the social, economic and environmental dimensions of sustainability.

Integration of the principles of sustainable development and international human rights law and implementation of a combined framework, which ensures that economic development does not take precedence over social and environmental considerations, would not only strengthen the protection available to communities facing threats such as land grabbing but also advance the international understanding of the fundamental importance of human rights and ecological sustainability to economic development.