

Land Grabbing in Sub Saharan Africa. A Human Rights Framework to address State and Extraterritorial Obligations: The case of China in the D. R. of the Congo

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Abstract

The size and duration of land grabs in Sub Saharan Africa are of dimensions never seen before. This work aims at using human rights as a tool to address the impact of land grabbing on local livelihoods. Findings suggest that land grabs serve the interests of investing governments entailing direct or indirect state involvement. In the majority of cases investments are characterised by a lack of transparency and participation of local populations. Land grabs cause loss of access to land and resources leaving people unable to feed themselves. At the same time those affected have no voice to demand justice. This article explores the obligations of host states under economic, social and cultural rights and examines extraterritorial obligations of investing states. The findings are applied to a case study of a Chinese investment in the Democratic Republic of Congo. The author argues that a human rights approach does not leave space for land grabs.

Keywords: Land Grabbing, Human Rights, Food Security, Extraterritorial Obligations, China, Democratic Republic of Congo.

Resumen

La área y la duración del acaparamiento de tierras en África al sur del Sahara son de dimensiones nunca antes vistas. Este trabajo tiene como objetivo utilizar los derechos humanos como un instrumento para abordar el impacto del acaparamiento de tierras a los sustentos locales. Los resultados sugieren que el acaparamiento de tierras sirve en primer lugar a los intereses de los gobiernos que invierten y que impliquen la participación de esos de forma directa o indirecta. En la mayoría de los casos, las inversiones se caracterizan por una falta de transparencia y la participación de las poblaciones locales. El acaparamiento de tierras causa la pérdida del acceso a la tierra y los recursos que resulta en que la gente es incapaz de alimentarse por sí misma. Al mismo tiempo, las personas afectadas no tienen voz para exigir justicia. Este artículo explora las obligaciones de los estados anfitriones bajo los derechos económicos, sociales y culturales, y examina las obligaciones extraterritoriales de los estados que invierten. Las investigaciones se aplican a un caso de estudio de una inversión de China en la República Democrática del Congo. El autor argumenta que un enfoque de derechos humanos no deja espacio para la apropiación de tierras.

Palabras claves: Acaparamiento de tierras, Derechos Humanos, Seguridad Alimentaria, Obligaciones Extraterritoriales, China, República Democrática del Congo.

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List of abbreviations

ACHPR:	African Charter on Human and Peoples Rights.
CESCR:	Commission on Economic Social and Cultural Rights.
DRC:	Democratic Republic of Congo.
ESC:	Economic Social and Cultural.
ETO:	Extraterritorial Obligation.
GC:	General Comment.
ICESCR:	International Covenant on Economic, Social and Cultural Rights.
UDHR:	Universal Declaration of Human Rights.
UN:	United Nations.
UNDRIP:	United Nations Declaration on the Rights of Indigenous Peoples.

1. A Human Rights Framework to address Land Grabbing

A formerly state-owned Chinese company acquired 3 million hectares of land in the Democratic Republic of Congo (DRC). The giant agricultural plantation will produce palm oil of which nearly 100 percent will be exported to China to provide food and biofuel for the Chinese. What will happen to the Congolese people living on the land in question, we don't know. What we know is that the Chinese have title to the land for 99 years and that those living upon it will be deprived of their rights to food and housing.

When foreign investors acquiring large stretches of land for cultivation and export of agricultural products, access to water or market speculations, we speak of land grabbing. When up to 100 percent of produce is used to satisfy food and energy needs of foreign countries, local populations driven off their lands lose the ability to feed themselves and their livelihood and culture. Therefore land grabbing is of essential concern to Economic Social and Cultural rights.

This article portrays the phenomenon land grabbing and its potential negative effects on local populations concerned by ana-

lysing its implications on economic, social and cultural rights. The author targets to assess the degree of compliance with human rights standards by states and examines their potential protection from negative impacts of investments. We identify host governments as primarily responsible to respect, protect and fulfil human rights of those affected. Further this paper argues that investing governments carry extraterritorial obligations. The findings are applied to a case study of a palm tree plantation in the DRC.

2. A global rush on farmland

Rising demand for food and energy has caused a global rush on farmland. Media reports claim that within the last decade 63 million hectares (amounting to the size of France, Germany and Italy combined) have been subject to this new form of agricultural investment.¹ In 2009 alone six million hectares of land deals have been publicly announced.²

Although not an entirely new phenomenon, the Special Rapporteur on the Right to Food, Oliver De Schutter states: 'What we are witnessing is a situation in which pressures on land and water are increasing at an unprecedented speed. Each year, up to 30 million hectares of farmland are lost.'³

The different estimates clearly draw the light on a key factor of land grabs: The lack of available information and transparency. In most cases investment contracts are not publicly available and may be nested in bilateral agreements of development cooperation. Negotiations are often held under a high level of secrecy and access to information is denied to the public. Thus affected populations most likely have not been consulted in the drafting phase of agreements.

While Latin America and South East Asia have traditionally been primary targets of foreign investment in agriculture, the World Bank in its initial report on the subject found that in recent years more than 70 percent of land deals took place in Sub Saharan Africa.⁴ Generally speaking Cameroon, the DRC, Ethio-

¹ Cotula, Lorenzo (2011) 'Land Deals In Africa: What is in the Contracts?', International Institute for Environment and Development, pp. 12-14.

² The Economist, 'When others are grabbing their land, Evidence is piling up against acquisitions of farmland in poor countries', 5 May 2011, accessible at: <http://is.gd/3SL76J>, (consulted: 6 May 2011).

³ GA/SHC/3985, 'Unprecedented Pressure on Farmland', 21. October 2010, accessible at: <http://www.un.org/News/Press/docs/2010/gashc3985.doc.htm>.

⁴ World Bank Group (2011): 'Rising Global Interest in Farm Land, Can it yield sustainable and equitable benefits?', The World Bank Publications, Washington DC, n.p.a.

pia, Madagascar, Mali, Mozambique, Sudan, Tanzania and Zambia have been identified as the primary targets of land grabs.⁵

3. Foreign investors looking for food and energy

The major current investors in the Sub Saharan Region are China, South Korea and the Gulf States. Investment of the Gulf States were targeted to Sudan and other African member states of the Organisation of the Islamic Conference. China on the contrary has favoured Zambia, Angola, Mozambique and the DRC.⁶

An essential characteristic of land grabbing is the direct or indirect involvement of investing governments. By acquiring arable land for up to 99 years, states may directly outsource their food production, or execute projects via state-owned enterprises. Furthermore they often provide subsidies for food or bio-fuel production.

By and large about 50 percent of land grabs are conducted with state involvement. The forms of investments and players involved often depend on the general level of openness to foreign investment and effective governmental control in host countries. Cotula for instance reports that up to 90 percent of foreign land acquisitions in Ethiopia are done by private entities.⁷ Whereas in countries like Sudan, Zimbabwe or Congo land grabs are often granted via government-to-government agreements. Additionally international financial institutions actively encourage large-scale investment in agriculture.⁸ Stock market brokers, investment houses, private equity funds and hedge funds have

emerged as new actors in the agricultural sector acquiring farmland for speculation purposes only.⁹

While governmental investments often aim at food production, private corporations mainly produce crops for biofuels and often are based in Western countries. While financial investment in food production is highest, biofuel investments tend to occupy larger scales of land.

Contrary to the wide spread belief the most common form of land grabbing is not the transfer of ownership but the acquisition of land through long-term leasing of up to 99 years.¹⁰ Most land acquisitions are not illegal and are by and large concluded mutually and under established investment or trade law. Many agreements consist of various (political) documents. Contracts themselves are in most cases short and unspecific. They provide little exchange for public revenue and often do not specify development objectives to be fulfilled in return. Neither do they provide for adequate protection for local populations affected.¹¹ It has been found that the vast majority of investments are characterized by this lack of transparency, public information or incompleteness of contracts. Therefore it can be argued that investments that are concluded without the participation or consultation of local populations under non-transparent conditions are illegitimate.¹² Beyond that the East African Farmers Federation takes a strong position against foreign land acquisitions and explicitly states that investments that cause displacements, lack of consultation, do not contribute to national food security, degrade natural resources including water and biodiversity, are not environmentally sustainable, destroy local livelihoods and/or are initiated due to market speculations, are viewed to be illegal.¹³

⁵ Ibid, n.p.a. Also refer to: IFAD (2009): 'The Growing Demand for Land Risks and Opportunities for Smallholder Farmers', Discussion Paper prepared for the Round Table organized during the Thirty-second session of IFAD's Governing Council, IFAD, Rome, p. 51. and De Schutter, Olivier (2009): 'Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge', Human Rights Council, Geneva, p. 3.

⁶ Cuffaro, Nadina and Hallam, David (2011): "Land Grabbing" in Developing Countries: Foreign Investors, Regulation and Codes of Conduct', Working Paper 3/2011, University of Cassino, Cassino, p. 5.

⁷ Cotula, Lorenzo, *op. cit.*, p. 14.

⁸ Shepard, Daniel (2011): 'Land Grabbing and Potential Implications for World Food Security', *Sustainable Agricultural Development: Recent Approaches in Resources Management and Environmentally-balanced Production Enhancement*, Springer Verlag, Heidelberg, pp. 25-44.

⁹ FIAN (2010): 'Land Grabbing In Kenya and Mozambique, A report on two research missions – and a human rights analysis of land grabbing', FIAN International Secretariat, Heidelberg, p. 10.

¹⁰ Cufarro, Nadina and Hallam, David, *op. cit.*, p. 4.

¹¹ Cotula, Lorenzo, *op. cit.*, p. 1.

¹² Cufarro, Nadina and Hallam (2009): David, *op. cit.*, p. 1 and Spiel-doch, Alexandra and Murphy, Sophia, 'Agricultural Land Acquisitions: Implications for Food Security and Poverty Alleviation', *Land Grab? The Race for the World's Farmland*, Woodrow Wilson International-Center for Scholars, Washington DC, n.p.a.

¹³ EAFF (2010): The Entebbe Declaration on large foreign land acquisition. Entebbe. The EAFF covers the following countries: Burundi, Democratic Republic of Congo, Djibouti, Eritrea, Federal Democratic Republic of Ethiopia, Kenya, Rwanda, Uganda and the United Republic of Tanzania.

The recent food price crisis, caused by a combination of supply problems and protectionist measurements against price volatility is both cause and motivation to land grabs. On the one hand soaring agricultural prices increased the expected profit per unit of land encouraging stock markets for quick and secure investments. On the other hand, in an attempt to protect local markets from price fluctuations, many countries outsourced agricultural production.¹⁴ Therefore it has been acknowledged that the surge for arable land is 'truly a consequence' of the food crisis.¹⁵ Moreover access to water has increasingly become a motivation for large-scale land acquisitions. Rising energy consumption and soaring oil prices increased the demand for bio-fuels. Additionally population growth, natural disasters, climate change and change of diets provide for long-term explanations. Financial market speculations are also to blame for volatility and increase of commodity prices.¹⁶

At the same time host countries justify land allocations in order to obtain skills and technology for their own food production. Many investors however, are not traditional agricultural enterprises and enter the sector appreciating rising demand or subsidies from their host governments. As a consequence potential knowledge transfer is limited. Especially international financial institutions promote the availability of abundant 'unused' land in Sub Saharan Africa. But even if not cultivated, often land is used for grazing, medicinal plants or access to water.¹⁷

4. Loosing access to land and resources

Those benefiting from investments are often local elites and corrupt governments. When up to 100 percent of crops are used for export to fulfill food security targets of foreign countries, benefits for local populations are limited.

Most importantly though in any case people are driven off their lands and loose access to resources. Moreover local populations residing on land in question are not consulted or included in contract negotiations. At the same time those affected have no voice to demand justice. Investigations revealed that no African country requires free, prior and informed consent of local landholders before entering into investment contracts.¹⁸ Usually no compensation had been paid upon eviction.¹⁹

Forced evictions cause an immediate and long-term loss of access to land and resources, driving people into poverty. It is highly likely that land grabs will cause long-term socioeconomic and cultural changes in local societies, impact the value and ownership structures of land and restructure agricultural production. A shift from domestic to foreign domination of natural resources and land, will contribute to inequality between groups of society.²⁰ Foreign investors might further divide communities by privileging few and further marginalize many.²¹ While ownership structures may create new elites, displacements may cause urbanisation and loss of traditional agriculture. In many cases land grabbing provokes social and violent conflicts.²² Giving up farming to work on industrial plantations may cause a loss of personal identity and culture. Likewise job opportunities are often only temporary, low-paid and insecure.²³

Moreover the fact that investors favour weak governmental structures provides evidence for a new form of resource curse. Benefits of foreign investments are often derailed from their initial purpose and end up enriching small elites. In this context private investors often apply only the least standards in terms of environmental, social, and labour regulations in their projects.

Soil degradation and water scarcity through inappropriate forms of farming and cultivation of alien crops are serious long-term consequences of large-scale industrial cultivation. Water pollution from pesticides and fertilizers are further con-

¹⁴ IFAD, *op. cit.*, n.p.a.

¹⁵ International Land Coalition, 'Food scare sparks Third World land rush', 30 April 2009, accessible at: <http://is.gd/JaWJs7>, (consulted: 01 June 2011).

¹⁶ Spieldoch, Alexandra and Murphy, Sophia, *op. cit.*, p.43, see also: African Economic Outlook, Macroeconomic Prospects, accessible at: <http://is.gd/w3tLFP> (consulted: 08 June 2011).

¹⁷ Spieldoch, Alexandra and Murphy, Sophia, *op. cit.*, p. 45.

¹⁸ Cotula, Lorenzo, *op. cit.*, p. 32. World Bank Group, *op. cit.*, p. 38-40.

¹⁹ Cotula, Lorenzo, *op. cit.* p. 32.

²⁰ Shepard, Daniel and Anuradha, Mittal (2009): 'The Great Land Grab - Rush for World's Farmland Threatens Food Security for the Poor', The Oakland Institute, Oakland, USA, p.12.

²¹ Spieldoch, Alexandra and Murphy, Sophia, *op. cit.*, p. 46.

²² Amnesty International (2010): 'Haki Zetu, ESC Rights in Practise, The Right to Adequate Food', Amnesty International Netherlands, Amsterdam, p. 13.

²³ Spieldoch, Alexandra and Murphy, Sophia, *op. cit.*, p. 47.

sequences. Agrofuels often involve deforestation and may negatively impact greenhouse gas emissions.²⁴

Generally speaking land in Sub Saharan Africa is not only an economic or environmental asset, but also a social, cultural and ontological resource. Land is essential to construct social identity and to organize religious beliefs. Land is the link of generations and key to spirituality of African societies. As a result land traditionally had no financial value and was commonly owned. According to World Bank estimates, only two to ten percent of land in Africa is held under formal tenure.²⁵ The lack of documented rights on land puts into jeopardy the legitimacy of local land claims and effectiveness of consultations, consequently the viability of the investment as such.²⁶

5. Economic Social and Cultural rights as a tool to demand justice

Land grabbing is a clear contradiction to Economic Social and Cultural Rights (ESC). The access to land and resources has been defined as core content of the right to food, housing and self-determination. The right to food calls for a fair distribution of food supplies while the right to housing aims at abolishing forced evictions. In the context of progressive realization ESC rights outlaw a derogation of living standards without fair compensation. In its General Comments (GC) the Committee on Economic Social and Cultural Rights (CESCR) has repeatedly stressed the importance of participation of local populations in decision-making processes. Furthermore the African system of human rights puts emphasis on the right to natural resources, development and a healthy environment.

Taking a closer look on the right to food, one can derive various aspects applicable to land grabs: Firstly, the duty to continuously improve living conditions does not permit the displacement

or eviction of groups of people. A violation occurs because local populations are deprived from access to productive resources indispensable to their livelihoods as defined as core content of the right to food.²⁷ Secondly the obligation to fulfil this right refers to the facilitation of access to food. The International Covenant on Economic Social and Cultural Rights (ICESCR) emphasises to develop and reform the agrarian system (Art 11 (2)) what as such could be interpreted as to encourage the practice. However, thirdly Art 11(3) perspicuously refers to the problem of distribution of world food supplies and calls upon states to take into account food security concerns. The paradox of food insecure countries exporting crops to feed other nations is directly applicable to this paragraph. The CESCR has defined in its GC12 principles that should guide the formulation of national food security strategies.²⁸ Therefore already in the negotiation phase of most land deals a violation of the right to food can be identified.

Forced evictions have generally been an issue in large-scale development projects or foreign investment projects. Therefore the CESCR defined in GC 7 that evictions are not compatible with the human rights laid out in the ICESCR and are only justifiable in the most exceptional circumstances.²⁹ These exceptional circumstances are clarified in the Basic Principles and Guidelines on development-based Evictions and Displacement (2007) and are not applicable to land grabs.³⁰ Most evictions are not carried out in accordance with international human rights law, neither are they undertaken solely for the purpose of promoting the general welfare.

A unique feature of the African system of human rights is that it imposes duties on its citizens. Among them the duty to promote the realization of African cultural values and unity (Art. 29). Article 21 of the African Charter on Human and Peoples' Rights (ACHPR) at the same time refers to the right to freely dispose of natural resources as means to strengthen African unity and solidarity.³¹ Those who find themselves forced to

²⁴ FoEE (2010): 'Africa Up for Grabs, The Scope and Impact of Land Grabbing for Agrofuels', Friends of The Earth Europe, Brussels, pp. 18-19.

²⁵ WB, *op. cit.*, n.p.a.

²⁶ *Ibid*, n.p.a.

²⁷ E/C.12/1995/5, 12 May 1999, 'General Comment 12, The right to adequate food (Art 11)', accessible at: <http://is.gd/AIXXTd>.

²⁸ GC 12, *op. cit.*, para 23.

²⁹ E/1998/22, annex IV, 20 May 1997, 'General Comment 7, The right to adequate housing (Art. 11.1): forced evictions', accessible at: <http://is.gd/FaCypN>.

³⁰ A/HRC/4/18, 2007, 'The Basic Principles and Guidelines on development-based evictions and displacements', accessible at: <http://is.gd/eouchr>, para 21.

³¹ OAU Doc CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 21, emphasis added.

sell their labour to foreign employers are in danger to lose their identity and culture. Consequently they may find themselves unable to fulfil the duty put on them by the African Charter.

At the same time ESC rights provide for a tool to address the negative impact of land grabbing. Under the ICESCR states are obliged to allocate the maximum of available resources to the realisation of ESC rights. Moreover the principle of progressive realisation allows for long-term political strategies for their fulfilment. Although all human rights are universal and independent, ESC rights generally are seen to lack justiciability. While critics refer to them as mere political concept, there is a strong legal foundation of ESC rights, in particular the access to land and resources in the context of the right to food. The African system of human rights does not only establish detailed rights and duties for development and environmental protection but also explicitly takes into account the needs of future generations. Moreover the African Commission and African Court of Human and Peoples' Rights are mandated to accept individual complaints guaranteeing the justiciability of ESC rights.

This article assesses the level of protection provided by the above discussed ESC rights according to their influence 'before, during and after' foreign land acquisitions.³² For a comprehensive overview of the findings refer to the annexed Table.

The right to food, self-determination, housing, environment and development overall provide for the strongest protection of local populations from the negative impacts of land grabs. Additionally the African Charter has established an explicit right to enjoy natural resources providing for the strongest argument of the analysis. While the focus on the rights of indigenous peoples may exclude some groups affected by investments, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) presents a powerful and detailed regime for the protection of ESC rights including the establishment of a right to land.

³² The condition 'before' refers to the general environment of policy making in which no investments have yet taken place. State are requested to gradually fulfil ESC rights and take them into account in development policies. The classification 'during' refers to the negotiation phase of foreign acquisitions of land in which human rights impact assessments have to be concluded in order to understand the potential negative impacts of land grabs. Finally the condition 'after' refers to the period of execution and duration of tenure of investment projects in which the mitigation of

'Before' land grabs take place the right to food, self-determination, environment and development deliver the strongest arguments against the practise. By applying a human rights approach to national development policies there will be no room for large-scale acquisitions of land. Likewise foreign domination of the agricultural sector can pose an obstacle to the individual duty to contribute to African unity and tradition as laid out in the ACHPR.

Still, many governments actively encourage foreign investment in industrial agriculture. Protection 'during' the negotiation phase of investment projects is provided by the right to food requiring measurements for distribution and export of produce. Regulations of illegalizing forced evictions are essential considerations to be taken into account when allocating land to foreign investors. Moreover the right to development sets high standards in participation in decision-making in the draft of investment contracts and requires a fair distribution of the economic benefits. Even though the right to development is not listed in the ICESCR, the African Charter provides for full protection. Finally the African Commission has determined that environmental impact assessments in order to fulfil the right to environment have to be taken into account in large-scale investments.³³

Lastly the right to work and housing (prohibiting forced evictions and a derogation of living standards) provide the strongest protection for citizens 'after' land grabs, hence during the actual project execution. At the same time strong obligations under the right to food and self-determination equally apply. It is important to mention that the rights related to future generations, the right to development, to environment and access to resources as laid out in the African Charter explicitly protect future generations from long-term negative impacts of large scale industrial plantations.

The scenarios 'before, during and after' also inherit different implications for the principal duty holders of human rights

negative impacts and the distribution of potential benefits are the primary targets.

³³ The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001). Accessible at: <http://is.gd/f8wN5C>.

obligations. 'Before' land grabs host governments are clearly responsible to respect, protect and fulfil the human rights of individuals within their territory. During the negotiation phase of investments, both host and investing government carry obligations. While host states primarily have the responsibility to respect and fulfil ESC rights, they also need to be protected from the actions of third parties, such as public or private investors. Finally when land grabs have already taken place and foreign investors run large-scale industrialized plantations both the host and investor governments have the obligations to respect, protect and fulfil the rights of those affected by the projects.

6. Extraterritorial Obligations of Human Rights

Consequently those states acquiring land abroad need to live up to their Extraterritorial Obligations (ETO) of human rights towards those affected by their actions. Already the UN Charter establishes the duty to internationally cooperate to establish an enabling environment for the fulfillment of human rights.³⁴ An 'enabling environment' does not provide for space for land grabs. While it has become clear that states are obliged to internationally cooperate, Gomez reveals that no detailed definition of what constitutes international cooperation can be found in the UN Charter.³⁵ While state parties often would like to reduce their obligations to providing development assistance via financial support, Gondek points out that international cooperation is not just aid but also an effort to create better trade conditions.³⁶ In the case of land grabbing investment decisions are (in theory) made by two equally powerful state parties (or parties representing state interests) at the

same time. Therefore both national obligations and ETOs are equally applicable.

Additionally the ICESCR does not mention territory or jurisdiction, which would allow for a delimitation of the scope of state obligations, in its formulations. Therefore the Covenant can be interpreted as clearly intending the extraterritoriality of its obligations.³⁷ The CESCR already has defined that obligations are not restricted to state territory but applicable to all territories upon which the state has effective control.³⁸ The allocation of extensive rights of possession and use of land for up to 99 years presents a situation of foreigners having effective control over territories outside their home states.

Extraterritorial Obligations define the responsibility of states to respect, protect and fulfil the human rights of individuals outside their state territory. The practise of land grabbing demonstrates that although (host) states are the primary duty holders of human rights, nowadays states do not exist in isolation and have turned to increasingly act outside their territory. The application of extraterritorial obligations provides for an opportunity to adapt the ICESCR to the challenges posed upon by globalisation beyond state sovereignty to provide for international solidarity and achieve global justice.³⁹ Already since 1999 the CESCR has referred to this dimension of human rights obligations in its General Comments. Since 2001 Parallel Reports on ETOs by Civil Society Organisations have been submitted to the CESCR. In 2005 the Un Special Rapporteur on the Right to Food took up the subject. Finally in 2011 the Maastricht Principles on Extraterritorial Obligations of States in the area of ESC rights have become an essential instrument to identify human rights obligations of investing government acquiring land abroad.⁴⁰

³⁴ UN Doc 51 E/CN.4/2005/47, 24 January 2005, 'Report of the Special Rapporteur on the Right to Food', Jean Ziegler, 2005, paras 57-58.

³⁵ Gomez, Isa, Felipe (2009): 'Transnational Obligations in the Field of Economic, Social and Cultural Rights', *Revista Electrónica de Estudios Internacionales*, Número 18, accessible at: <http://is.gd/Dwezoj>, consulted: 15 February 2011, p. 7.

³⁶ Gondek, Michal (2009): *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerpen, p. 324.

³⁷ Coomans, Fons (2004): 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in Coomans, Fons and Kamminga, Menno T., 2004, *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerpen, pp. 183-200.

³⁸ Decisions have been made in the case of Israel and the Palestinian Territories. UN Doc E/1999/22 E/C.12/1998/26 4 December 1998, Report of the 18th and 19th Session, Para 232, 234. Accessible at: <http://is.gd/nuY580>. Also see 'The Wall Opinion', Advisory Opinion ICJ Reports 2004 p. 136.

³⁹ Coomans, *op. cit.*, p. 183. and Künnemann, Rolf (2004): 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', Coomans, Fons and Kamminga, Menno T., 2004, *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerpen, pp. 201-232.

⁴⁰ Coomans, Fons and Künnemann, Rolf (eds) (2012): *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights*, Maastricht Series on Human Rights, Volume 13, Intersentia, Antwerpen. See also: Gondek, *op. cit.*, p. 317-319. Gondek finds that the UDHR entails ETOs of ESCR rights referring to Article 22 and Article 28.

By applying the international reach of human rights land grabbing would not be justifiable, or at the very least, investor countries would have to put into action regulations, monitoring and due diligence in their sphere of influence.⁴¹ We speak of the responsibility of investing states to prevent, address and/or compensate human rights violations occurring outside their territories due to direct or indirect involvement. An extraterritorial obligation is identified when there is a clear link of an action of a state and the implementation of a specific human right. While obligations under direct involvement can be identified, indirect involvement of host governments often blurs the line between state and private investment. Private actors are subcontracted and investing governments often subsidize private corporations.⁴² Additionally national export credit agencies and investment banks often play an important role in financing contracts. Imports are used to fulfil state obligations towards citizens in the context of food and energy security. Therefore we can conclude that the majority of land grabs are conducted with some foreign government involvement.⁴³

The obligation to respect refers to refraining from violations outside of state territory through direct or indirect actions, such as in decision making in international organisations. Ziegler (2004) declares the obligations to 'respect' as minimum extraterritorial obligations.⁴⁴ Künnemann extends the concept and established the minimum obligation to 'cooperatively' protect the right to food.⁴⁵ Most importantly, Ziegler (2005) points out that 'states should refrain at all times from policies of which the effects can be foreseen or that they are aware will have negative effects on the right to food.'⁴⁶ While primarily applicable under the obligation to respect, in the context of already existing policies of food and energy security, states are obliged to protect the rights of citizens outside their territory from the effects of executing these strategies.

⁴¹ FIAN, *op. cit.*, p. 40.

⁴² Cotula, Lorenzo, *op. cit.*, p. 18. South Korean company Daewoo for instance has been acting under the national food security strategy in acquiring half of Madagascar's arable land. In Mali a contract had been signed by both the ministers of agriculture of host and investor governments, but land had been allocated to a private company under control of the foreign government.

⁴³ IFAD, *op. cit.*, pp. 50-52.

⁴⁴ UN Doc 51 E/CN.4/2005/47, 24 January 2005, Paragraphs 48-49.

The international obligation to 'protect' also entails the regulation of national non-state actors operating in other countries. States are obliged to regulate, investigate and bring to court private enterprises for human rights violations committed abroad under their home state jurisdiction.

State involvement in large-scale industrial cultivation of land abroad has clear effects on the availability of food in the country in question. Therefore one can conclude that investment states if directly involved in land grabs do have the positive obligation to fulfil the right to food in a foreign territory. The Maastricht Guidelines support this argument by stating that a violation of the ICESCR occurs when states fail to take into account ETOs when entering into bilateral agreements.⁴⁷

As a result the extraterritoriality of human rights obligations in the context of land grabbing can fill the accountability gap between the primary obligations of host states and human rights violations committed by foreign investors. In the following we will apply these findings to above mentioned case study of a Chinese investment in the DRC.

7. Congolese Palm Oil for the Chinese

The DRC, where Gross Domestic Product per capita in 2010 amounted to USD 300 per annum, has all the characteristic of above described land grabbing targets. With enormous natural resources of land, forest and waters, estimates of arable land currently being cultivated in the DRC range only between 5 and 20 percent. Therefore the government is actively encouraging foreign investments in agriculture.⁴⁸ The DRC land law is not adapted to the country's customs and traditions and lacks of harmonisation with other regulations such as mining and forestry codes where licences are often allocated multiply. Foreign investments in the light of weak governmental and institutional

⁴⁵ Künnemann, Rolf, *op. cit.*, p. 210.

⁴⁶ E/CN.4/2005/47, 24 January 2005, Para 51.

⁴⁷ 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', pp. 691-705, in *Human Rights Quarterly*, Vol. 20, 1998, para 15(j).

⁴⁸ The DRC covers 167 million hectares of non-forest land and the continent's second largest undisturbed tropical rainforest. For information about investment promotion see: ANAPI, 'Secteurs de l'agriculture, forêt et hydrographie', 2011, accessible at: <http://is.gd/EOyqOk>, (consulted: 30 June 2011).

structures as well as ongoing conflict may drive the country into a new resource course.⁴⁹

China is the DRC's most important export partner, accounting for 47 percent of annual exports.⁵⁰ In 2010 China has become the world's second largest economy and its largest consumer of cereals.⁵¹ Chinese policies are largely silent about a detailed food security strategy or foreign production of crops, but refer to 'taking advantage of international ... resources'.⁵² In this context the country has been identified as the largest investor of farmland acquisitions in Africa.⁵³ Chinese international business ventures are characterised by China's non-interference policy in internal affairs.⁵⁴ Taylor finds that the liberal notion of states having to guarantee individual freedom is contradictory to the strong emphasis on social stability in China. State sovereignty is seen to be the foremost collective human right.⁵⁵ Human rights conditionalities imposed on economic assistance are perceived to constitute for a violation of human rights themselves.⁵⁶ Additionally the Chinese government generally, directly or indirectly, controls investments abroad, generating the need of direct accountability for land grabs.

In 2007 ZTE International, a formerly state-owned Chinese company and the world's fifth largest mobile phone producer,

published its plan to establish a 3 million hectares oil palm plantation in the DRC, an investment of USD 1 billion to produce biofuels.⁵⁷ Both the Congolese government and Chinese investor soon restricted any further information about the project including its definite location or plan for cultivation. However in the same year ZTE Agribusiness Congo SPRL branch in Kinshasa was founded.⁵⁸ Chinese sources emphasize the potential positive effects of the deal which 'will eventually provide thousands of jobs for the local Congolese people.'⁵⁹ However ZTE International and has been criticised for harsh working conditions in China.⁶⁰

Due to the lack of information and transparency in negotiations and the initial phase of the investment, effects on the fulfilment of the right to food of the Congolese are hard to access. Taking into account previous conduct in the DRC mining sector, one can assume that large-scale foreign investments will be connected to a derogation of living standards.⁶¹ Therefore the core content of the right to food will with close certainty be violated. Furthermore it has to be assumed that the basic principles of negotiations applicable in the context (GC12 para 23) have not been applied. Reports of ZTE International being involved in various corruption scandals, as for instance in Ethiopia, support this argument.⁶²

⁴⁹ See: Farmlandgrab, 'La nécessité de réformer la loi foncière et l'harmonisation de lois sont une de solution au phénomène d'accaparement des terres en RDC', 19 April 2011, accessible at: <http://is.gd/4qzIPs>, (consulted: 01 June 2011).

⁵⁰ CIA Factbook, 'The Democratic Republic of Congo', 14 June 2011, accessible at: <http://is.gd/7KpzKx>, (consulted: 04 July 2011).

⁵¹ The Guardian, 'China overtakes Japan as world's second largest economy', 14 February 2011, accessible at: <http://is.gd/dNq8HK>, (consulted: 07.07.2011). See also: Financial Times, 'China Rules out Pursuit of African Farmland', 20 April 2009, accessible at: <http://is.gd/3NbjLJ>, (consulted: 10.06.2011).

⁵² NDRC, 'Program of Action for Sustainable Development in China in the Early 21st Century', 2007, accessible at: <http://is.gd/zHlg8y>, (consulted: 04 July 2011). Emphasis added.

⁵³ The Economist, 'When others are grabbing their land, Evidence is piling up against acquisitions of farmland in poor countries', 5 May 2011, accessible at: <http://is.gd/3SL76J>, (consulted: 6 May 2011).

⁵⁴ The non-interference doctrine has been established in 1954 among the Five Principles of Peaceful Coexistence and has further been defined in the first Asian-African Conference convened in Bandung, Indonesia in 1955.

⁵⁵ Taylor, Ian (2008): 'Sino-African Relations and the Problem of Human Rights', *African Affairs*, 107/426, Royal African Society, Oxford University Press, Oxford, pp. 63-67.

⁵⁶ Ministry of Foreign Affairs, the People's Republic of China, 'Beijing Declaration of the FOCAC', 25 September 2009, accessible at: <http://is.gd/HIGELq>, (consulted: 03 July 2011).

⁵⁷ Oil palm trees are native to West Africa, producing fruit and seeds that can be crushed to oil that is also suitable for biodiesel. Palm oil is the most widely used form of cooking oil worldwide and is found in a wide range of processed foods, as well as soap and animal feed.

⁵⁸ Alertnet, 'Africa mulls biofuels as land grab fears grow', 30 November 2010, accessible at: <http://is.gd/4KB62D>, (consulted: 11 June 2011).

⁵⁹ Xinhuanet, 'Chinese agribusiness company in DR Congo to offer thousands of jobs for locals', 10 July 2009, accessible at: <http://is.gd/zOSv8z>, (consulted: 01 July 2011).

⁶⁰ Business and Human Rights Resources Center, 'Individual Companies: ZTE', 2011, accessible at: <http://is.gd/nV41tI>, (consulted: 01 July 2011).

⁶¹ World Bank Group, 'Democratic Republic of Congo Growth with Governance in the Mining Sector', World Bank Publications, Washington DC, 2008, n.p.a.

⁶² UN Global Compact, 'Participant Information, ZTE International', 2011, accessible at: <http://is.gd/opwY7J>, (consulted: 25 June 2011). ZTE International is a registered company under the UN Global Compact Initiative and has up to today filed all requested reports.

A definite identification of local populations affected and consequent assessment of a violation of the right to housing or the right to dispose of one's resources by access to land (Art 21 ACHPR) is not possible. Consequently their protection cannot be guaranteed. Furthermore forced displacements often are not directly associated with investment projects, since they already take place during logging before foreign investors take the stage.⁶³

The Congolese government has the primary obligation to respect, protect and fulfil human rights of its citizens. However both states have the obligation to take into account GC7 concerning forced evictions upon project execution. Under the obligations of the ICESCR China is obliged to take into account the effects on the enjoyment of human rights of the Congolese. Therefore China has the obligation to protect Congolese citizens from the negative effects of ZTE Energy's business conduct.

The Congolese case provides for a typical picture of land grabbing. The ownership structure of the investing enterprise is unclear but strong state influence has been acknowledged. Moreover the enterprise takes advantage of governmental policies encouraging foreign agricultural cultivation, hence acting in state interest. Having the fifth largest mobile phone producer cultivating palm trees also provides for an example that the investor often lacks of knowledge and expertise to manage large-scale agricultural plantations. The project lacks of environmental assessments and consultations with the local population. It intends to export the majority of crops to satisfy China's biofuel demand. Moreover the project is silent about regulations for the distributions of benefits obtained through the investments, or labour standards to be applied.

The presented case underlines the above mentioned findings and turns the reader's attention to the negative effects of large-scale acquisitions of land.

8. Providing a voice for demanding justice

In recent years awareness raising on the subject was largely left to non-governmental organizations and human rights activists, only in 2009 the World Bank took up the subject and argued for principles of responsible investment. Along the same line the Committee on World Food Security has completed the intergovernmental negotiations of the FAO Voluntary Guidelines on the Tenure of Land Fisheries and Forests in the context of National Food Security. However for many ethical guidelines are not an adequate solution to the problem. Civil Society Organizations call to outlaw land grabbing. They are the ones that provide a voice for demanding justice.

In a nutshell the presented human rights framework addresses violations occurring in land grabs and shall be used to analyse investments prior, during and after their coming into existence. The concept of extraterritorial obligations provides for a conclusive approach to identify the duty holders to respect, protect and fulfil the rights of those affected by large-scale foreign investments. Consequently human rights can serve as a tool to outlaw land grabbing. Especially the right to food needs to be taken into account considering investments. Therefore the author shares the conclusion of Kofi Annan:

"The food security of the country concerned must be first and foremost in everybody's mind. Otherwise it is straightforward exploitation and it won't work. We have seen a scramble for Africa before. I don't think we want to see a second scramble of that kind."⁶⁴

⁶³ Biopact, 'DRC: Chinese company to invest USD 1 billion in 3 million hectares oil palm plantation', 28 July 2007, accessible at: <http://is.gd/hlLkOx>, (consulted: 13 May 2011), n.p.a.

⁶⁴ Kofi Annan, as cited in an the article: *The New York Times*, 'African Farmers Displaced as Investors Move In', 21 December 2010 accessible at: <http://is.gd/njF3el>, (consulted: 25 May 2011).

Table 1 Framework

Human Rights Assessment according to their potential Protection in the context of Land Grabbing

Right	Instrument	Article	Content	before	during	after
Right to Food	ICESCR	Art 11.1	no derogation of living standards	+	+	+
		Art 11.3	exporting food crops	+	+	+
	GC 12	para 6	access to land and resources	+	+	+
		para 17	maximum of available resources	+	-	o
Right to Self Determination	ICESCR	para 23	negotiation principles	o	+	-
		Art 1.1	dispose of wealth and natural resources	+	+	+
		Art 1.2	not deprived of means of subsistence	+	+	+
	ACHPR	Art 20	free of foreign domination	-	o	-
		Art 21	dispose of natural resources	+	+	+
		Art 29	duty to African unity	o	o	o
Right to housing	ICESCR	Art 11.1	no derogation of living standards	+	+	+
		GC7	exceptional circumstances for forced evictions	o	+	o
Right to Work	ICESCR	Art 6	opportunity to gain a living	o	o	o
		ILO 184	health and safety in agriculture	o	+	+
	ILO 110		working standards	-	o	+
			social action of agricultural workers	-	o	+
Right to Development	Declaration	Art 1.1	no derogation of living standards	+	+	+
		Art 2.3	fair distribution of benefits of development	+	+	+
		Art 6.3 and 8.2	participation in decision making	+	+	-
	ACHPR	Art 22	economic, social and cultural development	+	+	+
Right to Environment	ACHPR	Art 24	environmental pollution, destruction of beauty and variety	+	+	+
			environmental impact assessment	o	+	o
Rights of Indigenous Peoples*	DRIP	Art 8.2	prevent dispossession of land, territory and resources	+	+	o
		Art 10	forced evictions	o	+	o
		Art 25	right to own land	+	+	+
		Art 32	free prior consent in development strategies	+	+	o
	ILO 169		land and resources for practising culture	o	o	o

* In order to benefit from protection peoples affected need to be classified as 'indigenous peoples'.

The framework analyses the potential protection of the listed human rights: 'before' refers to the general environment of policy making in which no investments have yet taken place; 'during' refers to the negotiation phase of foreign acquisitions; 'af-

ter' refers to the period of execution and duration of tenure of investment projects. Moreover the symbols of evaluations shall be interpreted as: + strong protection, o average protection, - weak protection.

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