

Land grabs and their effect on women's rights to cultivation in Ghana and Malawi

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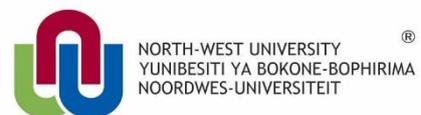
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ABSTRACT

Land is at the heart of everything human beings do. Many communities in African countries rely on subsistent farming as their source of livelihood. Ghana and Malawi have a dual legal system governing land. As such the laws applicable to a certain portion of land are dependent on the system which governs that land, be it civil or customary law. Customary law recognises the importance of women to the household and as such affords them certain rights to the land, such as the right to cultivate on the land of their father, husband or son. The aim of this study is to determine the effects of land grabs on women's right to cultivate in Ghana and Malawi. With this the various definitions of land grabs were consulted. The different international and regional legal instruments which promote gender equality were consulted. Land grabs have an effect on the men in the respected countries. Since a woman's right to land is attached to her male relation, it is safe to conclude that land grabs have an effect on the women's lives. Better regulation of land deals is needed to ensure the minimisation of land grabs.

Keywords: Land grabs; women's rights; cultivation; Ghana; Malawi; customary law

Opsomming

Grond het 'n baie belangrike plek in mense se lewens. Baie gemeenskappe in Afrika lande is afhanklik van bestaansboerdery as inkomste. Ghana en Malawi het 'n dubbele regstelsel wat grondadministrasie aanbetref. Sodanig kan die bestuur van grond onderworpe wees van siviele of inheemse reg. Inheemse reg erken die belangrike plek wat vroue speel in die huishouding en om die rede het hulle seker regte in grond, soos die reg om die grond van hulle evaders, mans of seuns te bewerk. De doel van die studie is om te bepaal wat die effek van "land grabs" is om vroue se regte om grond te bewerk in Ghana and Malawi. Verskeie definisies van "land grabs" word na gekyk, asook die verskeie internasionale en regionale instrumente wat geslagsgelykheid bevorder. "Land grabs" het 'n effek om mans se inheemsregtelike regte in grond, en seined dat vroue se regte afhanklik is van die man se regte, volg dit dat "land grabs" ook 'n effek het op vroue se lewens. Beter regulasie van grond is nodig om "land grabs" te beheer.

Sleutelwoorde: Land grabs; vroue regte; grondbewerking; Ghana; Malawi; Inheemse reg

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List of abbreviations

CEDAW	Convention on the Elimination of all forms of Discrimination against Women
DCE	District Chief Executive
EU	European Union
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
ICC	International Criminal Court
ICESCR	International Convention on Economic, Social and Cultural Rights
IEA	International Energy Agency
IFAD	International Fund for Agricultural Development
ILC	International Land Coalition
LDPI	Land Deals Policies Initiative
NLP	National Land Policy
SADC	Southern African Development Community
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
USAID	United States Agency for International Development
WCED	World Commission on Environment and Development

1 Introduction

1.1 Introduction and problem statement

Land is a very important natural resource. Land is used by humans for many things for their livelihood, such as shelter, food or for economic benefits. In many African countries land signifies wealth, the more land you have the richer you are. Many communities in the African continent use land for the purpose of subsistence farming.¹ However the tenure insecurity in many African countries hinders the use of this land.

Tenure security is but just a dream for some African countries. This could be blamed mostly on the dual (civil and customary systems) nature of the tenure system in most of the countries, such as Malawi and Ghana.² The civil system allows for the registration of individual rights to land and as such allows for "ownership" of land by an individual.³ Whereas the customary system does not allow for individual "ownership" as such, the land belongs to the community and must be used for the benefit of the community. Attached to that are the applicable customary laws.⁴ These laws do not allow for women "owning" land, it merely allows for women to have certain usage rights (such as the right to cultivate), which are attached to a male relation.⁵ Land tenure in African customary law provides for the social relations which determine who can use what land and how they are to use land.⁶ This is linked with women's right to cultivation, as the decision as to who can use what land and how is determined by these social relations. The land tenure system and its set of relations relate to other structures and institutions in society, these include family, marriage and inheritance systems.⁷ Tenure security is further compromised by the increased demand for land.

The need for land increased drastically in 2008, when commercial pressure on land increased.⁸ This shows the increase in the need for land. For a period of about ten

1 Stephens 2011 *International Affairs Review* 2.
2 Lastarria-Cornhiel 1997 *World Development* 1319.
3 Lastarria-Cornhiel 1997 *World Development* 1319.
4 Lastarria-Cornhiel 1997 *World Development* 1319.
5 Lastarria-Cornhiel 1997 *World Development* 1318.
6 Lastarria-Cornhiel 1997 *World Development* 1318.
7 Lastarria-Cornhiel 1997 *World development* 1318.
8 MacInnes "Corruption and Large-scale land acquisitions" 3.

years starting from the year 2000, it was reported that about 203 million deals were under consideration or have been approved.⁹ It was estimated that the size of the involved land in these deals was equal to eight times the size of the United Kingdom (UK).¹⁰ This sudden need for land resulted in some questionable land acquisitions, such as land grabs.

Land grabbing refers to “large scale land acquisition, be it purchase or lease for agricultural production by foreign investors.”¹¹ Borras and Franco prefer the term “trans (national) commercial land transactions as it pertains to both transnational and domestic deals, and underscores the commercial nature of the transactions regardless of scale and output markets.”¹² The International Land Coalition (ILC) defines land grabs in its 2012 Tirana declaration as acquisitions or concessions that are one or more of the following: (i) which violates human rights of the community, and disregards women’s rights to equality; (ii) does not include the free, prior and informed consent from the community which uses the said land; (iii) no thorough assessment takes place with the deals, the three legs of sustainable development (social, economic and environmental impacts) are not taken into consideration; (iv) with the contracts that are normally unclear about the commitments undertaken, the activities, employment and benefits sharing, and (v) democratic planning is not effective in these deals, the community is not given a chance to participate in a meaningful manner and there lacks an independent oversight.¹³

This phenomenon of land grabbing is nothing new, it can be traced back to centuries of history in the North, South, East and West, examples of these include the dispossession of the natives in North America and Australasia; the pre-colonial land seizures which were associated with territorial wars.¹⁴ In many Southern regions land was first grabbed by pre-colonial rulers in territorial wars, then the land was grabbed

9 MacInnes “Corruption and Large-scale land acquisitions” 3.

10 MacInnes “Corruption and Large-scale land acquisitions” 3.

11 Grain 2008, Cotula *et al* 2009, Daniel and Mittal 2009.

12 Borras and Franco 2012 *Journal of Agrarian Change* 34.

13 Tirana Declaration, 2012.

14 Franco *et al* 2013 *The Global Land Grab* 10.

by the colonial governments and then after that by foreign or domestic corporations.¹⁵ The problem with these modern day land acquisitions is that it is taking place at a rapid speed and affects the rights of the people involved.

There are a number of factors that provide a difference between the recent trend of land grabs and that from the past.¹⁶ First, being the rapid pace with which land grabs take place, this is due to the issues with food security,¹⁷ in energy security responses to 'peak oil',¹⁸ in environmental protection in the context of climate change,¹⁹ and in the global financial flow of capital since the collapse of housing markets.²⁰ Second, the trend is that of acquiring large scales of land.²¹ Third, the trend is also towards long-term leases, purchase or other economic arrangements.²² Fourth, the trend has become more global and reaching further than it was initially expected.²³ The combination of these factors led to civil society groups and transnational networks to alert the world about the land grabs and their impact.²⁴ Land grabs mainly take place in Sub-Saharan Africa and the rest of the targeted areas being Southeast Asia and Latin America. Ghana is located in the west side of Africa and Malawi are on the southeast side, however, the impact of land grabs on women are similar.

The dualistic nature of land tenure in Malawi and Ghana means that customary law plays an important role in land issues in the respected countries. As such principles of customary law are applicable. In terms of customary law women have "rights" to

15 Franco *et al* 2013 *The Global Land Grab* 10.

16 Franco *et al* 2013 *The Global Land Grab* 10.

17 Food security has become a problem in this day and age, this can be attributed to environmental factors as well as economic factors. Climate change effects are having an impact on which crops can be planted and where, thus making food production unstable.

18 Energy security is defined as the availability of energy supplies to satisfy demand at a given price (International Energy Agency (IEA) 2001), the trend is to move towards energy security which does not depend on the extraction of oil from the ground.

19 Environmental protection is important as the environment gives humans shelter, food and so on. The adverse effects of climate change are felt everywhere and the negative impacts are mainly felt by the poor. Land grabs have a negative impact in some instances, as they lead to clearing large portions of land, which leads to deforestation, soil erosion and the likes. The type of industry that will take place on that land also determines the amount of environmental damage sustained.

20 Franco *et al* 2013 *The Global Land Grab* 10.

21 Franco *et al* 2013 *The Global Land Grab* 11.

22 Franco *et al* 2013 *The Global Land Grab* 11.

23 Franco *et al* 2013 *The Global Land Grab* 11.

24 Franco *et al* 2013 *The Global Land Grab* 11.

cultivate on the family or community land when they are not married.²⁵ Upon marriage this “right” is transferred to the land of the women’s husband or the tribe of the husband. Divorce results in the termination of this right, the woman will have to go back to the parents’ land and cultivate on their land. This shows that women’s right to land are dependent on someone else, that someone being a male relation, either the father or husband. Women only have the right to cultivate on land which is given to the male representative of the family.

1.2 Research question

The purpose of this study is to determine the impacts that land grabs have on the rights of women to cultivate land in Ghana and Malawi. In order to determine this, the study will answer the question: To what extent do land grabs affect cultivation rights of women in Ghana and Malawi?

1.3 Methodology

The dissertation will be a comparative study which will be concluded by means of a literature review that will consider relevant textbooks and applicable electronic resources, international and regional agreements. This includes that the Constitution of the Republic of Ghana and that of the Republic of Malawi will be looked at with regard to aspects such as equality and rights to property. The different conventions and treaties, to which these countries are signatories, will be looked at. In the international sphere a brief discussion of the Universal Declaration of Human Rights (UDHR) of 1948, the International Convention on Economic, Social and Cultural Rights (ICESCR) of 1966 and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) of 1979. On a regional level the African Charter on Human and People's Rights of 1981 and the Southern African Development Community (SADC) declaration on gender and development of 1997. Case studies of situations in both those countries will be studied to see the impact of these land deals.

25 Lastarria-Cornhiel 1997 World Development 1318.

The problem is how these land deals should be dealt with. There are conventions in place giving protection to people's rights to land and equality, but not dealing specifically with land grabs. States are obliged by treaties to which they are signatories to protect and promote the rights of the people. As such the protection of the citizens from exploitive land deals rests with the state.

1.4 Overview of chapters

1.4.1 Chapter 1: Introduction

Chapter 1 provides an introduction into the research; it introduces the important aspect, states the research question and provides for the methodology to be used when conducting this research.

1.4.2 Chapter 2: Concept of land grabbing

This chapter focuses on the concept of land grabbing. The definition, characteristic and criticism against the definition of land grabbing are provided. The chapter also focuses on the impacts of land grabs on sustainable development and human security. To conclude the chapter land tenure in some African countries is discussed.

1.4.3 Chapter 3: Cultivation rights of women in Ghana

Chapter 3 discusses the land tenure system of Ghana, looking at both customary and civil law. A discussion on the international and domestic legal framework on women's rights, land and property rights follow. Customary law and women's right to land in Ghana is then discussed to determine what rights women have to land in Ghana if any. The Jatropha case study which deals with the biodiesel project in the Northern region of Ghana will be studied at, to look at the real life impacts of land deals on the community.

1.4.4 Chapter 4: Cultivation rights of women in Malawi

Chapter 4 discusses the Malawian land tenure system. International and domestic legal framework on women's rights, land and property rights are looked at. A discussion on customary law and women's rights to land follows. A case study on the Sugar wars in Malawi is discussed in which the impact that the land deals have on the community is discussed.

1.4.5 Conclusion and recommendations

This chapter gives the conclusion reached by the research and the recommendations to be considered. The principles to be considered when undertaking responsible agricultural investments are also discussed.

2 The concept of land grabbing

Land is very important in many African communities. The majority of people living in rural communities in Africa rely heavily on agriculture and natural resources for their social, political and economic life.²⁶ Land is, therefore, recognised as a very important asset for the rural poor.²⁷

While land grabbing is not a new phenomena it is placed in the spotlight once again due to the increase in land grabs, as well as the adverse effects it has on sustainable development. While foreigners have invested in international land assets for many centuries, the recent land grabs appear to have been labelled as an undesirable form of foreign direct investment (FDI), since recent land grabs tend to maximise unsustainable returns in the short run, without adequate compensation to the local communities affected.²⁸ This is in contrast with desirable forms of FDI aims to share the gains from trade with locals over a long time.²⁹

This chapter will look at the definition and the effect of land grabbing in general, as well as aspects of tenure, in order to facilitate a discussion on the effects of land grabbing on women's cultivation rights in Malawi and Ghana.

2.1 What is land grabbing?

Franco and others³⁰ provide that the concept of land grabbing is better understood when looked at through the political economy lens. In the introduction it has already been mentioned that land grabbing is essentially control grabbing of natural resources. It refers to the capturing of power to control land and other associated resources like water, minerals or forests, in order to control the benefits of its use.³¹ The most common definition of the global land grab refers to large scale land acquisition, be it purchase or lease for agricultural production by foreign investors.³² Other authors

26 Toulmin 2008 Land Use Policy 10.

27 German, Schoneveld and Mwangi 2011 Centre for International forestry Research (CIFOR) 4.

28 Zetland and Moller-Gulland 2013 "The political economy of land and water grabs" 257.

29 Zetland and Moller-Gulland 2013 "The political economy of land and water grabs" 257.

30 Franco *et al*/2013 TNI Agrarian Justice Programme 3.

31 Franco *et al*/2013 TNI Agrarian Justice Programme 3.

32 Graham *et al*"The Role of the EU in Land grabbing in Africa – CSO Monitoring 2009-2010).

prefer the term "(trans)national commercial land transactions as it pertains to both transnational and domestic deals, and underscores the commercial nature of the transactions regardless of scale and output markets."³³

The International Land Coalition (ILC) defines land grabs in its 2012 Tirana Declaration as acquisitions or concessions that are one or more of the following: (i) which violates human rights of the community, and disregards women's rights to equality; (ii) does not include the free, prior and informed consent from the community which uses the said land; (iii) no thorough assessment takes place with the deals, the three legs of sustainable development (social, economic and environmental impacts) are not taken into consideration; (iv) with the contracts that are normally unclear about the commitments undertaken, the activities, employment and benefits sharing, and (v) democratic planning is not effective in these deals, the community is not given a chance to participate in a meaningful manner and there lacks an independent oversight.³⁴ The above mentioned definitions by Franco and others are the most commonly used definitions.

Land grabs are made by two types of investors: food security seekers and financial investors.³⁵ Food security seekers want to increase domestic supplies and buffer local populations against global food price shocks, putting more trust in direct control over food production than in sourcing food from markets based on their willingness to pay.³⁶ The cost of food acquired in these deals may exceed global market prices, but national food security is not about price as much as quantity (household food security is about price).³⁷

An example of financial investors will be that of the European banks and pension funds which are funding Wilmar International, which is a palm oil giant in Uganda.³⁸ Wilmar

33 Graham *et al* "The Role of the EU in Land grabbing in Africa – CSO Monitoring 2009-2010).

34 Tirana Declaration, 2012.

35 Zetland and Moller-Gulland 2013 "The political economy of land and water grabs" 259.

36 Zetland and Moller-Gulland 2013 "The political economy of land and water grabs" 259.

37 Zetland and Moller-Gulland 2013 "The political economy of land and water grabs" 259.

38 Friends of the Earth International 2013 <http://www.foei.org/press/archive-by-year/press-2013/european-banks-and-pension-funds-fuel-land-grabs-in-uganda>.

is implicated in land grabbing in Uganda.³⁹ Friends of the earth International reported that British, Dutch, French and German banks gave Wilmar financial assistance of over one billion euros and it is said that European and American financial institutions own shares in the company.⁴⁰ The investors are investors in Wilmar for economic benefits and as such are financial investors.

Certain principles were developed by FAO, the World Bank, UNCTAD (United Nations Conference on Trade and Development) and IFAD (International Fund for Agricultural Development) which should guide investors on responsible agricultural investment. These principles are said to allow for investment that respects rights, livelihoods and resources with regard to agriculture.⁴¹ Detailed research on the nature, extent and impacts of foreign investments was conducted to come up with these principles.⁴² The principles include the following:

- Respect for land resource rights.⁴³ This principle entails respecting and recognising the existing land and natural resources.
- Food security and rural development.⁴⁴ Food security should not be compromised in any way by such deals and the development of the rural areas and the people.
- Transparency, good governance and an enabling environment.⁴⁵ The processes undertaken with regard to the land deals should be done in a way which is transparent and monitored carefully.
- Consultation and participation.⁴⁶ These are fundamental in democratic processes. The affected community members should be consulted with regard to the deals and should be encouraged to participate in the applicable processes as far as possible.

39 Friends of the Earth International 2013 <http://www.foei.org/press/archive-by-year/press-2013/european-banks-and-pension-funds-fuel-land-grabs-in-uganda>.

40 Friends of the Earth International 2013 <http://www.foei.org/press/archive-by-year/press-2013/european-banks-and-pension-funds-fuel-land-grabs-in-uganda>.

41 Anon 2014 <http://www.fao.org/fsnforum/forum/discussions/RAI>.

42 Anon 2014 <http://www.fao.org/fsnforum/forum/discussions/RAI>.

43 Anon 2014 <http://www.fao.org/fsnforum/forum/discussions/RAI>.

44 Anon 2014 <http://www.fao.org/fsnforum/forum/discussions/RAI>.

45 Anon 2014 <http://www.fao.org/fsnforum/forum/discussions/RAI>.

46 Anon 2014 <http://www.fao.org/fsnforum/forum/discussions/RAI>.

- Economic viability and responsible agro-enterprise investing.⁴⁷ The undertaken projects should be economically viable, respect the rule of law and should show responsible investing.
- Social sustainability.⁴⁸ The projects should not increase the people's vulnerability status.
- Environmental sustainability.⁴⁹ Measures should be taken to ensure that the environment is used in a sustainable manner. The negative impacts must be kept at a minimum.

Many show support for these principles, however, implementation seems to be the problem. Support for a legal instrument which embodies these principles seems to be very little.

Interestingly, studies showed that investors with global reputations to protect are less likely to engage in unsustainable activities while those concerned with short-term security or profits are more likely to make grab deals, since it is a useful strategy when their rule or business model is vulnerable to price volatility.⁵⁰

2.1.1 Characteristics of land grabs

NGOs, academics and the media provide the following characteristics of land grabs:

The first characteristic is that the land-use changes from community land, or land specifically devoted for production of food for subsistence or domestic consumption of land used for mass food production or biofuels for export.⁵¹ This involves taking the land from communities, which is mainly used for subsistence farming by the community and to generate some type of income for themselves. Thus community land changes to private land.

The second characteristic is that land grabs are transnational in character and the drivers are mainly the Gulf States, Chinese and South Korean governments and

47 Anon 2014 <http://www.fao.org/fsnforum/forum/discussions/RAI>.

48 Anon 2014 <http://www.fao.org/fsnforum/forum/discussions/RAI>.

49 Anon 2014 <http://www.fao.org/fsnforum/forum/discussions/RAI>.

50 Zetland and Moller-Gulland 2013 "The political economy of land and water grabs" 260.

51 Borras and Franco 2012 *Journal of Agrarian Change* 38.

companies.⁵² These countries are the main drivers in land deals, however, land deals are not limited to these countries and are not only transnational in nature, as in certain circumstances the government partakes in land deals.

The third characteristic is that land deals include finance capital and partly leading to speculative deals.⁵³ Finance capital refers to the funds which are available to acquire real capital.⁵⁴ From the Merriam-Webster's Learner's Dictionary one derives the definition of speculative deals as those deals which involve a financial risk and could result in either a large profit or a large loss. This would mean that such land deals only take place when there are funds which are readily available to enable the acquisition of the real capital, being land in this instance. This type of investment normally involves very high financial risk for the investor.

The fourth characteristic being the fact that the deals are often shady, non-transparent and do not involve any consultation processes with the locals in the host country.⁵⁵ An example of this is found in the report produced by the Friends of the Environment International in which it provides that the research which it conducted showed that Wilmar's subsidiary in Uganda violated environmental and land tenure legislation in the country.⁵⁶ This violation by Wilmar shows how shady land deals can get. How did Wilmar manage to move past the legislative requirements and obtain the necessary authorisation? The law stipulates the conditions to be met to allow for obtaining authorisation. Wilmar did not meet the required conditions, however, they managed to obtain the required authorisation. In most land deals the community is not consulted with regard to the acquisition of the land. They are not consulted and involved in deciding whether they want such a development to take place or not. The principle of transparency does not apply in such deals.⁵⁷

52 Borrás and Franco 2012 *Journal of Agrarian Change* 38.

53 Borrás and Franco 2012 *Journal of Agrarian Change* 38.

54 Anon http://www.investorwords.com/1947/finacial_capital.html.

55 Borrás and Franco 2012 *Journal of Agrarian Change* 38.

56 Friends of the Earth International <http://www.foei.org/press/archive-by-year/press-2013/european-banks-and-pension-funds-fuel-land-grabs-in-uganda>.

57 Friends of the Earth International <http://www.foei.org/press/archive-by-year/press-2013/european-banks-and-pension-funds-fuel-land-grabs-in-uganda>.

The fifth characteristic is the fact that the deals often lead to the dispossession of the locals, since most of them do not have tangible rights to land in their countries.⁵⁸ The displacement of so many families and community members ultimately has a social impact. Land grabbing has an impact on the spirituality of communities. There could be a rock which was used as a place of worship; there could be a burial ground nearby where their loved ones were put to rest. This relocation has cut such ties, now they have to find a new place of worship and have to travel far to visit the burial place of their loved ones.⁵⁹

Not all academics are happy with the most common definitions of land grabs like “(trans) national commercial land transactions as it pertains to both transnational and domestic deals and underscores the commercial nature of the transactions regardless of scale and output markets,”⁶⁰ and because of this some writers have written some criticism against this definition.

2.1.2 Criticism against the definition

Franco and others⁶¹ give criticism against the definition of land grabs. Firstly the focus seems to be on the fact that ownership changes and not on who controls the land and how that land is going to be used. Land grabs are characterised as the land being obtained in unlawful ways from a person or a group of people, which results in them losing the land and having to vacate the said land.⁶²

Secondly, the focus is more on the scale rather than the impact of the land grabs. Land grabs are now described using the scale of the acquired land, what normally follows such description are words such as thousands and tens of thousands of hectares of land.⁶³ From what the authors say it would seem like they would rather have the definition of land grabs to include the impact that these grabs have on the large scale of land that was acquired, an example being the fact that land grabs have an impact

58 Borrás and Franco 2012 *Journal of Agrarian Change* 38.

59 Major <http://www.taniamajor.org.au>.

60 Graham *et al* "The Role of the EU in Land grabbing in Africa – CSO Monitoring 2009-2010).

61 Franco *et al* 2013 TNI Agrarian Justice Programme 4.

62 Franco *et al* 2013 TNI Agrarian Justice Programme 4.

63 Franco *et al* 2013 TNI Agrarian Justice Programme 4.

on the environment. The definition should be expanded to make it clearer as to what land grabs do to the land which was obtained.

Thirdly, the focus is on the process – the emphasis is on how land grabs violate principles of transparency (the International Land Coalition have defined land grabbing as “deals that lack free, prior and informed consent by land-users, do not include socio-environmental impact assessments, and are carried out corruptly and without proper democratic participation”).⁶⁴

From what Franco and others say about the definition of land grabs it is evident that they are in favour of a more expanded definition (the definition of land grabs that was provided by the ILC in its Tirana Declaration seems to be more of an expanded definition) of land grabs and not just a narrow one (the most commonly used definitions of land grabs such as the one preferred by other authors which define land grabs as “(trans)national commercial land transactions as it pertains to both transnational and domestic deals, and underscores the commercial nature of the transactions regardless of scale and output markets”).

In a sense this definition limits the scope of what situation is to be regarded as a land grab and not just a normal purchase/lease of land transaction. The definition given by the ILC highlights the important factors surrounding land grabs, and not just limits the definition to the acquisition of large scales of land by nationals and (trans)nationals. The other definitions of land grabs could be mistaken for normal land deals between the community and the land seekers. However, the ILC provides the characteristics of land grabs as it includes the fact the concerned land deal will be in violation of human rights; no free and prior consent was acquired; the deals were not transparent; environmental and social assessments were not taken into consideration and no democratic planning and participation was involved. Land grabs violate certain democratic rights that individuals are vested with, such as the right to transparency, as the deals sometimes take place without the prior and informed consent of the

64 Franco *et al*/2013 TNI Agrarian Justice Programme 4.

community/land-users. Certain land deals could be beneficial to the host country; however, there are some serious negative impacts of land grabs, examples being economic; environmental and social impacts.

Franco and others are of the opinion that too much focus is placed on the land and not the rush for economic accumulation by national and transnational companies or the negative impacts that land grabs have on the host country.

2.2 What are the impacts of land grabs?

Land deals normally come with promises of great opportunities for the local community, the 'grabbers' promise to provide employment to the locals; investing in infrastructure and technology; education and the likes.⁶⁵ One Kusawgu-Waru who was involved in the Jatropha project in Ghana remarked as follows:

I decided to lease a land size of 300 hectares initially for the start of the project and if I find out any sign of positive development, then part of the vast idle land will be given to them to continue their operations. We need them because, we believe that their operations will generate employment for our people and create development for us.⁶⁶

However, all that glitters is not gold. Some of these deals if not most have some serious consequences for the community, an example being where valuable resources are exported out of the country to other countries, which results in the local community suffering from food and energy insecurity.⁶⁷ The situation in Madagascar illustrates the controversy surrounding land deals.⁶⁸ Large quantities of land in Madagascar were leased to a Korean company due to the government collapsing; this resulted in a public uproar.⁶⁹ What happened was that a Korean company Daewoo Logistics took a 99 year lease on 3.2 million acres of land, to grow maize and palm oil for biofuels.⁷⁰ The company was going to build its own road and other infrastructure to service the new

65 Behrman, Meinzen-Dick and Quisumbing 2012 Journal of Peasant Studies 49.

66 Boamah "The Relationship between Land Grabbing for Biofuels and Food Security" 1-21.

67 Behrman, Meinzen-Dick and Quisumbing 2012 Journal of Peasant Studies 49.

68 Behrman, Meinzen-Dick and Quisumbing 2012 Journal of Peasant Studies 49.

69 Behrman, Meinzen-Dick and Quisumbing 2012 Journal of Peasant Studies 49.

70 Spencer 2008 <http://www.telegraph.co.uk/news/earth/agriculture/3487668/South-Korean-company-takes-over-part-of-Madagascar-to-grow-biofuels.html>.

farms that will be created on currently undeveloped open space.⁷¹ The people of Madagascar protested that the deal will result them in being a South Korean colony.⁷² The protest resulted in the deal being placed on hold.⁷³ The company's intention was to grow maize and palm oil to export either back to South Korea or to sell them at international markets to raise funds to buy other food for its domestic market.⁷⁴

The countries that normally enter into land deals are based on the prospect of development. The question here is how beneficial is this development to the host country or its people?

Alter J provides the impacts of land grabs as:

Multinational companies are using natural resources in quantities and at paces that vastly exceed what would be used by local communities. The result is a worsening of the land. If the fruit of these labours was going to the local communities, perhaps that would be acceptable. However, this is unfortunately not the case. In addition to environmental concerns, land grabs also have social ramifications. Land grabs expose poor people to hunger, violence and the threat of a lifetime in poverty. Furthermore, land grabs result in the displacement of local people, which is detrimental to their human rights. For example in Uganda, a community claimed that they were forcefully evicted from their land to make way for a tree plantation. Land grabs also increase the risk of food shortages and contribute to food insecurity for Africans.⁷⁵

These land deals do not really benefit the community in the long term. The land deals have an impact on the concept of sustainable development as the social aspect of the community is infringed, in that they have to relocate to a different area. In doing so the community loses its sentimental and cultural attachments to the land. The land deals also infringe the economic aspect, as the community will not be able to use the

71 Spencer 2008 <http://www.telegraph.co.uk/news/earth/agriculture/3487668/South-Korean-company-takes-over-part-of-Madagascar-to-grow-biofuels.html>.

72 Ryall and Pflanz 2009 <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/madagascar/4240955/Land-rental-deal-collapses-after-backlash-against-colonialism.html>.

73 Ryall and Pflanz 2009 <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/madagascar/4240955/Land-rental-deal-collapses-after-backlash-against-colonialism.html>.

74 Ryall and Pflanz 2009 <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/madagascar/4240955/Land-rental-deal-collapses-after-backlash-against-colonialism.html>.

75 Alter 2013 *This Land is my Land*.

land to grow crops and harvest what they need, since the land is no more theirs. Lastly the environmental development aspect is infringed as the companies that use the land normally clear large areas of the land, this leads to further environmental degradation.

Having an International and regional instrument which is binding which deals with land grabs is needed, to address what land grabs entail and how to avoid grabbing land. Failure of which will result in a certain punishment which will be enforceable.⁷⁶ This will require governments working together and not against each other.

2.2.1 The impact on sustainable development

2.2.1.1 Defining sustainable development

Sustainable development is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁷⁷ It is characterised by two important concepts: the first being that of the needs of the world’s poor, this concept entails protecting these needs as a priority; and the second being protecting the environment by imposing limitations on how to use the environment. This is so to allow for the environment to meet the needs of the present and the future needs.⁷⁸

The concept has three areas of impact, these being social, economic and environmental development. This will be discussed below.

2.2.1.2 The three areas of impact

The *United Nations Conference on Environment and Development* (hereafter referred to as the *UNCED*) 2012 made the decision to include social and economic development aspects, to the environmental development aspect. These three areas of impact are linked to human security, as the seven threat areas of human security fall in line with the three areas of impact associated with sustainable development. Under the

76 Kugelman “Recommendations and Conclusions” 181.

77 World Commission on Environment and Development (WCED) *Our Common Future* (Oxford: Oxford University Press, 1987) 43.

78 World Commission on Environment and Development (WCED) *Our Common Future* (Oxford: Oxford University Press, 1987) 43.

economic development aspect we find economic security, under the environmental aspect we find environmental security and under the social development aspect we find; food security, health security, personal security, community security and political security. These concepts will be elaborated upon in the following sub-paragraph.

2.2.1.2.1 Economic development⁷⁹

Economic security is assured basic income for individuals; however, political tensions and ethnic violence is high due to the high unemployment rates.⁸⁰ The countries or companies that want to acquire the land promise to build schools, roads, irrigation infrastructure, and hospitals and so on. The host country involved will go into such deals thinking that it would be to the benefit of its country; since they will be gaining the above listed, however, in the long term the maintenance of these projects rests on the government. The problem is, therefore, that some countries cannot afford the maintenance, resulting in the structures then becoming bad and useless to a certain point.

The economic prospects of these deals do not benefit everyone. The families removed from such land could get compensation in some instances, however, the amount which they receive is mostly just a portion of what the land is truly worth. The majority of the money goes to corrupt state officials.

These land deals also come with the prospect of job creation in some instances. The first problem is that the jobs are mostly low paying jobs. The involved companies or countries normally come with their own experts and the menial tasks are left to the community.

What is evident from the discussion above is that land grabs take more from a country than they give. In some countries, when entering such land deals the company or country gets a reduction in the taxes which they would normally have to pay, thus not helping the economy of the country to grow. The maintenance of the structures

79 Mahbub 1995 Oxford University Press 11.

80 Mahbub 1995 Oxford University Press 11.

provided for, rests on the country, which means more money coming from the said country. This could make the country poorer than what it was before the development.

2.2.1.2.2 Environmental development⁸¹

Environmental security aims to protect all from the effects (both short and long term effects) of nature, such as pollution and global warming.⁸² Article 24 of the *African Charter on Human and People's Rights*⁸³ (hereafter referred to as the *Banjul Charter*) provides that: "All people shall have the right to a general satisfactory environment favourable to their development." Before the Charter was adopted environmental issues in Africa were only limited to natural disasters and the other possible issues with regard to the environment were not foreseen. Article 24 plays on the importance of the environment on human security, because if one lives in a satisfactory environment which is favourable to their development, then human security can be guaranteed.

The environmental impact of land grabs manifests from the activity undertaken. The impacts range from pollution, deforestation, soil erosion and the likes. An environment which is favourable to one's development helps in the development in that it provides food, shelter and so on.

Usually land grabs take place for large scale agricultural production and as such the impacts of agriculture on the environment are not always pleasant. Agricultural practices have been great emitters of carbon dioxide for a long time.⁸⁴ Increased levels of CO₂ have been found to be due to agriculture, this has been going on since the mid-1800s.⁸⁵ This is because of the conversion of land which takes place. Plants are destructed during this conversion, which leads to them releasing carbon dioxide into the air.⁸⁶

81 Mahbub 1995 Oxford University Press 11.

82 Mahbub 1995 Oxford University Press 11.

83 African Charter on Human and People's Rights, 1981.

84 Rodriguez, Sultn and Hilliker 2004 *The Traprock* 28.

85 Rodriguez, Sultn and Hilliker 2004 *The Traprock* 28.

86 Rodriguez, Sultn and Hilliker 2004 *The Traprock* 28.

The rapid growth of the human population has led to the invention of new ways to meet the demand on crops; this invention is the use of fertilisers.⁸⁷ Fertilisers are used to increase the amount of crop output.⁸⁸ The increase in the demand for food results in the increase of the use of fertilisers, this comes at a large cost to the environment.⁸⁹

2.2.1.2.3 Social development⁹⁰

Social development encompasses the threat areas such as food security, health security, personal security, community security and political security.

Food security requires that all people at all times have both physical and indirect access to basic food.⁹¹ Most of the local people rely on the land for food production (subsistent farming), thus taking the land away from them means taking away their ability to produce food. With some indigent groups, the food they eat is only found in that area and removing them from their land means removing them from their food source. The area which they relocate to may not have the same food and this means that they will have to adapt to food which they are not used to and this could be difficult. Thus food security cannot be guaranteed when land grabs take place.

Health security aims to ensure that there is a minimum standard which should be adhered to with regard to protecting individuals from diseases and unhealthy lifestyles.⁹² The poor people in both developing and developed countries have threats to their health securities, according to the UN.⁹³ When food security is compromised so is health security. Healthy eating equals a healthy human being. The type of industry that is undertaken also has an impact on this, if there is pollution, it could be detrimental to one's health.

87 Rodriguez, Sultn and Hilliker 2004 *The Traprock* 31.

88 Rodriguez, Sultn and Hilliker 2004 *The Traprock* 31.

89 Rodriguez, Sultn and Hilliker 2004 *The Traprock* 28

90 Mahbub 1995 Oxford University Press 11.

91 Mahbub 1995 Oxford University Press 11.

92 Mahbub 1995 Oxford University Press 11.

93 Mahbub 1995 Oxford university Press 11.

Personal security deals with the protection of the people from physical violence; this type of security can protect individuals from the state, other states and individuals.⁹⁴ Disputes over land normally result in violence taking place, the state might be benefiting from these deals and thus in turn want to remove these people forcefully, or the state gets threatened by those industrial companies or even the people themselves when they each have conflicting ideas on whether or not to partake in those projects.

Political security deals with ensuring the protection of people's basic human rights.⁹⁵ During periods of political unrest many human rights violations take place, and thus need better protection.⁹⁶ This aspect is better linked with personal security for the purposes of this dissertation, this is because the government could be benefiting from these deals and thus wanting to stay in power and using force and violence to win, and this thus causes political unrest and a violation of human rights and so on. An example of this is the situation in North-Western Myanmar, where people's land was seized to allow for expanding the coal mine, when they protested the police crushed these protests.⁹⁷ The opposition party leader led the report against these actions, thus creating political unrest.⁹⁸

Community security protects the traditional relationships and values of the people; and further protects the people from ethnic violence.⁹⁹ Moving people from their natural habitats is infringing on this community aspect as some of these people have cultural or religious attachments to the land from which they are being removed. Tania Major¹⁰⁰, an Aboriginal Australian elaborated:

Since many communities live on the land for time immemorial, there is also a spiritual connection to the land. Land is then also used as a place of reverence and worship, where every tree, rock and waterhole had significance; you will get some understanding of the importance of land to indigenous people.¹⁰¹

94 Mahbub 1995 Oxford University Press 11.

95 Mahbub 1995 Oxford University Press 11.

96 Mahbub 1995 Oxford University Press 11.

97 Robinson 2012 <http://m.ft.com/cms/s/0/e65369a0-39d0-11e2-85d3-00144feabdc0.html>.

98 Robinson 2012 <http://m.ft.com/cms/s/0/e65369a0-39d0-11e2-85d3-00144feabdc0.html>.

99 Mahbub 1995 Oxford University Press 11.

100 Major <http://www.taniamajor.org.au>.

101 Garson and Volunteer 2012 *Land grabbing violates human rights*.

Most communities have their burial grounds close to the homesteads, ancestral land and sacred grounds like such, which means that removing the community member's identities.

In the Belo Monte dam case the court stated clearly that:

[t]he installation [of the hydraulic plant equipment] will cause direct interference in the minimal ecological existence of the indigenous communities, with negative and irreversible impacts on their health, quality of life and cultural patrimony, on the lands that they have traditionally occupied for time immemorial.¹⁰²

The decision of the High Court of Brazil to suspend the Belo Monte dam project and to invalidate the environmental and installation licenses, shows that it is important to consult and take into consideration the needs of the people that are directly affected by such projects. Indigenous groups living in certain areas have a strong bond to the land, they eat food which can just be specific to that area, they have burial grounds and areas designated for cultural practices, so removing such people is robbing them of more than just a piece of land.

Land grabs impact both the concept of sustainable development and that of human security, this is shown by the discussion above.

Land grabs could be avoided by communities having secure land tenure. Having tangible rights to the land will enable the land owner to have the ability to fight legally for their land. This will enable them to be included in the land purchase/lease agreements, the owner has a say as to what happens to his or her land. However, this is a luxury for some African countries. Being able to prove ownership and control over a certain piece of land, could give the locals power as to whether they agree to sell/lease the land.

2.3 Land tenure

Land makes up about 75% of the wealth of developing countries. It has been long argued that having proper rights to property will help give value to the land and to

102 Hurwitz 2012 www.internationalrivers.org/blogs/258/belo-monte-dam-suspended-by-high-brazilian-court.

promote economic development.¹⁰³ The topic of land tenure is a complicated one and has received many terms and descriptions through the use of research.¹⁰⁴ Land tenure is in brief, "the social relations established around land that determine who can use what land and how."¹⁰⁵ The tenure security of an individual or entity has been defined as "the bundle of land rights held with rights being described along several dimensions (e.g. type and breadth, duration, and certainty of exercise)."¹⁰⁶ Thus, the concept of tenure insecurity arises when rights to property are lacking or are uncertain; this makes the individual/groups more open to having their land/property expropriated from them.¹⁰⁷ It is important to have certain and clear rights to property to ensure that there is tenure security, this will entail having recognisable rights to the property, be it ownership rights; rights to use the property and rights to alienate the property. This is only possible if one has a recognisable right to the property. This will also protect the right holder from having the property expropriated from them.

In many African countries one finds many different tenure systems, most of which are quite difficult to comprehend.¹⁰⁸ The many different African countries have different types of customary tenure systems, these systems are, however, adapting to the different economic and social processes found in the world.¹⁰⁹ The common denominator amongst these different tenure systems lies in the fact that the community remains the owner¹¹⁰ of the communal land and the resources found within that area.¹¹¹ Management of the communal resources such as water lies with the community and agricultural land is allocated to the different individual households.¹¹²

103 Blocher 2006 *Yale Human Rights and Development Law Journal* 166.

104 Place 2009 *World Development* 1327.

105 Lastarria-Cornhiel 1997 *World Development* 1317.

106 Place 2009 *World Development* 1327.

107 Place 2009 *World Development* 1327.

108 Lastarria-Cornhiel 1997 *World Development* 1319.

109 Lastarria-Cornhiel 1997 *World Development* 1319.

110 It is important to note that the term "owner" with regard to communal land does not mean "owner" in the western sense of the word. Here owner means that the community has certain rights to the concerned land, such as rights to use and enjoy the benefits of the land. The chief acts as trustee for the community with regard to the land. As much as the community is not owner in the traditional sense of the word, the community still has to be consulted with regard to major issues that concerns the land.

111 Lastarria-Cornhiel 1997 *World Development* 1319.

112 Lastarria-Cornhiel 1997 *World Development* 1319.

To understand the different rights that persons have to land and what impact privatisation of property has on land tenure systems, it is conceptually and empirically useful to distinguish between access to land and control of land.¹¹³ Control of land is “the command an individual has over a particular piece of land and over the benefits that derive from that land; this right is based on some type of recognised possession (customary or formal, temporary or permanent).”¹¹⁴

Access to land simply means that “a person is able to make use of the land.”¹¹⁵ Control of land seems to be the stronger right between the two rights, as the one in control of the land can determine who uses the land and how. The one in control could also determine who has the right of access to the land. In most African countries women only have the right of access to the land, and this access is obtained either from the father or from the husband. With this land women normally use to cultivate crops which will enable them to feed their families. The women normally engage in subsistence Farming which allows them to provide for their families and the remainder of the crops can be sold at the markets for extra income for their families. This right of access comes in the sense of a right to cultivate for women. Women’s access to land is often dependent on the male head of the family. The male head in the family will normally give the woman a piece of land to cultivate, hence the importance of tenure security for the protection of women’s rights. Once the land is taken away from the head of the family, then the woman loses her right of access/cultivation right.

The most difficult thing being faced by African countries, is trying to merge customary and statutory property law.¹¹⁶ It is crucial for the two to merge in order to align themselves with international standards and to also allow for better protection. Trying to merge the two and have a rational and efficient land policy is proving to be difficult for many countries.¹¹⁷ This is due to the fact that there must be a balancing act

113 Lastarria-Cornhiel 1997 *World Development* 1318.

114 Lastarria-Cornhiel 1997 *World Development* 1318.

115 Lastarria-Cornhiel 1997 *World Development* 1317.

116 Blocher 2006 *Yale Human Rights and Development L.J* 168.

117 Blocher 2006 *Yale Human Rights and Development L.J* 168.

between the modern statutory law and the customary law which governs the everyday lives of many African communities.

2.4 Conclusion

Customary tenure system allocates enough land to each household in the community to allow for the household to provide for their subsistent needs.¹¹⁸ As such women are enabled to provide for themselves and their families, however, their access to land and its resources is dependent on a male relative.¹¹⁹ Customary tenure systems are undergoing rapid change and cannot assure households' and women's access to sufficient land.¹²⁰ Land grabs continue to be a problem especially in African countries; they have an impact on the rights of the community and limit the rights women have to land. These land issues coupled with land grabs call for attention to be placed on regulating land grabs. Many African countries still use the customary tenure system and this to a certain extent limits the rights of women to land. Moving towards formalising land rights in both Ghana and Malawi is a step that is needed to ensure that women have their rights to land protected. The majority of land in both these countries is held under customary law, so the rules that govern the land are customary laws. Customary law does not allow for women to own land, women are merely given certain rights to land through their relationships with men, be it their husbands or fathers. This goes against gender equality on so many levels, but the level that is important for the purposes of this dissertation is to protect those little rights afforded to women by customary law.

118 Lastarria-Cornhiel 1997 *World Development* 1328.

119 Lastarria-Cornhiel 1997 *World Development* 1328.

120 Lastarria-Cornhiel 1997 *World Development* 1328.

3 Cultivation rights of women in Ghana

Land is a very important resource in the living conditions of women; it allows for economic empowerment and is a major factor in the fight against equality.¹²¹ It is estimated that in Southern Africa an average of about 60% of women rely on land for their livelihoods.¹²² This means that more than half of the women population in Southern Africa depend on land to survive and for the upkeep of their families. Women mainly receive access to land through their family, legacies, marriage or by contractual agreements.¹²³ Land plays an important role with regard to socio-economic development, food security and poverty alleviation; this would be done by ensuring the security of land rights and the reasonable access to land by the community with specific reference to women.¹²⁴ Land has proven to be a very vital resource towards fulfilling the basic needs of the rural community.¹²⁵

Customary law dictates that every person from a lineage has an inherent *usufructuary* right,¹²⁶ to access the community or family land, regardless of their gender. Elements such as marital residence, shortage of land, and so on determine the size of land that the woman will be given; these elements have an impact on the women's access to *usufruct*.¹²⁷ The Constitution of Ghana¹²⁸ protects women's rights to possess and to inherit land; however customary law does not provide such protection.¹²⁹ Customary law is important in this instance because the majority of land in Ghana is held under customary law, therefore making women's rights to land insecure.¹³⁰

121 Mutangadura 2004 sociologistwithoutborder's.org.

122 Mutangadura 2004 sociologistwithoutborder's.org.

123 Runger 2006 https://www.fig.net/.../ts01_02_ruenger.pdf.

124 Yirah 2012 "Land grabbing, biofuel investments" Policy brief.

125 Yirah 2012 "Land grabbing, biofuel investments" Policy brief.

126 Inherent *usufructuary* right means a vested right to use or enjoy something that belongs to someone else, in this case it would mean the vested legal right of women to use the land and enjoy the fruits of the land.

127 Runger 2006 https://www.fig.net/.../ts01_02_ruenger.pdf.

128 Article 18(1) of the Constitution of Ghana, 1992.

129 USAID 2012 <http://landwise.landesa.org/record/1304>.

130 USAID 2012 <http://landwise.landesa.org/record/1304>; Lamudi 2014 www.lamudi.com.gh/journal/land-ownership-ghana-2.

3.1 Land tenure in Ghana

Ghana uses a dual legal system for governing land, both statutory and customary law govern land in this African country.¹³¹ The majority of the land is held informally, under customary law.¹³² The Constitution also describes the nature of customary land ownership "as a social trust, whereby stools, skins or lineages hold land in care for their subjects whether living, dead and yet to be born."¹³³ This shows that the use of customary law in land is recognised by the constitution of Ghana. This makes sense since the majority of land in the country is held under customary law; it thus makes sense to have it governed in terms of the same law.

Blocher¹³⁴ says the following about the situation in Ghana:

Land is Ghana's single most valuable asset and the foundation of the national resource base. Agriculture accounts for more than sixty percent of the country's jobs. Despite its economic importance, however, the land sector in Ghana is plagued with a number of major problems. The National Land Policy (NLP) of Ghana, published in June 1999 after years of broad consultation, provides a good overview of the nature and scope of the obstacles to land sector development, including indeterminate boundaries, weak land administration and inadequate land tenure security. These problems and the importance of land itself are representative of problems across the country side.¹³⁵

As the most valuable asset of the country, land should be protected and governed in a way that ensures it's protection. Tenure security should be a prevailing thought in the majority of Ghana's population and furthermore a reality and not just a thought.

3.1.1 Tenure types in Ghana

The different categories of land tenure in Ghana are allodial title; freehold title; customary freehold title; leasehold and sharecropping.

131 USAID 2012 <http://landwise.landesa.org/record/1304>.

132 USAID 2012 <http://landwise.landesa.org/record/1304>.

133 USAID 2012 <http://landwise.landesa.org/record/1304>; Article 267 (1) of the Constitution of the Republic of Ghana.

134 Blocher 2006 *Yale Human Rights and Development L.J* 169.

135 Blocher 2006 *Yale Human Rights and Development L.J* 169.

Allodial title is vested in stools, skins, clans or families and is the highest form of customary tenure in Ghana.¹³⁶ Land is for the entire community, therefore, rights to the land belong to the community; however, the chief or traditional leader holds the actual title to the land.¹³⁷ According to customary law the elders must agree to the transfer of the land, before such transfer can be regarded as valid.¹³⁸

Freehold title (or common law freehold title) is derived from a freehold grant by an allodial rights holder.¹³⁹ The chief hold this land for the individuals or groups who have an interest in the land.¹⁴⁰ In order to have the rights regulated in terms of statutory law, all the involved parties must explicitly consent to have the change from customary law to common law.¹⁴¹ This will mean that common law will regulate all that concerns that land, be it disputes or transfers.

Customary freehold title refers to "the rights held by individuals or groups on behalf of the 'owner' community (such as the stool or skin)."¹⁴² This is based on the idea of having rights to use a portion of stool land given to male descendants of the first settlers of a region.¹⁴³ They can exercise this right by cultivating on the land.¹⁴⁴ Under this type of land tenure the holders may sell, lease or mortgage their rights to this land.¹⁴⁵ This title is held conditionally everlasting.¹⁴⁶ However, this does not take away the superior nature of the stool or skin.¹⁴⁷ The recipient of the land must still adhere to his customary obligations with regard to the land when asked to.¹⁴⁸

136 USAID 2012 <http://landwise.landesesa.org/record/1304>.

137 Blocher 2006 Yale Human Rights and Development L.J 179.

138 USAID 2012 <http://landwise.landesesa.org/record/1304>.

139 USAID 2012 <http://landwise.landesesa.org/record/1304>.

140 Blocher 2006 volume 9 Yale Human Rights and Development L.J 180.

141 USAID2012 <http://landwise.landesesa.org/record/1304>.

142 USAID 2012 <http://landwise.landesesa.org/record/1304>.

143 USAID 2012 <http://landwise.landesesa.org/record/1304>.

144 USAID 2012 <http://landwise.landesesa.org/record/1304>.

145 USAID 2012 <http://landwise.landesesa.org/record/1304>.

146 USAID 2012 <http://landwise.landesesa.org/record/1304>.

147 USAID 2012 <http://landwise.landesesa.org/record/1304> .

148 USAID 2012 <http://landwise.landesesa.org/record/1304>.

Leasehold is a time-bound right.¹⁴⁹ Allodial title and freehold title holders can grant leasehold to individuals.¹⁵⁰

Sharecropping has two arrangements being the *abunu* and *abusa*.¹⁵¹ Under an *ubunu* arrangement, the sharecropper provides one-half of the harvest to the landlord and under the *abusa* the sharecropper provides one-third of the harvest.¹⁵²

3.1.2 Statutory land law in Ghana

The Constitution of Ghana¹⁵³ is the starting point in this regard; the Constitution provides that all the public land is entrusted in the President.¹⁵⁴ The Constitution further entrusts stools, skins or clans with the holding of customary land.¹⁵⁵ In terms of the Constitution foreigners can only lease land for no more than 50 years.¹⁵⁶

Matters that have to do with compulsory and compensation of property are dealt with in terms of the 1962 *State Lands Act*.¹⁵⁷

Land registries find their powers and responsibilities in the *Land Title Registration Act*¹⁵⁸, the Act ensures that there is a set standard for registration; that registration of land is made compulsory and to ensure that government is able to compel its people to register.¹⁵⁹ The structure for the supervision of stool and skin lands is found in the *Office of the Administrator of Stool Lands Act*.¹⁶⁰

There are statutory measures put in place that deal with the transfer and ownership of land in Ghana. These are the channels which should be consulted on how to deal

149 USAID 2012 <http://landwise.landesesa.org/record/1304>.

150 USAID 2012 <http://landwise.landesesa.org/record/1304>.

151 USAID 2012 <http://landwise.landesesa.org/record/1304>.

152 USAID 2012 <http://landwise.landesesa.org/record/1304>.

153 Constitution of the Republic of Ghana, 1992.

154 USAID 2012 <http://landwise.landesesa.org/record/1304>; Article 257(1) of the Constitution of the Republic of Ghana.

155 Article 267(1) of the Constitution of the Republic of Ghana.

156 USAID 2012 <http://landwise.landesesa.org/record/1304>; Article 266(4) of the Constitution of the Republic of Ghana.

157 *State Lands Act*, 1962.

158 *Land Title Registration Act*, 1986.

159 USAID 2012 <http://landwise.landesesa.org/record/1304>.

160 *Office of the Administrator of Stool Lands Act, 1994*; USAID 2012 <http://landwise.landesesa.org/record/1304>.

with land deals, they provide which systems to follow and how they are to be followed. However, with these land deals the proper channels are not always followed. This thus limits tenure security, which have an impact on the security of women to have land to cultivate.

3.2 The legal framework on women's rights, land and property rights

3.2.1 International legal framework

The issues on tenure security have been recognised internationally, and a gap with regard to regulating access to property was identified by the international community. The guarantee to reasonable access to property is an important aspect of social justice¹⁶¹ and equity.¹⁶² International law is an important aspect as it aims to regulate the interaction between states, and it is at the forefront of human rights protection. The laws of the state in which the land grabs take place must be looked at; however, most African countries do not prioritise most human rights, the goal is for development.¹⁶³ Development is a good thing, as it shows progress within a country; however, the problem comes when the development in itself disregards human rights.¹⁶⁴ This is done for example when leasing customary land to a transnational company without obtaining consent from the community and without informing them of the lease agreement. This goes against the community's human rights, since their social, economic and religious status is impacted by the displacement.¹⁶⁵ The community will then have to start over with their lives in a different environment. Development that adheres to the three legs of sustainable development is more in with development that does not infringe on human rights.¹⁶⁶

161 Social justice is justice in terms of the distribution of wealth, opportunities and privileges within a society.

162 Equity has to do with everyone having access to fair and equal treatment under the law, regardless of race, social class or gender; Runger 2006 https://www.fig.net/.../ts01_02_ruenger.pdf.

163 World Commission on Environment and Development (WCED) *Our Common Future* (Oxford: Oxford University Press, 1987) 43.

164 World Commission on Environment and Development (WCED) *Our Common Future* (Oxford: Oxford University Press, 1987) 43.

165 World Commission on Environment and Development (WCED) *Our Common Future* (Oxford: Oxford University Press, 1987) 43.

166 Mahbub 1995 Oxford University Press 11.

This is because the legs of sustainable development allow for development of the area and the community at the same time. The reality is that in most cases land grabs take place between two different states or corporations from another state (like the Norwegian biofuel company that made a deal in Ghana)¹⁶⁷, therefore, the need for a middle ground, that being international law.

3.2.1.1 *Universal Declaration of Human Rights*¹⁶⁸ (*the Declaration*)

The *Declaration* provides for the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.¹⁶⁹ Article 1 of the *Declaration* stipulates the freedom and equality aspect of all human beings.¹⁷⁰ It further reaffirms that everyone has rights regardless of their gender in Article 2. Article 2 provides that “everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁷¹ This shows that women also have equal rights to property as men, which cannot be alienated by any law.

Land grabs have an impact on these rights. Most women in Ghana do not own the land, but have rights to use the land. Women have rights such as the right to cultivate on the provided land and to access the land. This right to use the land is usually dependant on the woman’s relationship to a man (e.g. the father, husband or son). Land grabs take away from this as the responsible people take (lease) the land for a long period of time, and the women do not have a say, as they do not own the land they merely have a right to access the land and to use the said land.¹⁷² The Constitution of Ghana also provides for equality in all forms.¹⁷³ A woman having a dignified life

167 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS_BIOFUEL.pdf.

168 *Universal Declaration of Human Rights* 1948.

169 Preamble of the *Universal Declaration of Human rights*, 1948.

170 *Universal Declaration of Human Rights*, 1948.

171 *Universal Declaration of Human Rights*, 1948.

172 USAID 2012 <http://landwise.landesa.org/record/1304>.

173 Article 12(2) of the Constitution of the Republic of Ghana.

means being able to take care of her family amongst other things and for some women, it means having land which they can cultivate.¹⁷⁴

3.2.1.2 *International Covenant on Economic, Social and Cultural Rights (ICESCR)*¹⁷⁵

Ghana signed and ratified *ICESCR* on the 7th September 2000. *ICESCR* provides that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.”¹⁷⁶ The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.¹⁷⁷ Article 11(1) provides that “the State Parties recognise the right of everyone to an adequate standard of living for himself and his family, including adequate clothing and housing, and to the continuous improvement of living conditions.”¹⁷⁸ Women in the rural areas mainly rely on land to feed and clothe their families; they do this by means of planting vegetables on the land portion which is allocated to them.¹⁷⁹ This process of planting enables them to sustain an adequate standard of living, which is provided for in terms of article 11(1) of *ICESCR*. Women normally use the land to cultivate which enables them to further their economic interests, to give them a social standing in the community as women.¹⁸⁰ In terms of customary law, which falls under the cultural rights, a woman has a right to cultivate the land that has been designated to her.¹⁸¹

3.2.1.3 *Convention on the Elimination of All Forms of Discrimination Against Women [(CEDAW)]*¹⁸²

174 USAID 2012 <http://landwise.landesa.org/record/1304>.

175 *International Covenant on Economic, Social and Cultural Rights*, 1966.

176 Preamble of the *International Covenant on Economic, Social and Cultural Rights*, 1966.

177 Article 3 of the *International Covenant on Economic, Social and Cultural Rights*, 1966.

178 *International Covenant on Economic, Social and Cultural Rights*, 1966.

179 *International Covenant on Economic, Social and Cultural Rights*, 1966.

180 Article 11(1) of *ICESCR*.

181 USAID 2012 <http://landwise.landesa.org/record/1304>.

182 *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979.

Ghana signed *CEDAW* on the 7th July 1980 and ratified it on the 2nd January 1986, Ghana also signed the *Optional Protocol to CEDAW*. *CEDAW* places an obligation on Ghana to ensure the protection and promotion of women's rights to property. Discrimination against women violates the principles of equality of rights and respect for human dignity.¹⁸³ The international financial sector should institute financial order on the basis of equality and fairness; this will enable the move towards equal rights for both men and women.¹⁸⁴

CEDAW places an obligation on State Parties to ensure that there are measures in place to remove discrimination against women. In Article 13(a) it provides "that State Parties shall take all appropriate measures to eliminate discrimination against women, in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: the right to family benefits."¹⁸⁵ In terms of customary law a woman has the right to cultivate the land of her parents when she is not married and that of her husband or his family when she is married.¹⁸⁶ This can be construed as a family benefit for the purposes of article 13(a).

CEDAW further places an obligation on State Parties to acknowledge the problems that rural women have and their roles in their families, including on an economic level; state parties are also obliged to take measures to ensure the protection of women in rural areas, this is found in Article 14(1) of *CEDAW*.¹⁸⁷ This problem of land grabs normally take place in the rural areas, where land is mainly held under customary law. Article 14 provides that the state party must ensure the application of this provision. Rural women face problems with regard to their rights to land, thus in accordance with this provision, Ghana is obliged to take measures to ensure the protection of the rights of these rural women.¹⁸⁸

183 Preamble of the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979.

184 Preamble of the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979.

185 *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979.

186 Runger 2006 https://www.fig.net/.../ts01_02_ruenger.pdf.

187 *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979.

188 Article 14(1) of *CEDAW*.

3.2.1.4 *Beijing Declaration and Platform for Action*¹⁸⁹

Under the *Beijing Declaration and Platform for Action*, Covenant for the New Millennium (Fourth World Conference on Women, Beijing, September 4-15, 1995) it is said that lack of financial prospects, lack of access to financial resources such as owning land and inheritance; and their lack of involvement in the decision-making process, is a direct link to women's poverty.¹⁹⁰ In most cases of land grabs the community is not consulted in the decision-making process of whether to lease the land or not.¹⁹¹ Even when the community is consulted, women are not included in the decision-making process, and this goes against the Action.¹⁹² Economic security for women in Ghana is not thriving; some women rely on the land for food and money. They use the land to plant food to eat and some of the plants, they sell for money.¹⁹³

3.2.2 *Domestic legal framework*

3.2.2.1 *The African Charter on Human and People's Rights*¹⁹⁴ (the Banjul Charter)

The preamble of the *Banjul Charter* provides that "freedom, equality, justice and dignity are the essential objectives for the achievement of the legitimate aspirations of the African People's."¹⁹⁵ Article 2 of the *Banjul Charter* provides for the enjoyment and entitlement of rights for all without any type of discrimination, be it gender, race, religion and so on.¹⁹⁶ Article 17(3) provides that the promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.¹⁹⁷ This shows that the customs and values of the communities are important and should be taken into consideration. Most communities in Ghana are ruled by customs and values of the area, this includes how land is to be used and by whom. In terms of many of the customs in the different communities, women have rights to

189 *Beijing Declaration and Platform for Action*, 1995.

190 Runger 2006 https://www.fig.net/.../ts01_02_ruengerpdf.

191 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fued-1.

192 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fued-1.

193 Mahbub 1995 Oxford University Press 11.

194 *African Charter on Human and People's Rights*, 1981.

195 Preamble of the *African Charter on Human and People's Rights*, 1981.

196 Article 2 of the *African Charter on Human and People's Rights*, 1981.

197 *African Charter on Human and People's Rights*, 1981.

cultivate land, be it the land of their parents or that of their spouse, depending on their marital status.¹⁹⁸

The *Banjul Charter* further obligates State Parties in Article 18(3) to guarantee that all forms of discrimination against women are removed and to guarantee further that their rights and those of children are protected in terms of International declarations and conventions.¹⁹⁹ Discrimination against women is at the forefront of land deals, as the consultation process happens without women being involved in the negotiation process. Article 18(3) puts an obligation on State Parties to eliminate discrimination and it only makes sense that this discrimination faced by women during land deals should be eliminated.²⁰⁰ To achieve a state of fair and equal consideration during land deals, the state will have to play a big role.

3.2.2.2 *The Constitution of the Republic of Ghana*²⁰¹

The constitution emphasises the importance of common law in Ghana by stipulating that “the laws of Ghana shall comprise of the common law”,²⁰² in Article 11(1) (e) of the constitution. The common law criteria as found in Article 11 includes common law in its general sense (laws which exists and applies to a group on the basis of customs and legal precedents)²⁰³, the doctrine of equity (a body of law that addresses concerns that fall outside the jurisdiction of common law)²⁰⁴ and the rules of customary law (included in the rules of customary law will be the laws determined by the Superior Court of Judicature).²⁰⁵

In Article 11(3) the definition of customary law is given and in terms of that provision common law means “the rules of law, which by custom are applicable to particular

198 Lastaria-Cornhiel 1997 *World Development* 1319.

199 *African Charter on Human and People's Rights*, 1981.

200 Article 18(3) of the *Banjul Charter*.

201 *Constitution of the Republic of Ghana*, 1992.

202 *Constitution of the Republic of Ghana*, 1992.

203 Duhaume's law dictionary provides for the definition of common law.

204 The free dictionary provides for the definition of equity.

205 Article 11(2) of the *Republic of Ghana*, 1992.

communities in Ghana.”²⁰⁶ Even though these customs are not written down or codified, the fact that they are customs recognised and acknowledged by the community in which they apply; make them customs as required by the Constitution. Article 11 shows the importance of customary law in the legal system of Ghana. Therefore, the rights afforded to women by customary law should be taken into consideration and protected.

The equality of all persons is contained in Article 17 of the Constitution²⁰⁷. The Article further prohibits discrimination of individuals in any type, shape or form.²⁰⁸ Discrimination is prohibited be it based on sex, religion, colour or ethnic origin. The state has been obligated by the constitution to take steps which will enable women to be added into the economic development of the country, this will allow for the required equal economic opportunity to all.²⁰⁹

Individuals or groups of people have a right to own property in Ghana, however this right has been limited when coming to women based on the legal system used in the area in which they reside and the ability of the woman to have such land rights registered²¹⁰ This is due to the fact that customary land is controlled by stools, skins or clans for the people of that area, and as such customary law will be used in managing the use and access of that land.²¹¹ Tenure security is important in order to give the individuals or groups of people secure rights, however, this does not mean that women will have more rights. Women’s rights in the public or formal sphere of the law have to some extent limited women’s ability to benefit from such formal structures, included in this being the registration systems.²¹² This could be due to the fact that registration procedures are usually burdensome, costly and time-consuming.²¹³ Some of rural women are illiterate and with registering property one

206 Constitution of the Republic of Ghana, 1992.

207 Article 17(1) of the Constitution of the Republic of Ghana, 1992.

208 Article 17 (2) of the Constitution of the Republic of Ghana, 1992.

209 Runger 2006 https://www.fig.net/.../ts01_02_ruenger.pdf; Article 36(6) of the Constitution of the Republic of Ghana.

210 Article 18 of the Constitution of the Republic Ghana, 1992.

211 Article 267(1) of the Constitution of the Republic Ghana, 1992.

212 Runger 2006 https://www.fig.net/.../ts01_02_ruenger.pdf.

213 Runger 2006 https://www.fig.net/.../ts01_02_ruenger.pdf.

has to have certain documents and sign some documents. This becomes a problem for the women as they have to rely on someone else to explain the content of the documents.²¹⁴ In some cases the women will have to pay someone to help with the documents. This adds to the costs already incurred by the women. Registration procedures normally require some form of payment, either for the documents required or for the person facilitating the process or even for both.²¹⁵ Included in the costs for these women would be transportation costs, since the women will have to go to the offices dealing with such registration.²¹⁶ These offices are normally located in towns and will require vehicles for some of the women to get to. Then there is the time factor, this process of acquiring documents going from your home to town and standing in lines for registering your property is time consuming.²¹⁷ For some they would rather use the time to do other things, which they deem more important in their lives.²¹⁸

In terms of customary law, customary land is held in trust by the chief or stool for the community.²¹⁹ The stool will determine which land goes to which family and how certain portions of land will be used. The constitution reiterates this notion in Article 267(1), in which it stipulates that the stool land vests in the stool on behalf of its community.²²⁰ The constitution recognises the chief as the trustee of customary land and will not interfere unnecessarily with regard to the decisions taken by the chief with regard to that land; however, the state still retains wide-ranging authority to oversee the ownership of that land.²²¹ This is found in Article 267(5)²²² which provides for the prohibition of making ownership rights to any customary land, this allows the state to regulate the use of this land.²²³

214 Runger 2006 https://www.fig.net/....ts01_02_ruenger.pdf.

215 Runger 2006 https://www.fig.net/....ts01_02_ruenger.pdf.

216 Runger 2006 https://www.fig.net/....ts01_02_ruenger.pdf.

217 Runger 2006 https://www.fig.net/....ts01_02_ruenger.pdf.

218 Runger 2006 https://www.fig.net/....ts01_02_ruenger.pdf.

219 *Office of the Administration of Stools Act*, 1994.

220 *Constitution of the Republic of Ghana*, 1992.

221 Blocher 2006 Yale Human Rights And Development Law Journal 185.

222 Article 267(5) of the *Constitution of the Republic of Ghana*, 1992 provides that: "No interest in, or right over, any stool land in Ghana shall be created which vests in any person or body of persons or body of persons a freehold interest howsoever described".

223 Blocher 2006 Yale Human Rights And Development Law Journal 185.

It is clear that the Constitution of Ghana tries to bridge the gap between men and women, as equality is included.²²⁴ The constitution prohibits any form of discrimination, so excluding a woman from land deals solely based on her gender is in contravention of the constitution of the country. However it is interesting to note that the Constitution will refrain from unnecessarily interfering with the decisions taken by the chief with regard to customary land.²²⁵ This basically means that a woman may own and purchase land provided that it does not form part of customary land and that she has gone through the process of formalising her right to that land.²²⁶

Women also have a right to own property in terms of the Constitution²²⁷, however, owning land as a woman in many African countries is easier said than done. This could be due to issues that come with formalising such right, time and money are important factors when formalising rights to property.²²⁸ As subsistent farmers, rural women lack the necessary funds and resources to register their pieces of land. Another factor that hampers the ability of women to own land is the fact that the majority of land in Ghana is held in terms of customary law and not statutory law.

The Constitution recognises customary law as a legal system, and the vast majority of land in Ghana is held in terms of customary law.²²⁹ Customary law does not recognise the right of women to own land; it however, gives women the right to use the land, such as the right to cultivate.²³⁰

3.3 Customary law

The Ghanaian legal systems is made up of both customary and statutory law, which intersect with each other, the legal system in Ghana is a pluralistic one.²³¹ In modern

224 Article 17(1) & (2) of the Constitution of the Republic of Ghana provides: "(1) All persons shall be equal before the law (2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status."

225 Blocher 2006 *Yale Human Rights And Development Law Journal* 185.

226 Blocher 2006 *Yale Human Rights And Development Law Journal* 185.

227 Article 18(1) of the Constitution of the Republic of Ghana which provides that every person has the right to own property either alone or in association with others."

228 Runger 2006 https://www.fig.net/.../ts01_02_ruenger.pdf.

229 Lamudi 2014 www.lamudi.com.gh/journal/land-ownership-ghana-2.

230 USAID 2012 <http://landwise.landesesa.org/record/1304>.

231 USAID 2012 <http://landwise.landesesa.org/record/1304>.

Ghana customary law is recognised as part of the laws of the country in the Constitution of the Republic of Ghana.²³² The fact that most of the land in Ghana is held under customary law means that the Stool plays a big role with regard to land and land rights in the country.²³³ Traditional leaders are obliged by the constitution to act as the keeper of land for the community and to act in the best interests of the community.²³⁴ While performing their duties as keepers of the land, traditional leaders must always put in mind the interests of the community as a whole.²³⁵

Customary land tenure is both a social system and a legal code, and as such it is rigid, has stability and is flexible.²³⁶ African customary tenure systems vary across the continent, and are continuously changing to adapt to the changing economic and social culture.²³⁷ The modern customary landholder cares mostly about the national law put in place to support land rights and the process in which the support will be maintained.²³⁸ Customary land is accessed through the male lineage, (eg. Land of the father or husband) and migrants or foreigners²³⁹ usually access the land through the trustee of the land.²⁴⁰ In terms of customary law women usually have only cultivation rights on the designated land.²⁴¹

3.3.1 Customary law and women's rights to land in Ghana

Women have secondary land rights in terms of customary law, this is especially so for women in the rural areas, as they obtain land rights through membership in households, through lineage and through marriage.²⁴² These secondary rights which women obtain are not secure, because they are not specific or written down. They are, therefore, susceptible to change at any time. Issues such as the content of the rights

232 Davies and Dagbanja 2009 Arizona Journal of International and Comparative law 303.

233 Yirah 2012 "Land grabbing, biofuel investments" Policy brief.

234 Yirah 2012 "Land grabbing, biofuel investments" Policy brief.

235 Yirah 2012 "Land grabbing, biofuel investments" Policy brief

236 Wily 2012 "Customary land tenure in the modern world" Brief number 1-5.

237 Lastaria-Cornhiel 1997 World Development 1319.

238 Wily 2012 "Customary land tenure in the modern world" Brief number 1-5.

239 Foreigners may not own land in Ghana, they are however allowed to have long term leases, however, the lease is limited to no more than 50 years. This is in terms of the Ghana Constitution, 1992.

240 USAID 2012 <http://landwise.landesa.org/record/1304>.

241 Lastaria-Cornhiel 1997 World Development 1319.

242 Runger 2006 https://www.fig.net/.../ts01_02_ruenger.pdf.

is not discussed; these rights rely on maintaining a good relationship with the other party.²⁴³

According to customary law all the people in the community have rights to access the land held in customary regardless of their sex. This is regarded as *usufructuary* interest or customary freehold.²⁴⁴ Customary land is regarded as land belonging to the community even though an individual has the right to cultivate it and use it.²⁴⁵ Customary land tenure refers to "the systems that most rural African communities operate to express and order ownership, possession and access, and to regulate use and transfer."²⁴⁶ However, these rules of customary law are binding to its own community and hardly ever beyond its own community.²⁴⁷

Smallholder farmers normally produce food for local consumption, this account for a large portion of the food production.²⁴⁸ The majority of these farmers are women who have certain rights to the land in terms of customary law.²⁴⁹ Rural women are not acknowledged when coming to the activities which they undertake.²⁵⁰ They are said to engage in invisible activities when coming to food crop production. This could be based on the position of customary law which places an obligation on women to assist their husbands in acquiring wealth, however this assistance does not vest any ownership rights to the woman no matter how much assistance she provided.²⁵¹ Whatever the wife assists in acquiring is regarded as the property of the husband and not that of both the husband and wife.²⁵²

The Constitution tries to limit its interference with the administration of customary land, it does however afford women the right to register land and thus take ownership of such land.²⁵³ Customary land does not belong to a certain person, it is merely held

243 Runger 2006 https://www.fig.net/....ts01_02_ruenger.pdf.

244 Runger 2006 https://www.fig.net/....ts01_02_ruenger.pdf.

245 Nothate <http://unu.edu/unupress>.

246 Wily 2012 "Customary land tenure in the modern world" Brief number 1-5.

247 Wily 2012 "Customary land tenure in the modern world" Brief number 1-5.

248 Yirah 2012 "Land grabbing, biofuel investments" Policy brief.

249 Yirah 2012 "Land grabbing, biofuel investments" Policy brief.

250 Akua 2004 Friedrich Ebert Foundation Accra 24.

251 Akua 2004 Friedrich Ebert Foundation Accra 12.

252 Akua 2004 Friedrich Ebert Foundation Accra 12.

253 Blocher 2006 *Yale Human Rights And Development Law Journal* 185.

by the chief, stool or skin to control for the benefit of the community.²⁵⁴ It would thus seem that women who reside within customary land have reconciled themselves and accepted the customs and traditions of the area, when coming to the rights they have to land.

3.4 Case study: The Jatropha Biodiesel Project in Northern Ghana

In this project the Norwegian Biofuel company claimed legal ownership of the lands in Kusawgu. They obtained this ownership by deceiving the chief who is an illiterate to sign away 38 000 hectares of the land, using his thumb print. This project did not obtain the relevant authorisation either. The community then realised that the promised jobs would most probably not materialise and that the project will lead to deforestation and the loss of income for most of the people who rely on forest products. The community armed with this information successfully fought to send these investors packing. The victory came with the negative side though. By this time 2600 hectares of land had already been cleared, this resulted in many losing their incomes from the forest.²⁵⁵

The District Chief Executive (DCE) said that he noticed that there was work on the site and he was in the process of finding out who was responsible for this because the company had not obtained the required planning permission²⁵⁶ to undertake the development.²⁵⁷

What normally entices the rural community to agree to such land deals is the promise for a better future; they are promised employment and are of the opinion that they will receive a steady income.²⁵⁸

254 Blocher 2006 *Yale Human Rights And Development Law Journal* 185.

255 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS-BIOFUEL.pdf.

256 The Norwegian Biofuel company had not obtained the necessary permission required from the state to proceed with the development in the said area. They had merely managed to acquire the land and proceeded with the development as if they had followed all the required steps.

257 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS-BIOFUEL.pdf.

258 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS-BIOFUEL.pdf.

Nyari had this to say about the project:²⁵⁹

This is a story of how a Norwegian biofuel company took advantage of Africa's traditional system of communal land ownership and current climate and economic pressure to claim and deforest large tracts of land in Kusawgu, Northern Ghana with the intention of creating "the largest jatropha plantation in the world"

This project did more harm than good. The majority of people in this community relied heavily on selling forest products for survival, the deforestation that took place as a result of this project led to many losing their livelihoods, amongst those are women.²⁶⁰ This is an example of how women lose their rights to cultivation. The land deal took place without the necessary consultation and consideration for the people of the community.²⁶¹ The Norwegian Biofuel company did not consult with the community on this matter, the chief claims that he did not know the content of the documents he signed using his thumb print.²⁶² The people of Kusawgu were not considered when the company cleared 2600 hectares of land, the forest was cleared and the community lost their source of income.²⁶³ The project did not benefit the community, since the jobs that they were promised did not materialise.²⁶⁴

3.5 Conclusion

Women do not have strong rights in terms of customary land tenure. The only rights they have are those to use the land, mostly in the form of cultivation rights. There are international legal instruments entered into by Ghana which oblige them to take into consideration women's rights, right to equality and the right to own property. These have played a significant influence on the Ghana Constitution. However, like most African countries the use of customary law is acknowledged alongside national legislation and in terms of customary law the rights of women are different to those

259 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS-BIOFUEL.pdf.

260 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS-BIOFUEL.pdf

261 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS-BIOFUEL.pdf

262 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS-BIOFUEL.pdf

263 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS-BIOFUEL.pdf

264 Nyari 2008 www.tnrf.org/.../E-INFO-RAINS-BIOFUEL.pdf

contained in the Constitution. Land grabs minimise the few rights that women have to land. Research in Ghana, where most agricultural investment takes place in the most food insecure northern regions, revealed that land deals were deepening intra-household gender inequality, limiting women's access to land further, and aggravating land scarcity, with men appropriating women's land.²⁶⁵

265 Sulle 2014 PLAAS.

4 Cultivation rights of women in Malawi

Malawi is a country located in the south-eastern region of Africa and has agriculture as its principle source of income.²⁶⁶ The majority of Malawians over 80% of the people rely on agriculture for income and make up over 90% of the country's earnings, this makes about 39% of Malawi's GDP and makes the majority of jobs in the country.²⁶⁷ This show the importance of the agricultural sector in the country and this plays on the importance of access to land for the people of Malawi.²⁶⁸

Access to land is important for the Malawian household as it ensures food security and improves the earning ability of the people.²⁶⁹ The female population in Malawi is higher than the male population, just like in many of its neighbouring countries.²⁷⁰ The majority of the women in Malawi live in rural areas and undertake subsistence farming as an activity to provide for their families.²⁷¹ Malawi has a significant number of rural households which are headed by women; the study shows that there about 30% of such households; these women are either divorced, separated, widowed, unmarried, married in polygamous unions or married to husbands who are migrant workers.²⁷² Malawi suffers from an insecure tenure system, and this leads to difficulty in ensuring women's land rights.²⁷³

4.1 Land Tenure in Malawi

In Malawi three categories of land being public land; private land and customary land, are recognised by the 1965 Land Act and the 2002 Land Policy.²⁷⁴

Public land is the land which is occupied, used, acquired or held by government to utilise in the interest of the public, eg. for schools and government offices.²⁷⁵ Public

266 Chinsinga and Chasukwa 2012 *Institute of Development Studies* 68.

267 Chinsinga and Chasukwa 2012 *Institute of Development Studies* 68.

268 Chinsinga and Chasukwa 2012 *Institute of Development Studies* 69.

269 Chinsinga and Chasukwa 2012 *Institute of Development Studies* 69.

270 Hatcher, Meggiolaro and Ferrer 2005 www.actionaid.org/www.actionaidinternational.it.

271 Hatcher, Meggiolaro and Ferrer 2005 www.actionaid.org/www.actionaidinternational.it.

272 Hatcher, Meggiolaro and Ferrer 2005 www.actionaid.org/www.actionaidinternational.it.

273 Hatcher, Meggiolaro and Ferrer 2005 www.actionaid.org/www.actionaidinternational.it.

274 USAID 2012 <http://landwise.landesa.org/record/1304>.

275 USAID 2012 <http://landwise.landesa.org/record/1304>.

land includes national parks, conservation and historical areas.²⁷⁶ Public land falls under the custodianship of the President.²⁷⁷

Private land is owned, held or occupied under freehold title, lease, Certificate of Claim, or land registered as private land under the Registered Land Act of 1967.²⁷⁸ The Registered Land Act includes privately owned freehold land and customary land, as private land.²⁷⁹ However, upon registration as private land the customary land loses its customary status.²⁸⁰

Customary land is “all land held, occupied, or used by community members under customary law.”²⁸¹ Customary land is held in trust by the President of Malawi for the people of Malawi and the customary traditional authorities have jurisdiction over such land.²⁸² Customary land may be held by the community as a whole or by individuals using the names of their lineage, family or individual.²⁸³

4.1.1 Tenure types in Malawi

Tenure types in Malawi include freehold, leasehold, and customary tenure:

Freehold: Private land can be held in freehold tenure, which carries rights of exclusivity, use, and alienation.²⁸⁴ The use and management of this tenure type of land is regulated by the 1965 Land Act and the 1967 Registered Land Act.²⁸⁵

Leasehold: Private, public, and customary land can be leased.²⁸⁶ The state has the power to lease customary and public land in terms of the Land Act.²⁸⁷ Upon expiration of the lease agreement the customary land is normally converted to public land.²⁸⁸

276 USAID 2012 <http://landwise.landesa.org/record/1304>.

277 USAID 2012 <http://landwise.landesa.org/record/1304>.

278 USAID 2012 <http://landwise.landesa.org/record/1304>.

279 USAID 2012 <http://landwise.landesa.org/record/1304>.

280 USAID 2012 <http://landwise.landesa.org/record/1304>.

281 USAID 2012 <http://landwise.landesa.org/record/1304>; Article 2 of the Land Act of 1965.

282 USAID 2012 <http://landwise.landesa.org/record/1304>.

283 USAID 2012 <http://landwise.landesa.org/record/1304>.

284 USAID 2012 <http://landwise.landesa.org/record/1304>.

285 USAID 2012 <http://landwise.landesa.org/record/1304>.

286 USAID 2012 <http://landwise.landesa.org/record/1304>; Article 5 of the Land Act of 1965.

287 USAID 2012 <http://landwise.landesa.org/record/1304>.

288 USAID 2012 <http://landwise.landesa.org/record/1304>.

However, customary law allows for land to be leased without changing the customary status of the land.²⁸⁹

Land held under customary tenure is usually managed by the traditional leader for the benefit of the community; the land is that of the community as a group.²⁹⁰ Community members have the option to personalise customary land. The effect of this personalisation is that the property falls under names of the family and the individual. The individual or family will be in charge of the management of the land, they decide whether to lease the land or to sell it.²⁹¹ The National Land Policy suggests that the land cannot be sold outside the community because the community has a residual interest in that land.²⁹² Land which is not personalised is regarded as common land and is dealt with in terms of customary law.²⁹³

4.1.2 Statutory land law in Malawi

The Constitution of Malawi²⁹⁴ stipulates that the land in Malawi is entrusted to the state. It further gives it citizens' rights to own property and to take part in commercial activities. The classification and known types of land tenure are found in the *Land Act*.²⁹⁵ The *Customary Land (Development) Act*²⁹⁶ provides for the conversion of customary land for agricultural development and establishes the means for adjudicating disputes over customary land.²⁹⁷

The *Registered Land Act*²⁹⁸ provides the legislative foundation for the transfer from a deed registration system of land administration to a title registration system.²⁹⁹ The

289 USAID 2012 <http://landwise.landesa.org/record/1304>.

290 USAID 2012 <http://landwise.landesa.org/record/1304>.

291 USAID 2012 <http://landwise.landesa.org/record/1304>.

292 USAID 2012 <http://landwise.landesa.org/record/1304>.

293 USAID 2012 <http://landwise.landesa.org/record/1304>.

294 *Constitution of the Republic of Malawi*, 1994.

295 *Land Act*, 1965.

296 *Customary Land (Development) Act*, 1967.

297 USAID 2012 <http://landwise.landesa.org/record/1304>.

298 *Registered Land Act*, 1967.

299 USAID 2012 <http://landwise.landesa.org/record/1304>.

*Land Amendment Act*³⁰⁰ does not allow for foreigners to own any land in Malawi. However, foreigners may enter into long term lease agreements with regard to land.

The Customary Land Act and Registered Land Act do not apply throughout the whole of Malawi, these acts operate in the Lilongwe West region of Malawi.

In 2002 the Malawian government came up with the National Land Policy (NLP). The government had the intention to change the NLP into law.³⁰¹ The NLP plays at the importance of having a land registration system which is aligned with the goals of government, these goals being economic growth and poverty eradication.³⁰² All this must always keep in mind the rights of women, especially the rural women who head their own households.³⁰³ The NLP seems to be more in line with the needs of women, as it understands that some women are the head of their homes, and from those women, some rely on cultivating crops to feed their families.³⁰⁴ The NLP puts the needs of women, especially rural women at the forefront.³⁰⁵

4.2 The legal framework on women's rights, land rights and property rights

4.2.1 International legal framework

Malawi accessioned³⁰⁶ the *ICESCR* on the 22nd December 1993; the importance and effect of the convention on women's rights is discussed above in paragraph 3.2.1.2.

On 12 March 1987 Malawi accessioned *CEDAW* which is also discussed above in paragraph 3.2.1.3. With regard to its *CEDAW* accession the Malawian government

300 *Land Amendment Act*, 2003.

301 USAID 2012 <http://landwise.landesa.org/record/1304>.

302 USAID 2012 <http://landwise.landesa.org/record/1304>.

303 USAID 2012 <http://landwise.landesa.org/record/1304>.

304 USAID 2012 <http://landwise.landesa.org/record/1304>.

305 USAID 2012 <http://landwise.landesa.org/record/1304>.

306 Accession is an act by which a State signifies its agreement to be legally bound by the terms of a particular treaty. It has the same legal effect as ratification, but is not preceded by an act of signature. The formal procedure for accession varies according to the national legislative requirements of the State.

informed the Secretary-General of its decision to withdraw the reservations which it had made; the following was stated:

Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices. While the Government of the Republic of Malawi accepts the principles of article 29, paragraph 2 of the Convention this acceptance should nonetheless be read in conjunction with [its] declaration of 12th December 1966, concerning the recognition, by the Government of the Republic of Malawi, as compulsory the jurisdiction of the International Justice under article 36, paragraph 2 of the Statute of the Court. In respect of the first reservation, the Secretary-General had received, on 5 August 1987, from the Government of Mexico the following communication.³⁰⁷

The government of Malawi is trying to move in the right way in terms of signing certain conventions and international agreements, however, due to customary law; women's rights are still limited. Accepting the terms of *CEDAW* will mean a big change in the Malawian legal system, as this will mean that some if not most of the rules found in customary law will have to change. This is due to the fact that the majority of rules found in customary law are not in support of women's rights; women have few and limited rights, whereas *CEDAW* is in support of women empowerment.

4.2.2 Domestic Legal framework

4.2.2.1 Banjul Charter

Malawi signed the *Banjul Charter* on 23 February 1990, which is discussed in paragraph 3.2.2.1 above.

4.2.2.2 Constitution of Malawi³⁰⁸

307 *CEDAW*, 1979.

308 *Constitution of Malawi*, 1995 (As amended in 201).

The Malawian Constitution provides for the promotion of welfare and growth of the people in Article 13.³⁰⁹ This should be done by putting in place policies and legislation which will aim at progressively realising goals such as gender equality. As much as customary law plays a significant role in Malawi, the constitution places an obligation on the state to progressively realise gender equality by putting policies and legislation in place. This shows the importance of women having more rights in the country.

The Constitution prohibits any form of discrimination against women; it further puts an obligation on government to implement legislation which will remove discriminatory practices such as deprivation of property.³¹⁰ The Constitution shows that gender equality is important in Malawi hence the need to protect it using legislation, starting with the Constitution itself. The wording of the provision in itself, does not guarantee the policies and legislation, it just provides that the adoption of these policies should take place in a progressive manner. This means that Malawi must just show that it is taking measures to adopt legislation and policies to promote gender equality.

The Constitution provides for equality amongst its citizens. This is found in Article 20 which provides for the equality of all regardless of their gender, race, colour, nationality, the list is endless, and it specifically prohibits discrimination and provides for the need for effective protection against discrimination in subsection (1).³¹¹ Subsection (2) requires legislation to be passed which will address inequalities and to criminalise discriminatory practices.³¹²

Inequalities based on sex is prohibited in terms of the Constitution, however, this is not always adhered to.³¹³ When discussions regarding land take place in some regions,

309 Article 13 of the Constitution of Malawi provides that the state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals

Gender Equality- to obtain gender equality for women with men through:

Full participation of women in all spheres of Malawian society on the basis of equality with men

The implementation of the principles of non-discrimination and such other measures as may be required; and

The implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.

310 Article 24(2)(c) of the Constitution of Malawi, 1995.

311 Article 20(1) of the Constitution of the Republic of Malawi.

312 Article 20(2) of the Constitution of the Republic of Malawi.

313 Article 20(1) of the Constitution of the Republic of Malawi.

they only have meetings with men and no women are allowed, and this could be in terms of customary law.

Article 24 of the Constitution provides for the rights of women. Article 24(1) provides that:

Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right:

- (a) To be accorded the same rights as men in civil law, including equal capacity-
- (ii) To acquire and maintain rights in property, independently or in association with others, regardless of their marital status.

However, this constitutional provision protects women's rights on a civil law basis. This provision shows the importance of women in terms of the law and it also shows that the law is obliged to treat women and men as equals. This poses a problem when coming to customary law since women do not have equal rights to men. The fact that the majority of land in Malawi is held under customary law shows that women's land rights are few if any.

4.3 Customary law and women's rights to land in Malawi

Malawi uses a dual legal system, in which customary and statutory law exist.³¹⁴ The courts have been given the task since 1969 with regard to the application of customary law.³¹⁵ The *Land Act*³¹⁶ and its amendments recognise three categories of land: private, public and customary. Private land is defined "as that which is held or owned under freehold or leasehold title, Certificate of claim or is registered under the *Registered Land Act*."³¹⁷ Public land is defined as "that which is occupied, used or acquired by the government and any other not being customary or private, and includes settlement

314 Hatcher, Meggiolaro and Ferrer 2005 www.actionaid.org/www.actionaidinternational.it.

315 Hatcher, Meggiolaro and Ferrer 2005 www.actionaid.org/www.actionaidinternational.it.

316 *Land Act*, 1965.

317 *Registered Land Act*, 1967.

schemes, national parks, and forest reserves and lapsed leaseholds.”³¹⁸ Customary land, on the other hand, “is that which is held or used under customary law.”³¹⁹

Public and customary land vests in the President of Malawi as trustee.³²⁰ The Act delegates the control and management of customary law to the minister that deals with land matters.³²¹ This control and management is further delegated to chiefs.³²² Customary law authorises the chief to allocate the customary land within their communities for use and livelihood.³²³ Customary law differs throughout Africa, and this is the same for Malawi, there exists different forms of customary law throughout the country, the type of customary law which is applicable depends on the traditional community itself.³²⁴ Customary law dictates that customary land belongs to the community, although the individual in the community has the right to cultivate it and uses the land as though he/she were the owner.³²⁵

All land in the country is placed in the President as trustee and as such comes the powers to control and manage the land lies in the minister responsible for land matters; the Land Act has the effect of transferring the legal title to the political authorities.³²⁶ This gives the political authorities so much power over customary law that they can make decisions without having to answer to any other authority about such decisions.³²⁷

Malawi has both the patrilineal and matrilineal system. This makes understanding Malawi's land use and management difficult.³²⁸ Land is viewed as “a gift from god to

318 Kishindo 2004 *Journal of Contemporary African Studies* 214.

319 Kishindo 2004 *Journal of Contemporary African Studies* 214.

320 Kishindo 2004 *Journal of Contemporary African Studies* 214.

321 Kishindo 2004 *Journal of Contemporary African Studies* 214.

322 Kishindo 2004 *Journal of Contemporary African Studies* 214.

323 Kishindo 2004 *Journal of Contemporary African Studies* 214.

324 Kishindo 2004 *Journal of Contemporary African Studies* 214.

325 Nothate <http://unu.edu/unupress>.

326 Kishindo 2004 *Journal of Contemporary African Studies* 215.

327 Kishindo 2004 *Journal of Contemporary African Studies* 215.

328 Hatcher, Meggiolaro and Ferrer 2005 www.actionaid.org/www.actionaidinternational.it.

communities for their subsistence."³²⁹ Family relations determine the right to access land for individuals.³³⁰

The patrilineal system is mostly applicable in the northern region of the country. This system favours men having land rights and not women. The right of access to land for women comes from their relationship with men (husband, father or even son).³³¹ With this system a divorced woman loses all her rights of access to land that belongs to her husband and she is expected to return to her own village; however if *lobola*³³² was paid for her she still enjoys cultivation rights to land.³³³ If there should arise disputes with the husband's family if he has passed on the woman may be forced off the land whether *lobola* was paid for her or not, issues such as suspicion of the wife's involvement in the husband's death, she failed to produce any children in the marriage, she refuses to be inherited by a family member as dictated by tradition or the family feel that she is of a bad character.³³⁴

In the matrilineal system which dominates in the central and southern region women are the ones who have rights to land.³³⁵ In this system a man is expected to return to his own village once his wife passes away.³³⁶ The children that came out of that marriage are, however, allowed to remain in the mother's village because they are regarded as part of the mothers' family line.³³⁷ The spouse that is regarded as a non-local has very insecure tenure, this spouse may become landless once their spouse dies or they divorce.³³⁸ The spouse is then given temporary land in their own village; the land may be claimed at any time by those who have the right to the land in terms of customary law.³³⁹

329 Kishindo 2004 *Journal of Contemporary African Studies* 214.

330 Kishindo 2004 *Journal of Contemporary African Studies* 215.

331 Kishindo 2004 *Journal of Contemporary African Studies* 214.

332 The Oxford dictionary defines *lobola* as a bride price, traditionally one paid with cattle. This is a practice among people from southern Africa.

333 Kishindo 2004 *Journal of Contemporary African Studies* 216.

334 Kishindo 2004 *Journal of Contemporary African Studies* 216

335 Kishindo 2004 *Journal of Contemporary African Studies* 214.

336 Kishindo 2004 *Journal of Contemporary African Studies* 216.

337 Kishindo 2004 *Journal of Contemporary African Studies* 216.

338 Kishindo 2004 *Journal of Contemporary African Studies* 216.

339 Kishindo 2004 *Journal of Contemporary African Studies* 216.

The matrilineal system favours women and has given them stronger land rights than its patrilineal counterpart. However, this does not guarantee that women are protected from the impacts of land grabs. The political authority still has much power with regard to the maintenance and management of customary law; with this power they may make decisions on their own without having to answer to any other authority.

4.4 Case study: "Sugar wars"

In 1979, Illovo Malawi acquired about 600 hectares of land. The farmers from Malawi's central region claim that the company and senior chief removed them from their land illegally and converted the land into part of its behemoth sugar cane plantation.³⁴⁰

The government leased the land to Lornho Sugar Company (the company that used to farm on the land before Illovo purchased the mill) in the 1970s. The government claims that compensation has been paid for the land, which the community denies.³⁴¹ Proof of such compensation was not provided by the government. Due to this, the ombud decided that compensation should be paid again to the community, since there is no proof that compensation was paid in the 1970s.³⁴² The government paid the required compensation and then another claim was instituted for another piece of land. The community laid claim to a certain piece of another land not farmed by Illovo, but adjacent to its cane fields.³⁴³

The Chief Stowell Kanyenda provided an affidavit in which he claims that the original agreement was merely a temporary arrangement.³⁴⁴ He says that the proper procedure for acquiring the land was not followed, as he did not give the necessary permission,

340 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1.

341 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1.

342 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1.

343 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1.

344 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1 .

he claims that this is evident of the fact that the arrangement was merely temporary.³⁴⁵

The Chief stated that:

Around 1979 I was approached by people from the Dwanga Sugar Corporation (which is now a part of Illovo), who stated that part of the area where they were growing their cane had been hit by floods and therefore they needed a piece of land for temporal relation. I gave them this piece of land on the strict understanding that it was a temporary arrangement.³⁴⁶

The version of events stated by the company and the chief are totally different. It's difficult to determine which version is correct. Whichever version one looks at, the result for the community is still the same. The people lost their land.

About 400 subsistence farmers have lost their lands; they claim that the chief gave Illovo the land without consulting the community. Illovo owns about 6159 hectares of sugar plantation in Malawi.³⁴⁷ One farmer stated that he "lost three hectares of land which were his livelihood, they pushed them to the hills where the land is infertile and now they are suffering."³⁴⁸

4.5 Conclusion

The people of Malawi rely highly on agriculture for their livelihood, and the majority of these are rural women. Malawi uses a dual legal system in which civil and customary law both apply. The majority of land in Malawi is, however, still held under customary law. This means that the rules governing the majority of land in Malawi are those of customary law. In the patrilineal system women are given certain rights to land, such as the right to cultivate the land. These rights to land are attached to the male counterparts in the women's lives, such as the husband or father. Therefore, taking this land from the men takes the rights that the women have in terms of customary law to the land. In the matrilineal system women have more power with regard to land

345 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1 .

346 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1 .

347 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1 .

348 Mtika 2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1 .

and the use of this land. However, this does not exempt them from the impacts of land grabs. The political authority have much power when coming to this land, they may take decisions without consulting anyone or answering to any other authority. This results in women being able to lose the land at the whim of the political authority.

The Malawian government introduced the Land Bill in August 2013, which seeks to set new standards for owning land and to change foreign-owned freehold land to leasehold. This will result in the land being billable in terms of ground rentals and the land will not be permanently conferred with regard to the title and ownership.³⁴⁹ However, the new Bill will focus more on tea, coffee and tobacco production and not sugar production. The Bill does not address important issues such as gender. The Bill is still in the pipeline and has not been changed to law.

The “sugar wars” case provides for the impacts of that such land deals have on the people. The community was not consulted with regard to this land acquisition and there seems to be some discrepancies with this land deal such as the basis of the agreement between the company and the chief, when the initial deal took place. Furthermore, the community lost their land which they used to grow their own crops and were displaced to a place which cannot cater for their agricultural needs.

349 Mtika 2014 <http://pambazuka.org/en/category/features/90079>.

5 Conclusion and Recommendations

5.1 Conclusion

The purpose of this study is to determine the impacts that land grabs have on the rights of women to cultivate land in Ghana and Malawi. As such the study determined what land grabs are. For the purposes of this study "land grabs" have been defined as the acquiring of large pieces of land from developing and poor countries, with the promise of development or job security to the host country; by either foreign or national investors in their pursuit for food security and/or agricultural production.³⁵⁰

With that said the impacts that land grabs have on sustainable development and human security were discussed. This was done to show the depth of the impacts of land grabs to the communities involved. It is more than just losing land. Other factors are also involved such as religious and social aspects to name a few.³⁵¹

Land grabs have been taking place for years, the growing attention placed on land grabs is due to the rapid pace in which they are taking place and the impacts they have on the environment and the people. At the forefront of the negative impacts are women. This is due to the fact that women are afforded few if any rights to land in many African countries. These two countries are located at different sides of the African continent, however, the women in these countries experience the same challenges when facing land grabs.³⁵²

Ghana and Malawi both have a dual legal system with regard to land, in which civil and customary land laws are followed. The majority of land in these countries is held under customary law, which makes customary the most applicable law in most land disputes.³⁵³

The problem faced with this study was determining where such rights (the right to cultivation) for women came from. There is no written law which provides for such a

350 See paragraph 1.1.

351 See paragraph 2.2.1.

352 See paragraph 2.1

353 See paragraph 3.3 and 4.3.

right to cultivation for women. However customs dictate that women have a right to use and as such cultivate the land of their husbands, fathers or even sons. The women's right to such land are attached to their relationship to a man. The fact that the majority of land in the above mentioned countries is held in terms of customary law means that the laws of customary law will be applicable. This has the effect that women have rights to use the land and cultivate the land of their male relations.³⁵⁴

Ghanaian customary law does not allow for women to own land in Ghana. The term "own" is not used in its literal sense meaning ownership. The majority of customary land is regarded as land of the community and the stool or chief is regarded as the custodian of that land. The stool or chief must manage the land to benefit the people of his community.³⁵⁵ The fact that women's rights to land are attached to their relationship to a man shows how limited women's rights to land in Ghana are. And then adding land grabs into the picture further limits the women's access to land. The land is taken away from the men and as a result the women lose the right to cultivate or use the land in any way. The Jatropa project illustrates the real life impacts felt by the people in Ghana when such land deals take place. The people are left without land or source of income. The forest was the main source of income for the majority of the community, and it was cleared to make way for the project. The people fought the project and won, however, a large portion of land had already been cleared. So the win was not much of a win.³⁵⁶

Malawi uses both the matrilineal and patrilineal system;³⁵⁷ these systems apply in different regions of the country. However, this does not guarantee the security of women's rights to property. The patrilineal system is similar to the system used in Ghana. The woman's rights to land are attached to her relationship with a man. The matrilineal system differs in that the roles are reversed. The man's right to land is dependent on his relationship to a woman. However, the matrilineal system does not protect women from having their land taken. The political authority has much power

354 See paragraph 3.3 and 4.3.

355 *Office of the Administration of Stools Act*, 1994.

356 See paragraph 3.

357 Kishindo 2004 *Journal of Contemporary African Studies* 216.

when coming to the land. They can make decisions on their own without being accountable or having to answer to any other authority.³⁵⁸ This means that they can decide to lease or sell certain portions of land whenever they want. This does not protect the women's rights to the land. The "sugar wars" provide for the real life impacts of land grabs as was experienced by the community in Malawi. This case has too many discrepancies with regard to the initial deal. The chief claims that it was merely a temporary agreement, whereas the Illovo Company disagrees.³⁵⁹ The circumstances surrounding the land acquisition is not important, the bottom line is that the people lost their land. Some of the community relied on the land for their livelihood, which they lost due to the land grab. The people were taken to land which could not produce crops and thus the loss of livelihood for some of the community members. The Malawian government attempted to deal with certain land issues when it proposed the Land Bill. The proposed Land Bill aims to address certain land issues; however, the issue of gender is not addressed. This pushes women back even more, since the issue of women's rights to land is not addressed.³⁶⁰

Violation of women's rights to land results in women having less bargaining power in their own households, having limited access to resources; and being more susceptible to gender based violence. Since women have no power, they become more prone to poverty, illness, food insecurity and less opportunity to development their livelihoods.³⁶¹

A case was brought to the International Criminal Court (ICC) which could deal with the problem of land grabs.³⁶² The case alleges that the land grabs taking place in Cambodia on a very large scale are crimes against humanity and as such should be punished under international law.³⁶³ These land grabs are said to be characterised by murder,

358 Kishindo 2004 *Journal of Contemporary African Studies* 216.

359 Mtika2014 mg.co.za/article/2014-08-01-sugar-wars-35-years-of-bitter-fueds-1

360 See paragraph 4.

361 Daley et al 2013 *International Land Coalition* 1.

362 Global Witness 2014 http://www.huffingtonpost.co.uk/andrew-simms/land-grabbing_b_5938500.html.

363 Global Witness 2014 http://www.huffingtonpost.co.uk/andrew-simms/land-grabbing_b_5938500.html.

illegal imprisonment and persecution.³⁶⁴ Acceptance of this case by the ICC will mean a shift in the way land deals are carried internationally.³⁶⁵ This case will signify a necessary shift with land grabs. Other governments and companies will have to recognise the high price involved with taking part in land grabs.³⁶⁶

This case will mean big changes for land deals taking place in developing/poor countries and as such Ghana and Malawi. Governments and companies will have to tread carefully when entering into land deals. However more dialogue will still be needed to address the challenges faced by women due to land grabs.

Land grabs have an impact on women’s customary law right to cultivate the land of their male relation. The reality is that women have no right to own land in Ghana and Malawi in terms of customary law. Customary law does however give women the right to cultivate on the land of their father or husband. This customary law right is infringed when the land is taken away from the men to allow for the assigned project to take place.³⁶⁷

5.2 Recommendations

Based on the findings the following recommendations are made:

The first recommendation would be to have an international instrument which is binding and deals with land grabs and international land deals.³⁶⁸ The document will have to outline the difference between land deals and land grabs, it will then have to go further by implementing an acceptable criterion for international land deals. The

364 Global Witness 2014 http://www.huffingtonpost.co.uk/andrew-simms/land-grabbing_b_5938500.html.
365 Global Witness 2014 http://www.huffingtonpost.co.uk/andrew-simms/land-grabbing_b_5938500.html.
366 Global Witness 2014 http://www.huffingtonpost.co.uk/andrew-simms/land-grabbing_b_5938500.html.
367 See paragraph 3.3 and 4.3.
368 See paragraph 2.2.

document will have to stipulate what the punishment will be for not complying with its requirements.

The second recommendation is that regional law should also have a document which will allow for the government being accountable for such deals.³⁶⁹ The document should ensure that the government places the needs of its people first, and does not compromise on this based on the promise of a land deal.

The third recommendation is to have stronger rights to land for women in the respective countries.³⁷⁰ It is not enough for the countries to cite the equal rights for men and women on paper. Equal rights for men and women should actually mean something, starting with including stronger rights to land for women.

The fourth recommendation should be to educate the community on their rights to land and on land deals.³⁷¹ This will allow for the community to be able to distinguish land grabs from land deals, and as such will arm themselves with the necessary armour against land grabs. This will also allow for the community to be more involved with the land deals, rather than just being side lined.

The fifth recommendation is to have governments working with each other and not against each other.³⁷² Governments hold the key as to what development or project is to take place on its land. As such it is only befitting for government to make the rules. Host countries should have stricter compliance rules for starting a project, especially as transnational company or another state. These rules should be non-negotiable but fair. The government should have its people in mind when coming up with such rules.

The sixth recommendation would be for investors to understand and respect local conditions.³⁷³ Investors need to take note of the situation in the countries in which

369 See paragraph 2.2.

370 See paragraph 3.3 and 3.4.

371 See paragraph 3.3 and 3.4.

372 See paragraph 2.2.

373 Kugelman "Recommendations and Conclusions" 181.

they want to invest. They need to face the realities of the country.³⁷⁴ Investors need to take the current use of the land by the community into consideration.

The seventh recommendation would be for the host government to uphold the right to food as a human right and to protect the most vulnerable from investor exploitation.³⁷⁵ The right of the local community to food security should be protected by the host government at all times.³⁷⁶ The host government should further assist local farmers with the contractual side of land deals to ensure that the agreement is beneficial to all parties.³⁷⁷ This can be done by offering legal assistance to local farmers to assist them with the negotiation problems.³⁷⁸

The only way to curb land grabs is for all the states and governments to work together as a whole. The starting point will be with the implementation of an international legal document that will be binding on all states. Then going to the regional level having a document which allows for the state to be held accountable for allowing land grabs to take place in its country. Then we go down to the states themselves. The state should ensure that the laws with regard to land deals are so strict that land grabs cannot take place. Educating the communities will also play a big role in helping limit land grabs. Communities normally agree to certain land deals due to the prospects which they have been promised, however, such are normally just that, promises. Once the communities have been educated and know what to look out for, it will be difficult for land grabbers to acquire land.

Then of course dealing with the issue at hand, the impacts that these land grabs have on women. The problem comes with the fact that women in Ghana and Malawi do not have strong rights to land. Government should stop with just stating that women have equal rights to men, and should rather start having policies which will enable them to enforce such rights.

374 Kugelman "Recommendations and Conclusions" 181.

375 Kugelman "Recommendations and Conclusions" 183.

376 Kugelman "Recommendations and Conclusions" 183.

377 Kugelman "Recommendations and Conclusions" 183.

378 Kugelman "Recommendations and Conclusions" 183.

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