

COMMUNAL LAND TENURE IN CROSS RIVERS STATE AND THE VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF LAND TENURE, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY

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1. Introduction

Oil and gas (petroleum) continues to be Nigeria's major foreign exchange earner, accounting for more than three-quarters of government revenues derived from hydrocarbons.¹ However, Nigeria remains mostly an agrarian economy – with the bulk of the population residing in rural areas and engaged in agricultural production. Over the years, however, the various Nigerian Governments' neglect of the agricultural sector following the advent of an oil economy has made her one of the largest net food importers in sub-Saharan Africa.² With increasing rural poverty, rural-urban migration and burgeoning youth unemployment, the agricultural sector is once again being considered as a veritable employer of labour and target for economic diversification.³

Cross River State⁴ has since the colonial era been one of Nigeria's largest producers of export cash crops such as cocoa, rubber and oil palm. However, by the 1970s, most of the State's large private and state-owned plantations had degraded into disrepair or completely abandoned. In line with recent Federal Government policy, the State has embraced and is championing a private-sector driven agrarian revolution aimed at rehabilitating its erstwhile moribund plantations and thereby restoring its once flourishing agricultural economy.⁵ Unfortunately, in advancing this agricultural revolution, Cross Rivers State has adopted the policy of land grabbing.

To be sure, land grabbing is not exclusive to Cross Rivers State or even Nigeria. It has, however, wittingly, or unwittingly become the 'convenient' and 'fastest' means of allotting land for large scale agricultural purposes in developing

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¹ C Obi, 'Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil Rich Niger Delta' (2010) 30 Canadian Journal of Developmental Studies 219, 223.

² J V Braun, *The World Food Situation: New Driving Forces and Actions Required* (International Food Policy Research Institute Publication 2007)11

³ G C Shoneveld, 'The Politics of the Forest Frontier: Negotiating between Conservation, Development and Indigenous Rights in Cross River State' Land Use Policy 38 (2014) 147-162 available at http://farmlandgrab.org/uploads/attachment/Schoneveld_Politics_of_the_forest_frontier.pdf Accessed 5 March 2017.

⁴ Present Cross Rivers State used to be within the old South Eastern Nigeria along the Cameroonian border.

⁵ G C Shoneveld (note 3 above).

countries. While the policy of land grabbing may be seen as the quickest means of assuring economic diversification, revenue generation and additional employment opportunities for some persons, questions arise concerning its constitutionality and legality together with its implications on rural settlers, who often bear the brunt of such policies.

Oxfam's Phil Bloomer reports on the shocking scandal of the negative impacts of the (mostly) secretive land-grabbing, usually from those least able to defend their property rights.⁶ Land grabbing has fast become a major threat to poor communities in Africa, Asia and South America.⁷ Poverty-stricken women and men are being driven from their homes and the land they rely on to grow food to eat and make a living, usually without compensation.⁸ In many cases, due processes of national laws and international standards for investment are not complied with and many local groups experience the violation of their rights to their lands.⁹ Communities which resisted this policy were subjected to inhuman violation of their rights as their lands were often confiscated by the state and the state security forces were sometimes unleashed on them.¹⁰ Many end up destitute, living under trees or plastic at the sides of roads, or migrating to urban slums to eke out a living.¹¹ The shift from thriving rural communities to landless labourers brings untold misery and suffering to these displaced families.¹²

This paper attempts to bring this ugly trend dispossessing the poor from their communal lands to the fore and ask the question if there are no other decent viable ways of bringing about development. It does this in 9 brief steps. After this introduction in Part 1, Part II deals with the issue of conceptual clarification. Part III examines land administration in Cross Rivers State within a brief historical context. A summary overview of the Land Use Act is provided for in Part IV. Part V deals with the issue of land grabbing in Nigeria. Part VI deals with the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forest in Context of National Security. Part VII deals with the Land Use Act as a Trilemma of Regulation; and a Summary that concludes the major findings.

The tentative findings after a comparative analysis of the customary land tenure system in Cross Rivers State of Nigeria with the Land Use Act is that the provisions of the Land Use Act not only violate our customary land tenure system but is also in conflict with the constitutionally guaranteed right to property, as it

⁶ P Bloomer, "The Great African Land Grab" available at http://www.theecologist.org/News/news_analysis/1676932/the_great_africa_land_grab.html Accessed 09 March 2017.

⁷ Ibid

⁸ Ibid; see also J Gilbert, *Indigenous Peoples' Land Rights under International Law, From Victims to Actors* (Leiden, NLD: Martinus Nijhoff Publishers, 2007) 36-40.

⁹ K Appiagyei-Atua, 'Minority Rights, Democracy and Development: The African Experience,' (2008) 15 *International Journal on Minority and Group Rights* 489, 493.

¹⁰ F Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2012) 166.

¹¹ P Bloomer (n 6 above)

¹² Ibid

provides a legal basis for land grabbing activities contrary to international standards set under the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.

2. Conceptual Clarification

The Food and Agricultural Organization (FAO) in “Land Tenure and Rural Development” refers to land tenure as:

the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. (For convenience, “land” is used here to include other natural resources such as water and trees.) Land tenure is an institution, i.e., rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.¹³

Communal land tenure rights refer to rights inherent, or vested in communities regarding access to, possession and ownership over land, fisheries and forests as well as rights and obligations thereunder. As a result of the fact that these lands are collectively owned they are described in international law as collective lands.

¹⁴ Communally owned lands constitute the bulk of agrarian lands in developing countries and they are used mostly for subsistent agriculture.¹⁵ Land tenure, communal or not, is a vital part of social, political and economic fabric. It has several facets working together to bring into play the social, technical, economic, institutional, legal and political aspects that are often overlooked but must be taken into account. Land tenure relationships may be formal or informal. The former is often well-defined and enforceable in a formal court of law or through customary structures in a community, whereas the latter may be relatively poorly defined with haziness that becomes susceptible to exploitation.¹⁶

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security was developed by the Food and Agricultural Organization (FAO)¹⁷ and its partners to:

serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security.¹⁸

¹³ FAO CORPORATE DOCUMENT REPOSITORY available at <http://www.fao.org/docrep/005/y4307e/y4307e05.htm> reproduced by the Economic and Social Development Department.

¹⁴ Collective lands are lands possessed by indigenous peoples under their native customs without option of division into individual plots. They are vested in the community as a whole and used in a non-exclusive way; A K. Barume, *Land Rights of Indigenous Peoples in Africa: with special focus on Central, Eastern and Southern Africa* (International Work Group for Indigenous Affairs Publication, Copenhagen, 2010) 177 -178

¹⁵ Ibid.

¹⁶ See note 13 above.

¹⁷ The Food and Agricultural Organization is an arm of the United Nations.

¹⁸ The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security available at www.fao.org/docrep/016/i2801e/i2801e.pdf Accessed 10 March 2017.

These guidelines were developed to ensure that land is used in a way that maximizes food production.

Land grabbing is defined as ‘the contentious issue of large-scale land acquisitions; the buying or leasing of large pieces of land in developing countries, by domestic and transnational companies, governments, and individuals.’¹⁹ Although the concept featured prominently throughout history, land grabbing as used today primarily refers ‘to large-scale land acquisitions following the 2007-2008 world food price crisis.’²⁰ The background to the current concept of ‘land grabbing’ is the fact that the food crisis of 2007-2008 (which triggered food security fears within the developed world) opened new economic opportunities for agricultural investors and speculators, and subsequently resulted in large-scale agricultural investments, (primarily foreign) in the Global South.²¹ Initially, land grabbing, was hailed by observers as a new pathway towards agricultural development and investment in land; however, it has recently been criticized by a number of civil society, governmental, and multinational groups for the various negative impacts that it has had on local communities.²² These groups have argued that land grabbing is capable of leading to negative situations like land insecurity, unemployment, dispute over compensation, issues as to local consultation and displacement of local communities.²³

3. Land Administration in Cross River State

Land tenure systems in Cross River State are generally broken down into customary and public systems, with the customary tenure more prevalent in rural areas of the state. The public land tenure practice represents an attempt by the Nigerian Government, through the Land Use Act of 1978, to modify land tenure and access for purposes of development. This public land tenure is operational and predominant in the urban areas where individual land rights are common, though negligible in the rural communities.²⁴ Prior to the enactment of the Land Use Act of 1978, the communal land tenure system was the primary system of land holding. The Land Use Act did not abolish communal lands in rural areas but qualified the tenure of communal land holdings.²⁵

Communal land tenure systems are more prominent in rural and semi-urban communities with relatively low population density. Land under this system is

¹⁹ S Borrás, R Hall, I Scoones, B White, W Wolford, ‘Towards a Global Understanding of Global Land Grabbing: an Editorial Introduction’ (2011) 38 (2) *The Journal of Peasant Studies* 209.

²⁰ *Ibid*

²¹ ‘Stop African Land Grab’ <http://www.stopafricanlandgrab.com/> Accessed 09 March 2017.

²² *Ibid*

²³ S Borrás et al (n 19 above) 211.

²⁴ N Edmead, C Ngwu, B I Oqua and F Pichel, “Streamlining Land Administration and Governance in Cross River State, Nigeria” available at http://www.fig.net/pub/fig2013/papers/ts01a/TS01A_pichel_ngwu_et_al_6572.pdf Accessed 10 March 2017

²⁵ The impact of the Land Use Act on Communal Land Holding is discussed in detail below.

held under an arrangement that provides for joint and several use of land by all members of the community. One prominent feature of this system of tenure is that land is owned by the community and its members cannot alienate such land without the consent of the Head of the community, family head, or such other authority as the community recognizes. This feature is not unique to the communal land tenure of Cross Rivers State but is the practice in all communal land tenures in Nigeria. This position was explained by the Privy Council of England in the pre-independence case of *Amodu Tijani V. Secretary, Southern Nigeria* as follows:

*'The next fact that is important to bear in mind to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community or the village or the family never to the individual. All members of the community or village or family have an equal right to the land but in every case the chief or head man of the community has charge of the land and in a loose mode of speech is called the owner. He is to some extent in the position of a trustee, and as such holds the land in trust for the community or family. He has control of it and any member who wants a piece to cultivate or build on goes to him for it. But the land remains the property of the community or family.'*²⁶

As noted in the above dictum, the family heads grant land-use rights to community members and to outsiders who make a suitable compensation and are approved by the customary group; however, these grants are often not documented and therefore leave the grantee with an unsecured asset. Grants of land made to the individual entitle the grantee, but further allocations or subleases by the grantee are not permitted without the knowledge and agreement of the family head. These distinctive features of customary tenure arrangement had two disadvantages. They constrained land information systems and limited government involvement in land issues as the traditional rulers managed the land for the entire community. These rulers managed allocation and made decisions regarding the use of communal land. This was this case even for lands that were needed for national concerns such as resource exploitation. The government or multinational oil companies had to consult the family heads to access these lands.²⁷ Customary land tenure was therefore perceived by the federal government as an obstacle in Nigeria's journey to economic freedom. These and other disadvantages of the customary land tenure inspired the enactment of the Land Use Act of 1978.

4. The Land Use Act: Summary Overview

In addition to the problem of monopoly of control of family and community lands by family and community heads, the promulgation of the Land Use Act was as a result of two factors: firstly, was the diversity of customary laws on land tenure and difficulty in applying the various customs of the different ethnic groups. The Supreme Court of Nigeria explained how the Land Use Act addressed this

²⁶ [1921] 3 A.C. 399. This statement which acknowledges that land is collectively owned in the customary law of the various ethnic groups in Nigeria was endorsed by the post - independence Supreme Court of Nigeria in the 1972 case of *Samuel Ajao V. M.O. Ikolaba* (1972) 5 S.C. 58, 67 – 68.

²⁷ R Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience' in F N. Botchway (ed) *Natural Resource Investment and Africa's Development* (Edward Elgar Publication, United Kingdom 2011) 72 at 81.

problem in the case of *Nkwocha v. Governor of Anambra State*²⁸ when it stated that: ‘the tenor of the Act as a single piece of legislation, is the nationalisation of land in the country by the vesting its ownership in the State....’²⁹ In other words, the Act created a common ownership for land in Nigeria by nationalizing the lands.

The Act vests all land comprised in the territory of each state (except land vested in the Federal Government for its agencies) solely in the hands of the military governors³⁰ of the state who would hold such land in trust for all Nigerians.³¹

Another factor that inspired the enactment of the Land Use Act was the frequency of fraudulent sales of land in Southern Nigeria. The same land would be sold to different persons at the same time giving rise to so many litigations.³²

The Act did not adopt a uniform approach for rural and urban lands. The Act distinguishes throughout between urban and non-urban (rural) land.

- In urban areas (to be so designated by the Governor of a state), land was to come under the control and management of the Governor.³³
- In rural areas it was to fall under the appropriate local government.³⁴
- **“Land Use and Allocation Committees”**, appointed for each state by the Governor, were to advise on the administration of land in urban areas.³⁵
- **“Land Allocation Advisory Committees”** were to exercise equivalent functions with regard to rural land.³⁶

The Act envisaged that **“rights of occupancy”**, which would appear to replace all previous system or rules of inheritance to land, would form the basis upon which land was to be held. *Nkwocha v. Governor of Anambra State*:³⁷

*the tenor of the Act as a single piece of legislation, is the nationalisation of land in the country by the vesting its ownership in the State, leaving the private individual with an interest in land which is a mere right of occupancy and which is the only right protected in his favour by law after the promulgation of the Land Use Act.*³⁸

These rights were of two kinds: statutory and customary.

²⁸ (1984) 6 S.C. 362 at 404

²⁹ Ibid

³⁰ Now civilian Governors of States.

³¹ See Section 2(1) of the Land Use Act 1978.

³² B Oseni, “The Land Use Act Decree No. 6 of 1978” available at <http://nigeriaenvironment.blogspot.com/2012/11/summary-of-land-use-act-decree-no-6-of.html> Accessed 11 March 2017.

³³ Section 2(1) of the Land Use Act 1978.

³⁴ Section 2(b) of the Act provides that Lands in non-urban areas is vested in the Local Government of the territory;

³⁵ See section 2(2) of the Land Use Act 1979.

³⁶ See section 2(5) of the Land Use Act 1979.

³⁷ (1984) 6 S.C. 362 at 404

³⁸ B Oseni, (note 28 above) 404

- **“Statutory rights of occupancy”** were to be granted by the Governor and related principally to urban areas.³⁹
- **“Customary right of occupancy”**, according to the Act, means the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by Local Government under this Act.⁴⁰

Local governments were empowered to grant customary rights of occupancy to any person or organisation for agricultural, residential and other purposes with the proviso that grants of land for agricultural or grazing purposes should not exceed 500 or 5000 hectares respectively without the consent of the State Governor.⁴¹ With the minor exception of land subject to Federal or State claims, the Act also empowered the local government to enter upon, use and occupy for public purposes any land within the area of its jurisdiction and to revoke any customary right of occupancy on any such land.⁴² The approval of the local government was to be required for the holder of a customary right of occupancy to alienate that right.⁴³

The Act prohibits the alienation by assignment, mortgage, transfer or possession, sub-lease or otherwise, of customary right of occupancy without the consent of either the Governor or the Local Government as the case may be.⁴⁴ It also prohibits the alienation of statutory right of occupancy without the due consent of the Governor.⁴⁵

Governors were empowered to revoke rights of occupancy for reasons of “overriding public interest.”⁴⁶ Such reasons included alienation by an occupier without requisite consent or approval; a breach of the conditions governing occupancy; or the requirement of the land by Federal, State, or local government for public purposes.⁴⁷ Only in the last of these cases would any compensation be due to the holder, and then only for the value of unexhausted improvements on the land and not for the land itself.

Experts argue that the Land Use Act 1978 was designed to accomplish four main objectives:

1. to effect structural change in the system of land tenure;
2. to achieve fast economic and social transformation;
3. to negate economic inequality caused by the appropriation of rising land values by land speculators and land holders; and

³⁹ Section 5 (1) (a) of the Land Use Act 1979.

⁴⁰ Section 6(1) (a) of the Land Use Act 1979.

⁴¹ Section 6(1)(b) and section 6(2) of the Land Use Act 1979.

⁴² Section 6(3) of the Land Use Act 1979.

⁴³ Section 21 of the Land Use Act 1979.

⁴⁴ *Ibid*

⁴⁵ Section 22 of the Land Use Act 1979.

⁴⁶ Section 28(1) of the Land Use Act 1979.

⁴⁷ Section 28(2) of the Act 1979.

4. to make land available easily and cheaply, to both the government and private individual developers.⁴⁸

As regards the objective of effecting structural changes in the system of land tenure this was the case for both rural and urban lands. Urban lands came under the domain of the public land tenure. For rural lands, the communal land tenure existed subject to the provisions of the Land Use Act of 1978. The Supreme Court noted in the case of *Abioye V. Yakubu*⁴⁹ that the effect of the Land Use Act was to: 'Remove the radical title in land from the communities and vests the same in the governor while leaving the community with a right to occupy.'⁵⁰The implication of this statement is that the communities' heads are no longer vested with ownership of community lands but are restricted to a mere right of occupancy of their lands. This was confirmed by the Supreme Court of Nigeria's dictum in *Ogunola v. Eiyekole*⁵¹that:

*Land is still held under customary tenure even though dominium is in the Governor. The most pervasive effect of the Land Use Act is the diminution of the plenitude of the powers of the holders of land...Thus an owner of customary land remains owner all the same even though he no longer is the ultimate owner.*⁵²

This is not peculiar to Nigeria. There is a parallel in this regard with the aboriginal peoples of Australia. In the case of *Mabo V. Queensland*,⁵³ it was argued 'that the annexation of Murray Islands⁵⁴ was sufficient to vest absolute ownership of the lands in the Crown.'⁵⁵ The High Court of Australia disagreed, holding that while 'the annexation did vest radical title in the Crown, it was insufficient to eliminate a claim for native title,'⁵⁶ and that 'native title can exist as a burden on the radical title of the Crown.'⁵⁷ The court was insisting that aboriginal people in Australia did not automatically lose their traditional land tenure system as a result of European colonization and settlement. Their traditional land tenure was a sub-system in the national land tenure system.

5. LAND GRABBING IN NIGERIA

Land grabbing in Nigeria did not originate in Cross Rivers State. The first experience of land grabbing in Nigeria was in the year 2004, when Governor Bukola Saraki of Kwara State appropriated 13,000 hectares of land from local farmers in Shonga Local Government Area of Kwara state and gave them to 5

⁴⁸ 'Summary of the Land Use Act' Decree Number 6 of 1978 in Nigeria' <http://nigeriaenvironment.blogspot.com.ng/2012/11/summary-of-land-use-act-decree-no-6-of.html> Accessed 1 March 2017.

⁴⁹ (1991) 5 N.W.L.R. (Part 190) 130.

⁵⁰ Ibid 217.

⁵¹ (1990) 4 N.W.L.R. (Part 146), 632 S.C.

⁵² Ibid.

⁵³ [1992] H.C.A. 23.

⁵⁴ The traditional historic home land of the aboriginal people of Australia.

⁵⁵ [1992]H.C.A. Brennan J. para 23, Toohey J. para 110.

⁵⁶ Ibid Brennan J. Para 52-54.

⁵⁷ Ibid Brennan J. para 53.

Zimbabwean farmers on a 25 years lease.⁵⁸ Governor Saraki took this step in spite of the protests of local farmers.⁵⁹

The lead provided by Kwara state was followed in 2010, by the government of Taraba state when they evicted farmers in Taraba State from the lands that they had farmed for generations to make way for a United States' Company, Dominion Farms to establish a 30,000 hectares rice plantation.⁶⁰ This move by the Taraba State government (which involved almost twice of the size of the land in Kwara state) displaced many local farmers and land users. Two Nigerian non-governmental organisations visited the affected areas and observed that the lands being given to Dominion Farms are part of a public irrigation scheme that thousands of families depend on for their food and survival.⁶¹ The local people were not consulted about the deal with Dominion Farms and were neither compensated nor resettled.⁶² The local people insist that they want their lands back to produce food for their families and the people of Nigeria.⁶³

Similarly, the Cross River state government between years 2011-2013 handed over an estimated 30,000 hectares of land to Wilmar international in its bid to revive the oil palm industry in the state and to restore its past glory.⁶⁴ The Cross River State government says its ambition is to ensure that Wilmar has access to a minimum of 50,000 hectares of land on which to cultivate palm plantation within a five year period.⁶⁵ Wilmar international has stated that its objective is to grow oil palm for exports and domestic industrial use; to this end it has formed a joint venture partnership with PZ Cussons Nigeria PLC to process the palm oil that would be produced from the estates into products.⁶⁶

⁵⁸ J A Ariyo and M Mortimore, 'Land Deals and Commercial Agriculture in Nigeria: The New Nigerian Farms in Shonga District, Kwara State' Paper Presented at the International Conference on Land Grabbing 6-8 April 2011 at the Institute of Development Studies University of Sussex. https://www.iss.nl/fileadmin/ASSETS/iss/Documents/Conference_papers/LDPI/3_Joseph_A_Ariyo_and_Michael_Mortimore.pdf Accessed 1 March 2017

⁵⁹ Ibid.

⁶⁰ "Dominion Farm's Land Grab in Nigeria!" available at <http://www.globaljustice.org.uk/resources/dominion-farms%E2%80%99-land-grab-nigeria>; Oliver Tickell, "Nigerian farmers face destitution from 300 sq.km land grab backed by UK aid" available at http://www.theecologist.org/News/news_analysis/2731886/nigerian_farmers_face_destitution_from_300_sqkm_land_grab_backed_by_uk_aid.html Accessed 1 March 2017.

⁶¹ Ibid.

⁶² N E Attah, 'Possession by Dispossession: Interrogating the new wave of Land Grabbing in Nigeria' (2013) 1(2) Journal of Land and Rural Studies 203.

⁶³ Ibid.

⁶⁴ The State government has so far handed over the Calaro Oil palm estate and the Ibiae oil palm estates. It has also transferred its interests in large tracts of land in Biase Local government area to Wilmar international. "Wilmar and Land Grab in Cross River State" available at <http://ejatlas.org/conflict/wilmar-and-land-grab-in-cross-river-state> Accessed 1 March 2017.

⁶⁵ Ibid

⁶⁶ A S Sajuyigbe, S.O. Ayanleke, 'Impact of Packaging on Organizational Sales Turnover: A case Study of Paterzon Zoconist Cussons (PZ) PLC, Nigeria. (2013) 4(11) Interdisciplinary Journal of Contemporary Research in Business 497 at 502.

Land grabbing is not exclusively a Nigerian phenomenon. As can be seen from the table below, other African countries are now experiencing land grabbing in ways that mimic the scramble for and colonisation of Africa.

LAND ACQUISITIONS IN SECLECT COUNTRIES

COUNTRY	PROJECTS	AREA	DOMESTIC SHARES
SUDAN	132	9.8	78
MOZAMBIQUE	405	6.6	53
LIBERIA	17	4.0	7
ETHIOPIA	406	2.9	49
CAMBODIA (ASIA)	61	2.4	70
NIGERIA	115	2.0	97

Source: Food and Agriculture Organisation, International Food Policy Research Institute cited in B. Nwesigire.

Bwesigye bwa Mwesigire, a Ugandan lawyer and writer in his article titled, “Land Grabbing in Africa, the new colonialism” had this to say”:

“Tragically, a silent recolonisation on a mass scale is happening through further dispossession in areas where the original colonisation had not been complete. The new colonisation is dressed in the language of economic development and fighting poverty but its interest is the satisfaction of the needs of multinational companies for markets and land to grow food for export – to satisfy the food needs of their primary market while depriving Africans the satisfaction of their needs.”⁶⁷

6. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests and Land Grabbing in Cross Rivers State

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security was endorsed in a landmark decision by the Committee on World Food Security (CFS). It is a set of far-reaching global guidelines aimed at helping governments safeguard the rights of people to own or access land, forests and fisheries.⁶⁸ Admittedly, these

⁶⁷ Available at: <https://thisisafrica.me/land-grabbing-africa-new-colonialism/>

⁶⁸ See Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security available at www.fao.org/docrep/016/i2801e/i2801e.pdf; Accessed 1 March 2017.

Guidelines are soft law instruments and, therefore, unenforceable.⁶⁹ They are thus persuasive recommendations to governments of state parties to the United Nations. Even at that, these Guidelines provide frameworks for developing strategies, policies, laws, programmes and activities on communal land tenure, food security and environmental sustainability. The Guidelines like those before it: *Voluntary Guidelines on the Right to Food; Code of Conduct for Responsible Fisheries; International Code of Conduct on the Distribution and Use of Pesticides; Responsible Management of Planted Forests: Voluntary Guidelines; and Fire Management Voluntary Guidelines: Principles and Strategic Actions*, are accompanied by a wide range of additional documents, such as supplementary guidelines that provide technical details on specific aspects when necessary, training and advocacy materials, and further guidance to assist with implementation.⁷⁰

The new Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security outline principles and practices that governments can refer to when making laws and administering land, fisheries and forests rights.

The guidelines are based on an inclusive consultation process started by FAO together with its partner institutions in 2009 and then finalized through CFS-led intergovernmental negotiations that included participation of government officials, civil society organizations, private sector representatives, international organizations and academics.⁷¹

The Guidelines aim to promote food security and sustainable development by improving secure access to land, fisheries and forests and protecting the rights of millions of often very poor people.

Much public debate has focused on the so-called 'land-grabbing' phenomenon, which is one of the issues that are dealt with in these guidelines. As regards land grabbing in Cross Rivers State, the following points are worth noting:

- While the guidelines acknowledge that responsible investments by the public and private sectors are essential for improving food security, they

⁶⁹ Three things distinguish Hard Law from Soft Law –

“**Obligations.** Harder law will have a higher degree of legal obligation, while softer law will have weaker or no legal obligation.

Precision. International law may be written in more or less detailed and precise language. Harder law will have a higher degree of precision, while softer law will use vaguer, general or abstract wording.

Delegation. Harder law is more likely to delegate interpretation or enforcement to an independent third party (like an international court or tribunal). Softer law is more likely to keep interpretation or enforcement within the parties, allowing more room for political maneuvering.” See Center on Law and Globalization available at https://clg.portalxm.com/library/keytext.cfm?keytext_id=66

⁷⁰ See Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security available at <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (preface).

⁷¹ About the Voluntary Guidelines on Responsible Governance of Tenure see <http://www.fao.org/nr/tenure/voluntary-guidelines/en/> Accessed 1 March 2017.

also recommend that safeguards be put in place to protect tenure rights of local people from risks that could arise from large-scale land acquisitions, and also to protect human rights, livelihoods, food security and the environment.⁷² No safe guards were put in place for the local farmers in Cross Rivers State. This is as a result of the fact that the Land Use Act 1978 provides legal basis for land grabbing by vesting ownership of urban lands in the state government and by vesting ownership of rural land in the local government. Both the state government and the local government hold this land in trust for the people. The Land Use Act has been criticized on the basis of the fact that the trusteeship created under the Land Use Act is a farce. According to Babatunde:

“A trusteeship is an office of very high fiduciary responsibility, which can never or should never be assumed by force of arms as under the Land Use Act. The Land Use Act enacts a Trust, without accountability, because Section 47 of the Act ousts the jurisdiction of the courts concerning the most germane aspects of the Act and its implementation. The Land Use Act creates a forced Trust with powers vested on the Trustee to convey trust property to any one he pleases, including himself, without question.”⁷³

Therefore, the fact that the Land Use Acts enacts a trust without accountability provides loop holes for land grabbing and other threats to communal land tenure. Section 47 of the Land Use Act expressly ousts the jurisdiction of the court to enquire into any question pertaining to the vesting of the land in the governor or the right of the governor or local government to grant a statutory or customary right of occupancy. In this regard it can be argued that the Land Use Act violates the rights to property of the Cross River people as guaranteed by the 1999 constitution. Section 43 of the constitution guarantees the right of every citizen of Nigeria to own and acquire immovable property in any part of Nigeria. The fact that the Land Use Act removes ownership of communal land from the community or family head and vests same in the local government violates this provision. This is because communities no longer own their ancestral lands but are assigned a mere right of occupancy. Similarly, the fact that assignment of lands to members of the family or community by the family or community heads must be with the consent of the local government violates this provision as the individual’s right to acquire property is subject to the local government’s consent. There is a potential argument that section 43 of the 1999 Constitution is not a guarantee of family or community rights to own land as this section provides for the rights of

⁷² USAID LAND TENURE AND PROPERTY RIGHTS PORTAL, Voluntary Guidelines available at <http://usaidlandtenure.net/projects/voluntary-guidelines> Accessed 1 March 2017.

⁷³ L Babatunde, ‘What to do with the Land Use Act’ <http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwi5lfD5iI3TAhVLXRoKHxvAHEQFggYMAA&url=http%3A%2F%2Fwww.nigerianlawguru.com%2Farticles%2Fland%2520law%2520TO%2520DO%2520WITH%2520THE%2520LAND%2520USE%2520ACT.pdf&u sg=AFQjCNGZq6YF fCce5NrlghS4qFs1DtTng&bvm=bv.151426398,d.d2s> page 2 Accessed 19 March 2017.

individuals (not communities) to own immovable property. This argument is addressed by the fact that the right of families and communities to own lands collectively is recognized by article 14 of the African Charter on Human and People's Right which provides that the Right to Property shall be guaranteed. The language applied in this section suggests that this provision guarantees both individual and community lands. Furthermore, article 21 (2) provides that a dispossessed people shall have the right to its property and to adequate compensation. After ratifying the African Charter in 1983, Nigeria incorporated it into domestic law by enacting it as the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act of 1983(African Charter Act). The implication of this domestication of the African Charter is that it became part of Nigeria's national laws. Section 1 of the African Charter Act provides that the provisions of the African Charter have 'force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.' Therefore, the Land Use Act also conflicts with this law.

- The guidelines also recommend that Investment models exist that do not result in the large-scale acquisition of land, and these alternative models should be promoted.⁷⁴ This option was not explored in the case of Cross Rivers State. The Land Use Act 1978 gave government the right to compulsorily acquire land for overriding public interest.⁷⁵ With this power to compulsorily acquire land; there was no incentive for the government to pursue models of investment that do not result in large scale acquisition of lands. Furthermore, Babatunde notes that although the Act envisages that for proper administration of land, Land in each state should be demarcated into "Urban and "non-Urban" areas, hardly any state till date, has succeeded in doing that.⁷⁶ The implication of this is that the land granted to Wilmar International would also include a sizeable amount of communal and family lands. Again the Land Use Act's guarantee of the right of the government to compulsorily acquire land violates section 44 of the 1999 constitution's provisions for the determination of the quantum of compensation payable by the government. Section 44 of the 1999 Constitution provides that:

No immovable property or any interest in immovable property shall be taken possession of compulsorily...except in manner and for purpose prescribed by a law that among other things: a. requires the prompt payment of compensation therefore and gives to any person claiming such compensation right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having such jurisdiction in that part of Nigeria.

⁷⁴ Ibid

⁷⁵ Section 28(1) of the Land Use Act 1979.

⁷⁶ L Babatunde (n 73 above) 3.

On the contrary, the Land Use Act provides in section 29(1) provides that the community shall only be entitled to compensation for the value at the date of the revocation of their unexhausted improvements. The compensation provided by the Land Use Act in contrast to what the constitution envisaged could fall short of the market value of the property. To further curtail the rights of these communities, the Land Use Act expressly provides that no court shall have jurisdiction to determine the adequacy of the compensation paid under this Act;⁷⁷ such disputes shall be referred to the Land Use Allocation Committee.⁷⁸ The Land Use Allocation Committee members are chosen by the governor and the governor is authorized to control its proceedings.⁷⁹ This provision and section 47 of the Land Use Act clearly violates section 6 (6) of the Constitution of Nigeria 1999.⁸⁰ In reality, the communities of Cross Rivers State whose lands were acquired for Wilmar say they have not been fully compensated.⁸¹

- The guidelines recommend further that Investments should also promote policy objectives such as boosting local food security and promoting food security, poverty eradication and job creation, and provide benefits to the country and its people, including the poor and most vulnerable. Again, this was not considered in the contract between Wilmar International and the government of Cross Rivers State as lands which should ordinarily have been used to grow food for domestic consumption have been transformed to lands for growing cash crops for export. This policy if unchecked could result in a situation in which the most fertile lands are employed in the production of cash crops for exports while the country struggles to grow food for domestic consumption.⁸²
- In addition, the guidelines recommend that there should be a recognition and protection of legitimate tenure rights, even under informal systems and that best practices for registration and transfer of tenure rights should be respected. Again, another criticism of the Land Use Act 1978 is the fact that the Act does not seem to have much regard for traditional values, or family life when under section 36 (5) thereof it prohibited subdivision and transfer of land without prior consent of the Governor.⁸³ It thus shows a lack of recognition and protection of communal tenure rights.

⁷⁷ Section 47(2) of the Act.

⁷⁸ Section 30 of the Act.

⁷⁹ Section 2(3) of the Land Use Act makes the governor responsible for appointment of persons into the Land Use Allocation Committee.

⁸⁰ Section 6(6) of the 1999 Constitution gives the court jurisdiction to hear all disputes between individuals, organizations and governments in Nigeria.

⁸¹ H Johnson. 'Legitimacy and Accountability in the Global Governance of Large Scale Agricultural Land Investments' (2016) 6 (1) *Journal of Sustainable Finance and Investment* 67.

⁸² For an analysis of this kind of struggle see R Blanton, D Mason, B Athow, 'Colonial Style and Post-Colonial Conflict in Africa' (2001) 38(4) *Journal of Peace Research* 473 at 477.

⁸³ L Babatunde (n 73 above) 3.

- The guidelines provide for the managing expropriations and restitution of land to people who were forcibly evicted in the past and for governments to ensure that investment in agricultural lands occurs responsibly and transparently. This implies that modalities should be put in place for returning the land to the communities at the end of the contract with Wilmar International. This is of particular importance in the light of the fact that the Land Use Act has no mechanism for implementing the effective titling of land.
- Finally, the guidelines provide that governments should create mechanism for resolving disputes over tenure rights and that governments should address the expansion of cities into rural areas. Again these mechanisms have not been put in place in Nigeria and communities who have grievances as regards land grabbing in Cross Rivers, Taraba and even Kwara state have no established mechanism for the resolution of their grievances. The ‘Land Use and Allocation Committees,’ and the ‘Land Allocation Advisory Committees’ were established (by the Land Use Act 1978) merely to advise the state governments and local governments on administration of land in urban and rural areas. They were not established for addressing the grievances of aggrieved communities.

7. The Land Use Act as a Trilemma of Regulation

In legal jurisprudence, there is a theory that a statute may constitute a ‘trilemma’ of regulation. This theory was propounded by Teubner. Teubner’s Trilemma can basically be summarised as the proposition that governmental regulatory intervention in a specific area (system) of society often fails as a result of any one of the following three factors in the relationship between the system sought to be regulated and the regulation:⁸⁴

- The law may be irrelevant to or incompatible with the system and thus be futile - described as the problem of ‘mutual indifference’ or ‘incongruence of law, politics and society’;⁸⁵
- The law may through rigid legalism damage the system that is sought to be regulated by limiting it to set of fixated rules thereby damaging the system’s capacity for ‘self-reproduction’ – described as the problem of ‘social disintegration through law’ or ‘over legalization of society’;⁸⁶
- The self – reproductive capacity of the law may be damaged through being ‘captured’ by the system it sought to regulate resulting in the fact that the

⁸⁴ G. Teubner ‘Justifications: Concepts, Aspects, Limits,’ in G Teubner (ed) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyan, New York, Berlin, 1987) 21-22, 27; G. Teubner, *Dilemas of Law in the Welfare State* (Walter De Gruyter, New York, Berlin, 1988) 311.

⁸⁵ Teubner Justifications (n 84 above) 22 -24; Teubner Dilemas (n 84 above).

⁸⁶ Teubner Justifications (n 84 above) 24 -25; Teubner Dilemas (n 84 above).

law becomes “ ‘politicized,’ ‘economised,’ ‘pedagogized’ etc” – described as the problem of ‘legal disintegration’ or ‘over socialization of law’⁸⁷

Applying the above trilemma to the Land Use Act 1978:

- The Land Use Act has been counter-productive and futile. This is because the Land Use Act has not resolved the issues of title to land but has created more problems. Babatunde notes that:

*The Certificate of Occupancy issued pursuant to the Act has become an intractable problem to Banks, Financial Institutions and even individuals; as the Government does not guarantee anything by its issuance. There have been instances of multiple certificates on the same piece of land. The battle between pre-existing rights over land and subsequent grant pursuant to the provisions of the Act, continues to rage in and out of the court (see Ogunleye v. Oni (1990) 4 S.C. 130) and there are several instances of those who hold the Certificate issued by government over so-called government acquired land, but cannot take physical possession, because the original land owners will not let them. Sometimes, they are forced to re-purchase from these landowners subsequent to a purchase from Government.*⁸⁸

- The Land Use Act has inhibited the effective administration of land through rigid legalism. According to Babatunde:

*While the Act, as some people have said, was meant to "revolutionise" land administration by simplifying procedure for land acquisition and thereby making land more readily available for development, no explanations have been offered as to why the Act failed to legislate into immediate existence, the corresponding manpower, required to implement this supposed "revolution." Any Law that ignores its environmental and social factors in concept, legislation and implementation, is bound to fail, no matter how you prop it up with the fear of the bayonette. The law certainly lacks manpower and infrastructural support even in Nigeria of today.*⁸⁹

In other words, the enactment of the Land Use Act provides a basis for theoretically arguing that the necessity of a national legislation on land administration has been addressed. In practice, problems on land administration abound.

- The Land Use Act 1978 has inhibited the proper evolution of effective land administration in Nigeria because it has become ‘politicized’ and ‘economised.’ According to Babatunde:

*Beyond the uncertainties in Title to Land, the cost implication of perfecting one's sometimes uncertain Title, has escalated with the imposition of consent fees; Capital Gains Tax and other impositions by the various State Governments. Yet, the State under the Land Use Act warrants nothing and offers no indemnity for collecting these huge sums. All it does is to give you a document, after which you are wholly and solely on your own. With due respect, why forcefully vest the land in yourself; collect revenue from it, issue documents of title to whom and as you please and thereafter bear no" obligation in guaranteeing the transaction! What a free meal.*⁹⁰

⁸⁷ Teubner Justifications (n84 above) 25 -27; Teubner Dilemmas (n 84 above).

⁸⁸ L Babatunde (n 73 above) 1-2.

⁸⁹ Ibid 3

⁹⁰ Ibid

In spite of these weaknesses, of the Land Use Act, it is entrenched in the 1999 Constitution. Section 315 of the 1999 Constitution expressly entrenched the Land Use Act and its provisions by specifying that the Land Use Act and its provisions 'shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this constitution and shall not be altered or repealed except in accordance with section 9(2) of this constitution.'⁹¹ There are suggestions that the Land Use Act was enacted by the Nigerian government on the insistence of foreign investors (particularly investors into the Nigerian oil sector) to enable these investors have unlimited access to community lands without the need to get their consent.⁹² Although these suggestions are not backed by evidence, they are somewhat confirmed by the fact of the Land Use Act's incorporation to the constitution.

8. Conclusion and Recommendations

This article examined the communal land tenure system in Cross Rivers State and noted that the communal land tenure system in Cross Rivers State mirrored the communal land tenure system in most part of Southern Nigeria. Under the communal land tenure system, land is held by the community or family head in trust for all members of the community and family. This article also examined the Land Use Act and noted that the Act was enacted as a result of the perceived weaknesses of the Communal Land Tenure system among which is the fact that the communal system did not provide for a uniform system of land acquisition and titling in Nigeria. It was noted that the Land Use Act has created challenges for Nigeria among which is the fact that it has provided a legal basis for the practice of land grabbing in Nigeria. It was also noted that the Land Use Act was in conflict with the right to property guaranteed in the 1999 Constitution because it limited the extent to which communities, families and even individuals could own their lands. In addition, the compensation prescribed in the Land Use Act was less than that envisaged by the constitution. This article noted that these conflicts between the Land Use Act and the constitution provided loopholes in our laws that allowed for the practice of land grabbing. It was also noted that Land Grabbing policy goes against the spirit and letter of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests.

⁹¹ The 1979 Constitution (which was the predecessor to the 1999 Constitution), had a similar incorporation of the Land Use Act and expressly stated that 'nothing in this constitution shall invalidate any of the provisions of the Land Use Act.' See section 274(5) of the 1979 Constitution.

⁹² Y Omorogbe, 'The Legal FrameWork for Public Participation in Decision Making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless' in D. N. Zillman, Alastair R. Lucas and George (Rock) Pring (ed) *Human Right in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, Oxford 2002) 549; see generally, K. S. A. Ebeku, "Oil and the Niger Delta People: The Injustice of the Land Use Act" (CEPMLP Journal, volume 9, 2004).

Yaya Olaniran,⁹³ did say that, the Voluntary Guidelines were the product of a three year, inclusive process of consultations and negotiations that brought together many stakeholders and ensured that a wide range of voices were heard, with the result that, ‘...we have a meaningful series of principles and practices that everybody — countries, the private sector, farmers, civil society — can stand behind and support, and that will work out in the real world.’⁹⁴

It is now up to the countries who endorsed the guidelines to put them into practice on the ground, according to Olaniran. ‘These changes won't happen overnight. But we also know as a result of the extensive consultations by FAO and the CFS-led negotiation process, that there is a lot of buy-in and support for the guidelines. The CFS endorsement lends them legitimacy and strength, and all the countries involved are ready to take them on board,’⁹⁵ he said.

The Voluntary Guidelines is not law and, therefore, unenforceable whether in Nigeria, at large, or in Cross River State. However, the principles, rights and Geographic Information System Agency of the Cross River State government could begin adopting these principles in so far as these are not in conflict with the Land Use Act. That said, the Land Use Act, being a 1978 federal enactment, which has not anticipated the latest developments in international best practices regarding land tenure administration should be reviewed with a view to reflecting the spirit of the Voluntary Guidelines and to make it conform to the right to property guaranteed in the 1999 Constitution.

⁹³ Chairman, Committee on Food Security of the Food and Agriculture Organization and Nigeria's permanent representative to the Food and Agriculture Organization of the United Nations.

⁹⁴ Food and Agricultural Organization of the United Nations, “Countries adopt global guidelines on tenure of land, forests, fisheries” available at <http://www.fao.org/news/story/en/item/142587/icode/> Accessed 7 March 2017.

⁹⁵ Ibid