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Using the Capability Approach to development in attempting to counter human rights violation due to land grabbing in Ethiopia

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Abstract

This article provides for an account of the land grabbing issue that is become very common in Ethiopia today. It is about land deals between the Ethiopia state and foreign investors whereby the latter move to Ethiopia to use those lands for agricultural and bio-fuel purposes. As a result, massive human rights violations have been recorded which are seriously affecting the lives of millions of local communities and indigenous peoples of Ethiopia. The article investigates how Amartya Sen's concept of Capability Approach can be used to mitigate if not eliminate the impact of such economic investments. It shows how land is a capability for local communities and how the present legal framework on land as a right is not adequate.

Keywords: Land investments, Ethiopia, Land rights, Human rights, Sen's Capability Approach

1. Introduction

Land investments in Ethiopia have been the cause of serious human rights violations of local communities. While the primary aim of such investments remains the influx of foreign direct investment in the name of development, some sections of the population are paying a heavy price for it. And yet, the very justification of such investments ought to have been the uplifting of the lives of every citizen of the country and certainly not the infringements of their rights. This article provides a factual account of land investments (also termed as land grabbing) in Ethiopia from which the human rights violations are highlighted. It uses the Capability Approach to illustrate what genuine human development should mean. Land will be used as the commodity which renders people capable in Ethiopia and therefore put them on the path of development. However, despite land being a right guaranteed by international human rights instruments, its limitation as a right is preventing people from enjoying land as a capability. The article finally looks at the impact land grabbing could have on investors.

2. Ethiopia and economic development

The Federal Democratic Republic of Ethiopia is the second most populous country in Africa with approximately 96.5 million inhabitants.¹ Its population is predicted to exceed 173 million by

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2050. A vast majority of Ethiopians live in rural areas, making up to 84% of the population to be rural dwellers. Their mode of subsistence is mainly small-scale agriculture which makes land of utmost importance to them.

95 % of the area under agriculture in Ethiopia is by small-scale farmers.² The economy of Ethiopia has grown at a very positive and encouraging rate compared to other East African countries. According to the World Bank, the economy has experienced strong and broad based growth over the past decade. Since 2004, it has recorded growth averaging 10.9% per year in comparison with an average of 5.3% for countries in East Africa.³ However, despite a rise in GDP per capita from 146 USD in 2006 to 220 USD in 2008, the gap between the rich and the poor keeps on increasing as noted by the United Nations Economic Commission for Africa.⁴ The Ethiopian economy has in general revolved around agriculture⁵ which is equally the major source of employment.⁶ The country has recently started to experience economic diversification with new sectors such as services. Foreign direct investment has also increased and is averaging the 626 million USD since 2011. Countries such as India, China, Israel, Saudi Arabia, the USA and some European countries have invested in sectors such as agriculture and energy.

Agricultural transformation has been earmarked as the government's strategy for large-scale development as evidenced by the Federal Government's Growth and Transformation Plan running from 2010 to 2015.⁷ Government policies suggest that the country has enormous potential in the sector of agriculture which has not yet been exploited. Agricultural sector can provide for solution not only in terms of food security and reduction of poverty but equally in terms of economic development and creation of employment. The Agricultural Transformation Agency has the mandate to identify hurdles in smallholder sectors and to support changes by relevant partners to realize the agricultural change. The reportedly under-utilized lands of Ethiopia provides for a background for the agricultural revolution. Mahlet shows that out of the 111.5 million hectares of land that Ethiopia is constituted of, 74.3 million hectares are suitable for agriculture and currently only 14.6 million hectares are being used by smallholders.⁸ Encouraging private investments by way of large-scale commercial farms in under-used lowland areas of

¹ Worldmeters 'Population of Ethiopia' available at <http://www.worldometers.info/world-population/ethiopia-population/> (Accessed 10 December 2014).

² AG Selassie and T Bekele 'A Review of Ethiopian Agriculture: Roles, Policy and Small-scale Farming Systems' page 36 in GLOBAL GROWING CASEBOOK.

³ See The World Bank 'Ethiopia Overview' available at <http://www.worldbank.org/en/country/ethiopia/overview> (Accessed 7 February 2015).

⁴ United Nations Economic Commission for Africa 'Tackling income inequality could help Africa quash extreme poverty' available at <http://www.uneca.org/mdgs/Story31October6.asp> (Accessed 10 May 2014).

⁵ There are five main types of agricultural production systems in Ethiopia – highland mixed farming system, lowland mixed agricultural production system, Pastoralism, Shifting Cultivation and Commercial Agriculture.

⁶ Mellor, J. *et al* 'Agriculture and Economic Transformation of Ethiopia', International Food Policy Research Institute at p 2. Available at <http://www.ifpri.org/sites/default/files/publications/esspwp010.pdf> (Accessed 25 December 2014).

⁷ Federal Government's Growth and Transformation Plan [hereafter the GTP: 2010] - This strategy will support strongly the intensified production of marketable farm products for domestic and export markets, by smallholders and private agricultural investors. Fundamentals of the strategy include a shift to production of high value crops, a special focus on potential high-productivity areas, intensified commercialisation, and support for development of large-scale commercial agriculture where it is feasible. The commercialisation of smallholder farming will continue to be the major source of agricultural growth. Concerted support will be given to increase private investment in large commercial farms (FDRE, 2010a: 22-3).

⁸ Mahlet, M. 'US experts join agro ministry for zone study' (2012) Fortune 12.

Ethiopia is another important feature of the agricultural strategy.⁹ Large-scale commercial farms and land investments are regarded as being the solution to poverty, job creation and the transfer of technology.

3. Land investments in Ethiopia

The Ethiopian Constitution provides for the legal basis for investment in agriculture by conferring land ownership on the state.¹⁰ At the regional level, authorities have been delegated to task of managing and administering land laws through the Federal Rural Land Administration and Use Proclamation 89/1997. Four regions, namely Tigray, Amhara, Oromia and Benishangul-Gumuz already have their regional Proclamation for land. Proclamation 280/2002 is the main law for investment in Ethiopia. The aims of the investment are to increase foreign direct investments, stimulate growth in export industries, transfer of technology and economic development. The 1960 Commercial Code is another enabling legislation for carrying out trade and commercial activities in Ethiopia.¹¹ Incentives are available to foreign investors such as tax and duty exemptions and there are equally certain investment sectors that are reserved for local investors. There was a major amendment in the law with the advent of the Proclamation 29/2001 in 2009 whereby the federal government was given the exclusive responsibility to deal with investments in land that are above 5000 hectares whereas before, the local authority were delegated the power to deal with such investments.

Regional land allocations have revealed to be very imprecise due to a serious lack of documentation and update on the current status of lands at that level. In addition, land allocated by the federal government to state corporations for the production of rubber and sugar are also sometimes not registered and documented in official inventories of land investment.¹² Very significant areas of land amounting to around 200,000 hectares of land have been allocated to state corporations in SNNPR and Gambella without figuring in official land inventories.¹³ Official figures from the government on land allocation revolve around 2.2 million hectares with only 372, 000 hectares under development. 11, 773 domestic and foreign investors have been issued with investment license and this has generated an income of US\$ 7.3 billion. Of the 5, 283 investors who have been allocated land, 126 are foreigners to which 594, 000 hectares of land have been leased.¹⁴ However, it has to be noted that these figures are being contested vehemently by other researchers. Dessalegn argues that as at 2011, 3.5 million hectares of land have already been allocated while Oakland Institute has documented around 3.6 million hectares of land already leased away.¹⁵

⁹ GTP: 2010: 23

¹⁰ Section 40 of the Ethiopian Constitution.

¹¹ The Commercial Code 1960 available at <http://www.wipo.int/edocs/lexdocs/laws/en/et/et014en.pdf> (Accessed 18 December 2014).

¹² Keeley: 2014: 23.

¹³ Yewondwossen, M. 'Rubber plantation closer to fruition' Capital (2012) available at http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=921:rubber-plantation-closer-to-fruition- (Accessed 12 January 2014).

¹⁴ Eskedar, K. 'Commercial farms' performance dire' Capital (2012) available at http://www.capitalethiopia.com/index.php?option=com_content&view=archive&Itemid=9&limitstart=3520 (Accessed 10 April 2014).

¹⁵ Dessalegn: 2011; Oakland: 2011: 19.

3.1 Characteristics of the land allocations

Keeley reports that out of the 131 land agreements signed to date, 17 of them are over 10,000 hectares while only two are above 50,000 hectares.¹⁶ Another important feature of the land deals is that they are primarily located in the lowland regions. Up to 80% of the land deals are in SNNPR, Gambella and Benishangul-Gumuz.¹⁷ Amhara, Oromia and Tigray are the regions where the highest number of land deals completed by the regional governments without the interference of the federal government has been recorded. In addition, in those regions, lands allocated are usually smaller in area and size compared to the deals in the lowlands regions. By September 2012, there were 31 different land lease agreements covering an area of 385,000 hectares. 24 of these 31 projects are in operation and 7 are in the implementation phase.

A majority of the land deals happens in the lowlands regions and this has resulted in significant socio-economic changes in those regions. With low population densities and an important variety of ethnic minorities, development in those areas has been rapid. The AILAA earmarked lands in the lowlands are uncultivated and not forming part of the livelihood of the inhabitants. Gambella has been a region which has been marginalised in terms of the political economy of the country. With increased land investments, Gambella has witnessed progress and development. In fact, it is the subject of two of the most publicised land investments in Ethiopia namely by karuturi (India) and Saudi Star. However, rapid growth and investment opportunities have also brought along human rights issues which will be discussed at a later stage.¹⁸

The profile of the investors is another important dimension in land investments. It has been noted that foreign or international investors are more involved in land deals at the federal level where allocations are larger in terms of area. The regional level is dominated by local investors or by the Ethiopian Diaspora.¹⁹ Out of the 31 lease agreements with the Federal land bank, 12 are Ethiopian investors, 8 are Diaspora investors, and 9 are Indian investors while the remaining two are Turkish and Saudi-Ethiopia. At the regional level, 93 agreements are with domestic investors and only 11 with foreign investors from Israel, Italy, Malaysia, Netherlands, New Zealand, Saudi Arabia, Turkey and USA.²⁰ It has to be noted that most of the international investing companies, at the federal or regional level, are private companies raising capitals by way of corporate capital or loans from commercial banks.

3.2 Execution and implementation of the land agreements

Government representatives are of the opinion that, while an important amount of lands have already been allocated, the execution and implementation of those deals measured in terms of job creation, production and development have been poor with most of the deals still at the pre-

¹⁶ Keeley: 2014: 25.

¹⁷ Oakland: 2011: 20.

¹⁸ Pearce, F. 'Land Grabbers: Africa's hidden revolution' The Observer (2012) Available at: <http://www.guardian.co.uk/world/2012/may/20/landgrab-ethiopia-saudi-agribusiness?INTCMP=SRCH> (Accessed 17 July 2014).

¹⁹ Berhanu, L. 'Diaspora engagement in the State of Oromia' 4 available at <http://www.imi.ox.ac.uk/publications/pdfs/briefing-lalem-t-berhanu-ethiopia> (Accessed 15 January 2015).

²⁰ Keeley: 2014: 31.

implementation phases.²¹ Keeley argues that despite the favourable climate for investment in Ethiopia, it has failed to attract the highest quality of international investors in agriculture and local investors have not done well which explains why the realisation of the multiple projects have failed.²² Imeru illustrates that only 35% of the projects have been implemented as per the terms of the lease agreements.²³ Several reasons can explain the low rate of materialisation of the projects. These may include the high cost of developing those areas²⁴, security issues, and poor capacity of investors, misuse of licenses and ineffective monitoring of projects. For instance, a company in Gambella estimated the cost of clearing and preparing the farms land at around US\$17,000 per hectare when it costed, in real, more since US\$80, 000 had to be invested in farm machinery.²⁵ Another Indian company named Ruchi has declared that it is only expecting to make profit as from the year 2020 due to the elevated investment and production cost.²⁶

Security issues are equally contributing factors to the low rate of implementation especially in regions such as Somali and Gambella. After the attack on five employees of the Pakistani company Ghulam Rasool & Co. who were killed as well as the 2012 bus attacks in which 19 people were killed in Gambella, investors have been reluctant to pursue the lease agreements on land investments.²⁷ The size of the land leased has also been reported as being problematic especially when it comes to manage it effectively. According to a regional land bureau chief, the maximum size of the land should not exceed 20,000 hectares.²⁸

4. The impact of land investments in Ethiopia

Land investment in Ethiopia has the potential to generate a significant amount of income for the government. The first source of revenue for the state is in terms of rental fee which is proportional to the distance from the capital city of Addis Ababa and on whether the land is irrigated or found in a rainy zone. For distances over 700 km from Addis Ababa, a flat rate for rental applies which is US\$6.1 per hectare for rain-prone lands and US\$8.7 for irrigated lands. Such revenue can serve to enhance foreign exchange reserves, development of public infrastructure, technology transfer and wage employment. The implementation of the Agricultural Development Led Industrialisation as a development strategy is believed to help in

²¹ Vhughen, D. & Gebru, A. 'Large-scale acquisitions of land in Ethiopia' Focus on Land in Africa (2013) 3 available at <file:///C:/Users/DELL/Downloads/large-scale-land-acquisitions-in-ethiopia.pdf> (Accessed 19 December 2014).

²² Keeley: 2014: 33.

²³ Imeru, T. 'Governance of large-scale agricultural investments in Africa: the case of Ethiopia' (2012) available at <http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/tamrat.pdf> (Accessed 10 January 2015).

²⁴ Belete, P. 'Making agricultural investments more appealing' Capital (2012) available at http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=1205:making-agricultural-investment-more-appealing- (Accessed 18 November 2014).

²⁵ Bekele, K. 'Saudi Star rice project feels the pinch' The Reporter (2013) available at <http://www.thereporterethiopia.com/index.php/newsheadlines/item/1282-saudi-star-rice-project-feels-the-pinch> (Accessed 18 January 2015).

²⁶ Davison, W. 'Ethiopia Push to Lure Farm Investment Falts on Flood Plain' Bloomberg News (2013) available at: <http://www.bloomberg.com/news/2013-11-24/ethiopian-drive-to-lure-farm-investment-founders-on-flood-plain.html> (Accessed 18 January 2015).

²⁷ Tadesse, K. 'Unknown gunmen attack Al-Amouni commercial farm' Capital (2012) available at http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=988:unknown-gunmen-attack-al-amoudis-commercial-farm-5-dead&catid=54:news&Itemid=27 (Accessed 19 December 2014).

²⁸ Keeley: 2014: 36.

alleviating poverty by way of transfer of technology to smallholders by opening market access for them.²⁹ It will also allow them to enhance their purchasing power and capacity to invest more in their undertakings. While it is still early to assess the success of land investments in terms of transfer of technology, early signs are not revealing to be encouraging. The average Ethiopian farmer is still using traditional methods of farming. It is also difficult to conceive in what ways large-scale farming will have as result a transfer of technology which will be accessible to the average local farmer.³⁰ In addition, it is reported that there is no evidence that strategies and policies have been adopted for technological transfer to the local farmers.³¹

Ethiopia is currently witnessing unprecedented developmental changes. Tarred roads are being built between all the capitals of the regions, enhancing market access throughout the country. By the end of 2015, Ethiopia is aiming to give access to electricity to 75% of its population.³² More than 2 million Ethiopians now have access to mobile phone and internet.³³ However, the land deals have not revealed any commitment towards better infrastructure and most of the above mentioned progress has been possible through donor's aid and finance.³⁴ So far, only Saudi Star and Karuturi in Gambella have pledged to provide a minimum of infrastructure to villagers and farmers on the site in terms of construction of canals and dams and supply of electricity and water.³⁵ Wages of local agricultural workers will not rise anytime soon as no legal reform pertaining to minimum wages and pay standards have yet been undertaken by the government. As far as creation of employment is concerned, Keeley reports that the creation of job to area ratio is very small and that most jobs created as casual and temporary rather than on permanent basis.³⁶

4.1 Effects caused on food security

The Gambella and SNNPR regions are the prime location for agricultural land investments because of the sufficient water supply and excellent soil fertility. In spite of those available natural resources, inhabitants of those areas are facing food security issues. According to the United Nations World Food Programme, over 80, 000 inhabitants of Gambella had to be given food aid in 2012.³⁷ Despite being one of the fastest growing economies in Africa, Ethiopia is still reliant on food aid irrespective of the agricultural investments projects which are aimed at

²⁹ Ministry of Agriculture 'Policies and Strategies' available at <http://www.moa.gov.et/policies-and-strategies> (Accessed 13 January 2015).

³⁰ Davison, W. 'Local Ethiopians miss out as big agriculture firms struggle in Gambella' (2015) The Guardian available at <http://www.theguardian.com/global-development/2015/jan/01/local-ethiopians-miss-out-as-big-agriculture-firms-struggle-in-gambella> (Accessed 2 January 2015).

³¹ Oakland: 2011: 34.

³² ESI-AFRICA.COM 'Electricity in Ethiopia' available at <http://www.esi-africa.com/ethiopia-aims-for-75-access-to-electricity-by-2015/> (Accessed 10 December 2014).

³³ Telecoms in Ethiopia 'The government expands the mobile-phone network' The Economist (2013) available at <http://www.economist.com/news/middle-east-and-africa/21584037-government-expands-mobile-phone-network-tightens-its-grip-out-reach> (Accessed 17 December 2014).

³⁴ Oakland: 2011: 34.

³⁵ Davison, W. 'Saudi billionaire to invest \$100 million in Ethiopian farm' Bloombergbusiness (2014) available at <http://www.bloomberg.com/news/articles/2014-12-02/saudi-billionaire-to-invest-100-million-in-ethiopian-rice-farm> (Accessed 18 December 2014).

³⁶ Keeley: 2014: 41.

³⁷ Marie, A. 'Forcible resettlement and land grabs in Ethiopia' FutureChallenges (2012) available at <https://futurechallenges.org/local/forcible-resettlement-and-land-grabs-in-ethiopia/> (Accessed 18 August 2014).

enhancing food security.³⁸ Intensive land investments are the consequences of rapid population growth, degradation of the environment, inefficient government policies on land tenure and market access, gender inequality and conflict and lack of infrastructure. These are endangering the availability and supply of food. For instance, people in Benishangul, SNNPR and Gambella are often faced with food related problems because of the presence of any one of the factors mentioned above.³⁹

In times of food scarcity, the forest can be an important source of food. However, land investments in some areas have even limited or completely restricted access to local people to the forest. The case of the Majangere people is a case study to illustrate this point. Numbered around 15,000 to 20,000, they live on the south-western slope of the forested Ethiopian plateau. Their livelihood depends on shifting cultivation, fishing and beekeeping. Their lives have however been deeply affected by the state-sponsored coffee plantations that started since the Derg era. People were brought from the highlands as labourers with the Majangere people forced back and out of their natural habitats little by little. The highlanders labourers eventually settled in those areas because of the availability of resources and facilities such as school and health services provided by the state. This resulted in the eviction of the Majangere people who are in a precarious and unstable situation. Several other ethnic groups are in similar situations.

Food security was equally bleak in Gambella's Abodo Woreda (District) where 5,100 people out of 17,000 had to be given food aid by the UN World Food Programme and the food shortage problem getting accentuated by health related issues.⁴⁰ Abodo Woreda is the site for investments from Saudi Star and Karuturi ventures. Saudi Star has a dam construction project alongside the Alwero River which has necessitated the clearance of forest and local farmland causing food insecurity. Along Baro River, a diaspora investor harvested the maize plantation of the local community for eventually clearing the land for rice plantation. Force was employed by the guards brought by the investor to prevent the local people to have access to their lands and to harvest their own crops.⁴¹ The cases discussed make it evident that large-scale land investments can have a negative impact on food security of the local peoples.

4.2 *Economic, social and cultural impacts*

When Karuturi started operation in Gambella, it was perceived that massive number of wage employment would be created amounting to as many as 20,000 to 30,000 employers.⁴² Similarly, Saudi Star pledged the creation of 4,000 to 5,000 workers to work in rice fields.⁴³ It is to be noted that all of these jobs are manual and labourers' job which are not permanent but on short-term

³⁸ See USAID 'Food assistance fact sheet – Ethiopia' available at <http://www.usaid.gov/ethiopia/food-assistance> (Accessed 22 December 2014).

³⁹ Grebmer et al. 'Global hunger index: The Challenge of hunger – building resilience to achieve food and nutrition security (2013) 41.

⁴⁰ World Health Organisation 'Dracunculiasis- Ethiopia' (2014) available at <http://www.who.int/dracunculiasis/ethiopia/en/> (Accessed 16 January 2015).

⁴¹ IRIN 'Ethiopia: the great land-grab debate' (2011) available at <http://www.irinnews.org/report/92292/ethiopia-the-great-land-grab-debate> (Accessed 17 February 2014).

⁴² Karuturi Global Limited 'Current Initiatives' available at http://www.karuturi.com/index.php?option=com_content&task=view&id=111&Itemid=130 (Accessed 19 December 2014).

⁴³ Hansia, F. 'Saudi Star to start rice project on disputed Anuak lands in Ethiopia' CropWatch available at <http://www.corpwatch.org/article.php?id=16006> (Accessed 19 December 2014).

period. Therefore, even if jobs are being created, it is not being done in a sustainable manner. A massive influx of male labourers from other regions of the country has also been noted which can have considerable adverse effect on local communities. For instance, locals in Gambella and Benishangul have complained that labourers from other regions have stayed back after employment, settled with families and acquired land and resources.⁴⁴ This creates additional pressure on the already existing food shortage problem. There is the danger of labourers from other regions coming in and clearing forests and lands for their own use in terms of cultivation and housing which will seriously affect the livelihoods of the locals.⁴⁵ Indeed, the social impacts of such influx of labourers include deforestation, constant pressure on fish reserves, wildlife and resources in the area, conflicts a rise in cases of sexual assaults, increase in prostitution and HIV/AIDS spread.⁴⁶

Increase in conflict is a rising issue that warrants attention since it has significant socio-economic impacts on the lives of people. Studies have shown that rapid and uncontrolled growth in population coupled with resource intrusion fuel conflicts.⁴⁷ Societal heterogeneity in terms of differences in incomes and distinctions of ethnicities can also lead to conflict situations.⁴⁸ In addition, weak governmental institutions and respect for democracy coupled with political instability and insecurity worsen the situation. Oakland Institute reports that all these problems are already present in those land lease areas which is negatively impacting on the local communities.⁴⁹ The impact can be cultural with a loss of identity which accompanies loss of lands. For instance, the indigenous Anuak people of Gambella have close ties with the lands which intimately connect them with their past and their future. The Anuak people are dependent on the forests for food, medicines, building materials and for spiritual purposes. Large-scale land leases are proving to be a barrier between themselves and all that the forests mean to them.

Large-scale land leases also have direct implication on workers and the way they are treated. An Environmental Code for Practice for Agricultural Investment has been drafted by the Ethiopian government containing legal provisions on the rights and relations of employees. Provisions such as overtime work, anti-discrimination policies, exposure to pesticides and safety measures, maternity leave for pregnant women and right to trade unions have been inspired from by the Ethiopian Labour Proclamation (42/1993). However, the problem of implementation and enforcement of the Code and the Proclamation is rampant in large-scale leases areas and in general.⁵⁰

Loss of livelihoods has also resulted from villagization projects which accompanies large-scale investments. However, it is contended that such projects have failed to fulfil their aims as they do

⁴⁴ IRIN Africa 'Ethiopia struggling to cope with South Sudanese refugee influx' available at <http://www.irinnews.org/report/99839/ethiopia-struggling-to-cope-with-south-sudanese-refugee-influx> (Accessed 14 January 2015).

⁴⁵ Oakland: 2011, 37

⁴⁶ Peebles, G 'Ethiopia: Displacement, intimidation and abuse' Oakland Institute (2013) available at <http://www.oaklandinstitute.org/ethiopia-displacement-intimidation-and-abuse> (Accessed 20 November 2014).

⁴⁷ Goldstone, J. 'Population and security: how demographic change can lead to violent conflict' (2002) 56 *Journal of International Affairs* 4.

⁴⁸ Vanhanen, T. 'Ethnic conflicts and violence in heterogeneous societies' 2012 (37) *Journal of Social, Political and Economic Studies*.

⁴⁹ Oakland: 2011, 38.

⁵⁰ Admassie, A. 'The Incidence of child labour in Africa with empirical evidence from rural Ethiopia' Centre for Development Research Discussion Paper (2000) 21.

not take into account the cultural component of rural communities.⁵¹ According to Jan Egeland, Europe Director at Human Rights Watch, “The Ethiopian government’s villagization program is not improving access to services for Gambella’s indigenous people, but is instead undermining their livelihoods and food security”.⁵² Around 100, 000 households around Gambella and Benishangul regions have been bulldozed off for the villagization project.⁵³ Self-reliant households become dependent on food aid when they are displaced due to villagization.⁵⁴

Compensation for relocation and displacement based on the villagization programmes are extremely hard to obtain. Compensation for expropriation is catered for by Proclamation 455/2005 which provides for payment of compensation equal to the replacement cost of property and improvements made to the land. The law also provides for a package of 10 times the average annual income as compensation to displaced persons. However, for the Proclamation to apply, one of the requirements is that the holder must have a legal title. Most of the land holdings in the rural areas are without title and it is in those areas that most of the relocation and displacements are happening. In addition, the monetary compensation can also prove to be unfulfilling as land cannot be bought in Ethiopia which would imply that the expropriated lands cannot be replaced by other lands, thus directly affecting livelihoods.

5. The concept of development based on Sen’s Capability Approach

Land investments are being carried out in the name of development in Ethiopia. However, it is clear from the above exposé that developmental projects based on land are proving to be the results of massive human rights violations especially of the poor people and local communities. Such economic measures for development are therefore not proving to be efficient as it is only benefit a section of the population which are primarily political elites or privileged people. Is that the true sense of development? Is development not supposed to render human beings more capable of achieving what they desire? It is argued that perhaps Amartya Sen’s theory of Capability Approach may provide for some interesting cues here.

The conceptual basis of the CA is a direct result of the criticism that Sen has made towards traditional welfare economics which tends to combine well-being with opulence (commodity, income) or utility (fulfillment of desire and happiness). Sen considers the commodity command or income agrees that economic growth and increase flow of goods and services are essential for human development. He argues however that wealth or opulence is not the final commodity that human beings are looking for as ‘it is merely useful and for the sake of something else’. The quality of life and overall human development should be judged not in terms of possession of commodities but the capability to convert those commodities into achievements desired by the people. In turn, the capacity to change income and commodities into valuable achievements differ from one individual to another and one society to another.

For instance, a disabled person will require more commodities such as wheelchair, ramps and elevators to achieve his freedom of movement compared to an able bodied person. Therefore the amount of income or commodities is not indicative of human development but merely a means

⁵¹ Human Rights Watch ‘Ethiopia: Forced relocations bring hunger, hardship’ (2012) available at <http://www.hrw.org/news/2012/01/16/ethiopia-forced-relocations-bring-hunger-hardship> (Accessed 15th December 2014).

⁵² As above.

⁵³ Oakland: 2011: 38.

⁵⁴ Dear, C. ‘Causes and consequences of displacement decision-making in Banhine National Park, Mozambique (2001) 157.

towards development. Sen argues that for more intricate social achievements such as ‘appearing in public without shame’, will depend on social convention, customary practices and culture of the society and not the amount of money an individual has to buy a suit or an expensive modern dress. In general, to compare the well-being of people, information pertaining to income and commodities solely would not suffice and would not lead to an accurate measurement of human development. Instead, it should be considered how efficiently, satisfactorily and easily an individual can function with the commodities that he can command.

The welfare or utility approach which emphasized on happiness, the fulfillment of desire and pleasure was also challenged by the CA. Sen argues that utility does not make any distinction between the different types of pains and pleasures as well as desires that can exist. Utility approach also is incapable to discard ‘offensive desires’ such as stealing to become rich or planning to harm someone else for one’s own pleasure. In addition, happiness or the fulfillment of desire is only one aspect of human life and there are other values such as rights and positive freedoms that are important for human development but neglected by the welfare approach. Another problem with the welfare or utility approach is that sometimes happiness can simply be a result of adaptation and conditioning and not necessarily a perfect and desirable condition. Sen uses empirical evidence from surveys carried out on health of widows in post famine period in India. It was observed that the health state of widows that were externally observed did not match with their own subjective impressions of their state of health and physical well-being. It led to the general conclusion that neither opulence nor utility accurately, adequately and precisely represent well-being of human beings. What is essential in the measurement of human development is human capabilities to achieve what are desired by people.

The CA has been revisited to add more parameters and make it an approach which is functional in nature. Several social scientists have attempted to generate a list of human capabilities with view of applying Sen’s moral or philosophical framework for human development. Among them, feminist philosopher Martha Nussbaum appears to be the most recognised attempt to complete the CA. She elaborated on a definite list of human capabilities which are central to whatever people would choose or would pursue. The list of central human capabilities includes life, bodily health, bodily integrity, senses, emotions, practical reason, affiliation, other species, play and political and material control over one’s environment. This leaves one with Sen’s CA which is open without any specific list of human capabilities and to be applied on a case to case basis and Nussbaum’s CA with a definite list of central human capabilities approach with capabilities that are encompassing irrespective of circumstances according to her.

5.1 What are capabilities?

Sen defines a capability as ‘a person’s ability to do valuable acts or reach valuable states of being; it represents the alternative combination of things a person is able to do or be’. A capability is the freedom and liberty to achieve something which an individual reflectively accepts as being valuable to him. CA is significantly contrasting compared to other ideas on how resources are to be fairly and justly distributed. Some theories about distribution are based on what an outsider would consider as being optimum in terms of the opportunities and resources to be given to an individual to achieve a desirable outcome, for instance providing education to eventually acquire skills for employment. For instance, Utilitarianism would impose that the best type of education or methods of acquiring skills would be the one which would benefit a maximum number of people at the national level.

The CA opposes this method of evaluating whether people are happy, free and capable of achieving what they desire. It advocates that the individual is not to be seen as a means to achieve social stability or economic growth but as an end. What needs to be evaluated is whether people are free to make decisions that they value and have the possibility to overcome any obstacle in the path to this freedom, thus enhancing their capabilities. It is very important to highlight that while the central tenant of the CA is the individual, it is not a framework with an individualistic nature embracing libertarian notions such as self-actualization above all other goods. On the other hand, it adopts the approach of ethical individualism, a normative framework which evaluates actions by way of their effects on human beings which are the primary objects of moral concern. Evaluation should therefore not be interpreted as being a response to the individual wants of particular individuals. Such an approach would be unimaginable as all the resources of a government would be used up to fulfil the individual wants of every citizen. Therefore, instead of evaluating outcomes or resources, the focus is on assessing the conditions that are present and enabling for the individual to decide on what he wants to value. The relevance of the CA is that despite endlessly varying conditions which is context-based, the approach remains sensitive to human diversity.

The CA therefore provides for a broad normative framework to assess and conceptualize well-being of individuals and social arrangements despite diversity on various levels in society. Walker and Unterhalter argue that while the CA may not be accepted as a complete theory of justice, it does however attempt to provide for a balance between freedom and equality. Sen believes that what should be equalized for instance is not the income of all individuals in the society but rather the capabilities given to them to achieve what they want or become what they desire. As such, expansion of human capability would be achieved by 'the freedoms people actually enjoy to choose the lives that they have reason to value'. CA is about the range of free options that an individual has to choose what is important and valuable for him in life. It is also about approaches that an individual may want to adopt in living life be it in a western way or traditionally.

6. The Capability Approach and land investments in Ethiopia

Land investments in Ethiopia are driven by justifications pertaining to economic growth and development. Arguments such as influx of foreign direct investments, generation of more wealth, and increase in GDP and uplift in the standard of living of citizens are often put forward to justify the controversial presence of foreign and local investors on the lands of the poor and the marginalized. The CA allows us to assess whether people are truly and genuinely benefitting from the wealth and income generations from the land investments in the three case studies. While more wealth can certainly ensure a better standard of living of some categories of people, other specific categories such as the rural and indigenous people may have other needs and differing understanding of living. As Sen argued, the value of the living standard lies in the living, and not in the possessing of commodities, which has derivatives and varying relevance. What has to be valued is people's capability to function and poverty, human rights violation or inequality in the distribution of income would be regarded as lack of capability.

From the human rights violations that have been highlighted above, it is evident that while land investments in Ethiopia are bringing income to the countries, it is far from bringing meaningful human development to the people from the rural regions where most of the land deals are taking place. What would be a meaningful development to those people? The CA would be the theoretical foundation that would allow determining this important question. Human capabilities

from the CA will help in assessing whether or not people in the local communities in Ethiopia are having the freedom to enjoy valuable activities and states.

7. Land as a capability for the local communities in Ethiopia

Land is crucially important for the local communities in Ethiopia. It is therefore argued that land represents a capability for human beings in that context. A majority of the people in the areas affected by land investments are dependent on the land for their livelihood. Their means of subsistence is closely associated with the land and the natural resources that are found on or in it. In addition, land is not merely regarded as a commercial commodity by minorities and indigenous peoples. Ancestral lands of these peoples are the focal point of their cultural existence and identity. Despite the enormous that land has in their lives, it becomes difficult for them to assert their authority on their lands because of the communal land tenure systems that normally exist for their situation based on customary law. This section of the article looks at how land is protected in law for the local communities as a property and how indigenous peoples are supposed to have a more specific protection based on their cultural attachment to land.

7.1 Land as protected by the right to property

Land can be interpreted as being property which implies that the right to property can be a legal basis based on which any expropriation of land could be regarded as a violation of the right to property. It is a right that has been enshrined by the Universal Declaration of Human Rights (UDHR) conferring the right to individuals to own property alone or in association with others as well as a protection from arbitrary deprivation of same. Krause and Alfredsson contend that the right to property is not an absolute one and can be limited provided that such action of limitation is not arbitrary. Other UN conventions such as the Convention relating to the Status of Refugee and the Convention relating to the Status of Stateless Persons have reflected the right to property albeit not specifically mentioning the term 'right to property'. International human rights law also prohibits discrimination on the basis of race on the issue of ownership of property.

What comes as a surprise though is the fact that the ICCPR and the ICESCR are silent on the right to property despite the argument that it is a dual right. The omission of it is explained by the antagonistic views on the subject matter that the West and the East as well as the North and the South had. However, the non-inclusion of the right to property in the ICCPR or the ICESCR should not be construed as a denial of the right. Travaux Préparatoires of the UN explains that during drafting discussions it was generally agreed that individuals have the right to property and states should have some form of control of it especially relating to matters of expropriation. In the end, since ideological and regional differences on the right to property could not be harmonized, it resulted in the term property only appearing in both Covenants in the discrimination provisions. Other human rights instruments which came after the ICCPR and the ICESCR have adopted the right to property in clearer terms. For instance, the Convention on the Elimination of All Forms of Discrimination against Women obliges states to guarantee equality in property ownership. The Convention on the Protection of the Rights of All Migrant Workers and their Families explicitly provides for the right to property and limitations that are allowed.

On the African level, the ACHPR guarantees the right to property in its article 14 and provides for general interest and public need as the grounds of limitation. Any encroachment on the right to property is allowed provided that it is in accordance with national laws. This has been regarded as a claw-back clause which renders protection from state actions very weak. Article 13(3) of the ACHPR confers a right to equal access to public property and services to every individual which

is essential in the African context as Ankumah argues. Article 21 provides for the right of peoples to freely dispose of their wealth and natural resources. This article is further developed in the thesis below.

The right to property is not clearly defined in terms of its object in any of the universal or regional instruments discussed above. The UN Human Rights Committee has also been reluctant to interpret the right and to add more substance to it in playing its role of supervisory body of the ICCPR. The African Commission has, on the other hand, interpreted the right to property in the Endorois Case whereby it held that possession is not a requisite condition for the existence of indigenous land restitution rights. It further elaborated that property rights ‘includes not only the right to have access to one’s property and not to have one’s property invaded or encroached upon, but also the right to undisturbed possession, use and control of such property however the owners deem fit.’”

On the subject of interference with the right to property, some conditions such as principle of legality, public or general interest character and the principle of proportionality must be applied. Based on the principle of legality, any limitation to property rights must be prescribed by the law which must be published, accessible to all and compatible with the rule of law. The concept of general interest has been subject to the doctrine of margin of appreciation, deferring the interpretation of general or public interest to the national jurisdictions. The means employed to achieve a limitation of the right to property must be proportional to the aim to be realised and a fair balance must be struck between what the general public demands and individual rights of affected persons. The African Commission stated that interference with the right to property must be ‘proportionate to a legitimate need, and should be the least restrictive possible measure’.

7.2 *Land and natural resources of indigenous peoples*

It is contended that any model of development affecting the local communities of Ethiopia has to take into account that land is central to the existence of the local communities irrespective of whether they are constituted of indigenous peoples or minorities groups. From a CA perspective, land is a human capability that is central to any meaningful model of development for the local communities. The present section therefore attempts at analyzing the legal framework on land as a human right. It is equally argued that any meaningful right to land has the right to natural resources (on or beneath the land) as an important component.

The rights to land and natural resources are generally regarded as constituents of the right to property enshrined in international instruments. The right to property has been interpreted as being constitutive of the rights to land and resources of indigenous peoples by the Inter-American Commission on Human Rights. It goes further to state that while interpreting the right to property of indigenous peoples, it is essential to take into consideration that their preferred system of land tenure is communal land tenure. Jurisprudence is also clear on the fact that the right to property of indigenous peoples does not require tenure of property by way of formal title deed or even the specific ways in which the state would have recognised. The collective aspect of indigenous peoples’ land tenure has been reiterated by the ILO Convention demanding states to respect the right to ownership and possession of lands which these peoples have traditionally occupied.

There is an obligation on states to recognize the long-standing traditions and customs based on which indigenous peoples have based their land tenure system. The right to natural resources of indigenous peoples is inclusive of the right to ‘participate in the use, management and

conservation' of the resources throughout their territories. In addition, the term 'territories' has been defined by the ILO Convention 169 to include the 'total environment of the areas which the peoples concerned occupy or otherwise use' which implies that land uninhabited by local communities but still used for grazing and pastures purposes would still constitute protected lands and resources of indigenous peoples. States are required to take steps to identify these territories and lands in the wake of affording more effective protection of the rights of ownership and possession by indigenous peoples.

Displacement of indigenous peoples is strictly regulated by the ILO Convention 169. For instance, the Convention provides for a prohibition of removal of these peoples from the land they originally occupied. The only exception to this rule is an exceptional measure only possible after free and informed consent of the peoples. There is equally a right to return provided to indigenous peoples to their traditional lands whenever the grounds for relocation cease to exist. Article 16(4) and 16(5) are of particular importance as they can be interpreted as a right to compensation for relocation in terms of land of equal quality and status. All cited articles from the ILO Convention can be comprehensively read as providing a right to participate on issues relating to their lands and resources by way of proper and meaningful consultation.

The UNDRIP also provides for important standards in relation to the protection of the rights to land and natural resources of indigenous peoples. By way of its article 26, indigenous peoples have the right to own, develop, use and control their lands, resources and territories and states are required to respect their customs, traditions and land tenure systems. The United Nations Convention on Biological Diversity equally provides for some important norms in relation to land and resources' rights. Article 8 stipulates that the approval and involvement of holders of tradition knowledge (targeting the indigenous peoples here) is required in the preservation of biological diversity which affects the lands and resources of such peoples.

Institutions such as the World Bank have also adopted standard-setting rules which, despite not being binding on state parties, do provide for guidelines on the issue of land and resources applicable in cases of World Bank funded projects in various states. It is acknowledged that 'the identities and cultures of indigenous peoples are inextricably linked to the lands on which they live and the natural resources on which they depend'. Free, prior and informed consultations with indigenous peoples are also required in all projects financed by the World Bank and which affect their rights to land and resources.

8. Giving legal effect to Capability Approach

Nussbaum contends that while the capability approach and human rights are distinct from each other, they do have a strong relationship in contemporary international discussion. Sen argues that human rights and capabilities go well with each other so long as we do not try to subsume either concept entirely within the territory of the other. Indeed the protection and promotion of several human rights can be the pathway towards human capabilities. However, the concept of universality of human rights can fail to take into account specific realities such as tradition and culture of individual communities. I would therefore argue that in the case of land investments in Ethiopia or even on a continental level in Africa, it is the democratically obtained list of human capabilities that should form the basis of the corresponding human rights. One may argue that land, water, food, environment, culture and participation as capabilities are all conferred with protection as human rights. However, these rights also have ways in which it can be legally and

justifiably be limited. And it is in this exercise of limitation of rights that local communities are suffering from severe and irreparable prejudices as illustrated in the previous chapter.

The CA provides for a philosophical approach through which genuine human development in terms of what the local communities desire and value can be achieved. However, the identified human capabilities also need legal protection against any potential non-respect or violation. As a matter of illustration, the local communities would not only require a human right to water but a human right to a capability achievable through water as a commodity. I argue that the moment it is legally agreed (by way of treaties or conventions) that what is to be promoted and protected is human capabilities by way of a list of capabilities, it will follow automatically that the human rights pertaining to those capabilities will be respected by states or non-states actors. I refer to this process as an exercise of giving legal effect to the CA.

In the current state of affairs, an individual who is prejudiced from land investments has the possibility of borrowing from various human rights instruments conferring protection on the right to culture for instance to make a case. However, the limitation of the right to land as a socio-economic right or its interpretation vis-à-vis the already contested right to development results in an incomplete protection of the right to land, thus prejudicing the individual. On the other, I argue that if, within the realm of land investments, a right to human capability is given to the same individual, the right to water, inter alia will be automatically respected. This is so as once we accept that the focus should be on whether land investment is rendering people capable in a given community or not, if water and forest for cultural use render him capable, then such an investment must be done by respecting the right to water and the right to culture. Similar logic needs to be applied to land as well as other human capabilities affected by land investments in Ethiopia.

9. Legal obligations of the home states of the investors

The state of nationality of the investors or the state of domicile of the business enterprises does have an important role to play in land investments and deals leading to human rights violations. In practice, the home state would initiate diplomatic negotiations with the host states on various issues such as taxation, preferential tariffs or investment loans or grants. After setting the base, individual investors or corporations from the home states would then start their business in the host states. There has always been a debate on the question of whether home states should shoulder responsibilities for the violations caused by investors from their jurisdictions or territory. One popular argument has been oriented towards the host state being the duty-bearer to respect, protect and fulfill human rights of its citizens and not the home states. As a result, the latter would not bear any responsibility as a duty-bearer.⁵⁵ It is also argued that in instances where soft laws would impose responsibilities on them, they would be very weakly drafted compared to those imposed on the host states.⁵⁶ This section discusses the obligations that home states may have following rights infringements authored by investors or corporations under their jurisdiction.

Based on the UN Guiding Principles on Business and Human Rights (Guiding Principles), the home state is supposed to ‘set out clearly the expectation that all business enterprises domiciled

⁵⁵ Haberli, C & Smith, F ‘Food security and agri-foreign direct investment in weak states: Finding the governance gap to avoid land grab’ 77 (2014) *Modern Law Review* 191.

⁵⁶ Vanderhole, W ‘Contextualizing the state duty to protect human rights as defined by the UN Guiding Principles on Business and Human Rights’ Research paper University of Antwerp (2012) 4 [hereafter Vanderhole: 2012].

in their territory and/or jurisdiction respect human rights throughout their operations'.⁵⁷ There is an increasing pressure on home states to design legal mechanisms that would compel their investors operating in foreign lands to respect human rights and environmental standards and not to be engaged in acts of corruptions.⁵⁸ Such an approach is necessary as corporations today have increased controlled over aspects of human rights which need regulation.⁵⁹ There is a demand for the onus to shift to the home states to regulate their own investors and corporations.⁶⁰ However, based on the wordings of the Guiding Principles it is clear that there is only a soft obligation in terms of an expectation on behalf of the home states towards their investors to respect human rights. It is argued that a higher or more legal expectation would not be widely accepted as it can be seen as an intrusion by the home state in the economic sovereignty of the host states or as neo-colonialist interference.⁶¹

Principle 3 which deals with the regulatory and policy functions of the state can also be interpreted as applying to home states. The third paragraph of the Principle imposes an obligation on home states to guide their investors on how to operate on foreign lands without jeopardizing rights and liberties of individuals and peoples. Such a duty for the home states is further consolidated by the words 'throughout their operations'.⁶² The soft nature of the obligation is highlighted by the commentaries to the Guiding Principle which provides that such guidance would involve advice on due diligence to human rights and on issues of marginalization and vulnerability. Principles 4 to 6 regulate the state-business relationship whereby additional steps are required to be taken by states when the business is owned or controlled by the states or when they receive substantial support from states. It is argued that there is no clear indication as to whether or not such obligations apply to home states. The commentaries to the Guiding Principles are silent on the issue and there is no mention of the home states.

Home states are more explicitly referred to in Principle 10 dealing with human rights obligations of states acting as members of multilateral institutions. They are accordingly required to maintain their obligations towards international human rights law while being member to international trade or financial institutions. They are equally addressed in Principle 7 which has conflict-affected areas as subject matter. It provides that *where transnational corporations are involved, their "home" States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse.*

10. Conclusion

There is a pressing need to investigate anew the legal framework which is available for victims of land investments and deals in Ethiopia. As it has been discussed above, land is a capability which is central for the genuine enjoyment of local communities in Ethiopia. From a legal perspective, land is protected in term of property and a cultural accessory for indigenous peoples. However, there are limitations to the existent legal framework. There is therefore a case to be made in terms of redefine land and the legal framework on land from the CA point of view. In other words, the

⁵⁷ Principle 1 para 2.

⁵⁸ Vanduzer, A, Simons, P & Mayeda, G *Intergrating sustainable development into international investment agreements* (2013) 264.

⁵⁹ Ziegler, J 'Report submitted by the Special Rapporteur on the right to food' UN Doc E/CN.4/2004/10 para 35-52.

⁶⁰ Aguirre, D *The human right to development in a globalized world* (2008) 267.

⁶¹ Seck, S 'Home state responsibility and local communities: The case of global mining' 11 (2008) *Yale Human Rights and Development Law Journal* 177.

⁶² Vanderhole: 2012, 5.

law must first recognize that land is a capability and genuine development will only occur with the full and uncompromised respect of land as a capability. Amartya Sen's CA must form the legal basis of land investments agreement or treaties.

It is humbly recommended that the UN Declaration on the Right to Development be transformed into a Convention on the Right to Development which the concept of CA as the cornerstone of it. It is critical for a legal instrument at the global level to define and interpret development as a right and development to be understood as a process to render people capable. Such a legal step will then provide for a more enhanced safeguard against investments and land deals in countries such as Ethiopia causing human rights violations. The UN Guiding Principles on Business and Human Rights regulates the role and duties of states towards business respect for human rights. However, the Guiding Principles is still at its infancy. It is merely a soft declaration which lacks legal force. Non-respect of it does not amount to any breach of the law. There is a need to convert the Guiding Principles into a treaty or convention which is legally binding. International investment instruments used for such international land deals must be judged and assessed from the lens of the Capability Approach. It has to be examined to what extent lives of local communities are affected and how are being proposed by investors to mitigate the impacts. However, it should not be left here as very often investors make such commitments which are left unfulfilled. A judicial body needs to be created in the form of a land investment tribunal specialized in overlooking the human rights aspects of land investments in Ethiopia.

Land grabbing in Ethiopia has affected millions of lives in a direct or indirect way. Blinded by economic interest only, host states, home states and private investors have completely overlooked the negative impacts of land deals and investments that have resulted. While economic development and the influx of foreign direct investment are critical for the growth of Ethiopia, the human development of its local communities are perhaps more important. Economic development must be designed with the local communities and citizens in general at the centre of it. It is argued that perhaps private investors are the most essential player to initiate this movement of genuine human development as they are closest to the local communities compared to the host states or the home states of the investors. Or else, many more will suffer from economic development.