

Land grabbing in Ethiopia and Madagascar: Balancing respect for human rights of victims with development needs through land investments

By

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DECLARATION

I Roopanand Mahadew, declare that *Land grabbing in Ethiopia and Madagascar: Balancing human rights and development needs of victims* is my original work and has not been submitted for examination or degree in any other University of institution of higher learning. While, numerous materials and resources have been referred to, they have been properly referenced and duly acknowledged.



DEDICATION

Dedicated to victims of land grabbing in Africa, especially in Ethiopia and Madagascar, who are facing obstacles in enjoying their human rights; but could have their plight alleviated with the genuine political will of governments of African states and foreign investors in their action to balance economic interests with human rights of peoples



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I am grateful to my wife Bhavna who has always been by my side and supported me through the entire LLD process. My gratitude goes to my Father and Mother who have been there for me. Regards go to my sister also.

Finally, I dedicate this thesis to my princess, Mayra!



KEYWORDS

Human rights

Land rights

Land grabbing

Ethiopia

Madagascar

International human rights law

Sen's Capability Approach to development

Human capabilities

Development



ABSTRACT

Many African states are in dire need of economic development to alleviate poverty, enhance the quality of life of peoples and bring development home. To meet this aim, land investments have been the preferred mode of development for a long time on the African continent with particular reference to Ethiopia and Madagascar as selected case studies of this study. Hectares of land are being given away to foreign investors involved in agricultural investments through investments treaties and contracts. The aim is primarily to attract foreign direct investments to boost the economy. Unfortunately, this seems to be a skewed vision of development, focusing exclusively on economic development without any consideration to social, cultural and political development of people, especially local communities. Such a narrow mode of development is not in line with human rights principles and considerations with thousands of people of the two countries having their basic human rights being constantly and irreparably violated by the actions of foreign investors involved in land investments. Their lands are being grabbed and this is entailing a series of other major infringements of civil and political as well as socio-economic rights intrinsically linked to land.

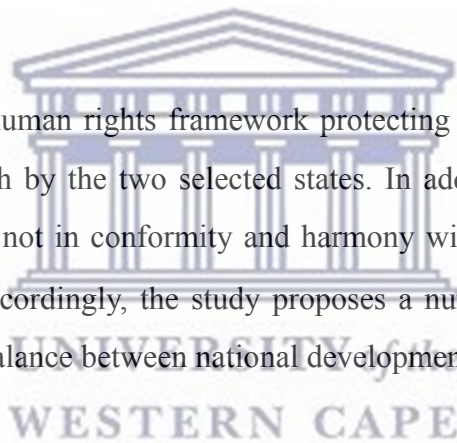
Ethiopia and Madagascar are both parties to major legal instruments on human rights at the UN and the African level. They have legal obligations to respect, protect and fulfil human rights that are being violated on a daily basis by land grabbing. In addition, their domestic legal frameworks are supposed to confer adequate and effective protection to those human rights and protect them from the negative impacts of land grabbing. When such a mode of economic development is resulting in basic human rights violations, it is clear that such development is not aligned with an all-inclusive and encompassing mode of development. To this end, this study adopts Sen's Capability Approach to development which advocates that development should render people free and capable. Individuals have capabilities which must be enhanced and protected. In the context of land grabbing, land, water, food, culture and political participation have been identified as the human capabilities which require the utmost form of protection and respect.

The thesis investigates the ways in which international and domestic legal frameworks on human rights can be used to protect the selected capabilities. While economic development in the form of investments and FDI is necessary in any country, there is a pressing need for such national economic interests to be balanced with human rights of local communities who are the main victims

of land grabbing. Accordingly, in terms of the central research question, the study, with references to the two selected jurisdictions, investigates how African states should take appropriate measures and steps to ensure that land investments are compliant with their obligations under international human rights normative framework in a way that renders local communities “capable” in line with Sen’s Capability Approach.

In terms of methodology, desk research is used based on reports and data that international research institutions have presented on land grabbing. The common capabilities that are violated in the two jurisdictions are singled out and eventually analysed in line with international human rights framework including the right to development, the right to land, the right to food, the right to water, the right to culture and the right to political participation. The main aim is to examine how a balanced mode of development as proposed by Sen can be achieved using the international framework on human rights, the right to development specifically and the domestic legal framework of the countries.

The study concludes that the human rights framework protecting the identified capabilities is not being effectively complied with by the two selected states. In addition, their domestic legislative framework on human rights is not in conformity and harmony with international standards set by treaties and treaties bodies. Accordingly, the study proposes a number of measures that could be taken by states to achieve the balance between national development interests and human rights.



LIST OF ABBREVIATIONS

ACHPR	-	African Charter on Human and Peoples' Rights
ACF	-	Africa Cooperation Forum
ADB	-	African Development Bank
ATA	-	Agricultural Transformation Agency
AU	-	African Union
BIT	-	Bilateral Investment Treaties
CA	-	Capability Approach
CAT	-	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	-	Civil Code
CED	-	Constitutional Explanatory Document
CEDAW	-	Convention on the Elimination of all Forms of Discrimination against Women
CERD	-	Convention on the Elimination of Racial Discrimination
CRC	-	Convention on the Rights of the Child
CRPD	-	Convention on the Rights of Persons with Disabilities
DTCs	-	Decentralised Territorial Collectivities
EC	-	Ethiopian Constitution
EIB	-	European Investment Bank
EU	-	European Union
EIA	-	Environmental Impact Assessment
FDI	-	Foreign Direct Investment
FIAS	-	Foreign Investment Advisory Service
FSC	-	Federal Supreme Court
GCC	-	Gulf Cooperation Council
GDP	-	Gross Domestic Product
HDI	-	Human Development Index
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights

ICRMW	-	Convention on the Protection of the Rights of All Migrant Workers
IFC	-	International Finance Corporation
IMF	-	International Monetary Fund
NHRAP	-	National Human Rights Action Plan
NHRI	-	National Human Rights Institution
OHCHR	-	Office of the High Commissioner for Human Rights
RTD	-	Right to development
SOE	-	State-owned Enterprises
SSC	-	State Supreme Court
SWF	-	Sovereign Wealth Funds
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNDRTD	-	United Nations Declaration on the Right to Development
UNECA	-	United Nations Economic Commission for Africa
UNWFP	-	United Nations World Food Programme
US	-	United States



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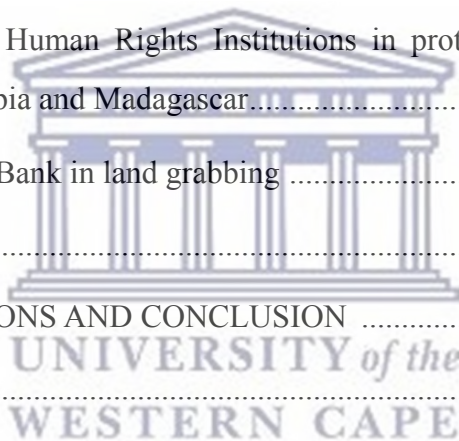
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Chapter 1: GENERAL INTRODUCTION AND BACKGROUND

1.1 Introduction

'Land grabbing' as a term was first coined by Karl Marx when he observed that the majority of corporate land grabs were practiced for the purpose of large-scale agricultural production and to have safeguarded access to its products.¹ While the nomenclature is about 160 years old, the phenomenon itself has existed in various forms in almost all regions of the globe. In the global north, land grabbing was reported during the European and particularly the English enclosures.² The dispossession of the native North Americans would also be an example whereby the British colonisers first recognised partial rights of Indians over the lands and eventually attempted to limit those rights by eliminating the Indians from settled areas.³ As was held in *Johnson and Graham's Lessee v. William M'Intosh*, despite being rightfully in possession of the lands, native Indians were not allowed to sell them to developers.⁴

In the global South, land grabbing took the form of territorial wars among pre-colonial rulers for occupation of lands at first.⁵ Later on, colonial masters and foreign or domestic incorporations embarked on the journey of grabbing land. In the early days of colonisation, the practice was

¹ Marx K *Das Kapital: A Critique of Political Economy* (1857) 470. Land grabbing on a great scale is the first step in creating a field for the establishment of agriculture on a great scale. Hence this subversion of agriculture puts on, at first, more the appearance of a political revolution.

² Sir Thomas Moore highlighted the drawbacks of enclosure in his work entitled *Utopia* where he says 'But I do not think that this necessity of stealing arises only from hence; there is another cause of it, more peculiar to England.' 'What is that?' said the Cardinal: 'The increase of pasture,' said I, 'by which your sheep, which are naturally mild, and easily kept in order, may be said now to devour men and unpeople, not only villages, but towns; for wherever it is found that the sheep of any soil yield a softer and richer wool than ordinary, there the nobility and gentry, and even those holy men, the abbots not contented with the old rents which their farms yielded, nor thinking it enough that they, living at their ease, do no good to the public, resolve to do it hurt instead of good. They stop the course of agriculture, destroying houses and towns, reserving only the churches, and enclose grounds that they may lodge their sheep in them.'

³ See generally Marks M *In a Barren Land: American Indian Dispossession and Survival* (1998) - They reluctantly recognized some form of Indian land rights at some point in the dispossession process, then sought to extinguish those rights, the "elimination of Indians from settled areas" quickly becoming "a distinguishing characteristic of the Anglo frontier."

⁴ *Johnson & Graham's Lessee v. McIntosh*, [1823] 21 U.S. 8 Wheat. 543 543- After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the court is decidedly of opinion, that the plaintiffs do not exhibit a title which can be sustained in the courts of the United States, and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

⁵ White B et al *The New Enclosures: Critical Perspectives on Corporate Land Deals* (2012) 4.

informed by outright sale of large areas of land held under customary land tenure systems. The creation of colonial legislations afterwards came as a prohibition of such land sales, opening the way to the new practice of long and renewable leases of lands.⁶

Land grabbing in its contemporary form was first signalled as a global phenomenon by the NGO Grain in its 2008 report.⁷ It consists of large scale land acquisitions particularly by Asian, Gulf and European states which are acquiring millions of hectares of fertile agricultural lands mostly in Africa.⁸ Corporations and states such as the US, European countries and the rising BRIC economies are all involved in the voracious acquisitions of arable lands which they have turned into enormous mono-cropped plantations of oil palm, soya and other cash crops.⁹ This new mode of development, favoured by host governments who are happy to swap lands for Foreign Direct Investment (FDI), directly affects pastoralists, smallholders and landless groups who are vulnerable.¹⁰

Global land grab is taking different forms in different countries: urban land grab in Kenya, new agricultural investment policies drafted in Ethiopia, the business of genetically modified soy cultivation in Argentina, the concept of residential tourism in Costa Rica, Peru and Ecuador's water grab and Vietnam's new land conversions practices.¹¹ Despite its variances and similarities, land grab has become a reality and is affecting millions of peoples around the world. A set of national and international policies and framework have paved the way to the global land grab.¹² Therefore

⁶ Cross S 'Customary Land Tenure, Taxes and Service Delivery in Rural Malawi: A Review of Institutional Features of Rural Livelihoods' (2002) LADDER Working Paper No 21 7.

⁷ GRAIN 'Seized: The 2008 landgrab for food and financial security' 24 October 2008 available at <https://www.grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security> (accessed 21 August 2016).

⁸ The Conversation 'The modern land grab as modern day corporate colonialism' 25 April 2014 available at <http://theconversation.com/the-global-land-grab-as-modern-day-corporate-colonialism-25844> (accessed 21 August 2016) [hereafter The Conversation: 2014].

⁹ Zoomers A 'Globalisation and the foreignisation of space: seven processes driving the current global land grab' (2010) 37 *The Journal of Peasant Studies* 429-447.

¹⁰ The Conversation (2014).

¹¹ The Conversation (2014).

¹² The Conversation (2014) - Huge tracts of land, under-exploited due to poor agricultural policy or decades of neglect, was made available. Foreign state aid donors emphasised the need to attract foreign investment. Land laws were modernised to make buying, selling and leasing land easier in many countries. And in many cases, institutional weaknesses or outright corruption eased through deals.

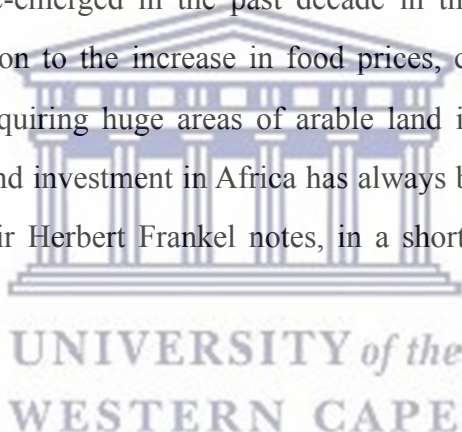
what is happening today is a continuation of historical events as described above but in new and different forms.

While many would see contemporary land grabbing as an economic development opportunity ensuring growth and development of host countries- it is nevertheless causing serious problems since local communities are directly affected by such large-scale land acquisitions. The statement of problem below provides an overview of how land grabbing is negatively impacting on the lives of millions of peoples in Ethiopia and Madagascar.

1.2 Statement of Problem

1.2.1 Africa continues to be appealing to land grabbers

While land grabbing is not a new phenomenon and has existed previously in different forms as would be discussed later, it re-emerged in the past decade in the context of rising food prices globally in 2007.¹³ As a reaction to the increase in food prices, countries such as China, Korea, India and Saudi Arabia are acquiring huge areas of arable land in developing countries such as Ethiopia and Madagascar.¹⁴ Land investment in Africa has always been a matter of great interest to the European colonisers. As Sir Herbert Frankel notes, in a short period of time, the Europeans



¹³ United Nations Economic and Social Council 'The Global Social Crisis' (2011) 62 - Beginning in 2006, international prices for basic agricultural commodities rose to levels not experienced in nearly three decades. Corn prices began rising in the third quarter of 2006 and soared by some 70 per cent within months. Wheat and soybean prices also rose to record levels during this time. Cooking oil—an essential foodstuff in many poor countries—is mainly produced from soybeans and other plant sources; as a result the price of this item shot upward as well. Rice prices had also more than doubled in the year ending in the first quarter of 2008. In many countries, the prices of most food staples remain volatile and are still at least 50 per cent above the average for the period 2000-2004. For example, in Lahore, Pakistan, wheat prices rose by 24 per cent in the year prior to February 2010 while the maize price in Zimbabwe's capital, Harare, went up by 36 per cent between October 2009 and February 2010. The spike was even worse in Burundi; in Bujumbura, the price of beans went up by 58 per cent during the same period. The food crisis has not abated as most food prices are rising again and have exceeded the peaks recorded in 2008. The Food and Agriculture Organization food-price index rose to a record high in February 2011, topping the previous all-time high set in June 2008, following unexpected shortfalls in major cereals owing to bad weather in 2010.

¹⁴ Braun J & Dick R 'Land grabbing by foreign investors in developing countries: Risks and opportunities' (2009) IFPRI Policy Brief 13, 1 - Food-importing countries with land and water constraints but rich in capital, such as the Gulf States, are at the forefront of new investments in farmland abroad. In addition, countries with large populations and food security concerns such as China, South Korea, and India are seeking opportunities to produce food overseas. These investments are targeted toward developing countries where production costs are much lower and where land and water are more abundant. Other factors that influence investments include geographic proximity and climatic conditions for preferred staple crops.

already had huge stake in the various investment portfolios in Africa.¹⁵ The Great Depression of 1873-1896 was the main reason that prompted Europe to start looking elsewhere and to adopt a vast export drive.¹⁶ The Europeans established regions of economic influence with Niger and Congo Rivers as the first entry points in Africa.¹⁷ They eventually expanded to cover most African regions such as trade in slaves, ivory, wild rubber, gum-copal, sesame, cereals and cloves in East Africa and ground nuts and palm-oil from West Africa. The importance and significance of European's investments in the above-mentioned commodities are clearly highlighted by the General Act of the Berlin Conference on West Africa 1885. Despite suggestions from the American counterpart that the consent of natives would be sought of¹⁸, their rights were never taken into consideration during the process of dispossession.¹⁹ By the end of the 19th century, it became clear that free trade only would not be the answer to Europeans quest for the African hinterlands and that political conquest would be required to ensure supremacy over African lands as the colonisers became overly protectionist towards 'their respective lands'. In addition, with the advent of powerful anti-slavery and human rights movements, it became highly relevant for the colonisers to legally justify their actions of dispossession of the native Africans to safeguard public opinion in their respective countries. Old feudal land laws of Europe were used to justify the dispossession, implying that the colonisers of Africa had ownership of the lands based on the theory of the right of discovery. It ensured the setting up of chartered companies and their duties were to administer justice, to enforce treaty rights, to collect customs duties and to spend the revenues solely on the expense of rule.²⁰

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¹⁵ Frankel H *Capital Investment in Africa: Its Course and Effects* (1938) 6 – What was the fons et origo of the Europeans drive into Africa that in a single generation turned Europe's 20 percent stake of 1878 into a grasp on the whole of Africa? For, by the 1930's, it could be said that only Liberia was still free of European control.

¹⁶ Hobsbawn E *The Age of Empire 1875-1914* (1987) 66.

¹⁷ Alden W 'Looking Back to See Forward: The Legal Niceties of Land Theft in Land Rushes' (2012) 39 *The Journal of Peasant Studies* 756 [hereafter Alden: 2012].

¹⁸ Huberich C *The Political and Legislative History of Liberia* (1947) 1207.

¹⁹ Article 34 of the General Act of the Berlin Conference on West Africa – In essence, the parties to the Act was solely required to inform each other when one of them 'takes possession of a tract of land on the coasts of the African continent outside of its present possession.

²⁰ Robinson R & Gallagher J *Africa and the Victorians: The Official Minds of Imperialism* (1965) 51.

1.2.2 What is driving land grabs by foreign countries today?

Land investors hold the opinion that investments in agricultural land are the leading clues to, bolster food production worldwide, satisfy biofuel prerequisites and garner more profits as food resources reach the summit of inadequacy.²¹ Also investors have started looking upon farmland as a reliable and lucrative area for their capital. Some Asian and Middle East countries encountering predicaments such as the scarcity of land and water resources for the production of food have embarked on an undertaking to look for arable land offshore, commonly in Africa in order to guarantee their own food security in the years to come.²² At the same time, new quotas which have been introduced for the use of biofuels in the EU and the, have also played a crucial part in giving rise to the universal land rush, as corporations search for massive land and water resources required yield crops which can be turned into fuel.²³ Furthermore, foreign governments may also magnetise more of these investments by using their own tax laws and agricultural policies as an effective medium. For example, in India, the major foreign investor in agricultural land in Ethiopia-agricultural imports are taxed at a lower cost than home-grown agricultural products thus stimulating the growing of agricultural crops overseas and driving them to India for consumption.²⁴ In essence, foreign land investors are interested in land in the two selected countries for two main reasons – food and energy security of their people.

1.2.2.1 Food security

Food insecurity has become a global issue that has pushed many governments to think over their food production plans and projects.²⁵ Investments in farmlands in African countries have become an

²¹The World Bank Brief 'land and food security' 31 March 2014 available at <http://www.worldbank.org/en/topic/agriculture/brief/land-and-food-security> (accessed 25 May 2016).

²²See World Bank 'World Development Indicators 2008' (2008) 137.

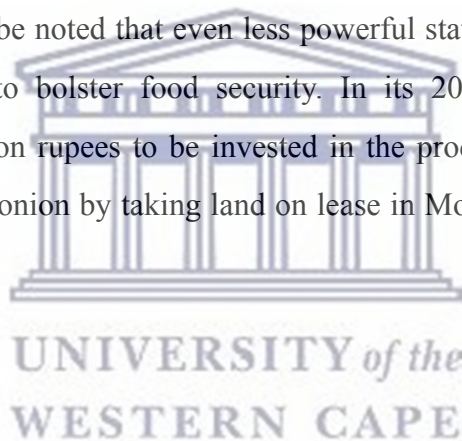
²³See European Biofuels 'Biofuels and sustainability issues' available at <http://www.biofuelstp.eu/sustainability.html> (accessed 05 July 2014).

²⁴See Thomas B 'India: Flood of food imports could destroy Indian agriculture' available at <http://www.twinside.org.sg/title/flood-cn.htm> (accessed 05 July 2014).

²⁵UN FAO 'The state of food insecurity in the world' (2011) 34 available at <http://www.fao.org/docrep/014/i2330e/i2330e.pdf> (accessed 10 June 2016).

appealing alternative for food insecure nations such as India and some gulf nations.²⁶ In 2008, the Gulf Cooperation Council (GCC) made public its desire to turn towards Africa as its bread basket in order to reduce cost of food production after spending USD 10 billion on food in 2007.²⁷ The political process of strengthening the relationship between the GCC-Africa Cooperation Forum (ACF) paved the way to countries such as Mozambique, Ethiopia, Senegal and Tanzania to get on board.²⁸ For instance, Ethiopia was targeted as the main farmland in Africa by food insecure nations such as Saudi Arabia with a projected amount of 2.4 billion USD into food production on over 1.25 million acres of arable land.²⁹

China is also threatened by food insecurity due to its growing population and it has turned towards Ethiopia as a solution to this problem and in particular for sesame seed production.³⁰ Chinese engagement in Africa is illustrated by way of China's agricultural aid projects in Africa, Chinese investment in agricultural enterprises that are intended to make profit and China-Africa trade in agricultural products.³¹ It is to be noted that even less powerful states such as Mauritius has shown interest in African farmland to bolster food security. In its 2008/2009 budget, the Mauritian government set aside one billion rupees to be invested in the production of crops such as wheat, potato, rice, pulses, maize and onion by taking land on lease in Mozambique and sub-leasing same to investors.³²



²⁶ Dessy S 'Foreign direct investments in Africa's farmland: Threat or opportunity for local populations' *Inter-University Centre on Risks, Political Economy and Employment Working Paper* 12-03 (January 2011) p 1.

²⁷ Woertz E 'The governance of Gulf agro-investments' (2013) 10 *Globalizations* 87.

²⁸ Kachika T 'Land grabbing in Africa: A review of the impacts and the possible policy responses' Oxfam International (2010) 24 available at <http://www.oxfamblogs.org/eastafrica/wp-content/uploads/2010/11/Land-Grabbing-in-Africa.-Final.pdf> (accessed 10 June 2016) [hereafter Kachika: 2010].

²⁹ Cotula L et al 'Land grab or development opportunity? Agricultural investments and international land deals in Africa' (2009) 38.

³⁰ Ayana N 'Status of production and marketing of Ethiopian sesame seeds: A review' (2015) 1 *Agricultural and Biological Sciences Journal* 221.

³¹ Shinn D 'China, Africa and food security' *International Policy Digest* 2015 available at <https://intpolicydigest.org/2015/07/09/china-africa-and-food-security/> (accessed 10 June 2016).

³² Kachika (2010) 25.

1.2.2.2 Energy security

Energy security is another reason for land investment in Africa. The EU legislated that one fifth of all energy used in the EU and one tenth of transport fuels in each member state should mandatorily be coming from renewable sources of energy by 2020.³³ The soaring oil prices have also triggered the search for alternative sources of energy and biofuels are said to represent a pragmatic solution.³⁴ The demand for biofuel feedstock has initiated a huge pressure for land and many European states have focused on African states for biofuel initiatives.³⁵ For instance, some governments have welcome foreign investors from Europe for the production of biofuel from *Jatropha* aimed primarily for foreign exports.³⁶ A Policy and Strategy for Biofuels has been adopted by the government to facilitate land investments for biofuel production.³⁷ A similar situation exists in Ethiopia with companies such as Flora EcoPower from Germany and Sun Biofuels from UK investing heavily in biofuel production, altogether occupying around 18 million hectares of land in the Oromia and Benshangul Gumuz Regions.³⁸ Food and energy security have therefore been highlighted as the main reasons explaining the current land rush in Africa by foreign actors.

1.2.3 Host states viewing foreign land investments as economic development opportunities

Land investments in African states for reasons discussed above have been regarded as economic and developmental opportunities by the host states. The main justification given by host states for opening their door to such investments is based on the 'win-win' narrative.³⁹ They view land

³³ Borras S & Franco J 'From threat to opportunity? Problems with the idea of a Code of Conduct for land grabbing' (2010) 13 *Yale Human Rights and Development Law Journal* 508.

³⁴ Matondi P 'Biofuels, food security and land grabbing in Africa' (2012) 10 available at <http://nai.diva-portal.org/smash/get/diva2:387049/ATTACHMENT01.pdf> (accessed 10 June 2016).

³⁵ Kachika (2010) 17.

³⁶ FIAN 'Land grabbing in Kenya and Mozambique - A report on two research missions and a human rights analysis of land grabbing' (2010) 8 [hereafter FIAN: 2010].

³⁷ FIAN (2010) 37.

³⁸ Kachika (2010) 27.

³⁹ Da Via E 'The politics of 'win-win' narratives: Land grabs as development opportunity' *Paper presented at the International Conference on Global Land Grabbing (6-8 April 2011)* organised by Land Deals Politics Initiative [hereafter Da Via: 2011].

investments in their countries as development opportunities. Many of them are currently battling with issues such as poverty and under-development.⁴⁰ Lack of political planning has resulted into a situation whereby various economic sectors have not been able to thrive and flourish.⁴¹ Significantly high level of literacy implies that the labour resources are limited to manpower that can only provide for manual labour.⁴² Economic sectors such as information technology and financial services have not developed as they require highly qualified and trained personnel.⁴³ From a macro-economic viewpoint, it implies that the most suitable type of investments would be land investments involving land deals between the host states and the foreign state and non-state actors in search of arable lands. By way of selling or leasing out thousands of hectares of arable lands, it is expected that FDI and the resulting influx of foreign currency would boost up the economy and ensure development.

Foreign investment in Africa has been highly encouraged by globalisation of transport and communication, economic liberalisation and the increasing demand for food and fuel. In 2013, the total FDI in Africa increased by 5% to USD 50 billion in 2012.⁴⁴ Ethiopia and Madagascar have experienced a drastic increase in FDI mainly in agricultural and fuel production sectors since 2004.⁴⁵ The African governments concerned have been tempted to base the progress of their economies on projects that are going to reap much in terms of FDI. A significant amount of such undertakings involves the use and acquisition of land which results in the problem of land grabbing. Indeed, governments play a pivotal role in promoting investments in foreign lands. Cotula reports

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⁴⁰ The World Bank 'How can Africa transform land tenures, revolutionize agriculture and end poverty' available at <http://www.worldbank.org/en/news/press-release/2013/07/22/how-africa-can-transform-land-tenure-revolutionize-agriculture-end-poverty> (accessed 25 May 2016).

⁴¹ Wambugu F 'The importance of political will in contributions of agricultural technology towards economic growth, food and nutritional security in Africa' in Wambugu F & Kamanga D (eds) *Biotechnology in Africa: Emergence, Initiatives and Future* (2014) 10.

⁴² Johanson R & Adams A 'Skills development in Sub-Saharan Africa' World Bank Publication (2004) 2 available at <http://documents.worldbank.org/curated/en/764171468741592643/pdf/288200PAPER0Skills0development.pdf> (accessed 17 January 2020).

⁴³ Thomas D 'Is Africa's boom over? African Business available at <http://africanbusinessmagazine.com/sectors/development/big-read-africas-boom/> (accessed 25 May 2016).

⁴⁴ See UNCTAD 'Foreign direct investment to Africa increases, defying global trend for 2012' Press Release 25 June 2013 available at <http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=136> (accessed 26 May 2015).

⁴⁵ Pagss S & Velde D *Foreign direct investments by African countries* (2004) 20.

that government involvements can be in the form of direct land acquisitions by state agencies, sovereign wealth funds (SWF), state-owned enterprise (SOE), national policies friendly to such investments and by way of support to private entities in both the investor and host states.⁴⁶

1.2.4 Non-state actors' participation in land investments

The mode of land investments today in African states arguably differs from land grabbing in the colonial era on the basis of the involvement and participation of non-state actors such as international financial and banking institutions. World Bank (WB) agencies such as the International Finance Corporation (IFC) and the Foreign Investment Advisory Service (FIAS) are playing an active role in the promotion of FDI through agricultural investments in developing countries via policies and technical assistance.⁴⁷ These institutions would insist on regulatory reform in host states to boost the Business Enabling Environment and the Investment Climate for their client states.⁴⁸ They have indeed played a crucial role in enhancing access to land in host states for the investor.⁴⁹ For instance, upon recommendations of the IFC, regulatory reforms such as attractive tax rates, corporate tax exemption for long periods of time and import duty exemption on machinery would be some incentives that investors would be afforded.⁵⁰

Many private-sector financiers have started to invest in land and agriculture as assets destined to produce significant returns. A plethora of newly designed financial instruments and investment structures are being offered to potential investors with the view of raising capital for agricultural investments.⁵¹ By the same token, the European Investment Bank (EIB) and the African Development Bank (ABD) have provided investors with significant volumes of funds as capital for

⁴⁶ Cotula L et al 'Land Grab or Development Opportunity? Agricultural investment land deals in Africa' (2009) 27.

⁴⁷ Kachina (2010) 18.

⁴⁸ Shepard D '(Mis)investment in agriculture: The role of the International Financial Corporation in global land grabs' *Oakland Institute publication* (2010) 6 [hereafter Shepard: 2010].

⁴⁹ Shepard (2010) 15.

⁵⁰ Da Via (2011) 2.

⁵¹ Hallam D 'International investments in agricultural production' in Kugelman M & Levenstein S (eds) *Land grab? The race for the world's farmland* (2009) 27.

investments.⁵² These institutions are active in providing financial, advisory, legal, technical and infrastructural advice through which ‘the corporate agendas can be sustained and pushed forward’.⁵³ The WB strongly believes that there are immense opportunities from land investments in African states as they would ensure sustained and broad-based development by enhancing access to better technology and creation of jobs for the poor farmers and rural citizens.⁵⁴ Non-state actors can therefore be considered as direct and active participants in land investments in African states.

1.2.5 How are land investments being carried out?

Negotiations would typically start from a government-to-government dialogue and fact-finding missions after which an extensive statement of economic collaboration would be signed. It then opens the gate for SOEs or private enterprises to invest by benefitting from financial and non-financial supports from both governments. In some instances, there may be collaborations between SWF, SOEs and other private entities which give rise to contractual arrangements that are complex in terms of finance and governance.⁵⁵ Bilateral Investment Treaties (BITs) are usually signed with broad content and significant legal and financial protection afforded to the investors by the states. Transfer of technology, joint research exchange of information and experience would generally be what the investor state or private investors proposed.⁵⁶ Diplomacy equally plays an important role for instance, with the various Africa Summits organised by various countries and global players.⁵⁷

Investment friendly fiscal policies and flexible corporate legal frameworks have contributed in attracting both state and non-state actors in the quest for arable lands in African countries. A lack of

⁵² Da Via (2011) 4.

⁵³ Da Via (2011) 4.

⁵⁴ Da Via (2011) 5.

⁵⁵ The difference between ‘state’ and non-state actors becomes unclear as can be illustrated with the Chinese corporation China National Cereals, Oils and Foodstuffs Import and Export Company (COFCO). The COFCO has senior staff appointed by the Chinese government and the CEO’s have ministerial level rank. It becomes a mixed bag of state ownership and state influence.

⁵⁶ Article 5 of the Memorandum of Understanding for the Cooperation in Agriculture between Lebanon and Sudan (29 November 2003) and article 4 of the Framework Cooperation Agreement between Mali and Portugal (14 September 1999).

⁵⁷ Africa summits hosted by China (November 2006), the EU (December 2007), India (April 2008), Japan (May 2008) and South Korea (October 2008).

effective land tenure of the people coupled with the fact that lands are generally state-owned in most African countries have facilitated actions of selling or leasing large tracts of land to foreign state or non-state actors in the name of economic development. While it is highly debatable as to the extent to which such land deals have brought economic development, it is clearly evident and hugely reported that they have been a serious cause of human rights violations. Land investments with the aim of boosting FDI have resulted in large scale evictions which are often forcefully carried out without due consideration to civil and political rights of people. Evictions have also led to transgressions of socio-economic rights such as right to food, housing and health.

The land deals and investments being carried out in the name of FDI and development have multiple consequences on the lives of local communities in African states. Lands earmarked for investments are sealed off and access to those lands and forests are denied to the local communities. This greatly impacts on their livelihood and food security since they heavily depend on the land for pastures and cultivation.⁵⁸ There is equally limited access to water since the lands that are used for investments would normally also include the waterways and rivers on which local communities were dependent on, thus often giving rise to conflicts.⁵⁹ The forests that are captured during land investments have immense cultural and traditional values for local communities. They are thus denied the possibility to practice their culture.⁶⁰ It is contended that land grabbing violates several civil and political, socio-economic rights and the right to development of local communities.

It is highlighted that most African countries which are allowing land grabbing are parties to international human rights instruments that protect the rights of local communities. Indeed, the right to food, water and culture, *inter alia*, are all protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to development is enshrined by the UN Declaration on the Right to Development (UNDRTD). There is equally the International Covenant on Civil and Political Rights (ICCPR) protecting the inherent civil and political rights of local communities. At

⁵⁸ Bush R 'Africa's land rush: Rural livelihoods and agrarian change' (2017) 116 *African Affairs* 543.

⁵⁹ Ananthaswamy A 'African land grab could lead to future water conflicts' (2011) *New Scientist* available at <https://www.newscientist.com/article/mg21028144-100-african-land-grab-could-lead-to-future-water-conflicts/> (accessed 19 February 2018).

⁶⁰ Centre for Economic and Social Rights 'Land grabbing and its implications for economic, social and cultural rights' available at <http://www.cesr.org/land-grabbing-and-its-implications-economic-social-and-cultural-rights> (accessed 18 January 2018).

the regional level, the African Charter on Human and Peoples' Rights (ACHPR) also confers adequate protection to the rights mentioned above.

It is therefore clear that land investments are not being carried out based on Sen's approach to development which will be the theoretical framework of the thesis. Sen's Capability Approach (CA) provides that 'social arrangements should be primarily evaluated according to the extent of freedom people have to promote or achieve functioning they value'.⁶¹ According to him development or poverty reduction are successful only when people have greater freedom to achieve, preserve and enjoy what they value, which is referred to as their capabilities.⁶² While African states are sovereign and independent to choose FDI in the form of land investments in their way forward to drive economic development, it should also ensure that the development is also benefitting the local communities. By Sen's approach, FDI and development policies that are resulting in human rights violations, are not rendering local communities capable, thus restricting them from enjoying greater freedoms which are the 'real opportunity that we have to accomplish what we value'.⁶³ Development through FDI obtained by land investments which denies access to water, land, culture, political participation and food to local communities cannot be free and inclusive development based on Sen's Capability Approach.

1.2.6 Summarised synthesis of the statement of problem

In light of the above discussion, there is clearly a conflict between the investment model of African countries and Sen's CA to development which advocates for development as freedom with full respect for the capabilities of local communities. The current investment model adopted by African states is benefiting only the elite class of societies and harming local communities. Livelihoods of local communities are being seriously jeopardised because of lack of access to land and water and food insecurity. In addition, their cultures and traditions are negatively affected with restricted access to lands and forests. Amidst all these negative consequences of land grabbing, the local communities have poorly been consulted and not effectively allowed to participate in the decision

⁶¹ Alkire S 'The Capability Approach and human development' available at <http://www.ophi.org.uk/wp-content/uploads/OPHI-HDCA-SS11-Intro-to-the-Capability-Approach-SA.pdf> (accessed 18 December 2017).

⁶² Sen A *Development as Freedom* (1999) 56 (hereafter Sen: 1999).

⁶³ Irudayan C *Towards an ethical framework for poverty reduction* (2010) 119.

making processes of large-scale land investments. Sen's CA to development is supported by International Human Rights law which also seeks to prevent the harm being caused to the local communities. The present synthesis of the statement of problem leads to the following research questions of the thesis.

1.3 Research Questions

1. What are the human rights implications of land-grabbing in the Ethiopia and Madagascar?
2. Can Sen's Capability Approach be a suitable model to balance development and respect for essential capabilities of the local communities in Ethiopia and Madagascar?
3. To what extent can the right to development reflect this critical balance based on Sen's Capability Approach?
4. How can the composite elements in the international human rights law framework ensure Sen's model of development in Ethiopia and Madagascar?
5. How can domestic law in Ethiopia and Madagascar achieve the balance through International human rights law and Sen's model?

1.4 Arguments

It is argued that Sen's CA to development can provide the balance between economic development which is necessary for the two selected case studies and the respect for land, access to water, food, culture and participation of the local communities. As a theoretical framework, the CA advocates for human development rather than development merely in the economic sense. This approach is based on achieving what human beings desire and they would regard as development. The local communities in Ethiopia and Madagascar can only accept a development model which revolves around and bolster their human capabilities which are land, water, food, culture and participation.

Sen's model of development which is a human-centered one can be realised through the Right to Development (RTD) which is a normative framework that encourages an all-inclusive development. The RTD requires respect for all other human rights. It is argued that development projects that have restricted access to land and water and affected food security, culture and political participation of the local communities led to human rights violations. Since the RTD is based on the respect of all human rights of people involved in development, it is contended that a genuine application of it can reflect the balance proposed by Sen's CA.

It is argued that the international human rights law framework can be applicable in preventing these human rights violations. If effective protection are conferred to local communities against these violations, then it would mean that development is being carried out whereby their livelihoods, access to water and land, food security, culture and participation are respected, thus reflecting Sen's CA to development.

Domestic laws in Ethiopia and Madagascar are arguably defective and do not provide sufficient protection to local communities who would fall victims to land investments. Sen's approach which is based on a balance between development and human rights considerations can be given effect through domestic laws. Indeed, it will be argued that domestic laws have a critical role to play to ensure a human-centered approach to development. This would include domestic laws in relation to land, legal instruments that allow for land investments, access to justice for victims of land investments and grabbing and the extent to which laws would protect essential capabilities such as food, water, culture and participation through the constitutions or other legislations.

It is critical to succeed in achieving a balance between development and the respect for human rights and human capabilities as propounded by Sen's CA (chapter 2). The RTD has been identified as the first legal framework that has the potential to reflect Sen's theory of a balanced development (chapter 4). The importance of the composite elements of international human rights law in giving effect to Sen's approach is equally cardinal (chapter 5). Finally, it is essential that this approach be reflected in domestic laws of the selected case studies in view of providing a more effective protection to the local communities involved in land investments (chapter 6 and 7).

1.5 Literature review

The subject of contemporary land grab in Africa has mainly been associated with production of food and biofuel as a result of the recent energy and food crises urging foreign state and non-state actors to seek for arable lands in the African continent.⁶⁴ However, Zoomers argues that there are various other processes that drive the current land rush such as a rise in domestic investments and land speculation and the persisting non-respect for human rights.⁶⁵ While examining Kenya's land grabbing, Klopp notes that the government has been turning towards public lands to be made the subject of land deals with the aim of maintaining control and as a patronage resource.⁶⁶ Corruption and violence have been used to achieve such control, leading to numerous human rights violations. It implies that it is essential to study land deals and their implications on local communities and indigenous groups in Africa from other lens and possibly from a human rights approach.

Discussing therefore a potential human rights approach to development, Hamm is of the view that development and human rights are interdependent and it does not suffice to have aspects of human rights as a mere content of development policies.⁶⁷ Instead, such a human rights approach primarily recognises the obligations of states parties to international human rights treaties to support development that put people as the central subject and that respect their fundamental rights and freedoms as encouraged by the UNDRTD.⁶⁸ Emphasising on this approach, Filmer-Wilson contends that it presents a framework that allows for the pursuit of human development with principles and standards of human rights guiding the process and human rights obligations setting the objectives of development.⁶⁹ Uvin reiterates the vital role that a human rights-based approach can play in the

⁶⁴ Rosset P 'Food sovereignty and alternative paradigms to confront land grabbing and the food and climate crises' (2011) 54 *Development* 21.

⁶⁵ Zoomers A 'Globalisation and Foreignisation of space: seven processes driving the current global land grab' (2010) 37 *The Journal of Peasant Studies* 429-447.

⁶⁶ Klopp J 'Pilfering the public: The problem of land grabbing in contemporary Kenya' (2000) 47 *Africa Today* 7.

⁶⁷ Hamm B 'A human rights approach to development' (2001) 23 *Human Rights Quarterly* 1005.

⁶⁸ UN Declaration on the Right to Development 41/128 Article 1.

⁶⁹ Filmer-Wilson E 'The human rights-based approach to development: the right to water' (2005) 23 *Netherlands Quarterly of Human Rights* 213.

international practice of development.⁷⁰ While a literature survey shows that there is no dearth of literature on a human rights-based approach, an initial assessment of the international and domestic human rights frameworks and its efficacy to remedy violations arising out of development has not been carried out in depth. It is argued that it is essential to review the existing human rights framework first to eventually be able to determine whether or not it is efficient enough to be employed as an approach to development.

It is equally critical to assess whether the existing international human rights framework is adequate and relevant to the discourse of human rights violations arising out of development projects in Africa. It is questionable as to whether modern human rights do take into account culture, tradition and indigenous ways of life that are visibly present in the African context. For instance, Panikkar put into doubt the fact that human rights is a 'universal symbol powerful enough to elicit understanding and agreement' when he interrogates whether the notion of human rights is a western construct.⁷¹ Thomas challenges Panikkar in his research paper and argues it is unimportant to ask whether human rights is a western construct as far as it is useful to protect people even with different cultures and traditions.⁷² Again in literature, while we find that the very basic concept of human rights has been challenged, whether it can be applied to modern social problems and issues such as land grabbing has not been discussed.

A majority of existing literature on land grabbing deals with the proposed solution by western institutions such as the WB and the IMF, both focusing on a win-win solution. As such, investors have been encouraged to follow a Code of Conduct (CoC). As an introductory overview of the issue of land grabbing in Africa, Borras et al describe it as a North-South dynamics that echoes the land grabs that underwrote both colonialism and imperialism.⁷³ The article explains the opposite views that some people have on the issue such as a major threat to human rights and governance for some

⁷⁰ Uvin P 'From the right to development to the rights-based approach: How human rights entered development' (2007) 17 *Development in Practice* 597.

⁷¹ Panikkar R 'is the notion of human rights a western construct' (1982) 30 *Diogenes* 75.

⁷² Thomas N 'Are human rights a western construct From the confucius peace prize to the practice of suttee in India' (2012) 5 *Journal of International Social Research* 467.

⁷³ Borras SM 'Towards a better understanding of global land grabbing: An editorial introduction' (2011) 38 *The Journal of Peasant Studies* 209.

and an economic opportunity for rural poor for others. Borras also argues that the WB has not analysed the issue of who wins, who loses and what are the social, political and ecological drivers and consequences of the investments. He concludes that the CoC proposed by the WB is not based on a political analysis of how those principles would work in practice. In an article entitled 'Centering labour in the land grab debate'⁷⁴, Tania Murray Li argues that without a solid political organisation and social mobilisation, the rural poor are not going to benefit from the CoC and its contents. She argues that without complete participation of rural poor on an equal footing with major investors, the regulatory regime of the CoC has no purchase.

Another point which might explain the potential failure of the CoC is the energy security and profitability of the biofuels industry. According to McMichael, the profitability argument will not allow an effective and real implementation of the CoC.⁷⁵ Weak democracy and weak democratic institutions as well as governments have been more open and welcoming to investors in agricultures. Dauvergne and Neville see this point as another setback to the proper functioning of the CoC. They argue that in the absence of state oversight in a democratic and fair manner, the profitability potentials of land grab will be heavier than any real materialisation of the principles in the CoC.⁷⁶ One of the principles of the CoC is that land rights should be improved in countries where land grabbing is taking place to provide bargaining power to rural farmers. Vermeulen and Cotula disagrees with this point by citing countries such as Mozambique and Tanzania where despite a fair regime of land rights, land grabbing is still having negative effects on local farmers.⁷⁷

SM Borras analysed the content of the CoC and also gave reasons why it would not be a solution to the numerous good governance and human rights violations which are taking place due to land grabbing.⁷⁸ He argues that the CoC does not look at the fundamental problem encircling the land

⁷⁴ Li TM 'Centering labour in the land grab debate' (2011) 38 *The Journal of Peasant Studies* 214.

⁷⁵ McMichael P 'The politics of biofuels, land and agrarian change' (2010) 37 *The Journal of Peasant Studies* 576.

⁷⁶ Dauvergne P & Neville KJ 'Forest, food and fuel in the tropics: the uneven social and ecological consequences of the emerging political economy of biofuels' (2010) 37 *The Journal of Peasant Studies* 654.

⁷⁷ Vermeulen S & Cotula L 'Over the heads of local people: Consultation, context and recompense in large-scale land deals for biofuels projects in Africa' (2010) 37 *The Journal of Peasant Studies* 913.

⁷⁸ Borras SM 'From threat to opportunity? Problems with the idea of a 'Code of Conduct' for land grabbing' (2010) 13 *Yale Human Rights and Development Law Journal* 508.

grab issue which is poor land rights and an overall respect for human rights. He also states that the claims made by investors that land grabbing are only targeting reserve agricultural land is bogus and unreliable as there are simply no such lands in Africa. Borras admits that the CoC at least theoretically promotes transparency in land deals but promotion of transparency does not equate to accountability to the rural farmers. He also criticises the voluntary nature of the CoC and how it is impractical to pin down violations and to enforce the CoC against violators.

Saturnino M. Borras, argues that the rhetoric of land grabbing are carried out only on marginal lands which are defined as lands which are thinly inhabited, unproductive and under-utilised is fundamentally flawed as there exists no such lands in the world.⁷⁹ He also argues that claims that land grabbing only results in displacement and dispossession of poor people is only partly correct. Deepak Mishra paints a picture of the role of the state in land grabbing in his paper and stated that:

‘Competition among national and State governments to attract foreign and domestic capital through liberal (and often illegal) concessions, has made state power an essential element of land grabbing’.⁸⁰

In ‘The outlook on farmland acquisitions’ by Lorenzo Copula from the International Institute for Environment and Development, the author discusses the direct and indirect impacts of land grabbing which are expropriation and deforestation respectively.⁸¹ ‘Resisting agribusiness development’ a paper by Longgena Ginting and Oliver Pye looks at the very interesting issue of the opinion of farmers themselves. The paper illustrates that there is divided opinion between local and rural farmers as some oppose such development projects whereas a category of them are agreeable.⁸² Nadia Cuffaro and David Hallam discusses the possible role of corporate social

⁷⁹Borras SM ‘The fundamentally flawed marginal lands narrative’ available at http://www.future-agricultures.org/publications/research-and-analysis/doc_details/1332-the-fundamentallyflawed-marginal-lands-narrative-insights-from-the-philippines?tmpl=component (accessed on 11 November 2011).

⁸⁰Mishra D ‘Behind dispossession: State, land grabbing and agrarian change in rural Orissa’ available at http://www.future-agricultures.org/index.php?option=com_docman&task=doc_details&gid=1304&tmpl=component&Itemid=971 (accessed on 11 November 2011) 3.

⁸¹Cotula L ‘The outlook on farmland acquisitions’ available at <http://www.landcoalition.org/publications/outlook-farmland-acquisitions> (accessed on 11 November 2011).

⁸²Ginting L & Pye O ‘Resisting agribusiness development’ available at http://www.future-agricultures.org/publications/research-and-analysis/doc_details/1408-resisting-agribusiness-development-the-merauke-integrated-food-and-energy-estate-?tmpl=component (accessed on 11 November 2011) 2.

responsibility and of a model code of conduct promoted by international organisations in mitigating the risks of human rights violations by land grabbing.⁸³ Jean Pierre Chauffour argues that proponents of international human rights oversee economic and development principles while development experts advocate incoherent approaches without considerations of human rights.

While a significant amount of work has been done around the human rights implications and violations resulting from land grabbing, the focus of research in this field has not been on whether such land projects can still go on in view of benefitting local communities but in a legally structured way to prevent human rights violations. In addition, it is yet to be determined whether the existing international legal framework can be effective in allowing for development but with due respect and consideration to human rights. The research questions formulated in this thesis have not yet been covered by existing literature. Land investments justified by the argument of economic development have not yet been viewed from the lens of Sen's CA in an attempt to see whether a more balanced land investment can still be achieved.

While there is no dearth of literature on the RTD, there is a lack of scholastic work on how it can be effective in promoting Sen's CA to land investments in Ethiopia and Madagascar. In addition, assessing the extent to which domestic laws of the two selected countries can help in striking the balance proposed by Sen's approach to development is equally an argument that has not yet been covered by existing literature. Therefore the formulation of the research questions based on Sen's CA to investigate land investments in Ethiopia and Madagascar with the ultimate aim of conferring better protection to local communities through international human rights laws and domestic laws addresses the dearth of literature in this direction and also constitutes a contribution to knowledge in this field of study.

1.6 Scope and methodology

The thesis is an analytical one which cuts across at least two major disciplines. It looks at land grabbing from legal and development studies angle. It uses theory from developmental studies to propose that development and economic benefits should be in harmony with human rights to give

⁸³ Cuffaro N and Hallam D 'Land Grabbing in developing countries: Foreign investors, regulation and codes of conduct' available at <http://ideas.repec.org/p/css/wpaper/2011-03.html> (accessed on 11 November 2011) 10.

development its broad meaning. However, since it involved lives and livelihood of people, human rights-based approach to development should be subject to strict regulations and legal parameters to enhance accountability and to provide an effective and legal avenue for justice to be done in cases of violations resulting out of such developmental projects. Analysis is normative and conceptual in nature and discussions and arguments will be based on human rights principles.

The thesis is based on desktop research with the analysis of literature on human rights and development studies. The main arguments are based on legal principles emanating from primary sources of law such as international legal instruments. Secondary sources such as cases and literature providing for explanation and discussion on those laws also form part of the basis of the methodology applied in this work. Country reports from NGOs on the issue of land grabbing have also been used to practically understand the situations and to critically analyse the human rights violations. Articles and books were examined thoroughly, and they were selected mainly in view of their relevance to responding to the research questions formulated.

1.7 Rationale behind the choice of the case studies

While land grabbing is a phenomenon which is occurring in many African states, the research questions set above would be responded to with reference to two specific countries: Ethiopia and Madagascar. These two countries have been chosen as case studies since they have different legal systems and land grabbing is taking place in different ways in both. In Ethiopia, lands are given to foreign companies (Indian mostly) with the interference of the Indian Government through indirect ways such as lavish development grants or even bi-lateral investment talks to indirectly allow foreign investors from India to benefit from land grabbing without the Indian Government implicating themselves directly.⁸⁴ In Madagascar, investors pledge to build schools, public facilities and make other similar promises in exchange of the lands of local communities ends up being fake promises.⁸⁵

⁸⁴ Anwar M 'The lesser known story of India's role in Ethiopian land grab' 15 June 2015 Ecologist available at http://www.theecologist.org/blogs_and_comments/Blogs/2892711/the_lesser_known_story_of_indias_role_in_ethiopian_land_grabs.html (accessed 25 May 2016)

⁸⁵ Renaud J et al 'Madagascar : The new eldorado for mining and oil companies' (2013) 16.

While in Ethiopia land ownership belongs to the state only, Madagascar has a pluralistic legal environment governing land with a formal land tenure system that recognises individual freehold tenure under formal law and a community-based customary land tenure system. The systems are governed by formal law and community-based rules that regulate access and use.⁸⁶ It is noted that the Ethiopian government tends to keep a low profile in such land deals and in a very discreet way whereas Madagascar collaborates with other governments for land projects that lead to land grabbing.

Giving out huge tracts of land to domestic and foreign investors has been a state practice in Ethiopia since the end of 1990s. The criticism levelled against this has been that it has not benefitted the general population as campaigned and the terms and circumstances of the land deals carried out have not been made public and transparent. Ethiopia is one of the poorest countries in the world with frequent threat of food shortages and famine. Large scale agriculture and an open policy to foreign investors are being supported by the Ethiopian government as a necessity for agricultural modernisation and improving production efficiency. The then Ethiopian minister of agriculture, Tefera Deribew, opined that large scale agricultural investment is not a threat to development and will, on the contrary help solve the problem of food shortage in the country.⁸⁷

The local people especially from the rural areas of Ethiopia have had to bear the consequences of such land deals. For instance, due to investment from the Indian company Karuturi Agro Products in the region of Gambella (100 000 hectares of land leased), pastoralists and farmers have reportedly been evicted from the region. ‘We were not told that our land will be given to foreign investors’, said Ujulu, who used to live with his seven children on the banks of Gambella’s Baro river in an area now being developed by Karuturi, and who was recently relocated to a new village, several hours’ walk away. He added:

⁸⁶ USAID Country Profile MADAGASCAR available at http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Madagascar_Profile.pdf (accessed on 26 May 2013).

⁸⁷ See IRIN News ‘Ethiopia: The great land grab debate’ 25 March 2011 available at <http://www.irinnews.org/report.aspx?ReportID=92292> (accessed on 5 January 2012) [hereafter IRIN News: 2010].

‘What I know is government promised us new schools for our children, health clinics, and clean water if we are to be included in the ‘villagisation’ programme. That is why I came to this village three months ago’.⁸⁸

The Ethiopian authority has often declared that only unused lands are being leased. However, farmers from the Oromiya state’s Karmi village do not share the view, arguing that even unused land is used by them for grazing their cattle, an activity which is pivotal for their existence and survival. This is in violation of the article 40(3) of the Ethiopian Constitution (EC) which states that Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands.

Experiences from Ethiopia and Madagascar will be useful in the search for solutions or recommendations that would benefit the whole of Africa. It is argued that even if land investments/grabbing would take different forms in different countries with different legal systems, there are recurring themes such as lack of effective land tenure systems, lack of political will to genuinely protect the interests of local communities and the role of non-state actors which is similar in most cases. Therefore, Ethiopia and Madagascar provide for a good insight about land grabbing in two distinct legal systems and jurisdictions where investments are increasing for various types of business undertakings.



1.8 Terminologies

1.8.1 Land grabbing

The thesis uses the term land grabbing based on the definition provided by D’Odorico and Rulli⁸⁹ Land grabbing has been defined as:

‘acquisitions or concessions that are one or more of the following: (i) in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits

⁸⁸IRN news (2010).

⁸⁹D’Odorico P & Rulli C *International Land grabbing* (2014) available at <http://www.oxfordbibliographies.com/view/document/obo-9780199363445/obo-9780199363445-0013.xml> (accessed 21 August 2016) [D’Odorico & Rulli: 2014].

sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation.’⁹⁰

Other terms such as ‘land rush’, ‘large scale land deals’ or ‘large land acquisitions’ have been proposed to avoid the word land grabbing which is often thought to have a negative connotation and looking at only investments.⁹¹ However, it does not exclude the fact that many of such acquisitions constitute real acts of grabbing, affecting human rights. The thesis will thus use the word ‘land grabbing’ to give the true sense and picture of how such land deals are being carried out.

Large-scale land investments in Ethiopia and Madagascar, with the complicity of the host states and the foreign investors, state-led investments or private investments have resulted in human rights violations as would be elaborated upon in chapter three. Local communities have not been adequately consulted in the way as would be prescribed by law. Their free, prior and informed consent have not been obtained and in some cases, violence have been used to forcefully displace them. Serious questions have been raised in the way contracts and agreements on land deals have been concluded without transparency and accountability in Ethiopia and Madagascar.

The terminology land grabbing is therefore appropriate as an analytical tool which highlights the above mentioned issues. It enables to underline the human rights violations that are taking place and assess effective remedies that could be possible under the current regime of international human rights law. The undemocratic and non-transparent ways of agreements for land investments provide the basis for the discussion on the responsibilities and duties of state and non-state actors.

1.8.2 Local communities

The concept of community is a problematic one to define and cannot be separated from politics of homogeneity and essentialism especially in the discourse of national identity.⁹² A community has been defined as a group of people with a common characteristic or interest living together within a

⁹⁰D’Odorico & Rulli (2014).

⁹¹ D’Odorico & Rulli (2014).

⁹² Manetsi T ‘Communities, groups and individuals’ Asia-Pacific Cultural Centre available at http://www.accu.or.jp/ich/en/pdf/c2006Expert_MANETSI_2.pdf (accessed 21 August 2016).

larger society.⁹³ The word ‘local’ in the term local communities acts as a qualifier which adds a spatial requirement which focuses on a common interest and rules out broader definitions.⁹⁴ Murphree argues that ‘community is an ambiguous term that eludes unequivocal definition’ which nevertheless requires some attention since it is a persisting concept subsuming organisational and institutional principles.⁹⁵ Certain criteria have been identified to help in the definition of local communities. These characteristics are a small spatial unit, a shared norm and a homogenous social structure.⁹⁶

The thesis focuses on the spatial unit as a component to define local communities. Irrespective of ethnic or cultural differences, local communities are to be considered as any group of people directly affected by land grabbing in Ethiopia and Madagascar. They would generally be the rural communities as all the large-scale land investments in the two case studies are taking place in villages and rural areas- they are direct victims in terms of displacement, relocation, reduced access to water and food, loss of lands and the resulting loss of culture.

1.8.3 Human rights violations

The thesis assumes that there is nearly universal consensus that every individual is entitled to certain basic and fundamental rights which are to be respected and protected in any circumstances.⁹⁷ These rights are conferred by the domestic laws of the states supplemented by international human rights laws. Human rights violations are defined as being the violations of the physical and moral components of the applicable human rights as a result of the impacts of large-scale investments leading to land grabbing. When a right is conferred by domestic and international laws to the

⁹³ Fach E ‘legal empowerment of local communities: a role for international environmental law’ available at <https://www.scps.nyu.edu/export/sites/scps/pdf/global-affairs/estelle-fach.pdf> (accessed 21 August 2016) [hereafter Fach].

⁹⁴ Fach p 4.

⁹⁵ Murphree M ‘The role of institutions in community-based conservation’ in Wright W (ed) *Natural connections: Perspectives in community-based conservation* (1994) 403.

⁹⁶ Agrawal A & Gibson C *Enchantment and disenchantment: The role of community* (1999)

⁹⁷ Maiese, M ‘Human rights violations’ *Beyond Intractability* (2003) available at <http://www.beyondintractability.org/essay/human-rights-violations> (accessed 30 January 2017).

victims, any illegal and illegitimate interference with it and without any due process of the law to remedy it is considered as human rights violations.

1.9 Overview of the thesis

The current **chapter one** serves as an introduction to the thesis, stating the problem statement and establishing the corresponding research questions. **Chapter two** lays down the theoretical foundation based on Sen's CA through which it would be assessed whether a balance can be found between economic development by large scale land investments and respect for human rights of local communities. **Chapter three** highlights the various human rights violations by focusing on factual cases in Ethiopia and Madagascar. These violations would enable to focus on the specific rights which are being violated and to assess whether based on the CA.

The factual account is followed by **chapter four** which focuses on the RTD as a legal framework which can be effective in advocating development in tandem with effective consideration and respect for human rights. **Chapter five** then focuses on the existing international human rights framework to assess how effective they are in protecting the rights which are being violated by large-scale land grabbing. State and non-state obligations are equally examined in this chapter in line with the framework to highlight their duties towards the local communities who would be victims of land grabbing. The domestic laws in Ethiopia and Madagascar are analysed in **chapter six** to determine the extent to which they are capable of contributing towards the balance between development and human rights. **Chapter seven** assesses the role that judicial and non-judicial institutions have played in the two countries in the context of land grabbing. The thesis is concluded by **chapter eight** which proposes relevant recommendations to achieve the balance between economic development and respect for human rights in line with Sen's CA.

Chapter 2: THEORETICAL AND PHILOSOPHICAL FRAMEWORK

2.1 Introduction

The current chapter presents the philosophical and theoretical framework of the thesis. It argues that the theory of CA developed by Amartya Sen which primarily focuses on development as providing individuals with the freedom to choose what they want to do or to be provides such a balance. In this essence, it will be shown that land investments in Ethiopia and Madagascar do not necessarily translate into meaningful development which people may value. Any meaningful development must place people at the centre and cannot be solely driven by the concerns of profit at the expense of human rights and values. The chapter commences by introducing the CA as expounded by Sen. It further provides for an overview of the criticism against the approach. There is eventually an attempt to articulate the CA into human rights norms. It will finally be argued as to how the CA will form the theoretical basis of this thesis, to be applied directly or indirectly in all the chapters that will follow.

It is not always straight forward to achieve development, especially economic, in a way that would satisfy each and every member of society. Indeed, the world has known various eras of development which were affected by changing economic, social and political circumstances. Before the First World War, trade and commerce were carried out based on the concept of world's division of labour.⁹⁸ Goods that were not being produced locally had to be imported but later this system was hindered by the First World War, the Great Depression of the thirties and the Second World War.⁹⁹ The World Wars disrupted the maritime routes and fewer goods that could be imported at higher prices. The Great Depression heavily affected the foreign exchange rates which disrupted import and export activities.¹⁰⁰

⁹⁸ Baer W 'Import substitution and industrialisation in Latin America: Experiences and interpretations' 7 (1972) *Latin American Research Review* 95 [hereafter Baer: 1972].

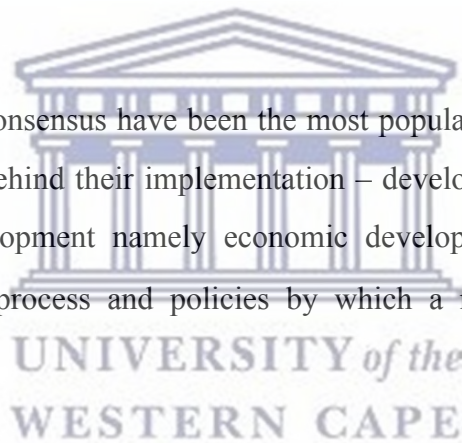
⁹⁹ Mokyr J *The Oxford Encyclopedia of Economic History* (2002) 136.

¹⁰⁰ Banerjee D *Colonialism in action – Trade, development and dependence in late colonial India* (1999) 171.

The concept of Import Substitution Industrialisation (ISI) was then introduced for strengthening and prioritising local industries and reducing imports.¹⁰¹ Indeed, economic growth and development were boosted by the ISI with rise in industrial input and life expectancy and a fall in social and health related problems in several societies.¹⁰² However, ISI stagnated after around four decades.¹⁰³

This led to the appearance of the Washington Consensus which was imposed by the International Monetary Fund (IMF), the WB and the Treasury Department of the US. A ten-points solution was proposed which greatly preached trade liberalisation, opening market access and requiring states to intervene less and less in the market.¹⁰⁴ Under-developed countries were forced to adopt the Washington Consensus as a pre-requisite for conditional aids and assistance.¹⁰⁵ However, this economic system was challenged by the financial crises in Latin American and East Asian countries in the late 1990s, exposing the limitations of the American-style capitalism.¹⁰⁶ Saad-Filho argues that it was necessary to develop strategies for poor countries in a way that development is seen to take place.¹⁰⁷

The ISI and the Washington Consensus have been the most popular ones on the international front and all of them had one aim behind their implementation – development. However, the focus was one particular mode of development namely economic development despite the definition of development being given as process and policies by which a nation improves the economic,



¹⁰¹ Sheperd P ‘Transnational corporations and the denationalization of the Latin American cigarette industry in Teichova A et al. (eds) *Historical studies in international corporate business* (1989) 203.

¹⁰² Baer (1972) 99-103.

¹⁰³ Baer (1972) 102.

¹⁰⁴ Williamson J ‘The Washington Consensus as Policy Prescription for Development’ *Institute for international Economics* (2013) 2.

¹⁰⁵ Kanbur R ‘The co-evolution of the Washington Consensus and the economic development discourse’ 24 (2008) *Macalester International* 46.

¹⁰⁶ Birdsall N & Fukuyama F ‘The Post-Washington Consensus – development after crisis’ (2011) *Foreign Affairs* available at <http://www.foreignaffairs.com/articles/67456/nancy-birdsall-and-francis-fukuyama/the-post-washington-consensus> (accessed 17 January 2020)

¹⁰⁷ Saad-Filho A ‘Growth, Poverty and Inequality: From Washington Consensus to inclusive growth’ *DESA Working Paper No 10* (November 2010) 17.

political and social well-being of its peoples.¹⁰⁸ Development has been seen as primarily economic, entailing growth and increase in per capita income.¹⁰⁹ The question that arises with this definition of development is whether it caters for the needs and specific requirements of vulnerable and marginalised peoples and does a rise in income truly mean growth or development or should there be other factors while computing the notion of development. Development economics allows for the incorporation of social and political factors in the computation of development.¹¹⁰ Thus the status of health, life expectancy, educational and work-related conditions are also taken into account to measure development more accurately.

Sen's CA has emerged as a leading discourse and as an alternative to the typical economic standards to measure poverty and human development. Sen's interrogation of human well-being started in 1979 when he argued that well-being is not simply a matter of wealth or pleasure that a person has but rather a question of how people can manage to live and do things that are important to them.¹¹¹ The CA has strong resemblance with Adam Smith's theory of 'necessities' and conditions of living and Karl Marx's work on human freedom and emancipation.¹¹² Sen has also recognised that Rawls's Theory of Justice (1971) has deeply influenced the CA.¹¹³ He argues that other approaches which exist in development economics focusing on human rights, human capital, entitlements or liberty do have something to offer but only the CA can address all relevant concerns about human development.¹¹⁴ It is generally argued that the CA bears the closest of similarities as a theory to the

¹⁰⁸ Sheffrin S *Economics: Principles in action* (2003) 471.

¹⁰⁹ Mansell R & Wehn U *Knowledge societies: Information technology for sustainable development* (1998) 8.

¹¹⁰ Todaro M & Smith S *Economic Development* (2003) 13.

¹¹¹ Sen A 'Equality of What?' in *The Tanner Lecture on human rights* (1980) 197-220 [hereafter Sen: 1980].

¹¹² Smith A 'An inquiry into the nature and causes of the wealth of nations' (1776) – based on his theory, human beings' inborn tendency towards self-interest results in prosperity. According to him, three principles were essential for world prosperity namely enlightened self-interest, limited government and solid currency and free market; Marx, K. 'On the Jewish question' (1844) – Marx argued that political emancipation that would lead to human freedom implied equal status of people and equality before the law irrespective of religion, property or individual and private features of the human individual.

¹¹³ Sen A *Inequality re-examined* (1992) 8 [hereafter Sen: 1992].

¹¹⁴ Sen A *Resources, values and development* (1984); Sen A 'Well being, agency and freedom: The Dewey Lectures' 82 (1985) *Journal of Philosophy* 169-221 [hereafter Sen: 1985]; Sen A 'Editorial: Human capital and human capacity' 25 (1997) *World Development* 1959 – 1961; Sen A *Development as Freedom* (1999); Sen A 'Human rights and capabilities' 6 (2005) *Journal of Human Development* 151 – 166.

theory of Basic Needs Approach¹¹⁵ which is not only centered on possession of commodities but equally with providing human beings, the poor and marginalised in particular, with the opportunities to live a ‘full life’.¹¹⁶ The advantage that the CA has on the Basic Need Approach is that it has managed to explicitly bring out the assumptions on the value of choice and participation of human beings in development that were implicit in the latter theory.¹¹⁷

2.2 The Capability Approach

It is difficult to start by defining the CA as it is not a theory with a scientific definition but rather an approach that is malleable to suit different discourses and fields of study. It focuses on the moral significance of the capability of human beings to achieve the type of lives they have reason to value.¹¹⁸ The CA distinguishes itself from theories such as utilitarianism which emphasises on subjective well-being and resourcism which focuses on the availability of means to the good life.¹¹⁹ Therefore, an individual’s capability to live a good life is defined by a set of valuable ‘doings and beings’ such as being close to his/her ancestral land.

The criticism that Sen has made towards traditional welfare economics which tend to combine well-being with opulence (commodity, income) or utility (fulfilment of desire and happiness) forms the conceptual basis of the CA.¹²⁰ Sen agrees that economic growth and increase flow of goods and services are essential for human development while considering the commodity command or income.¹²¹ He argues that wealth or opulence is not the final commodity that human beings are

¹¹⁵ Stewart F ‘Basic Need Approach’ in Clark D (ed) *The Elgar Companion to development studies* (2006) 18 [hereafter Stewart: 2006] – A basic needs approach (BNA) to development is one that gives priority to meeting peoples’ basic need – to ensuring that there are sufficient, appropriately distributed BN goods and services to sustain all human lives at a minimally decent level.

¹¹⁶ Streeten P *First things first: Meeting basic needs in developing countries* (1981) 21.

¹¹⁷ Alkire S *Valuing Freedom: Sen’s Capability Approach and poverty reduction* (2002) 170.

¹¹⁸ Sen A *Development as Freedom* (1999) 74.

¹¹⁹ Wells T ‘Sen’s Capability Approach’ Internet Encyclopedia of Philosophy available at <http://www.iep.utm.edu/sen-cap/> (accessed 10 July 2016) [hereafter Wells: 2013].

¹²⁰ Clark D *Vision of development: A study of human values* (2002) 29-34; Crocker D ‘Functioning and capabilities: The foundation of Sen’s and Nussbaum’s development ethic’ 20 (1992) *Political Theory* 584-612.

¹²¹ Stewart (2006) 33.

looking for.¹²² The quality of life and overall human development should be judged in terms of the capability to convert those commodities into achievements desired by the people and not in terms of possession of commodities.¹²³ The capacity to change income and commodities into valuable achievements is different from one individual to another and one society to another.

For instance, the extra commodities that a disabled person will require are wheelchair in order to achieve freedom of movement compared to an able-bodied person. To this effect, the quantity of income or commodities does not indicate human development but merely a means towards development. It is argued by Sen that for more intricate social achievements such as ‘appearing in public without shame’, will depend on dimensions such as social convention, customary practices and culture of the society and not the amount of money an individual has to buy an expensive outfit.¹²⁴ Information pertaining to income and commodities solely would not suffice when comparing the well-being of people and this would not lead to an accurate measurement of human development. Instead, how efficiently, satisfactorily and easily an individual can function with the commodities that he can command should be matters of consideration.

The CA also challenged the welfare or utility approach which emphasised on happiness, the fulfilment of desire and pleasure¹²⁵ where Sen argued that it does not distinguish between different types of pains and pleasures.¹²⁶ ‘Offensive desires’ such as stealing to become rich is not discarded by the Utility approach.¹²⁷ In addition, besides happiness or the fulfilment of desire there are other values such as rights and positive freedoms that are important for human development but neglected by the welfare approach.¹²⁸ The fact that sometimes happiness can simply be a result of adaptation

¹²² Sen A ‘Development as capability expansion’ in Griffin K & Knight J (eds) *Human development and the international development strategy* (1990) 41.

¹²³ Stewart (2006) 33.

¹²⁴ Sen A *Development as freedom* (1999) 70-71 [hereafter Sen: 1999].

¹²⁵ Kahneman D ‘Experienced Utility and objective happiness: A moment-based approach’ in Kahneman D & Tversky A *Choices, values and frames* 674 (2000).

¹²⁶ Rawls J *A Theory of Justice* (1971) 30-31.

¹²⁷ Cohen A ‘Equality of what? On welfare, goods and capabilities’ in Nussbaum M & Sen A (eds) *The Quality of life* (1993) 9-29.

¹²⁸ Sen A *The Standard of living: The Tanner lectures* (1987) 8.

and conditioning and not necessarily a perfect and desirable condition represents another problem with the welfare or utility approach.¹²⁹ Sen uses empirical evidence from surveys carried out on health of widows in post famine period in India and it was observed that their health did not match with their own subjective impressions of their state of health and physical well-being. Neither opulence nor utility accurately, adequately and precisely represent well-being of human beings and this was the general conclusion which was observed. Human capabilities to achieve what are desired by people are essential when measuring human development.

2.2.1 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’.¹³⁰

A capability is the freedom and liberty to achieve something which an individual reflectively accepts as being valuable to him. The CA significantly contrasts with other ideas on fair and just distribution of resources. 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, to substantiate the provision of education to eventually acquire skills for employment.¹³¹ 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 would be imposed by utilitarianism.¹³²

This method of evaluating whether people are happy, free and capable of achieving what they desire is opposed by the CA. It advocates that the individual is to be seen as end and not as means to achieve social stability or economic growth but as an end. Whether people are free to make

¹²⁹ Sen (1999) 62.

¹³⁰ Sen A ‘Capability and well-being’ in Sen A & Nussbaum M (eds) *The Quality of Life* (1993) 30 [hereafter Sen: 1993].

¹³¹ Walker M & Unterhalter E ‘The capability approach: Its potential for work in education’ in Walker M & Unterhalter E (eds) *Amartya Sen’s Capability Approach and Social Justice in Education* (2007) 2 [hereafter Walker & Unterhalter: 2007].

¹³² Barrow R *Plato, Utilitarianism and Education* (1975) 1.

decisions that they value and have the possibility to overcome any obstacle in the path to this freedom, thus enhancing their capabilities- are matters which need to be evaluated. While the central tenet of the CA is the individual, it is not a framework with an individualistic perspective embracing libertarian notions such as self-actualisation above all other goods.¹³³ On the other hand, it adopts the approach of ethical individualism whereby there is a normative framework evaluating actions by way of their effects on human beings which are the primary objects of moral concern.¹³⁴ Therefore evaluation should not be interpreted as being a response to the individual wants of particular individuals. Such an approach would be unimaginable because all the resources of a government would be used up to fulfil the individual wants of every citizen.¹³⁵ Therefore, the focus is on assessing the conditions that are present and enabling for the individual to decide on what he wants to value, instead of evaluating outcomes or resources. Despite endlessly varying conditions which is context-based, the CA as an approach remains sensitive to human diversity.

A broad normative framework to assess and conceptualise well-being of individuals and social arrangements despite diversity on various levels in society- is provided by the CA. It is argued by Walker and Unterhalter that while the CA may not be accepted as a complete theory of justice, it attempted to provide for a balance between freedom and equality.¹³⁶ Sen believes that what should be equalised is not the income of all individuals in the society but instead the capabilities given to them to achieve what they want or become what they desire.¹³⁷ As such, human capability would be expanded by 'the freedoms people actually enjoy to choose the lives that they have reason to value'.¹³⁸ It is also about approaches that an individual may want to adopt in living life be it in a western way or traditionally.¹³⁹

¹³³Smith M 'Capitalism and Morality – a critique of libertarian justice' available at <https://www.wju.edu/academics/bus/iscm/MSmith.pdf> (accessed 1 September 2015).

¹³⁴ Robeyns I 'The Capability Approach: A theoretical survey' (2005) 6 *Journal of Human Development* 93-114.

¹³⁵ Walker & Unterhalter (2007) 2.

¹³⁶ Walker & Unterhalter (2007) 3.

¹³⁷ Sen (1980) 197.

¹³⁸ Sen (1992) 81.

¹³⁹ Unterhalter E 'Crossing disciplinary boundaries: The potential of Sen's capability approach for sociologists of education' (2003) 24 *British Journal of Sociology of Education* 666.

Applying the theory explained above to local communities affected by land investments, their capabilities would be translated into opportunities given to them to achieve what they desire and cherish the most. It implies that their effective political participation will be mandatory while state and non-state actors discuss about land for investments. In cases of relocation, it is important to consider whether the new environment allows them to achieve their capabilities. A list of capabilities will be proposed further through the chapter which will enable the measurement of effective human development.

2.2.2 Capabilities and Functionings

The second central component of the CA is the distinction between capabilities and functionings.¹⁴⁰ Functionings are outcomes that would be achieved by an individual. Walker and Unterhalter argue that when it comes to the field of education some functionings would be reading, talking to children being calm and much more.¹⁴¹ According to Robeyns, functionings ‘together constitute what makes a life valuable’.¹⁴² On the other hand, the capabilities that would be necessary to achieve the above mentioned functionings, for example having books and articles available to read. The basic difference therefore between a capability and a functioning is one between the opportunity and potential to achieve and the achievement or outcome itself.

This difference is at the core of the CA, accessing only outcomes or functionings will only give little information about how well people are doing. It is argued that there may be two cases with the same functionings but with completely different stories of opportunities behind. A young lady from a rich family can achieve a good university degree with the financial support of her family whereas a poor lady from a rural area may achieve the same university degree but with a lot of sacrifices behind. In these two cases, the functionings are the same, that is, a good university degree. However, the human capabilities of the two ladies are different since they do not have the same opportunities.

¹⁴⁰ Sen (1980).

¹⁴¹ Walker & Unterhalter (2007) 4.

¹⁴² Robeyns I ‘The Capability Approach in practice’ (2006) 14 *Journal of Political Philosophy* 352.

The CA requires that human development should not only be measured by way of the functionings or the outcome, but the freedom or opportunities that an individual has to achieve what he values. It is therefore a method to measure real changes caused by development and to ascertain discrimination, marginalisation and exclusion.¹⁴³ Sen argues that the reason to favour capabilities over functionings, for instance less freedom that a rich person has to live a healthy life.¹⁴⁴

2.2.3 Freedoms and Agency

The CA is constituted of freedoms and agency as another group of concepts which is at the core of the approach. The individual has to be an active participant in development. Therefore, agency would mean that everyone is a socially responsible and dignified human being capable of shaping one's life based on valuable and desirable goals instead of shaped and instructed ones.¹⁴⁵ Sen argues that active participation with possibilities and opportunities is reflective of positive social change.¹⁴⁶

Alkire argues that agency is a defining dimension of the well-being of an individual, giving the individual the possibility to expand on the social status that he could have acquired already.¹⁴⁷ This brings us to the concept of adaptive preferences which means that when one, by way of agency, decides what one values or who one would want to think and decide about one's life, many times one is forced to adapt to certain realities of life and forego some desires and dreams that one may think is impossible to achieve. Sen captures adaptive preferences by considering how one needs to adjust their desires and expectations to what they unambiguously see as feasible.¹⁴⁸

¹⁴³ Walker & Unterhalter (2007) 5.

¹⁴⁴ Sen (1993) 32.

¹⁴⁵ Galliot N & Graham L 'A question of agency: applying Sen's theory of human capability to the concept of secondary school student career choice' (2014) 37 *International Journal of Research and Method in Education* 270.

¹⁴⁶ Sen (1999) 333.

¹⁴⁷ Alkire S *Valuing freedoms: Sen's Capability Approach and poverty reduction* (2002).

¹⁴⁸ Sen (1999) 63.

Nussbaum shares this idea as she argues that external circumstances ‘affect the inner lives of people: what they hope for, have, fear, and are able to do’.¹⁴⁹ Sen underlines that people are faced with vulnerable situations but they settle with their respective difficulties.¹⁵⁰

This is mainly the reason why capability theorists would opt for capabilities rather than utility or preferences satisfaction.¹⁵¹ The CA conceptualises happiness and well-being of an individual as his capabilities which are expanded by development because adaptive preferences do not provide for the complete form of agency.

2.2.4 Critics against the Capability Approach

Liberal critics of Sen are of the view that it is problematic to interpret and implement ‘the ability to achieve a life that one has reason to value’ as such an approach seems to be imposing an external valuation of a good life.¹⁵² Conversely, Rawls points out that liberals would normally focus on the allocation of resources rather than what is to be achieved with them since every individual has the fundamental right to pursue what he/she desires.¹⁵³ Rawls’ concept of justice is to ensure a fair distribution of opportunities and resources rather than measuring achievements. Sen does provide for a reply to this criticism by highlighting the variability in the abilities of individuals to convert the same resources into valuable functionings. It does not suffice only to bring to people the resources and letting it up to them to decide how effectively they can transform them since there will always be successes and failures to achieve something with the resources.¹⁵⁴ As a result, Sen argues that a theory of justice which is founded on the concept of fairness should be seriously concerned with the capability of individuals to achieve the lives they have reason to value.

¹⁴⁹ Nussbaum (2000) 31.

¹⁵⁰ Commin F ‘Capability dynamics: The importance of time to capability assessments’ *Third International Conference on the Capability Approach, University of Pavia, Italy* (2003).

¹⁵¹ Oosterlaken I & Van den Hoven J *The Capability Approach, technology and design* (2012) 5.

¹⁵² Wells T *Reasoning about development: Essays on Amartya Sen’s Capability Approach* (Unpublished thesis, Erasmus University Rotterdam, 2013) 48.

¹⁵³ See Novak D ‘The right and the good’ in Weiner A & Kaplan L (eds) *On Interpretation: Studies on culture, law and the sacred* (2002) 226.

¹⁵⁴ Wells (2013).

Another criticism against the CA is that it is under-theorised. Capability theorists argue that the content and substance of the CA have not been theorised enough which makes it inappropriate to be applied as a theory of justice.¹⁵⁵ Sen is silent over the types of capabilities he is referring to and how they are to be achieved. He argues that these are political questions that each society must decide for itself. Many capability theorists have argued that without a list of valuable capabilities, it is difficult to identify the goal which a society must strive to achieve where every individual would be able to achieve capability. For instance, Pogge interrogates whether some basic capabilities must be prioritised as most urgent over others and how do we compensate for deprivation that cannot be remedied such as blindness?¹⁵⁶ Sen rebuts by saying that the CA is not a theory of justice but rather an approach to measure effective freedom.

Sen's CA has also come under criticism on the basis that it is an approach which is too individualistic focusing on individual effective freedom. Gore argues that Sen's approach only considers social arrangements and state of affairs in terms of how bad or how good they are for the individual's well-being, thus excluding other factors of well-being that can only be communal and not individual.¹⁵⁷ Giri contends that the individualistic nature of the CA is explained by Sen's relationship with economic and philosophy and his unfamiliarity with anthropology, psychology and sociology.¹⁵⁸

Despite numerous criticisms against the CA, it is contended that it is the most suitable approach towards studying development through land investments in Ethiopia and Madagascar without any infringement of human rights and fundamental freedoms. Land investments have been promoted in the two countries for more economic opportunities to the people which would also be termed as more resources from the lens of utilitarianism and resourcism. However, how effectively the local communities are turning these opportunities into capabilities or how are they being directly affected

¹⁵⁵ Davis J & Wells T 'Transformation without paternalism' (2016) *Journal of Development and Capabilities* 1-17.

¹⁵⁶ Pogge T 'Can capability approach be justified' (2002) 30 *Philosophical Topics* 167 – 228.

¹⁵⁷ Gore C 'Irreducibly Social Goods and the Informational Basis of Amartya Sen's Capability Approach' (1997) 9 *Journal of International Development* 235-250.

¹⁵⁸ Giri A 'Rethinking Human Well-being: A Dialogue with Amartya Sen' (2000) 12 *Journal of International Development* 1003-1018.

in terms of infringements of their rights is best studied through the CA. The alleged individualistic nature of the CA equally suits the study of land investments since it allows to take into account minority groups which are suffering from development and failing to achieve what they desire even if land investments could be meaningful to the majority especially those benefitting from the urban areas.

2.2.5 Selecting capabilities and the issue of a list

In order to make it an approach which is functional in nature, the CA has been revisited so that more parameters can be added. In view of applying Sen's moral or philosophical framework for human development, several social scientists have attempted to generate a list of human capabilities.¹⁵⁹ Among them, there is the feminist philosopher Martha Nussbaum who appears to have made the most recognised attempt to complete the CA. She developed a definite list of human capabilities which are central to whatever people would choose or would pursue.¹⁶⁰ This said 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.¹⁶¹ On one hand there is Sen's CA which is open without any specific list of human capabilities and to be applied on a case to case basis and on the other hand there is Nussbaum's CA with a definite list of central human capabilities approach with capabilities that are encompassing irrespective of circumstances according to her.¹⁶²

Amartya Sen and Martha Nussbaum differ in the approach they take on the question of selecting capabilities. While Sen opts for a participatory human development approach, Nussbaum is attracted more by an analytic philosophy. Sen has constantly maintained an argument based on the

¹⁵⁹ Alkire S & Black R 'A practical reasoning theory of development ethics: Furthering the capabilities approach' 9 (1997) *Journal of International Development* 263-279; Desai M 'Poverty and capability: Towards an empirically implementable measure' in Elgar E *Poverty, Famine and Economic development* (1995) 185-204; Nussbaum M 'Aristotelian social democracy' in Douglas B et al. (eds) *Liberalism and the good* (1990) 203-252; Robeyns I 'Sen's capability approach and gender inequality: Selecting relevant capabilities' 9 (2003) *Feminist Economics* 61-92 [hereafter Robeyns: 2003].

¹⁶⁰ Nussbaum M *Women and human development* (2000) 74 [hereafter Nussbaum: 2000].

¹⁶¹ Nussbaum (2000) 72-75.

¹⁶² Nussbaum (2000) 74.

importance of dialogue and public participation in coming up with human capabilities in each and every context and situation.¹⁶³ He argues that the CA is deliberately incomplete as neither he tries to come up with a complete ordering of non-negotiable options¹⁶⁴, nor comes up with a scale of capabilities based on a hierarchy or with a formula which would predict an outcome by combining two or more capabilities. Instead, he believes that to every problem there can be a workable solution without complete social consensus and unanimity.¹⁶⁵ He argues that each individual in a particular society ‘should be able to be active in the decisions regarding what to preserve and what to let go’.¹⁶⁶

According to Sen, a dialogical democratic process enhances public debate and discussion on development related proposals or projects and allows a collective to come to a reasoned conclusion of what is best for it in terms of capabilities and policies. Opportunities are shaped by the exercise of freedom to participate in social choice and making public decisions.¹⁶⁷ Sen disagrees with the idea that a pure theory can replace a democratic exercise of free choice and that a list of capabilities can capture accurately what the public values. He argues that ‘a fixed forever list of capabilities would deny the possibility of progress in social understanding’.¹⁶⁸ People must enjoy freedom in determining their own list of capabilities as it is intrinsically important ‘in making us free to choose something we may or may not actually choose.’¹⁶⁹ Sen has faith in individuals making the correct choice for themselves as he believes that man has the potential to think in a fair and just manner and it is only a matter of making ‘systematic, cogent and effective use of the general moral concerns that people have’.¹⁷⁰

¹⁶³ Sen A ‘Capabilities, lists and reasons: continuing the conversation’ (2004) 10 *Feminist Economics* 77-80 [hereafter Sen: 2004].

¹⁶⁴ Walker & Unterhalter (2007) 12.

¹⁶⁵ Dreze J & Sen A *India: Development and Participation* (2002) 226-228.

¹⁶⁶ Sen (1999) 242.

¹⁶⁷ Sen (1999) 5.

¹⁶⁸ Sen (2004) 80.

¹⁶⁹ Sen (1999) 292.

¹⁷⁰ Sen (1999) 262.

Nussbaum disagrees significantly with Sen on the question of a list of capabilities. She argues that for the concept of human capability to be really effective, it is mandatory that for instance the basic conditions to live a good life are made available by a government.¹⁷¹ She comes up with a cross-cultural and universal list of central capabilities arguing that it is important to have an idea what is being distributed as capabilities and they are good things.¹⁷² She seeks to provide for specific substance to capabilities and she is of the opinion that without that substance, social justice is too limited¹⁷³, and considers her list as being ‘a minimum account of social justice’.¹⁷⁴

One criticism against Nussbaum’s list has been that it is not clear whether it underwent a democratic process of public debate and whose voices and opinions determined it.¹⁷⁵ Sen finds the approach by Nussbaum too canonical for his liking.¹⁷⁶ Nussbaum refutes by stating that her list constitutes of one which is a comprehensive notion of good which is grounded in political liberalism.¹⁷⁷ Sen argues that he is not opposed to any list per se provided that:

‘we understand what we are doing (and in particular that we are getting a list for a particular reason, related to a particular assessment, evaluation or critique)’.¹⁷⁸

2.3 The Capability Approach and Land Investments

As discussed above, land investments in Ethiopia and Madagascar are driven by justifications pertaining to economic growth and development. Arguments such as influx of FDI, 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

¹⁷¹ Sen (1993) 265.

¹⁷² Nussbaum M ‘The good as discipline, the good as freedom’ in Crocker D & Linden T (eds) *Ethics of Consumption* (1998) 314.

¹⁷³ Walker & Unterhalter (2007) 13.

¹⁷⁴ Nussbaum M ‘Capabilities as fundamental entitlements: Sen and social justice’ (2003) 9 *Feminist Economics* 33-59.

¹⁷⁵ Robeyns (2003).

¹⁷⁶ Walker & Unterhalter (2007) 13.

¹⁷⁷ Nussbaum (2003) 27.

¹⁷⁸ Sen (2004) 79.

and the marginalised. The CA allows us to assess whether people are genuinely benefitting from the wealth and income generations from the land investments in the two 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’.¹⁷⁹

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.¹⁸⁰

It is evident that while land investments in Ethiopia and Madagascar 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 for determining this important question. Human capabilities from the CA will help in assessing whether or not people in the local communities in Ethiopia and Madagascar are having the freedom to enjoy valuable activities and states.¹⁸¹

2.3.1 Articulating the Capability Approach into human rights norms

The CA enhances human capabilities which, according to Sen, go well with human rights which can be seen as rights to particular capabilities.¹⁸² Sen argues that human rights on its own, despite its tremendous appeal have been considered as being frail intellectually without a foundation, coherence and cogency.¹⁸³ It was forcefully challenged by Bentham that ‘natural rights are simple

¹⁷⁹ Sen (1985) 25.

¹⁸⁰ Atkinson A & al. *Income distribution* (1992) 6.

¹⁸¹ Alkire S ‘The Capability approach to the quality of life’ (2008) 5 [Alkire: 2008].

¹⁸² Sen A ‘Human rights and capabilities’ (2005) 6 *Journal of Human Development* 151 [Hereafter Sen: 2005].

¹⁸³ Sen (2005) 152.

nonsense'. Sen therefore argues that human rights and capabilities together can have 'something of a common motivation' in terms of providing for a better understanding and application of each.¹⁸⁴

Human rights can be seen as entitlements to capabilities and certain specific freedoms. As a matter of illustration, one could consider access to land. Being in physical contact with the land renders a person capable of achieving what he or she desires which could be being in contact with the ancestors through the ancestral land. To achieve this, the right to land as a human right could be seen as an entitlement to the capability of being close to the ancestors. Sen argues that freedom has an opportunity aspect and a process aspect.¹⁸⁵ Focusing on the opportunity aspect, a farmer can be given the opportunity to sell his ancestral land to investors for ten thousand dollars with which he or she could start a computer business which he or she has been planning.

On the other hand, the same farmer could have been forced through compulsory acquisition by the state to leave his or her traditional land after a compensation of one million dollars here. In both ways, the farmer could exercise the right to economic development by investing elsewhere. In other words, in both ways the right to development can be said to be respected. However, whether such mode of development has rendered the farmer capable would depend on what he or she desires – the computer business or the desire to live on the land of the ancestors. As a result of such illustration, Sen is of the view that the idea of capability – achieving what one wants to do or to be – can be very helpful to understand the opportunity aspect of human rights.¹⁸⁶ He contends that 'there are many human rights for which the capability perspective has much to offer'.¹⁸⁷

Nussbaum argues that the most important theoretical development in human rights during the past twenty years has been the elaboration of the Human Development Approach also known as the CA.¹⁸⁸ She highlights the distinction between first generations rights (with only a negative

¹⁸⁴ Sen (2005) 153.

¹⁸⁵ Sen A *Rationality and Freedom* (2002) Essay 20 – 22.

¹⁸⁶ See in general Sen (1985).

¹⁸⁷ Sen (2005) 163.

¹⁸⁸ Nussbaum M 'Human rights and human capabilities' (2007) 20 *Harvard Human Rights Law Journal* 21 [hereafter Nussbaum: 2007].

obligation) and second generation rights (which is resource dependent with positive obligations, seems too facile and the reality is that all human rights require material and social preconditions as well as government actions.¹⁸⁹

It is common knowledge that human rights norms have their own limitations despite that their importance today can no longer be questioned. Since land investments have resulted in several socio-economic rights violations as will be illustrated in the next chapter, one could start with the limitation of socio-economic rights for the purpose of illustration. Article 2 of the ICESCR explicitly provides that socio-economic rights are to be achieved based on the principle of progressive realisation subject to the availability of resources.¹⁹⁰ A substantive notion of progressive realisation would imply that the State must continually enhance the quality and increase the range of socio-economic goods' beneficiaries.¹⁹¹ Land investments and land deals with foreigners could be one way of fulfilling this obligation with the influx of FDI and the aim of economic development. Therefore, from a purely human rights norm viewpoint, the government would be respecting its obligations vis-à-vis socio-economic rights. However, it does not mean that general investment plans such as land investments related to agriculture will benefit every individual in the same way as will be demonstrated in Chapter 3.

Human rights norms are designed to thrive and be successfully implemented in certain specific environment. For example, the ICCPR recognises the fact that a society must be one where principles of equality and non-discrimination are respected and derogation of laws is legal and legitimate. The ICCPR lays emphasis on the creation of appropriate conditions and a conducive environment for respect and realisation of civil and political as well as socio-economic rights.¹⁹² Therefore the CA can be articulated into human rights norms to the effect that human rights become entitlements to human capabilities which are the desired state of being or doing of a human being.

¹⁸⁹ Nussbaum (2007) 21.

¹⁹⁰ See in general UN CESCR, General Comment No 3 'The nature of States parties obligations' (1990).

¹⁹¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 45.

¹⁹² Preamble of the ICCPR - Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Central to the CA is the concept of human being as such, the CA provides for a basis to define and rationalise human rights.¹⁹³ Every human being aims at realising his/her ‘doings or beings’ and to develop his/her capabilities he or she thinks are worth developing.¹⁹⁴ Human rights ensure that the prerequisite conditions for such a realisation are present. Tepe aptly articulates the CA into human rights norms through the work of Nussbaum in the following terms:

‘The CA supplements the standard human rights approaches by grounding right claims in bare human birth and minimal agency, by articulating the relationship between human rights and human dignity more clearly than most standard rights account, by more clearly setting out the relationship between human entitlements and those of other species and finally by spelling out the relationship between human rights and duties’.¹⁹⁵

The articulation of the CA into human rights norms can be done by way of using the CA as a method of interpretation of human rights. The finality of human rights is to provide for the conditions necessary to achieve what a human being would desire. Additionally, it can help in interpreting human rights norms in a way which put human being at the centre. For example, depriving a farmer from his/her land being his/her only means of livelihood after legally acceptable compensation through an action of expropriation for the purpose of economic development would be justifiable under conventional human rights norms. However, if same is viewed and interpreted from the lens of CA, the farmer has not been put at the centre and what he or she wants to achieve as a human being has not been taken into account.

2.3.2 Adapting the CA in the current land grabbing context - determining the list of capabilities

The best approach to adopt in the case of land investments would be the one proposed by Sen. The list should be determined by a democratic process and public participation, people have to say what could render them capable and as the absence of which they are failing to achieve what they desire. Arguably, Nussbaum pre-determined list will not be appropriate as land investments all over Africa

¹⁹³ Tepe H ‘Rethinking human nature as a basis for human rights’ in Albers M et al (eds) *Human Rights and Human Nature* (2014) 75 [hereafter Tepe: 2014].

¹⁹⁴ Nussbaum M *Creating Capabilities* (2011) 28 [hereafter Nussbaum: 2011]

¹⁹⁵ Tepe (2014) 75; Nussbaum (2011) 63.

have different implications in terms of development opportunities and human rights violations. While maintaining this argument, it is also contended that there are strong similarities in terms of the pattern of human rights violations in the two case studies and even across the continent. Therefore based on the similarities as singled out by the interviews and data collection processes which are forms of public participation and democratic processes, it is safe to determine a list of capabilities which would render local communities capable. While Sen rejects a universal list of capabilities, he is for the idea of one which is context based and obtained through a democratic process involving public participation.

Development which will be meaningful to the local communities in Ethiopia and Madagascar must be one which will be based on the free choice of the people. Based on a factual and democratic account of the various land investments occurring in the case studies as would be evidenced by the Chapter three, it is proposed that land, water, food, political participation and culture be the human capabilities which would provide for meaningful development to the local communities. Access to land is what determines the lives of those people who are mostly pastoralists or farmers. Therefore, for them to achieve what they desire, land is central to them as a human capability. Gilbert argues that there is a significant nexus between the use, access and ownership of land on one hand and development and poverty reduction on the other hand.¹⁹⁶ According to him, land as a human capability 'brings another perspective to the value of land, as a social and cultural asset and, more importantly, a fundamental right'.¹⁹⁷ Land as a human capability and as a human right has been identified as a portal for realising other fundamental rights. It should therefore be considered as an important human capability.

Food, as a critical component to be in good health and to stay alive, is another human capability which must be respected and provided in any developmental project involving the local communities. Water would perhaps be the most important human capability as it determines livelihoods and existence of the entire local community in question. Perhaps more than economic development, the local communities would value cultural development. Therefore culture should

¹⁹⁶ Gilbert J 'Land rights as a human rights: The case for a specific right to land' (2013) *International Journal on Human Rights* 128 [hereafter Gilbert: 2013].

¹⁹⁷ Gilbert: 2013, 129.

also be strongly protected and provided to the local communities. Participation of the local communities is another critical human capability that would complete this list of human capabilities in relation to land investments in Ethiopia and Madagascar.

It is argued that economic development that is being targeted by way of land investments in the two case studies must be carried out by respecting the free choice of the local communities, enhancing their capabilities by given them access to land, water, food, political participation and culture. It is only by providing for the above human capabilities that the local communities would be able to enjoy development in a way which is meaningful to them. It has to be pointed out that the thesis is not advocating for stopping development but merely that development has to be carried out by rendering the local communities, which are the most affected, more capable and not prejudiced.

2.4 Giving legal effect to the Capability Approach

It is contended by Nussbaum that while the capability approach and human rights are distinct from each other, they do have a strong relationship in contemporary international discussion.¹⁹⁸ Moreover, as argued by Sen, 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.¹⁹⁹ Indeed, the route towards human capabilities can be realised through the protection and promotion of several human rights. However, the concept of universality of human rights can fail to take into account specific realities which encompass elements such as tradition and culture of individual communities. It is therefore argued that in the case of land investments in the two case studies 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. While one may argue that land, water, food, environment, culture and participation 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.

A philosophical approach through which genuine human development in terms of what the local communities desire and value can be achieved is provided by the CA. However, legal protection

¹⁹⁸ Nussbaum (2000) 97.

¹⁹⁹ Sen A 'Human rights and capabilities' (2006) 6 *Journal of Human Development* 151.

against any potential non-respect or violation of the identified human capabilities is also required. To illustrate 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. It is contended that it will follow automatically that the human rights pertaining to those capabilities will be respected by states or non-states actors the moment it is legally agreed (by way of treaties or conventions) that what is to be promoted and protected as human capabilities by way of a predefined list. Hence, this process will be referred to as an exercise of giving legal effect to the CA.

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. In contrast, the limitation of the right to water as a socio-economic right or its interpretation compared to the already contested right to development results in an incomplete protection of the right to water, thus prejudicing the individual. However, it is argued 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 it is accepted that the focus should be on whether land investment is rendering people capable in a given community or not, then such an investment must be done by respecting both the right to water and culture, if water and forest for cultural use render him capable.

2.4.1 How will the Capability Approach be applied in the thesis?

This thesis relies prominently on international and national human rights framework as a means of protection of people affected by land grabbing. Through subsequent chapters it will be illustrated how existing normative framework on human rights can have significant limitations resulting in an ineffective protection of local communities and indigenous peoples in the two case studies. At the national level, law can be existent but ineffective in its implementation or simply non-existent for protection of the victims. The CA will thus be used, directly or indirectly, to illustrate how it can act as a guiding principle in interpreting existing human rights norms by putting people at the centre of development and as the main beneficiaries in the true sense.

In cases where legal frameworks are non-existent at the national or international level, any proposition to come up with new legislations and treaties would be guided by the CA. It would be

argued that human capability must be the main pillar in the new laws and that the provisions therein must be interpreted and applied in a way that effectively protect local communities and indigenous peoples and promote their rights vis-à-vis land investments.

2.5 Conclusion

This chapter has attempted to demonstrate the usefulness and effectiveness of the CA to be used as a framework in addressing human rights issues in land investments in the two case studies. The CA allows assessing development and social progress in a way that is meaningful and valuable to the local communities. It is contended that by way of the CA, a list of democratically generated human capabilities will indicate what are the freedom, liberties or commodities that are most valued and desired by the local people. In the present context, water, land, culture, political participation and food are the human capabilities that are common for the local communities to achieve real development.

It is further argued that it will not suffice to only adopt the CA in an abstract and philosophical way. Instead, the CA must be given a legal force by way of legal instruments. In other words, local communities must be given that right to human capabilities which then can be consolidated through specific human rights that already exist in international instruments. The area of land investments in Ethiopia and Madagascar, which can even be extended to other African countries, should have human capability and what local communities desire as the foundational basis. Land investments can only co-exist after it is ascertained that human capabilities are fully respected and promoted in terms of what local communities desire and value.

The following chapter will now analyse how the human capabilities established in the list drawn in the current chapter are being violated and infringed through a factual account of land grabbing in the two case studies. It will be examined how food, land, water, culture and political participation are affected in the land investment deals.

Chapter 3: A FACTUAL ACCOUNT OF LAND INVESTMENTS IN ETHIOPIA AND MADAGASCAR

3.1 Introduction

Africa has many reasons to attract business investments despite the continent's reputation of being politically unsteady. According to the ADB, one-third of African states have a GDP rates which are more than 6%. The cost of initiating a business activity has decreased by around two-thirds over the past decade and it is also reported that it takes twice as less time to start trade activities on the African continent now. Economic growth has raised the standard of living of Africans.²⁰⁰ The African continent has a significant youth population which will be extremely beneficial to Africa in terms of labour force and intellectual talents.²⁰¹ The IMF has predicted that the African continent will experience the highest economic growth in the coming years.²⁰²

Among these promising and encouraging economic indicators being highlighted by the ADB, income inequalities and unequal benefits being enjoyed by various population classes of the economic growth have not been stressed upon.²⁰³ There are still certain segments of the population of African countries who are not benefitting at all from investments in Africa, directly or indirectly. In countries where land investments from foreigners have been rampant over the past decade, local

²⁰⁰ African Development Bank *Annual Development Effectiveness Review* (2016) 5.

²⁰¹ Youth and African Union Commission *A youthful continent: Africa's position on youth* available at <http://www.africa-youth.org/Africayouth> (accessed 13 December 2014).

²⁰² IMF 'Subdued demands, diminished prospects' January 2016 available at <http://www.imf.org/external/pubs/ft/weo/2016/update/01/> (accessed 12 June 2016).

²⁰³ Harsch E 'Combating inequality in Africa' July 2016 available at <http://www.un.org/africarenewal/magazine/july-2006/combating-inequality-africa> (accessed 12 June 2016).

communities have not been properly involved and made to take genuine advantage of those land investments and resulting economic benefits. Instead, they have had to suffer from a number of human rights violations as well as threats to their livelihoods. Ethiopia and Madagascar are two African states which have been regarded as hotspots for land investments.

However, it is equally important to ponder about the people or group of people who are benefitting from such land investments. While it is a fact that the GDP of those two countries have been growing at a desired rate, human rights violations of rural and marginalised people have been occurring constantly wherever the investors have been investing. Such development would mean one which is focused on economic increase only, and not one which is inclined towards human development including social, cultural and political development. The Sen's CA proposes to measure development and freedom in terms of human capabilities – to what extent human beings are capable to choose and achieve what they desire. The current chapter will lay down the factual foundations of the thesis in terms of an account of what precisely is happening amidst land investments in the two case studies proposed. Land tenure and the current land investments will be assessed to investigate how they are hindering human capabilities to free and genuine development in each of the two countries chosen as case studies.

For the purpose of clarity and a systematic overview of land grabbing in each case studies, the following format has been adopted. The economic, social and political context of each case study is presented first with a brief historical overview. This is followed by the study of land investment in each case study where the characteristics, execution and implementation of land deals are reviewed. As a result of the land deals and its impacts on the selected human capabilities as discussed in the previous chapter (food, water, land, culture and political participation), it then becomes more coherent to analyse the impact of such investments on human rights of local communities. This format allows one to have a detailed background on land grabbing in each case study after which more in-depth analysis on the issue will follow in subsequent chapters.

3.2 ETHIOPIA

3.2.1 Social, Political and Economic Context

The Federal Democratic Republic of Ethiopia is the second most populous country in the African continent having approximately 96.5 million inhabitants,²⁰⁴ which is predicted to exceed 173 million by 2050.²⁰⁵ A large number of Ethiopians live in rural areas hence 84% are rural dwellers. They live mainly on small-scale agriculture and 95% of agricultural lands in Ethiopia are occupied by small-scale farmers.²⁰⁶ Ethiopia is ethnically very diverse with around 35% of the population being Oromo, 27% are Amhara, 7% the Somali and 31% are the Tigray with these four ethnic groups being the main ones. Amharic is the working language which is spoken by around 30 million Ethiopians. Access to information is ensured by the radio which is the main medium of information. The main radio stations as well as the television station are state-controlled. Printed media are only common in urban areas and self-censorship is common in the country.²⁰⁷ Not more than 2% of the population has access to the internet.²⁰⁸ Access to information is largely restricted and laws pertaining to freedom of information are not enforced.²⁰⁹

Ethiopia has adopted the concept of ethnic federalism to enhance self-determination and political autonomy of the various ethnic groups, with 9 ethnically-based states. The Tigray People's Liberation Front (TPLF) through the Ethiopian People's Revolutionary Democratic Front (EPRDF) is the dominant party in politics. The TPLF has assumed power since the fall of the Derg regime in

²⁰⁴ Worldmeters 'Population of Ethiopia' available at <http://www.worldometers.info/world-population/ethiopia-population/> (accessed 10 December 2014).

²⁰⁵ One World Nation Online 'Ethiopia' available at <http://www.nationsonline.org/oneworld/ethiopia.htm> (accessed 11 June 2016).

²⁰⁶ Selassie A & Bekele T 'A Review of Ethiopian Agriculture: Roles, Policy and Small-scale Farming Systems' (2010) *Global Growing Casebook* 37.

²⁰⁷ Ethiopia Profile BBC News Africa available at <http://www.bbc.com/news/world-africa-13349401> (accessed 30 March 2016).

²⁰⁸ Freedom House 'Ethiopia' available at <https://freedomhouse.org/report/freedom-net/2013/ethiopia#.VGmUKLvoS-w> (accessed 26 January 2016).

²⁰⁹ Freedom of the Mass Media and Access to Information Proclamation (No. 590/2008)

1991.²¹⁰ Since the 2005 elections during which there were alleged election irregularities, post-election violence and arbitrary arrests of politicians and journalists, open dissent towards the government is not tolerated.²¹¹ As a consequence there is a constant culture of fear among Ethiopians to publicly criticize and oppose the current leadership and government policies.²¹² Several diaspora groups have been formed outside Ethiopian territory with the aim of commenting on and sensitizing people about various atrocities of the government and their poor human rights records.²¹³

The stressed political environment is not supportive of the promotion, protection and respect for human rights. Ethiopia does have good groundings for human rights by way of its constitution as well as other proclamations. Enforcement of these laws is the major problem especially in the constant fear of political retaliation. Ethnic violence from state authorities is a serious issue which is becoming more and more flagrant in Ethiopia. The UN Committee mandated to oversee the implementation of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) has noted with alarm that security forces have been targeting systematically some ethnic groups with reported cases of summary executions, illegal detention, torture, destruction of property and livelihoods and rape of women.²¹⁴ In particular, a number of cases of human rights violations of the Anuak Community have been reported. As many as 424 died and 10 000 internally displaced after violence perpetrated on them by EPRDF security forces since their traditional lands are of great interest to the government and investors due to their strategic locations.²¹⁵ Ethiopia's major donors such as US, EU and UK have been criticised for failing to

²¹⁰ The Derg, a communist party led by Mengistu Haile Mariam, was in power from 1974 to 1991, a period in which tens of thousands of people were executed or imprisoned on political grounds without a fair trial.

²¹¹ Neamin A Ethiopia: Opposition Political Parties Rant over recent Crackdown available at <http://allafrica.com/stories/201407140328.html> (accessed 28 August 2015).

²¹² Jacey F 'Fear and loathing in Ethiopia' International Business Times available at <http://www.ibtimes.com/fear-loathing-ethiopia-groups-individuals-cite-government-abuse-new-opposition-party-report-1506052> (accessed 28 August 2015).

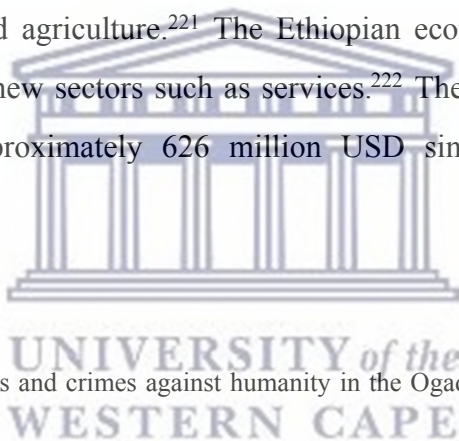
²¹³ The Advocates for Human Rights Human Rights in Ethiopia: Through the eyes of the Oromo Diaspora December 2009 available at http://www.advrights.org/uploads/oromo_report_2009_color.pdf (accessed 27 August 2015).

²¹⁴ CERD, Concluding Observation: Ethiopia UN Doc CERD/C/ETH/CO/15 20 June 2007 para 19.

²¹⁵ Human Rights Watch 'targeting the Anuak: Human Rights Violations and Crimes against Humanity in Ethiopia's Gambella Region' 2005.

condemn war crimes against indigenous peoples in Ogaden.²¹⁶ It is important to highlight the close relations Ethiopia shares with the United States which is their largest provider of assistance in terms of military aids and other kinds of assistance. Donors such as the US, Canada, Germany and Italy consider Ethiopia as an important ally for greater influence on a region which is unstable and for the global war on terror.²¹⁷

The economy of Ethiopia has grown at a very positive and encouraging rate compared to other East African countries. According to the WB, the economy has experienced strong and large scale growth over the past decade. It has recorded growth averaging 10.9% per year compared to an average of 5.3% for countries in East Africa, since the year 2004.²¹⁸ It was noted by the United Nations Economic Commission for Africa that the gap between the rich and the poor keeps on increasing despite a rise in GDP per capita from 146 USD in 2006 to 220 USD in 2008.²¹⁹ The main source of employment²²⁰ comes from the agricultural sector around which the Ethiopian economy has in general revolved around agriculture.²²¹ The Ethiopian economy has started to experience economic diversification with new sectors such as services.²²² There has been an increase in FDI, for instance experiencing approximately 626 million USD since 2011.²²³ Investment in the



²¹⁶ Human Rights Watch “War crimes and crimes against humanity in the Ogaden area of Ethiopia’s Somali Region” June 2008.

²¹⁷ Davis J *Terrorism in Africa: The Evolving Front in the War on Terror* (2012) 230.

²¹⁸ See The World Bank ‘Ethiopia Overview’ available at <http://www.worldbank.org/en/country/ethiopia/overview> (Accessed 7 February 2015).

²¹⁹ 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).

²²⁰ Mellor J *et al* ‘Agriculture and Economic Transformation of Ethiopia’, International Food Policy Research Institute p 2. available at <http://www.ifpri.org/sites/default/files/publications/esspwp010.pdf> (accessed 25 December 2014).

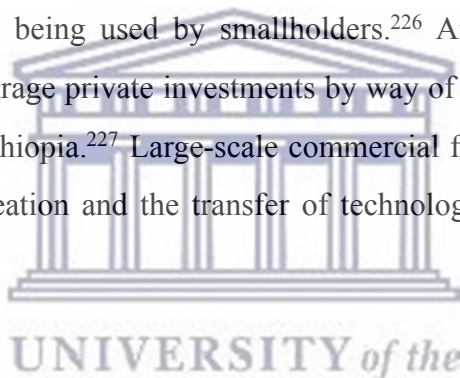
²²¹ There are five main types of agricultural production systems in Ethiopia – highland mixed farming system, lowland mixed agricultural production system, Pastoralism, Shifting Cultivation and Commercial Agriculture.

²²² Block S & Webb P ‘The dynamics of livelihood diversification in post-famine Ethiopia’ (2001) 26 *Food Policy* 333-350.

²²³ Index Mundi ‘Ethiopia- Foreign Direct Investment’ available at <http://www.indexmundi.com/facts/ethiopia/foreign-direct-investment> (accessed 30 November 2014).

agriculture and energy sectors came from countries such as India, China, Israel, Saudi Arabia, the USA and some European countries.²²⁴

It has been confirmed by the Federal Government's Growth and Transformation Plan running from 2010 to 2015 that agricultural transformation has been earmarked as the government's strategy for large-scale development.²²⁵ It is suggested by government policies that the country has enormous potential in the sector of agriculture which has remained unexploited. Agricultural sector can provide for solution not only in terms of food security, reduction of poverty and additionally in terms of economic development and creation of employment. The Agricultural Transformation Agency is mandated to identify difficulties in smallholder sectors and to support changes by relevant partners to realise the agricultural change. A background for the agricultural revolution is provided by the reportedly under-utilized lands of Ethiopia. As per Mahlet 74.3 million hectares out of the 111.5 million hectares of land in Ethiopia is constituted of are suitable for agriculture and only 14.6 million hectares are being used by smallholders.²²⁶ Another important feature of the agricultural strategy is to encourage private investments by way of large-scale commercial farms in under-used lowland areas of Ethiopia.²²⁷ Large-scale commercial farms are hence viewed as being the solution to poverty, job creation and the transfer of technology.²²⁸ Any irregularity regarding



²²⁴ Tsegaye A 'Ethiopia- Africa's third largest recipient of FDI' available at <http://allafrica.com/stories/201407010872.html> (accessed 15 January 2015).

²²⁵ 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).

²²⁶ Mahlet M 'US experts join agro ministry for zone study' (2012) *Fortune* 12.

²²⁷ GTP (2010) 23.

²²⁸ GTP (2010) 54 - Large-scale farming will be undertaken by private investors in lowland areas where abundant extensive land exists will be expanded and given due attention in the next five years [sic]. The necessary arrangements will be made to increase the private investors' participation by identifying areas that are not inhabited but are suitable for agriculture. Exploratory studies will be conducted to determine which forms of agricultural production enterprises are most suitable for each area identified. These areas and the data concerning them will be registered and organised in a land bank [...] The necessary support will be given to encourage the participation of Ethiopian investors. Efforts will be made to attract foreign investment in a manner that will be beneficial for Ethiopia's agricultural sector development.

large-scale commercial farms is stifled and kept away from the knowledge of the public and this is done through political oppression and lack of freedom of expression.

3.2.2 The study of land investment

Agriculture, particularly crop production and smallholder cultivation, was given a primary role in the development policies of Ethiopia as from the mid-1990s. Smallholders and peasants were provided with domestic resources and donor assistance in terms of resource management practices and technology packages in such a way that the government policy was considered to be peasant-friendly.²²⁹ However, a subtle shift from that position was noted in the government policies on development. The focus turned to large-scale agricultural undertakings and enterprises establishing the important role of foreign investors, thus beckoning the era of change from peasant cultivation to capitalist farming.²³⁰ The Rural Development Policy and Strategies of Ethiopia also identified ‘unutilised vast lands’ and ‘high-value agricultural products such as flowers and vegetables’ as the main pillars of the new agrarian change.²³¹ Policies on poverty reduction have also alluded to the commercialisation of agriculture as a means to achieve economic development and eradicate poverty.²³²



²²⁹ Kassa H ‘Agricultural extension in Ethiopia: Historical evolution, relevant policies and challenges’ in Taye A (ed) *Digest of Ethiopia’s national policies, strategies and programs* (2008) 153.

²³⁰ Ministry of Finance and Economic Development (MOFED) *Rural Development Policy and Strategies* Addis Ababa, Ethiopia (April 2001); Lavers T ‘Patterns of agrarian transformation in Ethiopia: State-mediated commercialization and the ‘land-grab’ in White B et al (eds) *The new enclosures: Critical perspectives on corporate land deals* (2013) 177.

²³¹ Makki F & Geisler C ‘Development by dispossession: Land grabbing as new enclosures in contemporary Ethiopia’ (2011) 11 available at http://www.iss.nl/fileadmin/ASSETS/iss/Documents/Conference_papers/LDPI/29_Fouad_Makki_and_Charles_Geisler.pdf (accessed 15 June 2016).

²³² Ministry of Finance and Economic Development *Ethiopia: Building Progress: A Plan for Accelerated and Sustained Development to End Poverty (PASDEP)* Addis Ababa Ethiopia (2006).

As discussed above, the legal basis for investment in agriculture by conferring land ownership on the state- is provided by the Ethiopian Constitution.²³³ Through the Federal Rural Land Administration and Use Proclamation 456/2005, authorities have been conferred the task of managing and administering land laws at the regional level. Four regions which already have their regional Proclamation for land are Tigray, Amhara, Oromia and Benishangul-Gumuz. The main law for investment in Ethiopia is Proclamation 280/2002. An increase FDI's, stimulate growth in export industries, transfer of technology and economic development- are the aims of the investment.²³⁴ Another enabling legislation for carrying out trade and commercial activities in Ethiopia is the 1960 Commercial Code.²³⁵ Foreign investors are given numerous incentives- including tax and duty exemptions²³⁶ and in addition there are certain investment sectors that are reserved for local

²³³ "Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange." Section 40(2); "Ethiopian peasants have the right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law." Section 40(3); "Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law." Section 40(5); "Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labor or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it..." Section 40(7); "Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property." Section 40(8); "All persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance." Section 44(2); "Government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development." Section 89(5).

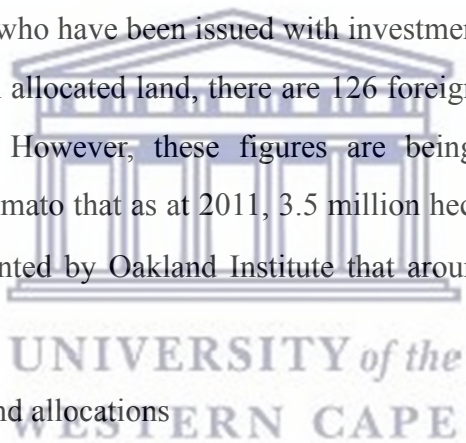
²³⁴ Section 4 of the Proclamation 280/2002 - Investment Objectives of the Federal Democratic Republic of Ethiopia The Objectives of the investment policy of the Federal Democratic Republic of Ethiopia are designed to improve the living standards of the peoples of Ethiopia through the realization of sustainable economic and social development, the particulars of which are the following: (1) to accelerate the country's economic development; (2) to exploit and develop the immense natural resources of the country; (3) to develop the domestic market through the growth of production, productivity, and services; (4) to increase foreign exchange earnings by encouraging expansion in volume and variety of the country's export products and services and the improvement of their quality as well as to save foreign exchange through production of import substituting products; (5) to encourage balanced development and integrated economic activity among the Regions and to strengthen the inter-sectoral linkages of the economy; (6) to enhance the role of the private sector in the acceleration of the development of the country's economy; (7) to render foreign investment play its proper role in the country's economic development; (8) to create wide employment opportunities for Ethiopians and to foster the transfer of technical know-how, of managerial skills, and of technology required for the progress of the country.

²³⁵ The Commercial Code 1960 available at <http://www.wipo.int/edocs/lexdocs/laws/en/et/et014en.pdf> (accessed 18 December 2014).

²³⁶ Rahmato (2011) 9 - Foreign investors have the right to fully repatriate, in convertible currency, profits and dividends, principal and interest payments on external loans, proceeds from technology transfers, and from asset sales in the event of liquidation of the investment, and proceeds from the transfer of shares or ownership to a domestic investor. Expatriates employed in an enterprise may remit in foreign currency salaries and other payments accruing from their employment. Investors, foreign or domestic, are guaranteed against expropriation or nationalization except as required by the public interest. In the event this happens full compensation is payable at the prevailing market value. Foreign investors may repatriate compensation paid in foreign currency; Investment Regulations 84/2003 of Ethiopia.

investors. With the advent of the Proclamation 29/2001 in 2009, there was a major amendment in the law whereby the federal government was exclusively responsible to deal with investments in land that are above 5000 hectares whereas before, such power was conferred only on the local authority.

The regional land allocations were very imprecise and it was noted that there was a serious lack of documentation and update on the current status of lands at that level. Additionally land allocated to state corporations for the production of rubber and sugar, by the federal government are also sometimes neither registered nor documented in official inventories of land investment.²³⁷ Considerable portions of land amounting to around 200,000 hectares have been allocated to state corporations in SNNPR and Gambella and same were not in official land inventories.²³⁸ According to the official figures from the government on land allocation, only 372, 000 hectares out of 2.2 million hectares are under development. US\$ 7.3 billion income has been generated from 11, 773 domestic and foreign investors who have been issued with investment license. Moreover, among the 5, 283 investors who have been allocated land, there are 126 foreigners to whom 594, 000 hectares of land have been leased.²³⁹ However, these figures are being contested strongly by other researchers. It is argued by Rahmato that as at 2011, 3.5 million hectares of land have already been allocated while it was documented by Oakland Institute that around 3.6 million hectares of land already leased away.²⁴⁰



3.2.2.1 Characteristics of the land allocations

It has been a common practice to allocate farm lands to investors in different parts of Ethiopia since early 1990s. Investors were predominantly locals, usually allocated small size of land not more than

²³⁷ Keeley J et al 'Large-scale land deals in Ethiopia: Scale, trends, features and outcomes to date' (2014) 2 [hereafter Keeley: 2014].

²³⁸ 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).

²³⁹ 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).

²⁴⁰ Rahmato D Land to investors: Large-scale land transfers in Ethiopia (2011) 5 [hereafter Rahmato: 2011]; Oakland Institute *Understanding land investment deals in Africa: Country Report Ethiopia* (2011) 21 [hereafter Oakland: 2011].

500 hectares during the period ranging from 1990s to 2002.²⁴¹ The enactment of investment proclamations and the resounding success of the floriculture business in Europe prompted foreign investors to show keen interest in land investments and agricultural undertakings in Ethiopia. There was an increase in demand for land by foreign investors in 2006 and by the year 2008 there was a mad rush to acquire land amounting to over 10, 000 hectares.²⁴²

The size of the land allocation varies from investors to investors and from projects to projects. It is reported by Keeley that 17 of the 131 land agreements signed to date are over 10,000 hectares while only two are above 50,000 hectares.²⁴³ Equally important, land deals are primarily located in the lowland regions. Approximately 80% of the land deals have taken place in SNNPR, Gambella and Benishangul-Gumuz.²⁴⁴ The highest number of land deals which have been completed by the regional governments without the interference of the federal government took place in regions such as Amhara, Oromia and Tigray. In those regions, lands allocated are usually smaller in area and size compared to the land deals in the lowlands regions. By September 2012, there were 31 different land lease agreements covering an area of 385,000 hectares and 24 of which are in operation and the remaining 7 are in the implementation phase.

As discussed above, a majority of the land deals occurs in the lowlands regions, resulting in significant socio-economic changes in those regions. Development in those areas has been rapid, due to the low population densities and an important variety of ethnic minorities. The AILAA has labelled lands in the lowlands which are uncultivated and not forming part of the livelihood of the inhabitants. A marginalized region in terms of the political economy of the country is Gambella. Gambella has experienced progress and development by virtue of increased land investments. This region is the subject of two of the most publicised land investments in Ethiopia namely by karuturi

²⁴¹ Rahmato (2011) 12.

²⁴² Rahmato (2011) 12.

²⁴³ Keeley (2014) 25.

²⁴⁴ Oakland (2011) 20.

(India) and Saudi Star. However, besides the rapid growth and investment opportunities, this has also brought along human rights issues which will be discussed at a later stage.²⁴⁵

Another important dimension in land investments is the profile of the investors. Foreign or international investors are more involved in land deals at the federal level where larger portions of land are allocated. Furthermore, the regional level is controlled by local investors or by the Ethiopian Diaspora.²⁴⁶ There have been 31 lease agreements with the Federal land bank, out of which 12 are Ethiopian investors, 8 are Diaspora investors, and 9 are Indian investors while two are Turkish and Saudi-Ethiopia. At the regional level, out of the 93 agreements only 11 with foreign investors from Israel, Italy, Malaysia, Netherlands, New Zealand, Saudi Arabia, Turkey and USA and the remaining are with domestic investors.²⁴⁷ It has to be noted that at the federal or regional level, the international investing companies are private companies raising capitals by way of corporate capital or loans from commercial banks.

The process through which land allocation is carried out is highly questionable which results in land grabbing as there is no control or supervision. Currently, lands are provided to investors through two channels: the Regional Government and the Federal Government under the aegis of the Ministry of Agriculture and Rural Development. The latter has come up with standard guidelines for land use practices, land transfers and rent assessment whereas there is a worrying lack of guidelines for such activities at the regional level.²⁴⁸ The bias towards foreign investors in Ethiopia has also resulted in contractual requirements and obligations that are not stringent on them.²⁴⁹ Rahmato also reports that in the rural areas, the real size of land allocated to foreign investors would be different from the figures that appear on lease contracts and official documents. A serious lack of documentation and control over land deals has as consequence an uncontrolled process of

²⁴⁵Pearce 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).

²⁴⁶Berhanu 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).

²⁴⁷ Keeley (2014) 31.

²⁴⁸ Rahmato (2011) 14.

²⁴⁹ Keeley (2014) 13.

allocating lands to investors without taking into account the environment, human rights principles and the basic livelihood of local communities and individuals.

3.2.2.2 Execution and implementation of the land agreements

While an important amount of lands have already been allocated, government representatives have opined that, 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-implementation phases.²⁵⁰ It is argued by Keeley that despite having a favourable climate for investment, Ethiopia has failed to attract the highest quality of international investors in agriculture and local investors have not done well, explaining why the realisation of the multiple projects have failed. It is illustrated by Imeru that only 35% of the projects have been implemented as per the terms of the lease agreements.²⁵¹ There are several reasons explaining the low rate of materialisation of the projects- these include the high cost of development²⁵², security issues, and poor capacity of investors, misuse of licenses and ineffective monitoring of projects. For example, a company in Gambella estimated the cost of clearing and preparing the farms land at around US\$17,000 per hectare however in real the cost is more since US\$80, 000 had to be invested in farm machinery.²⁵³ Ruchi is another Indian Company which has declared that it is only expecting to make profit as from the year 2020 because of the elevated investment and production cost.²⁵⁴

²⁵⁰ Vhughen D & Gebru A 'Large-scale acquisitions of land in Ethiopia' Focus on Land in Africa (2013) 3.

²⁵¹ Imeru T 'Governance of large-scale agricultural investments in Africa: the case of Ethiopia' (2012).

²⁵² 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).

²⁵³ 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).

²⁵⁴ 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).

Security issues are also the cause of low rate of implementation more precisely in regions such as Somali and Gambella. Investors have been reluctant to pursue the lease agreements on land investments, aftermath 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.²⁵⁵ Moreover, the size of the land leased has also been reported as being problematic especially when it comes to effective management. The maximum size of the land should not exceed 20,000 hectares- according to a regional land bureau chief.²⁵⁶

3.2.3 The impact of land investments in Ethiopia

Land investment in Ethiopia has the capacity to generate a considerable income for the government. The first source of revenue being the rental fee and same is proportional to the distance from the capital city of Addis Ababa and on the fact that whether the land is irrigated or found in a rainy zone. A flat rate for rental applies which is US\$6.1 per hectare for rain-prone lands and US\$8.7 for irrigated lands- for distances over 700 km from Addis Ababa. With such revenue, this can enhance foreign exchange reserves, enable development of public infrastructure, help in the transfer of technology and wage employment.

Poverty can be alleviated through transfer of technology to smallholders by opening market access for them through the implementation of the Agricultural Development Led Industrialisation as a development strategy.²⁵⁷ This will also bring about enhancement of their purchasing power and increase in their investing capacity. While it is too early to quantify the success of land investments in terms of transfer of technology, early signs are not seen to be encouraging. Given that the average Ethiopian farmer is still using their traditional methods, it is difficult to quantify the results of large scale farming in terms of transfer of technology which will be accessible to the average local

²⁵⁵ 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).

²⁵⁶ Keeley (2014) 36.

²⁵⁷ Ministry of Agriculture 'Policies and Strategies' available at <http://www.moa.gov.et/policies-and-strategies> (accessed 13 January 2015).

farmer.²⁵⁸ It is reported that there is a lack of proof concerning on matter of strategies and policies have been adopted allowing for technological transfer to the local farmers.²⁵⁹

An unprecedented developmental change is currently being experienced by Ethiopia. These include, building of tarred roads connecting all the capitals of the regions, enhancement of market access throughout the country. Ethiopia was aiming to give access to electricity to 75% of its population by the end of the year 2015. Now, more than 24 million Ethiopians have access to mobile phone and internet.²⁶⁰ However, most of the above mentioned progress has been possible through donor's aid and finance and additionally the land deals have not revealed any commitment towards better infrastructure.²⁶¹ Only Saudi Star and Karuturi in Gambella have promised the provision of 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.²⁶² Since no legal reform pertaining to minimum wages and pay standards have yet been undertaken by the government- wages of local agricultural workers will not experience an increase. As far as creation of employment is concerned, it is reported by Keeley that most jobs created are casual and temporary and the creation of job to area ratio is very small.²⁶³ This situation raises serious question as to whether the proposed form of development is in line with Sen's CA and whether it is rendering people capable to achieve what they desire.

3.2.3.1 Impact on food and livelihoods

Since the 1984-85 famine in Ethiopia, the country has very often suffered from hunger problem. Even if the state of famine is not a constant one, it is reported that around 6.5 million Ethiopians

²⁵⁸ 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).

²⁵⁹ Oakland (2011) 34.

²⁶⁰ 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).

²⁶¹ Oakland (2011) 34.

²⁶² Davison W 'Saudi billionaire to invest \$100 million in Ethiopian farm' *Bloomberg Business* (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).

²⁶³ Keeley (2014) 41.

were chronically hungry in 2014.²⁶⁴ The 2008 food price crisis also had its impact on Ethiopia as food became expensive and inaccessible, resulting in some 6.4 million more people to become dependent on food assistance.²⁶⁵ It has also been the largest recipient of food aid in recent times.²⁶⁶ It is a country which is highly at risk of severe drought and food shortage problems being one of the ten countries considered as being at extreme risk. The regions which are most acutely food insecure are the Afar and Somali region. Chronic hunger is frequently noted in areas such as South and East Tigray Region, the eastern part of Amhara and eastern Oromia region, thus requiring urgent food aid and assistance.²⁶⁷ Rapid population growth, degradation of the environment²⁶⁸, inefficient government policies on land tenure and market access, gender inequality and conflicts and lack of infrastructure have been the reasons behind severe food shortage in Ethiopia.²⁶⁹

The prime location for agricultural land investments, are Gambella and SNNPR regions by reason of the sufficient water supply and excellent soil fertility. The inhabitants of those areas are faced with food security issues, despite of the above mentioned available natural resources. Over 80, 000 inhabitants of Gambella had to be given food aid in 2012, according to the United Nations World Food Programme.²⁷⁰ Ethiopia is still reliant on food aid irrespective of the agricultural investments projects which are aimed at enhancing food security and most importantly despite being one of the fastest growing economies in Africa.²⁷¹ The availability and supply of food are being endangered by

²⁶⁴ World Food Programme 'Leading a positive life in Ethiopia' available at <http://www.wfp.org/countries/ethiopia> (accessed 15 December 2014).

²⁶⁵ Secretariat of the UN System High Level Task Force for the Global Food Security Crisis (HLTF) 'Ethiopia: Summary of country visit' (2009).

²⁶⁶ World Food Programme 'Food aid flow 2012 report' available at <https://www.wfp.org/content/food-aid-flows-2012-report> (accessed 8 January 2015).

²⁶⁷ USAID 'The new alliance for food security and Nutrition in Ethiopia' available at <http://www.usaid.gov/sites/default/files/documents/1868/EthiopiaCooperationFramework.pdf> (accessed 15 January 2015).

²⁶⁸ Taffa T 'Characteristics of Property Units in Ethiopia' (2009) 6 *Nordic Journal of Surveying and Real Estate Research* 9.

²⁶⁹ USAID, 'Food Security Framework' available at <http://www.fews.net/ml/en/info/Pages/fmwkfactors.aspx?gb=et&l=en&fmwk=pop> (accessed 14 November 2014).

²⁷⁰ 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).

²⁷¹ See USAID 'Food assistance fact sheet – Ethiopia' available at <http://www.usaid.gov/ethiopia/food-assistance> (accessed 22 December 2014).

intensive land investments. Notably, people in Benishangul, SNNPR and Gambella face food related problems because of the presence of any one of the above mentioned factors.²⁷²

The forest can be an important source of food, during times of food scarcity. However, due to land investments in some areas, this have even limited or completely restricted access of local people to the forest. To illustrate, there is the case study of the Majangere people who are numbered around 15,000 to 20,000, and they live on the south-western slope of the forested Ethiopian plateau. They depend greatly on shifting cultivation, fishing and beekeeping. Due to state-sponsored coffee plantations that started since the Derg era, their lives have however been deeply affected. People were brought from the highlands as labourers with the gradual removing of the Majangere people out of their natural habitats. This led to the highlanders labourers eventually settling in those areas because of the availability of resources and facilities such as school and health services provided by the state. In this way, the Majangere people were evicted and left in a precarious and unstable situation. It is reported by Oakland Institute that this is the story of only one ethnic group and hundreds of similar groups are facing the same fate with large-scale land investments.²⁷³ Access to food which eventually results in severe food insecurity is the major problem that entails such eviction.

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 [UNWFP] and the food shortage problem increasing by health related issues.²⁷⁴ Abodo Woreda is the site for investments from Saudi Star and Karuturi ventures and the former has a dam construction project alongside the Alwero River which required the clearance of forest and local farmland. Ultimately this led to a loss of food supply and food security problems to the local people. A similar fate was reserved to the people of a small village along the Baro River where a diaspora investor harvested the maize plantation of the local community for clearing of land for rice plantation. The investors had used force and employed guards to prevent the local people to have access to their lands and to harvest

²⁷² Grebmer et al. *Global hunger index: The Challenge of hunger – building resilience to achieve food and nutrition security* (2013) 41.

²⁷³ Oakland (2011) 39.

²⁷⁴ UN WHO 'Dracunculiasis- Ethiopia' (2014) available at <http://www.who.int/dracunculiasis/ethiopia/en/> (accessed 16 January 2015).

their own crops.²⁷⁵ From the cases discussed above, it is evident that large-scale land investments can have a negative impact on food security of the local peoples.

The villagisation projects which accompany large-scale investments have also resulted in the loss of livelihoods. It is contended that such projects have failed to fulfil their aims because of the fact that they do not take into account the cultural component of rural communities.²⁷⁶ According to Jan Egeland, Europe Director at Human Rights Watch, the livelihoods of the indigenous people are being undermined by the villagization programme.²⁷⁷ Approximately 100, 000 households around Gambella and Benishangul regions have been bulldozed off for the villagisation project.²⁷⁸ Self-reliant households become dependent on food aid when they are displaced due to villagisation.²⁷⁹

Food has been selected as one of the capabilities constituting the theoretical foundation of the thesis. According to Sen's CA, respect for the capabilities of a person determine the extent to which a particular mode of development will be all-inclusive and in line with human rights principles. The impact land investments is having on food and livelihoods as discussed above clearly shows that development is not being carried out in conformity with the CA.

3.2.3.2 Impact on culture and society

Large scale land investments are the primary reasons behind the relocation and displacement of local communities in Ethiopia.²⁸⁰ As a result, members of the local communities are deprived access

²⁷⁵ 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).

²⁷⁶ 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) [hereafter HRW: 2014]

²⁷⁷ HRW (2014).

²⁷⁸ Oakland (2011) 38.

²⁷⁹ Dear C *Causes and consequences of displacement decision-making in Banhine National Park, Mozambique* (2001) 157.

²⁸⁰ Moreda T 'Large-scale land acquisitions, state authority and indigenous local communities: Insights from Ethiopia' (2017) 38 *Third World Quarterly*.

to forests, rivers, lakes and species which form part of their cultural patrimony.²⁸¹ Indeed, they constitute the foundation of cultural identity of the local communities and are not merely fixed assets belonging to the state.²⁸² The impact of such investments encompasses both losses of identity and culture which is an essential component of the CA adopted in this thesis. For instance, the Anuak people of Gambella have close ties with the lands which intimately connect them with their past and their future.²⁸³ The Anuak people are dependent on the forests for food, medicines, building materials and spiritual purposes. Large-scale land leases are proving to be a barrier between themselves and their natural resources.

When Karuturi started operation in Gambella, it was perceived that wage employment would be created amounting to as many as 20,000 to 30,000 employers.²⁸⁴ Similarly, Saudi Star pledged the creation of 4,000 to 5,000 workers to work in rice fields.²⁸⁵ It is to be noted that all of these jobs are manual and are based on only on short-term period; hence employment is not being created in a sustainable manner. There was also a massive influx of male labourers from other regions of the country which can have considerable adverse effect on local communities. Locals in Gambella and Benishangul have complained that labourers who came from other regions have stayed back after employment, settled with families and acquired land and resources²⁸⁶, ultimately this put an additional pressure on the already existing food shortage problem.

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²⁸¹ See 'The Rift Valley and the cultural mosaic of the South' Ethiopia – Land of origins (2015) available at <https://www.ethiopia.travel/destinations/ethiopian-routes/rift-valley-and-cultural-mosaic-of-the-south> (accessed 12th June 2017).

²⁸² Jaatee M 'Land grabbing and violations of human rights in Ethiopia' Genocide Watch (2016) available at <http://genocidewatch.net/2016/02/01/land-grabbing-in-ethiopia/> (accessed 12 June 2017)

²⁸³ Oakland Institute 'Unheard Voices' (2013) 11 – 'For the Anuak, land is essentially everything. . . . Land is identity and is survival for the community. . . . They use the land, forest, and river; everything is very vital to their survival. For the Anuak, the environment is their food source, for hunting, for fishing, for medicinal purposes. . . . The government is depriving the Anuak people of their memories, homeland, and traditional farming system. And the Anuak are leaving behind homes [they have lived in] for generations'.

²⁸⁴ 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).

²⁸⁵ 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).

²⁸⁶ 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).

There is the danger that these labourers from other regions coming in and clearing forests and lands for their own use in terms of cultivation and housing- thereby seriously affecting the livelihoods of the locals.²⁸⁷ Indeed, deforestation, constant pressure on fish reserves, wildlife and resources in the area, conflicts, rise in cases of sexual assaults, increase in prostitution and HIV/AIDS spread are some of the social impacts of such influx of labourers.²⁸⁸ All these issues do not make a person capable of choosing the mode of development that he desires or cherishes.

Since increasing in conflict has significant socioeconomic impacts on the lives of people- it is a rising issue that warrants attention. Studies have shown that rapid and uncontrolled growth in population together with resource intrusion give rise to conflicts.²⁸⁹ Equally important there is the issue of societal heterogeneity in terms of differences in incomes and distinctions of ethnicities can also lead to conflict situations.²⁹⁰ In addition, weak governmental institutions and respect for democracy together with political instability and insecurity make the situation even worse. It is reported by Oakland Institute that in these land lease areas people are already facing these problems which are negatively impacting on the local communities.²⁹¹

Moreover, large-scale land leases also have direct implication on workers and the way they are treated. The Ethiopian government has drafted an Environmental Code for Practice for Agricultural Investment which contains legal provisions on the rights and relations of employees. Equally important, the provisions on 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, there is the problem regarding

²⁸⁷ Oakland (2011) 37.

²⁸⁸ 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).

²⁸⁹ Goldstone J 'Population and security: how demographic change can lead to violent conflict' (2002) 56 *Journal of International Affairs* 4.

²⁹⁰ Vanhanen T 'Ethnic conflicts and violence in heterogeneous societies' 2012 (37) *Journal of Social, Political and Economic Studies*.

²⁹¹ Oakland (2011) 38.

implementation and enforcement of the Code and the Proclamation which is uncontrolled in large-scale leases areas and in general.²⁹²

It is extremely hard to obtain compensation for relocation and displacement based on the villagisation programmes. Moreover, the Proclamation 455/2005 caters for compensation for expropriation whereby there are provisions regarding payment of compensation equal to the replacement cost of property and improvements made to the land. A package of 10 times the average annual income as compensation to displaced persons is equally provided by the law.²⁹³ However, one of the requirements is that the holder must have a legal title -for the Proclamation to apply. Most of the relocation and displacements are happening as regards the land holdings in the rural areas are without title. In addition, unfulfilling as land cannot be bought in Ethiopia, the monetary compensation can also prove to be unfulfilling implying that the expropriated lands cannot be replaced by other lands, thus directly affecting livelihoods.

3.2.3.3 Impact on access to land

Ethiopia is exposed to several environmental problems such as degradation of land, loss of biodiversity, climate change and air and water pollution.²⁹⁴ Deforestation is occurring at an alarming rate of 160,000 to 200,000 hectares per year.²⁹⁵ This results into erosion and soil degradation causing the loss of around 30,000 hectares of productive land per year.²⁹⁶ Unused lands in Ethiopia are covered with forest or woodland exceptionally rich in species and act as natural habitat to animals and plants.²⁹⁷ Ethiopian forests are also a reservoir of 219 million metric tons of

²⁹² Admassie A 'The Incidence of child labour in Africa with empirical evidence from rural Ethiopia' Centre for Development Research Discussion Paper (2000) 21.

²⁹³ Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No 455/2005 article 8.

²⁹⁴ Peoples S 'Population, health and environment in Ethiopia' Wilson Centre available at <http://www.wilsoncenter.org/publication/issue-21-population-health-and-environment-ethiopia> (accessed 16 December 2014).

²⁹⁵ Bishaw B *Deforestation and Land Degradation on the Ethiopian Highlands: A Strategy for Physical Recovery* (2011) 2.

²⁹⁶ Taddese G *Effective management of water and livestock resources for community based irrigation in Ethiopia* ILRI (2006).

²⁹⁷ NABU 'Protecting the last cloud forest of Ethiopia' available at <http://www.nabu.de/en/aktionenundprojekte/kafa/> (accessed 24th December 2014).

carbon thus supporting the fight against global warming.²⁹⁸ A vast majority of the land deals have been concluded in regions where lands are covered with forests. It implies that for development, the investors have to clear those lands, and this is accentuating environmental problems such as loss of biodiversity, land degradation and climate change. Oakland Institute reports that the clause of planting six trees for every hectare of land cleared found in the agreements of investments in Benishangul has never been enforced so far.²⁹⁹

Monoculture results from the industrial-style cultivation of only one crop. The danger associated to such method of cultivation is increased toxicity which affects soil fertility, natural pest control system and invasion by genetically modified species.³⁰⁰ Large-scale investors are using pesticides and fertilisers for production without paying heed to the Environmental Code of Practice for Agricultural Investment which provides for a list of authorised and approved chemicals. There is another law dealing with use of chemicals namely the Pesticides Registration Proclamation 20/1990 and more precisely with human safety considerations, which has not yet been implemented though and it is alarming to the already worrying situation of pesticides and fertilisers uses in Ethiopia.³⁰¹ The clearing of wetlands in Ethiopia is also problematic as it renders rural communities more vulnerable to floods and decreases groundwater supply, thus rendering less and less capable of achieving development that could free them.

Major development projects are normally accompanied by both an environmental and a social impact assessment. Ethiopian law imposes such requirements through the 1997 Environmental Policy which promotes public consultation and requires full environmental and social assessment reports.³⁰² However, lack of political will, awareness and enforcement mechanisms contributed to the weakening of such procedures. Environment and social assessment prior to development

²⁹⁸MONGABAY 'Ethiopia forest information and data' available at <http://rainforests.mongabay.com/deforestation/2000/Ethiopia.htm> (accessed 20 November 2014).

²⁹⁹ Oakland (2011) 45.

³⁰⁰ Altieri M 'Modern agriculture: Ecological impacts and the possibilities for truly sustainable farming' available at http://nature.berkeley.edu/~miguel-alt/modern_agriculture.html (accessed 18 October 2014).

³⁰¹ Abate T *Ethiopian experience with pesticides – no foundation for food security-* *Pesticide News* (1996) 12.

³⁰² EIA Proclamation 299/2002.

projects are not proving to be effective.³⁰³ Out of 300 projects in 2005 around Addis Ababa, only two followed the EIA procedures and the rest have not even submitted any documentation for the assessment.³⁰⁴ All these environmental problems directly affect the lives of the rural communities. The fear is that the effects would not only be felt by the current generation but also by the future ones. Large-scale land investments are proving to be against principles of sustainability enshrined in the discourse of international environmental law.³⁰⁵

3.2.3.4 Impact on access to water

It is relevant to highlight that in Ethiopia, the distance of an area of land from a surface water body determines the price of the land lease.³⁰⁶ The water component is an important factor in land investment. Therefore, the allocation and use of water in the Gambella region affected by land grabbing are determined by the 'private investors'.³⁰⁷ They would usually delimit rivers and lakes that were used by local communities. The 'villagisation' project in Gambella has resulted in thousands of people being relocated and consequently left without access to water.³⁰⁸ A limited or scarce access to water has immense effect on the livelihoods of pastoralists Ethiopians and land investments are accentuating the already existing stress around water in Ethiopia.³⁰⁹

The Anuak People in the Gambella region are also dependent on the waters of the Alwero River for fishing activities. A Saudi-based industrialist has leased land surrounding the Alwero River areas for cultivation purposes and has restricted the Anuak people from access to the River so that the water

³⁰³ Ruffeis D *Evaluation of the environmental policy and impact assessment process in Ethiopia* (2010) 33.

³⁰⁴ Oakland (2011) 46.

³⁰⁵ Agenda 21 from the International Conference on Development and Environment Rio 1992.

³⁰⁶ Erda F 'Water dimensions of land grabbing' available at <https://africaupclose.wilsoncenter.org/water-dimensions-of-land-grabbing/> (accessed 03 June 2017).

³⁰⁷ Seide W 'Lease the land, but use the water' in Sandstorm, E et al (eds) *Land and hydropolitics in the Nile River Basin: Challenges and new investments* (2016) 183.

³⁰⁸ Degife A 'The intricacies of large scale agricultural investments in Gambella Region, Ethiopia' 2017 World Bank Conference on Land and Poverty (2017) 13.

³⁰⁹ Nassef M & Belayhun M 'Water development in Ethiopia's pastoral areas' (2012) 3.

can be used exclusively for irrigation purposes. This has heavily affected access to water for the Anuak People resulting in violence with the death of five people from the local communities.³¹⁰

3.2.3.5 Political participation

The local communities are generally not involved effectively in the land investment decision making process. The necessity and importance of their active participation in decision that directly affect their lives and capabilities are often undermined and critical information about land deals are hidden from them.³¹¹ It has been reported that large tracts of land have been leased to foreign investors in the Gambella region which historically belong to the Anywaa and the Majanger communities without any consultation with them.³¹²

Communities from the Lower Omo Valley have been displaced and their lands cleared of all cultivation to make way for land investments without their free, informed and prior consent. The Bodi and Mursi peoples have been particularly affected and yet, they have never been genuinely and effectively involved in any decision-making process.³¹³

3.3 MADAGASCAR

The world's fourth biggest Island after Greenland, New Guinea and Borneo, Madagascar is blessed with a fauna and a flora which is unique on earth.³¹⁴ Situated in the Indian Ocean, it is exposed to tropical cyclones, torrential rain falls and flood which can be destructive as was the case in 2000

³¹⁰ GRAIN 'Squeezing Africa dry: behind every land grab is a water grab' (2012) available at <https://www.grain.org/fr/article/entries/4516-squeezing-africa-dry-behind-every-land-grab-is-a-water-grab> (accessed 3 June 2017).

³¹¹ Ochalla N 'Ethiopia's land grabs: Stories from the displaced' available at <https://intercontinentalcry.org/ethiopias-land-grabs-stories-displaced-20830/> (accessed 3 June 2017).

³¹² Ochalla N 'Ethiopia's land grabs: Interviews with the displaced' available at <https://intercontinentalcry.org/ethiopias-land-grabs-interviews-displaced/> (accessed 3 June 2017).

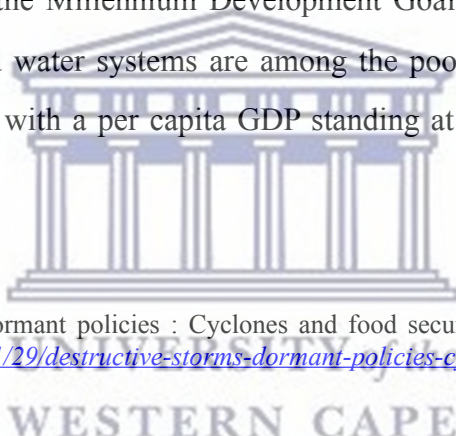
³¹³ Human Right Watch 'Ethiopia: Land, water grabs devastate communities' available at <https://www.hrw.org/news/2014/02/18/ethiopia-land-water-grabs-devastate-communities> (accessed 3 June 2017).

³¹⁴ Madagascar Flora 'Exploring Madagascar, a land of cultural and biological richness' available at <http://www.wildmadagascar.org/flora/> (accessed 13 November 2013).

and 2004 with several dead and displaced.³¹⁵ The Malagasy are descendants of the Africans and Indonesians who started to inhabit the Island nearly two millennia ago. It is a country where the dead is worshipped and given so much attention in the form of ancestral tombs and related rituals.³¹⁶ It became independent in 1960 after brutal French colonial rule which resulted in the deadly suppression of the 1947 uprising.³¹⁷ It was then captured under military rule in 1970 with the dream of developing a socialist state. It remained an unfulfilled dream as the economy witnessed severe decline driving the IMF to impose structural adjustment programmes in 1982.³¹⁸ According to the WB, around 92% of the inhabitants live on less than USD 2 per day.³¹⁹ The country is also the world leader in vanilla production.

3.3.1 Social, political and economic context

Political crises in Madagascar have significantly impinged social progress despite relative success achieved in realising some of the Millennium Development Goals in the 2000s.³²⁰ The country's education, health, nutrition and water systems are among the poorest in the world.³²¹ 90% of the population lives under poverty with a per capita GDP standing at \$420.³²² 50% of children under



³¹⁵Clayton A 'Destructive storms, dormant policies : Cyclones and food security in Madagascar' available at <http://www.africaportal.org/articles/2012/11/29/destructive-storms-dormant-policies-cyclones-and-food-security-madagascar> (accessed 13 November 2014).

³¹⁶BBC News 'Madagascar dance with the dead' available at http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/7562898.stm (accessed 13 November 2014).

³¹⁷Global Security 'Madagascar's battle for independence' available at <http://www.globalsecurity.org/military/world/war/madagascar.htm> (accessed 17 November 2014).

³¹⁸Gaudusson J 'Madagascar: A case of revolutionary pragmatism' in Markakis J & Waller M (eds). *Military Marxist regime in Africa* (2013).

³¹⁹Barret C 'The Economics of Poverty and the Poverty of Economics: A Christian perspective' Upstate New York InterVarsity Christian Fellowship Faculty Conference (2003) 4 available at <http://chestertonhouse.org/static/audio/barrett/Econ-of-Poverty-and-Poverty-of-Econ.pdf> (accessed 14 November 2014).

³²⁰See The World Bank 'Overview of Madagascar' (10 January 2017) available at <http://www.worldbank.org/en/country/madagascar/overview> (accessed 13 June 2017) [hereafter World Bank: 2017].

³²¹See UNICEF 'Eastern and Southern Africa – Madagascar' (2011) available at https://www.unicef.org/hac2011/files/HAC2011_4pager_Madagascar_rev1.pdf (accessed 13 June 2017).

³²² World Bank (2017).

the age of five suffer from malnutrition.³²³ The 2018 Human Development Index (HDI) has ranked the country 161st, depicting its social context.

From a political lens, Madagascar used to enjoy strong economic and political ties with France as well as the West African Francophone countries.³²⁴ However, after Andre Rajoelina seized power undemocratically in 2009, it was deserted by the international community. African Union suspended the membership of Madagascar and the European Union halted aid. The appointment of the new president, Hery Rajaonarimampianina, had been observed as a major step towards a return to constitutional rule.³²⁵ However, such hope has proven to be short-lived with the 2013 Elections. President Rajaonarimampianina refused to accept the landslide victory of the opposition party which claimed 121 of the 151 seat in the National Assembly on the 26 May 2013 with the support of the High Constitutional Court which ruled in favour of the President.³²⁶ After the November 2018 presidential elections, Andre Rajoelina has been re-installed as President after winning the second round of the elections with 55.66% vote against the 44.34% won by Marc Ravalomanana.

The economic context of the island has been affected by political turmoil. Political instability is impeding on efforts to revitalise the Malagasy economy since investors with genuine developmental projects have been put off by politicians prioritising their political interests over economic ones.³²⁷ Since 2016, however, the WB has noted some signs of improvement led by public works programmes, expansion of the tertiary sector and recovery in the primary sector aided by favourable climatic conditions and high prices of vanilla on the international market.³²⁸ FDI in the agricultural

³²³ 'Malnutrition in Madagascar – A silent crisis' *AllAfrica* (16 July 2016) available at <http://allafrica.com/view/group/main/main/id/00017939.html> (accessed 13 June 2017).

³²⁴ France Diplomatie 'Economic relations' available at <http://www.diplomatie.gouv.fr/en/country-files/madagascar-273/france-and-madagascar/economic-relations-6078/> (accessed 12 December 2014).

³²⁵ 'Madagascar president unveils new government' Yahoo News available at <http://news.yahoo.com/madagascar-president-unveils-government-202706893.html> (accessed 14 February 2015).

³²⁶ Ackbarally N 'Madagascar: A new political crisis' *NewAfrican* (10 July 2015) available at <http://newafricanmagazine.com/madagascar-a-new-political-crisis/> (accessed 13 June 2017) [hereafter Acbarally: 2015].

³²⁷ Ackbarally (2015).

³²⁸ World Bank (2017).

and manufacturing sector have arguably reinforced economic stability.³²⁹ Since 2008, a significant number of large-scale investments in relation to land have impacted on the lives of local communities. The political crisis and dire economic conditions have attracted most of the attention and served as a cover for land investments causing distress to local communities. The following section reviews the impact that large-scale agricultural investments by foreigners have had on food, culture, access to land and water and political participation of the local communities.

3.3.2 The impact of land investments in Madagascar

When the Daewoo scandal erupted in Madagascar, people showed their discontent against the project.³³⁰ In 2009, the state had promised 1.3 million hectares of land in the region of Melaky, Sava, Menabe and Atsinanana to Daewoo Logistics of South Korea for the cultivation of corn and palm oil for exportation to South Korea. A significant lack of information on the terms of the 99 years deal to the public was considered to be an act of treason as it was interpreted as ‘selling the ancestors to foreigners’.³³¹ Malagasy would only sell lands that they have acquired themselves and not inherited only in exceptional circumstances and that too preferably to other family members or neighbours to ensure that land does not go to foreigners and the ancestors are always close to them. The cultural impact of land investments in Madagascar cannot be ignored as it is too central to the Malagasy way of life. In a similar way, land investments have hugely impacted on access to land, water and food for the local communities. In addition, they have never been meaningfully engaged in the decision-making process by the authorities as would be illustrated in the ensuing section of the thesis.

³²⁹ ‘Madagascar Country Profile 2016’ United Nations Economic Commission for Africa (2016) 19 available at http://www.uneca.org/sites/default/files/uploaded-documents/CountryProfiles/2017/madagascar_cp_eng.pdf (accessed 13 June 2017).

³³⁰ Hong K ‘How to create win-win land deals in Mozambique – Strategic review of Daewoo land deal in Madagascar as a case study’ (2011) 8 available at <http://www.slideshare.net/KevinHong3/analysis-of-daewoo-land-deal-in-madagascar-paper> (accessed 14 December 2014) [hereafter Hong: 2014].

³³¹ Giulia F & al. ‘*Land grabbing in Madagascar – Echoes and testimonies from the fields*’ (2013) 16 [hereafter Giulia: 2013].

3.3.2.1 Impact on food and livelihoods

Tozzi Green, an Italian Tozzi Holding Group's subsidiary company has invested in a project called Biomass Biofuel Ihorombe Project for the cultivation of jatropha which is an energetic plant useful in the production of agrofuels.³³² They are also involved in the plantation of dry beans and grains as well as plants for oil. There is uncertainty on whether the biofuel generated would be used to serve the energy need of Madagascar itself as stated by the company or whether it would be exported back to Italy.³³³ For the project to materialise a land lease was signed between Tozzi Green and the Malagasy authorities in August 2012 and 6558 hectares of land was leased in the rural district of Ihosy for a period of 30 years.³³⁴ According to the Malagasy Circular 321 of October 2010 which provides for strict and lengthy procedures to be followed when signing the lease, the areas' boundaries must be clearly marked and a field assessment is mandatory after consultation and input from the local communities.³³⁵

In the Tozzi Green Project, it is important for the State to mark the boundary and to officially declare the land as state land in order to be able to lease it to a foreign investor. The said procedure is a costly one and all land conflicts have to be resolved first.³³⁶ The local community living there belongs to the Bara ethnic group who has been herders for centuries and has been grazing their cattle on those lands. As described above, the Land Reform of 2005 does protect occupancy by conferring customary land rights. However, in the case of Tozzi Green, it was interpreted that grazing lands do not fall within the ambit of untitled private property which acknowledges

³³² Environmental Justice Organisations, Liabilities and Trade (EJOLT) 'Italian Company Tozzi Green is grabbing land in Madagascar' available at <http://www.ejolt.org/2013/02/italian-company-tozzi-green-is-grabbing-land-in-madagascar/> (accessed 13 January 2015).

³³³ GRAIN 'Who is behind Senhuile-Senethanol?' available at <http://www.grain.org/article/entries/4815-who-is-behind-senhuile-senethanol> (accessed 14 February 2015).

³³⁴ Perrone T 'Land grabbing in Madagascar: when others come to take the land' available at <http://magazine.expo2015.org/cs/Exponet/en/sustainability/land-grabbing-in-madagascar-when-others-come-to-take-the-land>. (accessed 14 February 2015).

³³⁵ Ministry of Decentralisation and Territorial Planning – Circular No. 321/10/MATD/S6/DGSF (25 October 2010).

³³⁶ Giulia (2013) 57.

customary rights.³³⁷ This added to the legal complication and uncertain vision of the government about whether the reform was meant to protect land tenure or to boost FDI.

Interviews carried out by Giulia revealed that the Tozzi Green Project is hampering the livelihoods of the local communities in the district of Ihosy because of limited access to grazing lands. The cattle are central to the living of the Bara population. They are not only a source of food but equally important in agriculture as they till the land to make it softer and facilitate cultivation.³³⁸ Important rituals, whether when there is death or someone is sick, are practised by sacrificing the *Zebus* (Cow). Members of the village of Ambararatabe of the Satrokala municipality reported that the cultivation of the *jatropha* which is an unknown crop to them is causing a lot of difficulties and affecting their capabilities. The crop has restricted access to the fields for the cattle. If a *Zebus* would step on the field and destroy one *jatropha* plant, the owner will have to pay a fine of 12 Euros.³³⁹

3.3.2.2 Impact on culture and society

Jaovelo-Dzao illustrated earth as the first wife of the creator who amasses the living people and wraps the dead.³⁴⁰ In Madagascar, land is where human beings live and also connect with their ancestors.³⁴¹ Aliderson contends that *tany* or land can be interpreted as to mean earth, soil, field, world, environment, estate, ground or native land.³⁴² Therefore, *tanindrazana* is a concept which implies a symbol of national unity introducing the first line of the Malagasy national anthem.³⁴³ Each family has its own *tanindrazana* a rural piece of land that symbolises their ancestral territory. The concept is engrained in the Malagasy culture and it is a national sentiment without any

³³⁷ Giulia (2013) 58.

³³⁸ Giulia (2013) 60.

³³⁹ Giulia (2013) 37.

³⁴⁰ Jaovelo-Dzao R *Mythes, rites et trances a Madagascar* (1996) 15.

³⁴¹ Fournet-Guerin C 'La Dimension spatiale du fait national a Madagascar' (2009) 7 *Espace Politique* 1.

³⁴² Aliderson F 'Land as foundation of the Malagasy nation seen through Randria's Kabary' available at <http://laboratoires.univ-reunion.fr/oracle/documents/375.html> (accessed 14 December 2014).

³⁴³ Ry tanindrazanay malala o!

exaggeration.³⁴⁴ The ancestors have to be evoked for protection of the family and society and for approval before embarking on any project. Since the ancestors and the land are intertwined, the latter is given utmost respect and importance.

In order to always enjoy from the protection of the ancestors, the umbilical cords of newborn babies are buried in the ancestral lands where the very same bodies will be buried as dead after life.³⁴⁵ This practice is even accepted among younger generations living in the capital city of Antananarivo as studies show that they desire to be buried in their ancestral lands in the village.³⁴⁶ Land in Madagascar is not only a symbol of wealth. It is a necessity for not only present survival but also to ensure that the descendants can create *tanindrazana*.³⁴⁷ A Malagasy without *tanindrazana* considers himself as someone without blessing and not as a 'full person'.³⁴⁸ The consequence of not having a *tanindrazana* is marginalisation from the society since those without one would be considered as people without a history.³⁴⁹ *Tanindrazana* also implies control over the land which means that labourers without it cannot claim right to property.

When the Daewoo scandal erupted in Madagascar, people showed their discontent by evoking *tanindrazana* as a central argument against the project.³⁵⁰ Ancestors are believed to have a say in living people's lives to the extent that illness, misfortune and poverty are often related to the discontent and dissatisfaction of the ancestors.³⁵¹ In 2009, the state had promised 1.3 million hectares of land in the region of Melaky, Sava, Menabe and Atsinanana to Daewoo Logistics of

³⁴⁴ Keller E 'The banana plant and the moon: Conservation and the Malagasy ethos of life in Masoala, Madagascar' (2008) 35 *American Ethnologist* 650 [hereafter Keller: 2008].

³⁴⁵ Rakotoarivony C 'Terre ancestrale ou parc national ? Entre legitimité sociale et legalité a Madagascar' (2006) *Vetigo* 17.

³⁴⁶ Heuvel M & Evers S 'Once there were rich-fields...life away from the ancestral land' (2007) 18 *Taloha*.

³⁴⁷ Keller (2008) 656.

³⁴⁸ Bloch M 'The slaves, the king and Mary in slums of Antananarivo' in Thomas N & Humphrey C (eds) *Shamanism, history and the state* (1994) 133-145.

³⁴⁹ Evers S 'Expropriated from the hererafter: the fate of the landless in the Southern Highlands of Madagascar' (2006) 33 *Journal of Peasant Studies* 417.

³⁵⁰ Hong (2011).

³⁵¹ Astuti R & Harris P 'Understanding mortality and the life of the ancestors in rural Madagascar' (2008) *Cognitive Science* 713-740.

South Korea for the cultivation of corn and palm oil for exportation to South Korea. A significant lack of information on the terms of the 99 years deal to the public was considered to be an act of treason as it was interpreted as ‘selling the ancestors to foreigners’.³⁵² The cultural impact of land investments in Madagascar cannot be ignored as it is too central to the Malagasy way of life. Culture is indeed an essential capability of Malagasies and any mode of development which does not respect this cannot be said to be in line with the CA.

3.3.2.3 Impact on access to land

It has been reported that access to land and effective control over it are key requirements for economic development in Madagascar.³⁵³ So far, access to land has not been respected by the authorities who have been involved in land grabbing. Indeed, over two million complaints based on eviction from land have been recorded in Madagascar.³⁵⁴ The village of Faharetana in the region of Itasy has been the subject of massive eviction following the decision of the Malagasy government to allow Bionexx, a company involved in the production of Artemisia, in 2012. It has been reported that violence and threat were used on the local communities to force them to leave the land which has been held by them for decades now.³⁵⁵

Also, residents of Soanierana have faced evictions due to large scale land investments. It is reported that bulldozers have been used to destroy their houses and belongings.³⁵⁶ Upon resistance from the residents, authorities have made use of force with several persons injured.³⁵⁷ The residents have been living in that place since 1972 but they have not been able to obtain a title despite their

³⁵² Giulia F & al. ‘Land grabbing in Madagascar – Echoes and testimonies from the fields’ (2013) 16 [hereafter Giulia: 2013].

³⁵³ Ramarason M et al. ‘Promoting women’s access to and control over land in the central highlands of Madagascar’ International Land Coalition (March 2011) available at <http://www.landcoalition.org/en/resources/promoting-womens-access-and-control-over-land-central-highlands-madagascar> (accessed 12 June 2017).

³⁵⁴ ‘Snatching up Madagascar’s land’ Slow Food (12 August 2011) available at <https://www.slowfood.com/snatching-up-madagascars-land/> (accessed 12 June 2017).

³⁵⁵ Giulia (2013) 75.

³⁵⁶ Toure S ‘Madagascar: People of Soanierana evicted, with 48 hours warning only’ Ecofin Agency (January 2017) available at <http://www.ecofinagency.com/law/1301-36278-madagascar-people-of-soanierana-evicted-with-48h-warning-only> (accessed 12 June 2017) [hereafter Toure: 2017].

³⁵⁷ Toure (2017).

multiple attempts. People living in those areas do not have the financial means to register their lands. Therefore, in the absence of written titles, they were evicted after an agreement was reached between the investors and the leaders. In the same vein, fifty households were displaced in the village of Menalanga for the purpose of large scale land investments.³⁵⁸ No proper houses were constructed in the form of compensation for them. It is also reported that they were never consulted before the land lease was finalized and signed.

3.3.2.4 Impact on access to water

It has been reported that over half of the Malagasy population lives without safe access to water³⁵⁹ which results in very poor level of sanitation and hygiene.³⁶⁰ Large scale investments in Madagascar have further accentuated this problem with local communities and villagers being driven away from water-rich areas to be used for land investments.³⁶¹ Water being central to the livelihoods of local communities, a lack of access to it is proving to be detrimental and deadly to them.³⁶² Land grabbing in Madagascar has drastically affected access to water for the local communities with the government reportedly ready to discuss possibilities of even selling water access with foreign investors.³⁶³

For instance, one of the most significant investments has been the Ambatovy SA mining project which regroups the Canadian Sherritt International Company, Korea Resources Company from South Korea and Sumitomo Company Ltd from Japan.³⁶⁴ They are investing in the mining of cobalt

³⁵⁸ Stagni A 'The great Rush – European Union responsibility in natural resources grabbing' (2011) 28.

³⁵⁹ Access to water – Madagascar *Water Aid* (June 2017) available at <http://www.wateraid.org/mg> (accessed 12 June 2017).

³⁶⁰ Water, Sanitation and hygiene' UNICEF Madagascar (2017) available at https://www.unicef.org/madagascar/eng/wes_15164.html (accessed 12 June 2017).

³⁶¹ MacDonald A et al 'Groundwater in Africa' in Allan J (ed) *Handbook of land and water grabs in Africa: Foreign direct investment and food and water security* (2013) 376.

³⁶² Mliga A 'Madagascar's food and water security as affected by natural disasters' Future Directions International (6 September 2011) available at <http://www.futuredirections.org.au/publication/madagascars-food-and-water-security-as-affected-by-natural-disasters/> (accessed 12 June 2017).

³⁶³ Giulia (2013) 7.

³⁶⁴ Sherritt 'Metals – Ambatovy joint venture' available at <http://www.sherritt.com/operations/metals/ambatovy-joint-venture> (accessed 14 January 2015).

and nickel with the financial support of the EIB, Japanese Bank for International Cooperation and the ADB.³⁶⁵ They have made an investment amounting to USD 6.9 billion. The project consists of the mine area in Ampitambe village on an area of 7596 hectares and the plant site which is 11 km away from the Southern Port of Tamatave on an area of 320 hectares. A pipe-line of the length of 220 km links the mine site and the plant site.³⁶⁶

The project had a huge impact on the lives of the local communities, whereby an area of 2500 hectares had to be cleared for the construction of the above mentioned pipeline. There was equally serious pressure on the supply and accessibility of water resources. There was a significant risk of pollution and fish dying in the Torotorofotsy and Ranomainty Rivers.³⁶⁷ In some cases, waterways are diverted from the local communities and directed towards lands that have been allocated to foreign investors as is the case with the Tozzi Green involved in the *Jatropha* cultivation in Ambararatabe.³⁶⁸ Undoubtedly, there has been a significant impact on access to water for local communities as a result of large scale agricultural investments in Madagascar. A mode of development premised on reduced accessibility to water, a primordial capability, is against Sen's CA.

3.3.2.5 Political participation

Local communities are often consulted when the authorities plan foreign investments which would affect them. However, these consultations tend to be asymmetrical with lack of information and misguidance with regard to the real impact of the projects. In some cases, objections from the local authorities are not given any due consideration. For instance, in the case of Tozzi Green's investments in the Ivaro West village in Madagascar, opposition from the local communities was not considered in the decision-making process.³⁶⁹

³⁶⁵ Triki T & Faye I 'Financial inclusion in Africa' (2013) 84.

³⁶⁶ SNC-LAVALIN 'Ambatovy Nickel Project-Madagascar' available at <http://www.snclavalin.com/en/ambatovy-nickel-project-madagascar> (accessed 13 January 2015).

³⁶⁷ Giulia (2013) 59.

³⁶⁸ Giulia (2013) 36.

³⁶⁹ Giulia (2013) 8.

The Mayor of the Ambatolahy village opposed the project after consulting with local communities and not getting their consent.³⁷⁰ A letter was drafted, signed by villagers and the Mayor, and was addressed to the President of Madagascar rejecting any investment from foreign companies as it negatively impacted on their lives. They argued that it was an attempt on their traditional and cultural Bara identity especially because the Zebus were being affected.³⁷¹ Despite their opposition, the Italian company has tilled lands around the village of Ivaro West at night time and in the morning the villagers could only helplessly take note of the act.

Similarly, Ambatovy Company is involved in mining activities in the municipality of Andasibe and the local communities were not made aware of the construction of a 220 km long pipeline which was important for the mining activities which was affecting their livelihoods. It is reported that even the National Office for the Environment did not consult the local communities when the environmental impact assessment was being conducted.³⁷² It is therefore evident that local communities are being restricted in such type of decision making process. In rare cases where consultation and participation are being allowed, they are only proving to be an eye-wash.³⁷³

3.4 Conclusion

The way land investments have been carried out in Ethiopia and Madagascar has shown some recurring trends as well as some unique features. As described through the two case studies above, land investments have considerably decreased access to natural resources. In the presence of powerful foreign actors in the form of investors on their lands, the local communities in each state have seen their access to water, land or forest restricted- which even brought about destruction of some the local communities. One recurring feature in these cases of land investments is a lack or a

³⁷⁰ Giulia (2013) 42.

³⁷¹ Giulia (2013) 45 - The zebus is the backbone of our medical system; The zebus is our only mean of survival; The zebus is our tool of cultural exchange; The zebus is our banking system; The zebus is our connection to our ancestors; The zebus is a currency of social and mutual aid and it is our social cement.

³⁷² Giulia (2013) 60.

³⁷³ Vermeulen S & Cotula L 'Over the heads of local people: consultation, consent and recompense in large-scale land deals in Africa' (2010) 37 *Journal of Peasant Studies* 899.

non-respect of free, prior and informed consent and active participation. It is therefore important to look at the position of the national laws in relation to free, prior and informed consent.

The land tenure systems of the two states, though both similar in not guaranteeing land rights, are different in substance. In Ethiopia, the focus seems to be on the constitutional statement that land belongs to the state. There is a lack of legislations and regulations to regulate land rights. In Madagascar, attempts have been made to reform the land tenure system but some types of land such as grazing pastures are not catered for or at least unclear to their status. It is also perhaps the country which is most affected in terms of culture in relation to concepts such as *tanindrazana* and *Zebus*. Land investments in the two case studies were supposed to bring development to the countries. While one can argue that economic development has become a reality, human development has become highly questionable. The development of the local communities never becomes a reality. In fact, with restricted access to resources, they lose their opportunities to develop in their own way. In addition, land grabbing has seriously implications on the attainment of SDGs, for instance, ending poverty (Goal 1), zero hunger (Goal 2), good health and well-being (Goal 3), clean water and sanitation (Goal 6), responsible consumption and production (Goal 12), climate action (Goal 13), life on land (Goal 15), peace and justice (Goal 16).

The two case studies have clearly shown that access to food, land, water, culture and political participation in decision-making processes are being undermined and neglected. These are the established human capabilities in the context of large scale land investments as discussed in the previous chapter. The fact that the rights to these capabilities are being systematically violated indicates that agricultural investments by foreign actors in Ethiopia and Madagascar are not in harmony with the CA. Such types of economic development are not rendering local communities capable to achieve their own state of happiness and success.

The five human capabilities are all arguably guaranteed by international human rights instruments in the form of socio-economic rights. In addition, a development process that would follow the CA has been advocated by international instruments dealing with the right to development. The next chapter will hence focus on the right to development as a normative framework based on which development that renders people capable by protecting human capabilities can be advocated for.



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Chapter 4: ASSESSING THE POTENTIAL OF THE RIGHT TO DEVELOPMENT IN PROTECTING HUMAN CAPABILITIES AFFECTED IN LAND INVESTMENTS IN ETHIOPIA AND MADAGASCAR

4.1 Introduction

It is contended by way of Sen's CA that development can only be substantial for the local communities in Ethiopia and Madagascar- by having complete access to the selected human capabilities and the autonomy to decide on the type of development they favour. The existing international legal and normative framework on human rights indubitably provides for a structure of rights that protects the five human capabilities.

It is reiterated that the overall purview of the thesis is a balanced way of development which will economically benefit the states in questions and their citizens and respect the human rights and freedoms of local communities affected by unmeasured and unsustainable development. It is the aspiration of every state and all its nationals to move forward on the path of development. This is generally measured by economic development in terms of FDI, import-export capabilities, creation of jobs and quality of public infrastructure and services. However, it is essential to ensure that basic human rights and fundamental freedoms of people, especially the most vulnerable ones, are not affected. It is equally critical to ensure that development projects are carried out in the most consultative and participatory form possible, making local communities the main stakeholder in development.

However, one can argue that the exact opposite is happening in the two selected case studies. Development projects are arguably only reaping economic benefits to the already privileged class of the population whereas the local communities have not profited from such development at all. Instead, development has been carried out in a way that violates their basic human rights and drastically affects their lives and livelihoods. In essence, local communities are entitled to development as a matter of right but are only falling as victims to the wrath of inhumane development as exposed by chapter three of the thesis. Land, water, food, participation and culture which are what render the local communities capable to achieve what they desire are being blatantly violated.

Yet, international normative framework on human rights and development proposes a different course of development, one which is all-inclusive, non-discriminatory and geared towards human development instead of merely economic development. Indeed, international human rights law provides for such model of development as a right, assembled under the right to development (hereafter the RTD). It will be argued in the present chapter that if development projects in Ethiopia and Madagascar are anchored in the RTD, they will result in human development as per Sen's approach with all due respect to human rights and freedoms. Differently put, the RTD has the potential to protect and promote the human capabilities of local communities in terms of land, food, water, participation and culture.

The current chapter will therefore introduce the RTD in terms of its content and nature. As a right, its effectiveness in protecting the interests and capabilities of local communities in the selected case studies will also be argued. It is then critical to analyse to what extent the RTD is provided in the domestic legal framework of Ethiopia and Madagascar. Its justiciability at the domestic level will be considered to assess the extent to which it can favour an all-inclusive human development. It will be argued that the RTD has the potential to act as a driver of the CA towards large-scale land investments in Ethiopia and Madagascar and therefore it has a quintessential role to play in the protection of the rights of local communities and individuals in the middle of large scale land investment projects.

4.2 The right to development

The argument of development, both for the local communities and for the general population has time and again been the prevalent discourse in the land investments projects in the two case studies. The rhetoric of such investments bringing about the creation of employment in the rural areas, an upsurge in exports and the allocation of more advanced technologies have been frequently used by the state or its agents to validate land investments.³⁷⁴ Likewise, it is often maintained that the proceeds gained from the land investments would prove to be beneficial to both the people in urban areas more precisely in terms of enhancing the standard of living and quality of life as well as

³⁷⁴ See BBCNews 'Analysis: land grab or development opportunity' (23 February 2012) available at <http://www.bbc.com/news/world-africa-17099348> (accessed 18 September 2015)

bringing development to the rural areas.³⁷⁵ No doubt can be raised on the fact that to make progress and to experience a positive change in the standard of living is what every individual will generally aspire for. Therefore, there exists a right to such aspiration occasioning in the state to normally be the duty-bearer of the right. This is the contested and disputed RTD.

The RTD forms part of the third generation of rights together with the right to environment and the right to peace.³⁷⁶ In fact, the objective of the RTD is to deliver a new international order which will smooth the process of the full realisation of human rights whereby it aims at attaining this goal by conferring a right based on which everyone can partake in the process of development and can reap benefits equally and legitimately from it. Marks has highlighted that the RTD has been a comprehensively challenged and disputed issue right since the 1970's.³⁷⁷ The RTD has been provided for by the United Nations Declaration on the Right to Development (hereafter the Declaration) which was adopted by the General Assembly in 1986.³⁷⁸ The RTD has also been recognised by other declarations and conferences among which the Vienna Declaration of 1993 is the most popular one.³⁷⁹ Nevertheless, irrespective of the far-reaching support, the RTD has encountered momentous practical impediments in its effective implementation.³⁸⁰ Lindroos contends that there is an intrinsic elusiveness on the substance of the RTD and a dearth of political consensus on its modes of implementation further thwarts its recognition as a right.³⁸¹

Development was looked upon as being a prerequisite for the effective and complete realisation of human rights as early as after the Second World War which is the early stage of the development of

³⁷⁵World Bank ‘Economic Overview – Ethiopia’ (5 April 2015) available at <http://www.worldbank.org/en/country/ethiopia/overview> (accessed 18 September 2015).

³⁷⁶ Sachs A ‘Social and Economic Rights: Can they be made justiciable’ 53 (2000) *SMU Law Review* 1383 [hereafter Sachs: 2000].

³⁷⁷ Marks S ‘The human right to development: Between rhetoric and reality’ 17 (2004) *Harvard International Law Journal* 137 [hereafter Marks: 2004].

³⁷⁸ Declaration on the Right to Development, UNGA Res 41/128 (04 December 1986) UN Doc A/41/53.

³⁷⁹UN World Conference on Human Rights *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF157/23.

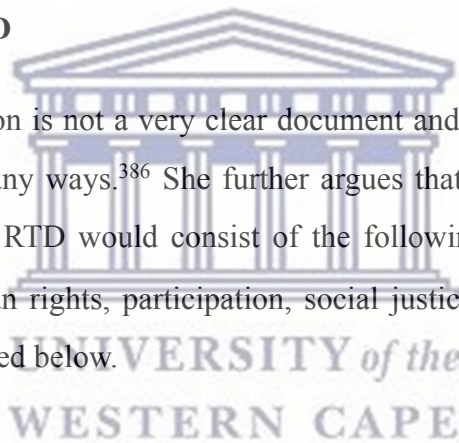
³⁸⁰ Marks (2004) 137.

³⁸¹ Lindroos A *The right to development* Research Report University of Helsinki (1999).

human rights law.³⁸² However, there was still no explicit entitlement to a RTD as such. Incontrovertibly, the term RTD only appeared with the emergence of the concept of New International Economic Order and was used by leaders of developing states to call for greater north-south equality and economic organisations and arrangements favourable to them.³⁸³ It is in the 1970's that the RTD started to evolve as a human right as the upshot of a movement called 'structural approach' which projected solidarity rights as the way to resolve global issues.³⁸⁴ In 1986, there was international consensus to endorse the RTD as a right to a development process which has to adhere to certain standards and for which the state had the prime task by way of the Declaration on the Right to Development.³⁸⁵ The content and nature of the RTD will be discussed in the following section in order to have a proper background of the RTD to eventually assess its potential as a driver of the CA as a means for proper economic development which accounts for the well-being of humans.

4.2.1 The content of the RTD

Piron argues that the Declaration is not a very clear document and consequently the content of the RTD is often interpreted in many ways.³⁸⁶ She further argues that, based on current development philosophy, the content of the RTD would consist of the following components: Comprehensive development, respect for human rights, participation, social justice and international cooperation. These components are considered below.



³⁸² The Article 28 of the Universal Declaration of Human Rights was to the effect that there should be 'a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised'; The Final Act of the International Conference on Human Rights acknowledged that 'the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development' (13 May 1968) UN Doc A/CONF32/41 at page 3.

³⁸³ Villaroman N 'The right to development: Exploring the legal basis of a supernorm' 22 (2010) *Florida Journal of International Law* 300 [hereafter Villaroman: 2010].

³⁸⁴ Tomuschat C *Human Rights: Between idealism and realism* (2003) 52 [hereafter Tomuschat: 2003].

³⁸⁵ United Nations Commission on Human Rights (UNCHR) Res 36 (XXXVII) (11 March 1981) UN Doc A/RES/36(XXXVII).

³⁸⁶ Piron L 'The right to development – A review of the current state of debate for the Department for International Development' (April 2002) 9 available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2317.pdf> (accessed 14 June 2017) [hereafter Piron: 2002].

4.2.1.1 Comprehensive development

The RTD positions the human being at the centre of development. The Declaration refrains from defining development solely as economic growth but as a comprehensive process which is multifaceted with cultural, social, political and economic elements.³⁸⁷ It has, as object, the realisation of its aim of ‘a social and international order in which the rights and freedoms set forth in the UDHR can be fully realized’.³⁸⁸ The RTD could then best be interpreted as a right to a specific course of development which may vary from state to state and culture to culture. This right equally comes as a safety device as it provides that during such a process of development, there are certain standards in terms of human rights and liberties that have to be conformed to. Tomuschat maintains that because of the collective nature of the RTD, there exist multitudes of legal and factual elements beyond the control of the government.³⁸⁹

The Preamble of the Declaration expounds on development as being a wide-ranging economic, social, cultural and political process, which targets at the relentless process of upgrading the well-being of the entire population. It is indubitably translucent that economic development is not the only purview of the RTD. Social and cultural development has also been given equal standing. In addition, the general aim seems to be a guarantee of the overall welfare of the people. According to article 2 of the Declaration, the individual is the active participant, contributor and main beneficiary of the right. Tomuschat considers the RTD as an aggregate right which draws its substantial object from other human rights instruments.³⁹⁰ It is contended that the RTD can only be considered as separate human rights with additional value if the process of development brings together all the existing human rights in an all-inclusive manner.³⁹¹ It is transparent from the object of the RTD that the objective is not merely about boosting up the income or GNP of a state and development is therefore not simply an economic one.

³⁸⁷ Article 2(1), 4(2) and 8(1) of the Declaration.

³⁸⁸ Preamble of the Declaration on the Right to Development.

³⁸⁹ Tomuschat (2003) 51.

³⁹⁰ Tomuschat (2003) 48.

³⁹¹ Sengupta A ‘Right to development as a human right’ (2001) 36 *Economic and Political Weekly* 2529 [hereafter Sengupta: 2001].

4.2.1.2 Respect for human rights

The Declaration provides that any development process should respect human rights and fundamental liberties of all individuals as well as help in the realisation of rights for everyone.³⁹² Article 6 further stipulates that failure to respect and observe human rights amounts to an obstacle to development. Piron contends that since the Declaration enshrines the principle of indivisibility and inter-dependence of human rights, it implies that equal attention needs to be given to both civil and political and socio-economic rights.³⁹³

Unquestionably, the Declaration provides for equal rights of access to natural resources, transparent decision-making process and an impartial and just sharing of all the benefits derived from development. The Declaration equally makes reference to the right to self-determination and the right to sovereignty of natural wealth and resources of the people.³⁹⁴ Accordingly, development cannot be done in a way that becomes a form of economic coercion for the local communities or simply the less powerful one as it would amount to a violation of the right to economic self-determination.³⁹⁵

4.2.1.3 Participation

Involving human beings, who are at the centre of development as supported by the CA is another integral content of the RTD. Article 8 encourages popular participation whereas article 1 clearly provides for ‘a right of individuals and peoples to participate in, contribute to and enjoyment’ development. The concept of participation has been qualified as one which is free, active and meaningful.³⁹⁶ It implies that the Declaration requires the international community and states to formulate development policies with human being as the main focus and primary decision-makers.

³⁹² Article 1 and 6 of the Declaration.

³⁹³ Piron (2002) 10.

³⁹⁴ Article 1(2) of the Declaration.

³⁹⁵ Villaroman (2010) 316.

³⁹⁶ Article 2(3) of the Declaration.

4.2.1.4 Social Justice

The Declaration regards development as a means to promote social justice and eradicate social injustices. By way of its article 2(3), development processes should promote social justice characterised by a fair distribution of the benefits to all individuals. The RTD is also interpreted as one which enshrines the principle of equality of opportunities for all in accessing basic services and resources which eventually leads to an effective eradication of social injustices.³⁹⁷

4.2.1.5 International cooperation

Article 3 and 4 of the Declaration jointly advocates for the need of appropriate international conditions with relevant international policies and cooperation. This specific requirement entails the need for a New International Economic Order and world peace and security.³⁹⁸ Piron highlights that the requirement of appropriate international development policies and an effective international cooperation constitute the most controversial components of the RTD.³⁹⁹

4.2.2 The nature of the RTD

While it seems to be rather straight forward to list the core content of the RTD, it is quite problematic to clarify the nature of it. Very often, questions are asked relating to the nature of the RTD. What type of right is the RTD? Who bears the obligations of such a right and who are the beneficiaries? How effective is the monitoring, implementation and enforced of the RTD? All these questions no doubt raise a number of debate and controversies among scholars.⁴⁰⁰ It has repeatedly been referred to as the ‘right to everything’ and laid off as not being an apposite human right.⁴⁰¹ Gibson argues that the RTD hinders the already existing system of human rights because of its

³⁹⁷ Article 8(1) of the Declaration.

³⁹⁸ Article 7 of the Declaration.

³⁹⁹ Piron (2002) 11.

⁴⁰⁰ Oduwole O ‘International law and the right to development: A pragmatic approach for Africa’ International Institute of Social Studies (May 2014) 4 available at https://www.iss.nl/fileadmin/ASSETS/iss/Documents/Academic_publications/PCC_Inaugural_Lecture_20May2014.pdf (accessed 20 June 2017).

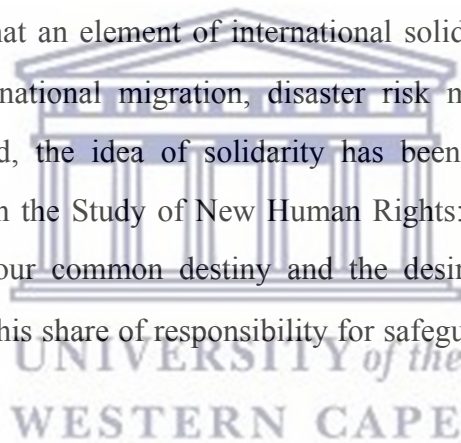
⁴⁰¹ Kirchmeier F *The Right to Development – where do we stand?* Frederich-EbertStiftung Occasional Paper No 23 (July 2006) Geneva (2006) 10 [hereafter Kirchmeier: 2006].

indeterminate and nebulous scope.⁴⁰² In contrast to this proposition, Ngang, Kanga and Gumede argue that contrary to orthodox understanding of human rights as being individualistic in nature, the RTD has a composite definition of being an entitlement that can be claimed by both individually and collectively.⁴⁰³ The following section sheds some light on the nature of the RTD.

4.2.2.1 A human right

The RTD is considered to be a composite human right to a particular process of development ensuring the realisation of all human rights: civil and political as well as socio-economic.⁴⁰⁴ This proposition has been reaffirmed by the UN 6th Report of the Independent Expert on the RTD by underlining its principle of indivisibility and interdependence.⁴⁰⁵

The RTD has an element of solidarity or collectiveness which is why it is often referred to as a solidarity right which ‘espouse a shared or collective responsibility for the realisation of human rights’.⁴⁰⁶ It is contemplated that an element of international solidarity is required to solve issues such as climate change, international migration, disaster risk management and the post 2015 development agenda.⁴⁰⁷ Indeed, the idea of solidarity has been discussed at the UN level as evidence by the Symposium on the Study of New Human Rights: The Right to Solidarity.⁴⁰⁸ The idea of solidarity recognises our common destiny and the desire to enable each individual to exercise his rights and assume his share of responsibility for safeguarding and improving the future



⁴⁰² Gibson N ‘The right to a clean environment’ (1990) 54 *Saskatchewan Law Review* 9.

⁴⁰³ Ngang C, Kanga S and Gumede V ‘Introduction: The right to development in broad perspective’ in Ngang C, Kanga S and Gumede V (eds) *Perspectives on the right to development* (2018) 1.

⁴⁰⁴ Kiechmeier (2006).

⁴⁰⁵ UN Economic and Social Council ‘Review of progress and obstacles in the promotion, implementation, operationalisation and enjoyment of the right to development’ 17 February 2004 E/CN.4/2004/WG.18/2 para 3.

⁴⁰⁶ Vandenbogaerde A ‘The right to development in international law: A call for its resolution’ (2013) 31 *Netherlands Institute of Human Rights* 188 [hereafter Vandenbogaerde: 2013].

⁴⁰⁷ UN HRC ‘Mandate of the Independent Expert on human rights and international solidarity’ UN Doc. A/HRC/RES/26/6 (16 July 2014).

⁴⁰⁸ See UNESCO ‘Symposium on the Study of New Human Rights: The Right to Solidarity’ Mexico 12-15 August 1980 available at <http://unesdoc.unesco.org/images/0004/000407/040770eo.pdf> (accessed 16 February 2017).

of mankind.⁴⁰⁹ It was argued that an element of solidarity in tackling problems related to development could result in the creative development of every nation, every community and every individual.⁴¹⁰

The RTD as a solidarity right has the possibility to ensure an all-round development as aptly summarised by UNESCO as the right for every individual to benefit from comprehensive development which includes access to human capabilities and also individuals and nations should cooperate for development.⁴¹¹

Piron contends that the RTD has been subject to numerous interpretations among which the most popular and widely used ones would be: the aggregate of socio-economic rights, the economic dimension of the right to self-determination and the right of people affected by the development process to realise their human rights through development processes.⁴¹² One unique feature of the RTD that deserves to be highlighted is that it can be considered as both a composite human rights and one with a component of collective solidarity.

In addition, the added value of the RTD is that it can be considered as the sum total or the aggregate of existing human rights.⁴¹³ Vandenbogaerde contends that it is a ‘process that demands the realisation of all rights, not merely the realisation of human rights individually’.⁴¹⁴ In the same vein, Sengupta has also described the RTD as a vector of all the different rights which implies that an improvement on the RTD will mean an improvement on all other rights.⁴¹⁵ The High-Level Task Force on the Implementation of the RTD was of the view that it entails the right of peoples to a

⁴⁰⁹UNESCO ‘Symposium on the Study of New Human Rights: The Right to Solidarity’ SS-80/CONF.806/6NGO/80/46/DH/11 (30 June 1980) para 9 [hereafter UNESCO: 1980].

⁴¹⁰ UNESCO (1980) para 10.

⁴¹¹ UNESCO (1980) para 32.

⁴¹² Piron (2002) 11.

⁴¹³ Abi-Saab G ‘The legal formulation of the right to development’ in Dupuy R (ed) *The right to development at the international level* (1980) 159.

⁴¹⁴ Vandenbogaerde (2013) 197.

⁴¹⁵ Sengupta S ‘On the theory and practise of the right to development’ (2002) 24 *Human Rights Quarterly* 868 [hereafter Sengupta: 2002].

‘constant improvement of their well-being’ which denotes again that the RTD protects the process of development.⁴¹⁶

It is apposite at this stage to discuss the RTD as provided by the African Charter (ACHPR) given that Ethiopia and Madagascar are parties to it. The ACHPR is the only human rights instrument that provides for binding obligations and duties on states towards the implementation of the RTD.⁴¹⁷ Article 22 of the African Charter provides that for two important concepts in relation to the RTD. Firstly, in its first paragraph, the African Charter provides that:

‘all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind’.⁴¹⁸

At the outset, it is noted that the ACHPR, based on the wording of article 22(1), does recognise the different modes of development which is not restricted solely to economic development but is expanded to social and cultural development.⁴¹⁹ In addition, the concept of development is to be discussed, applied and implemented by states by giving due consideration to the freedom of the people. This is in line with Sen’s CA whereby development is about freedom and enhancing the capabilities of human beings. Secondly, article 22(2) provides that the states have duties, both individually and collectively, towards the exercise of the RTD.

The African Commission has considered cases in relation to the RTD at different instances with a varying degree and scope of interpretation of the RTD. Prior to the *Endorois* case⁴²⁰, the African Commission gave an authoritative decision in *SERAC v Nigeria* recognising the collective rights of

⁴¹⁶ UN High-Level Task Force on the Implementation of the Right to Development ‘Right to development: Criteria and operational sub-criteria’ UN Doc. A/HRC/15/WG.2/TF/2/Add.2 (08 March 2010) note 12 [hereafter UN High-Level Task Force: 2010].

⁴¹⁷ Kamga S ‘The right to development in the African human rights system: The Endorois case’ (2011) 44 *De Jure* 386.

⁴¹⁸ Article 22(1) of the African Charter

⁴¹⁹ Adeola R ‘The right to development under the African Charter: Is there an extraterritorial reach?’ in Ngang C, Kamga S & Gumede V (eds) *Perspectives on the right to development* (2018) 37-38 [hereafter Adeola: 2018].

⁴²⁰ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) [hereafter Endorois: 2009].

peoples as having been violated by the actions of non-state actors (Shell Corporation).⁴²¹ However, it did not pronounce itself on the concept of ‘peoples’ and failed to identify the Ogoni community as a specific people and as beneficiary of the RTD.⁴²² This position changed in the *Endorois* case in which the Commission considered the interdependency of rights in protecting the RTD and highlighted the holistic character of the RTD encompassing elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities.⁴²³ The Commission qualified the RTD as being both ‘constitutive and instrumental’ and thus violating either the procedural or substantive element of the RTD is an infringement of the RTD.⁴²⁴

In essence, the African Commission, through the interpretation of article 22 of the African Charter, has significantly contributed to the understanding and interpretation of the RTD in a way that no judicial or quasi-judicial body around the world has done so far. The African Commission defined the concept of ‘peoples’, explained the content of the RTD and its multi-faceted dimension and clarified the threshold of people’s participation in development thus providing for guidance on the justiciability of the RTD.

Ngang and Kamga, while highlighting the major characteristics of the RTD in Africa, have stated that it can be considered as a mechanism with the power of establishing redistributive justice and as an integrated process through which opportunities can be equalised for the advancement of all people in Africa.⁴²⁵ In addition, while elaborating on the substantive entitlements of the RTD under the ACHPR, they elaborate on what socio-economic and cultural development entails as follows:

‘a scrutiny of other provisions of the Charter indicates that the rights to poverty ownership, employment and income security would contribute to economic development. The rights to health

⁴²¹ *Social and Economic Rights Action Centre and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

⁴²² Olowu D *An integrative rights-based approach to human development in Africa* (2009) 155.

⁴²³ *Endorois* (2009) para 128.

⁴²⁴ *Endorois* (2009) para 277 and 298.

⁴²⁵ Ngang C & Kamga S ‘O Cameroon, thou cradle of our fathers...: Land of promise’ and the right to development’ in Ngang C, Kamga S & Gumede V (eds) *Perspectives on the right to development* (2018) 186 [hereafter Ngang & Kamga: 2018].

care and education would contribute to social development, while the rights to the protection of traditional values, belief systems and customary practices would lead to cultural development'.⁴²⁶

Adeola has further argued that there is an extra territorial reach of article 22(2) of the ACHPR which clearly implies that states parties have a duty to assist in realising the RTD beyond their borders and national territories.⁴²⁷ She also highlights two levels of duties on states towards the RTD: firstly, to act individually and secondly in solidarity in realising the RTD in line with the notion of collectivity.⁴²⁸ This extraterritorial reach of the RTD under the ACHPR no doubt renders the RTD more justiciable and effective.

4.2.2.2 Right holders

The Vienna Declaration and Programme of Action (VDPA) has reaffirmed the 'RTD, as established in the Declaration on the Right to Development, as a universal and inalienable human right and an integral part of the fundamental human rights'.⁴²⁹ It is a right to be realised progressively as a process without however providing for the possibility for states to impose any retrogressive measures without any appropriate and legal justification. Villaroman maintains that the RTD was initially regarded as a people's right which could be claimed from the international community as a whole.⁴³⁰

Ultimately, it was changed into an individual human right and not exclusively a people's right wrapping merely global issues. Irrefutably, even if the RTD is best categorised as a collective right, the right to participate in the process and the right to benefit from development are reminiscent to the individual rights contained therein.⁴³¹ It is maintained therefore that the RTD has an internal and

⁴²⁶ Ngang and Kamga (2018) 186.

⁴²⁷ Adeola (2018) 46.

⁴²⁸ Adeola (2018) 43.

⁴²⁹ Vienna Declaration and Programmes of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 1 [hereafter Vienna Declaration and Programmes of Action: 1993].

⁴³⁰ Villaroman (2010) 300.

⁴³¹ Sengupta (2001) 2528.

an external dimension⁴³² with the possibility of it being an individual right and a collective right respectively. It is to be noted that the term ‘peoples’, which was formerly interpreted as meaning the whole population has now changed to mean a group within the whole population.⁴³³

There has equally been a debate on whether the RTD is to be interpreted as a right of the state. Villaroman reasons that the RTD would be more effective in the horizontal relationships between states and that it would be an excuse for not fulfilling their primary responsibilities from the states if the RTD is considered as a human right.⁴³⁴ Conversely, the RTD is less likely to be interpreted today as a state’s rights and is more regarded as a human right which implies that the beneficiaries of the RTD are human beings and not the states.⁴³⁵ Sengupta argues that even if states can act as right-holders on behalf of their citizens, the ultimate beneficiaries of the RTD remain the individuals.⁴³⁶ States may be given the entitlement of claiming the RTD on behalf of their citizens if the concept of state is accepted as meaning a collectivity of human beings.⁴³⁷

4.2.2.3 Duty-bearers

The state remains the primary duty-bearer of the RTD. In terms of the Declaration, the state has the responsibility to create ‘national and international conditions favourable to the realization of the RTD’.⁴³⁸ At the national level, states have the obligation to take ‘all necessary measures for the realisation of the right to development’ which must embrace the designing of development policies that are pertinent and apposite. States equally have to guarantee that all persons have equal access to natural resources and that they benefit from an equivalent distribution of wealth.⁴³⁹ The Report on

⁴³² Article 5 of the Declaration

⁴³³ Alfredsson G ‘Peoples’ Max Planck Encyclopedia of Public International Law para 24 available at http://ilmc.univie.ac.at/uploads/media/peoples_empil.pdf (accessed 22 September 2015).

⁴³⁴ Villaroman (2010) 323.

⁴³⁵ UN Report (1991) 24.

⁴³⁶ Sengupta (2002) 862.

⁴³⁷ Morss J ‘The legal relations of collectives’ (2009) 22 *Leiden Journal of International Law* 290.

⁴³⁸ Article 3(1) of the Declaration.

⁴³⁹ Article 2 and 8 of the Declaration.

the RTD affirms the obligation for states to take concrete steps to enhance economic, social and cultural conditions of people which would amount to fulfilling their RTD.⁴⁴⁰

The obligations towards the RTD that have to be borne by states are also of an international nature. There is the primary duty of international cooperation in accordance with article 4 of the Declaration. Therefore, states should, irrespective of financial or economic dissimilarities join forces to formulate international development policies which are in accordance with the interest of everyone comprising of local communities and peoples from rural areas. All states have the responsibility to work together to generate equitable economic relations and environment internationally.⁴⁴¹ Bunn argues that the principle of international cooperation in realizing the RTD is evidenced by the fact that developing states are given a preferential treatment when they are party to any international economic relation.⁴⁴²

It also emphasised the solemn commitment of all states towards the realisation of the RTD by stating that ‘states should cooperate with each other in ensuring development and eliminating obstacles to development and that the international community should promote effective international cooperation for the realisation of the RTD.’⁴⁴³ The VDPA has noted that the implementation of the RTD requires effective development policies at the domestic level.⁴⁴⁴

4.2.2.4 Implementation of the RTD

The external dimension of the RTD has the potential to provide for a complete framework of responsibility towards local communities. The internal dimension reaffirms the obligation on the domestic state to realise the RTD⁴⁴⁵ while the external dimension focuses on all states to cooperate

⁴⁴⁰ UN Report (1991) 44.

⁴⁴¹ Sengupta (2001) 2529.

⁴⁴² Bunn I ‘The right to development: implications for International Economic Law’ (2000) 15 *American University International Law Review* 1448.

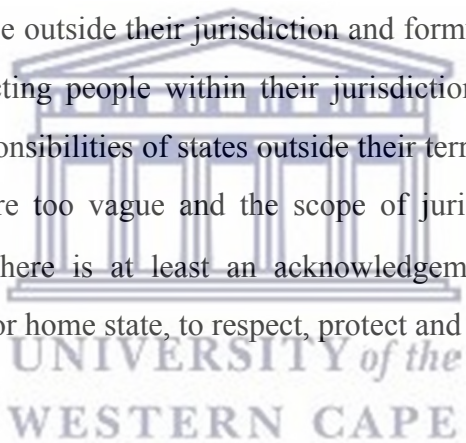
⁴⁴³ Vienna Declaration and Programmes of Action: 1993, para 10.

⁴⁴⁴ Vienna Declaration and Programmes of Action: 1993, para 10.

⁴⁴⁵ De Feyter K ‘Towards a multi-stakeholder agreement on the right to development’ in Marks S (ed) *Implementing the right to development: the role of international law* (2008) 98.

in ensuring the realisation of the RTD globally.⁴⁴⁶ The internal dimension of the RTD has acquired recognition as illustrated in the *Endorois* case where the African Commission was of the view that Kenya ‘bears the burden for creating conditions favourable to a people’s development’.⁴⁴⁷ It added that the failure of Kenya to provide for alternative lands for grazing meant that it did not ‘adequately provide for the Endorois in the development process’.⁴⁴⁸

The external dimension of the RTD, in turn, focuses on the states’ international and collective responsibilities towards development. Shelton echoes this statement by noting that ‘one valuable aspect of the RTD is that it encompasses a more broadly based legal obligation of states: the duties corresponding to the RTD are not exclusively domestic in nature but have an international component.’⁴⁴⁹ Indeed, the UN High-Level Task Force states that there exist three levels of States’ responsibility towards the RTD: collective actions of states through global and regional partnerships, adoption and implementation of policies by states individually against the negative effects of development to people outside their jurisdiction and formulation of national development policies and programmes affecting people within their jurisdictions.⁴⁵⁰ The first two obligations clearly apply to duties and responsibilities of states outside their territory. Despite criticisms such as these duties and obligations are too vague and the scope of jurisdiction has not been properly developed, it is argued that there is at least an acknowledgement that the RTD imposes an obligation on state actors, host or home state, to respect, protect and promote the RTD of indigenous peoples and local communities.



4.2.2.5 Enforcement and Justiciability

In international law, a right can be rendered non-justiciable by factors such as absence of a legal rule on the international level to interpret a situation or simply a decision to tag the situation as a

⁴⁴⁶ Vandenberg (2013) 198.

⁴⁴⁷ *Endorois* (2009) para 298.

⁴⁴⁸ *Endorois* (2009) para 298.

⁴⁴⁹ Shelton D ‘A response to Donnelly and Alston’ (1985) 15 *California Western International Law Journal* 527.

⁴⁵⁰ UN High-Level Task Force (2010), note 12.

political question which can only be answered by domestic jurisdictions.⁴⁵¹ As for the RTD, two factors have been mentioned, elucidating the difficulties in rendering it justiciable: the imperfect nature of its obligations and the enormous resources requirement as it is a positive right.⁴⁵² Such criticisms are also articulated against socio-economic rights even if it can be debated that they are today reflected as to having substantial justiciable elements.⁴⁵³

It is recognised that socio-economic rights have the obligations to respect and protect which have a more justiciable character compared to the responsibility of fulfilling which is more resource dependent. In the same vein, even if the obligation to fulfil of the RTD seems to be open to debate, it is at least common knowledge that the obligations to respect and to protect are utterly justiciable. The RTD can also be subject to concepts such as the prohibition of retrogressive measures without legal and acceptable justifications which applies to socio-economic rights to make it more justiciable.⁴⁵⁴ It is significant to highlight at this point that the African Commission has interpreted the RTD provided by article 22 of the ACHPR in the *Endorois* case, which implies that the RTD has the potential of becoming more justiciable.⁴⁵⁵

While substantively interpreting the nature of the RTD, the African Commission was of the view that the RTD:

‘is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end’.⁴⁵⁶

It is further elaborated that violating either the procedural or substantive element of it would constitute a violation of the RTD.⁴⁵⁷ The example used by the African Commission was quite

⁴⁵¹ Lauterpacht H ‘The doctrine of non-justiciable disputes in international law’ (1928) 24 *Economica* 288.

⁴⁵² Salomon M ‘Legal Cosmopolitanism and the Normative Contribution of the Right to Development’ in Marks S (ed) *Implementing the right o development: The role of international law* (2008) 21.

⁴⁵³ UN CESCR, General Comment No 9: The domestic application of the Covenant (1998) para 10.

⁴⁵⁴ Sachs (2000) 1389.

⁴⁵⁵ See discussion under section 4.2.2.1

⁴⁵⁶ *Endorois* (2009) para 277.

⁴⁵⁷ *Endorois* (2009) para 277.

pertinent - it does not suffice for the state to provide for houses only but to provide to the people the possibility to choose where they want to live. It mentioned that freedom of choice is part of the RTD.⁴⁵⁸ It also emphasised that while protecting and respecting the RTD, the state must ensure the effective and meaningful participation and consultation of people. According to the African Commission, recognising the RTD requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the RTD.⁴⁵⁹

The African Court on Human and Peoples' Rights has also recently interpreted the RTD in the case of the *African Commission on Human and Peoples' Rights v Kenya*.⁴⁶⁰ This case was initially brought before the African Commission in 2009 on behalf of the Ogiek people and other settlers living in the Mau Forest in Kenya after the government issued eviction notices against them. They alleged violations of the rights to life, property, natural resources, development, religion and culture protected by the African Charter. The African Commission referred the case to the African Court following the inaction of the State of Kenya related to the Order of Provisional Measures that were issued in December 2009.

While specifically interpreting article 22 of the African Charter on the RTD, the African Court highlighted the necessity and importance of effective consultation of local communities pertaining to their RTD. In addition, it held that the evictions have adversely impacted on their economic, social and culture development emphasising on development as an encompassing concept and not only an economic one. The Court added that it is mandatory for the state to actively involve the people in determining and developing health, housing and other economic and social programmes affecting them.⁴⁶¹ It is thus clear that, at least at the level of the African system of human rights, the RTD is considered as a human right which is justiciable and enforceable.

⁴⁵⁸ Endorois (2009) para 278.

⁴⁵⁹ Endorois (2009) para 277.

⁴⁶⁰ *African Commission on Human and Peoples' Rights v Kenya*, App. no. 006/2012, Judgment of 26 May 2017 [Hereafter Ogiek Case: 2017].

⁴⁶¹ Ogiek Case (2017) para 210.

Furthermore, while defining the nature of the RTD, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has noted that almost all the rights from Article 1 to 15 of the ICESCR ‘touch upon the substance of the right to development’, in particular the right to an adequate standard of living.⁴⁶² Former President Singh of the International Court of Justice has also noted that:

‘a right to development is a recognised principle of international law beyond dispute. It is founded on the principles of the UN Charter, namely sovereign equality of States, non-discrimination, the principle of inter-dependence and international cooperation’.⁴⁶³

Obstructions such as erroneous and indefinite contents as well as issues in relation to the duty-bearers and the beneficiaries make the justiciability of the RTD challenging. Yet, it is indisputable that the RTD is a vital right which is gradually gaining in prominence and with time more substance will be added to its content making it more justiciable in a way socio-economic rights are today. So far, at the international level, it is still provided by a declaration which raises essential questions related to its probative force. Commentators generally refer to the Declaration as a ‘broad framework yet to crystallise into substantive law’.⁴⁶⁴ However, there is general consensus that General Assembly resolutions and declarations do influence and initiate the process of custom-building, thus playing an important part in the international law making process.⁴⁶⁵ In addition, the CESCR has explicitly highlighted the importance of the Declaration and the need for states to take full account of it.⁴⁶⁶

Sloan argues that the fact that the RTD was provided by a declaration coming from the General Assembly which is representative of the world community giving rise to reasonable expectations

⁴⁶²Committee on Economic, Social, and Cultural Rights, Submission in Follow-up to Human Rights Council Resolution 25/15 ‘The Right to Development’, available at: www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForceWrittenContributions.aspx (accessed 10 January 2017).

⁴⁶³ Bulajic M *Principles of International Law* (1993) 74.

⁴⁶⁴ Salomon M & Sengupta A *The right to development: Obligations of states and the rights of minorities and indigenous peoples* (2003) 26.

⁴⁶⁵ Simma B & Alston P ‘The sources of human rights law: Customs, jus cogens and general principles’ (1988) 12 *Australian Yearbook of International Law* 90.

⁴⁶⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No 3 ‘The nature of states parties’ obligations’ (1990) 14.

from the state is indicative of the probative force of the Declaration.⁴⁶⁷ The latter also refers to the RTD as an inalienable human right to which every human person and all peoples are entitled and scholars therefore argues that there is little doubt that the General Assembly wanted to provide for a legally guaranteed RTD.⁴⁶⁸

4.3 The potential of the RTD as a driver of the capability approach

Both the content and the nature of the RTD as discussed above are indicative of the fact that it is a right that can act as a driver of the CA that should be adopted for economic projects directly affecting the lives of local communities and people in general. In terms of the content of the RTD, it advocates for a comprehensive development which is not only economically driven. In the same vein, the CA also considers development as an all-inclusive process which renders people capable to achieve what they desire.⁴⁶⁹ The RTD, as provided by international instruments discussed above, embodies the respect for human rights which in turn is a central tenet of the CA.⁴⁷⁰ The achievement of social justice is another target of the RTD in a similar way as it is an objective of Sen's CA.

It implies that the content and nature of the RTD are very close to the essence of the CA - both advocate for the individual as the central subject of development as a process which is meaningful to him.⁴⁷¹ It is thus contended that the RTD has the potential to act as a driver of the CA to land investments in Ethiopia and Madagascar. It is a human right that seeks to render people and the individuals capable to achieve what they desire through a comprehensive and all-inclusive mode of development. It is however argued that a mere resemblance from a theoretical viewpoint of the RTD and the CA will not suffice to provide for solutions to the infringements of human rights that are

⁴⁶⁷ Sloan B 'General Assembly resolutions resisted (forty years later)' 1987 39 *British Yearbook of International Law* 127.

⁴⁶⁸ Mansell W & Scott J 'Why bother about the right to development?' (1994) 21 *Journal of Law and Society* 174.

⁴⁶⁹ Stewart F 'Capabilities and human development: Beyond the individual - the critical role of social institutions and social competencies' UNDP Human Development Report Office Occasional Paper 2013/03 3 available at http://hdr.undp.org/sites/default/files/hdro_1303_stewart.pdf (accessed 13 July 2017).

⁴⁷⁰ Nussbaum M 'Capabilities and human rights' (1997) 66 *Fordham Law Review* 276.

⁴⁷¹ Parr S 'Theory and policy in international development: Human development and Capability Approach and the Millennium Development Goals' (2011) 13 *International Studies Review* 123.

resulting in large-scale land investments in the case studies of the thesis. As a right, the RTD needs to be implemented in a way that will provide for judicial solutions to human rights violations occurring because of large-scale land investments. As would be discussed below, the composite nature of the RTD, being a solidarity right that sees development as a process and the external dimension of it, makes it an apposite right that can be effective in finding a solution for local communities and individuals who have fallen victims of land investments in Ethiopia and Madagascar.

4.3.1 The composite nature of the RTD

It is evident from chapter three that land investments in Ethiopia and Madagascar are violating human rights belonging to all the generations of rights - civil and political rights, economic, social and cultural rights as well as the right to environment. Civil and political rights and socio-economic rights are all catered for by a robust human rights normative framework at the UN level as well as at the African level through treaties and conventions. Indeed, the five human capabilities that are being violated through land investments are protected by specific human rights laws which would be discussed in the following chapter. For the current discussion, it suffices to say at this point that land investments are violating numerous human rights of the local communities. While each of these rights has its own content, interpretation and enforcement mechanisms, judicial or quasi-judicial, it can be quite challenging to be invoking each one of them as a means of protection from the negative impacts of land investments.

This holds true mainly because the different generations of rights are protected to different degree in the two selected case studies. The Ethiopian Constitution (EC) for instance has enshrined all categories of rights and is the only one in Africa that has recognised the right to self-determination to ‘nations, nationalities and peoples’.⁴⁷² However, Kassie argues that when it comes to the justiciability of the socio-economic rights provided by the EC, the extent of it is debatable as the EC does not provide for a clear justiciability clause and the way the House of Federation would interpret socio-economic rights in Ethiopia would depend on the level of activism exerted by

⁴⁷² Kassie A ‘Human Rights under the Ethiopian Constitution: A descriptive overview’ (2011) 5 *Mizan Law Review* 44 [hereafter Kassie: 2011].

them.⁴⁷³ As for the Malagasy Constitution, the drafting style used is a different one which imposed varied obligations on the State and the possibility of multiple interpretation which is typical to civil law jurisdictions.⁴⁷⁴ The Malagasy Constitution refrains from defining the various socio-economic rights and only provide for the broad principles in general terms.⁴⁷⁵

It is clear therefore that, while the human capabilities and corresponding human rights violations are similar in the two jurisdictions, the ways and means used to confer protection upon them differ considerably from one jurisdiction to the other. The extent of their justiciability and the depth, nature and scope of their content vary considerably. The composite nature of the RTD, assuming that it is provided for in the domestic legal framework (which would be discussed later), can be considered as a solution to this problem of similar human capabilities being subject to varying degrees protection in the two countries and, by extension, to other jurisdictions in Africa.

From the above words, it is clear that for the RTD to be respected and fulfilled, it is imperative that any other human right must be respected. As a matter of illustration, it would imply that for the State of Ethiopia, for instance, to fulfil the RTD of Ethiopians through land-investments project based on agriculture, it would first be incumbent on the State to ensure that basic civil and political rights such as the right to life, participation or expression as well as socio-economic rights such as right to land, housing, property, food and livelihood must necessarily be fulfilled first. It is therefore argued that, using the RTD as a basis, other human rights and human capabilities of local communities will be conferred a more effective protection especially within development projects. The assumption to this argument is that the RTD is provided in the two selected jurisdictions, which will be assessed later on in this chapter.

4.3.2 The RTD as a solidarity right

Land investments projects in Ethiopia and Madagascar usually involved groups of peoples living in communities and who are affected in similar ways. For instance, when a community of people is

⁴⁷³ Kassie (2011) 54.

⁴⁷⁴ Dickson B *Introduction to French law* (1994) 11.

⁴⁷⁵ See Tetley W 'Mixed jurisdictions: common law v civil law (codified and uncoded)' UNIDROIT (2000) available at <http://www.cisg.law.pace.edu/cisg/biblio/tetley.html#119> (accessed 10 January 2017).

relocated for a particular development projects, all the members are affected in the same way with similar rights being affected.⁴⁷⁶ As a group, all of them are deprived of their land, would be denied access to water and food, children prevented from going to the local school where they are taught in their language and women being deprived from access to the forest to ensure the livelihood of their families.⁴⁷⁷ If these problems are studied from an individualistic point of view, they are all related to a specific human right which is being violated and which can be remedied. Arguably therefore, there is the possibility of each individual invoking the judicial protection of his or her right to land, access to food, access to water or right to education. However, such a manoeuvre would constitute an individualistic approach which would only ‘ensure that individuals are given primacy over the rights of groups and collectives and that it guarantees the dominance of our rights over our responsibilities to each other’.⁴⁷⁸ Such an approach lacks solidarity or collectivity which is required to solve problems related to collective violations of human rights associated with land investments in Ethiopia and Madagascar.

Economic development in Ethiopia and Madagascar is revealing acts of oppression on the weaker local communities by the stronger class of societies which are politically and economically powerful. The solidarity component of the RTD has the potential to rule out such oppression.⁴⁷⁹ It is also presented as a solution to the problem of major material obstacles to the full enjoyment of socio-economic rights in parts of the world which is suffering from underdevelopment.⁴⁸⁰ The development of an individual cannot be isolated from his political and social context. It is therefore argued that individual development of citizens of any country is a collective undertaking which

⁴⁷⁶ See Cotula L ‘Addressing the human rights impacts of land grabbing’ Directorate-General for External Policies (2014) 16.

⁴⁷⁷ Melis G ‘The socio-political impact of land grabbing in Africa and its destabilising effects’ Centre Studi Internazionali (03 November 2016) available at <https://www.cesi-italia.org/index.php?page=articoli&id=630&ln=en> (accessed 18 January 2017).

⁴⁷⁸ Mujkic D ‘Individual rights and solidarity’ RIGHT NOW human rights in Australia available at <http://rightnow.org.au/opinion-3/individual-rights-and-solidarity/> (accessed 10 January 2017).

⁴⁷⁹ UNESCO (1980) para 11.

⁴⁸⁰ UNESCO (1980) para 13.

includes the achievement of better living conditions in a harmonious environment and a social development which is based on justice and security.⁴⁸¹

The RTD as a solidarity right is essential for the genuine implementation of development as a right in a way which would render human beings capable. There are definitely other categories of rights such as the first and second generations which can be effective in solving human rights infringements involved in land grabbing as would be discussed in the next chapter. However, it is contended that, while these rights being equally important, they only have an individualistic scope and remedies are at a personal level. The RTD in turn provides for the collectiveness and solidarity that is crucial to eliminate or curtail human rights violations in land investments projects. As such solidarity is essential among the victims themselves in terms of uniting their voices and advocating their issues on a collective basis, among investors, foreign and international equal, who are required to show some solidarity towards the victims in the way they would impose modes of development in the local communities and between the states, who would sanction such investments and their citizens towards who they have an obligation to protect, promote, fulfil and respect their rights.⁴⁸²

4.3.3 The RTD as a process

In the two case studies, land investments as a mode of development have been described as a process that will eventually reap profit for the benefit of all citizens, local communities included.⁴⁸³ A process would normally be over a period of time which is, or is not, specifically calculated. During such a process, there is always that tendency to overlook or to justify human rights violations that may occur at the beginning as inevitable or a wrong for a greater good that will happen in future. In other words, for instance, a farmer who has been relocated from his ancestral land would be told that his relocation is important as the proposed development on that land would benefit him in terms of permanent and stable employments, which are normally sugar-coated

⁴⁸¹ UNESCO (1980) para 25.

⁴⁸² See Article 1 of the Proposed Draft Declaration on the Rights of Peoples and Individuals to international Solidarity available at <http://www.ohchr.org/Documents/Issues/Solidarity/ProposedDraftDeclarationSolidarity.pdf> (accessed 19 January 2017).

⁴⁸³ Mbaya S 'Land investments in Africa: It's all about responsible governance' Future Agricultures available at <http://www.future-agricultures.org/blog/entry/land-investments-in-africa-its-all-about-responsible-governance-> (accessed 15 January 2017).

promises.⁴⁸⁴ In this particular instance, even the right to land or property will not be an effective tool as it will be limited with a justification - economic progress, public interest and for the greater good of the country. The process of development therefore is not protected and there is no guarantee that all privileges and rights that should accompany the development process will be respected.

In such a case, the RTD as a process can present better protection to local communities who are victims of land investments. Water, land, participation, food and culture, as capabilities, are all essential in the realisation of an all-inclusive and humane development. In the process of development, access to these commodities for the local communities and indigenous peoples in Ethiopia and Madagascar is critical. The RTD as a process can therefore be a medium through which water, land, participation, food and culture, which are the most affected capabilities as identified in Chapter two, can be protected as the constituents of the process of development.

4.3.4 The external dimension of the RTD

Land investments in Ethiopia and Madagascar involve state as well as non-state actors. State actors would involve the host state (the state where the land investments are taking place) and the home state (the state of nationality of the foreign investors) while the non-state actors would be individuals from the host or home state, investment banks, corporate bodies and investment companies.⁴⁸⁵ It is clear that alleged violators of human rights of local communities who are victims of land investments in the selected case studies are not solely the host state (the country of nationality of the victims) but other global state and non-state actors are involved. It thus implies that the actor who should bear the legal responsibility is not only the domestic state but also the other above mentioned actors. The existing normative human rights framework on land, participation, food, water and culture would dictate that it is the domestic states, in the current case, Ethiopia and Madagascar which shoulder the legal responsibility for the protection of the rights of the victims of land investments. While this is true, it only confers a partial protective framework to the victims. There is therefore a need to look at a legal framework that would involve the legal responsibility of all state and non-state actors involved.

⁴⁸⁴ Tinyade K 'Land grabbing in Africa: A review of the impacts and possible policy responses (2015) 37.

⁴⁸⁵ See 'Countries, companies and individuals' Stop Africa Land Grab available at <http://www.stopafricalandgrab.com/countries-and-companies.php> (accessed 17 February 2017).

This dimension of the RTD is appealing as an extra layer of protection which is required to protect local communities from the actions of other states, individuals or corporations. The external dimension of the RTD solves the problem of territorial jurisdiction and imposes extra-territorial duties and obligations towards people in ‘far away places’.⁴⁸⁶

India has become the biggest land investor in Ethiopia with serious concerns being raised at the behaviour of Indian firms in the Gambela ecological hotspot.⁴⁸⁷ Madagascar has witnessed the presence of Italy through the Italian companies such as Tozzi Green and Delta Petroli, for biofuels cultivations, China through the Chinese company Mainland Mining for mining activities, Norway through the Norwegian company Mada Woodlands and France through the French company Bionexx which are all involved in the land investments for their respective activities amounting to dispossession of local communities of their lands.⁴⁸⁸ Such states which would be involved, directly or indirectly, in land investments can be compelled to shoulder responsibilities and observe their duties towards the local communities and indigenous peoples by the external dimension of the RTD.

4.3.5 Concluding remark

The RTD can be implemented in a way that matches what is required as per Sen’s CA - human development as a process that enlarges peoples’ choices.⁴⁸⁹ As per its content and nature, it has been argued that it has enormous potential and should imperatively be among the legal basis that could be used to remedy the human rights violations that have been caused by large-scale land investments in the two case studies. While it is provided as a soft law provision in the UN Declaration and as a full fledged right in the African Charter, it is relevant to see how the RTD has

⁴⁸⁶ Salomon M ‘Legal cosmopolitanism and the normative contribution of the right to development’ London School of Economics Working paper 16/2008 11.

⁴⁸⁷ Mohammad A ‘The lesser known story of India’s role in Ethiopian land deals’ The Conversation (01 June 2015) available at <http://theconversation.com/the-lesser-known-story-of-indias-role-in-ethiopian-land-deals-42432> (accessed 10 January 2017).

⁴⁸⁸ See ‘Land grabbing in Madagascar: Echoes and testimonies from the field’ Report Launch Farmlandgrab available at <http://www.farmlandgrab.org/post/view/22796-land-grabbing-in-madagascar-echoes-and-testimonies-from-the-field-report-launch> (accessed 19 January 2017).

⁴⁸⁹ Human Development Report *UNDP* (1990) 10.

been adopted and implemented domestically in Ethiopia and Madagascar which will be dealt with in the following section.

4.4 THE RTD IN ETHIOPIA AND MADAGASCAR

The RTD, if strictly followed, would result in better protection of the human capabilities. However, the main problem at the domestic level seems to be the domestication or in some cases the existence of the RTD as a right.

(I) Ethiopia

4.4.1 Legal status of the RTD under the Ethiopian Constitution (EC)

At the international level, Ethiopia has shown its commitment to provide for the RTD to its citizens. This is demonstrated by its adoption of the Declaration at the UN General Assembly and its ratification of the African Charter which provides for the RTD. At the domestic level, the EC has incorporated the RTD as a democratic right in the following terms in article 43:

The People of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.

Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.

All international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development.

The basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.

At the international level, there is a consensus that the RTD is considered as a composite right requiring the realisation of all other human rights.⁴⁹⁰ However, Ali argues that at the domestic level, the RTD is not provided as a composite right but as a right in itself which does not require the fulfilment of any other right for it to be materialised in line with article 22 of the African Charter.⁴⁹¹

⁴⁹⁰ Sengupta A 'The human right to development' (2004) 32 *Oxford Development Studies* 182.

⁴⁹¹ Ali A 'Distinguishing limitation on constitutional rights from their suspension: A comment on the CUD case' (2012) 1 *Haramaya Law Review* 16.

In other words, the RTD provided by the EC ought to be given a more direct and effective interpretation similar to the right to life for instance. Without defining the RTD, the EC provides for its constitutive elements in terms of a right to improved standard of living, participation and sustainable development. The substantive RTD are in terms of the right to improved standard of living and sustainable development while the procedural RTD is given in the form of the right to participate in national development by way of consultation on projects and policies on development.

The government of Ethiopia considers the right to improved standard of living as being one which is similar to the right to adequate standard of living under the ICESCR which encompasses the basic needs of the citizens.⁴⁹² Indeed, article 43 of the EC stipulates that the basic objective of development is to realise the basic needs of every citizen and that policies must be formulated in a way that ensures access to housing, food and clean water to all Ethiopians.⁴⁹³ The second limb of the RTD as provided by the EC is sustainable development, which is considered as encompassing the economic and social development and protection of the environment.⁴⁹⁴ In particular, social development should be geared towards eradication of poverty, creation of employment, promoting social integration and enhancing access to education and health.⁴⁹⁵

Focusing on the third limb of the RTD under the EC, the latter does provide for the right of communities to be consulted and to be allowed to participate in national development under article 43 which have to be ensured by the state as a duty at all times.⁴⁹⁶ In this process, the rights of women to be consulted and to participate in development on an equal footing with men have been specifically provided for by the EC.⁴⁹⁷ The Ethiopian Government therefore has a clear

⁴⁹² UN CESCR 'Combined reports of Ethiopia under the ICESCR' (2009) Un Doc. E/C.12/ETH/1-3, para. 200.

⁴⁹³ Article 90 of the Ethiopian Constitution (1995).

⁴⁹⁴ See United Nations World Summit for Social Development 'Copenhagen Declaration on Social Development' (1995) UN Doc. A/CONF.166/9 para 6[hereafter Copenhagen Declaration on Social Development: 1995].

⁴⁹⁵ Copenhagen Declaration on Social Development: 1995, para 29.

⁴⁹⁶ Article 89 of the Ethiopian Constitution (1995).

⁴⁹⁷ Article 35 and 89 of the Ethiopian Constitution (1995).

constitutional obligation to ensure participation and consultation of local communities in ‘good faith, through culturally appropriate procedures and with the objective of reaching an agreement’ as propounded by the African Commission in the *Endorois case*.⁴⁹⁸ Concerning the subjects of the EC refers to the people of Ethiopia as a whole and Nation, Nationality and People in particular.⁴⁹⁹ In turn, the EC defines Nation, Nationality and People as a:

‘group of people who have or share a large measure of a common culture or a similar customs, mutual intelligibility of languages, belief in a common or related identities (or identity), a common psychological make-up and who inhabit an identifiable, predominantly contiguous territory’.⁵⁰⁰

4.4.2 Challenges towards the implementation of the RTD in Ethiopia

(I) The essence of the RTD is not given an effective implementation

The legal framework on the RTD in Ethiopia is quite progressive- providing for the RTD in rather elaborated terms. However, there is a significant disconnection between what is provided as a right and how the right is effectively and genuinely implemented on the ground. According to the Constitution, policies for economic and social development are approved by the House of Peoples’ Representatives through the elected representatives of the peoples.

(II) Limited justiciability of the RTD

The RTD in Ethiopia also has limited justiciability before courts of law. According to the Constitutional Explanatory Document (CED) of 1995, the RTD is a programmatic right which the government needs to attain and it is not justiciable and enforceable.⁵⁰¹ It also highlighted that even if the RTD is not justiciable, the purpose of having it in the Constitution ensures that the government knows which course of action they need to take for the development of the country.⁵⁰²

⁴⁹⁸ Endorois (2009) para 289.

⁴⁹⁹ Nahum F *Constitution for a nation of nations: The Ethiopian prospect* (1997) 172.

⁵⁰⁰ Article 39(5) of the Ethiopian Constitution (1995).

⁵⁰¹ Constitutional Explanatory Document, House of Peoples’ Representatives Documentation (1995) 90 [hereafter Constitutional Explanatory Document: 1995].

⁵⁰² Constitutional Explanatory Document: 1995,91.

From a judicial practice point of view, it is also noted that courts of law in Ethiopia are generally reluctant to deal with constitutional issues and are more inclined to hear matters based on ordinary legislations, thus leaving constitutional matters to the House of Federation.⁵⁰³

4.4.3 Implementation of the RTD through the National Human Rights Action Plan

A National Human Rights Action Plan (NHRAP) was launched in Ethiopia in October 2013.⁵⁰⁴ It declares that Ethiopia's obligation on RTD is to be guided by the UDHR, the UN Charter, the UN Declaration on Right to Development, the African Charter on Popular Participation in Development and Transformation, the New Economic Partnership for Africa's Development and the MDGs. It is noted that the ACHPR does not feature in this list and one could argue that the reason is because the ACHPR explicitly provides for the RTD and imposes obligations on states parties.

A series of domestic legislations has also been enumerated as they arguably act as vehicles for the implementation of the RTD including the Freedom of Mass Media and Access to Information Proclamation No. 540. It also reaffirms the stand of the CED with regard to the justiciability of the RTD.⁵⁰⁵ In addition, the responsibility to implement the RTD has been conferred to the Ministry of Finance and Economic Development, the Council of Ministers and the House of Representatives while the judiciary has been carefully ignored. Therefore based on the analysis from the CED and the NHRAP, it is clear that the RTD is only a programmatic goal or objective and not a justiciable right.

(II) Madagascar

⁵⁰³ Alemayehu S 'The Constitutional protection of economic and social rights in the Federal Democratic Republic of Ethiopia' (2010) *Journal of Ethiopian Law* 143.

⁵⁰⁴ Voice of Africa 'Ethiopia presents human rights action plan' available at <http://www.voanews.com/a/ethiopia-presents-human-rights-action-plan/1615576.html> (accessed 10 January 2017).

⁵⁰⁵ The Federal Democratic Republic of Ethiopia 'National Human Rights Action Plan 2013 - 2015' June 2013 Addis Ababa p 176 [hereafter Ethiopia National Action Plan: 2013].

Ethiopia National Action Plan: 2013, 181.

4.4.6 The RTD under the Malagasy Constitution

The Malagasy one does not provide for a direct RTD. However, the concept of development and its necessity have been reiterated in the supreme law of the land several times. In its preamble, the Constitution stipulates that the equitable and rational administration of natural resources for the needs of the development of the human being is an essential factor for durable and full development.⁵⁰⁶ It is noted here that development is linked to the human being which could imply that economic development is not the only form of development that is emphasised but equal importance is given to social and cultural development. Article 65 imposes an obligation on the Prime Minister to assure the balanced and harmonious development of all the decentralised territorial collectivities. The Regions (a sub division of the State) also bear the responsibility to:

'direct, make dynamic, coordinate and harmonise the economic and social development of all their territorial resort and assure the planning, the territorial development and the implementation of all the actions of development'.⁵⁰⁷

4.4.7 State policies catering for development in Madagascar

The Ministry of Economy and Planning of Madagascar proposed a National Development Plan for the period of 2015-2019 in October 2014.⁵⁰⁸ Through this Plan, foreign partners have obtained the required access to finance projects in priority areas as have been listed by the Ministry of Economy and Planning. There is also support from the WB to the government to formulate policies geared towards growth and an environment which promotes domestic and foreign private sector development.⁵⁰⁹ A changing political environment has attracted companies from United Kingdom, Canada, Japan and the Republic of Korea to invest in the mining sector of Madagascar.⁵¹⁰

⁵⁰⁶ The Constitution of Madagascar (2010) para 9 of the Preamble.

⁵⁰⁷ Article 153 of the Constitution of Madagascar 2010

⁵⁰⁸ World Trade Organisation 'Trade Policy Review' (2015) 3 [hereafter Trade Policy Review: 2015].

⁵⁰⁹ Trade Policy Review (2015) 12.

⁵¹⁰ Trade Policy Review (2015) 20.

The Economic Development Board of Madagascar is another entity involved in the development process of the country,⁵¹¹ offering promotion and facilitation services for new businesses. There is also the International Trade Board of Madagascar which is a private association focusing on export promotion and international trade.⁵¹² In the sector of agricultural investment, the Sectoral Agriculture, Livestock and Fisheries Programme which is aligned on the African Union's Comprehensive Africa Agriculture Development Programme is the main structural support for investment in agriculture to boost economic growth.

4.4.8 Concluding remark

The RTD has not yet been properly formulated in the legal framework of the two case studies. The EC is the only one providing for the RTD whereas Malagasy laws only makes reference to the concept of national and economic development without providing it in the form of a human right. However, despite being given as a right by the EC, its justiciability is hugely contested. It is therefore clear that the RTD is only provided as an inspirational right or concept in the two countries and cannot yet be used as a human right on the basis of which the wrath of land related investments on the local communities and indigenous peoples can be legally argued before a court of law. However, the RTD has enormous potential in conferring protection from human rights violations resulting from land investments.

4.5 CONCLUSION

The current chapter has argued that economic development is often the justification put forward by states in an attempt to legitimise land related investments. Yet, as discussed in Chapter two development is not only a matter of increase or decrease in national average incomes or how rich or poor the country is getting from an economic viewpoint. This chapter has attempted at explaining the argument that development is also a matter of capabilities and achieving what people would desire to illustrate that normative framework on human rights also makes similar provisions - development for the benefit of all.

⁵¹¹ Trade Policy Review (2015) 24.

⁵¹² Trade Policy Review (2015) 24.

The RTD has been used to advocate for such a mode of development. The imprecise and disputed nature of the RTD was examined by focusing on the scope, the beneficiaries and the justiciability of the RTD. It was also argued that the RTD has enormous potential to provide for a normative framework based on which development could be achieved in a comprehensive way. The chapter highlighted the composite nature of the RTD, the RTD as a solidarity right, the RTD as a process and the external dimension of the RTD. The RTD as a composite and solidarity right arguably can be a solution regarding affected human capabilities. The argument that emerged through this chapter is that the RTD as a human right can be the driver of the CA based on which development can be achieved with a genuine and effective respect for human rights. This chapter has also unveiled an important fact in terms of the level of adoption and implementation of the RTD domestically in Ethiopia and Madagascar.

While it is contended that the RTD is a main driver of the CA to land investments in Ethiopia and Madagascar, an enhanced adoption, implementation and enforcement at the domestic level would be imperative and the need for it to be provided at the international level with more probative force. Coupled with the RTD, there are other existing human rights that can be effectively used to ensure that land investments are undertaken in line with the CA. The following chapter will now focus on the existing normative framework on human rights that protect the human capabilities such as land, water, food, culture and participation. The potential of the existing human rights framework would be assessed in the wake of protecting local communities from the downside of land investments.

Chapter 5: APPLICATION OF THE INTERNATIONAL HUMAN RIGHTS NORMS TO SELECTED HUMAN CAPABILITIES

5.1 Introduction

The capabilities being used in the thesis are provided by the international normative framework on human rights - the right to land, the right to food, the right to water, the right to culture and the right to political participation. It is contended that if these human rights are respected, implemented, fulfilled and enforced by the states, then it can possibly ensure that the selected human capabilities of this thesis will be consequently respected. However, one has to bear in mind that the existing normative framework also has its limitations in terms of human rights. They are not absolute rights and are often subject to being curtailed for various reasons which can still be legal and legitimate.

If there is an effective and genuine respect and implementation of the aforementioned human rights, then there is a greater possibility of Sen's model of development to be successfully applied in large-scale land investments in Ethiopia and Madagascar. Therefore, international human rights law can be an important driver of land investments in the selected countries that would render people capable to achieve what they desire and want. It arguably has the potential to give legal effect to the capability approach required for a balanced method of development resulting in both economic development and respect for human rights.

The focus of the current chapter is primarily on the international normative framework on human rights and its effectiveness to protect the selected human capabilities. It begins with an analysis of state actors obligations towards human rights as the recognised duty-bearer. Ethiopia and Madagascar are reviewed in terms of the extent to which they fulfil their obligations as duty-bearers. A critical overview on the obligations of home states is also provided with regard to their duty of respecting, promoting and fulfilling human rights in the host states.

The focus then shifts on the human rights that are associated with the selected human capabilities involved in large-scale land investments and how they are provided by international human rights law. The effectiveness of these rights and their provisions in the domestic context are then discussed

to determine whether they can provide for the required protection to the selected human capabilities.

5.2 Obligations of the host states

The nexus between the state and human rights has been an ambivalent one as illustrated by the two most prominent theories on the formation of Western view of human rights from the sixteenth century. Thomas Hobbes (1588 – 1679) and John Locke (1632 – 1704) held diverging views on the relationship between the state and human rights. Hobbes argued that in the absence of a government or state as powerful as the Leviathan, man would keep arguing and fighting with each other and seek greater power and wealth through robbery, murder and violence.⁵¹³ Locke, in contrast, took a positive view of the state of nature of the human being and instead argued that the rights of man can be endangered by the wrath of a brutal state against which one must have the right to revolution.⁵¹⁴ In one way or another, the state has always been a central tenant in the discourse of human rights. The idea was eventually reinforced by the UN which focused on the nation state as holding primary responsibility for human rights.⁵¹⁵ With specific commitments shouldered by states based on human rights instruments such as the UDHR, they are equally accountable and answerable for the human rights violations suffered by their citizens.

5.2.1 General obligations of the host states towards their citizens

The states involved in this thesis have played a major role in large-scaled investments as depicted in chapter three. It can be argued that they do have the sovereign right to decide which mode of economic investment is appropriate for their development. However, so far, the approach that they have taken is arguably not in line with Sen's CA. The focus of the states has been principally economic without much attention to human capabilities and human rights. As will be argued in this chapter, the human capabilities involved in large-scale investments are protected by international

⁵¹³ Wolfenden K 'Hobbes' Leviathan and views on the origins of civil government: Conservatism by covenant' 2 (2010) *Student Pulse* available at <http://www.studentpulse.com/articles/349/2/hobbes-leviathan-and-views-on-the-origins-of-civil-government-conservatism-by-covenant> (accessed 24 November 2015).

⁵¹⁴ Franklin J *John Locke and the theory of sovereignty* (1978) 97.

⁵¹⁵ Ife J *Human rights from below* (2010) 76.

human rights law. States are the main actors in protecting, prompting, respecting and fulfilling these rights. It is therefore relevant to look at the obligations that states must shoulder to as to be able to achieve a balance between development and respect for human rights of all victims of land grabbing.

Land investments in Ethiopia and Madagascar have resulted in civil and political as well as socio-economic rights violations as discussed with evidence in Chapter 3. Yet, these states are parties to the ICCPR and the ICESCR as a result of which, they all have taken a legal commitment to respect, protect and fulfil human rights. The duty of national governments to uphold human rights and implement international standards setting them up is no more open to debate. International human rights law engages the legal commitment of states in that direction.⁵¹⁶

Political philosophers have regularly observed that some actors hold rights automatically implies that other have duties.⁵¹⁷ Within the human rights context, individuals would be rights holders and governments, or states would be duty bearers. As expounded by the Office of the High Commissioner for Human Rights (OHCHR), the mandate of the states as duty bearers includes the obligations to respect, protect and fulfil human rights of individuals.⁵¹⁸ In essence, the obligations require that states must refrain from interfering or curtailing the enjoyment of rights (obligation to respect), states must protect individuals and groups of peoples from human rights abuses (obligation to protect) and they should equally take positive steps to enhance and facilitate the enjoyment of rights for their citizens (obligation to fulfil).⁵¹⁹

The above combination of obligations, commonly referred to as the tripartite typology of obligations, has been incorporated into various UN human rights treaties. For instance, the CDESCR has precisely elucidated the role that states have towards the right to adequate food which is based

⁵¹⁶ See Human Rights Advocacy and the History of International Human Rights Standards ‘Government Obligations’ available at <http://humanrightshistory.umich.edu/accountability/obligationr-of-governments/> (accessed 24 November 2015).

⁵¹⁷ Breakey H ‘Positive duties and human rights: Challenges, opportunities and conceptual necessities’ 63 (2014) *Political Studies* 1198.

⁵¹⁸ UN OHCHR ‘What are human rights’ available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (accessed 24 November 2014).

⁵¹⁹ Shue H *Basic rights: Subsistence, affluence and US foreign policy* (1996) 52.

on the tripartite typology, whereby states parties should facilitate access to food, ensure that there is no deprivation and access to resources are not hindered to safeguard livelihood and food security.⁵²⁰

A similar stand has been adopted by the Human Rights Committee in relation to the nature of the obligation that is imposed on states under the ICCPR.⁵²¹ The tripartite typology is now popularly used and referenced in modern human rights discourse and studies.⁵²² The categorisation of obligations is reminiscent of the fact that states have an active role to play in implementing human rights and not only the mere obligation of non-interference. The vertical and negative obligation of states not to abuse the right of individuals has been extended to the positive obligation of states to remedy and prevent abuses even between private parties as part of the doctrine of horizontality.⁵²³ The following section will assess the general obligations that Ethiopia and Madagascar have under the ICCPR, the ICESCR and the ACHPR, arguably instruments whose provisions are most violated in relation to land investments.

5.2.2 Nature of obligations under the ICCPR

The nature of obligations imposed by the ICCPR is provided by article 2 specifically designed to ensure that states parties apply the treaty provisions domestically.⁵²⁴ Article 2 plays a crucial role in the interpretation of the substantive rights of the ICCPR and it focuses on the duties of states parties rather than establishing subjective rights.⁵²⁵ Its importance has been highlighted by the UN HRC's consistent requirement of detailed explanation from states parties as to the status of the article and the ICCPR in their respective constitutional and legal regimes.⁵²⁶ The UN HRC has also held that

⁵²⁰ UN CESCR, General Comment No 12: The right to adequate food para 15.

⁵²¹ UN HRC, General Comment No 6 The right to life - The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

⁵²² Koch E 'Dichotomies, Trichotomies or Waves of Duties?' 5 (2005) *Human Rights Law Review* 81.

⁵²³ Kinley D 'Multinational corporations and human rights' 27 (2002) *Alternative Law Journal* 7.

⁵²⁴ Carlson S & Gisvold G *Practical guide to the ICCPR* (2003) 17 [hereafter Carlson & Gisvold: 2003].

⁵²⁵ Nowak M *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 33 [hereafter Nowak: 1993].

⁵²⁶ McGoldrick D *The Human Rights Committee: Its role in the development of the ICCPR* (1994) 270.

some states parties have been in contravention of article 2 specifically by not ensuring the proper implementation of it.⁵²⁷

Article 2(1) has both a negative and a positive character. The negative character implies that there is an obligation on states parties to refrain from restricting the substantive rights provided by the ICCPR. This negative duty may mean an absolute restriction for example in cases of prohibition against torture while in cases of rights such as freedom of expression or assembly, the restriction may only mean that interference by the states must not be arbitrary.⁵²⁸ It is however noteworthy that the obligations in article 2(1) are not progressive in nature and are to be realised immediately, resulting in a state party either is, or is not, fulfilling the obligations.⁵²⁹ As for the positive obligations, the states parties have the duty to guarantee that both procedural and substantive protection are given to persons within their jurisdiction. Such protection is not only conferred to citizens against the acts of the state or its agents but equally against the acts of private persons and entities that would impair the enjoyment of the rights.⁵³⁰

The methods or means to be adopted by states parties in order to give effect to article 2 are provided by the second paragraph of the ICCPR. In essence, legislative or other means must be adopted in view of enforcing article 2 domestically. The UN HRC notes that the means to be adopted by states parties are left at their discretion but the standard to be achieved is that domestically there are effective remedies available to an aggrieved individual irrespective of whether constitutional provisions, legislative provisions or other means are employed.⁵³¹ The UN HRC has even invited state to develop new mechanisms that would enable their citizens to enjoy civil and political

⁵²⁷ Luciano Weinberger Weisz v Uruguay, Communication No 028/1978 (29 October 1980) CCPR/C/11/D/28/1978; Luyeye Magana ex-Philibert v. Zaire, Communication No 090/1981 (21 July 1983), CCPR/C/19/D/90/1991.

⁵²⁸ Nowak (1993) 36.

⁵²⁹ Sepulveda M *The nature of the obligations under the ICESCR* (2003) 128.

⁵³⁰ UN HRC, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) [hereafter General Comment No 31: 2004] para 8 - There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

⁵³¹ Carlson & Gisvold (2003) 19.

rights.⁵³² The importance of human rights NGOs has also been equally highlighted by the HRC and intensive dialogue between states and civil society organisations has been recommended.⁵³³

Another important limb is that any violation of the provisions of the ICCPR must be followed by a remedy which is effective. In the event that no remedy is available at the domestic level, the victim is to be allowed to petition directly the HRC.⁵³⁴ As for the nature of the remedies available, while political remedies seem to be acceptable, priority seems to be given to judicial remedies- which⁵³⁵ must mandatorily be in line with article 14 of the ICCPR which provides for due process rights in civil and criminal trials.⁵³⁶ Therefore, article 2(3) imposes a duty on states parties to enact laws that would provide for remedies to victims. In addition, the laws should not be couched in a way that they present hurdles and loopholes in the investigations of human rights violations contributing to an environment of impunity.⁵³⁷

Bringing the discussion in context, it is relevant to highlight that Ethiopia and Madagascar have specific obligations towards civil and political rights of their citizens affected by the land deals and investments. This argument applies in both cases where the state itself is directly responsible or when the state allows with impunity private parties to infringe rights of the citizens.⁵³⁸ The basic role of the two states under the ICCPR is therefore to respect, protect and fulfil the civil and political rights of their citizens. A subsequent section in the current chapter will deal with the situation in each jurisdiction regarding their commitments towards the ICCPR, the ICESCR and the ACHPR which will be the subjects of the following two sections.

⁵³² UN HRC, Concluding Observations: Yemen, CCPR/C/79/add.51 (1995) para 260.

⁵³³ UN HRC, Concluding Observations: Uzbekistan, CCPR/CO/71/UZB (2001) para 22.

⁵³⁴ Nowak (1993) 57.

⁵³⁵ Nowak (1993) 59.

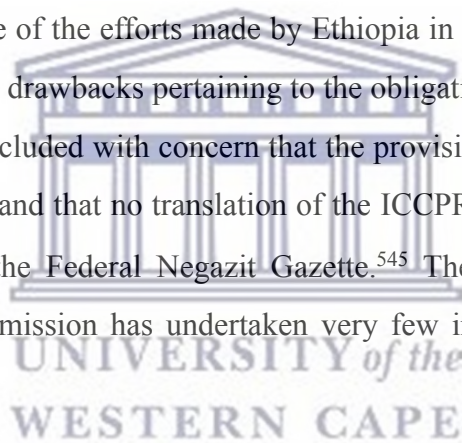
⁵³⁶ UN HRC, Concluding Observations: Venezuela CCPR/C0/71/VE para 14.

⁵³⁷ UN HRC, Concluding Observations: Uruguay CCPR/C/79/Add.19 (1993) para 7.

⁵³⁸ General Comment No 31 (2004) para 18.

Ethiopia submitted its first periodic report to the UN HRC on 22 October 2009. Measures taken towards the implementation of the ICCPR have been highlighted in the report.⁵³⁹ It has been reported that measures have been taken by the Ethiopian government to provide for the rights in the ICCPR to citizens through the constitution and other subordinate legislation.⁵⁴⁰ According to the Common Core Document submitted to the UN OHCHR, Ethiopia's Constitution provides that all legislative organs of government at different levels have the duty to ensure the promotion and protection of human rights and fundamental freedoms guaranteed by the ICCPR.⁵⁴¹ In addition, a Five Year Development Plan was adopted by the House of Peoples' Representatives to ensure the incorporation of human rights and democratisation as one of the principles aspects of the programmes.⁵⁴² Institutions such as the Ethiopian Human Rights Commission and the Institution of Ombudsperson have also been established to promote human rights and they are seemingly independent and accountable to only themselves.⁵⁴³

The HRC has been appreciative of the efforts made by Ethiopia in its Concluding Observations but it also highlighted some critical drawbacks pertaining to the obligations to implement the provisions of the ICCPR.⁵⁴⁴ The HRC concluded with concern that the provisions of the ICCPR have not been invoked before national courts and that no translation of the ICCPR into local languages have been undertaken and published in the Federal Negazit Gazette.⁵⁴⁵ The HRC has also noted that the Ethiopian Human Rights Commission has undertaken very few investigations on alleged human



⁵³⁹ UN HRC First Periodic State Report Ethiopia UN Doc CCPR/C/ETH/1 22 October 2009 [hereafter First Periodic Report: 2009].

⁵⁴⁰ First Periodic Report: 2009, para 15.

⁵⁴¹ UN OHCHR *Core Document forming the initial part of the reports of states parties - Ethiopia* UN Doc HRI/CORE/ETH/2008 6 February 2009 [hereafter Common Core Document: 2008] para 211.

⁵⁴² Common Core Document (2008) para 212.

⁵⁴³ Common Core Document (2008) para 215.

⁵⁴⁴ UN HRC, *Concluding Observations of the Human Rights Committee Ethiopia* UN Doc CCPR/C/ETH/CO/1 19 August 2011 [hereafter *Concluding Observations Ethiopia: 2011*].

⁵⁴⁵ *Concluding Observations Ethiopia* (2011) para 5.

rights violations and that the recommendations and suggestions it made after monitoring correctional facilities in Ethiopia have not been implemented by the State Party.⁵⁴⁶

The State Report submitted by the State of Madagascar to the HRC reveals an interesting submission. The State of Madagascar contended in the report that the state has endeavoured to refrain from adopting legislative, judicial and other measures that could have the result of curtailing or denying the rights provided by the ICCPR to its citizens.⁵⁴⁷ It has also been submitted that amendments of legislations have been carried out to ensure that they are in harmony with the provisions of the Covenant in order to avoid misinterpretation of the provisions therein.⁵⁴⁸ The Concluding Observations by the HRC highlighted, similar to the case of Ethiopia, that the Covenant has been rarely invoked or applied by the courts and that there is a serious lack of mechanism responsible for implementation of the views of the HRC.⁵⁴⁹ It was also noted that the Independent National Human Rights Commission of Madagascar does not have an independent budget which puts into question its efficacy in investigating cases of human rights violations.⁵⁵⁰

5.2.3 Nature of obligations under the ICESCR

Numerous economic, social and cultural rights (socio-economic rights) are violated on a daily basis as a result of land investments and deals in the two case studies. The right to adequate food, housing, natural resources and culture would be some of the examples among a list of various others. Socio-economic rights are critical to human beings and a minimum respect of these rights is required.⁵⁵¹ However, an understanding of the implementation of socio-economic rights is not an easy task especially when states are often tempted to raise the argument of availability of resources

⁵⁴⁶ Concluding Observations Ethiopia (2011) para 6.

⁵⁴⁷ UN HRC *Fourth Periodic Reports of States Madagascar* UN Doc CCPR/C/MDG/4 21 December 2015 [hereafter *Fourth State Report Madagascar: 2015*] para 138.

⁵⁴⁸ *Fourth State Report Madagascar (2015)* para 139.

⁵⁴⁹ UN HRC, *Concluding Observations on the Fourth Periodic Report of Madagascar* UN Doc CCPR/C/MDG/CO/4 22 August 2017 [*Concluding Observations Madagascar: 2017*] para 5.

⁵⁵⁰ *Concluding Observations (2017)* para 2017.

⁵⁵¹ Bilchitz D 'Giving socio-economic rights teeth: The minimum core obligations and its importance' 119 (2002) *South African Law Journal* 484.

as a pre-requisite.⁵⁵² With this difficulty as the backdrop, the CESCR has come up with General Comment No 3 which sheds light on the nature of obligations under the ICESCR and on the implementation of article 2.⁵⁵³ Basically, obligations under the ICESCR can be studied either through the lens of obligations of conduct and result or that of obligations to respect, protect and fulfil similarly to civil and political rights under the ICCPR.

According to definitions from the International Law Commission, an obligation of conduct is one where the state or its organ will be obliged to take a specific course of action to realise a certain goal whereas an obligation of result will require the state to achieve a specific result from a course of action.⁵⁵⁴ According to the CESCR⁵⁵⁵, the ICESCR incorporates a mixture of these two types of obligation in order to implement article 2.⁵⁵⁶ It is argued that even if some of the rights cannot be achieved immediately, states are under the obligation of adopting specific conduct in view of their progressive realisation. For instance, realising the right to health progressively will be as a result of steps such as prevention, treatment and control of epidemic and other diseases which is an obligation of conduct. Therefore, for the host states in relation to land investments to fulfil their obligations towards socio-economic rights, there is the primary duty of embracing both obligations of results and obligation of conduct. In other words, it makes no sense for the state to argue that development will only bring economic gain that will empower people to buy a house for instance. This is so as the right to housing also entails an obligation of conduct which would imply that the people must be correctly and indiscriminately empowered to fully realize their right to housing.

⁵⁵² Craven M *The ICESCR: A perspective on its development* (1995) 106 [hereafter Craven: 1995].

⁵⁵³ 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

⁵⁵⁴ ILC Report *Yearbook 2* (1977) para 8.

⁵⁵⁵ UN CESCR, General Comment No 3 *The nature of states parties obligation* : 1991, para 1 [hereafter General Comment No 3: 1991].

⁵⁵⁶ Alston P & Quinn G 'The nature and scope of states parties' obligations under the ICESCR' 156 (1987) *Human Rights Quarterly* 165.

In relation to socio-economic rights, the same duty of respect, protect and fulfil would apply similar to the case of civil and political rights as discussed above. It is relevant to note that the obligation of states to protect individuals against the infringements of their socio-economic rights is one which is applicable not only for state actions but equally for third parties over which the state has or should have control.⁵⁵⁷ Such a responsibility was highlighted by the CESCR in its Concluding Observations to Iran in the following words:

‘While appreciating that fatwahs are issued by the religious authorities and not by the State organizations per se, the question of state responsibility clearly arises in circumstances in which the state does not take whatever measures are available to it to remove clear threats to the rights applicable in Iran in consequence of its ratification of the Covenant’.⁵⁵⁸

Article 2(1) imposes an obligation on states parties to undertake to take steps towards the progressive realisation of socio-economic rights of their citizens. The Travaux Préparatoires of the ICESCR reveals that the phrase ‘undertake to take steps’ was used as an alternative to ‘ensure’ or ‘guarantee’ as it has a more progressive overtone.⁵⁵⁹ The CESCR has commented that:

‘while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time...’⁵⁶⁰

It is therefore the responsibility of the states parties whether developing or developed to ensure that necessary and immediate steps or measures are being taken to uphold socio-economic rights as unavailability of resources cannot defer this obligation. It is clear that Ethiopia and Madagascar have not taken such steps but instead their measures, justified by development goals, have only been regressive and resulted in direct violations of socio-economic rights of their citizens.

There is an array of methods through which socio-economic rights could be given genuine effect and these include legislative, administrative, judicial, social, educational or other methods to

⁵⁵⁷ Craven (1995) 113.

⁵⁵⁸ UN CESCR, Concluding Observations: Iran 1993 para 7.

⁵⁵⁹ Craven (1995) 114.

⁵⁶⁰ General Comment No 3 (1991) para 2.

achieve the realisation of the rights in the ICESCR.⁵⁶¹ The CESCR has left it to the discretion of states parties to determine which measures would be most appropriate for them depending on their economic, social and political context. It is argued that the Committee has given states a margin of appreciation in selecting their appropriate course of action inspired by the jurisprudence of the European Court of Human Rights.⁵⁶² This discretion or margin of appreciation seems to be wrongly applied by Ethiopia and Madagascar in light of the land deals they are sanctioning in the name of development. It is true that they have the discretion to choose their economic pathway to achieve progress and development. Yet, the choice must be one which does not affect the socio-economic rights of individuals and peoples.

Despite the innumerable complexities of article 2 and in general the implementation of socio-economic rights, it appears that the ultimate aim of the ICESCR is the full realisation of socio-economic rights.⁵⁶³ Full realisation is the result that states parties are obliged to aim achieving in a reasonable period of time.⁵⁶⁴ The progressive achievement of socio-economic rights was a matter of debate during the drafting stage of the ICESCR in the sense that states would indefinitely postpone the realization of the rights and avoid their obligations. The General Comment from the CESCR provides for an interpretative direction as to the understanding of the phrase progressive realization whereby it is highlighted that its flexible aspect cannot be used as a pretence, also there is the real aspect of resource scarcity and tribulations faced by states and justification is required if progressive realisation is deliberately used.⁵⁶⁵

While the realisation of socio-economic rights is subject to availability of resources, states are under the obligation of making a maximum use of their resources in order to fulfil a minimum core obligation. It implies that states parties are not allowed to indefinitely postpone their duties towards socio-economic rights because of resource constraints. Rights such as the protection from

⁵⁶¹ General Comment No 3 (1991) para 7.

⁵⁶² O'Donnell T 'The margin of appreciation doctrine: standards in the jurisprudence of the European Court of Human Rights' 4 (1982) *Human Rights Quarterly* 474.

⁵⁶³ Craven (1993) 128.

⁵⁶⁴ General Comment No 3 (1991) para 9.

⁵⁶⁵ General Comment No 3 (1991) para 9.

starvation, access to basic or primary education, emergency healthcare and basic shelter or housing must be ensured and guaranteed by states at all times which even includes states of emergencies or economic downturn.⁵⁶⁶

The nexus between business and human rights and more specifically the adverse impact that business activities may have on socio-economic rights have been the subject of the General Comment No 24 issued by the CESCR in August 2017⁵⁶⁷ which has shed light on the nature of states parties under the ICESCR with reference to business activities and their impact on socio-economic rights. The first obligation expounded upon is the obligation of non-discrimination.

Women, children, indigenous peoples, peasant, fishermen and person with disabilities *inter alia* are among the vulnerable groups that are more directly and disproportionately affected by business activities.⁵⁶⁸ The CESCR specifically recommended that states parties address the impact of business on vulnerable groups ‘including by consulting the Guidance on National Action Plans on Business and Human Rights’.⁵⁶⁹

The General Comment No 24 reiterated the obligations of states parties to respect, protect and fulfil socio-economic rights in the context of business and human rights, and the ways in which states parties can be held responsible for acts of private business entities in accordance with the Draft Articles on Responsibility of States for Internationally Wrongful Acts (private business entity acting under the control or direction of the State, private business entity exercising elements of government authority and the State acknowledges and adopts the conduct of the private business entity as its own).⁵⁷⁰ In relation to the obligation to respect, the General Comment in question

⁵⁶⁶ General Comment No 3 (1991) para 10 - a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights ... incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the *Covenant*.

⁵⁶⁷ UN CESCR, ‘General Comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’, 10 August 2017, E/C.12/GC/24 [hereafter General Comment No 24: 2017].

⁵⁶⁸ General Comment No 24 (2017) para 7.

⁵⁶⁹ General Comment No 24 (2017) para 9.

⁵⁷⁰ General Comment No 24 (2017) para 11.

stipulates that such as obligation is violated if the state prioritises the interest of business entities over socio-economic rights of citizens as is the case for forced evictions in the context of investment projects.⁵⁷¹ To avoid such violations, an obligation is placed on the states parties to identify potential conflict between their obligations under the ICESCR and other trade and investment treaties, to carry out human rights impact assessments before engaging into investment treaties with specific reference to the contribution of such treaties to the RTD and to allow for any corrective measure that may be required.⁵⁷²

The General Comment No 24 equally provides for the obligation to protect socio-economic rights of citizens from potential infringements by business activities by effectively adopting legislative, administrative, educational and other measures applicable.⁵⁷³ Under paragraph 15, states parties are encouraged to consider imposing criminal or administrative sanctions and penalties where business activities result in abuses of socio-economic rights. The importance of an adequate legal framework requiring business entities to exercise human rights due diligence and the need for states parties to consider direct regulation and intervention are also emphasised.⁵⁷⁴ As for the obligation to fulfil, it is provided that states parties have to:

‘take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment’.⁵⁷⁵

It is interesting to note that part of the obligation to fulfil of states parties is also for them to direct the efforts of business entities towards fulfilling the rights protected under the ICESCR.⁵⁷⁶

General Comment No 24 also emphasises on the extraterritorial nature of the obligations that states parties to the ICESCR have in relation to business activities and their impact on socio-economic

⁵⁷¹ General Comment No 24 (2017) para 12.

⁵⁷² General Comment No 24 (2017) para 13.

⁵⁷³ General Comment No 24 (2017) para 14.

⁵⁷⁴ General Comment No 24 (2017) para 16 & 19.

⁵⁷⁵ General Comment No 24 (2017) para 23.

⁵⁷⁶ General Comment No 24 (2017) para 24.

rights. States parties are clearly required to take necessary steps to prevent violations of human rights abroad by companies domiciled in their territory or jurisdiction.⁵⁷⁷ This obligation includes the duties by home states to ensure that they do not obstruct the host states to comply with the ICESCR especially when negotiating trade and investment treaties or financial and tax related ones.⁵⁷⁸ The extraterritorial obligation to protect is translated into the requirement of home states to take steps to prevent, redress and remedy cases of violations of rights under the ICESCR. This obligation is particularly important in cases where domestic remedies are ineffective or unavailable to victims in the host states.⁵⁷⁹ The extraterritorial obligation to fulfil on home states corresponds to the obligation under article 2(1) of the ICESCR, setting out the expectation that states parties will take ‘collective action, including through international cooperation, in order to help fulfil the economic, social and cultural rights of persons outside of their national territories’.⁵⁸⁰

The 2011 *Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* is entirely based on the principle of extraterritorial responsibility of states. Principle 12 states that state responsibility extends to business enterprises empowered by the state to exercise elements of governmental authority. The home state obligation to protect from violations from business undertakings has been provided as an obligation to regulate, influence and cooperate. The obligation to cooperate is incumbent on all states in view of preventing abuses caused by non-state actors, to hold them accountable in cases of abuses and to ensure effective remedies for those affected.⁵⁸¹

To invoke the responsibility of the home state, the Guiding Principles require information on the nationality of the perpetrator or the victim and proof of substantive harm caused to the state whereas the Maastricht Principles only a reasonable link between the state and the conduct of a non-state actor will suffice to hold the home state responsible under international law. One criticism

⁵⁷⁷ General Comment No 24 (2017) para 26.

⁵⁷⁸ General Comment No 24 (2017) para 29.

⁵⁷⁹ General Comment No 24 (2017) para 30.

⁵⁸⁰ General Comment No 24 (2017) para 36.

⁵⁸¹ Principle 27 of the 2011 Maastricht Principles.

against the Maastricht Principles is that there is no clear division as to the responsibilities of the home and host state. In addition, Durojaye argues that the lack of a monitoring body established and the non-binding nature of the Principles are the weak points.⁵⁸²

The way the land deals and investments have been carried out appears to be equivalent to retrogressive measures taken resulting in the violation of socio-economic rights of the people in the two case studies. Economic plans and policies based on land cannot be beneficial to local communities if they represent a source of direct violations of their socio-economic rights. Such plans from the governments cannot realistically achieve the full realisation of socio-economic rights through progressive achievements which is supposed to be an obligation to be shouldered by Ethiopia and Madagascar as states parties to the ICESCR.

Ethiopia provides for constitutional guarantee to socio-economic rights (Article 41) and chapter ten of the Ethiopian Constitution equally provides for economic, social and cultural principles and objectives of the Federal and State governments to ensure the progressive realisation of these rights.⁵⁸³ It is also reported that other legislations have been passed by parliament to progressively realised the rights encompassed by the ICESCR such as Public Health Legislation, Condominium Legislation for urban housing problems, revised Family Law Codes to ensure equality between spouses and labour legislations have been amended to ensure the protection of workers' rights.⁵⁸⁴ Ethiopia accepts the obligation to fulfil socio-economic rights as two distinct obligations - the obligation to facilitate and the obligation to provide.⁵⁸⁵ It shoulders the responsibility to facilitate the promotion of socio-economic rights by, for example, ensuring that the correct and appropriate market conditions exist for health and education services while the obligation to provide is subject to progress realisation with the available resources of the government.⁵⁸⁶

⁵⁸² Durojaye E 'The viability of the Maastricht Principles on Extraterritorial Obligations of States on Socioeconomic Rights in Advancing Socioeconomic Rights in Developing Countries (2014) 5 *Mediterranean Journal of Social Sciences* 74.

⁵⁸³ UN CESCR Combined initial, second and third periodic reports Ethiopia UN Doc E/C.12/ETH/1-3 28 March 2011 [hereafter UN CESCR State Report Ethiopia: 2011] para 10.

⁵⁸⁴ UN CESCR State Report Ethiopia (2011) para 11.

⁵⁸⁵ UN CESCR State Report Ethiopia (2011) para 16.

⁵⁸⁶ UN CESCR State Report Ethiopia (2011) para 16.

The obligations that Ethiopia shoulders towards socio-economic rights under the ICESCR are also fulfilled by policy measures such as the Growth and Transformation Plan (2015/16 - 2020/21) which has the following vision:

‘The major objective of GTP II is to serve as a spring board towards realizing the national vision of becoming a low middle-income country by 2025, through sustaining the rapid, broad based and inclusive economic growth, which accelerates economic transformation and the journey towards the country’s Renaissance’.⁵⁸⁷

The CESCR highlighted the serious political crisis that Madagascar has endured during the last decade which has prevented it from fulfilling its obligations under the ICESCR. It also highlighted the lack of implication of the ICESCR provisions by domestic courts despite the fact that international treaties form part of the domestic legislative framework.⁵⁸⁸

5.2.4 Nature of obligations under the African Charter

The nature of the obligations of states parties to the ACHPR is characterised by the indivisibility of the three generations of rights and the concept of peoples’ rights. The categorisation of rights into three generations was discredited by the ACHPR with the move of providing for all three categories of rights in one single document. This is resonated by the preamble of the ACHPR which proclaims that civil and political rights cannot be dissociated from economic, social and cultural rights. Viljoen argues that one of the far-reaching consequences of this development is that socio-economic rights are unequivocally justiciable as any other rights in the Charter.⁵⁸⁹ It has to be noted that not all socio-economic rights are provided by the African Charter as a result of the minimalist approach adopted at the time of the drafting of the instrument. Consequently, rights such as the right to social security and the right to food, clothing and housing have all been omitted. However, after the decision of *SERAC v Nigeria*, it became clear that almost all socio-economic rights are justiciable at

⁵⁸⁷ Development and Assistance Group Ethiopia National Development Strategies Second Growth and Transformation Plan (2015/16 - 2020/21) available at <http://dagethiopia.org/new/national-development-strategies> (accessed 10 January 2018).

⁵⁸⁸ UN CESCR, Concluding Observations of the CESCR Madagascar UN Doc E/C.12/MDG/CO/2 16 December 2009 para 6 and 8 [hereafter UN CESCR Concluding Observations Madagascar: 2009].

⁵⁸⁹ Viljoen F *International Human Rights law in Africa* (2007) 237 [hereafter Viljoen: 2007].

the Commission. Indeed, the Commission spelt out that ‘there is no right in the ACHPR which cannot be made effective’.⁵⁹⁰

The first article of the ACHPR imposes an obligation on the states parties to recognise the rights, duties and freedom enshrined therein. It is equally noteworthy that the same article entrusts on states parties the duty to take legislative or other measures to give effect to the rights in the Charter. The political and social conditions reigning before the coming into existence of the ACHPR are to be borne in mind when discussing about the obligations states parties have under the Charter. The situation was one characterised by dire poverty and exploitation by kleptocratic elites.⁵⁹¹ The reason of proposing the ACHPR was as a response to dictatorial regimes and unhindered human rights violations caused by autocratic and despot leaders. It implies that states parties have an additional responsibility of respecting and implementing the provisions of the ACHPR as a vehicle to drive forward the agenda of eliminating poverty and destitution of Africans.

The African Commission on Human and Peoples’ Rights noted in its Concluding Observations and Recommendations on the 5th and 6th Periodic Report of Ethiopia with concern that there have been negative impacts of agri-business activities on traditional living ways and customs of people and that some have been displaced for such industrial activities.⁵⁹² It has also highlighted the fact that there is a significant number of the population who live in poverty and lack basic amenities such as food, health care, education, housing and employment.⁵⁹³ It is to be noted that there are no concluding observations available on Madagascar.

5.2.5 Specific obligations of host states related to business and human rights

The impact that business activities can have on human rights has been a matter of concern for a long period of time. In 2003, the Sub-Commission on the Promotion and Protection of Human

⁵⁹⁰ *SERAC* (2001) para 68.

⁵⁹¹ Viljoen (2007) 237.

⁵⁹² AU, Concluding Observations and Recommendations on the 5th and 6th Periodic Report of the Federal Democratic Republic of Ethiopia 56th Ordinary Session 21 April 2015 to 7 May 2017 Banjul The Gambia [hereafter AU Concluding Observations Ethiopia: 2017] para 34.

⁵⁹³ AU Concluding Observations Ethiopia (2017) para 34.

Rights adopted the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights and in 2011 the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights emanated from an expert meeting in Maastricht.⁵⁹⁴ At the UN level, it was realised that there was a need to implement the ‘protect, respect and remedy framework’ to the area of business and human rights. As a result, the Special Representative of the Secretary-General, John Ruggie, on the issue of human rights and transnational corporations and other business enterprises came up with a set of guidelines that would specifically regulate abuses resulting from business activities to be known as the Guiding Principles on Business and Human Rights (Guiding Principles). Those principles were endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011 in view of providing a framework for such abuses.⁵⁹⁵ The Guiding Principles exclusively emphasises the role of states as the sole duty-bearers to ensure business respect for human rights.⁵⁹⁶ The General Comment No 24 has also acknowledged the relevance and application of the Guiding Principles in reading and interpreting its provisions.⁵⁹⁷

It should be mentioned that the obligation to protect human rights from business activities does not originate from the Guiding Principles. For instance, case law from the European Court of Human Rights is rather rich in judgments where an obligation of states to protect individuals from abuses resulting from both state owned or controlled companies and private corporations exercising public control has been imposed.⁵⁹⁸ Criteria such as the corporation’s legal status, rights conferred to it by the state, *de facto* or *de lege* state control or supervision and the context are used to attribute

⁵⁹⁴ *Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* available at www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf (accessed 27 November 2015).

⁵⁹⁵ UN OHCHR ‘Guiding Principles on Business and Human Rights’ HR/PUB/11/04 available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 27 November 2015).

⁵⁹⁶ Jagers N ‘UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?’ 29 (2011) *Netherlands Quarterly of Human Rights* 160 [hereafter Jagers: 2011].

⁵⁹⁷ General Comment No 24 (2017) para 2.

⁵⁹⁸ *Lopez Ostra v. Spain* (judgement of 9 December 1994); *Tatar v. Romania* (judgement of 27 January 2009), *Fadeyeva v. Russia* (judgement of 9 June 2005), *Guerra & Others v. Italy* (judgement of 19 February 1998),

responsibilities of corporations to the state.⁵⁹⁹ States cannot absolve themselves from their obligations and responsibilities by delegating them to individuals or private bodies.⁶⁰⁰

Principle 1 of the Guiding Principles confers a responsibility to protect on states against human rights violations within their jurisdiction/territory by private parties such as business enterprises.⁶⁰¹ This obligation is reiterated by the General Comment No 24 which provides for the obligations to protect, respect and fulfil socio-economic rights that are often violated by business activities.⁶⁰² There are specific duties that have to be undertaken by the states such as the duty to prevent, investigate, punish and redress violations of rights resulting from business activities. Lagoutte categorises these duties into a substantive obligation to ensure rights' protection through legislation, a procedural obligation to investigate and remedy abuses and the responsibility to monitor and disseminate information about high-risk business activities such as mining and extractive industries.⁶⁰³

The Guiding Principles favour a mixture of domestic, international, voluntary and mandatory measures to foster business respect for human rights. A similar approach has been adopted by General Comment No 24 which favours the adoption of actions plans on business and human rights by states parties and the implementation of which should be closely monitored.⁶⁰⁴ Several avenues that can be undertaken to create those measures have been proposed – activities that highlights pressing and serious business and human rights issues, high-risks business undertakings and vulnerable groups and peoples, awareness campaigns on the business human rights nexus with Ministries and state organs or agents⁶⁰⁵ and supporting work on business and human rights that are being carried out at the international level.

⁵⁹⁹ *Yershova v. Russia*, Judgement of 8 April 2010, para 55.

⁶⁰⁰ *Costello-Roberts v. United Kingdom*, Judgement of 25 March 1993, para. 28.

⁶⁰¹ Principle 1 of the Guiding Principles.

⁶⁰² General Comment No 24 (2017) para 10-24.

⁶⁰³ Lagoutte S 'The state duty to protect against business-related human rights abuses' Danish Institute for Human Rights 2014 13 [hereafter Lagoutte: 2014].

⁶⁰⁴ General Comment No 24: 2017, para 59.

⁶⁰⁵ Principle 8 of the Guiding Principles.

The most important function of the state arguably is the regulatory and policy function. It is at the core of the state's responsibility to protect human beings rights' infringements resulting from business activities entailing the duty of state to enact direct or indirect laws to regulate business activities and their impact on individual's rights.⁶⁰⁶ The Guiding Principles provide that such laws and policies should not only be regarded as being prohibitive in nature but they should equally be regarded as a vehicle to guide businesses through sound human rights practices.⁶⁰⁷ Principle 3 also encourages business enterprises to communicate their activities based on due diligence and reporting duties. The states have the duty to design communication procedures and requirements under the law so that businesses are compelled to voice out how they intend to address the human rights impacts of their business activities. This again is in line with the essence of the General Comment No 24 requiring business entities to exercise due diligence to mitigate risks of infringements of socio-economic rights of citizens.⁶⁰⁸

Principle 4 of the Guiding Principles regulates state owned or controlled business activities.⁶⁰⁹ The word 'additional steps' is to be highlighted here. It implies that together with the general obligations that states have towards the respect, protection and fulfillment of human rights, there are certain additional measures to be taken by states. For instance, the human rights performance of state owned or controlled companies must be included in their management reports that are submitted to the authorities or agencies concerned.⁶¹⁰ To operationalise this specific duty, states must put in place competent authorities to assess such reports and issue guidelines pertaining to diligence and reporting obligations. General Comment No 24 provides for a similar requirement of assessment to enhance respect for human rights by businesses.⁶¹¹ The application of Principle 4 extends to entities

⁶⁰⁶ Principle 3 of the Guiding Principles.

⁶⁰⁷ Jagers N 'Will transnational private regulation close the good governance gap?' in Deva S & Bilchitz D (eds) *Human Rights obligations of Business: Beyond the Corporate Responsibility to Respect* (2013) 316.

⁶⁰⁸ General Comment No 24 (2017) para 15.

⁶⁰⁹ States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

⁶¹⁰ Lagoutte (2014) 26.

⁶¹¹ General Comment No 24 (2017) para 22.

such as export credit agencies, development agencies and finance institutions. There is a responsibility on such institutions to take into account human rights records before agreeing to finance businesses.⁶¹²

Principle 5 and Principle 6 regulate privatisation and public procurement and their nexus with human rights. These principles impose an obligation on states to guarantee that private services and goods providers are compliant with international human rights standards when they enter into contracts with public authorities. It is also the responsibility of the state to ensure that privatisation of essential services does not negatively impact on human rights.⁶¹³ This important aspect is exemplified in the General Comment No 24 in the following words:

‘The privatisation of education illustrates such a risk, where private educational institutions lead to high-quality education being made a privilege affordable only to the wealthiest segments of society, or where such institutions are insufficiently regulated, providing a form of education that does not meet minimum educational standards while giving a convenient excuse for States parties not to discharge their own duties towards the fulfilment of the right to education’.⁶¹⁴

There is therefore an obligation to perform a human rights impact assessment to outline risks of abuses and possibilities of mitigation which is not a practice that is undertaken as it should.⁶¹⁵ Procurement and related legislations must equally be clear as to what the state expects in terms of respect for human rights from enterprises delivering the services or goods before public contracts are allocated and such requirements must be mandatory for more effectiveness.⁶¹⁶ Adequate monitoring and accountability mechanisms must be put in place by the state to assess public procurement and its impact on human rights.⁶¹⁷

⁶¹² Drummond R ‘The role of export credit agencies in project financing’ Report 2008 available at <http://whoswholegal.com/news/features/article/11811/the-role-export-credit-agencies-project-financing/> (accessed 27 November 2015).

⁶¹³ Isa F *Privatisation and human rights in the age of globalization* (2005) 115.

⁶¹⁴ General Comment No 24 (2017) para 22.

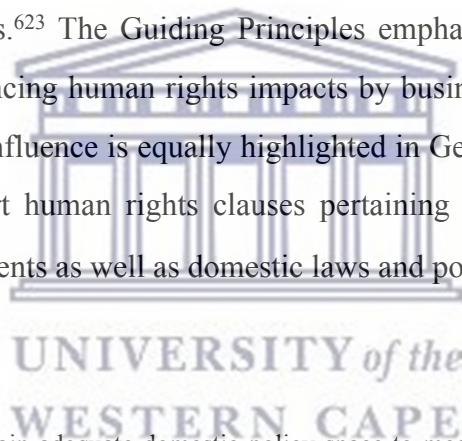
⁶¹⁵ Chirwa D ‘Privatisation and freedom from poverty’ in Bueren G (ed) *Freedom from poverty as a human right: Law’s duty to the poor* (2010) 308.

⁶¹⁶ Gatto A *Multinational enterprises and human rights: Obligations under EU law and International Law* (2011) 157.

⁶¹⁷ Lagoutte (2014) 28.

Most of the land deals and investments in the two case studies are by way of economic agreements concluded by states. It was only logical therefore for the Guiding Principles to devote one principle on economic agreements as vehicles of businesses and trade activities⁶¹⁸ in a similar way that General Comment No 24 has done.⁶¹⁹ Economic agreements such as free-trade agreements, bilateral investment treaties and contracts for investment projects are signed by states and investors through which securities to their assets, activities and taxation requirements are provided therein.⁶²⁰ These instruments also include stabilisation clauses which act as a mitigation clause against changes in law or policies that may not be beneficial to the investors.⁶²¹

While the primary purpose of such economic agreements is to foster a healthy and favourable business environment, there are claims that their contents or the way they are arbitrated are often the subject of human rights concerns.⁶²² For instance, there are exemption clauses in BIT which would exempt investors from changes in labour law or workers' rights thus preventing people to have better working conditions.⁶²³ The Guiding Principles emphasise that states have the unique possibility of positively influencing human rights impacts by business when economic agreements are drafted.⁶²⁴ This particular influence is equally highlighted in General Comment No 24.⁶²⁵ States therefore have a duty to insert human rights clauses pertaining to their respect, protection and promotion in economic agreements as well as domestic laws and policy.



⁶¹⁸ Principle 9 - States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

⁶¹⁹ General Comment No 24 (2017) para 13.

⁶²⁰ Lagoutte (2014) 28.

⁶²¹ Bockstiegel K 'Arbitration of foreign investments disputes: An introduction' in van den Berg A (ed) *New horizon in international commercial arbitration and beyond* (2005) 131.

⁶²² De Brabandere E *Investment treaty arbitration as Public International Law* (2014) 18.

⁶²³ Mosley L 'Taking workers' rights on the road? Multinational firms and the transmission of labour practices' Conference paper University of North Carolina available at <https://www.princeton.edu/~pcglobal/conferences/FDI2011/papers/mosley.pdf> (accessed 27 November 2015).

⁶²⁴ Lagoutte (2014) 29.

⁶²⁵ General Comment No 24 (2017) para 37.

In many of the local communities or regions in Ethiopia and Madagascar affected by land grabbing, there are conflicts which further heighten the risk of human rights abuses. The Guiding Principles single out conflict-affected areas and provides for specific obligations to be held by states. Principle 7 imposes a duty on states to ensure that business enterprises and corporations are not involved in human rights abuses in conflict-affected regions. The business' home and host states both have a duty to address issues arising out of human rights abuses even if they sometimes may not have control over the areas. Legislative measures such as introduction of civil or criminal liabilities for companies domiciled in their territories which have committed international crimes or abuses are encouraged by the Guiding Principles.⁶²⁶ The Principle 7 provides for measures to be taken against enterprises which are non-compliant with the standards set by the states. Financial consequences seem to be favoured in the form of punishment. The Principle 7 explicitly provides for denial of access to public support and services in cases of abuses. Proper investigative structures must be set up by the states so that they could assess the liability of business enterprises in such matters and impose required sanctions which may also include freezing of assets or seizure of equipment.

The Guiding Principles do provide for a basic framework within which the obligations of states can operate. However, the drawback is the non-binding nature of the provisions. It would imply that only genuine political will can ensure that they are actually implemented at the domestic level. The Guiding Principles still serve as a global expression of the state's obligation to ensure that there is business respect for human rights. The responsibility of the home states is equally dealt with albeit to a lesser extent. A subsequent section will focus on their obligation towards human rights.

As discussed in chapter three of the thesis, land investments deals between the host states and foreign investors normally are carried out through international agreements and contractual relationships. Such agreements in the cases of Ethiopia and Madagascar do not make any specific reference to any framework that will 'protect, respect and remedy' human rights and ensuing violations. For instance, a review of the contents of land deals in Ethiopia has revealed that there is no specific mention or implementation of Ruggie's framework.⁶²⁷ There is no clause to ensure that

⁶²⁶ Lagoutte (2014) 31.

⁶²⁷ Oakland Institute *Understanding Land Investment Deals in Africa: Country Report Ethiopia* (2011) 30 [hereafter OI Report Ethiopia: 2011].

adverse impacts of the investments are to be minimized and violations of human rights remedied.⁶²⁸

One interviewee was even reported to state that:

‘Our agreement with government is purely commercial. Government is charging us a rent... what we choose to do on the land for our own commercial intent is our own business. There are no governance, no constraints, no contracts, none of that’.⁶²⁹

It is therefore clear that Ruggie’s framework, being a voluntary one, is not being given any importance and significance in the land deals agreements in Ethiopia and Madagascar. Blitt argues that this framework, though being a good starting point, does not provide for a rigorous approach that is required for businesses and corporations to comply with human rights principles.⁶³⁰

In addition, Harrison suggests that additional requirements such as transparency, external participation and verification and independent monitoring and review must necessarily be added to Ruggie’s framework which is based on the principle of human rights due diligence for it to be functional.⁶³¹

To address the issue of the non-binding nature of Ruggie’s framework, negotiations started in July 2015 for the development of a treaty on business and human rights which would be binding. The UN Human Rights Council’s open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIWG) has been mandated to elaborate an international legally binding treaty on the issue.⁶³² In July 2018, a Zero Draft was released with provisions on the purpose, scope and jurisdiction, rights and definition of

⁶²⁸ OI Report Ethiopia (2011) 30.

⁶²⁹ OI Report Ethiopia (2011) 30.

⁶³⁰ Blitt R ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance’ (2012) 48 *Texas International Law Journal* 33.

⁶³¹ Harrison J ‘Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment’ (2013) 31 *Impact Assessment and Project Appraisal* 107.

⁶³² Business and Human Rights Resource Centre ‘Debate the treaty’ available at <https://www.business-humanrights.org/en/about-us/blog/debate-the-treaty> (accessed 10 May 2019) [hereafter Business and Human Rights Resource Centre: 2019].

victims, legal liability, due diligence, mutual legal assistance and implementation. This was followed by a Revised Draft in July 2019.⁶³³

The Revised Draft of the proposed treaty starts with a series of definitions which ensures that all stakeholders are on the same wavelength when it comes to the purview of the treaty.⁶³⁴ It has been stated that the purpose of the proposed treaty is to strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities.⁶³⁵ However, one major difference is the bindingness of these provisions which will enhance justiciability and accountability.

The main interrogation with this proposed treaty is whether or not it will only prove to be yet another legally binding treaty with a plethora of rights but without adding any new dimension to the debate. For instance one such dimension could be the recognition of human capabilities instead of human rights only. This would have resulted in more focus and attention being given to the victims with a victim-driven treaty.

Highlighting a major significance of the proposed treaty, Lopez argues that the provisions on legal liability for enterprises are very significant for the implementation of international criminal law and human rights law relating to business activities.⁶³⁶ Quijano underlines a few positives of the proposed treaty such as the removal of 'for profit' in the definition of 'business activities' which enlarges the scope of application to non-profit making activities also which are generally state-owned enterprises.⁶³⁷ The proposed treaty also provides for a new scope since it regulates business activities or both transnational and domestic businesses contrary to the Zero Draft.⁶³⁸ New

⁶³³ Business and Human Rights Resource Centre (2019).

⁶³⁴ Article 1 of the Revised Draft.

⁶³⁵ Article 2 of the Revised Draft.

⁶³⁶ Lopez C 'Legal liability for business human rights abuses under the revised draft of a treaty on business and human rights' available at <https://www.cambridge.org/core/blog/2019/09/11/legal-liability-for-business-human-rights-abuses-under-the-revised-draft-of-a-treaty-on-business-and-human-rights/> (accessed 11 September 2019).

⁶³⁷ Quijano G 'A new draft business and human rights treaty and a promising direction of travel' available at <https://www.cambridge.org/core/blog/2019/09/11/legal-liability-for-business-human-rights-abuses-under-the-revised-draft-of-a-treaty-on-business-and-human-rights/> (accessed 11 September 2019) [hereafter Quijano: 2018].

⁶³⁸ Oribhabor I 'Revised draft UN treaty on business and human rights: a few steps forward, a few unanswered questions' available at <https://www.business-humanrights.org/en/revised-draft-un-treaty-on-business-and-human-rights-a-few-steps-forward-a-few-unanswered-questions> (accessed 11 September 2019) {hereafter Oribhabor: 2019}.

obligations imposed on states are also created by the proposed treaty in view of ensuring and enhancing cross-border accountability and remedy.

A major drawback of the proposed treaty is that its article 5 is almost entirely based on the concept of due diligence in the application of measures to prevent harm. Quijano argues that other concepts such as FPIC of indigenous peoples, participation in decision-making and meaningful consultation must be enshrined in article 5.⁶³⁹ She also contends that the proposed treaty limits the scope of company's due diligence to activities which are 'under their contractual relationships' which is restrictive as it leaves other stakeholders such as buyers outside the scope.⁶⁴⁰ There is significant debate on the term 'contractual relationship' as to whether the relationship between a parent company and its subsidiary (which could have done the harm) fall within the scope of contractual relationship.

Although the proposed treaty aims at providing for effective access to justice and remedy to victims, it falls short in providing for an international remedial mechanism. There is an over-reliance on state-level implementation mechanism without active systems of international arbitration and dispute settlement mechanisms.⁶⁴¹ Oribhabor also argues that the proposed treaty fails to properly address the state-business relationship and does not reflect the concert for state responsibility.⁶⁴² It is thus clear that while the proposed treaty should be considered as a welcome addition especially with its binding force, there are aspects that require considerable review and a new direction, perhaps guided by Sen's CA with regard to the notions of victims and remedies.

It is apposite to note that the African Commission has issued an Advisory Note to the African Group in Geneva on the legally binding instrument to regulate in international human rights law, the

⁶³⁹ Quijano (2019).

⁶⁴⁰ Quijano (2019).

⁶⁴¹ Oribhabor (2019).

⁶⁴² Oribhabor (2019).

activities of transnational corporations and other business enterprises.⁶⁴³ Developed by the Working Group on Extractive Industries, Environment and Human Rights in Africa, it recommended that some of the core principles which should inform discussions include indivisibility and interdependence of rights, non-discrimination and equality, sovereignty and ownership, transparency and accountability, consultation and participation, protection of vulnerable groups and sustainable development.⁶⁴⁴ In view of advising for direct obligations on business enterprises, the Working Group stated that:

‘The WGEI therefore proposes that the Binding Instrument should go further than the very minimum, and also envision promotion and fulfilment of certain human rights obligations by business enterprises. In this regard the adoption of sustainable and ethical business practices should not be voluntary, but should be a binding duty on business enterprises. These obligations on business enterprises should be recognised in the operative section of the Legally Binding Instrument and not only in the Preamble’.⁶⁴⁵

It has also been proposed that ‘Competent regional courts as an avenue for accessing judicial remedies must also be recognized in the Legally Binding Instrument’.⁶⁴⁶ The idea of a complementary national level internationally regulated inspection framework has also been proposed by the Working Group as follows:

‘To buttress the monitoring and enforcement framework, the African group may also consider proposing the establishment at the level of states parties to the treaty of an internationally regulated monitoring, inspection and certification framework for ensuring compliance with the established standards and reporting to the treaty monitoring body’.⁶⁴⁷

⁶⁴³ African Commission on Human and Peoples’ Rights ‘Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)’ (04 November 2019) available at <https://www.achpr.org/news/viewdetail?id=206> (accessed 20 January 2020) [hereafter Advisory Note: 2019].

⁶⁴⁴ Advisory Note (2019) 2-3.

⁶⁴⁵ Advisory Note (2019) 4.

⁶⁴⁶ Advisory Note (2019) 5.

⁶⁴⁷ Advisory Note (2019) 6.

5.2.6 Obligations to ensure that effective remedies are available to victims

States are undoubtedly responsible for protecting human rights from infringements and violations that are likely to occur from business activities. The African Commission has adopted a resolution with regard to ensuring access to an effective remedy for violation of socio-economic rights by private actors. The resolution also reminds private actors of their responsibility to respect socio-economic rights of citizens.⁶⁴⁸ It is also argued that a state is also responsible for damages and harm already caused by previous actions of business enterprises. Indeed, as illustrated in chapter three, the last decade has witnessed massive violations of rights of local communities in Ethiopia and Madagascar. In such instances, states are under an obligation to alleviate the pain and heal the wound already caused to these people in the past. It is argued that the mere failure on behalf of the state to protect its citizens from acts of states or non-state actors amount to a wrongful act which opens the door for an obligation to provide for an effective remedy.⁶⁴⁹

Numerous human rights instruments impose an obligation on states parties to ensure that effective remedies are available to victims of human rights' violations.⁶⁵⁰ For examples, article 2(2) of the ICCPR provides that a state party 'adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant' while article 2(3) further elaborates that effective remedy must be available to victims. The same article also stipulates that complaints should be entertained and adjudicated upon by competent judicial, administrative and legislative authorities and any granted remedy should be enforced. The importance of the obligation upon states to provide for effective remedy is perhaps highlighted by the existing principle of exhaustion of local remedies when international judicial and quasi-judicial bodies are required to adjudicate on

⁶⁴⁸ Resolution on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services - ACHPR / Res. 420 (LXIV) 2019 para 1 and 2.

⁶⁴⁹ Gallagher A *The international law of human trafficking* (2010) 355.

⁶⁵⁰ Article 6 of the International Convention on the Elimination of all Forms of Racial Discrimination; article 14 of the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment; article 29 of the Convention on the Rights of the Child.

matters of violations of rights⁶⁵¹ and the supplementary nature of international awards and decisions to effective national remedies.⁶⁵²

The obligation under article 2(2) of the ICCPR is one which is unqualified, meaning that any failure to fulfil this particular obligation cannot be justified by political, social, cultural or economic factors by states.⁶⁵³ Remedies must equally be adapted and effective in nature by taking into consideration the specific realities and vulnerabilities of certain categories of peoples.⁶⁵⁴ The UN HRC has further elaborated on the fact that an effective remedy also consists of the duty of the state to investigate into matters of violations and a failure to fulfil this duty is a breach of the ICCPR.⁶⁵⁵ Furthermore, the UN HRC has interpreted the right to an effective remedy as one that requires reparation which is quite encompassing.⁶⁵⁶

The UN General Assembly has emphasised on the importance of states to provide for effective remedies by connecting such a duty to the states' commitment to the protection of human rights. The necessity to fulfil such an obligation is more significant when people are victims of serious human rights violations. Indeed, the UN General Assembly's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law is to the effect that domestic laws of states must be consistent with international law in providing measures and procedures that reflect an



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⁶⁵¹ Article 5(2) of the First Optional Protocol to the ICCPR requires that individuals must exhaust local remedies before submitting a complaint to the Human Rights Committee.

⁶⁵² UN CESCR, General Comment No 9: The Domestic Application of the Covenant para 4.

⁶⁵³ UN HRC, General Comment No 31: Nature of the General Legal Obligation imposed on States Parties to the Covenant (2004) [hereafter General Comment No 31: 2004].

⁶⁵⁴ General Comment No 31 (2004) para 15.

⁶⁵⁵ General Comment No 31 (2004) para 18.

⁶⁵⁶ General Comment No 31 (2004) para 16 – it includes rehabilitation, measures of satisfaction, restitution, public apologies and memorials and guarantees of non-repetition.

effective remedy.⁶⁵⁷ Remedies provided by the Ethiopian Government for human rights violations have not been particularly effective as noted by the UN HRC.⁶⁵⁸ In addition, no cases have been submitted to the courts in Ethiopia and Madagascar relating to human rights abuses and violations arising from land investment deals.

5.3 Obligations of home states

The state of nationality of the investors or the state of domicile of the business enterprises have an important role to play in land investments and deals which are causing human rights violations. In practice, diplomatic negotiations with the host states on various issues such as taxation, preferential tariffs or investment loans or grants would be initiated by the home state. Individual investors or corporations from the home states would then start their business in the host states, after setting the base. It has always remained a debatable issue on the question of whether home states should shoulder responsibilities for the violations caused by investors from their jurisdictions or territory. The host state being the duty-bearer to respect, protect and fulfil human rights of its citizens and not the home states has been one popular argument. Therefore, the latter would not bear any responsibility as a duty-bearer.⁶⁵⁹ It is also argued that in instances soft laws imposing responsibilities on them, would be very weakly drafted compared to those imposed on the host states.⁶⁶⁰ This section discusses the duties that home states may have following rights infringements which are directly caused by investors or corporations under their jurisdiction.

⁶⁵⁷ UN General Assembly Resolution 147 UN Doc A/RES/60/147 (2005) – (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
(c) *Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;*
(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

⁶⁵⁸ UN, Concluding Observations Ethiopia (2011) para 16.

⁶⁵⁹ 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.

⁶⁶⁰ 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].

The home state is supposed to ‘set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations’ based on the Guiding Principles.⁶⁶¹ Also, there is an increasing pressure on home states to iron out legal mechanisms- compelling their investors operating in foreign lands to respect human rights and environmental standards and not to be engaged in acts of corruptions.⁶⁶² Moreover, as corporations today have increased control over aspects of human rights which need regulation such an approach is important.⁶⁶³ Equally important, there is a demand for the onus to shift to the home states to regulate their own investors and corporations.⁶⁶⁴ However there is only a soft obligation in terms of an expectation on behalf of the home states towards their investors to respect human rights- based on the wordings of the Guiding Principles. 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, it is argued that a higher or more legal expectation would not be widely accepted.⁶⁶⁵

International investment agreements are often used as vehicles through which land investments are carried out in Ethiopia and Madagascar. It is argued that these instruments are often ‘one-way’ instruments that impose obligations on the host states much more than the home states.⁶⁶⁶ Bottini contends that usually the home states are not even party to the investments agreements normally signed by the private investors and the host states.⁶⁶⁷ It thus becomes challenging to directly hold the home states responsible for the harm done by their investors especially if there is no sufficient control that the home states are exercising on the investors. It should be noted that the proposed treaty on business and human rights is proposing extraterritorial responsibilities of home states but,

⁶⁶¹ Principle 1 para 2.

⁶⁶² Vanduzer A, Simons P & Mayeda G *Integrating sustainable development into international investment agreements* (2013) 264.

⁶⁶³ Ziegler J ‘Report submitted by the Special Rapporteur on the right to food’ UN Doc E/CN.4/2004/10 para 35-52.

⁶⁶⁴ Aguirre D *The human right to development in a globalized world* (2008) 267.

⁶⁶⁵ Seck S ‘Home state responsibility and local communities: The case of global mining’ 11 (2008) *Yale Human Rights and Development Law Journal* 177.

⁶⁶⁶ Bottini G ‘Extending responsibilities in international investment law’ (2015) 1 available at <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Bottini-Final.pdf> (accessed 15 September 2019) [hereafter Bottini: 2015].

⁶⁶⁷ Bottini (2015) 3.

as discussed above, without clearly mentioning their positive duties and obligations with a clear demarcation from the host states.

It should also be highlighted that a fairly recent development in international law which is the acquiring of international legal personality by non-state actors has affected the degree of obligation and responsibilities of home states.⁶⁶⁸ They can now be considered as subjects of international law and bearers of certain obligations, thus resulting in a degree of dilution of the direct responsibility of the home states.⁶⁶⁹

5.3.1 Obligation under the UN Guiding Principles

Principle 3 deals with the regulatory and policy functions of the state and can also be interpreted as applying to home states. An obligation on home states to guide their investors on how to operate on foreign lands without jeopardising rights and liberties of individuals and peoples- is imposed by the third paragraph of the Principle. The words ‘throughout their operations’ consolidate such a duty as mentioned above for the home states.⁶⁷⁰ The commentaries to the Guiding Principle which provides that such guidance would involve advice on due diligence to human rights and on issues of marginalisation and vulnerability- highlights the soft nature of the obligation which exist. The state-business relationship is regulated by Principles 4 to 6, 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. Moreover, it is contended that there is no clear indication as to whether or not such obligations apply to home states. Equally important, the commentaries to the Guiding Principles are silent on the issue and there is no mention of the home states.

Principle 10 more explicitly refers to home states and deals with human rights obligations of states acting as members of multilateral institutions. They are required to maintain their obligations towards international human rights law while being member to international trade or financial

⁶⁶⁸ Ijalaye D *The extension of corporate personality in international law* (1978).

⁶⁶⁹ Muchlinski P ‘Policy issues’ in Muchlinski P, Ortino F & Schreuer C (eds) *The Oxford Handbook of International Investment Law* (2008) 6.

⁶⁷⁰ Vanderhole (2012) 5.

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’.

The Guiding Principles identify the responsibility of home states only to a limited extent. In rare cases where same is mentioned, it is difficult to see which specific division of responsibility applies to the host states or the home states. The only area of an iota of precision is in relation to the responsibility of home states in the actions of transnational corporations in conflict-affected areas. The justification for imposing the obligation on the home states in the above mentioned instance is that during periods of conflicts, the host states have less effective controls over the actions of transnational corporations thereby making it more logical to request home states to shoulder the responsibility of ensuring respect for human rights. However, to what extent the home states would be responsible and liable for the acts of their transnational corporations is a matter which is not clearly and pertinently covered by the Guiding Principles.

The reason as to why the Guiding Principles prioritises the responsibility of host states is to be found in the report from John Ruggie⁶⁷¹ where he argues that:

‘(host) States have an obligation to protect against human rights abuses by corporations affecting persons within their territory or jurisdiction, through regulation and adjudication. While home States are not required to help prevent human rights violations by corporations based within their territory, they are free to do so under a two-fold condition: there needs to be a recognised basis of jurisdiction and the actions of the home State need to meet an overall reasonableness test (including the principle of non-intervention in internal affairs)’.⁶⁷²

It is argued that Ruggie’s position on the responsibility of home states in business and human rights can be challenged. From a human rights’ point of view, such a stand is dangerous and less favourable to the protection of rights and liberties. Indeed, Jagers argues that the statement of

⁶⁷¹ Ruggie J Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, , Protect, Respect and Remedy: a Framework for Business and Human Rights, UN Doc. A/HRC/8/5 of 7 April 2008 [hereafter Ruggie’s Framework: 2008].

⁶⁷² Ruggie’s Framework (2008) para 18-19.

Ruggie is ‘not correct’ and against established rules of international law of state responsibility.⁶⁷³ There exist other frameworks on human rights and business that go beyond Ruggie’s work and the Guiding Principles and divert from the stand taken by Ruggie as discussed above.

With regard to the proposed treaty on business and human rights, it has to be noted that it fails to make the distinction between home state and host state. As such, there are no clear obligations and duties that apply to both. The broad scope of the proposed treaty is with regard to states (home or host) and human rights abuses and violations caused by business enterprises. The obligations, liabilities and duties of the home state can only be inferred by the notion of a business activity of a transnational character. It is argued that a clear demarcation between home and host states would be more effective especially with respect to remedies to be provided.

5.3.2 Other normative framework on business and human rights

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1996 rejected the stand of home states only having the possibility and not the obligation to protect against infringements of rights caused by their investors. The Maastricht Guidelines clearly impose a duty on home states to ensure that private individuals or corporations over which states exercise jurisdiction to ensure that social, economic and cultural rights are not deprived. It is clearly mentioned that states are responsible for violations resulting from their own failure to exercise diligence in controlling the actions of non-state actors under their jurisdiction.⁶⁷⁴ It is relevant to highlight the clear and strong words that are used to engage the responsibility of home states. The Commentary made to the Maastricht Guidelines further emphasises on the attribution of responsibility to home states by stating that ‘inaction by a State in controlling the conduct of private entities such as transnational corporations will result in the State being assigned responsibility for the violations of the former’.⁶⁷⁵

⁶⁷³ Jagers (2011) 159; See also Joseph S ‘Taming the Leviathans: Multinational Enterprises and Human Rights’ 46 (1999) *Netherlands International Law Review* 183.

⁶⁷⁴ Guideline No 18 of the Maastricht Guidelines.

⁶⁷⁵ Dankwa V, Flinterman C & Leckie S ‘Commentary on the Maastricht Guidelines’ in Van Boven T & Westendorp I (eds) *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) 29.

The 2003 Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights (the 2003 Norms) is another legal framework that reiterates the fact that home states do have responsibilities for the actions of corporations or enterprises domiciled in their jurisdiction. The first paragraph of the 2003 Norms repeats the obligations of states to protect against violations authored by business enterprises under their control. It is equally mentioned that nothing contained in the Norms should be construed as diminishing duties and responsibilities that states have towards human rights.⁶⁷⁶ Kinley and Chambers even argue that corporate responsibility should be subordinate to state responsibility.⁶⁷⁷

The 2011 Committee on Economic, Social and Cultural Rights' *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights* addressed the duty and responsibilities of home states in the following terms:

'States Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant'.⁶⁷⁸

The state of incorporation of the enterprises is required to:

'encourage such companies to assist, as appropriate, including in situations of armed conflict and natural disaster, host States in building capacities needed to address the corporate responsibility for the observance of economic, social and cultural rights'.⁶⁷⁹

5.4 Concluding remark on state obligations

The five human capabilities can only be protected effectively if there is a genuine will from the states concerned. Their roles have been regulated by international human rights law as discussed above generally for the respect of human rights and when it comes to business and human rights. In other words, they have a crucial role to play when it comes to striking the balance between

⁶⁷⁶ The 2003 Norms para 19.

⁶⁷⁷ Kinley D & Chambers R 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' 6 (2003) Human Rights Law Review 447.

⁶⁷⁸ UN CESCR Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights UN Doc E/C.12/2011/1 para 5 [hereafter UNCESCR Statement: 2011].

⁶⁷⁹ UN CESCR Statement (2011) para 6.

development and human rights. Sen's model of development can only be driven forward in Ethiopia and Madagascar if the states remain in conformity with their obligations.

The fact that the selected human capabilities already exist in the form of human rights specific to them, as would be discussed later in this chapter, already signals the legal obligation that states have under the ICCPR, ICESCR and the ACHPR to respect them. The existence of soft laws on business and human rights also represents a good foundation based on which the capability approach to large-scale land investments can be driven in the selected countries. However, the concern is with regard to the enforceability of these soft laws in cases of non-observance. The necessity to transform these soft laws into binding ones will be discussed in the recommendation part of the thesis.

Another important issue to be considered is the level of compliance by the two states used to their obligations towards human rights in the development context. It is rather complex to measure the level of compliance of host and home states to the normative framework on business and human rights. It can be due to the non-binding nature of the framework which makes accountability and answerability less formal and more difficult to assess. Therefore, the most accurate way to examine whether states have been fulfilling their duties and obligations of protecting, promoting and fulfilling human rights of local communities affected by land investments in Ethiopia and Madagascar would be by way of the state reports and concluding observations issued by quasi-judicial bodies such as the HRC and the CESCR. It has to be noted that in the various state reports submitted to these committees and their ensuing concluding observations did not reveal any accurate account or interrogation on the issue of land grabbing in Ethiopia.

It was however a different case for Madagascar. In fact, in the concluding observations issued by the CESCR in 2009, the latter specifically expressed its concern about the Law No. 2007-036 which has land acquisition for foreign investors as subject matter. The CESCR has highlighted that such a law is impacting on the access of peasants and people living in rural areas to cultivable lands, natural resources and their right to food.⁶⁸⁰ Over exploitation of land and natural resources and their

⁶⁸⁰ UN CESCR, Concluding Observations on Madagascar (2009) UN Doc E/C.12/MDG/CO/2 para 12 [hereafter UN CESCR : 2009]

resulting effect on the cultural and social link of ethnic groups to their natural and ancestral lands has also been raised as a matter of concern by the CDESCR.⁶⁸¹

In the concluding observation issued to the attention of the Government of Ethiopia after the latter submitted its report in 2012, the way socio-economic rights are treated is quite apparent and indicative of how land investment related violations of rights would be treated. For instance, the CDESCR expressed concern regarding the Charities and Societies Proclamation (No 1113/2019) which prohibited the free and fair functioning of civil societies.⁶⁸² Attempts of impeding on the work of civil societies bear testimony that non-governmental societies are not free to report land investments related rights' violations thus preventing the state from protecting, promoting and respecting the rights of civilians. More related to the issue of land investment would be the remark made by the CDESCR on the Voluntary Settlement Programme based on which thousands of people in various regions are being relocated to villages that lack basic infrastructure, such as health clinics, clean water supplies and schools, as well as agricultural assistance or food assistance.⁶⁸³ Land used for the construction of Gilgel gibe hydro-electric dam causing serious impact on indigenous peoples relying on the Omo River for their livelihood has equally been highlighted as a matter of serious concern by the CDESCR.⁶⁸⁴ In addition, at the African Commission on Human and Peoples' Rights' level, only Ethiopia has been the subject of one concluding observation which made no reference to the issue of land investment or related human rights violations.

There is no doubt that the obligations of states towards human rights as established by various binding and non-binding international instruments discussed above should have been an effective platform based on which Sen's Capability Approach to development could be driven forward. It is argued that if the general obligations were being respected by Ethiopia and Madagascar in cases of land investment deals, it would have automatically meant that the five human capabilities are being respected, protected and fulfilled. However, a lack of harmony between international law and

⁶⁸¹ UN CDESCR (2009) para 33.

⁶⁸² UN CDESCR, Concluding Observations on Ethiopia (2012) UN Doc E/C.12/ETH/CO/1-3 para 7 [hereafter Concluding observations Ethiopia: 2012].

⁶⁸³ Concluding Observations Ethiopia (2012) para 21.

⁶⁸⁴ Concluding Observations Ethiopia (2012) para 24.

domestic provisions, an absence of cases before the local courts on matters of alleged human rights violations resulting from land investments and the voluntariness of soft law such as Ruggie's report imply that compliance to the obligations are very low. The normative framework on the obligations of the states involved arguably is present both through hard law and soft law. The difficulty tends to arise in relation to their implementation at the domestic level resulting in poor compliance. Therefore, how implementation and compliance can be enhanced will be at the core of the discussion in the next chapter which is on the domestic legal framework. At this point, the focus is now on the normative framework that exists at the international level on the five selected human capabilities. They all exist as specific human right to land, water, food, culture and political participation and it is critical to assess how these rights can be supportive of Sen's ideas of development rendering people capable.

5.5 Existing legal framework protecting the selected human capabilities

The human capabilities selected based on Sen's CA namely land, water, food, political participation and culture are all protected under international human rights normative framework as rights. Sen argues that since human rights are rights to certain specific freedoms and human capabilities are freedoms of particular kinds, there is immediately a basic connection which can be made between these two concepts.⁶⁸⁵ The existing normative framework on human rights can be considered as a foundation based on which capabilities can be protected. The following section assesses this framework in order to determine the extent to which human rights to the capabilities cited above can be effective in their promotion and protection.

5.5.1 Land as protected by the right to property

Land is crucially important for the local communities in Ethiopia and Madagascar. A majority of the people are dependent on the land for their livelihood in the areas affected by land investments . Moreover, their means of subsistence is closely associated with the land and the natural resources that are found on or in it. In addition, the minorities and indigenous peoples do not merely regard land as a commercial commodity by minorities and indigenous peoples. Ancestral lands of these peoples are the focal point of their cultural existence and identity, but due to the communal land

⁶⁸⁵ Sen A 'Human Rights and capabilities' 6 (2005) *Journal of Human Development* 152.

tenure systems that normally exist for their situation based on customary law, they cannot assert their authority on their lands. This section of the thesis looks at how land is protected in law for the local communities as a property and how local communities are supposed to have a more specific protection based on their cultural attachment to land.

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 by virtue of the fact that land being interpreted as being property. The UDHR has enshrined same as a right which is conferred to individuals to own property alone or in association with others as well as a protection from arbitrary deprivation of same. It is contended by Krause and Alfredsson that the right to property is not an absolute one and can be limited provided that same is not arbitrary.⁶⁸⁶ 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'.⁶⁸⁷ International human rights law also prohibits discrimination on the basis of race on the issue of ownership of property.

Despite the argument that the right to property is a dual right- the ICCPR and the ICESCR are silent on same.⁶⁸⁸ This 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.⁶⁸⁹ However, the fact that the right to property is not included in the ICCPR or the ICESCR should not be construed as a denial of the right.⁶⁹⁰ It is explained by Travaux Préparatoires of the UN 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.⁶⁹¹ In the end, this resulted in the term property only

⁶⁸⁶ Krause C & Alfredsson G 'Article 17' in Alfredsson G & Eide A (eds) *The Universal Declaration of Human Rights: A common standard of achievement* (1999) 364.
Article 17(1) and (2) of the UDHR.

⁶⁸⁷ See Article 13, 18, 19, & 30 of the Convention relating to the Status of Refugee and article 13, 19, 29 & 30 of the Convention relating to the Status of Stateless Persons.

⁶⁸⁸ Rosas A 'Property rights' in Rosas A et al *The strength of diversity: Human rights and pluralist democracy* (1992) 138.

⁶⁸⁹ Reidel E *Theorie der Menschenrechtsstandards* (1986) 39 [Hereafter Reidel: 1986].

⁶⁹⁰ Reidel (1986) 45.

⁶⁹¹ See Annotations on the text of the draft International Covenants on Human Rights (1995) UN Doc. A/2929 para 202 & 206.

appearing in both Covenants in the discrimination provisions because of the ideological and regional differences on the right to property could not be harmonized. Other human rights instruments which came after the ICCPR and the ICESCR have adopted the right to property in clearer terms for example the CEDAW obliges states to guarantee equality in property ownership.⁶⁹² The Convention on the Protection of the Rights of All Migrant Workers (ICRMW) and their Families explicitly provides for the right to property and limitations that are allowed.⁶⁹³

On the African level, the ACHPR provides for the right to property in its article 14 and stipulates 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. However, this has been seen as a claw-back clause which renders protection from state actions very weak.⁶⁹⁴ 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 argued by Ankumah.⁶⁹⁵ The right of peoples to freely dispose of their wealth and natural resources is provided at Article 21.

The right to property is not clearly defined in terms of its object in any of the above mentioned universal or regional instruments. Moreover, it is to be noted that the UN HRC 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.⁶⁹⁶ On the other hand the African Commission has 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.⁶⁹⁷ It further elaborated that property rights:

⁶⁹² Articles 15(2) and 16(1).

⁶⁹³ Article 15 - No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.

⁶⁹⁴ Odinkalu C 'Implementing economic, social and cultural rights under the ACHPR' in Evans D & Murray R (eds) *The ACHPR: the system in practice* (2002) 191.

⁶⁹⁵ Ankumah A *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 142.

⁶⁹⁶ In *Ackla v Togo*, the UN HRC highlighted that the right to property was not protected by the ICCPR and decided that the communication was inadmissible. *Ackla v Togo* Communication No. 505/1992, UN Doc. CCPR/C/51/D/505/1992 para 6.3

⁶⁹⁷ *Endorois* (2009) para 209.

‘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.’⁶⁹⁸

In line with interference with the right to property, it is important to apply some conditions such as principle of legality, public or general interest character and the principle of proportionality. Based on the principle of legality, any limitation to property rights must be prescribed by the law whereby same must be published, accessible to all and compatible with the rule of law.⁶⁹⁹ Moreover, 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.⁷⁰⁰ 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 the individual rights of affected persons and what general public demands.⁷⁰¹ 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’.⁷⁰²

It is apposite to note that the Guiding Principles on Large Scale Land Based Investments in Africa can also be considered as a soft law that confers protection to the right to land in Africa. These Guiding Principles were drafted by the Land Policy Initiative and endorsed and supported by the consortium of the African Union, the UN’s Economic Commission for Africa and the African Development Bank (AfDB) in 2014. The main objective of these Guiding Principles is to enhance land governance to secure land rights and livelihoods. The Guiding Principles are modelled in a way to help AU member states and other stakeholders develop larger-scale agricultural investments that can be more sustainable and beneficial to communities, investors and governments.⁷⁰³ They are

⁶⁹⁸ Endorois (2009) para 86.

⁶⁹⁹ *James and others v The United Kingdom*, Application No 8793/79 (21 February 1986) para 67.

⁷⁰⁰ *Former King of Greece and others v Greece* Application No 25701/94 (23 November 2000).

⁷⁰¹ *Aktiebolag v Sweden* Application No 10873/84 (07 July 1989) para 46.

⁷⁰² Endorois (2009) para 214.

⁷⁰³ See Land Links ‘Guiding Principles on Large Scale Land Based Investments in Africa’ available at <https://landlinks.org/globalpolicy/guidingprinciples/#:~:text=The%20Guiding%20Principles%20on%20Large,improve%20land%20governance%20to%20secure> (accessed 17 September 2020).

founded on the basis of human rights and gender equality and promote six fundamental principles namely respecting the human rights of communities; respecting women's land rights; conducting holistic and effective assessments of investments; recognizing the crucial role of smallholder farmers for achieving poverty reduction and food security; promoting collaboration among member states; and, enhancing transparency and accountability with the view of improving governance. The Guiding Principles highlights the importance of recognizing customary rights to land and resources, and of participation of local communities in consultations and negotiations. They also encourage timely and adequate compensation for those who lose rights. They also call for more robust monitoring of investment activities.

Ethiopia and Madagascar have land tenure systems and right to property legislations that affect land as a human capability in different ways. This perspective will be taken in the following chapter which examines the domestic legal framework. At the international level, Ethiopia and Madagascar being states parties to ICESCR have specific obligations towards land as a property. Despite not specifically mentioning the term property, to reiterate the UN CESCR has risen concerned about Law No. 2007-036 in Madagascar.⁷⁰⁴ As for Ethiopia, the UN CESCR has not highlighted any aspect concerning human rights violations related to land investments. The African Commission has also issued one concluding observation for Ethiopia which makes no mention of access to land and land as property in relation to the land investments by foreigners.

5.5.2 The right to water

On 28 July 2010, through Resolution 64/292, the UN General Assembly explicitly recognised the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights.⁷⁰⁵ Water is the essence of life without which no living thing can survive. It is always blessed with healing effects for diseases such as asthma, arthritis, constipation and hypertension.⁷⁰⁶ It has been predicted that by 2020, water will become

⁷⁰⁴ UN CESCR, Concluding Observations Madagascar (2009) para 12.

⁷⁰⁵ UN GA 'The human right to water and Sanitation' UN Doc A/RES/64/292.

⁷⁰⁶ Batmanghelidj F *Water for Health, for healing, for life* 2003.

more valuable than gold.⁷⁰⁷ From the CA, if one has the desire to stay alive and healthy in the form of a functioning, then the capability to achieve it would be water. Nevertheless, water as a central human capability is proving to be scarce and ever so difficult to acquire by local communities who are the victims of land investments in Ethiopia and Madagascar. The reason behind it is the limited accessibility that they have to their lands since the taking over by the investors with political complicity from the state.⁷⁰⁸ In some cases, water courses have been diverted to make the land more suitable for investments. It results in local communities having to walk for miles to have access to clean and safe water. In cases where the water supply has not been much affected, the quality of it has certainly alarmingly shrunk due to pollution resulting from the investment activities.

While there is a right to water in international law as will be discussed here, to what extent it is effective and applicable is a serious matter of concern. More so as local communities are suffering each and every day and a practical and speedy solution is urgently required. The right to water will be assessed in order to measure to what extent the way the right presented and conferred on individuals in international human rights law is complementary to water as a human capability.

Prior to now, the right to water has not been recognised as a self-standing human right in international human rights law but recent developments such as the UN General Assembly Resolutions and General Comments no 15 by the CESCR would seem to give recognition to a self-standing right to water. There are various provisions in several human rights related treaties and conventions related to access to safe drinking water imposing on all stakeholders to provide to all human beings a basic water requirement.⁷⁰⁹ Access to safe drinking water imposes on states the obligations to ensure that every individual has access to water for personal and domestic uses and to ensure that adequate sanitation level is progressively maintained and enhanced. The basic requirements of water to meet the fundamental needs of human beings was first debated at the United Nations Water Conference where it was asserted that all peoples, irrespective of their stage of development and socio-economic conditions, had a right to water in quantity and quality that is

⁷⁰⁷ Shari 'Water: The essence of life' (2010) available at <http://www.baliadvertiser.biz/articles/feature/2010/water.html> (accessed 3 October 2015).

⁷⁰⁸ Bakker K 'The commons versus the commodity' (2007) 39 *Antipode* 430-455.

⁷⁰⁹ Gleick P 'The human right to water' (1999) 1 *Water Policy* 487.

equal to their basic needs.⁷¹⁰ This principle was reiterated in the Agenda 21 which was adopted at the UN Conference on Environment and Development dealing with the issue of sustainable development. Regional declarations have equally acknowledged the importance and the essence of the right to water.⁷¹¹

The right to water has been defined by the CESCR in its General Comment No 15 as to mean the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses. The CESCR has stressed on the fact that although the ICESCR does not provide for a specific right to water, it has to be implied from the right to an adequate standard of living provided by article 11 which should include water in the list consisting of housing, food and clothing as the word *including* denotes that the catalogue of rights was not meant to be exhaustive.⁷¹² While it is debatable whether core human rights instruments provide for the right to water, it is logical to say that more and more of them are at least recognising the obligation states have relating to access to safe drinking water and sanitation. For instance, the CEDAW imposes an obligation on states to ensure access to water and sanitation in its article 14(2).⁷¹³ The Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) have followed in the steps.⁷¹⁴

The right to water has also been provided in an implicit way in several core human rights conventions. For instance, the right to life provided by the ICCPR can be interpreted to implicitly provide for the right to water. The UN HRC has commented that the right to life does not merely impose an obligation on states to protect individuals from the active taking of life but equally to ensure access to means of survival, one of them being water.⁷¹⁵ The right to health provided by the

⁷¹⁰ United Nations Water Conference Resolutions No 2 p 1 available at <http://www.ielrc.org/content/e7701.pdf> (accessed 3 October 2015).

⁷¹¹ Council of Europe Recommendation (2001)14 of the Committee of Ministers to member States on the European Charter on Water Resources; Message from Beppu, 1st Asia-Pacific Water Summit, Beppu, Japan, 3-4 December 2007.

⁷¹² UN CESCR, General Comment 15 : The right to water (2002) para 3.

⁷¹³ Article 14(2) (h) - To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

⁷¹⁴ Article 27 and 28 respectively.

⁷¹⁵ UN HRC, General Comment 6: Article 6 (1982) para 5.

ICESCR can also be a right from which the right to water can be implied. The CESCR has recognised water as an underlying determinant of health without which realising the right to health is impossible.⁷¹⁶ Based on legal interpretation therefore, right to water is a corollary of the right to health.

At the regional level, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa have explicit states' obligations on access to safe drinking water and sanitation.⁷¹⁷ As for the African Charter, the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the ACHPR provides that while the Charter does not provide for a direct right to water, it can be implied from a number of rights such as the right to life, dignity, food, work, development, health and a satisfactory environment.⁷¹⁸ It goes further to state that the right to water under the African Charter imposes a minimum core obligation on states parties to ensure access to the minimum amount of what that is essential, safe physical access to water and prohibition of using water as a political tool.⁷¹⁹ The African Convention on the Conservation of Nature and Natural Resources imposes an obligation on states to endeavour to ensure that their populations have sufficient and continuous supply of water.⁷²⁰

The right to water is associated with freedoms and entitlements. The freedoms include protection against illegal disconnection of supply, prevention of unlawful water pollution, land and housing status not acting as a discrimination basis in accessing water and protection from the threat to

⁷¹⁶ UN CESCR, General Comment 14: The Right to the highest attainable standard of health (2000) para 4.

⁷¹⁷ Article 14 of the African Charter on the Rights and Welfare of the Child – to ensure the provision of adequate nutrition and safe drinking water; Article 5 of the Women's Protocol - provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food.

⁷¹⁸ African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' paras 87 [Principles and Guidelines on Implementation of Socio-Economic Rights].

⁷¹⁹ Principles and Guidelines on Implementation of Socio-Economic Rights para 92.

⁷²⁰ Article 7 - The Parties shall establish and implement policies for the planning, conservation, management, utilization and development of underground and surface water, as well as the harvesting and use of rain water, and shall endeavour to guarantee for their populations a sufficient and continuous supply of suitable water.

personal security when accessing water.⁷²¹ It implies that actions of the investors in the cases studies of the thesis resulting in limiting or preventing access to local communities to water sources or deliberately polluting them and physically beating the local communities who would be regarded as trespassers violate international norms and standards on the right to water. Physical accessibility in terms of the distance from home to the water source is equally an important factor. The WHO has stated that water sources have to be within a range of 1000 metres from the home and that water collection should not exceed 30 minutes.⁷²² The factual account in chapter three is illustrative of the fact that members of the local communities especially the women are compelled to cover very long distances to fetch water which is impacting on their lives.

The CESCR has underlined the fact that a large number of households in the rural areas of Ethiopia are denied access to safe drinking water and over half of households in rural areas have to make long journey to fetch water despite Ethiopia's specific obligation under article 11 of the ICESCR to provide for safe drinking water.⁷²³ The CESCR also highlighted the fact that around 50% of the Malagasy population does not have access to clean and safe drinking water.⁷²⁴

5.5.3 The right to adequate food

Food is essential for the survival of a human being. It is the source of energy that is required for the daily activities and, more importantly, it is the means by which the body acquires essential vitamins and nutrients that keep an individual in good health. From a CA theory point of view, it is candid to understand the importance of food. Staying healthy for all human activities and enjoying a sound life would be the functioning of an individual. To achieve this desired functioning, the capability that essentially needs to be present is food. Yet, it can be a challenge for some people to get food as a capability as evidenced by the fact that around one billion of people around the world are

⁷²¹OHCHR 'The right to water' Fact Sheet No 35 page 7 available at <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf> (accessed 3 October 2015) [hereafter OHCHR Fact Sheet].

⁷²² Howard G & Bartram T 'Domestic water quantity, service level and health' (World Health Organization, 2003), p. 22.

⁷²³ Concluding Observations Ethiopia (2012) para 23.

⁷²⁴ UN CESCR, Concluding Observations Madagascar: 2009, para 25.

undernourished.⁷²⁵ The majority of people dying of hunger and malnutrition are poor people, smallholders or landless peoples and women and girls in rural areas without productive resources.⁷²⁶

Local communities affected by land investments in Ethiopia and Madagascar are facing severe food shortage as discussed with evidence in Chapter 3. Expropriation or encroachment of their productive and arable lands is the reason behind a lack of food supply. In instances where compensation and relocation of displaced communities are being carried out, it is found that the new eating habits and food that are being imposed on them is causing health issues. The problem is more acute in cases where the displaced communities are indigenous peoples as their foods tend to be unique to their culture and tradition which is not necessarily available in places where they are relocated. It is argued that local communities were not supposed to be facing issues relating to food. This important capability is protected by international human rights treaties and convention as a right to adequate food. Yet, the implementation of the right is proving to be challenging and the violations are not being adequately remedied by existing legal framework. The following section deals with the right to adequate food, providing the basis whether such a right is apt and adequate to protect food as a human capability to local communities of the case studies of the thesis.

The right to food has been recognised by several core human rights instruments such as the UDHR and the ICESCR as a component of the right to an adequate standard of living. The right to food of specific groups has also been acknowledged by several regional and international treaties and conventions as will be dealt with below. The right to adequate food and the right to be free from hunger have to be ensured by states without discrimination based on grounds such as race, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status.⁷²⁷ Pursuant to a call for states to respecting obligations arising out of the right to food protected by human rights instruments during the World Food Summit by the Food and Agriculture Organization (FAO) in 1996, the CESCR issued General Comment No 12 (1999) which defines the

⁷²⁵ FAO 'The state of food insecurity in the world 2009: Economic crises' (Rome, 2009) p 11.

⁷²⁶ United Nations Publications 'Millennium project – Halving hunger: It can be done' Sales No. 05.III.B.5 p 2-4 [hereafter Millennium Project].

⁷²⁷ OHCHR 'The right to adequate food' Fact Sheet No 34 available at <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf> (accessed 6 October 2015) [hereafter: Fact Sheet 34: 2010].

right to food.⁷²⁸ A Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security was adopted in 2004 by the FAO in an attempt to practically guide states in their implementation of the right to food.⁷²⁹

The right to food has been interpreted as an inclusive right in terms of constituting of all nutritional elements that a person needs for an active and healthy life with the unhindered possibility of accessing them.⁷³⁰ In the same vein, inequality in the enjoyment of the right to adequate food between men and women has been strongly discouraged by the CESCR as it acts as a hindrance towards the full implementation of the right.⁷³¹ For the Special Rapporteur on the right to food,

‘the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear’.⁷³²

There are certain elements of the right to food on which states are particularly supposed to focus upon namely availability, accessibility and adequacy of food. Availability is the possibilities of feeding oneself directly from the land and natural resources that are available or the possibility and capacity of buying essential foodstuffs from markets and shops.⁷³³ Accessibility implies that economic and physical access to food must be guaranteed. Economic accessibility means that an

⁷²⁸ UN CESCR, General Comment No 12: Right to adequate food (1999) para 4 [hereafter General Comment No 12] - The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.

⁷²⁹ FAO Corporate Document Repository ‘Voluntary Guidelines’ adopted by the 127th Session of the FAO Council (November 2004) available at <http://www.fao.org/docrep/009/y7937e/y7937e00.htm> (accessed 6 October 2015) [hereafter FAO Guidelines: 2004] - The objective of the Voluntary Guidelines is to provide practical guidance to States in their implementation of the progressive realization of the right to adequate food in the context of national food security, in order to achieve the goals of the World Food Summit Plan of Action. They provide an additional instrument to combat hunger and poverty and to accelerate attainment of the Millennium Development Goals.

⁷³⁰ Fact Sheet 34 (2010) 2.

⁷³¹ UN CESCR, General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (2005) para 4.

⁷³² OHCHR Special Rapporteur on the right to food ‘The right to food’ available at <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx> (accessed 6 October 2015).

⁷³³ General Comment No 12 para 12.

individual must be able to afford food at reasonable prices without having to compromise on other basic amenities such as school fees, medicines or rent.⁷³⁴ Such economic accessibility can be guaranteed by minimum wage system or by social security structures which would ensure that people have enough money to meet the cost of nutritious food.⁷³⁵ Physical accessibility implies that food must be physically accessible to all categories of persons including children, women, elderly persons, the physically disabled and the mentally ill.⁷³⁶ Adequacy refers to the fact that food must satisfy dietary needs by considering an individual's age, condition of health, occupation and sex.⁷³⁷ Food for children without proper nutrients for growth and development or food which is responsible for obesity and illness are considered as inadequate food.⁷³⁸ Adequate food should also be interpreted as food which is culturally and religiously acceptable.⁷³⁹

The UDHR recognises that every individual has a right to food in its article 25.⁷⁴⁰ The ICESCR provides for the right to food as a component of the right to adequate standard of living and as an explicit right to be free from hunger.⁷⁴¹ The CEDAW acknowledges the right to adequate food of pregnant and lactating women in relation to the protection of maternity.⁷⁴² The CRC provides for a right to adequate food to children in the context of the health of children and their adequate standard of living.⁷⁴³ Article 25(f) of the CRPD equally protects the right to food of persons with disabilities jointly with the protection of their health and standard of living. At the African level, the African Charter on the Rights and Welfare of the Child caters for the right of children to nutrition while

⁷³⁴ General Comment No 12 para 13.

⁷³⁵ Fact Sheet 34 (2010) 3.

⁷³⁶ General Comment No 12 para 13(2).

⁷³⁷ General Comment No 12 para 9.

⁷³⁸ Fact Sheet 34 (2010) 3.

⁷³⁹ General Comment No 12 8(2).

⁷⁴⁰ Article 25 of the UDHR - Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, ...”

⁷⁴¹ Article 11(1) and 11(2) of the ICESCR.

⁷⁴² Article 12(2) of the CEDAW.

⁷⁴³ Article 24(2)(c) and 27(3) respectively of the UNCRC.

protecting the right to health and health services for children.⁷⁴⁴ The African Women's Protocol recognises the right to food of women specifically in Article 15 and while addressing the specific rights of pregnant and breastfeeding women in article 14(2). It is important to highlight that the right to food has also been interpreted through other human rights. For instance, the African Commission has interpreted the right to food as being implicitly provided by the right to life, right to health and right to economic, social and cultural development.⁷⁴⁵ The UNHRC has also commented to the effect that there is an obligation on states to eliminate malnutrition in the wake of protecting the right to life, thus providing another implicit recognition of the right to adequate food.⁷⁴⁶ The Committee against Torture (the implementing body of the Convention against Torture) has highlighted that an inadequate supply of food in prisons can even amount to inhumane and degrading treatment.⁷⁴⁷

The CESCR has highlighted that the Voluntary Resettlement Programme in Ethiopia has caused local communities and people from rural areas to be relocated to village that lack adequate access to food.⁷⁴⁸ It also noted with concern the prevalence of chronic food insecurity and malnutrition, in particular amongst children.⁷⁴⁹ The CESCR has hinted at problems that economic investments in Ethiopia, if not well planned, can have on food security. Citing the prospect of the Gilgel Gibe III hydro-electric dam, the CESCR highlighted that reduced access to the Omo River will endanger local food security. In the case of Madagascar, the CESCR raised concern about the Law No. 2007-036 of 2008 relating to investment law allowing for land acquisition by foreign investors which negatively impacts on the right to food of local communities.⁷⁵⁰

⁷⁴⁴ Article 14 (2) of the ACRWC.

⁷⁴⁵ SERAC (2001) para 64.

⁷⁴⁶ UN HRC General Comment No 6: The right to life (1982) para 5.

⁷⁴⁷ UN, Concluding Observations on Argentina (2004) UN Doc CAT/C/CR/33/1 para 6.

⁷⁴⁸ UN CESCR, Concluding Observations Ethiopia (2012) para 21.

⁷⁴⁹ UN CESCR, Concluding Observations Ethiopia (2012) para 22.

⁷⁵⁰ UN CESCR, Concluding Observations Madagascar (2009) para 12.

5.5.4 The right to political participation

When important decisions are being taken regarding the land, environment and way of life of local communities without giving them a meaningful and effective opportunity, it is certainly a violation of human dignity. The liberty to self-determine one's life has been enshrined and accepted in international law since long. However, it is also common knowledge that the right to self-determination is not necessarily an absolute one and should be exercised by respecting national unity and territorial integrity. It implies that in some instances, especially when it is a case of national security or for greater economic good, states may interfere with such a right. Such interference must also be possible after an effective political participation which is given a wider meaning and not merely standing as candidate for elections or the possibility of voting. In the light of the above, the right to political participation of minorities and indigenous peoples is considered in the subsequent sections.

The right to political participation is one which is conferred by the African Charter in its article 13. It is to the effect that citizens should have the possibility to freely participate in the government of his country, directly or through elected representatives.⁷⁵¹ The African Charter on Democracy, Elections and Governance has enshrined effective participation of citizens in democratic and development processes and in governance of public affairs as one of its guiding principles.⁷⁵² In addition, article 27(2) of the same charter provides that states parties should foster popular participation and partnership with civil society organisations in order to advance economic and social governance. There is also article 30 which stipulates that 'states parties shall promote citizen participation in the development process through appropriate structures'. Similar provisions are also guaranteed by other international human rights instruments.⁷⁵³ An increasing number of multiparty elections in Africa since the early 1990s have been interpreted as a sign of the growing prominence of the right to political participation in Africa.⁷⁵⁴ Quasi-judicial bodies both at the international and

⁷⁵¹ Article 13 (1) of the ACHPR – 'every citizen shall have the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.'

⁷⁵² Article 3(7) of the African Charter on Democracy, Elections and Governance.

⁷⁵³ Article 25 of the ICCPR and article 23 of the American Convention on Human Rights.

⁷⁵⁴ Fox G 'Right to political participation in international law' (1992) 17 *Yale Journal of International Law* 539.

regional levels have affirmed the right to political participation in various communications and General Comments⁷⁵⁵. The UN OHCHR has also highlighted that:

‘states must ensure the active, free, informed and meaningful participation of persons living in poverty at all stages of the design, implementation, monitoring and evaluation of decisions and policies affecting them’.⁷⁵⁶

It can be safely stated that the existence of the right to political participation is firmly acknowledged by the international community. However, the scope and the application of the right have raised several questions.

It seems that the right to political participation has been exclusively dealt with by the African Commission in instances of coup d’état or exclusive of opposition political parties from the political arena.⁷⁵⁷ Bojosi contends that, based on the jurisprudence of the African Commission, it seems that the right to political participation seems to be more of an individual right rather than a collective one.⁷⁵⁸ Despite tying the right of peoples to self-determination and the right to political participation in the case of *Constitutional Rights Projects*, the African Commission noted that ‘it is a counterpart of rights enjoyed by individuals under article 13(1)’.⁷⁵⁹ Accordingly, the collective rights of peoples under article 20 of the African Charter would be satisfied if the individual rights to participate in government are not obstructed.⁷⁶⁰ It is argued that such an individualistic interpretation of the right to political participation may be too narrow vis-à-vis indigenous peoples or minorities who would prefer a collective right to political participation. In addition, the obligation that states should

⁷⁵⁵ *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) [hereafter *Constitutional Rights project*: 2000]; UN HRC, General Comment No 25: The rights to participate in public affairs, voting rights and the right to equal access to public service (1996).

⁷⁵⁶ UN Office of the High Commissioner for Human Rights *Guiding Principles on Extreme Poverty and Human Rights* 2012 10 available at http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf (accessed 10 January 2018).

⁷⁵⁷ For instance in *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 67 – declaring that the banning of former members of Parliament and Ministers was a violation of their right to political participation.

⁷⁵⁸ Bojosi k ‘Towards an effective right of indigenous minorities to political participation in Africa’ in Dersso S *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 287 [hereafter Bojosi: 2010].

⁷⁵⁹ *Constitutional Rights Project* : 2000, para 52.

⁷⁶⁰ Dersso S ‘The jurisprudence of the African Commission with respect to peoples’ rights’ (2006) 6 *African Human Rights Law Journal* 358.

shoulder under article 13 is also ambiguous pertaining to minorities groups and indigenous peoples as it seems to be agreed that the right only means free participation in government which may not necessarily be the concern of the aforementioned vulnerable groups.⁷⁶¹ They need the possibility of participating in public affairs such as land investments and land projects involving the state by which they would be affected and not merely the possibility to stand as candidates for elections or the possibility to vote.

There is a clear relationship between self-determination of peoples and political participation. According to the UN HRC, the right to self-determination is interpreted as the right conferred on people to freely determine their political status and to freely choose their government. Myntti argues that this link implies that self-determination has two aspects – an internal one and an external one.⁷⁶² The external aspect allows people to freely determine their political status and their place in community.⁷⁶³ The internal aspect confers the possibility to people to freely pursue their economic, social and cultural development without impediment from outside.⁷⁶⁴ It is clear therefore that political participation for local communities would mean more than merely elections or voting. They are arguably more concerned with the possibility of participating in public affairs that have a bearing on their economic, social and cultural development.

Another essential counterpart of such a political participation as discussed above would be the right to free, prior and informed consent (FPIC). If political participation implies that people have the right to freely choose the way they want to develop in an economic, social and cultural way, it is clear that their FPIC is paramount in any developmental project envisaged by the state. FPIC of people is derived from the right to self-determination which is the founding principle of the rights

⁷⁶¹ Bojosi (2010) 286.

⁷⁶² Myntti K 'The right of indigenous peoples to self-determination and effective participation' in Scheinin & Aikio (eds) *Operationalising the right of indigenous peoples to self-determination* (2000).

⁷⁶³ UN Committee on the Elimination of Racial Discrimination General Recommendation XXI (48), UN Doc A/51/18126 para 4.

⁷⁶⁴ Wheatley S 'Democracy in international law: A European perspective' (2002) 51 *International and Comparative Law Quarterly* 225.

of indigenous peoples.⁷⁶⁵ The CESCR has highlighted the importance of consultation to obtain the consent of indigenous peoples in an attempt to protect their participation rights in relation to land and resources. In its General Comment No 21, the CESCR even provides for a right to restitution of lands and resources taken away from indigenous peoples without their FPIC.⁷⁶⁶ The CESCR calls on all states to respect the principle of FPIC in all matters relating to their specific rights.⁷⁶⁷

Despite the FPIC being considered as a cardinal principle pertaining to rights of indigenous peoples⁷⁶⁸ Jurisprudence has shown that consultations with indigenous peoples cannot be interpreted as merely an administrative procedure as it is not in line with the notion of participation and the principle of FPIC.⁷⁶⁹ The African Commission issued a resolution urging states to guarantee the participation of the local communities when taking decision the governance of natural resources. In this resolution, again the concept of FPIC was linked with participation of the local communities.⁷⁷⁰ It is therefore clear that without the consent of the local communities, their political participation and participation in public life cannot be ensured.

The UN HRC highlighted the issue of political participation of ethnic and linguistic minorities in Ethiopia in the following terms:

‘The Committee notes the recognition of the rights of ethnic and linguistic communities to self-determination at the level of the regional State according to the “ethnic federalism” established by

⁷⁶⁵ Clavero B ‘The Indigenous rights of participation and International Development’ (2005) 22 *Arizona Journal of International and Comparative law* 41.

⁷⁶⁶ UN CESCR, General Comment No 21: The Right of everyone to take part in cultural life (2009) [hereafter UN CESCR General Comment No 21] para 36.
UN CESCR Concluding observations of the CESCR on Colombia UN Doc E/C.12/1/Add.74 para 12 and 33.

⁷⁶⁷ UN CESCR General Comment No 21 para 37.

⁷⁶⁸ Ward T ‘The right to free, prior, and informed consent’ (2011) 10 *Northwestern Journal of International Human Rights* 83.

⁷⁶⁹ *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984; *Maya Indigenous Communities of the Toledo Dist. v. Belize*, Case 12.053, Inter-American Commission on Human Rights Report No. 40/04.

⁷⁷⁰ African Commission on Human and Peoples’ Rights, 224: Resolution on a Human Rights-Based Approach to Natural Resources Governance (May 2012) available at <http://www.achpr.org/sessions/51st/resolutions/224/> (accessed 10 December 2019).

the Constitution, but is concerned about the lack of recognition and participation in public life of the ethnic and linguistic minorities living outside their designated “ethnic regions”⁷⁷¹.

The Concluding Observations for Madagascar have not mentioned any aspect of political participation.

5.5.5 The right to culture

The right to culture is considered as an essential part of human rights and is deemed to be universal, interdependent and indivisible.⁷⁷² To enhance social interaction and human dignity, the full promotion and respect for the right to culture is of paramount importance.⁷⁷³ Culture is a defining characteristic of the identity of a person, allowing him to recognise or demarcate himself and the groups to which he bears a cultural allegiance. It is an assimilation of ways of living embraced by a group of human individuals and of which some instances have been transmitted from one generation to the other.⁷⁷⁴ It implies that every cultural or ethnic group or community has its common or unique values, ways of living and cultural beliefs. Food, celebrations, religion, clothing and language are some observable and visible components of culture despite not being the only ones. Cultural values, customs and histories often shape the way an individual behave or live in society as well as his perception of the world and similar common behaviours and beliefs with other individuals create a cultural bond and provides for a cultural sense of belonging and acceptance.⁷⁷⁵

Indigenous communities are certainly one of the groups of peoples mostly associated with culture and cultural diversity. Irrespective of their geographical locations and diverse claims and aspirations, their common demand is often based on the quest to preserve and promote their culture

⁷⁷¹ UN HRC, Concluding Observations on Ethiopia UN Doc CCPR/C/ETH/CO/1 (19 August 2011) para 26.

⁷⁷² UNESCO ‘Cultural rights – Fribourg Declaration’ Preamble para 2 available at <https://www1.umn.edu/humanrts/instreet/Fribourg%20Declaration.pdf> (accessed 11 October 2015).

⁷⁷³ Stanley D ‘The social effects of culture’ (2006) 31 *Canadian Journal of Communication* available at <http://www.cjc-online.ca/index.php/journal/article/view/1744/1856> (accessed 11 October 2015).

⁷⁷⁴ Acerbi A & Parisi D ‘Cultural transmission between and within generations’ (2006) 9 *Journal of Artificial Societies and Social Simulation* available at <http://jasss.soc.surrey.ac.uk/9/1/9.html> (accessed 11 October 2015).

⁷⁷⁵ Humanity in Action ‘A question of culture and belonging: Identity and integration in Denmark’ available at <http://www.humanityinaction.org/knowledgebase/194-a-question-of-culture-and-belonging-identity-and-integration-in-denmark> (accessed 11 October 2015).

which is very often linked to their ancestral land.⁷⁷⁶ Indeed, the unique culture and traditions of indigenous peoples determine their survival and heritage and is often the basis of formulation of several other fundamental human rights that they could have.⁷⁷⁷ The reason why indigenous peoples cherish a special attachment to their land and natural resources is to be able to preserve their distinct culture and way of living.⁷⁷⁸ Asiema and Situma argue that indigenous peoples ‘conceive of their land as a substance endowed with sacred meanings, which defines their existence and identity and to which they are inextricably attached’.⁷⁷⁹ Displacing indigenous peoples from their lands therefore amounts to a transgression from their right to culture. Their close and vital attachment to culture is symbolical to the fact that culture is a human capability for indigenous peoples as well as local communities. This human capability is protected in the form of a right to culture.

The UDHR provides for cultural rights albeit in a narrow sense in its article 27.⁷⁸⁰ Likewise, the ICESCR is also not much expansive when it comes to the content of the right to culture. It gives the possibility to individuals to take part freely in cultural life.⁷⁸¹ The CESCR has indicated that the term ‘culture’ should be given a wide meaning and that states should refrain from defining what culture is based on its diversity.⁷⁸² Instead, the obligations are imposed on states in line with the need to protect cultural participation of diverse categories of persons. Minorities groups should be allowed to take part in cultural life but more importantly, they should be given the possibility of conserving, developing and promoting their own culture.⁷⁸³ The Convention on the Prevention and

⁷⁷⁶ Wiessner S ‘The cultural rights of Indigenous peoples: Achieving and continuing challenges’ (2011) 22 *European Journal of International Law* 121.

⁷⁷⁷ UN HRC General Comment No 23(50) UN Doc A/49/40 (1994) para 3.2.

⁷⁷⁸ Brownlie I ‘Rights of indigenous peoples in international law’ in Crawford J (ed) *The rights of peoples* (1988) 4.

⁷⁷⁹ Asiema J & Situma F ‘Indigenous peoples and the environment: The case of pastoral Maasai of Kenya’ (1994) 5 *Colorado Journal of International Environmental Law and Policy* 150.

⁷⁸⁰ (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

⁷⁸¹ Article 15 of the ICESCR -

⁷⁸² Keefe O ‘The right to take part in cultural life under Article 15 of the ICESCR’ (1998) 47 *International and Comparative Law Quarterly* 904.

⁷⁸³ Article 27 of the ICCPR; Para 1(1) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Punishment of the Crime of Genocide prohibits the deliberate destruction of a people's culture.⁷⁸⁴ UNESCO has gone further in providing some substance especially to the definition and understanding of culture. Accordingly, culture has a value and a dignity that must be preserved and this duty of development and preservation of culture is imposed on every people as all cultures together form part of a common heritage of mankind.⁷⁸⁵ The Mexico City Declaration provides that cultural identity is a way of liberation for peoples and any domination would constitute an impairment or denial of that identity.⁷⁸⁶

The right to culture has also been enshrined in various regional legal instruments. The ACHPR by way of its article 17 guarantees the right of individuals to take part in the cultural life of their community. It also imposes a duty on the state to promote and protect morals and traditional values of all communities. Article 22 of the same instrument confers a right to cultural development to people and the possibility to enjoy the common heritage of mankind.

It is also relevant to note that the right to culture is specifically linked to the RTD as illustrated in the case of *Sesana & Others V Attorney General* from the High Court of Botswana. The Court rejected the State's argument that it was unfair to leave a section of citizens underdeveloped under the excuse of allowing them to practise their culture, adding that it was imperative for the state to protect the right to culture of the San people.⁷⁸⁷ This shows the importance of the right to culture as well as its inter-connectedness with the RTD.

5.6 Can composite elements in the international human rights framework ensure Sen's model of development?

The main objective of this chapter has been to examine whether the existing international normative framework on human rights can be a driver of Sen's model of development which is based on freedom and capabilities. It is now relevant to assess the degree to which these composite elements

⁷⁸⁴ Article 2

⁷⁸⁵ Article 1 of the UNESCO Principles on International Cultural Co-operation.

⁷⁸⁶ Mexico City Declaration on Cultural Policies – Principle 2.

⁷⁸⁷ *Sesana & Others v Attorney-General* (2006) AHRLR 183 (BwHC 2006), para 206(a).

in the international human rights framework corresponding to the human capabilities can ensure Sen's model of development in Ethiopia and Madagascar through land investments deal.

5.6.1 The degree of compliance by the states parties

The international human rights framework has no doubt made enormous progress in terms of its scope and application- through treaties and quasi-judicial bodies such as the CESC, the HRC and the African Commission have interpreted the standards in the form of communications and have enlarged, defined and contextualised the scope of application of these standards through general comments. If Ethiopia and Madagascar had complied with these standards as is required as per their obligations under the various treaties and conventions cited above, it would have meant that such a framework would have been sufficient enough, both in content and substance, to protect the selected capabilities of this study. In other words, the existing international human rights framework is robust and substantive enough to be the platform based on which Sen's model of development can thrive. However, the challenge and difficulty lie with the subsidiary nature of the international framework of human rights and an arguably low level of compliance to these standards.

There exist various ways in which states parties can demonstrate compliance to the obligations they undertake through ratification of international human rights instruments. One of them is the domestication and implementation of these rights in their domestic laws. This aspect will be considered in the following chapter focusing on the domestic legal frameworks. Another mode of compliance would be to report periodically and more important genuinely to the various human rights bodies. According to the UN OHCHR, the reporting system is an essential tool that allows for the assessment of the degree to which a state party is promoting, protecting, respecting and fulfilling their human rights obligations.⁷⁸⁸

State reporting to human rights bodies is normally an exercise that is done on a voluntary basis even if once a state ratifies a particular treaty, it shoulder a legal obligation to submit initial and periodic reports.⁷⁸⁹ For instance, much delays and irregularities have been noted by the UN treaties bodies,

⁷⁸⁸ UN OHCHR *Reporting compliance by states parties to the human rights treaty bodies* [hereafter UN OHCHR Reporting compliance] para 2 available at <http://www.ohchr.org/Documents/Issues/HRIndicators/MetadataReportingCompliance.pdf> (accessed 20 January 2018).

⁷⁸⁹ UN OHCHR Reporting compliance para 2.

especially the CESCR and the HRC. The delay is demonstrated by the fact that combined reports for several years are submitted in a single report which makes it challenging for the committees to have a timely and accurate assessment of compliance to the international human rights standards. On various occasions, human rights treaty bodies have highlighted the lack of information or accuracy of information that Ethiopia or Madagascar have provided regarding the issue of land grabbing and related alleged violations.

In addition, a lack of genuine political will has to be highlighted when it comes to reporting on the issue of land grabbing by the two countries. None of the state reports and ensuing concluding observations examined above demonstrates any factual account on land grabbing given by Ethiopia and Madagascar even if the issue is being expansively documented and reported by various think-tanks and research groups. Reporting to the African Commission has also not been carried out effectively by the two countries especially regarding the issue of land grabbing. In addition, the duty to report to these regional and international bodies often tends to be a legal exercise. Factual information is given to assess the degree of compliance. It is however argued that a different nature of reporting would be required based on other disciplines such as economics, sociology and psychology to be able to accurately measure the extent to which Sen's selected capabilities are being respected in land investments.

The current reporting system is no doubt effective but only if it is being carried out with full consideration and genuinely. So far, it has been argued that neither Ethiopia nor Madagascar has been reporting diligently enough and with full disclosure of information on the issue of land grabbing in their respective jurisdiction. A more effective system of reporting will consequently be discussed in the recommendation section of the thesis.

5.6.2 The enforcement powers of the international and regional human rights bodies

Another reason as to why Sen's model of development cannot be substantively ensured by international normative framework on human rights is the lack of enforcement powers of the UN

treaty bodies and the African Commission. Saunders argues that these bodies have more monitoring mechanisms rather than enforcement mechanisms.⁷⁹⁰ She also contends that:

‘while monitoring mechanisms utilize neutral parties to make factual and legal findings, neither they nor reporting mechanisms are typically empowered to impose formal sanctions’. Hafner-Burton and Tsutsui even goes further to state that ‘human rights treaties are not only ineffective and unlikely to affect state behaviour, but are also, in some cases, actually correlated to worsening human rights records post-ratification’.⁷⁹¹

Most of these regional and international treaty bodies utilise state reporting, special procedures such as parties. However, all these mechanisms are arguably voluntary, and the reporting obligations are based on information provided by the states parties themselves which no doubt will be the least incriminating vis-à-vis themselves. As for the complaints procedures, the Optional Protocol to the ICCPR which establishes the complaints procedure for victims of civil and political rights violations has been ratified by only Madagascar. This implies that Ethiopians who are victims of land grabbing cannot complain against their states. As for the complaint procedure established under the Optional Protocol to the ICESCR, neither of the two countries have ratified it and thus denied access to the CDESCR for citizens who have genuine complaints.

It is argued that in the event the countries had ratified the above communication procedures, the effectiveness of their decisions can also be put into question. These decisions do not have the required legally binding force on states parties.⁷⁹² Nevertheless, states parties are under the *pacta sunt servanda* obligation to respect and ensure that rights recognised under the treaties are enforced as well as the implicit obligation that states which accepts the possibility of individual complaints also accept the obligation to comply with the recommendations issued by the treaty bodies.⁷⁹³ Yet, states parties not respecting these recommendations do not necessarily face sanctions serious

⁷⁹⁰ Saunders P ‘The integrated enforcement of human rights’ (2012) 45 *International Law and Politics* 111[hereafter Saunders: 2012].

⁷⁹¹ Hafner-Burton M & Tsutsui K ‘Human rights in a globalizing world: The paradox of empty promises’ (2005) 1375 *American Journal of Sociology* 1401.

⁷⁹² Mechlem K ‘Treaty bodies and the interpretation of human rights’ (2009) 42 *Vanderbilt Journal of Transnational Law* 906.

⁷⁹³ Keller H & Ulfstein G *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012) 92-100.

enough to compel them to comply. Ethiopia and Madagascar are also states parties to the African Union human rights architecture which provides for the African Court on Human and Peoples' Rights. However, since they have not ratified the Protocol establishing the African Court, it therefore means that no other states can bring cases against Ethiopia and Madagascar regarding human rights abuses related to land grabbing.

5.6.3 The nature of the human rights protecting the selected capabilities

The rights to property, food, water, culture and political participation do provide for a platform for their protection as human capabilities involved in land grabbing cases. However, none of them are absolute and are legitimately subject to limitations. In the case of *Handyside v The United Kingdom*, the European Court of Human Rights explained that rights can only be limited if they are prescribed by the law, legitimate, proportionate and necessary.⁷⁹⁴ The Siracusa Principles, a non-binding document adopted by the UN Economic and Social Council in 1985, provides that measures restricting human rights should be legal, should not be arbitrary or discriminatory, necessary, proportionate, the least restrictive available measures under the circumstances and based on sound science.⁷⁹⁵ Boggio et al argue that:

‘for a restriction of a human right to be considered legitimate, a government has to address the following five criteria: 1) the restriction is provided for and carried out in accordance with the law; 2) the restriction is in the interest of a legitimate objective of general interest; 3) the restriction is strictly necessary in a democratic society to achieve the objective; 4) there are no less intrusive and restrictive means available to reach the same objective; and 5) the restriction is based on scientific evidence and not drafted or imposed arbitrarily — that is, in an unreasonable or otherwise discriminatory manner’.⁷⁹⁶

The exercise of limitation of rights under international law has an important bearing in the study of land grabbing in Ethiopia and Madagascar. As matters stand, it is not difficult for the government of

⁷⁹⁴ *Handyside v The United Kingdom* Application No 5493/72 7th December 1976

⁷⁹⁵ See United Nations Economic and Social Council UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4 (1985).

⁷⁹⁶ Boggio A et al ‘Limitations on human rights: Are they justifiable to reduce the burden of TB in the era of MDR and XDR-TB?’ (2013) 10 Health and Human Rights available at <https://www.hhrjournal.org/2013/09/limitations-on-human-rights-are-they-justifiable-to-reduce-the-burden-of-tb-in-the-era-of-mdf-and-xdr-tb/> (accessed 30 January 2018).

the two states to justify how and why some of the human capabilities, protected by human rights, can and must be limited for a greater economic interest achievable through land investments. It is equally not difficult for them to provide such land investments through domestic legislations which already cater for the limitation of right for a general interest. In addition, these countries sovereignly find that land is a commodity that they should capitalise upon for economic development to combat poverty and enhance development and therefore there is no other less intrusive and restrictive means available.

The argument therefore here is that if the existing human rights, as they are substantively and the way they are interpreted, that are meant to protect the selected human capabilities are the sole grounds on which victims of land grabbing are to seek redress, their alleged violations can simply be justified under provided rules of limitations of rights. In addition, it is contemplated that such a debate will only be possible if a case reaches a judicial or quasi-judicial body at the regional or international level. Such a possibility looks scant as Ethiopia and Madagascar have not provided for access to such bodies to their citizens as discussed above. It implies that either their interpretation must be altered and be brought more in line with human capabilities or the rights themselves must be provided in a way that is drafted based on human capabilities. While rights can be limited, capabilities cannot. This discussion will be taken in more depth at the level of the recommendation part of the thesis.

5.7 Conclusion

The existing international human rights framework does provide for a platform for the selected capabilities to be protected in land investment deals in the two case studies. However, their subsidiary nature and a lack of enforcement mechanisms of the framework dictate that it cannot provide for immediate and effective remedies to victims whose capabilities and rights are being affected by land grabbing. In addition, neither Ethiopia nor Madagascar has yet fully submitted itself to scrutiny by human rights treaty bodies by fully respecting their reporting duties with full disclosure, ratification of the Optional Protocols that allow for individual complaints and inviting special rapporteurs of the UN or the AU to visit their countries to assess the issue of land grabbing. While all these aspects can be remedied and made more effective with the correct political will of the states, one can remain doubtful of whether this will be synonymous to effective redress to the

victims of land grabbing. The international human rights framework only provides for a soft platform to encourage states to adopt Sen's model of development.

This chapter outlined the various obligations that states have towards human rights violations resulting from land investments. It is agreed today that the state remains the best protector of the rights of its citizens. Therefore, under international human rights instruments such as the ICCPR and the ICESCR, it has been shown that states, both the host and the home states, have the responsibility and obligation to protect, promote and fulfil human rights of aggrieved peoples. Such obligation is more precise and warranted in the field of business and human rights. Therefore, the normative framework related to business activities and human rights has been assessed to complete the picture of responsibilities and obligations that states have in the current subject matter. As for land deals that have already caused harm to peoples, the duty to provide for effective remedies by states has also been invoked.

There is no doubt that the proposed treaty on business and human rights can be considered as a major improvement especially from Ruggie's Framework. However, it has been argued that not enough and significant attention has been given to victims from a CA point of view. In other words, the treaty fails to consider that one is a victim if one's capabilities, and not only rights, are being affected. The novel legal techniques such as extraterritorial responsibilities of states and the enhanced ways of providing for remedies through the proposed treaties are all welcome. However, these would be applicable in the case of an abuse or a violation of human rights. On the contrary if the same rights are curtailed following the due process, it may still be regarded as an 'acceptable' harm, abuse or violation under international law. There is thus a serious overlooking of the human capabilities aspect of the whole discourse on business and human rights. The following chapter will now focus on the domestic framework in Ethiopia, and Madagascar to assess their capacity to drive forward Sen's model of development with the aim of striking a balance between development for the national interest and respect for the rights and capabilities of local communities.

Chapter 6: THE EFFECTIVENESS OF THE DOMESTIC NORMATIVE FRAMEWORK IN ENSURING SEN'S MODEL OF DEVELOPMENT

6.1 Introduction

Sen's model of development which is based on the concept of freedom and capabilities approach is in line with the respect, protection and promotion of human rights. Sen argues that there are various human rights that can be regarded as rights to particular capabilities.⁷⁹⁷ Indeed, as discussed in chapter five, the five selected capabilities of this thesis namely land, water, food, political participation and culture have all been shown as being human rights in themselves. Hence, it is legitimately logical to infer that respecting, protecting, promoting and fulfilling the human rights to the five mentioned capabilities in the course of developmental projects through land investments in Ethiopia and Madagascar will eventually align such projects with Sen's CA to development. It is therefore relevant in the current chapter to assess the normative framework that exists in the two countries regarding the human rights to land, water, food, political participation and culture. The effectiveness of the laws protecting these rights and their degree of enforceability and justiciability are considered.

6.2 Effectiveness of domestic laws in protecting the selected capabilities

States are generally considered as the primary protector of human rights of their citizens within as well as outside their territories.⁷⁹⁸ Englehart argues further that they are simultaneously a threat to human rights and their principal protectors.⁷⁹⁹ It is therefore mandatory that human rights be firmly entrenched in domestic laws of states and that their enforcement and justiciability are assured and guarded by an independent judicial system. In addition, the executive and legislative branches of every government have significant role to play in the promotion and fulfilment of these rights.⁸⁰⁰ It

⁷⁹⁷ Sen A 'Human Rights and Capabilities' (2005) 6 *Journal of Human Development and Capabilities* 151.

⁷⁹⁸ Hafner-Burton et al 'International human rights law and the politics of legitimization' (2008) 23 *International Sociology* 115.

⁷⁹⁹ Englehart N 'State capacity, state failure and human rights' (2009) 46 *Journal of Peace Research* 163.

⁸⁰⁰ See in general Reif L 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) 13 *Harvard Human Rights Journal* 1.

is therefore relevant at this stage of the thesis to analyse how the selected capabilities involved in land investments in Ethiopia and Madagascar are protected, promoted and fulfilled by human rights laws and institutions. It is argued that if these rights are adequately respected, promoted, protected and fulfilled by the states, it is more likely that development will then be in line with Sen's CA.

6.2.1 The human rights to the selected capabilities in Ethiopia

6.2.1.1 Land rights in Ethiopia

Article 40 of the Ethiopian Constitution (EC) on the right to property focuses on property in general and land ownership in particular. Article 40(3) provides that ownership of both rural and urban lands as well as natural resources is exclusively conferred to the State and its peoples and they are not subject to sale or other means of exchange. As for acquisition of lands, Article 40(4) states that peasants have the constitutional right to obtain land without payment and they are equally protected against eviction from possession. Pastoralists from lowland areas are given the right to free land for cultivation and grazing as well as the right not to be displaced from possession under Article 40(5) of the EC. It is noted that although peasants are not given private ownership rights to the land, Article 40(7) provides for full right to immovable property and to the permanent improvements they bring to the lands. The Constitution also guarantees peasant against arbitrary eviction carried out by the state through Article 40(8).

The Constitution is silent over the urban lands and does not say much on the transfer and acquisition of land by urban dwellers.⁸⁰¹ However, an interpretation of Article 40(6) dealing with right of investors to acquire land has also included urban dwellers in the category of investors. As per this article, private investors may obtain land on the basis of payment implying that, unlike peasants and pastoralists, investors are required to pay a fee for lands obtained from the State.

Access to rural lands is regulated by the Rural Land Administration and Use Proclamation 87/1997 (RLAUP). Article 5(1) provides that pastoralists and peasants farmers whose main activities are agricultural ones are to be given rural lands free of charge. The two applicable conditions are that the person claiming rural lands must be engaged in agricultural activities as his main source of

⁸⁰¹ See Ambaye D 'Land Rights in Ethiopia: Ownership, equity and liberty in land use rights' (2012) [hereafter Ambaye: 2012].

income and that he must reside in the area of location of the agricultural lands. The residency requirement is opened to criticism as it is often misinterpreted as nativity requirement.⁸⁰² For example, in February 2012, about 20,000 farmers who had migrated from the northern part of Ethiopia were forcefully evicted from a place called Gura Farda by the SNNPS authorities.⁸⁰³ They were labelled as illegal settlers despite claims from them that they had been living in that place for 20 years. The Beni Shangul Gumuz region has also witnessed similar evictions of around 5000 people coming from the Amhara region on the same basis. It is therefore clear that a lack of precision in the law on the subject of residency and nativity makes people from rural areas vulnerable to evictions for the benefit of large-scale land investments by investors.

The RLAUP also denies private land ownership in line with the Constitution and only a holding right is conferred upon farmers- which is defined as:

‘to use rural land for purposes of agriculture and natural resources development, lease and bequeath to members of his family or other lawful heirs, and includes the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same’⁸⁰⁴

without any limit in time.⁸⁰⁵ Conversely, the law does not say anything about rights of pastoralists since it is difficult to define a holding right for them due to their nomadic nature of life. Pastoralists seem to be subject to more communal holding rather than private holding in terms of property regime.⁸⁰⁶ The RLAUP also recognises three ways in which land can be acquired in rural Ethiopia. These are Land Grant, Bequeath (inheritance or donation) and Lease.⁸⁰⁷ It is through this third modality of land acquisition which is lease that the State has been transferring land to private investors for large-scale agricultural land transfer.

⁸⁰² Ambaye (2012) 69.

⁸⁰³ Ambaye (2012) 69.

⁸⁰⁴ Article 2.4 of the RLAUP.

⁸⁰⁵ Article 7.1 of the RLAUP.

⁸⁰⁶ Ambaye (2012) 70.

⁸⁰⁷ Ambaye (2012) 70-72.

The land rights regime in Ethiopia does not seem to be completely aligned with international norms and the CA. While the international normative framework emphasises on private ownership of land as a property, land ownership in Ethiopia is vested on the State. It simply means that citizens cannot fructify land as a natural resource the way they wish to in order to achieve their ways of development. This is in clear contradiction with the CA to development.

6.2.1.2 Land tenure in Ethiopia

The regional governments in Ethiopia are responsible for land tenure and related certification of land which results in the system being varied from one region to another. As illustrated by Tesfaye Teklu, there are three important tenure arrangements namely administrative-based, re-emerging market-based and customary-based non-market arrangements.⁸⁰⁸ Based on the administrative system, families which are eligible have the right to land in accordance with a size limit. Rental rights are also attached to this system which is the most common one in Ethiopia. Access to government land being a constitutional right, an individual has free access to them with a right of use which is unrestricted except for cases of land improvement or conservation.

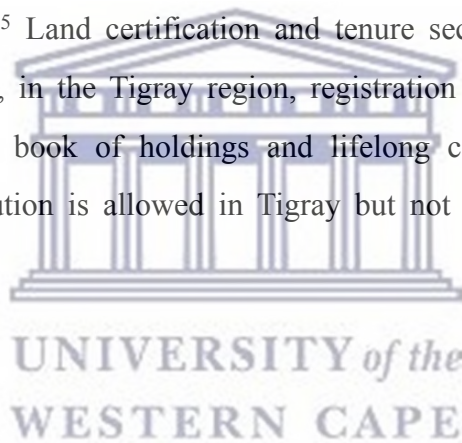
The second system of arable land right in Ethiopia is based on market forces. It is a consequence of the fact that land demands have outstripped land supply in many parts of the country since farm sizes are decreasing while population growth is on the rise. There is thus a creation of rent markets which is subject to the law of demand and supply. Shared tenancy and short-term contracts are the usual modes of arrangements for such enterprises. Shared tenancy is normally the popular practice among farmers with close social ties while the short-terms contracts are usually drafted for seasonal crops. These rental lands are not transferrable, and the original holder of the land still possesses the initial rights.⁸⁰⁹ The customary-based non-market arrangements apply for arable lands as well as common resources such as pasture for grazing, forests and water resources.

⁸⁰⁸ Teklu T 'Land scarcity, tenure change and public policy in the African case of Ethiopia' Centre for African Development Policy Research (2005) available at http://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1090&context=africancenter_icad_archive (accessed 10 January 2015) [hereafter Teklu: 2005].

⁸⁰⁹ Teklu (2005) 8.

The management of such resources has been through customary tenure systems with the right to exploit them being vested to groups and communities that claim legitimacy to customary laws.⁸¹⁰ Due to the great variance in ethnic groups and their corresponding customary laws in Ethiopia, this system has many forms and variation. There are informal but clear rules on the mode of access and sharing with minimal interference from the state. Four types of arrangements of sharing common resources have been noted – unrestricted pool of resources with open access, restricted common resources, individualised areas for specific groups and direct state-operated.⁸¹¹

A drop in the utilisation of common resources has been noted in Ethiopia, both in terms of quantity and quality.⁸¹² Climate change is regarded as one of the main reasons together with population growth, political instability and weak land policies.⁸¹³ Communal land tenure has often been disregarded by state policies despite the fact that the EC does provide for a basis for pastoralist rights.⁸¹⁴ Several issues with the land tenure in Ethiopia have been documented with regard to loss of lands and tenure security.⁸¹⁵ Land certification and tenure security are applied differently in different regions. For instance, in the Tigray region, registration certificates are issued while in Amhara and Oromia regions, book of holdings and lifelong certificate of holdings are used respectively.⁸¹⁶ Land redistribution is allowed in Tigray but not in Oromia and in Tigray some



⁸¹⁰ Teklu (2005) 8-9.

⁸¹¹ Teklu (2005) 9.

⁸¹² Oakland Institute ‘Understanding land investment deals in Africa’ (2011) 12 [hereafter Oakland: 2011] available at www.oaklandinstitute.org/land-deals-africa-ethiopia (accessed on 15 July 2014).

⁸¹³ Teklu (2005) 14.

⁸¹⁴ Hagmann T ‘Confronting the concept of environmentally induced conflict’ (2005) 6 *Peace, Conflict and Development* 1-22.

⁸¹⁵ See Land Times ‘Ethiopia dams and destroying peoples for development’ available at <http://landtimes.landpedia.org/newsdes.php?id=pGhr&catid=ow> (accessed 10 January 2015) – “Several human rights organizations have reported on the conditions of the approximately 15 indigenous tribes’ estimated population of some 260,000 people of the region, in addition to 300,000 others in Kenya, who are threatened by the destruction of their livelihoods dependent on flood waters of the Omo River and the loss of their land due to the construction of Gibe Dam III. The organizations have reported cases of violence, intimidation and forced displacement committed against the indigenous tribes that live on the banks of the River Omo for these energy hydroelectric projects and to favor large-scale commercial farms. Fears of conflict over resources are on the rise, owing to the lack of respect for the inhabitants’ property rights”.

⁸¹⁶ Byamugisha F *Agricultural land redistribution and land administration in Sub-Saharan Africa* (2014) 68.

people involved in the fight against the Derg regime are allowed to maintain their rural lands unlike in any other region in Ethiopia.

It has also been documented that some government officers only implement land laws that help to achieve strengthening of political support in the countryside.⁸¹⁷ Sometimes land tenure system and land certification system are quite disconnected from each other with different government offices earmarking the same piece of land for different purposes thus creating uncertainty and disorder.⁸¹⁸ Dessalegn argues that Ethiopia lacks a 'robust system of land tenure' with farmers being only given the right to rent land the use of which is subject to several conditions and the possibility of being expropriated for private investments.⁸¹⁹

It is clear that the Ethiopian land tenure system is complex with various models of land administration and with land being subject to state ownership. In essence, the land tenure system may not be defective or outdated in itself since various groups of peasants, pastoralists and farmers dictate that the system be one which includes multiples ways in which land is to be administered. However, it is contended that for such a system to effectively work, especially since land ownership is conferred to the state by the Constitution, the state needs to be one which is democratic, open and with a strict observance of good governance and human rights principles. Rahmato argues that the relation of power between the state on one hand and the individuals and communities on the other has systematically prevented the land tenure system to work.⁸²⁰ The state is too powerful to be opposed regarding its decisions on land issues and administration. In fact, any civil society organisation or opposition political party or individuals opposing the land administration of the state is tagged as rent-seeking entities while the EPRDF claim that they are the only body with genuine developmental credentials for Ethiopia, thus possessing the ideological and moral legitimacy to

⁸¹⁷ Crewett W & Benedikt K 'Ethiopia reforming land tenure' (2008) 116 *Review of African Political Economy* 203.

⁸¹⁸ Witten M 'The protection of land rights in Africa' (2007) 20 *Afrika Focus* 153.

⁸¹⁹ Rahmato D 'Land to investors: large-scale land transfers in Ethiopia' Forum for Social Sciences (2011) [hereafter Rahmato: 2011].

⁸²⁰ Rahmato (2011) 5.

serve as the sole active force in deciding on land issues.⁸²¹ In such repressive environment where democratic protest is forbidden⁸²², it is difficult to have an open debate with all the stakeholders on land issues in Ethiopia.

Land investments in Ethiopia have been the result of policy decisions by the powerful Ethiopian authority which implies that despite being entitled to constitutional protection of their land rights, peasants, farmers and pastoralists in the rural areas often find their land rights alienated. Rahmato contends that while the programme of land registration and certification has been welcomed by land holders, it has not prevented public authorities from expropriating land and natural resources, in contravention of the constitutional and legislative provisions on land.⁸²³ It results in a land system where holders only have limited rights which can be subject to abrogation since there is a lack of robust security of tenure. In essence, Ethiopians only have conditional land rights compared to sovereign land rights or land sovereignty as per Rahmato.⁸²⁴ Land holders in Ethiopia do not have effective control over the land as well as the resources because of conditional land rights- which result in insecurity by preventing individuals and communities from becoming active agents and enhance the hegemonic authority of the state on land issues.⁸²⁵

The overriding power of the state has been further justified by its economic and development mission. The state remains of the view that it is the sole agent that can bring development to the whole country. As a consequence, such state-led or 'managed development' becomes invariably non-participatory as most land and policies related decisions are taken by the central government which, by its own nature, is not accountable to anyone.⁸²⁶ Rahmato argues that the 'rubber-stamp' Ethiopian Parliament, state-controlled media and repressive laws have further

⁸²¹ Rahmato D 'Civil society organisations in Ethiopia' in Zewde, B & Pausewang, S (eds) *Ethiopia: The challenge of democracy from below* (2002) 103.

⁸²² Human Rights Watch 'Ethiopia: No let up in crackdown on Protests' available at <https://www.hrw.org/news/2016/02/21/ethiopia-no-let-crackdown-protests> (accessed 13 June 2016).

⁸²³ Rahmato (2011) 6.

⁸²⁴ Rahmato (2011) 6.

⁸²⁵ Rahmato (2011) 7.

⁸²⁶ Rahmato (2011) 7.

empowered the centralised and hegemonic control of the state on lands and natural resources.⁸²⁷ The way in which land governance has been imposed in Ethiopia excludes consideration for the nature of the state and how land tenure, shaped by the state's legislative instruments, strains the relationship with rural communities and individuals.

The complex land tenure system in Ethiopia, especially when incorrectly and corruptively managed, violates the essence of the right to land as a property as articulated in international human rights law. Such a land tenure system is not in line with the CA since it does not allow citizens to maximise on the use of land as a capability rendering them free as advocated by the CA. On the contrary, such a system would act in a complicit manner to encourage land grabbing as land can be easily taken away from victims without compensation and a due process.

6.2.1.3 Land reforms in Ethiopia

The land tenure of a country represents the legal and institutional framework within which legal and contractual or customary arrangements exist based on which people engage in agricultural activities.⁸²⁸ Such a system not only regulates the use of land of a country but it also enhances social stability by establishing standard of social patterns and relationships.⁸²⁹ The land tenure is also indicative of the struggle, suffering and life of a society. In Ethiopia, various socio-political factors and processes have shaped the present land tenure among which the rise in power of the Derg regime would be significant.⁸³⁰ Prior to 1974, Ethiopia had one of the most complex land tenure systems in developing world and the methods of tenure were so varied throughout the country that it was impossible to define the system.⁸³¹ Among those different modes of tenure, the communal

⁸²⁷ Rahmato (2011) 7.

⁸²⁸ Feder G & Feeny D 'Land Tenure and Property Rights: Theory and Implications for Development Policy' (1991) 5 *World Bank Economic Review* 135.

⁸²⁹ Adams M *Land Reform: New Seeds on Old Ground?* Overseas Development Institute (1995).

⁸³⁰ Tesfu D 'The Land Tenure System in Ethiopia and its Implications for Land Reform' Unpublished thesis Haile Selassie I University.

⁸³¹ Baye T 'Peasants, land reform and property rights in Ethiopia: The experience of Gojjam Province, 1974 to 1997' (2013) 5 *Journal of African Studies and Development* 148 [hereafter Baye: 2013].

land tenure system is the oldest one and has survived in some parts of the country to this day.⁸³² Members of the society had communal right to land based on the family, clan and other lineage groups and could freely exploit the resources available.

Such system was more popular in eastern Ethiopia with a significant number of nomads. With the emergence of modern agriculture, the communal land tenure system gradually changed and was replaced by the *rist* system. It is land rights that members of families and clans have based on the facts that their ancestors have lived on that land over a long period of time. It is a sort of birth right which is inherited from one generation to another.⁸³³ Land users under the *rist* system did not have the right to sell as they only had possession and not ownership. They could only pass the land on to their descendants for use.⁸³⁴ After the end of the Italian rule in 1941, the imperial government of the time embarks on a land reform project with the setting up of a Ministry of Land Reform and Administration in 1955. However, instead of bringing genuine changes to land tenure, the reform only gave birth to restrictive laws on the use of land while land ownership remained unchanged. Land reforms attempts by the imperial government were also often resisted by the people resulting in the 1942, 1951 and 1969 revolts.⁸³⁵

The Derg regime came into power in 1974 and initiated further land reforms- the main aim was to restrict land sales and transfers in rural areas so as to allow the local farmers to remain the primary beneficiaries of the rural lands. Both the Provisional Military Administrative Council (PMAC, also known as the Derg) and the Ethiopian People's Revolutionary Party (EPRP), the two opposing political parties of that time, agreed that a radical land reform was essential for the development of

⁸³² Temesgen G 'The History of the 1968/9 peasant Uprising in Eastern Gojjam with Reference of Mota and Bichena' Unpublished Master's thesis Baher Dar University (2001).

⁸³³ Molla T 'System of Land Tenure and Peasant Protest in Gubbalafto Woreda: 1785-1974' Unpublished thesis, Addis Ababa University (1984).

⁸³⁴ Ottaway D *Ethiopia: Empire in Revolution* (1978).

⁸³⁵ Baye (2013) 149 - In 1951, for example, a revolt broke out in Mota and Bahir Dar Awrajjas. The revolt in the western half of the province, led by Dejjach Aberre Yemmam, was a threat to the regime. Aberre, a former patriot, had also personal grievances. The power of the imperial government started to weaken. In the early 1970s, the erosion of royal power continued. The regime failed to provide political opportunities for the urban intelligentsia or to address problems in the countryside. The power of the state was declining with the advancing age of the Emperor. The imperial system became incapable of accommodating change. Oppositions continued in all corners of the country. The revolts in Gojjam, like other peasant rebellions, contributed to the weakening and eventual downfall of the imperial regime. The authorities lost touch with political reality and had outlived their time.

the country. The Derg regime was also aware of the fact that it was important to put in place a radical land policy which would be in favour of the peasants in order to have their support and thus the regime consolidating its power. The reform focused on abolishing the economic, social and political administrations of the previous land tenure system. The landlord-tenant relationship was outlawed and social groups were authorised to own land which traditionally was not possible.⁸³⁶ Proclamation No. 31/1975 provided for public ownerships of lands in the rural areas, land distribution to the tillers, outlawing the transfer of use rights by lease, mortgage, succession, exchange or sale and a limitation of 10 hectares for a family in terms of ownership of land.⁸³⁷ The Ministry of Land Reform and Administration were responsible for administering the lands with the support of Peasant Associations.⁸³⁸

The land reform under the Derg regime brought some solutions to the problems which were inherent in the agricultural system prior to the revolution in 1974. A more equitable distribution of wealth and land was possible as feudalistic bonds between peasants and landlords were broken. The feudal regime was dissolved, leaving space for more modern and democratic institutions such as the peasant associations and cooperatives societies to flourish. A re-organisation of different forms of agricultural production was made possible which saw the advent of individual run peasant farms for instance.⁸³⁹ However, producer cooperatives would often receive priority over peasant farmers leading to the failure of the land reform to engineer greater support for the rural farmers. Another problem was the non-uniform pace at which the reform was implemented in the different areas of provinces. In less populated areas, land reform activities were not applied immediately, and the system remained communal for a significant length of time.⁸⁴⁰

⁸³⁶ Kebede B 'Land Tenure and Common Pool Resources in Rural Ethiopia: A Study Based on Fifteen Sites' (2002) 14 *African development Review* 114.

⁸³⁷ Beyene A 'Land Tenure and its Challenges to Agricultural Development: A Case Study of a Smallholder-Farming System in Tigray, Ethiopia' First International Conference on the Ethiopian Economy, Ethiopian Economic Association (2004).

⁸³⁸ Yigremew A 'Some queries about the debate on land tenure in Ethiopia' Tenth Annual Conference on the Ethiopian Economy. Addis Ababa, Ethiopian Economic Association (2001).

⁸³⁹ See in general Alemneh D *Peasants, Agrarian Socialism, and Rural Development in Ethiopia* (1987)

⁸⁴⁰ Kebret H 'Land reform: Revisiting the public versus private ownership controversy' (1998) 7 *Ethiopian Journal of Economics* 46 – 64.

The Derg regime was ousted from power in 1991 by the Ethiopian People's Revolutionary Democratic Front (EPRDF) and the new regime introduced ethnic federalism in Ethiopia. Rapid privatisation of collective farms post-Derg rule made international observers believe that land institutions would be privatised and land titles would be registered with the aim of granting individualistic rights of ownership which would breed land security.⁸⁴¹ However, the transitional government decided to pursue the land policy of the Derg regime and the Constitution of 1995 was drafted to confirm state ownership of land.⁸⁴² Furthermore, Article 40 of the 1995 EC provides for the right to access and for protection against displacement to peasants and pastoralists.⁸⁴³

The Federal Rural Land Administration and Use Proclamation (Proclamation 456/2005) devolved responsibility for the creation of land policy to the regions. Other law such as the Proclamation on the Re-allotment of the Possession of Rural Land of 1996 was enacted to even out the inequality of possession of land by the rural people as Derg officers had unlawfully possessed significant hectares of land. The Ministry of Agriculture and Rural Development was conferred the mandate for land issues at the federal level while land administration at the regional level was the responsibility of the *woreda* (District) and *Kebele* (village). Despite land reforms since 1974, the land issue is still a contested one.⁸⁴⁴ For instance, today state ownership of land is regarded as a hurdle towards investment, production and economic growth.

The insecure land tenure system as described above requires concrete land reforms to allow for the protection of land rights as a human capability. It is argued that for development to enhance the lives and welfare of Ethiopians from the rural areas in accordance with the CA, a genuine land reform is mandatory. Ethiopia has considered and carried out land reform several times throughout its history. However, as Dunning argued, these have been done with a:

⁸⁴¹ World Bank 'Key Issues in the Update of World Bank Policy' (2004).

⁸⁴² Article 40 of the 1995 Ethiopian Constitution - The right to ownership of rural land and urban land, as well as of all natural resources is exclusively vested in the state and the peoples of Ethiopia. Land is a common property of the nations, nationalities and peoples of Ethiopia and shall not be subject to sale or to other means of exchange

⁸⁴³ "Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labor or capital. This shall include the right to alienate, to bequeath, and where the right of use expires, to remove his property, transfer his title, or claim compensation for it" (FDRE, 1995, Art. 40(7)).

⁸⁴⁴ Mequanent G 'Assessing the attribute of land security to agricultural growth in Ethiopia' (December 2012) available at <http://aigaforum.com/articles/Assessing-the-Attribute-Land-Security.pdf> (accessed 01 April 2015).

‘highly political flavour...designed to reward one group or to punish another, and always ultimately to consolidate the power of the ruler’.⁸⁴⁵

Dunning also proposed that modernisation of the agricultural sector for economic development as being carried out through large-scale land investments requires at least some implementation measures of land reform.⁸⁴⁶ With some attempts of land reforms by various regimes as discussed above, inequality of land distribution has been considered as another hurdle to effective land reform.⁸⁴⁷ The vast mass of peasants who are the one to benefit from any land reform are either ignorant of its importance or totally against the concept of effective land reform.⁸⁴⁸ This argument is highly likely to hold good even today as there seems to be no genuine and forceful demand for land reforms from peasants’ organisation and other political quarters in Ethiopia.

6.2.1.4 The right to adequate food

The right to adequate food is implicitly recognised and guaranteed by the EC. Article 43(1) provides that the peoples of Ethiopia have a right to improved living standards and to sustainable development. It is argued that neither better standards of living nor sustainable development is possible without access to adequate food.⁸⁴⁹ It is interesting to note that the EC has a provision which, at least on paper, provides for the mode of development proposed by Sen which enhances capabilities. Article 43(4) stipulates that:

‘the basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs’.

There are also directives principles of state policy within the Constitution which provides that it is the government’s duty to endeavour to protect and promote the health, welfare, and living standards

⁸⁴⁵ Dunning H ‘Land reform in Ethiopia: A case study in non-development’ (1970-1971) 18 *UCLA Law Review* 277 [hereafter Dunning: 1970-1971].

⁸⁴⁶ Dunning (1970-1971) 293.

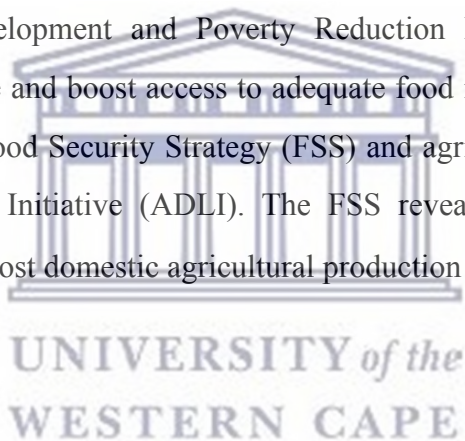
⁸⁴⁷ Kebede B ‘Land reform, distribution of land and institutions in rural Ethiopia: Analysing of inequality with dirty data’ (2006) Paper presented at CSAE’s Annual Conference at Oxford University 21.

⁸⁴⁸ Dunning (1970-1971) 307.

⁸⁴⁹ Burchi et al ‘The role of food and nutrition system approaches in tackling hidden hunger’ (2011) 8 *International Journal of Environmental Research and Public Health* 358.

of the working population of Ethiopia and to aim to provide access to food to all Ethiopians.⁸⁵⁰ Ethiopia is also state party to various international human rights instruments that provides for the right to adequate food.⁸⁵¹ It is to be noted that the relevant provisions from these international instruments do have legal effect domestically as per article 9.4 and 13.2 of the Constitution.⁸⁵²

The Ethiopian Government has also adopted various policies in view of enhancing and promoting access to adequate food. For instance, the Poverty Reduction Strategy Paper Growth and Transformation Plan (PRSPGT) 2011/11-2014/15 is one such policy through which an attempt was made to ensure access to adequate food.⁸⁵³ As per the PRSPGT, one of the main objectives of the Ethiopian Government has been to ensure food security and support the food industry through increasing crop production.⁸⁵⁴ It has also been encouraging private sector investment in agriculture and increase agricultural products exports with the aim of increasing foreign currency generation through cultivating suitable land, and increasing flower and vegetable production.⁸⁵⁵ Earlier policy such as the Sustainable Development and Poverty Reduction Programme 2002 was equally designed to, *inter alia*, enhance and boost access to adequate food in Ethiopia.⁸⁵⁶ This policy deals with food security under the Food Security Strategy (FSS) and agricultural development under the Agriculture Development-Led Initiative (ADLI). The FSS reveals that the major aims of the Ethiopian government are to boost domestic agricultural production and guarantee access to food:



⁸⁵⁰ Article 89.8 and 90.1 of the Directive Principles of State Policy – Ethiopian Constitution.

⁸⁵¹ ICESCR, CEDAW, UNCRC and CRPD.

⁸⁵² Article 9.4: All international agreements ratified by Ethiopia are an integral part of the law of the land; Article 13.2: The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.

⁸⁵³ See ‘The Federal Democratic Republic of Ethiopia: Poverty Reduction Strategy Paper Growth and Transformation Plan 2010/11–2014/15 – Volume II’ International Monetary Fund IMF Country Report No 11/305 available at <https://www.imf.org/external/pubs/ft/scr/2011/cr11305.pdf> (accessed 24 August 2018) [hereafter PRSPGT: 2011].

⁸⁵⁴ PRSPGT (2011) 5.

⁸⁵⁵ PRSPGT (2011) 6.

⁸⁵⁶ Ethiopia: Sustainable Development and Poverty Reduction Program July 2002 available at <http://siteresources.worldbank.org/INTPRS1/Resources/073102.pdf> (accessed 24 August 2018) [hereafter SDPR:2002].

‘through better networked roads and other infrastructure as well by improving the purchasing capacity of the small scale farmer with the creation of work, education, and short term credit loans’.⁸⁵⁷

While there is no dearth of legal provisions and policy-based initiatives in Ethiopia regarding the right to adequate food, a serious lack of enforceability and justiciability of these provisions do act as a hurdle. This was noted by the UN Special Rapporteur on the right to food, Jean Ziegler, who reported that:

‘Ethiopia’s poor still have inadequate access to justice, given the high costs of going to court, long delays in court proceedings, lack of legal aid and the lack of human rights knowledge, resources and independence of the judiciary at the woreda (district) level’.⁸⁵⁸

Indeed, to date, no case has been submitted and heard by the judicial bodies in Ethiopia under the implicit right to adequate food provided by the Constitution. While the various policies discussed above are essential, they remain political documents which cannot be enforced in a court of law. For instance, Getachew argues that SDRP:

‘does not make reference to any legal measure that can turn this provision from a constitutional to protected and justiciable right for the individual Ethiopian’.⁸⁵⁹

Therefore a lack of legal enforcement mechanism of the policy measures as well as limited access to justice to litigate on the constitutional right to food do not provide for the conducive environment for food to be protected as a human capability. Developmental projects which are thus violating the right to access to adequate food without the possibility of effective remedies from the courts are not in line with Sen’s CA to development. In addition, the way the right to food has been softly provided in the Ethiopian legal framework is not in line with the international framework on right to food set by both the ICESCR and the ACHPR.

⁸⁵⁷ SDRP (2002) 67.

⁸⁵⁸ UN Economic and Social Council ‘Report of the Special Rapporteur on the right to food’ (2005) UN Doc. E/CN.4/2005/47/Add.1 13.

⁸⁵⁹ Getachew T ‘Implementation of the right to food and poverty reduction papers in perspective: The Ethiopia and South African examples’ (2004) 27 available at https://repository.up.ac.za/bitstream/handle/2263/990/getachew_t_1.pdf;sequence=1 (accessed 24 August 2018).

6.2.1.5 The right to water

Under chapter ten of the EC entitled National Policy Principles and Objectives, one of the social objectives is on the drafting of policies by the government to provide all Ethiopians access to clean water.⁸⁶⁰ Article 51 also provides that it is the function of the Federal Government to determine and administer the utilisation of waters or rivers and lakes linking two or more states or those which cross national boundaries. Despite these numerous constitutional obligations on the Ethiopian Government to ensure access to water, 61 million Ethiopians lack access to safe water.⁸⁶¹ In addition, many women and girls have to walk for more than three hours to get water which is from ponds or shallow wells often shared by animals.⁸⁶² Recurring droughts are also the main reason for the use of contaminated and stagnant water which results in water-related diseases.

The Water Resources Management Policy reiterates that all Ethiopians should have access to a sufficient amount of water of an acceptable quality towards the satisfaction of basic needs.⁸⁶³ Water to be used for domestic purposes is also given priority over other uses through this policy.⁸⁶⁴ Such a priority is also given by the Ethiopian Water Resources Management Proclamation 2000 which states that water resources are to be used for their highest social and economic value.⁸⁶⁵ The same legislation also provides for settlement of disputes through article 9. Accordingly, a Supervising body, which is the Ministry of Water, Irrigation and Energy itself, is established to examine and decide disputes between permit holders and third parties in relation to rights and obligations arising from the permit. This body has the power to determine and execute compensation that one party may have to pay to another.⁸⁶⁶ Article 9(2) also states that the decision of the body is appealable to

⁸⁶⁰ Article 90(1) of the Ethiopian Constitution (1995).

⁸⁶¹ See Water Org 'Ethiopia's water and sanitation crisis' available at <https://water.org/our-impact/ethiopia/> (accessed 26 August 2018) [hereafter Water Org: 2018].

⁸⁶² Water Org (2018).

⁸⁶³ Chenoweth J et al 'Water law, human health and the human right to water and sanitation' in Lankford B et al (eds) *Water Security: Principles, perspectives and practices* (2013) 324.

⁸⁶⁴ 'Ethiopian Water Resources Management Policy' Policy No 2.2.1 The Federal Democratic Republic of Ethiopia available at <http://extwprlegs1.fao.org/docs/pdf/eth158196.pdf> (accessed 26 August 2018).

⁸⁶⁵ Article 3 of the Ethiopian Water Resources Management Proclamation No 197/2000.

⁸⁶⁶ Article 9(1) of the Ethiopian Water Resources Management Proclamation No 197/2000.

the Court of competent jurisdiction while articles 9(3) and 9(4) provides for the possibility of negotiation and arbitration respectively for settlement of disputes.

It is argued that for Sen's mode of development to be achieved whereby water as a human capability is respected, it is mandatory to have an appropriate and effective legal framework on the basis of the right to water. While the EC has provisions on water, they are mainly on the utilisation of water as a resource and on giving access to water to the citizens. This is not synonymous to saying that all Ethiopians have a constitutional right to water which can be enforced. It implies that the way the right to water has been provided under Ethiopian law is not aligned with the ICESCR and its substantive provisions. It should also be noted that while there is no hierarchy among the capabilities, water can still be considered as utterly essential for Ethiopians to achieve freedom and development as prescribed by the CA to development.

In addition, both the Constitution and the federal laws discussed above entrusts water management to the Federal Government whereas it has been argued elsewhere that regional governments should be given a more active and meaningful role in ensuring access to water as a right.⁸⁶⁷ Yimenu argues that the Proclamation No 197/2000 takes a way too centralised approach to the right to water which makes effective implementation especially in rural areas challenging.⁸⁶⁸ He also highlights a degree of inconsistency between the Constitution and the Proclamation no 197/2000 in the sense that while Article 52(1) gives the mandate to state governments to deal with utilisation of water or rivers or lakes not linking two states, Article 8(1) of the Proclamation stipulates that it is the Ministry of Water, Irrigation and Energy which is the responsible organ for water resources management. The Proclamation is also silent on inter-sectoral coordination for water resources management at both the federal and regional levels according to Yimenu.⁸⁶⁹

In the absence of clearly stipulated right to adequate water in the constitution, sometimes a strong welfare system or series of well drafted acts of parliament on water with appropriate effective

⁸⁶⁷ Yimenu S 'Water resources management in Ethiopia: normative and institutional analysis' (2016) Unpublished dissertation University of Gondar 101 [hereafter Yimenu: 2016].

⁸⁶⁸ Yimenu (2016) 102.

⁸⁶⁹ Yimenu (2016) 108.

institutions can be seen as a compensating factor.⁸⁷⁰ But in Ethiopia, there is arguably a lack of both. There is no well-developed institutions established to deal with water disputes nor is the Federal Supreme Court provided with the constitutional arrangement to receive cases on the basis of the right to adequate water as would be discussed later.

6.2.1.6 The right to political participation

The EC stipulates that all sovereign power resides with the nations, nationalities and peoples of Ethiopia and that their sovereignty is to be expressed through the representatives that they elect and through their own direct democratic participation.⁸⁷¹ Furthermore, under Article 89 which provides for economic objectives, paragraph 6 clearly states that participation of Ethiopians in the formulation of national development policies and programmes should be promoted and the initiatives of Ethiopians in their own development endeavours must be supported as a duty by the government. In addition, the participation of women in development has been given importance though Article 89(6). Regional laws on land administration and use such as the Amhara Proclamation 46/2000, the Tigray Proclamation 23/89, the SNNPR Proclamation 53/2003 and the Oromia Proclamation 46/2000 focus on the importance of public participation. However, in practice, lands selected for large-scale agricultural projects are done without the effective and meaningful participation and consultation with the inhabitants. Officials from the regional governments carry out socio-economic assessments on candidate lands which are then, if they meet soil suitability and water availability requirement, transferred to the Federal land bank and made available to foreign investors.⁸⁷²

There is a lack of opportunities for political participation of the rural dwellers in the land investment process also. The latter consists of issuance of the investment certificate, the land use agreement and the land acquisition process. However, Oakland Institute reports that in none of the three stages political participation of the rural dwellers are clearly respected and given importance

⁸⁷⁰ The case of welfare state of Mauritius for example.

⁸⁷¹ Article 8 of the Ethiopian Constitution (1995).

⁸⁷² Oakland Report (2011) 26.

despite regional land use laws providing for political participation.⁸⁷³ Government departments involved in land selection for large-scale agricultural projects asserts that community consultation is carried out at the stage of the EIA being submitted by the investor, during the socio-economic assessment and by Woreda/Kebele officials. However, there are no records of such consultation even if the EIA Proclamation 299/2002 provides that regional authorities must solicit comments from the public on the impact assessment studies which should be incorporated in the report.⁸⁷⁴

Political participation is enhanced when there is more transparency in the land deals. Oakland Institute reports that there is virtually no transparency in the land deals agreements whose content always remains secret.⁸⁷⁵ There are disclosure clauses in the agreements to ensure confidentiality of information.⁸⁷⁶ Political participation is also essential for the proper determination of compensation for those who are displaced. Since there is no effective and meaningful participation of rural dwellers as discussed above, it affects the determination of compensation. Indeed, Proclamation 455/2005 provides for the procedures of expropriation which includes the payment of compensation equal to the cost of property on the land and improvements thereon to be made in advance and which should be ten times their annual income. However, since this procedure only applies for farmers with legal title, the majority of people affected by land investments in Ethiopia without legal title experience immense difficulties in claiming compensation.⁸⁷⁷

While the legal framework on the right to political participation is present in Ethiopia, it is clear that a lack of enforcement presents itself as a violation of the right. The opacity with which the land deals are materialised and the lack of consultation with alleged victims of displacement make it more challenging for political participation as a human capability to be respected and protected. The right to political participation has been provided in international human rights law with particular focus on the political participation of local communities, vulnerable groups and indigenous peoples

⁸⁷³ Oakland Report (2011) 28.

⁸⁷⁴ Article 15(1) and 15(2) of the EIA Proclamation 299/2002.

⁸⁷⁵ Oakland Report (2011) 31.

⁸⁷⁶ Oakland Report (2011) 31.

⁸⁷⁷ Oakland Report (2011) 44.

as discussed in Chapter 5. However, the way it is provided in Ethiopia legal framework does not match the international set standard on political participation as a right and as a human capability.

6.2.1.7 The right to culture

Article 39 of the EC provides for the right to every Nation, Nationality and People of Ethiopia to express, develop and promote their culture. Furthermore, under the heading of cultural objectives in Article 91, it is stipulated that:

‘Government shall have the duty to support, on the basis of equality, the growth and enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions Constitution’.

In an attempt to define the terms ‘Nation, Nationality and People’, Article 39(5) uses the concept of culture in terms of a *group of people who have or share large measure of a common culture or similar customs*. There is also the Proclamation No 209/2000 on Research and Conservation of Cultural Heritage in Ethiopia. One of its objectives is to protect cultural heritage against man-made and natural disasters.⁸⁷⁸

Ethiopia is a culturally rich country with an immense set of both tangible and intangible cultural heritage.⁸⁷⁹ In view of protecting this cultural diversity, the Federal Government has adopted a Cultural Policy of the Federal Democratic Republic of Ethiopia which has the main aim of :

‘implementing the FDRE constitution’s democratic and human rights provisions that give equal recognition to the cultures and languages of the nation, nationalities and peoples of Ethiopia, that allow their preservation, respect, and development, and that empower the people to promote their history and be proud of their identity’.⁸⁸⁰

It is noted that one of the basic principles of this Cultural Policy is ensuring culture-based economic development which is defined as follows:

⁸⁷⁸ Article 1(2) of the Proclamation No 209/2000.

⁸⁷⁹ Ministry of Culture and Tourism ‘Cultural Heritage’ available at <http://www.moct.gov.et/-/intangibel-heritage?inheritRedirect=true&redirect=%2Fethiopian-intangible-cultural-heritage> (accessed 28 August 2018).

⁸⁸⁰ Ministry of Culture and Tourism ‘Cultural Policy of the Federal Democratic Republic of Ethiopia’ (2016) 4 [hereafter Cultural Policy: 2016].

‘Using culture for economic development so as to speed up the growth and transformation of the nation; utilising cultural products and services as a means of economic development and source of wealth; assigning international standards and national identifications for cultural products, services and value’.⁸⁸¹

The Cultural Policy has a broad cultural objective which includes the development of a cultural industry, research and tourism and diplomacy. As for the implementation of the cultural Policy, the Ministry of Culture and Tourism is the principle implementer.⁸⁸² The role of civil society organisations, religious and faith institutions and the private sector is also recognised in protecting and promoting cultural diversity.⁸⁸³ What is lacking is the appropriate legal framework which will enable the implementation of the Cultural Policy. Indeed, Article 3.10 can be read as follows:

‘Legal framework for implementing the Policy Laws, strategies, short-medium and long term plans and programmes, and procedural manuals shall be prepared to enable the implementation of the policy’.

To date, the legal framework is still not in place which implies that the right to culture which is being violated by large-scale land investments cannot be the subject of any judicial decision in Ethiopia.

Ethiopia therefore still lack the appropriate legal framework for the protection of the right to culture in line with international normative framework on human rights. It implies that culture as a capability does not have the appropriate legal protection and lacks enforceability and justiciability. It is noted that in a country like Ethiopia where culture and related aspects hold immense importance, its violation as a right and as a capability by land grabbing is not properly addressed through legal and adjudicatory means.

6.2.1.8 Concluding remark on the human rights to the selected capabilities in Ethiopia

At this stage, it is relevant to say a word on the changing political environment in Ethiopia. The newly appointed Prime Minister, Abiy Ahmed, has promised and undertaken a series of actions that

⁸⁸¹ Cultural Policy (2016) art. 1.3.3.

⁸⁸² Cultural Policy (2016) art. 3.1.1.

⁸⁸³ Cultural Policy (2016) art. 3.2, 3.3 and 3.4.

are hinting towards democratisation and respect for human rights.⁸⁸⁴ While there is still a long way to go, the direction taken may be a good one to solve, amongst many other issues in Ethiopia, the issue of land grabbing. The above sections on the human rights framework on Ethiopia specifically related to the human capabilities inspired by Sen's CA, indicates that the foundation is present, directly or indirectly. For instance, land tenure system does recognise the various types of land rights in Ethiopia, communal or individual, but the main issue has been the way the system was being administered. Enormous political pressure and interference as well as the problem of politicisation of land have prevented land rights to be genuinely recognised and protected as basic human rights. Devoid of such protection, it is argued that a balanced mode of development which favour economic progress and respect for people at the same time is impossible.

Food, water, political participation and culture are implicitly recognised in Ethiopian law as discussed above. However, when these capabilities are being directly violated by land grabbing, it seems to help less that the legal protection as provided by corresponding rights are given implicit rather than explicit recognition. Though international human rights law does form part of Ethiopian legal framework, the implementation of the obligations imposed on the state by these legal instruments has not been effective so far. It can be concluded therefore that while the foundational basis of human rights to the selected capabilities are present, the required framework to implement, protect and promote them seems inadequate. It is therefore quite challenging to encourage development that balances the economic needs of the country and the required respect for human rights involved in development.

6.2.2 The human rights to the selected capabilities in Madagascar

6.2.2.1 Land law in Madagascar

Land ownership and land rights in Madagascar used to be regulated by the Civil Code (CC) from 1896 until the advent of the Law 2005-019 after the land reform in 2005. The situation was not clear when it comes to the right to property. Article 544 of the CC provides that lands which are without titles are deemed to belong to the state. However, the same Code stipulated that the presumption of state ownership does not apply to lands which have been occupied individually or

⁸⁸⁴ The Guardian 'How Abiy is upending Ethiopian politics' (08 July 2018) available at <https://www.theguardian.com/world/2018/jul/08/abiy-ahmed-upending-ethiopian-politics> (accessed 15 September 2018).

collectively in a way which is evident, effective and permanent. In 2005, state hegemony in the management of land and the presumption of state ownership was replaced by the Law 2005-019 which brought forward the presumption of private property.⁸⁸⁵ Pursuant to the Law 2005-019, lands which are occupied and used based on customary practices and principles are to be considered as rights of usufruct which would be protected at the legislative level as untitled private properties and managed at the municipal level.

The right of usufruct has existed since the colonial era. Colonial land policies were drafted to allow the colonial master to manage the indigenous land.⁸⁸⁶ Such land policies were drafted in order to exploit the immense agricultural potential that Madagascar possessed in view of producing raw materials. To achieve same, the 'Torrens Act' was promulgated by the colonial state conferring the presumption of state ownership to the state and paving the way for land ownership to be formalised by way of the Land Registry.⁸⁸⁷ The concept of written contracts and title deeds was unknown at that time in Madagascar. Articles, 2, 4 and 6 of the 'Torrens Act' therefore allowed for the recognition of indigenous occupation of land for the purpose of shelter and agriculture. The concept of the right to usufruct would later be weakened by the Decree of September 1926 which required the submission of written evidences to prove the right of usufruct to refute any possibility of presumption of state ownership.⁸⁸⁸

After independence in 1960, the Act 60-004 of 15 February 1960 was the main legislation pertaining to land in Madagascar. Collective and individual right of usufruct was restored by the Act which stipulated that the presumption of state ownership would not be applicable to the right of usufruct.⁸⁸⁹ The practice of usufruct or occupation of lands started to gain popularity and it reached a stage where the population started regarding occupation and usufruct as property with even the

⁸⁸⁵ Cotula L *Land deals in Africa: What is in the contracts?* (2011) 18.

⁸⁸⁶ Queen Ranavalona III enacted the Land Policy in 1896 in favour of the then Resident General of France called Laroche Hippolyte.

⁸⁸⁷ State Government of Victoria 'Property and land titles – Torrens titles' (2014) available at <http://www.dtpli.vic.gov.au/property-and-land-titles/land-titles/torrens-titles> (accessed 13 December 2014).

⁸⁸⁸ Article 32 of the Decree of 28 September 1926 – Domain in Madagascar.

⁸⁸⁹ Article 11 of the Act 60-004 of September 1960.

power of disposing it.⁸⁹⁰ In spite of this, occupation recognised by the law was still considered as secondary to titled property or ownership. According to the land registration Ordinance No. 60-146, unregistered land titles are not opposable to third parties and are of no legal value. It posed the danger of eviction by an individual who could demonstrate that he has a written title on the land that had been occupied by rural people. A majority of the population did not register their properties due to the complicated and expensive procedures which exposed them to the danger of eviction.⁸⁹¹

In order to confer more protection to land occupants and to ensure that their rights of usufruct are respected, the 2008 legislation Law No. 2008-014 was introduced which repealed the presumption of state ownership, strengthening the right of usufruct which brought about the presumption of ownership for the occupants with untitled private land. It therefore meant that local land practices started to be regulated by the law and finally had a land tenure system. The decentralisation of land management, encouraged by the Constitution of Madagascar, has been supported by various laws in Madagascar.⁸⁹² While Law No. 2005-019 provided for the various statuses of land in Madagascar, Law No. 2006-031 empowers local authorities and the Municipality to guarantee right to property on lands that are without titles and privately used. The Act No. 94-008 of 1995 provides for rules pertaining to the functioning, power and organisation of local authorities related to the management of lands.

There exist also other policies for other sectors related to land in Madagascar which aim at a better and more effective land management there. The Decree No. 2006-910 of December 2006 has amended the Malagasy Mining Code to ensure that mining companies which have leased those lands maintain a good neighbourly relationship with the owners of the lands or the traditional occupants.⁸⁹³ However, the issue of large grazing lands still does not seem to have a legal solution when it comes to the status that they are to be given. The Law No. 2006-031 only mentions that traditional grazing lands are to be classified under untitled private lands. There is still a prevailing

⁸⁹⁰ Giulia (2013) 20.

⁸⁹¹ Van den Brink R *Madagascar: Land and Property Rights Review* World Bank (2006) Washington, DC.

⁸⁹² Article 136 of the Malagasy Constitution.

⁸⁹³ Ffooks J 'Madagascar – Mining law 2015' available at <http://www.iclg.co.uk/practice-areas/mining-law/mining-law-2015/madagascar> (accessed 13 February 2015).

vagueness as to whether or not grazing lands are to be considered as falling within the state's domain.⁸⁹⁴

Prior to independence, the Land Service was established allowing colonial settlers to register the most fertile lands in their names to be used for cultivation of raw materials for industries in France.⁸⁹⁵ After independence, when the colonial masters left, local people occupied and used the lands for decades. However, from a legal point of view, the legal titles for those lands are still attributed to the colonial settlers. For a long time, they showed no interest towards those lands. However, with the increasing value of those lands and with land investments gaining force on the international market, the descendants of the colonial settlers are coming back to claim ownership over those lands. This situation is adding undue pressure on local communities.

Land tenure security is therefore at the heart of land grabbing in Madagascar. Burnod contends that holding a land title in Madagascar does not systematically confer a deep feeling of tenure security.⁸⁹⁶ The reason of insecurity can be explained by factors such as the land conversion system not being up to date, land register not in order, titles registered on parents who have passed away and cases of corruption and clientelism.⁸⁹⁷ By contrast, land holders with very strong social recognition but without valid land titles and documents feel more secure as they enjoy political and social protection.⁸⁹⁸ Another major issue with the Malagasy land tenure system is a lack of availability of information and legal land institutions accesses.⁸⁹⁹ Cotula is of the view that for legal empowerment and security of land rights to materialise, it is essential to have access to legal information.⁹⁰⁰ There is a challenging lack of information about the existence of local land offices

⁸⁹⁴ Giulia (2013) 22.

⁸⁹⁵ Sodikoff G *Forest and Labour in Madagascar* (2012) 184.

⁸⁹⁶ Burnod P et al *Land reform and certification in Madagascar: Does perception of tenure security matter and change?* (2012) 8 [hereafter Burnod: 2012].

⁸⁹⁷ Teyssier A et al 'Decentralisation of land administration in madagascar' in Colin J (ed) *the politics of land title recognition* (2009) 273.

⁸⁹⁸ Evers S 'The challenges of implementing a land registration system in Madagascar' in Evers S & Wels H (eds) *Competing jurisdictions: Settling land claims in Africa* (2005) 223-242.

⁸⁹⁹ Burnod (2012) 8.

⁹⁰⁰ Cotula L *Legal empowerment in practice: Using legal tools to secure land rights in Africa* (2008) 22.

and land certificates among people residing in municipalities and villages which hampers right awareness and right enablement.⁹⁰¹

While there exists a right to land as required by international human rights framework, its application may not be effective enough in Madagascar because of the weaknesses of the land tenure system. As a result, the platform required for the protection of land as a human capability in accordance with Sen's CA is insufficient.

6.2.2.2 Land rights for local communities

During the years 1787 till 1810 under the rule of King Andrianampoinimerina, a feudal system based on the concept of collective usufruct was noticed.⁹⁰² The land was the exclusive property of the King and the people could only enjoy usufruct of rice fields for food production and livelihood. The traditional rural communities also referred to as *Fokonolona* had the right of enjoyment on those lands but they could not sell them.⁹⁰³ Customary land rights in Madagascar have always co-existed with written civil laws pertaining to land.⁹⁰⁴ After independence, the *Fokonolona* acquired a collective right to use of crops, pasture and grazing land for livelihood and use of wood for the household.⁹⁰⁵ Positive rights have recognised customary practices and occupation of land in Madagascar. However, state authorities shy away from respecting those kinds of rights even though Malagasy land law starts with peaceful customary occupation as a recognised concept.⁹⁰⁶

Land use by the local communities is not restricted to cultivation and production only. Grazing is another essential activity in the way of life of local communities and grazing lands cover a

⁹⁰¹ See in general Bruce W *Legal empowerment of the poor: From concepts to assessment* (2007) 20.

⁹⁰² Giulia (2013) 16.

⁹⁰³ Serre-Ratsimandisa G 'Theory and practice of modern Fokonolona in Madagascar' (1978) 12 *Canadian Journal of African Studies* 37-58.

⁹⁰⁴ Jacoby H & Minten B 'Is land titling in Sub-Saharan Africa cost-effective? Evidence from Madagascar' (2005) 2 available at http://siteresources.worldbank.org/INTISPMA/Resources/Training-Events-and-Materials/Land_Titles_MG.pdf (accessed 12 December 2014).

⁹⁰⁵ Keck A, Sharma N & Feder G 'Population growth, shifting cultivation and unsustainable agricultural development' World Bank (1994) 25.

⁹⁰⁶ Giulia (2013) 16.

significantly large surface of the country.⁹⁰⁷ Breeding of cows holds an important place in the culture of the Malagasy and the cow is a cultural symbol at the national level. The cow meat is served at funerals and cattle are used as dowry.⁹⁰⁸ In addition, social status is measured in terms of the number of cows one possesses. The value of the cow also explains the fact that cow theft and trafficking are phenomena that are frequent in Madagascar.⁹⁰⁹ One of the principles of the local communities since their existence has been the exploitation of land rendering it more productive and of positive use.⁹¹⁰ Such principle is affected by the cultural practice of a particular region with some regions practicing cattle farming and other regions involve in cultivation or agricultural production. Therefore, the practice of maximisation of use and land and the culture of possessing cows thus requiring huge grazing lands explain why lands in Madagascar are rarely unoccupied and free of rights.

6.2.2.3 Unwritten land rights and the state

Successive governments in Madagascar have banked on investment policy that is heavily based on FDI. Due to the low population density of Madagascar and availability of what is considered as uncultivated land, the appetite for agricultural investments is growing rapidly in the country.⁹¹¹ Article 1 of the Malagasy Constitution stipulates that the terms and conditions attached to the sale or lease of land are to be determined by the law. However, land negotiations and agreements are done without any transparency and legal guideline.⁹¹² Despite the Daewoo scandal, business promoters and investors have been coming to invest in Madagascar which includes investors from Australia, Mauritius, Germany, Sri Lanka, Italy and France together with local investors.

⁹⁰⁷ Rasambainarivo J & Razafindratsita R 'Inventory of feed resources for small-scale livestock producers in Madagascar' FAO available at <http://www.fao.org/wairdocs/ilri/x5548e/x5548e07.htm> (accessed 13 December 2014).

⁹⁰⁸ Austin D & Bradt H 'Madagascar' (2014) 211.

⁹⁰⁹ 'Small Arms Survey 2011: States of security' Graduate Institute of International and Development Studies (2011) 183.

⁹¹⁰ Giulia (2013) 15.

⁹¹¹ SADC 'Foreign Direct Investment' available at <http://www.sadc.int/themes/economic-development/investment/foreign-direct-investment/> (accessed 12 February 2015).

⁹¹² Giulia (2013) 17.

The delineation from local to foreign investors has become more difficult with the promulgation of the law No. 2007 036 relating to investment law in Madagascar.⁹¹³ The law was promulgated with the aim of attracting investors and making the private sector the thrust for development. A large freedom of investment was given to foreign and local investors.⁹¹⁴ The law also sets up the Economic Development Board of Madagascar in order to enhance the competitiveness of the private sector by finding partners and investors and elaborate and design business plans. It is to be noted that the Board was supported by the WB and it is sometimes considered as the ‘armed branch’ of the law.⁹¹⁵ There are special titles that are conferred to validate long-term leases which further add to the confusion in relation to unwritten land rights in Madagascar.⁹¹⁶

There is a sentiment of negligence and lack of consideration on the part of the government towards unwritten land rights in Madagascar.⁹¹⁷ Indeed, acquisition of land would have been impossible without the help and support of the government to the investors. The complicity of the government has resulted in rural communities facing problem as they only hold land rights that are unwritten. Following the 2005 Land Reform, land rights, unwritten or otherwise, were supposed to be recognised and better protected. However, it has been reported that state and local authorities dealing with land investments have prioritised rights that are in a written form.⁹¹⁸ This is prejudicial to the majority of the rural communities which have unwritten titles. The negligence on the part of the government towards unwritten rights has posed problems and difficulties to the local communities in Madagascar. Therefore the current land tenure system and land rights in

⁹¹³ LAW No. 2007-036 dated 14th January 2008 relating to investment law in Madagascar available at <https://europa.eu/capacity4dev/file/6624/download?token=Xuf4O6dF> (accessed 12 February 2015).

⁹¹⁴ Article 2 - Freedom of investment: Any natural person or legal entity, Malagasy or foreign, is free to invest and settle down on the national territory, in accordance with the laws and regulations in force, subject to provisions applicable to some activity sectors which are also subjected to specific regulations. These concern banking, insurance, mining, oil and gas, telecommunications, medical, paramedical and pharmaceutical activities.

⁹¹⁵ MCI (Madagascar International Council) ‘Innovations brought by the law relating to investment’ (translated) available at <http://www.cabinet-mci.com/669/les-innovations-apportees-par-le-projet-de-loi-sur-les-investissements-3/> (accessed 13 January 2015).

⁹¹⁶ Circular dated 20 October 2010 Ministry of Planning and Decentralization on the procedures of acquisition of land.

⁹¹⁷ This is the case despite unwritten land rights being conferred protection by Law 2005 and 2006-031 of Madagascar.

⁹¹⁸ Rozeboom A ‘Tombs and title deeds’ (2014) Good Governance Africa available at <http://gga.org/stories/editions/aif-27-on-the-fence/tombs-and-title-deeds> (accessed 12 February 2015).

Madagascar and, more specifically, its application act as a barrier to the protection of the right to land as a human capability enable development as advocated by Sen.

6.2.2.4 The right to adequate food

The Malagasy Constitution implicitly provides for the right to adequate food through article 17 stating that:

‘the State protects and guarantees the exercise of the rights that assure the individual the integrity and the dignity of their person, and their full physical, intellectual and moral development’.

In addition, all citizens have the right to a fair remuneration for their work to ensure their existence as well as that of their family in conformity with human dignity.⁹¹⁹ The Republic of Madagascar also shoulders legal obligations towards the right to adequate food by being state party to a number of international instruments that explicitly provides for this right.⁹²⁰ The right to food is of particular importance for Madagascar with almost 50% of all Malagasy children under the age of five suffering from chronic malnutrition considered as a major public health concern.⁹²¹ The country has benefited from Unconditional Food Assistance and Food Assistance for Assets programmes from the World Food Organisation as well as School Meal Programmes.⁹²²

The Decree No 2004-1071 of 2004 has established the National Nutrition Council which is responsible for development strategies with regard to nutrition at the national level. At the policy level, there exist indirect ones that cater for food security such as climate change and agricultural and forestry related policies. The National Policy on Climate Change (2011), has as objective the promotion of measures to reduce the vulnerability of Madagascar to climate change and emissions of greenhouse gases.⁹²³ The Rural Development Policy Brief and the Rural Development National

⁹¹⁹ Article 29 of the Malagasy Constitution (2010).

⁹²⁰ Article 25 of the UDHR; Article 11 of the ICESCR; Article 12 and 14 of the CEDAW; Article 24 and 27 of the UNCRC; Article 28 of the CRPD.

⁹²¹ World Food Programme ‘Madagascar’ available at <http://www1.wfp.org/countries/madagascar> (accessed 5 September 2018) [hereafter WFP: Madagascar].

⁹²² WFP: Madagascar.

⁹²³ Rakotondrasoa O & Ratovo O ‘A comprehensive scoping and assessment study of climate smart agriculture policies in Madagascar’ (2014) 22 [hereafter Rakotondrasoa & Ratovo: 2014].

Programme of 2001 aim at the speedy growth of the rural economy.⁹²⁴ The former Special Rapporteur on the right to food, Olivier De Schutter, reported that the legal and policy framework on food and nutrition shows that there is a will in Madagascar to realise the right to food of the people. However, the same is not explicitly recognised in the Constitution and other laws which pose a serious problem for courts to protect and promote its realisation.⁹²⁵

6.2.2.5 The right to water

According to UNICEF, Madagascar is the 4th worst country in Africa when it comes to access to clean water.⁹²⁶ Around 60% of Malagasy people live with (or without) access to clean water and nearly half of the whole population is without sanitation facilities.⁹²⁷ The Constitution does not explicitly guarantee the right to water. Constitutional provisions dealing with integrity and human dignity as well as physical and moral development can be interpreted as implicitly providing for the right to water. The main law on water in Madagascar is the Law No 98-029 promulgated in January 1999, known as the water code. Another code called the Drinking Water Access Code was validated by the Council of Ministers in June 2005.⁹²⁸ In essence, these two laws provide that water resources belong to the state and the local communities are their guardians, that access to drinking water is paid, that a National Water and Sanitation Board has been established for the integrated management of water resources and that a National Water Resources Fund has been set up to subsidise disadvantaged water users.⁹²⁹

It is argued that despite the existence of various legal and institutional mechanisms dealing with the right to water, various reasons such as lack of harmonisation among the institutions, lack of political

⁹²⁴ Rakotondrasoa & Ratovo (2014) 23.

⁹²⁵ Human Rights Council 'Report of the Special Rapporteur on the right to food, Oliver de Schutter' UN Doc A/HRC/19/59/Add.4 (26 December 2011) 5.

⁹²⁶ UNICEF Madagascar 'Water, sanitation and hygiene' available at https://www.unicef.org/madagascar/eng/wes_15164.html (accessed 6 September 2018).

⁹²⁷ USAID Madagascar 'Water' available at <https://www.usaid.gov/madagascar/water> (accessed 6 September 2018).

⁹²⁸ African Development Bank 'Rural drinking water supply and sanitation programme – Madagascar' (2005) 2 [hereafter ADB Report: 2005].

⁹²⁹ ADB Report (2005) 2.

and budgetary priority, dependence on donors' funds and agendas, lack of human and technical capacity for implementation, lack of service providers and lack of access to credit have seriously impeded its realisation.⁹³⁰ In addition, enforceability of the right to water in cases of alleged infringement in large-scale land investment projects by local courts is non-existent. This can be explained by the lack of explicit provision of the right to water in Malagasy laws and limited access to justice and trust in the judicial system by the victims.⁹³¹ A lack of justiciability of the right to water as a human capability promotes further violation and does not allow for development as a matter of freedom and in a balanced way.

6.2.2.6 The right to political participation

Article 6 of the Malagasy Constitution provides for the participation of men and women in the functions in the domain of political, economic and social life. In view of protecting cultural heritages and to guarantee intellectual property rights, the Constitution encourages the participation of the Decentralised Territorial Collectivities (DTCs).⁹³² Citizens are also called upon to contribute in public expenditures based on their contributive capacity in a progressive and calculated manner.⁹³³ From an institutional perspective, the DTCs are responsible for the effective participation of citizens in the administration of public affairs taking into account their diversities and specificities.⁹³⁴ These regional collectivities also have the constitutional obligation of ensuring the participation of citizens in the territorial development, economic development, the preservation of the environment and the amelioration of the framework of life.⁹³⁵

⁹³⁰ Waterfund 'Sanitation and hygiene in developing countries and responding to barriers – A case study from Madagascar' (2007) 30 available at <http://www.waterfund.go.ke/watersource/Downloads/001.%20Sanitation%20and%20Hygiene%20Case%20Study%20Madagascar.pdf> (accessed 6 September 2018).

⁹³¹ Wambua P & Logan C 'Citizens access to justice compromised, by perceived bias, corruption and complexity' (2017) 2.

⁹³² Article 26 of the Malagasy Constitution.

⁹³³ Article 36 of the Malagasy Constitution.

⁹³⁴ Article 139 of the Malagasy Constitution.

⁹³⁵ Article 141 of the Malagasy Constitution.

Public participation in Madagascar with regard to decisions concerning the environment is regulated by Article 37 of the Constitution which states that ‘the government guarantees the freedom of enterprise within the limits of respects for the environment’. In addition, the Malagasy Charter of the Environment guarantees public participation through articles 7 and 14. Since there are often environmental implications relevant to the large-scale land investments in Madagascar, these provisions can be effectively used to protect the right to political participation as a human capability.

6.2.2.7 The right to culture

The right to culture is protected by the Malagasy Constitution in Article 26 which states that:

‘all individuals have the right to participate in the cultural life of the community, in scientific progress and in the well-being resulting from them’.

The Law No 2005-006 adopted in 2005 entitled National Cultural Policy for Socio-Economic Development (Politique Culturelle Nationale) clearly recognises access to culture as a fundamental right and guarantees cultural identity of all the people in Madagascar.⁹³⁶ Culture and economic development has also been linked and harmonised through article 10 of the above law. Indeed, it provides that every developmental project must have a cultural dimension which must be supported by the State, private sector and civil society organisations. It can still be argued that the way cultural rights have been formulated in Malagasy law does not accurately reflect the outright right to culture in its full form as provided for by the international human rights framework. The current provisions in the Malagasy law tend to be rather restrictive to participation in cultural life only which is only one component of the right to culture.

A major lacuna in the law is the lack of enforcement mechanisms in cases where the above cited provisions are not being respected. The law also makes mention of the National Council for Cultural Orientation and the National Council for Arts as bodies responsible for harmonisation, consultation and discussion on cultural matters. There is no mention of any specific court or even general judicial bodies which are empowered to hear and adjudicate on cases regarding breaches of the right to culture in Madagascar. Thus, the current normative framework on the right to culture in

⁹³⁶ Article 2 of the Law No 2005-006.

Madagascar is not conducive and effective for the protection of culture as a capability based on Sen's CA.

6.2.2.8 Concluding remark on the human rights to the selected capabilities in Madagascar

Similar to the case of Ethiopia, maladministration and political interference are inhibiting the proper application and interpretation of land rights and land tenure system in Madagascar. Clientelism and favouritism are conferring protection to social elites without title deeds whereas those with title deeds are often marginalised to the benefit of foreign investors. The right to food, water, culture and political participation are implicitly or explicitly recognised in Malagasy laws as discussed above. However, their implementation and application are far from being effective. A lack of enforcement mechanisms and also knowledge of victims about the existence of these rights result in an incomplete protection of these rights to the selected capabilities. It therefore follows that reliance on the legal framework of human rights in Madagascar is insufficient to promote a balanced mode of development in line with Sen's CA.

6.3 A comparative analysis of the situations in the two jurisdictions

From a comparative perspective, there seems to be major commonalities in the ways the capabilities identified are protected in the two jurisdictions. For instance, the two countries have their land tenure systems that do take into account the land rights and access to land of the local communities especially from the perspective of unwritten land titles and usage. They have also both undergone significant degree of land reforms throughout their history. However, both seem to face the similar issue of maladministration of the system related to land titling to local communities and a heavy dose of politicisation of the question of land. In addition, the fact that land ownership is conferred upon the state in both countries and that the judiciaries, as would be discussed later, have not been proactive or have been unwilling to adjudicate on land rights violation, have accentuated the problem of land grabbing in Ethiopia and Madagascar. In addition, a non-computerised system of records on land titles and an unchecked amount of power given to local authorities to deal almost exclusively with land have also not supported the need for proper land administration and titling.

As for the human rights to the five capabilities identified, they have all been found to be provided by the legal framework of the two countries in a way which is too implicit. Neither of the

constitutions of the two countries clearly and directly provides for the above mentioned rights. It is argued that such a situation does not allow for a direct form of adjudication of these rights by the judiciaries which are all foreign to the idea of judicial activism or theories such as implied rights theory (to be discussed in the following chapter). The rights to food and water are indirectly catered for by national policies geared towards reduction of poverty and malnutrition. It is argued that such policies are not enforceable and thus same cannot be upheld and protected. Both countries seem to adopt the same legal definition of political participation with the possibility of citizens participating in the decision-making process for developmental projects that directly impact on their lives. However, in reality, neither of the two countries seems to genuinely implement essential concepts such as free, informed and prior consents of local communities and effective and meaningful participation.

6.4 Conclusion

The legal framework on human rights plays a crucial role in the promotion, protection and respect of human rights in any country. This chapter has reviewed the human rights laws corresponding to the selected capabilities in the study of land grabbing in Ethiopia and Madagascar. This exercise is premised on the argument that if the selected capabilities are already genuinely protected by human rights laws, then it is most probable that development projects related to agriculture in the two countries will be carried out in an inclusive way as propounded by Sen's CA.

The general observation has been that while the domestic laws of the countries do implicitly or explicitly, though rarely, recognised the corresponding human rights to the selected capabilities, their implementation and application are highly dubious. The two countries have undergone land reforms to various degrees to the extent that land tenure systems and land rights are recognised for different categories of people. However, the general impression is that there exists on particular system of land tenure and land rights on paper, and an altogether different one on the ground. Political interference, corruption, administrative maladministration at the local governments and community level, the use of violence and intimidation on people with relevant titles and papers and a lack of education and knowledge on the application of the legal regimes on land tenure and rights are acting as serious barriers to the recognition and implementation of land as a human capability to the victims and land rights as a basic human rights.

In the same vein, water, food, culture and political participation are all directly or indirectly recognised in the countries' domestic laws. However, enforcement mechanisms are drastically lacking. Victims of land grabbing do not seem to be aware of the existence of the human rights to the selected capabilities approach and relevant mechanisms available to them for remedies. The selected human capabilities seem to be more recognised as needs rather than rights. This is evident by the number of policies and programmes, often internationally funded, on the access to food and water and the protection and preservation of culture. While it is very important to have such policies, not providing effectiveness enforcement mechanisms in cases of alleged violation is a regressive step towards their promotion and protection.



Chapter 7: THE ROLE OF OTHER INSTITUTIONS IN PROTECTING THE SELECTED HUMAN CAPABILITIES

7.1 Introduction

The CA to development as propounded by Sen also requires the governmental structures and institutions for development to be respectful of the various human rights to the above-mentioned capabilities. Consideration for human rights must be an integral part of the functioning of institutions responsible for development. This chapter also examines the extent to which relevant judicial, quasi-judicial and non-judicial institutions in Ethiopia and Madagascar operate with the view of promoting development that render people free and capable. It is equally essential to examine the role that international institutions such as the WB play in the land investments related development in Ethiopia and Madagascar.

7.2 The role of courts in protecting the human rights to the selected capabilities in Ethiopia and Madagascar

The jurisdiction of courts in Ethiopia is provided by Article 80 of the EC. The Federal Supreme Court (FSC) exercises the highest and final judicial power over federal matters,⁹³⁷ and for state matters, same is exercised by the State Supreme Courts (SSC).⁹³⁸ While the former has a power of cassation over any final court decision, the latter has a power of cassation over any final decision on state matters containing any basic error of law.⁹³⁹ Decisions of State High Courts are appealable to the SSC whose decisions are in turn appealable to the FSC.⁹⁴⁰ It has to be noted that all constitutional disputes in Ethiopia submitted by the Council of Constitutional Inquiry are decided by the House of Federation.⁹⁴¹

⁹³⁷ Article 80(1) of the Ethiopian Constitution (1995).

⁹³⁸ Article 80(2) of the Ethiopian Constitution (1995).

⁹³⁹ Article 80(3) of the Ethiopian Constitution (1995).

⁹⁴⁰ Article 80(5) & (6) of the Ethiopian Constitution (1995).

⁹⁴¹ Article 83 of the Ethiopian Constitution (1995).

Such a provision may be problematic especially in cases where human rights or democratic rights as provided by the EC are infringed by large-scale agricultural investments projects as discussed in chapter 3. It means that any State or Federal law enacted to encourage land investments in Ethiopia cannot be subject to a judicial control of its constitutionality. Kassie argues that the Constitution does not consider the role of courts in constitutional disputes adjudication and it seems that this is an exception to the judicial powers of Ethiopian Courts.⁹⁴² Donovan further argues that the intention of the drafters of the Constitution was to take away from ordinary courts the power to invalidate legislations that would be unconstitutional.⁹⁴³ As Kassie argues, with such an arrangement, *it is hard to say that there exists judicial review in Ethiopia.*⁹⁴⁴ It is argued that this has given rise to a judiciary with very limited role in the content, formulation and implementation of state policies through legislative acts, administrative acts or customs in Ethiopia.⁹⁴⁵ The clear lack of formal recognition of the judicial enforcement of human rights provisions of the Constitution makes it difficult to see how the Ethiopian judicial system can protect, promote and fulfil the rights of victims of large-scale land investments projects.

With specific reference to land rights in Ethiopia, Witten argues that laws and policies at the regional levels regarding rural lands and their conformity with the constitutional right to property and land are untested in courts.⁹⁴⁶ The FSC of Ethiopia's Cassation Bench ruled in the case of *Ethiopia Roads Authority v Issa Mohammed* that since land are jointly owned by the people and the State, there is no right to compensation for expropriation of land use rights.⁹⁴⁷ The Ethiopian Judiciary has not consider any further case especially addressing more substantive questions on land rights and related policies. Witten further highlights the importance of having the possibility of land

⁹⁴² Kassie A 'Human rights in the Ethiopian Constitution: A descriptive overview' (2011) 5 *Mizan Law Review* 66 [hereafter Kassie:2011].

⁹⁴³ Donovan D 'Leveling the playing field: the judicial duty to protect and enforce the constitutional rights of accused persons unrepresented by counsel' (2002) 1 *Ethiopian Law Review* 31.

⁹⁴⁴ Kassie (2011) 68.

⁹⁴⁵ Bulto T 'Judicial referral of constitutional disputes in Ethiopia: From practice to theory' (2011) 19 *African Journal of International and Comparative Law* 99.

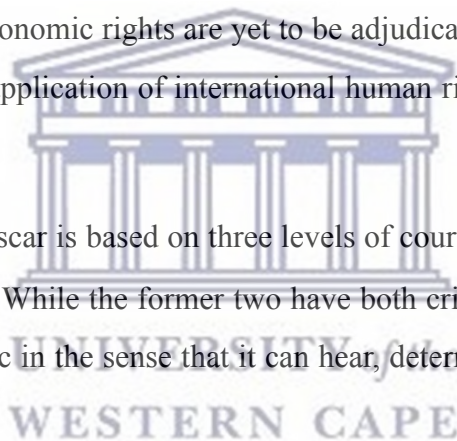
⁹⁴⁶ Witten M 'The protection of land rights in Ethiopia' (2007) 20 *Afrika Focus* 156 [hereafter Witten: 2007].

⁹⁴⁷ *Ethiopian Roads Authority V. Issa Mohammed*, File No. 30461 (2008). Federal Supreme Court Cassation Division.

rights related policies challenged in courts to limit policy choices.⁹⁴⁸ It has also been underlined that the rural dwellers tend to resolve their land disputes through more traditional mechanisms such as elders or witnesses of the last land distribution or through the use of local government administrative dispute resolution mechanisms or even the village social court which is a hybrid judicial system where locally elected judges serve without pay and more like mediators.⁹⁴⁹ However, such dispute resolution mechanisms have their own weaknesses and limitations which are accurately captured by Witten where the affordability as well as the shortfalls of such mechanisms along with the less reliability element of the village Social Court and the under-utilised formal legal forum were underlined.⁹⁵⁰

In addition, all these local fora can be subject to political pressures, corruption or abuse of power.⁹⁵¹ Witten adds that women's land rights are more often attacked than men as they have fewer resources available to defend themselves before a judicial body.⁹⁵² This arguably explains why the right to food and other socio-economic rights are yet to be adjudicated before Ethiopian Court.⁹⁵³ In addition, there is no domestic application of international human rights treaties ratified by Ethiopia before the domestic courts.⁹⁵⁴

The Judicial system of Madagascar is based on three levels of courts - lower courts, Supreme Court and Constitutional High Court. While the former two have both criminal and civil jurisdictions, the one of the latter is more specific in the sense that it can hear, determine and review any law, decree



⁹⁴⁸ Witten (2007) 157.

⁹⁴⁹ Witten (2017) 176.

⁹⁵⁰ Witten (2017) 177.

⁹⁵¹ Witten (2017) 177.

⁹⁵² Witten (2017) 177.

⁹⁵³ Tura A 'Linking land rights and the right to adequate food in Ethiopia: Normative and implementation gaps' (2017) 35 *Nordic Journal of Human Rights* 9.

⁹⁵⁴ Yashenew S 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Human Rights Law Journal* 273.

and ordinances as well as monitor and certify elections and results.⁹⁵⁵ The biggest issue with the judicial system of Madagascar and its potential to protect the human capabilities in the form of human rights seems to be its constant subordination to the executive. Indeed, the Malagasy Constitution has been modified at numerous occasions to serve the interest and purpose of successive presidents. For example, the 1998 amendments by Ratsiraka allowed him to unilaterally dissolve the National Assembly and the 2007 amendments allowed the President to take measure by ordinance in the field of law.⁹⁵⁶ In recent times, a series of institutional crises have resulted in a serious lack of rule of law and constitutional principles as a result of which human rights are barely implemented.⁹⁵⁷ Successive presidents have never allowed the development of strong and independent institutions including the judiciary which have only been used to monopolise power.⁹⁵⁸

The Malagasy Constitution provides for an independent judiciary. However, it has been reported that same is influenced by the executive at all levels and corruption in the judiciary is rampant⁹⁵⁹, which is arguably the case for most African Judiciaries being the creations of the executive as Munyai and Agbor has argued.⁹⁶⁰ A severe lack of training, personnel and resources resulted in an ineffective judiciary whose judges have themselves reported cases where they were forced to release sex offenders who would be citizens of donor countries.⁹⁶¹ The judiciary has also been used as a weapon to silence opposition political leaders, environmental activists and journalists.⁹⁶² In July 2017, the UNHRC noted a lack of trust by the citizens in the State and its justice system which

⁹⁵⁵ Pillay K & Zimbris A 'Law and legal systems in Madagascar: A political siege' (2013) available at http://www.nyulawglobal.org/globalex/Madagascar.html#_edn30 (accessed 10 September 2018) [hereafter Pillay & Zimbris: 2013].

⁹⁵⁶ Pillay & Zimbris (2013).

⁹⁵⁷ Ramandimbarison J 'Le Cahier de Madagascar' (2003) 53.

⁹⁵⁸ International Crisis Group 'Madagascar: Sortir du cycle de crises' Rapport Afrique No. 156 (2010) 13.

⁹⁵⁹ Government of the United States Bureau of Democracy, Human Rights and Labour 'Madagascar 2017 Human Rights Report' (2017) 8 [USA Human Rights Report: 2017].

⁹⁶⁰ Munyai A & Agbor A 'The impact of corruption on the right to development in Africa' in Ngang C, Kanga S & Gumede V (eds) *Perspectives on the right to development* (2018) 77.

⁹⁶¹ USE Human Rights Report (2017) 9.

⁹⁶² June 2017 case of environmental activist Clovis Razafimalala; May 2017 case of Journalist Fernand Cello; August 2016 case of opposition party Alain Ramaroson.

has led to mob justice and cases of lynching of persons suspected of having committed offences.⁹⁶³

The UNHRC has summarised the situation on administration of justice succinctly as follows:

‘The Committee remains concerned at: (a) reports that the political authorities frequently intervene in judicial issues; (b) the fact that, although the elected members of the High Council of the Judiciary constitute the majority of the Council, the President and the Minister of Justice also hold the offices of President and Vice-president of the Council, which could be seen as a violation of its independence; and (c) the small number of cases processed by the High Council. The Committee is further concerned at: (a) the considerable delays in the administration of justice; (b) the limited coverage of judicial services across the State party; and (c) the high cost of proceedings, which forces a large number of people to turn to traditional justice systems. In this connection, the Committee is concerned about reports that dina courts consider cases outside their jurisdiction, which is limited to civil matters (art. 14)’.⁹⁶⁴

It has been discussed in this chapter that, implicitly or explicitly, the human rights to the selected capabilities are recognised in the constitutions or other laws of the two case studies. It is argued therefore that the judiciary has an essential role in the interpretation of the legal rules that promotes the protection and promotion of the rights and capabilities in line with Sen’s model of development. However, it is noted that the judiciary in Ethiopia and Madagascar are failing to provide for such protection to the victims of land grabbing.

While the constitutions of the two countries provide that the Supreme Court or High Court is mandated to hear and determine human rights matters, no case has been entered in any of these jurisdictions against the states or investors for large-scale land investments entailing human rights violations. In addition, the influence of the executive on the judiciary and related perception of corruption therein have also been reported in the two countries. A lack of education on human rights violations and possible judicial remedies has also contributed to victims not being conversant with their rights and the enforcement mechanisms. As for the judiciary itself, a lack of judicial activism and pro-activeness to admit and decide on merit human rights cases has created a culture of mistrust among the citizens. In such circumstances, the judiciary of the two countries is clearly failing to contribute in enhancing Sen’s mode of development that enhances freedom and human capabilities.

⁹⁶³ UN HRC, Concluding Observations on the Fourth Periodic Report of Madagascar (2017) UN Doc CCPR/C/MDG/4 para 25 [hereafter UNHRC Concluding Observations Madagascar: 2017].

⁹⁶⁴ UN HRC, Concluding Observations Madagascar (2017) para 45.

7.3 The role of National Human Rights Institutions in protecting the human rights to the selected capabilities in Ethiopia and Madagascar

The United Nations Paris Principles provide that NHRIs should be vested with the competence to protect and promote human rights with a broad mandate.⁹⁶⁵ Among their responsibilities, NHRIs are required to submit to governments, parliaments or any competent body reports, recommendations, opinions or proposals on any matter related to the promotion and protection of human rights.⁹⁶⁶ Their roles of watchdog is further accentuated by their duty to draw the attention of governments on situations in their country where human rights are being violated⁹⁶⁷ There is also the requirement of governments ensuring independence and pluralism for the effective and meaningful functioning.⁹⁶⁸ The Paris Principles thus highlight the important role that NHRIs have to play in the promotion and protection of human rights in states. On this basis, the role of NHRIs in Ethiopia and Madagascar is studied below to assess their contribution in halting the human rights impacts that land grabbing is having on local communities.

The Ethiopian Human Rights Commission (EHRC) is an independent and autonomous body accountable to the Parliament with both a statutory and a constitutional status. The members of the EHRC namely the Chief Commissioner, the Deputy Commissioner and other Commissioners are appointed by Parliament on receiving two-thirds vote of the Nomination Committee and ratified by Parliament.⁹⁶⁹ The Nomination Committee is comprised of the speaker of the House, seven members of the House of Federation, the president of the Federal Supreme Court and representatives of the Ethiopian Orthodox Church, Islamic Council, Catholic Church and

⁹⁶⁵ See Paris Principles defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993 para 1 & 2 [hereafter Paris Principles: 1993].

⁹⁶⁶ Paris Principles (1993) para 3(a).

⁹⁶⁷ Paris Principles (1993) para 3(a) (iv).

⁹⁶⁸ Paris Principles (1993) para 1-3.

⁹⁶⁹ Gudeta L 'The Ethiopian Human Rights Commission: Critical analysis in its role of promoting human rights' (2018) 5 available at https://www.academia.edu/31271791/The_Ethiopian_Human_right_commission_Critical_analysis_in_its_role_of_promoting_human_rights (accessed 11 September 2018) [hereafter Gudeta: 2018].

Evangelical Church.⁹⁷⁰ Article 6 of the Proclamation No 210/2000 states that the powers and duties of the EHRC are to:

‘ensure that the human rights and freedoms provided for under the Constitution of the Federal Democratic Republic of Ethiopia are respected by all citizens, organs of state, political organizations and other associations as well as by their respective officials and to ensure that laws, regulations and directives as well as government decisions and orders do not contravene the human and democratic rights of citizens guaranteed by the Constitution’.⁹⁷¹

The EHRC also has the mandate for awareness creation and education of the citizens in relation to human rights issues. It also has the overall responsibility of monitoring and supervising the human rights situation across the country.⁹⁷² It is empowered to deal with claims of human rights abuses by citizens perpetrated by the government and its agents as well as by private parties.⁹⁷³ As per Articles 5, 6, 7 and 19 of the Proclamation No 210/2000, the EHRC is mandated to draft recommendations on laws and policies of the country on human rights matters and review government policies which bear certain implications on rights of people. It is also responsible for advising the government on the task of state report submission to international human rights treaty bodies.

The effectiveness of the EHRC has been severely questioned with the recent mass protests that Ethiopia has witnessed. Gudeta notes that:

‘it is evident that, their reports, appeals and petitions on human rights abuses, particularly in view of mass arrest, violation in detention center and extra-judicial killing on peaceful protester in many parts of Ethiopia met with deafening silence and no clear impartial investigation has been seen yet on human rights violation by EHRC’.⁹⁷⁴

He also argues that the EHRC has failed in its duty of advice to the government on the drafting of various laws that have stifled human rights such as the mass media laws, anti-terrorism laws and

⁹⁷⁰ Article 11 of the Proclamation No 210/2000 on the Ethiopian Human Rights Commission.

⁹⁷¹ Article 6(1) and 6(2).

⁹⁷² Abdo I ‘The Ethiopian Human Rights Commission: Challenges confronting its effective functioning’ (2006) 4 *Chinese Yearbook of Human Rights* 27-28 [hereafter Abdo: 2006].

⁹⁷³ Abdo (2006) 7.

⁹⁷⁴ Gudeta (2018) 8.

Charities and Societies Proclamation.⁹⁷⁵ Specifically discussing the issue of land grabbing and violations of human rights, Abdo has argued that the EHRC has failed to discharge its duties of ensuring that land investments policies and programmes of the government are accompanied by transparency, accountability, participation and effective remedies.⁹⁷⁶

It is argued that the EHRC seems to be more comfortable on issues of human rights which are not of a political nature. Abdo notes that ‘where issues involved in a complaint have political overtones, the Commission tends to avoid them by disclaiming competence to handle them’.⁹⁷⁷ In May 2011, a complaint was filed by one Tamiru Ambello acting in the name of a local community in the Gambella region to challenge the decision of the Gambella National Regional State which gave away forest land to investors to be cleared for tea farming. The local community alleged that they were not consulted on the matter of allocation of land and that the clearing of the forest would have devastating environmental effects on the community.⁹⁷⁸ The EHRC only accepted to investigate the case upon pressure from the President of Ethiopia. It approached experts and local organisations working on environmental issues for a report on the impact on the local community. When they asked for a formal letter from the EHRC before starting the work, the latter refused stating that such a case did not fall under its purview and it sent it to the Ombudsman Institute which also refused to investigate.

In 2014, the Malagasy Government established the legal framework for a National Independent Human Rights Commission (CNIDH) consisting of 11 commissioners. These commissioners are chosen by other members of human rights institutions and they essentially have the mandate of investigating complaints and publishing reports on the human rights situation in Madagascar. In 2016, the 11 members of the commission were sworn in allowing the CNIDH to become publicly

⁹⁷⁵ Gudeta (2018) 8.

⁹⁷⁶ Abdo I ‘The Human Rights Commission of Ethiopia and issues of forced evictions: A case oriented study of its practice’ (2018) 19 available at <https://biblio.ugent.be/publication/5826348/file/5847861.pdf> (accessed 12 September 2018) [hereafter Abdo: 2018].

⁹⁷⁷ Abdo I ‘National Human Rights Institution and economic, social and cultural rights: An examination of the mandate and practice of the Ethiopian Human Rights Commission’ in Brems E et al (eds) *National Human Rights Institutions and economic, social and cultural rights* (2013) 144.

⁹⁷⁸ Abdo (2018) 20.

active. Funding seems to be a major issue with the commission as pointed out by the UN HRC.⁹⁷⁹ As at October 2017, it was still without a budget and had to use a single room lent but the government and equipments donated by international organisations and diplomatic missions. It is even reported that members had to use their personal funds to travel around the country to investigate human rights violations.⁹⁸⁰

Of the two national human rights institutions, the Ethiopian one seems to be the more settled and active one. However, as discussed above, a lack of political independence and interference of the executive has prevented from fulfilling its obligations towards victims of land grabbing in Ethiopia. Victims have submitted complaints which the EHRC has refused to investigate. The Malagasy one has only been recently established and it has experienced enormous financial difficulties to initiate investigation and report preparation on land grabbing and the alleged human rights violations. One common factor among the two institutions seems to be a lack of autonomy and independence and political interference in their work. The way the commissioners or members are elected or nominated also raises serious doubt regarding the impartiality of the commissions. It is therefore quite challenging for the commissions to present themselves as credible and effective platforms from which remedies can be available for victims of land grabbing in the two countries.

7.4 The role of the World Bank in land grabbing

After the food and financial crises in early 2000's, the WB took a leading role on the international stage with the aim of finding global solutions. As a result, programmes such as the Global Food Crisis Response (GFCR) were created as part of what the then President of the WB referred to as the 'new deal on global food policy'.⁹⁸¹ The WB was also the central organiser of the multilateral Agriculture and Food Security Initiative together with members of the G20 and other interested

⁹⁷⁹ UN HRC, Concluding observations on the fourth periodic report of Madagascar (2017) UN Doc CCPR/C/MDG/4 para 7 & 8.

⁹⁸⁰ See CCPR Centre 'Madagascar: Discrimination, corruption and flawed justice system threaten the protection of human rights in the country' available at <http://ccprcentre.org/ccprpages/madagascar-discrimination-corruption-and-flawed-justice-system-threaten-the-protection-of-human-rights-in-the-country> (accessed 13 September 2018).

⁹⁸¹ Shepard D & Mittal A '(Mis)investment in agriculture: The role of the International Finance Corporation in global land grabs' (2010) 6 [hereafter Shepard & Mittal: 2010].

donors and organisations.⁹⁸² However, Shepard and Mittal noted that, despite the primary objective of such initiatives were supposed to be a vast improvement to food security in developing world, evidence has revealed that they are having a negative effect especially on small-scale farmers and rural dwellers.⁹⁸³ Mousseau noted that policies of the WB are favouring farmers who are already productive and better off to the detriment of marginal farmers and the non-farming rural populations such as small holders and pastoralists.⁹⁸⁴ Shepard and Mittal have also questioned the role of the WB in fuelling land grabbing through the promotion of technical assistance to governments and policies to boost FDI in agriculture with adverse effects of global food security and the livelihoods of small-scale farmers.⁹⁸⁵

Two other groups within the WB umbrella, that is, the International Finance Corporation (IFC) and the Foreign Investment Advisory Service (FIAS) have been criticised for their role in promoting land grabbing in African countries. Though these two institutions are supposed to share the overall objective of the WB to improve the conditions and quality of life of people in developing countries, they remain the private sector arm of the WB which implies that they are profit-oriented institutions.⁹⁸⁶ The IFC main activity is private sector financing with the aim of making profit and the FIAS has the main role of advising client government on improving business environment.⁹⁸⁷ In summary, the IFC and the FIAS have created products such as Access to Land, Investing Across Borders and Land Market for Investment sold to countries such as Ethiopia and Madagascar.⁹⁸⁸ They have advised and participated in the re-writing of land laws, promoting land investments and targeting and fructifying 'idle' lands in these countries.⁹⁸⁹

⁹⁸² Shepard & Mittal (2010) 6.

⁹⁸³ Shepard & Mittal (2010) 6.

⁹⁸⁴ See Mousseau F 'Policy and programme responses to high food prices' Oakland Institute (2010).

⁹⁸⁵ Shepard & Mittal (2010) 6.

⁹⁸⁶ IFC 'Financing through IFC' Global Education Conference Washington (2006) available at [http://www.ifc.org/ifcext/che.nsf/attachmentsbyTitle/ed_06_Mccahan/\\$file/Mccahan_Ifc+financing.pdf](http://www.ifc.org/ifcext/che.nsf/attachmentsbyTitle/ed_06_Mccahan/$file/Mccahan_Ifc+financing.pdf) (accessed 14 September 2018).

⁹⁸⁷ Shepard & Mittal (2010) 8.

⁹⁸⁸ Shepard & Mittal (2010) 13-15.

⁹⁸⁹ Shepard & Mittal (2010) 19.

IFC has been involved and active in Ethiopia for more than a decade now. In 1997, it reviewed the investment climate in Ethiopia and the approval process for FDI. Training was provided by their office to the Ethiopian Investment Agency to strengthen its capacity of investment promotion which was followed by another review from IFC specifically on export-oriented FDIs.⁹⁹⁰ In addition, the WB announced the financing of a new initiative in Ethiopia called ‘Enhancing Shared Prosperity Through Equitable Services’ (ESPES) in 2015 to the tune of US Dollar 600 million which is very similar to the previous initiative called the ‘Promoting Basic Services’ (PSB) programme.⁹⁹¹ The latter was one which was tainted with human rights abuses and violations in its task of funding local authorities to enhance basic services to the local communities as was noted by the WB Inspection Panel itself after the Anuak people of Gambella in Ethiopia filed a complaint against the WB PSB programme.⁹⁹²

Indeed, it was found that the PSB programme funds were actually being utilised by the Ethiopian Government to carry out the villagisation programme, which basically consisted of relocating and displacing local communities to give land to foreign investors in agriculture, instead of genuinely enhancing access to basic services of the local communities.⁹⁹³ The WB response to the findings of the Inspection Panel and the numerous human rights violations was simply to change the PSB programme to the ESPES programme which is fundamentally the same as the PSB implying that no remedial actions has been taken by the WB. For instance, ESPES is not subject to the Bank’s safeguards and social protection tools, lacks financial management of the block grants and is devoid of monitoring and evaluation tools.⁹⁹⁴

Madagascar has also largely adopted and absorbed the WB’s approach to development. Following the global trend of ‘win-win’ situation related to land acquisition, the Malagasy Government started

⁹⁹⁰IFC ‘Projects in Sub-Saharan Africa’ https://www.ifc.org/wps/wcm/connect/region_ext_content/IFC_External_Corporate_Site/Sub-Saharan+Africa (accessed 20 September 2019).

⁹⁹¹ Fraser E ‘Moral bankruptcy: World Bank reinvents tainted aid programme for Ethiopia’ (2016) 4 [hereafter Fraser: 2016].

⁹⁹² Fraser (2016) 5.

⁹⁹³ Oakland Institute ‘Unheard voices: The human rights impact of land investments on indigenous communities in Gambella’ (2013) available at http://www.oaklandinstitute.org/sites/oaklandinstitute.org/les/OI_Report_Unheard_Voices.pdf (accessed 14 September 2018).

⁹⁹⁴ Fraser (2016) 8-11.

focusing on legislative reforms and improvement of procedures with the aim of avoiding delays and losing precious investment opportunities. The advice and direction of the WB, the IFC and the FIAS have been taken on board which has driven further land grabbing in the country.⁹⁹⁵

The WB, the IFC and the FIAS have been focusing on improving business environment and investment climates in Ethiopia and Madagascar to facilitate access to private investors in agriculture. A number of legislative and policy frameworks have been advised and promoted by these institutions in the two countries as discussed above. While so doing, the WB Group has overlooked the conditions of local communities and the human rights impacts that FDI that they have proposed and facilitated have had on them. Despite having a plethora of safeguards mechanisms, monitoring and evaluation tools and assessment of social impacts of their grants, loans and advices that the WB, IFC and FIAS provides, they have failed to take a genuine interest in the needs and concerns of local communities.

Indeed, in 2011, around 100 civil society organisations from 38 countries wrote to the WB demanding that its lending to private corporations must be more responsive to social and environmental needs. The IFC's failure to recognise human rights, lack of supervision and transparency and inadequate climate changes policy consideration while providing for technical and financial assistance to government clients were highlighted in the complaint letter.⁹⁹⁶ It is argued that to advance Sen's model of development which is based on development as freedom and enhancing human capabilities, the WB and its affiliates have a major role to play. They are highly influential towards various governments around the world and can therefore utilise their influence in a more positive and constructive manner to drive forward a more responsible and all-inclusive mode of development in Ethiopia and Madagascar as will be discussed in the recommendation part of the thesis.

7.5 The role of ombudsman in land grabbing

⁹⁹⁵ Giulia (2013) 92.

⁹⁹⁶ See Accountability Project 'Complaint letter to the IFC' (2011) available at www.accountabilityproject.org/jointsubmission and www.ciel.org. (accessed 14 September 2018).

As previously discussed, land grabbing in Ethiopia and Madagascar has been significantly aided by maladministration by the public service sector. In both countries, there exists the office of the ombudsman which is mandated to investigate and make recommendations in case of public maladministration regarding land tenure and title registration which eventually facilitates land grabbing. The Ethiopian Constitution provides that the house of people's representatives shall establish the institution of ombudsman.⁹⁹⁷ Accordingly, a Federal Ombudsman Office has been established under Ethiopian law⁹⁹⁸ which has, as main objective, the realization of an effective system of public administration rooted in the principles of rule of law and respect for the right of individuals in the administrative process. Article 5 of the Proclamation 211/2000 establishing the Federal Ombudsman Office provides that the Office seeks to 'to see to bringing about good governance that is of high quality, efficient and transparent, and based on the rule of law, by way of ensuring that citizens' rights and benefits provided for by law are respected by organs of the executive'. The said Office has the power to supervise and revise administrative decision in accordance with article 6 of the Proclamation 211/2000. According to the same Proclamation, the Office can also make recommendations for the revision of existing laws and the formulation of policies with the aim of enhancing governance. The Office also has investigatory powers upon complaints or grievances brought to it by any interested party affected by maladministration or on its own initiatives.

A similar ombudsman office exists in Madagascar since 1992 after it was established by Ordinance no. 92-012. The Ombudsman institution is responsible for handling complaints from users of the public service against the poor functioning of the Administration. It also ensures respect for human rights and observance of the principles of good governance in the management of public affairs. Finally, it ensures the promotion and protection of citizens' rights. The Ombudsman institution cannot intervene in proceedings brought before a court, except to accelerate their course. It cannot call into question the merits of a judicial decision. It has neither the capacity of administrator nor that of judge; his actions do not have the character of administrative decisions but of genuine recommendations for the application of equity and justice.

⁹⁹⁷ Article 55 of the Ethiopian Constitution.

⁹⁹⁸ See Proclamation 211/2000.

While this important institution can play an important role in both countries, especially with their investigatory powers, their independence can act as an impediment in realising their duties. For instance, the ombudsman and the other members are generally political or government appointees which question their impartiality and their political will to genuinely and effectively investigate public maladministration resulting in land grabbing. In addition, the fact that they both derive their budget from public or state budget further diminishes their impartiality which significantly puts in doubt their effectiveness and efficacy in investigating and recommending in cases of land grabbing arising out of maladministration in the public service.

7.6 Conclusion

The role of the judiciary of the two countries has been analysed and it was argued that courts act as the fortress against the violations of the human rights to the selected capabilities. For Sen's model of development to be followed and adopted, it is mandatory for the judiciary to play a progressive and imposing role. It was explained that courts of law in Ethiopia and Madagascar are not independent and are under the tight control and scrutiny of the executive contravening the doctrine of separation of powers. While the constitutions provide that the supreme courts or high courts are mandated to adjudicate on human rights issues, in reality, none of these courts seem to be opened and willing to hear such cases. In the unlikely event that such cases are brought before them, it can be anticipated that no judicial activism or progressive attitude would be shown by the courts to the benefit of victims of land grabbing. The lack of knowledge about the courts and the avenue for judicial remedies also result in cases on human rights violations in land grabbing remaining untested in courts.

The NHRIs were also reviewed for the two countries respectively. It was argued that they have a crucial investigative and monitoring role to play relating to human rights. The corresponding commission for Madagascar has not undertaken any investigation or monitoring on the impact of large-scale land investments on human rights. The Ethiopian one has the opportunity to do so with regard to a specific complaint brought by the Anuak community in the Gambella region which it refused, invoking lack of jurisdiction. The nomination procedure of the commissioners and members of the commissions and the lack of independence from political interference indicate that the national human rights commissions in the two countries are not robust and effective enough in

the protection of the human capabilities and rights involved in the discourse of large-scale land investments in Ethiopia and Madagascar. The office of the ombudsman in both countries was also reviewed and it was concluded that despite their power to investigate in matters of maladministration, they are arguably not impartial enough to deal with instances of land grabbing arising out of maladministration.

Lastly, the role of the WB and its affiliate institutions such as the IFC and FIAS was analysed. They have played and are still playing a critical role in designing the investment environment of the two countries. However, as discussed, they have not been particularly attentive to the human rights involved in international agricultural and food security projects which they have promoted and supported technically and financially. A lack of monitoring and reporting guidelines on the projects that they fund in the two countries has resulted in the infringement of human rights. The ways of economic development that they propose to countries such as Ethiopia and Madagascar do not promote development as freedom and do not take into account the respect for the human capabilities involved. This chapter has therefore focused on the domestic institutions with responsibilities to promote and protect human rights. Their role is arguably critical to prevent and prohibit the practice of land grabbing and to encourage a more balanced mode of economic development. While the foundational structures are present in the two countries, there are major changes and amendments that need to be made to both the laws and the institutions. These are discussed and proposed in the following chapter which provides for recommendations and concludes the thesis.

Chapter 8: RECOMMENDATIONS AND CONCLUSION

8.1 Introduction

Large-scale land investments in Ethiopia and Madagascar have been qualified as the way forward and the solution to boost FDIs and the economy in general. Governments of the countries believe that allowing foreign investors to acquire land for investments purpose result in a ‘win-win’ situation whereby the host countries benefit in terms of influx of investment money, transfer of technology and employment creation.⁹⁹⁹ While all countries have the sovereign right to determine their mode of development and economic self-determination¹⁰⁰⁰, any particular mode of development which is infringing basic human rights raises critical questions. More so as the international community and literature in development theories have widely accepted the mode of development proposed by Sen as one which is all-inclusive and which renders people capable and free despite Sen’s CA having been subject to its fair share of criticism.¹⁰⁰¹ The thesis, while not advocating for large-scale land investments as a mode of development to be stopped or prohibited, pursue the need of having a balanced one which can be achieved through human rights law.

The thesis, through the previous chapters, has sought to address the central research question of the study by assessing how Sen’s model of development can be achieved by balancing the economic needs and interests achievable through large-scale land investments with human rights and fundamental freedoms consideration as protected by both international and domestic legal frameworks. The research question has been approached with particular focus on Ethiopia and Madagascar and the rationale behind the choice of these two case studies has been explained in Chapter 1.¹⁰⁰² Chapter 1 elaborated on the introduction and background to the study with particular focus on the research questions, underlying arguments, review of the literature on land grabbing and the methodology employed. Chapter 2 presented the theoretical and philosophical framework of the study based on Sen’s CA to development. The main argument was based on how the CA can be

⁹⁹⁹ See 1.3 in Chapter 1.

¹⁰⁰⁰ Principle 2 of the Rio Declaration on Environment and Development (1992).

¹⁰⁰¹ Villani A ‘Social justice and Capability Approach’ (2012) 2 *International Review of Social Science* 225.

¹⁰⁰² See 1.7 in Chapter 1.

articulated into human rights norms which can then serve as a basis on which a balanced mode of development can be achieved. The list of capabilities relevant to the study was also determined and its application to the thesis was clarified.¹⁰⁰³

Chapter 3 provided for a factual account of land grabbing in Ethiopia and Madagascar with specific references to the impact that large-scale land investments are having on the selected capabilities which are land, food, water, culture and political participation. Chapter 4 assessed the potential of the right to development as a human right in protecting the capabilities affected by land grabbing in the two selected case studies while Chapter 5 focused on the international human rights normative framework and its capacity to drive a mode of development which remains in full compliance with international human rights law. The domestic normative framework of Ethiopia and Madagascar was critically analysed in Chapter 6 in view of determining its effectiveness in allowing for large-scale land investments in a way that render people capable and free and protect the human capabilities cited above. Chapters 4, 5 and 6 identified the positive aspects as well as the gaps, resulting in determining how human rights law can drive forward Sen's mode of development and also emphasising on the lacunas that hinder development as freedom.

The current chapter now provides for the summary of the study, findings from the key chapters and recommendations that can be explored for Ethiopia and Madagascar to balance their economic needs in the form of large-scale land investments with the respect for human rights and capabilities. The findings on the potential of the CA as a theoretical foundation, the right to development as a human right, the international human rights normative framework and the domestic legal system to address the issue of land grabbing are discussed in subsequent sections of the current chapter. Thereafter, recommendations at various levels are proposed before concluding the thesis.

¹⁰⁰³ See 2.3 & 2.4 in Chapter 2.

8.2 SUMMARY OF ANALYSIS AND FINDINGS

8.2.1 The Capabilities Approach to development

Summary of analysis

In essence, Chapter 2 explains and justifies the choice of Sen's CA as a theoretical basis on which large-scale land investments in Ethiopia and Madagascar should be promoted. A historical overview on various development phases and policies that the world has witnessed has been provided to highlight the fact that development was mainly regarded as economic development in monetary terms. Not much focus was laid on other forms of development such as social and cultural which had the human being as the central tenant. Comparing his approach to other theories such as Adam Smith's theory of necessities and conditions of living, Karl Marx work on human freedom and emancipation and Rawl's theory of justice, Sen argued that only the CA addresses all relevant concerns of human development.¹⁰⁰⁴

It has been found in Chapter 2 that it is impossible to find a scientific theory of development as development remains a subjective matter which differs from one country to another and even from one region to another within a country. Thus, an approach to development makes more sense as it encompasses and takes into account numerous variables that exist and that are affected by development. Sen's CA allows determining whether a particular development project is empowering human beings or only benefiting one particular class of the population to the detriment of another. As illustrated in Chapter 2, if a particular section of the Malagasy population values their connection to ancestral land more than the monetary gains from exploiting the land through large-scale land investments projects, then their mode of development must be one which is centered around their affinity to ancestral land and not result in distancing them from it.

Chapter 2 equally focused on the criticisms against the CA. Liberal critics of Sen believe that it is problematic to interpret and implement the concept of development as the freedom for individuals to achieve what they desire and value. It is best to focus on an equal and fair distribution of resources through development rather than what individuals manage to achieve with the resources.

¹⁰⁰⁴ See 2.1 in Chapter 2.

Sen has replied to the liberal approach by stating that there is huge variability in the capacity for individuals to turn resources into valuables and therefore the individualistic approach is necessary when assessing development. Another critic against the CA is that it is an under-theorised approach with its contents and substance not adequately explained. For instance, what are capabilities remain unlisted in Sen's work and this should be left to each and every society to decide and not by social scientists in a one-size-fits-all manner.¹⁰⁰⁵

Another critical discussion in Chapter 2 was about Nussbaum's argument regarding the importance to establish a list of universal human capabilities which would be cross-cutting to all societies and would represent itself as 'a minimum account for social justice'.¹⁰⁰⁶

Findings

Based on the above analysis, various findings were made with regard to the theoretical foundation of the thesis. Firstly, since both Sen's CA and international and domestic human rights frameworks have the human being as the central subject and beneficiary, CA can be articulated into human rights norms. A particular human right is a right to a capability – the right to water is a human right which protects water as a capability. Thus, there is a fine possibility for human rights law applicable to development and protection of human beings involved in development processes to be interpreted and implemented through a capability approach. This articulation is visible in Chapters 4, 5 and 6 where the right to development, international human rights law and domestic human rights laws respectively are promoted, protected and fulfilled based on the CA.

In Chapter 3, it was illustrated that what is valuable to Ethiopians and Malagasies was determined through their own complaints and grievances as documented by various international NGOs and Institutes working on land grabbing.¹⁰⁰⁷ It has been found that water, land, food, culture and political participation were the human capabilities that were valued by the communities. However,

¹⁰⁰⁵ See 2.2.4 in Chapter 2.

¹⁰⁰⁶ Holst C 'Martha Nussbaum's outcome-oriented theory of justice' *Centre for European Studies Working Paper No 16* (December 2010) 8 available at <https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2010/wp-16-10.pdf> (accessed 10 September 2018).

¹⁰⁰⁷ See Chapter 3 for a factual account on land investments in Ethiopia and Madagascar.

these capabilities were being constantly infringed and impacted upon. Since all the five capabilities are also protected by a specific human right, it has therefore been found that there is the potential of interpreting and implementing human rights through the CA.¹⁰⁰⁸ It should also be noted that while Nussbaum pre-determined list of universal capabilities has not been adopted in the thesis, the five selected capabilities remain implicit to her list.

8.2.2 The right to development as a framework for a balanced mode of development

Summary of analysis

Chapter 4 focuses on the RTD as a human right and its capacity and effectiveness to ensure development as freedom and in line with the CA. After assessing literature and legal instruments on the RTD, it has been found that its primary objective is to offer a human right to development based on which human beings, individually and collectively, can partake in the process of development and reap the benefits equally and fairly. However, it has also been found that the RTD is a right which is heavily contested and whose content and meaning have been interrogated.¹⁰⁰⁹ Therefore the main focus of Chapter 4 was on the potential and the effectiveness of the RTD as a driver of the CA to a balanced mode of development despite its contested and controversial nature.

The content of the RTD has been examined in Chapter 4 in terms of its components namely comprehensive development, respect for human rights, participation, social justice and international cooperation.¹⁰¹⁰ Based on its component of comprehensive development, it has been found that the RTD is one which puts the human being as the central tenant of development which should be multi-faceted with cultural, social, political and economic elements. The RTD is to be regarded as a right with the aim of a new social and international order which guarantees the overall welfare of the people in a country.¹⁰¹¹

¹⁰⁰⁸ See 2.4.1 in Chapter 2.

¹⁰⁰⁹ See 4.2 in Chapter 4.

¹⁰¹⁰ See 4.2.1 in Chapter 4.

¹⁰¹¹ See 4.2.1.1 in Chapter 4.

The RTD advocates for a mode of development which respects human rights and the violation of which is to be regarded as an obstacle to development. It goes further to highlight the importance of human rights in development by enshrining the concept of indivisibility and inter-dependence of human rights. This implies that equal attention is to be given to civil and political and socio-economic rights that are involved in development process. The RTD is also closely associated with the equal right of access to natural resources, transparency and participation in the decision making processes of development and an equitable sharing of benefits derived by development.¹⁰¹² It is also linked with the right to self-determination and the right to sovereignty of wealth and natural resources of the people.¹⁰¹³

Participation of individual human beings in development process has been found as occupying a prominent place in the substantive content of the RTD. The Declaration on the RTD encourages popular participation and the right of individuals to participate, contribute and enjoy the process of development.¹⁰¹⁴ It has been argued that the international community and states therefore need to formulate development policies which place human being as the central subject through their active, free and meaningful participation. The RTD is also framed around the concept of social justice based on equality of opportunities and access to resources. Lastly, international cooperation has also been found to play a significant role in a balanced mode of development in ensuring a new international economic order and world peace and security. This has also been noted as being the most controversial component of the RTD.¹⁰¹⁵

Chapter 4 also focuses on the analysis of the nature of the RTD in view of identifying it as a driver of the CA to development. An analysis has been carried out on the type of right that is who bears the obligation and who the beneficiary of the RTD is and how effectively can it be monitored, implemented and enforced. It has been found that the RTD is to be considered as a composite human right wherein all other rights, civil and political and socio-economic, are realised

¹⁰¹² See 4.2.1.2 in Chapter 4.

¹⁰¹³ Article 1(2) of the UN Declaration on the Right to Development.

¹⁰¹⁴ Article 8 and 1 of the UN Declaration on the Right to Development respectively.

¹⁰¹⁵ See 4.2.1.5 in Chapter 4.

together.¹⁰¹⁶ The RTD has an element of collectiveness and solidarity which allows it to ensure an all-round and all-inclusive type of development.¹⁰¹⁷ Literature from Piron, Vandenbogaerde and Sengupta has been cited and analysed to counter argument on the RTD such as it being a right to ‘everything and nothing at the same time’.¹⁰¹⁸ It was conclusively found that the RTD is a well-defined human right with its own specificities and substantive content.

In terms of the right-holders of the RTD, the internal and external dimensions of it indicate that it is both an individual and a collective right. The right-holders are thus the individual as well as a larger collective such as a local community or even a whole country. The state has also been argued as being a right-holder of the RTD with the beneficiaries ultimately being the citizens.¹⁰¹⁹ Instead, there is no doubt that the state remains the primary duty-bearer of the RTD and it shoulders the obligation of creating national and international conditions favourable to the realisation of this right. The RTD also entails the obligation of international cooperation and economic and commercial arrangements among states that are favourable to the development of all peoples and communities.¹⁰²⁰

The implementation of the RTD is also discussed in Chapter 4 with regard to its internal and external dimensions. The duty to implement the internal dimension of the RTD is attached with states at the domestic level as pointed out by the African Commission in the *Endorois case*. The implementation of the external dimension in turn relies on international cooperation among states in the form of collective actions of states- through global and regional partnerships, adoption and implementation of policies by states individually against the negative effects of development to people outside their jurisdiction and formulation of national development policies and programmes affecting people within their jurisdictions.¹⁰²¹

¹⁰¹⁶ See 4.2.2.1 in Chapter 4.

¹⁰¹⁷ McInerney-Lankford S ‘Human rights and development: a comment on challenges and opportunities from a legal perspective’ (2009) 1 *Journal of Human Rights Practice* 51.

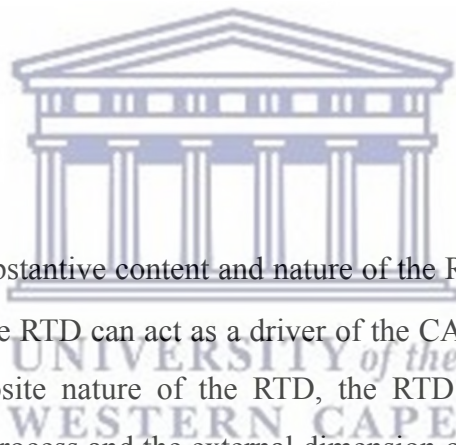
¹⁰¹⁸ See 4.2.2.1 in Chapter 4.

¹⁰¹⁹ See 4.2.2.2 in Chapter 4.

¹⁰²⁰ See 4.2.2.3 in Chapter 4.

¹⁰²¹ UN High-Level Task Force: 2010, note 12; See 4.2.2.4 in Chapter 4.

The enforceability and justiciability of the RTD is also part of the discussion in Chapter 4. The former is discussed comparatively with socio-economic rights in terms of the duty to respect, protect and fulfil.¹⁰²² It has been found that the duty to protect and respect the RTD is highly enforceable and justiciable while the duty to fulfil remains dependent on availability of resources. The justiciability of the RTD is also subject to the concept of prohibition of retrogressive measures without legal and acceptable justifications as is applicable to socio-economic rights which are today considered as enforceable rights. The African Commission noted that the RTD has both a constitutive and an instrumental element and the infringement of either of the element constituted a violation of the RTD.¹⁰²³ At the international level, the RTD is recognised as an enforceable and justiciable human right as evidenced by the explicit recognition of the importance of the Declaration on the RTD by the UN CESCR and implicitly by the fact that it is founded on the principles of the UN Charter, namely sovereign equality of States, non-discrimination, the principle of inter-dependence and international cooperation.



Findings

Based on the analysis of the substantive content and nature of the RTD as summarised above, it has been found in Chapter 4 that the RTD can act as a driver of the CA to development. These findings have been based on the composite nature of the RTD, the RTD as a solidarity right, the RTD recognising development as a process and the external dimension of the RTD which binds all states at the international level.

The Declaration on the RTD itself recognises that in order to protect, respect and fulfil the RTD, it is mandatory to protect both civil and political and socio-economic rights which explain its composite nature.¹⁰²⁴ Land grabbing in Ethiopia and Madagascar are constantly violating both

¹⁰²² See 4.2.2.5 in Chapter 4.

¹⁰²³ Endorois (2009) para 277.

¹⁰²⁴ See 4.3.1 in Chapter 4.

generations of human rights as discussed in Chapter 3. Even if the human capabilities selected in this study are individually protected by a specific human right, there are limitations that apply to their enforcement in the case studies as has been discussed in Chapter 5. The RTD therefore presents itself as a relevant and effective composite right through which the two generations of rights can be protected.

Secondly, the RTD is a solidarity right or collective right which can be more effective in legally remedying the violations caused by land grabbing in Ethiopia and Madagascar. Human rights violations have been presented as a collective issue in Chapter 3. Individuals living in communities are facing the same issues and infringements of human rights. Litigating the issues on a common front and on the basis of a solidarity right such as the RTD gives more impetus to the combat against land grabbing.¹⁰²⁵

Thirdly, the RTD is also a human right that sees development as a process that renders people capable much as is the case with the CA. Development projects undertaken by Ethiopia and Madagascar are not situations where human rights are violated on a one-off basis and judicially remedied. Such projects are a process during which human rights can be infringed at any stage and even aftermath realisation of the developmental projects. The RTD has the potential of guaranteeing the protection of human rights throughout the process. It can even anticipate future violations that such projects can entail and therefore preemptively provide for judicial remedies.¹⁰²⁶

Fourthly, the external dimension of the RTD is another component that makes it apposite as a driver of a CA to development. Land grabbing involves both domestic states as host states and foreign states as home states. There is a degree of complicity between or among states that result in human rights violations through land grabbing. The external dimension of the RTD ensures that states act responsibly and through international cooperation to ensure that development is carried out in a balanced and all-inclusive manner. It provides for the extra-layer of protection in addition to what

¹⁰²⁵ See 4.3.2 in Chapter 4.

¹⁰²⁶ See 4.3.3 in Chapter 4.

the domestic legal framework is supposed to provide for to local communities in Ethiopia and Madagascar.¹⁰²⁷

Lastly, the finding in Chapter 4 has also revealed that the RTD is not adequately formulated in the domestic legal framework of the two countries. Only Ethiopia has a constitution that provides for the RTD as a human right while Madagascar only refers to development as an economic concept without any legal foundation. The issue with Ethiopia is that justiciability and enforceability of the RTD is highly contested with no case argued before the Supreme Court on the basis of the RTD till date.

The RTD is an apposite and relevant human right through which Sen's mode of balanced and all-inclusive development can be driven. Its substance and nature provide for adequate legal protection against the infringements of human rights taking place through land grabbing. The issue remains with its uncertainty in terms of its content at the international level despite the fact that both legal literature and authoritative bodies having recognised the RTD as an enforceable and justiciable human right. Also, at the domestic level, Ethiopia and Madagascar have yet to fully implement the RTD in their domestic legal framework.

8.2.3 The international human rights law as a framework for Sen's model of development

Chapter 5 discusses the potential of existing framework on international human rights law as a framework for Sen's model of development. The capabilities selected for the study being land, water, food, culture and political participation are all protected as individual human rights at the international level. Indeed, the human rights to land, water, food, culture and political participation have all been enshrined in key international human rights instruments and reiterated and re-emphasised upon by authoritative bodies such as the HRC and the CESCR. The extent to which the international normative framework is effective and relevant in the protection of the human rights involved in land grabbing is the subject of Chapter 5.

Chapter 5 focuses on the way the rights to the specific human capabilities are formulated and interpreted as law and also the obligations that are imposed on states as the duty-bearers of these

¹⁰²⁷ See 4.3.4 in Chapter 4.

rights. It discusses the obligations that both host states and home states involved in land grabbing have towards the human rights to the selected capabilities. In addition, the chapter also discussed the relevance and effective of the normative framework on business and human rights as a basis on which a balanced mode of development can be driven forward in Ethiopia and Madagascar.

Summary of analysis

Ethiopia and Madagascar are states parties to the ICCPR which protect the right to political participation and the right to land, though in an implicit way for the latter.¹⁰²⁸ States have both a negative obligation and a positive obligation towards civil and political rights as per Article 2 of the ICCPR. The negative obligation entails the duty to not arbitrarily interfere and restrict the rights provided for by the ICCPR. As for the positive obligations, the states parties are legally bound to guarantee that both procedural and substantive protection is given to persons within their jurisdiction. Such a protection is conferred not only against the state or its agents but also against the acts of private persons.¹⁰²⁹ States therefore have the legal obligation to take legislative and other means as deemed appropriate to ensure that civil and political rights are being respected, protected and fulfilled.

The right to water, food and culture are human rights that are conferred legal protection under the ICESCR to which Ethiopia and Madagascar are states parties. It has been found that obligations under the ICESCR are assessed either from the perspective of obligations of conduct and result or that of obligations to respect, protect and fulfil similarly to civil and political rights under the ICCPR.¹⁰³⁰ According to Article 2(1) of the ICESCR, states have the duty to undertake concrete, targeted and deliberate steps to ensure that socio-economic rights are progressively realised in a reasonable manner depending on the availability of resources. While states do benefit from the principle of margin of appreciation while deciding on their ways and methods of development, such a choice must mandatorily uphold socio-economic rights of peoples.

¹⁰²⁸ See 5.5.1 in Chapter 5.

¹⁰²⁹ See 5.2.2 in Chapter 5.

¹⁰³⁰ See 5.2.3 in Chapter 5.

Ethiopia and Madagascar are states parties to the ACHPR which imposes legal obligations specifically in the context of development. The ACHPR has taken an approach towards the protection of human rights which is based on indivisibility and inter-dependence of rights. It is an international legal instrument that protects both civil and political and socio-economic rights. All socio-economic rights are justiciable under the ACHPR despite the fact that some socio-economic rights such as the right to food and right to housing are not explicitly mentioned.¹⁰³¹ It implies that the ACHPR can be a critical instrument in the protection of human rights of victims of land grabbing in Ethiopia and Madagascar.

Chapter 5 has also discussed the specific obligations of host states related to business and human rights through the lens of the Sub-Commission on the Promotion and Protection of Human Rights adopting the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights and in 2011 the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights. Ruggie's Principles of Business and Human Rights endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011 exclusively highlights the role of states as the sole duty-bearers to ensure business respect for human rights. Through a list of 7 principles, the duties and obligations that states have in ensuring that human rights involved in business activities are respected, protected and promoted have been clearly spelt out. The proposed treaty on business and human rights has also been considered and examined to see what improvements could be brought if it comes into force.¹⁰³²

It has also been discussed in Chapter 5 that home states of companies and corporations operating in foreign lands have an obligation 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 fraud and corruption. However, the main issue is that such an obligation seems to be rather weak as it comes from the Ruggie's Principles of Business and Human Rights which only provides for a voluntary and non-binding approach.¹⁰³³ The proposed treaty on business and human

¹⁰³¹ See 5.2.4 in Chapter 5.

¹⁰³² See 5.2.5 in Chapter 5.

¹⁰³³ See 5.3 in Chapter 5.

rights does not specifically provide for the role, duties and obligations of home states by demarcating them from those of the host states.¹⁰³⁴

The way international human rights framework protects the human rights to the selected capabilities has been thoroughly discussed in Chapter 5. Land as a capability and as a human right has been discussed in terms of 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.¹⁰³⁵ While both the ICCPR and the ICESCR are silent over the right to property, Travaux Préparatoires have been cited to prove that this is not to be construed as a denial of the right. Land as protected by the right to property does appear in the discrimination provisions of both Covenants and other instruments such as the CEDAW and ICRMW and their Families explicitly recognise property as a right. The ACHPR, in turn, provides for a direct and more explicit protection of land as a right to property under Article 14. The African Commission has also defined the right to property as including ‘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’.¹⁰³⁶ Therefore the substantive interpretation of land as a right to property based on international human rights instruments does provide for a legal means by way of which land as a capability in development discourse can be protected.

The right to water has been recognised as a self-standing human right as per UN General Assembly resolutions and General Comment No 15 by the CESCR as discussed in Chapter 5.¹⁰³⁷ Other conventions such as the CEDAW and the CRC impose on states an obligation to ensure access to water and sanitation. At the African level, the ARCWC and the Maputo Protocol have explicitly provided for the right to access to safe drinking water and sanitation. It has been found in Chapter 5 that there is little doubt on the fact that today international human rights normative framework

¹⁰³⁴ See 5.2.5 in Chapter 5

¹⁰³⁵ See 5.5.1 in Chapter 5.

¹⁰³⁶ See 5.5.1 in Chapter 5.

¹⁰³⁷ See 5.5.2 in Chapter 5.

confer direct and explicit protection to water as a basic human rights and by extension to water as a human capability.

The right to food has been recognised as a component of the right to an adequate standard of living by legal instruments including the UDHR and the ICESCR. General Comment No 12 of the CESCR has highlighted the specific obligation of states to focus upon namely availability, accessibility and adequacy of food. A Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food has been adopted by the FAO in an attempt to practically guide states in their implementation of the right to food in the Context of National Food Security.¹⁰³⁸ The legal framework on the right to food is as extensive as being inclusive of the obligation on states to eliminate malnutrition and to ensure that every human being is entitled to the correct amount of nutritional values in daily meals.

Chapter 5 also discussed the right to political participation based on which all human beings have the right to actively, effectively and meaningfully participate in the decision-making process especially if those decisions have a direct impact on their lives and environments.¹⁰³⁹ It has been found that the right to political participation is an internal dimension of the right to self-determination conferring the possibility to people to freely pursue their economic, social and cultural development without impediment from outside. It also includes the right to free, prior and informed consent of the people in relation to major decisions that are taken in the context of developmental activities. The importance of these essential components of the right to political participation has been reiterated by the CESCR in its General Comment No 21. The African Commission has adopted a similar approach by issuing a resolution urging states to guarantee the participation of local communities when taking decisions on the governance of natural resources.¹⁰⁴⁰

The right to culture provides for the possibility of local communities and all individuals to promote, conserve and develop their culture as guaranteed by the ICESCR. Access to sites and places of high

¹⁰³⁸ See 5.5.3 in Chapter 5.

¹⁰³⁹ See 5.5.4 in Chapter 5.

¹⁰⁴⁰ African Commission on Human and Peoples' Rights, 224: Resolution on a Human Rights-Based Approach to Natural Resources Governance (May 2012).

cultural and traditional values to people must be preserved and any kind of illegal, illegitimate and unjustified limitation is against international human rights law as guaranteed by the UDHR and the ICESCR.¹⁰⁴¹ The ACPHR, through its Article 22, even extends this right to the cultural development to people and the possibility to enjoy the common heritage of mankind. The Mexico Declaration, as discussed in Chapter 5, provides that cultural identity is a way of liberation for people and any domination would constitute an impairment or denial of that identity.

Findings

Ethiopia and Madagascar are under the legal obligations to promote, protect and respect the human rights involved in land grabbing in view of protecting the human capabilities involved and to be able to balance economic interests of the countries with human rights considerations in the way that Sen's model of development advocates. It has been found in Chapter 5 that the international human right normative framework is strong and robust enough to act as a rampart for the protection of human rights of victims of land grabbing. The nature of the obligations under the ICCPR, the ICESCR, the ACHPR and other human rights instruments do provide for the basis of such protection as synthesised above. Countries directly or indirectly involved in land grabbing such as the host states or the home states also have specific obligations under the UN Guiding Principles and other frameworks of business and human rights.

In addition, the human capabilities involved in this thesis have been shown to be adequately protected by specific human rights to those capabilities. The right to land as property, the right to water, the right to food, the right to political participation and the right to culture are all protected by various human rights instruments including the ICCPR, the ICESCR and the African Charter. They have also been the subject matter of various General Comments, declarations and resolutions from treaty-based and charter-based bodies on human rights, emphasising on their importance and providing for more details and precision on their content and nature.

On major gap identified in Chapter 5 has been the lack of genuine compliance by states parties and more specifically Ethiopia and Madagascar in this thesis. Chapter 5 has cited the UN HRC and the CESCR highlighting the drawbacks pertaining to the obligations of Ethiopia to implement the

¹⁰⁴¹ See 5.5.5 in Chapter 5.

provisions of the ICCPR and the ICESCR. However it have not been cited before national courts and no translation has been carried out of the ICCPR into local languages. As for Madagascar, the HRC highlighted a lack of mechanisms at the local level for its recommendations to be implemented. The African Commission has also highlighted the impact of agri-business on human rights and the lack of reporting duties of the Ethiopia on these issues.

It is therefore clear that there is a major issue of implementation and reporting compliance by Ethiopia and Madagascar which makes it challenging for the rights provided by international human rights instruments to be respected, protected, promoted and fulfilled. It has also been found in Chapter 5 that the HRC and the CDESCR have both highlighted the lack of compliance and implementation of provisions related specifically to the right to land as property, the right to water, the right to food, the right to political participation and the right to culture.¹⁰⁴²

The main interrogation in Chapter 5 has been whether the composite elements in the international human rights framework ensure Sen's model of development in Ethiopia and Madagascar. In other words, is the present system of international human rights with its laws and enforcement mechanisms effective enough to strike the much required balance between economic interests and human rights considerations? It has been found that in terms of the substantive contents of the various rights involved in land grabbing, international human rights framework does effectively cater for all of them.

Where human rights instruments do not explicitly provide for one right or there is ambiguity while interpreting those rights, treaty-based bodies and quasi-judicial bodies such as the HRC, the CDESCR and the African Commission have all come to precise the contents, meaning and interpretation of the rights. It is therefore safe to say that today, at least theoretically, the existing international normative framework on human rights does confer effective, adequate and essential protection to all the human capabilities selected in this thesis in the form of the specific human right to the capabilities. It implies that by itself the international human rights framework can prevent violations of human rights involved in large-scale land investments in Ethiopia and Madagascar and that the

¹⁰⁴² See discussions in 5.5.1, 5.5.2, 5.5.3, 5.5.4 & 5.5.5 in Chapter 5.

selected capabilities involved can be respected, protected, promoted and fulfilled through the existing human right to each capability.

However, it has also been found that there are considerable barriers for the above to be a reality and to confer effective protection to victims of land grabbing. Firstly, the degree of compliance on behalf of Ethiopia and Madagascar has been quite questionable. Even if the exercise of reporting to the treaty-based bodies through the state reporting mechanism is carried out, albeit with significant delay in some cases, the treaty bodies themselves have highlighted the precision, accuracy and effectiveness of the reports that are submitted. As discussed in Chapter 5, none of the reports submitted by the two countries have effectively dealt with or even mentioned the issue of land grabbing and provided for justifications or remedial actions to deal with it.¹⁰⁴³

Secondly, while the treaty bodies have no doubt done an immense job in the promotion and protection of human rights, it has been found that they do lack genuine enforcement powers to deal with violations of human rights involved in land grabbing. The Concluding Observations issued by the bodies are non-binding in nature despite the fact that they do have considerable political force. It has been discussed in Chapter 5 that they are more of a monitoring mechanism than an enforcement mechanism. Treaty-bodies normally receive state reports which are prepared by states in the least self-incriminating way possible based on which concluding observations are issued. It has been found that the procedures used by treaty-bodies seem to be more voluntary than legally binding. In addition, non-observance and non-compliance of findings of the quasi-judicial bodies are not met with legal sanctions and barely any political ones also.¹⁰⁴⁴ It is therefore evident that the treaty-bodies do lack critical enforcement powers and that states tend to maximise on this weakness by remaining non-compliant with many of the essential provisions of the treaties.

Thirdly, the specific human rights that protect the selected capabilities that are the right to land as property, the right to food, the right to water, the right to culture and the right to political participation can all be limited. The limitations can be based on economic and national interest or necessity. In addition, if the parliaments of Ethiopia and Madagascar would impose laws that boost

¹⁰⁴³ See 5.6.1 in Chapter 5.

¹⁰⁴⁴ See 5.6.2 in Chapter 5.

FDI or the economy, even if they are limiting human rights, there will be no possibility of challenging as based on legal literature on limitations of rights, if they are legal and legitimate then they would be allowable limitations.¹⁰⁴⁵

It is also critical to point out that no case has been brought to courts in Ethiopia and Madagascar to adjudicate on matters of limitations of rights by large-scale land investment projects. It implies that laws and policies in favour of land grabbing but against human rights are not being judicially challenged. Therefore, even if there exists human rights protecting the selected human capabilities, their proper interpretation and implementation are lacking and they are not able to effectively protect victims of land grabbing in Ethiopia and Madagascar.

8.2.4 Domestic normative framework in Ethiopia and Madagascar and their contribution in achieving Sen's model of development

Chapter 6 analyses the domestic legal framework in Ethiopia and Madagascar by looking at the national laws and policies and the extent to which they confer effective protection to the human rights to the selected capabilities. It also elaborates on the role of the judiciary and the national human rights institutions of the countries to assess the degree of enforcement of the human rights that are affected by land grabbing. The role of the WB is also analysed to assess its impact and influence of land grabbing in the two countries.

Summary of analysis

Land rights in the countries have been analysed in Chapter 6 in terms of constitutional and legislative provisions. In Ethiopia, land ownership is vested exclusively on the State as per the Constitution. Regional governments, in turn, have the responsibility of land tenure and related certification. Chapter 6 explained in detail the three types of land tenure that exist in Ethiopia namely administrative-based, re-emerging market-based and customary-based non-market arrangements.¹⁰⁴⁶ It implies that land tenure is regulated by the Civil Code and legislative provisions as well as customary laws.

¹⁰⁴⁵ See 5.6.3 in Chapter 5.

¹⁰⁴⁶ See 6.2.1.2 in Chapter 6.

The 2005 land reform in Madagascar theoretically brought an end to state hegemony of land management and the presumption of state ownership.¹⁰⁴⁷ It has been found that the majority of victims of land grabbing in Madagascar are people without title for lands that they have been occupying for a long period of time. Law 2008-014 has been introduced to repeal the presumption of state ownership on occupied but untitled private lands. Through the Law 2006-031, local authorities and municipalities have been entrusted the task of guaranteeing property rights to local communities.

Chapter 6 also reviews the normative framework on the right to capabilities such as water, food, culture and political participation in Ethiopia and Madagascar. The right to adequate food is implicitly provided by the Ethiopian Constitution and there are state policies, programmes and action plan focusing on the elimination of poverty and malnutrition. The Malagasy Constitution indirectly provides for the right to adequate food through its Directives Principles of State Policies and policy framework with the support of the World Food Programme.¹⁰⁴⁸ Similar to Ethiopia, Madagascar also only recognises the right to adequate food in a very implicit way in its constitution. It has policies such as the Rural Development Policy Brief and the Rural Development National Programme of 2001 and institutions such as the National Nutrition Council which are responsible for guaranteeing the right to adequate food.¹⁰⁴⁹

The right to water in Ethiopia is provided by the chapter on the National Policy Principles and Objectives.¹⁰⁵⁰ The Malagasy Constitution does not explicitly recognise the right to water but same can be inferred from the provisions dealing with integrity and human dignity. Law no 98-029, also known as the Water Code, and the Drinking Water Access Code provide that water resources belong to the state and the local communities are their guardians.¹⁰⁵¹

¹⁰⁴⁷ See 6.2.3.1 in Chapter 6.

¹⁰⁴⁸ See 6.2.2.3 in Chapter 6.

¹⁰⁴⁹ See 6.2.3.4 in Chapter 6.

¹⁰⁵⁰ See 6.2.1.5 in Chapter 6.

¹⁰⁵¹ See 6.2.3.5 in Chapter 6.

It has been found in Chapter 6 that political participation in developmental projects and affairs is explicitly provided by the Constitution in terms of democratic participation of citizens in the formulation of national development policies and programmes. Regional Laws also clearly provides for the need of public participation.¹⁰⁵²

Chapter 6 discusses the right to culture in Ethiopia and Madagascar. The Ethiopian Constitution provides to all citizens the possibility to access development and promotes their culture. A Cultural Policy has also been formulated which provides for the usage of culture for economic development so as to speed up the growth and transformation of the nation.¹⁰⁵³ In Madagascar, the right to culture is more explicitly provided for by the Constitution in terms of all individuals having the right to participate in the cultural life of the community, in scientific progress and in the well-being resulting from them. Law No 2005-006 entitled National Cultural Policy for Socio-Economic Development identifies culture as a fundamental right of peoples and guarantees cultural identify to all.¹⁰⁵⁴

Findings

It has been found that land laws and land tenure systems in Ethiopia and Madagascar all have certain strengths and flaws very specific to their own legal system. The mixed and complex system in Ethiopia has given rise to a number of issues. Firstly, land certification and tenure security are applied differently in different regions without any harmonisation and standardisation. Secondly, some government officers implement land laws in a way that strengthen political support in the countryside. It means that land is used as a political tool which does not allow for a fair and just procedure of distribution and certification. Thirdly, the State seems to be too powerful to oppose in cases of wrongly decisions on land issues and administration.

In Madagascar, it has been found that there is a feeling of insecurity regarding land tenure despite a relatively advanced system of land rights. The management of the land conversion system, land

¹⁰⁵² See 6.2.1.6 in Chapter 6.

¹⁰⁵³ See 6.2.1.7 in Chapter 6.

¹⁰⁵⁴ See 6.2.3.7 in Chapter 6.

register, titles registered on parents' names that have passed away and corruption and clientelism are the main reasons highlighted in Chapter 6. People with political protection are conferred more tenure security despite not having proper titles. A serious lack of information and legal land institutions has also been highlighted as factors that weaken the land tenure system.¹⁰⁵⁵

The right to food, water, culture and political participation as human rights protecting the corresponding capabilities in Ethiopia and Madagascar are provided implicitly and explicitly to various degrees in the two countries. It has been found that there is a normative framework in the form of constitutional provisions or policy framework protecting those rights. However, it has to be highlighted that their implementation and enforcement have been seriously lacking. Despite all the violations taking place due to land grabbing as Chapter 3 discusses, no case has been brought either before any judicial or administrative body in the two countries.

In addition, there is no direct and explicit recognition of these rights and most of the time, a progressive judicial interpretation would be required for such an inference. With the two countries having judiciaries which do not practice judicial activism and which are not completely free from interference from the executive, the possibility of these rights being implemented and enforced seem rather scant. The domestic legal framework on the human rights to the selected capabilities is not robust enough to prevent further infringements caused by land grabbing.

The role of the courts in Ethiopia and Madagascar is also extensively discussed in Chapter 6. It has been argued that the courts of the countries have a pivotal role to play in order to protect and promote the rights of victims being violated by land grabbing. It has been found though that the judiciaries of the two countries may not be genuinely empowered or willing to do so. In Ethiopia, the Constitution does not mandate the Supreme Court to adjudicate on constitutional matters which are dealt with by the House of Federation which is not a judicial organ. There is also a lack of formal and clear recognition of judicial enforcement of human rights violated by land grabbing. In addition, the human rights to capabilities land as property, water, food, culture and political participation are all untested as there is doubt and uncertainty as to whether courts are even mandated to take up these matters especially if the cases have a constitutional element. Victims of

¹⁰⁵⁵ See 6.2.3.3 in Chapter 6.

land grabbing have preferred to have recourse to traditional mechanisms such as social courts or elders' advice which are not free from political pressures, corruption and abuses of power.¹⁰⁵⁶

As for Madagascar, it has been found in Chapter 6 that, despite the mandate of the Supreme Court and the Constitutional High Court to look into human rights violations, the major challenge is their subordination to the executive and a serious lack of independence. Separation of powers is non-existent in Madagascar. Corruption in the judiciary is also rampant which acts as a barrier for victims of land grabbing to approach the judiciary. The Malagasy judiciary also suffers from lack of training of the legal practitioners and judges especially with the application and interpretation of international human rights laws. With such a background, it has been challenging for the judiciary to defend the human rights of victims of land grabbing. Also, the victims themselves do not have faith and confidence in the judiciary and do not find approaching them as a credible and reliable option.

Chapter 6 also discusses the role that national human rights institutions have in the two countries concerning the issue of land grabbing. The Ethiopian Human Rights Commission has the mandate to ensure that human rights provided by the Ethiopian Constitution are protected, promoted and respected by all the organs of the government through the Proclamation No 210/2000. However, it has been found that it has been very reluctant and unwilling to take position on situations of human rights violations especially if they are of a political nature. Evidences have shown that they have also failed in their duty of advising the government on laws and policies on land investments that have a negative impact on human rights.

In addition, it has not been able to ensure a culture of transparency, accountability, effective participation and access to remedies in cases of land grabbing. The Commission has refused to investigate the case of land investment in Gambella on the alleged environmental impact that a large-scale tea farming project would have on lands given away to investors.¹⁰⁵⁷ The State of Madagascar established its National Independent Human Rights Commission in 2014 and its funding has been pointed out as a major hurdle for it to actively carry out its functions as a guardian

¹⁰⁵⁶ See 6.3 in Chapter 6.

¹⁰⁵⁷ See 6.4 in Chapter 6.

of human rights.¹⁰⁵⁸ It is therefore clear that the national human rights institutions of the two countries are not independent, free and robust enough to take a leading role in dealing with land grabbing.

Chapter 6 also discusses the role of the WB in land grabbing in Ethiopia and Madagascar. It has been found that the policies of the WB and the way it has fuelled land grabbing by providing for technical assistance to countries to encourage large-scale land investments have had a negative impact and a damaging effect on small-scale planters and pastoralists hailing from rural local communities. Organs of the WB such as the IFC and the FIAS advised and participated in the re-drafting of land laws, promotion of land investments and targeting and fructifying of ‘idle’ lands in Ethiopia and Madagascar without taking into account the impacts and effects these investments have on local communities.¹⁰⁵⁹

8.3 CONCEPTUAL AND LEGAL RECOMMENDATIONS

Based on the summary of analysis proposed above which have the aim of synthesising the main arguments of the thesis, the following section will now provide for recommendations on how a balance can be achieved between human rights considerations and national economic interests. The recommendations have been categorised into conceptual ones, recommendations applicable at the international level and those relevant at the domestic level in Ethiopia and Madagascar.

8.3.1 Conceptual recommendation

At the outset, it is recommended that Sen’s CA be crystallised and incorporated into development discourses, policies and projects in Ethiopia and Madagascar. Sen’s CA has been endorsed by the United Nations which today bases the Human Development Index on parameters propounded by Sen. From an academic and research point of view, the CA has been utilised directly and indirectly in concrete ways resulting in revolutionary findings. However, at the policy-making level and in relation to human rights principles and discourses, the CA has been under-utilised and not given enough importance. Taking into account the unique specificities of the CA as discussed in Chapter

¹⁰⁵⁸ See 6.4 in Chapter 6.

¹⁰⁵⁹ See 6.5 in Chapter 6.

2, with particular reference to the fact that it is really an approach that can be applied in various types of countries, societies and communities in a genuinely flexible and customised manner, it is recommended that the CA be materialised in a concrete and effective manner.

It is recommended that terminologies such as capabilities, functioning, freedom, the liberty of choice, desire and value which all form part of the CA be incorporated into legal and policy documents applicable both domestically and internationally. The ability for an individual or a group of people living in a community to choose which type of development project they value the most and which will mean freedom to them needs to be operative provisions of laws and policies nationally and supra-nationally. So far, such a concept is arguably available through principles such as the right to self-determination, informed, prior and free consent of communities to developmental projects or the right to political participation as discussed in previous chapters of the thesis. However, they are all subject to limitations and judicial interpretation which often are against the interest of victims of land grabbing. Incorporation of the CA and its terminologies will entrench the need to render people capable through development and thus acquire the much needed balance between respect for human rights and capabilities and national economic interests.

It is therefore recommended that Sen's CA to development be the operative and defining provisions of directives, laws and policies on development. In this way, an all-inclusive approach to development and one which is not limited only to economic but extended to social, cultural and political development will be directly enforceable by courts and justiciable in favour of victims of land grabbing. In addition, there is a need for policy-makers, judges, legal practitioners and decision-makers regarding development to be offered education and training on Sen's CA to development. They all need to be formed and given acquaintance to abstract and yet critical concepts such as freedom, desire, value and capabilities.

8.3.2 Recommendations applicable at the international level

8.3.1.1 Re-visiting the status of the UN Declaration on the RTD

The RTD has been extensively discussed in Chapter 4 and it has been found that it does provide for a proper legal basis on which the CA approach to development can be rooted. Its external and internal dimension implying that states have both a domestic and an international obligation through

cooperation to promote the RTD are appealing factors. However, the major issue is the legal force of the UN Declaration on the RTD which is considered as a soft-law with more political than legal weight. It is therefore recommended that the Declaration should be elevated to the status of a convention which will be binding on states parties.

From a substantive viewpoint, the Declaration does advocate for an all-inclusive mode of development in a people-centered manner. However, being still a declaration, its provisions tend to be more philosophical in nature. It is recommended that constituent elements of CA be incorporated in the proposed convention and that further provisions be added to directly impose legal obligations on states to conduct developmental projects relating to land and others based on the CA. In addition, the proposed convention should speak directly to all stakeholders involved in development projects such as host states, home states and private entities as investors.

The Declaration is considered as a guiding document which all states are encouraged to follow and abide by. However, its non-binding provisions do not allow for a legally-binding solution to essential questions such as is the RTD a legally enforceable right, what are the duties of states relating to the RTD and what would the full realisation of the RTD entail. Thus, having a legally binding convention on the RTD will clarify the status of the RTD and more importantly the entitling obligations on states, both domestically and as members of the international community.

The advantage with turning the Declaration into a convention with probative force is that it will also allow for monitoring mechanism in the form of a Committee on the Right to Development. In line with other conventions under the aegis of the UN, this will allow for procedures such as state reporting and issuance of concluding observations and general comments on the RTD specifically. It is believed that such mechanisms will result in more specific and detailed monitoring of large-scale land investments, inter alia, which will be more effective in prevention human rights violations and allowing for a more balanced mode of development. There is no doubt that there will be enormous political pressure opposing such a legal transformation especially perhaps from developed nations and international development agencies. However, if there is robust political commitment among developing and under-developed countries, then there is a real possibility for a successful debate initiating the process at the UN General Assembly.

8.3.1.2 Strengthening the normative framework on business and human rights

Chapter 5 has discussed the existing normative framework on business and human rights as proposed and endorsed by the UN. It is highlighted that this framework is of significant importance since it directly deals with the subject matter of impacts of business on human rights. However, the non-binding nature of the Ruggie's Principles for instance makes the application and implementation of the principles thereof challenging. They are heavily dependent on political will of states and non-state actors for them to be applied, respected and followed.

It is therefore recommended that the UN must urgently look into the possibility of turning the non-binding framework into a legally binding one for states and non-state actors in the form of a convention. This task is currently being undertaken by the UN Human Rights Council with the drafting and negotiation of the proposed treaty on business and human rights. This will enhance the application and implementation of the principles through mechanisms such as state reporting, concluding observations, individual complaints and general comments. It is also recommended that the views of the African Commission, sent as an Advisory Note as discussed in Chapter 5, be taken on board genuinely and effectively by the UN during the drafting process.

It is also allow for the creation a corpus of jurisprudence to be developed specifically regarding the issue of development and human rights through the communications procedures to the established monitoring committee of the treaty. A proper binding system of norms headed by a convention with probative force will be particularly effective. However, as discussed in Chapter 5, there is a need for the provisions of the proposed treaty to be couched in the terms and overarching philosophy of the CA. The interest of people must be the focal point of the proposed treaty from which duties, obligations and responsibilities of home states and host states must follow. Both the preamble and the operative articles of the proposed treaty must enshrine the philosophy of the CA to development.

8.3.1.3 Advocating for a legal framework on land investments in Africa

It has been observed in the thesis that the African system on human rights does provide for a very strong basis on large-scale land investments related development especially with the RTD as an enforceable and justiciable human right in the ACHPR. The African Commission also has a

jurisprudence which has shown to interpret the RTD in line with the CA. However, while such a framework imposes obligations on states parties to the ACHPR, they lack the legal force to impose obligations on non-African states and non-state actors. In addition, the ACHPR does not directly regulate human rights infringements through land investments and one has to rely on a progressive and purposive interpretation of other human rights provisions.

It is thus recommended that a legally binding Charter on Land Investments in Africa be created at the level of the African Union and closely monitored by the African Commission. It must be premised on Sen's CA to development and impose specific obligations to home states, host states and non-state actors. The Charter must also provide for a more stringent approach to reporting system and monitoring mechanisms. For instance, the level of compliance with the Charter may become a determining factor based on which foreign aid or other support from institutions such as the African Union and other regional bodies would be allocated to African states including Ethiopia and Madagascar. Monitoring and compliance to the proposed Charter should be less voluntary and more binding.

The African Commission must be given the power to supervise large-scale land investments related instruments of the two countries together with other African countries. There is the argument of such mechanism diluting state sovereignty and non-interference in the domestic affairs of African states. However, the counter argument is that the voluntary mode of compliance such as state reporting is proving to be inefficient on its own to prevent human rights violations through land grabbing in Ethiopia and Madagascar. It is therefore recommended that the proposed Charter on Land Investments in Africa be adopted to balance national economic interests with human rights considerations for developmental projects.

8.3.1.4 A more resolute approach to land grabbing by treaty-based bodies

Treaty bodies such as the HRC and the CESCR have an essential role to play in protecting human rights that are prone to be violated by large-scale land investments. It is recommended that such bodies must adopt a more resolute approach in dealing with land grabbing. It has been found in Chapter 5 that state reports being submitted to such bodies are too brief, inaccurate and evasive in terms of real information being provided on the issue of land grabbing. Another mechanism which

is the communication system is not effectively used by complainants and victims of land grabbing. In addition, no special rapporteur has been sent to Ethiopia and Madagascar to investigate specifically on land grabbing.

It is therefore recommended that UN treaty bodies urgently adopt a more results-oriented approach which rises above political considerations and work towards the best interest of victims of land grabbing. Informative campaigns at both the international and domestic level must be carried out to educate victims, citizens and civil society about the existence of the various mechanisms available and on how to make an effective use of them. The issue of land grabbing must also prominently feature as a subject matter in the concluding observations issued by treaty bodies following state reports. If the state reports do not provide for enough information, treaty bodies must invite and encourage other stakeholders such as civil society and NGOs, both domestic and international, to submit shadow reports on land grabbing in Ethiopia and Madagascar.

While treaty-based bodies at the UN level can provide for remedial solution to the issue of land grabbing, it is recommended that a higher responsibility to do so must be endorsed by judicial and quasi-judicial institutions at the African Union level. Here, particular focus is on the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. It is recommended that special effort be made to politically lobby and encourage Ethiopia and Madagascar to submit to the jurisdiction of these institutions. Firstly, it is imperative for the countries to respect the mechanism of state reporting and to follow proper guidelines set by the African Commission while submitting reports. Proper submissions by the two countries will allow the African Commission to issue relevant and effective concluding observations tackling the issue of land grabbing which can then be implemented at the domestic level. In addition, individuals and civil society organisations in Ethiopia and Madagascar must be encouraged to submit complaints to the African Commission so that for recommendations to be issued meant to be followed by the states. Ethiopia and Madagascar should also be called upon to ratify the protocol establishing the African Court so that the latter can hear and adjudicate matters pertaining to land grabbing for the benefit of victims.

8.3.3 Recommendations applicable at the domestic level

8.3.3.1 A more effective administration of land rights and land tenure system

It has been found in Chapter 6 that Ethiopia and Madagascar have land rights and land tenure systems that have both commonalities and differences. Each country has taken into specific context to come up with land reforms and relevant legislations. The need for further reforms and more importantly giving private land ownership and to do away from state ownership of land have been recommended by different domestic and international stakeholders. However, Chapter 6 has also shown that the issue is not necessarily with the land tenure systems of the two countries. It is more with the administration of the land by central and local authorities. Lack of information, delays in recognising land titles and sometimes use of violence to force people from ceding their lands are the issues that require more attention.

It is therefore recommended that administration of land with regard to local communities and a better system of adjudication in cases of disputes must be reviewed. While private ownership of land by people may have its own economic advantages, this thesis focuses more on how actual land rights of local communities can be protected to avoid human rights violations and enhances the capabilities of local communities who are victims of land grabbing. Thus, a clear system of land rights attribution to local communities, a public register of all lands in the two countries and who has ownership of what and a democratic way of transferring rights to other parties including investors is recommended. It is equally important that such recommendations be accompanied by a modern and free adjudication system free from political interference whenever land rights and titles related disputes would arise.

8.3.3.2 Re-visiting the legal framework on human rights at the domestic level

It is recommended that the human rights to food, water, culture and political participation which are also essential human capabilities must be reviewed especially with regard to their substance. It has been seen in Chapter 6 that while these rights are present in the legal framework, they either lack much substance or they tend to be in the form of policies that are not legally binding. As a result, their adjudication before courts of law becomes extremely challenging to the extent that their very existence is put in jeopardy.

It is therefore essential that the rights mentioned above be given the status of constitutional guarantees by the state and that their meaning, definition and scope be aligned with international human rights norms and standards as provided by the UN and AU systems. It is certainly not enough for the right to culture for instance be only narrowly interpreted and constricted regarding its scope and only be provided by non-enforceable and non-justiciable policies. It is also recommended that specific legal instruments for investments in the two countries must acknowledge the complete existences, respect and protection of these essential human rights and capabilities.

8.3.3.3 The need for judicial activism from the courts

The courts have a crucial role to play in the promotion and protection of human rights and human capabilities involved in land grabbing. It has been found in Chapter 6 that no cases have been brought to courts in Ethiopia and Madagascar for violations of human rights by land grabbing. It is believed that even if cases in that sense are brought before the courts, the outcome may not be desirable due to the high level of political interference and lack of independence in the functioning of the judiciaries in the two countries.

It is thus recommended that courts show more judicial activism to deal with such cases. They should be able to apply theories such as implied rights theory in cases where any specific human right is not clearly provided but can be read into from other existing human rights. In addition, while interpreting rights provided by constitutions or acts of parliament, a constructive and purposive approach is recommended in line with Sen's CA to development. Inspiration must also be drawn from other jurisdictions or from international judicial and quasi-judicial bodies that have provided for a progressive jurisprudence on the RTD and other associated human rights and capabilities. Judges and legal practitioners must also be trained and educated specifically on Sen's CA to development to allow them to interpret laws regarding human rights and development with a broader knowledge and understanding of development as freedom.

It is also recommended that courts adopt a more receptive approach to such cases especially when they involved indigent people who are victims of land grabbing. They should not be barred by considerations such as *locus standi* or time barred actions or exhaustion of local remedies when and

where some degree of flexibility may be allowed by the courts. Finally, matters related to development and human rights must be exclusively heard by proper courts of law and not by local non-legal adjudication bodies such as village courts or such similar social institutions.

8.3.3.4 Pro-activeness from national human rights institutions

It is recommended that national human rights institutions adopt a more pro-active role in preventing land grabbing and the associated violations of human rights and human capabilities. Chapter 6 has shown the lack of action from these institutions in the two countries. No concrete investigations have been carried out and there is a serious lack of documentation and reporting on the issue of land grabbing. It is mandatory that national human rights institutions closely follow and monitor such cases across the two countries. It is recommended that they actively participate and advise governments on matters of economic development and human rights in a free, unbiased and democratic manner.

They should be able to educate local communities about the rights and capabilities that they possess and how to ensure that they are respected, promoted and protected. It is also recommended that they take a leading role in the preparation of states reports to be submitted to treaty bodies at the African and UN level. It should be their responsibilities to ensure that information provided are factual, clear and transparent so that human rights bodies can provide for more accurate and reliable recommendations to governments. For the above to be possible, it is also recommended that the composition of national human rights institutions and elections of its members should be completely free and apolitical to ensure that they enjoy the required degree of freedom and independence to carry out their tasks.

8.3.3.5 An active role from civil society organisations

It is further recommended that civil society be allowed to take a defining role in combatting land grabbing and allowed for a more balanced approach between economic development and human rights considerations in Ethiopia and Madagascar. They should be allowed the freedom to take up such matters and escalate them to the relevant authorities. Their involvement in allocation of land to investors must also be well-defined as they have the potential to act as watchdogs in instances where essential parameters such as free, informed and prior consent of local communities have to

be received or when the impacts and consequences of investment projects are ambiguous or unclear to local communities.

It is therefore recommended that the legal framework governing civil society organisations in the two countries be reviewed, allowing them greater independence and financial support. Inter-governmental bodies such as the UN and the AU must also work in closer collaboration with such organisations by giving them more visibility and greater access through observer status and effective partnership.

8.3.3.6 Genuine political will from governments

It is recommended that governments display a more genuine political will when dealing with essential questions of economic development and human rights considerations. The above recommendations would not be effective if governments of Ethiopia and Madagascar do not willingly display the right political will to halt human rights violations caused by land grabbing. Governments must have tight control over the activities of investors and how they are impacting on the lives of communities. Governments must also give priority to the respect for rights and capabilities of their own people when dealing with economic investments and related projects. It is their duty to ensure that policies that they develop through their ministries and development agencies on investment matters are in line with Sen's CA.

It is therefore recommended that governments and their agents be apprised, educated and trained on the concept of development that is all-inclusive and that allow local communities and people to choose the mode of development that they value the most. They have the moral obligation to respect the trust and confidence that people have put in them and voted them to position of powers. While acknowledging that it is equally their duty to ensure that the countries move forward on the path of economic development, it is also their responsibility to ensure that no person is left behind or become subjects of exploitation and victims of violations. Such a situation is achievable only if governments show a genuine political will.

8.3.3.7 The need for respect towards domestic affairs from the World Bank

It has been found in Chapter 6 that the World Bank has imposed, albeit with a degree of acceptance and complicity of the host countries, a mode of development on Ethiopia and Madagascar which is not in line with Sen's CA to development. Inadequate considerations have been given to human rights, liberty of people and freedom to choose their mode of development by the World Bank. It is thus recommended that the global institution should pay more respect to the specificities of each country and only recommend for structural and financial changes that will breed an all-inclusive mode of development.

It is further recommended that governments of host countries be able to stand firm on their positions especially when a specific mode of development or a step or process recommended by the WB towards recommendations is not aligned with their own duties and responsibilities as governments. The WB should take full responsibilities of their actions and influence on countries through its policies and programmes.

8.4 Conclusion

The thesis has investigated the extent to which economic investments in Ethiopia and Madagascar can be carried out in a balanced way by taking into account rights and capabilities of local communities. A factual account in a comparative manner between the two countries has clearly shown that large-scale land investments have given way to land grabbing as a result of which human rights of local communities have been constantly violated. It has been argued that such a mode of development is not aligned with Sen's mode of development which advocates for development that renders people capable and allows them to achieve what they value. This has been the theoretical framework of the thesis based on which land, water, food, culture and political participation were chosen as the human capabilities involved and affected by land grabbing.

The existing international human rights framework has been analysed to assess the extent to which it has the potential of promoting Sen's mode of development in Ethiopia and Madagascar. The RTD as a stand-alone human right and the right to food, water, culture, land and political participation have been all assessed. While the normative system on these rights has the potential to uphold and

protect these rights, it has been found that they do have their own inherent limitations in achieving development as freedom. This has led to recommendations such as the need to consolidate the legal status of the RTD and the importance of human rights treaty bodies to take a more pro-active role in relation to cases of land grabbing.

The domestic legal frameworks of Ethiopia and Madagascar have also been studied to highlight the challenges and gaps that they contain and that must be addressed in order to curtail the effects of land grabbing. The RTD and the corresponding human rights to the above human capabilities have been found to be present but not to the extent of allowing for Sen's mode of development. Therefore, the roles of the law, the judiciary, national human rights institutions and also the WB have been assessed to be able to recommend changes and amendments in line with Sen's CA to development.

While the necessity and the crucial importance of economic development for Ethiopia and Madagascar are not under-estimated, it has been argued in the thesis that there is a pressing need to balance economic interests of the countries with human rights and human capabilities related considerations. A new approach to the RTD, a more robust international and domestic system of monitoring and implementation of the human rights infringed by large-scale land investments and a genuine endorsement of Sen's CA to development by all stakeholders have been identified as the way forward.

African states including Ethiopia and Madagascar should look no further than adopting a culture of development as freedom, acknowledging, implementing and protecting human rights and human capabilities involved in land investments and designing their economic development policies in an all-inclusive and non-discriminatory manner. They need to be assisted in this essential task by institutions such as the UN, the AU and the World Bank over and above the genuine political will that they must themselves show to protect their own peoples and promote a culture of economic development that respects human rights and enhances capabilities.



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