

## Large Scale Land Acquisition and Human Rights at Crossroads: A Quest for Right Based Approach to the land administration in Ethiopia

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### Abstract

Large scale land investment, dubbed ‘land grabbing’, is a headache for local community and indigenous peoples in Africa, and so more in Ethiopia. This article explored human right impacts of large-scale land investment in Ethiopia and pinpointed a key forward. It confirmed that large scale land investment in the country undermined substantive rights of the local and indigenous peoples, including land right, right to food, right to development, right to culture, labor rights, environmental right, and right to self-determination as well as their procedural right to public participation, prior informed consent, access to information and justice recognized under international instruments and FDRE constitution. The study advocates for human right based approach to large scale land investment governance that respects and integrates the aforementioned substantive and procedural rights of local and indigenous peoples. This also involves government’s duty to put in place effective human right impact assessment, efficient monitoring, evaluation, and dispute resolution mechanism, and empowering local community and other stake holders to safeguard the rights of affected communities. That way, we can mobilize the large-scale land investment for sustainable development without compromising rights of local and indigenous peoples.

**Keywords:** Ethiopia, human rights, large scale land investment

### Introduction

Human rights are the fundamental rights and freedoms naturally given to all human beings by virtue of being human.<sup>1</sup> They are ‘universal legal guarantees protecting individuals and groups against evictions and omission that interfere with fundamental freedom, entitlement and human dignity’.<sup>2</sup> Different international human right instruments to which Ethiopia is a party provide various contents of the inalienable and inviolable human rights, and imposed duty to respect, protect and promote these rights on states.<sup>3</sup> These Human right standards as reflected in international human right treaties and principles guides all aspects of development programming and sets the realization of human right as the main objective of development policy and program.<sup>4</sup>

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<sup>1</sup> United Nations Human Rights Office of High Commissioner, “What are human rights?” <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed on 20 June 2019

<sup>2</sup> HRBA Portal <<https://hrbaportal.org/faq/what-is-a-human-rights-based-approach>> accessed 20 June 2019

<sup>3</sup> Ibid

<sup>4</sup> HRBA portal <<https://hrbaportal.org/faq/how-do-human-rights-guide-programme-formulation>> accessed on 20 June 2019

In light of this, a development program of a given state shall respect and be geared towards the realization of human right of individuals and local community.<sup>5</sup> Yet, the new wave of large scale land investment also dubbed ‘land grabbing’<sup>6</sup> in the media and critical literature is reported to cause adverse impacts on human right of local community in Ethiopia as it so does in Africa.

Large scale land investments are one of the key new trends that emerged out of the 2008 global food crisis.<sup>7</sup> The main target of these recent waves of ‘foreign investment in land are Sub-Saharan Africa countries such as Cameroon, Ethiopia, Democratic Republic of Congo, Madagascar, Mali, Somalia, Sudan, Tanzania and Zambia.’<sup>8</sup> Such aggressive large scale farm land acquisitions for commercial agricultural investment in Africa have attracted worldwide debate. The proponents see the large-scale land investments as ‘opportunities for development, given their potential for creating infrastructures and employment, increasing public revenues and improving farmers’ access to technologies and credit’.<sup>9</sup> The critics expressed concern about the negative impact of such developments on human right of local communities, land rights, indigenous communities and the environment.<sup>10</sup> Some also claim that the impacts of such ‘large-scale land investments have become more threatening in Africa due to lack of legal and institutional mechanisms to alleviate the spill over risks of such investments.’<sup>11</sup>

Ethiopia represents typical example for large scale land investment and its human right challenges, particularly in Africa. The government of Ethiopia has warmly welcomed such large-scale land investments<sup>12</sup> allocating huge hectares of land at very low lease price. It has been reported that by January 2011, the government had transferred 3,619,000 hectares of land to investors.<sup>13</sup> The land transferred to large scale land investors, without including land already allocated, has been planned to increase to 3.3 million hectares by 2015.<sup>14</sup> Therefore, it can be estimated that by 2016, at least 7 million hectares of agricultural land was transferred to investors. Total land transferred to investors account about 38% of land utilized by smallholders.<sup>15</sup> The main investors are foreign

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<sup>5</sup> This way of linking development program with human right is commonly termed as human right based approach.

<sup>6</sup> Land grabbing’ is defined as ‘a global enclosure movement in which large areas of arable land change hands through deals often negotiated between host Governments and foreign investors with little or no participation from local communities who depend on access to those lands for their livelihoods’. See Oliver De Schutter, ‘The Green Rush: The Global Race for Farmland and Rights of Land Users’ [2011] HILJ 503, 504.

<sup>7</sup> Special Rapporteur on Right to Food, Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge, UN Doc A/Hrc/13/33/Add.2,28 December 2009, 5, Para. 11

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Evadne Grant & Onita Das, ‘Land Grabbing, Sustainable Development and Human Rights’ [2015] TRANSNATIONAL ENVIRONMENTAL LAW, 289; Dessalegn Rahmato, ‘Land to investors: Large-Scale Land Transfers in Ethiopia, Forum for Social Studies’ [2011]; Schutter (n.6).

<sup>11</sup> Semahagn G. Abebe, ‘The Need to Alleviate the Human Rights Implications of Large-scale Land Acquisitions in Sub-Saharan Africa’[2012] GoJIL 873, 879

<sup>12</sup> Large-scale means 2000 hectares or more. See Rahmato(n.10)53

<sup>13</sup> The Oakland Institute, ‘Understanding Land Investment Deals in Africa: Country Report: Ethiopia, 2011, p.18

<sup>14</sup> Rahmato (n.10)22

<sup>15</sup> Ibid

investors, the largest foreign holding being Karuturi Company of India, which has been given 0.3 million hectares of land in Gambella and 11,000 in Bako district of Oromia <sup>16</sup>.

Ethiopia has been chosen for agricultural investment considering the availability of cheap labor and arable land, her strategic location and the Government's support to boost foreign investment in agriculture.<sup>17</sup> The Government of Ethiopia strategically promoted large scale agricultural investment and this is reflected through its strategies such as the 'Agricultural Development-Led Industrialization(ADLI)',<sup>18</sup> its perceived developmental state ideology<sup>19</sup>, investment legislation<sup>20</sup> as well as the five years Growth and Transformation Plan. Ethiopia's Growth and Transformation Plan II (GTP II: 2015-2020) clearly promotes commercial agricultural investment.<sup>21</sup> The government's initiative to support commercial farming in Ethiopia 'displays three primary objectives :(I) boost productivity, (ii) link smallholder farmers with new technologies and markets, and (iii) create of job opportunities for rural youth'.<sup>22</sup> Conversely there is widespread concern that such investments operate at the expenses of human rights of local community.<sup>23</sup>

This article explores the human right implication of large-scale land investment in Ethiopia and pinpoints the pressing need to adopt human right based approach to large sale land investment governance in the country as a way out. In furtherance of this, section 2 reviews and analyzes human right implication of relevant international instruments and soft laws applicable to large scale land investment. Section 3 exposes human right impact of large-scale land investment in Ethiopia. Section 4 stresses adoption of human right based approach to investment governance to achieve win-win outcome. Section 5 is the conclusion.

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<sup>16</sup> Ibid 12

<sup>17</sup> The Oakland Institute (n.13)14

<sup>18</sup> As its name indicates, ADLI is long-term strategy to achieve faster growth and economic development by employing technologies, fertilizers, improved seeds and cultural practices.

<sup>19</sup> Developmental State refers to state which makes its primary goal to enhance economic growth and even denies human rights as condition for rapid economic development, and Ethiopian government shifted to this ideology since 1995. See Befekadu W/ Gabriel, *EPRDF, Developmental State and Rent Seeking* <<http://www.meleszenawi.com/wpcontent/uploads/2013/03/EthiopiaEPRDF-Developmental-State-and-Rent-Seeking.pdf>>accessed on 20 June, 2019)

<sup>20</sup> See Investment proclamation No 769/2012; investment Incentive and investment areas reserved for domestic investor's regulation No 270/2012; Agricultural Investment Land Administration Agency Establishment Regulation No. 283/ 2013, which clearly supports and facilitate commercial agricultural investment.

<sup>21</sup> Dawit Alemu and Gezahegn Ayele, 'Future agriculture, Ethiopian agricultural investment policy'[2018] <<https://www.futureagricultures.org/blog/ethiopia-commercial-farming-investment-and-policy/>>accessed on 25 June 2019

<sup>22</sup> Ibid

<sup>23</sup> See inter *alia* Oakland Institute (n.12); Rahmato(n.14); Human Rights Watch 'Waiting here for Death: Forced Displacement and "Villagization" in Ethiopia's Gambella Region [2012] <<http://www.hrw.org/reports/2012/01/16/waiting-here-death>> accessed on June 27 2019. In this regard, a prominent opposition party leader, Bekele Garba, also known for his motto 'our land is our bone' bitterly opposed the ongoing large scale land grabbing in the county.

## **International Instruments and Principles that Support Right Based Approach to Large Scale Land Investment**

### **The International Bills of Human Right**

The 'International Bill of Rights' consists of Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social, and Cultural Rights (ICESC). This Bill of Rights contains a variety of civil and political rights as well as economic, social and cultural rights which can conveniently be grouped into procedural and substantive rights. The main substantive rights of the bill include: right to life, freedom from slavery, freedom from torture, right to privacy, freedom of thought, conscience and religion, freedom of assembly and association, right to property, right to health, right to self-determination, right to social security, right to work, right to rest and leisure, right to an adequate standard of living, right to education, right to participate in the cultural life and others.<sup>24</sup> The main procedural rights include right to access to information, right to public participation in decision-making, and right to access to justice and effective remedy for rights violations.<sup>25</sup>

The Bills require the states to respect, protect and fulfill the human rights of individuals and groups within their territory.<sup>26</sup> This includes the duty to protect against human rights abuse by third parties, including business enterprises. The principles and standards derived from these bills of rights along with all other specific treaty signed to reinforce the right contained in the bills, including the relevant ILO conventions and Declarations<sup>27</sup> guide all policies and programming in all sectors and, hence, can be used to discipline human right impacts of large-scale agricultural investment.<sup>28</sup> This is because the rights are considered inalienable and inviolable requiring universal respect.

### **Declaration on Right to Development**

Declaration on right to development<sup>29</sup> proclaims right to development. It defines right to development as 'inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'.<sup>30</sup> The

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<sup>24</sup> See list of civil and political rights and freedoms under Articles 3-21 of UDHR, and social and cultural rights listed under Articles 22 to 27 of UDHR. These rights are also listed and detailed under the corresponding provisions of ICCPR and ICESCR.

<sup>25</sup> See Art 19 of UDHR & Art 19 of ICCPR; Art 21 of UDHR & Art 25 ICCPR, and Art 8 of UDHR respectively.

<sup>26</sup> Art 2 of both ICESCR and ICCPR stresses state's obligations to respect, protect and takes steps for realization of the right contained in the respective conventions.

<sup>27</sup> For instance, the 1998 ILO Declaration on Fundamental Principles and Rights at Work can provide labour obligation for responsible large scale land investment.

<sup>28</sup> UN Office of High Commissioner for Human Rights, Land grabbing' must be disciplined: UN expert on food [2009] <<http://reliefweb.int/report/ethiopia/land-grabbing-must-be-disciplined-un-expert-food>> accessed on June 25/2019

<sup>29</sup> Declaration on the Right to Development, (adopted 4 December 1986 UNGA Res 41/128(DRD))

<sup>30</sup> RRD, art .1

basic requirements of right to development under the declaration include putting people at center of development, public participation, non-discrimination, fair distribution of benefits of development, self-determination and sovereignty over natural resources, and the creation of favorable conditions for enjoyment of other civil, political, economic, social and cultural rights.<sup>31</sup> Under the declaration, states have the right and the duty to formulate appropriate national development policies, legislative and other steps that aim at the constant improvement and realization of the right to development.<sup>32</sup>

### **Declaration on the Rights of Indigenous Peoples**

Declaration on Rights of Indigenous Peoples<sup>33</sup> reaffirmed the vulnerability and special need of indigenous people and adopted set of rights available for them. The core right of indigenous people that could be invoked in relation to development programs under the declaration include: right to self-determination and self-government, right to revitalize their culture and have access to their religious and cultural sites, right not to be forcibly removed from their lands without free, prior and informed consent, right to full participation and consultation before implementation measures affect them, right to own, use, develop, conserve and control the lands they have traditionally owned or used, right to determine and develop priorities and strategies for exercising their right to development, and right to free, and informed consent prior to the approval of projects affecting their lands, territories and other resources.<sup>34</sup> These rights of indigenous people shall be respected in all course of development program affecting the indigenous people including the large scale land investment.

### **Declaration on the Rights of Peasants**

Reaffirming vulnerability in development process and need for greater protection of the human rights of peasants and other people working in rural areas, the UN general assembly adopted Declaration on Rights of Peasants and Other People Working in Rural Areas in 2018.<sup>35</sup> The core right of peasants under the declaration includes: the right to determine and develop priorities and strategies to exercise their right to development; the right to equal access to the use of and management of land and natural resources, and to equal or priority treatment in land and agrarian reform and in land resettlement schemes; the right to decent employment, equal remuneration and social protection benefits, and to have access to income generating activities; the right to adequate food and fundamental right to be free from hunger; the right to information; the right to effective remedy and access to justice infringements of their human rights; the right to public participation and full consultation; the right to benefit directly from social security programs; and the right to

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<sup>31</sup> DRD, arts.1-10

<sup>32</sup> DRD, Arts.3 and 10

<sup>33</sup> Declaration on the Rights of Indigenous Peoples, (adopted 13 September 2007 UNGA Res 61/295)

<sup>34</sup> Declaration on right of Indigenous people, Ars.,3,4,10,18,19,23,26,29 & 32.

<sup>35</sup> Declaration on the Rights of Peasants and Other People Working in Rural Areas, (Adopted 30 October 2018 UNGA Res A/C.3/73/L.30)

be free from all forms of violence.<sup>36</sup> Article 2 of the Declarations requires states to respect, protect, and take appropriate steps to fulfill or achieve the progressive realization of rights of peasants and other people working in rural areas.

### **UN Guiding Principles on Business and Human Rights**

This UN Guiding Principles on Business on Human Rights<sup>37</sup> rests on three pillars: protect, respect and remedy frameworks that clarify the human rights duties of states and companies under the existing human rights instruments. The ‘protect framework’ imposes on states duty to protect human rights against third-party interference, including interference from business actors. This duty requires taking appropriate steps to prevent, investigate, punish and redress human rights violations through effective policies, legislation, regulations and adjudication.<sup>38</sup> In addition to the state duty to protect, states (including all public bodies and agencies) also have a duty themselves to respect human rights. The ‘respect framework’ imposes duty on businesses to; ‘(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services.’<sup>39</sup> The ‘remedy framework’ asserts the need for effective remedies, including judicial fora and non-judicial grievance mechanisms.<sup>40</sup> While not legally binding, the guiding principles have received wide acceptance at national level.

### **FAO Principles for Responsible Agricultural Investment**

The principle for responsible agricultural investment that respects rights, livelihoods and resources<sup>41</sup> contains seven set of principles applicable to large scale land investment. These seven principles include: respecting land and resources right, ensuring food security, good governance and transparency, public participation and consultation, ensuring responsible agricultural investment that respects rule of law and best practice, and ensuring social and environmental sustainability. In its discussion on principle 1 relating to ‘ensuring land and resource right’, the instrument strictly circumscribed use of expropriation of the land before it can be transferred to private investors and calls for prompt and fair compensation. The principles are agreed to be guiding framework for national investment policy making, and possibly codes of best practices that shall be adhered to by state and companies.

### **AU Guiding Principles on Large Scale Land Investments in Africa**

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<sup>36</sup> See Articles 2, 3, 4, 5, 10, 11, 12, & 15 of the Declaration on the right of peasants

<sup>37</sup> UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘protect, respect and remedy’ framework, [2011] UN Doc. A/HRC/17/31

<sup>38</sup> Ibid. principle 1

<sup>39</sup> Ibid 13

<sup>40</sup> See general principles of UN guiding Principle on Business and Human Right

<sup>41</sup> FAO, IFAD, WB, & UNACTAD Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources [2010] (Extended Version) (FAO Principles]



These guiding principles<sup>42</sup> are dedicated to address challenges of large scale land investment in Africa and ensure that investments in land benefit Member States and key stakeholders.<sup>43</sup> The fundamental principles for large scale land investment provided under the guide include: respect human rights of communities, contribute the national plan and strategy for sustainable agricultural development, the decision based on principles of good governance and prior informed participation of affected community, respect land rights and benefit of women, maximize benefit while minimizing economic, financial, social and environmental costs to the community, and the need for cooperation, collaboration and mutual accountability to ensure that large scale land investment is beneficial to African economies and their people.<sup>44</sup> The Guiding Principles serve as basis for commitment, solidarity and collective responsibility by governments, stakeholders and investors to improve the governance of large scale land based agricultural investments in Africa.<sup>45</sup>

### **Exposing the Human Right Impacts of Large-Scale Land Investment in Ethiopia**

The wave of large-scale land investment in Ethiopia posed considerable human right impacts on local community, especially to the indigenous peoples. The perpetrators are both government and the investor. The government commits violation of human right in the course of facilitating such large-scale land investment. The investors engage themselves directly or indirectly in suppression of human rights to ensure continued maintenance of regimes favourable to their investments. The threatened right constitute both substantive and procedural right recognized under the relevant international instruments and the FDRE constitution. This section scrutinizes the most frequently invoked human right impacts of large-scale land investment in Ethiopia based on recent report, literatures, and the relevant human right instruments, standards and principles.

### **The Core Substantive Human Rights at Stake**

#### **The Right to Land**

Despite the debate that there is no international human right law that recognizes human right to land, it is recognized under several binding and nonbinding international human rights instruments as an implied right.<sup>46</sup> This is because ‘land is crucial for the enjoyment of human rights including right to food, right to adequate standard of living and the right to development, right to property, and it is indispensable to exercise the right to self-determination’ and right to culture.<sup>47</sup> Moreover, the right to land features prominently in the Declaration on Rights of Peasants<sup>48</sup> and Declaration on Rights of Indigenous People.<sup>49</sup> What is more, land right is clearly recognized under FDRE

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<sup>42</sup> African Union Guiding Principles on Large Scale Land Based Investments in Africa [2014] (AU principles)

<sup>43</sup> Ibid 1

<sup>44</sup> AU Principles, principle 6

<sup>45</sup> Ibid 4

<sup>46</sup> H.A Tura, ‘Land rights and land grabbing in Oromia, Ethiopia’ [2018] Land Use Policy 247, 248

<sup>47</sup> Ibid

<sup>48</sup> Art 17 of the Declaration on the right of peasant expressly states that Peasants and other people living in rural areas have the right to land.

<sup>49</sup> Art 10 of the Declaration on right of indigenous peoples.

constitution<sup>50</sup> and other land legislations. This right to land includes right to acquire land without payment, right to not be evicted from possessions, right to use land for agricultural production without time limitation, the right to transfer their land use rights to family members through inheritance or donation, and the right to rent up half of their land holding to other persons.<sup>51</sup>

Against this constitutional and international framework on right to land, the practice of large-scale land investment has seriously undermined land right of local community and indigenous people in Ethiopia. To illustrate with practical scenario, it has been reported that large scale land investment has led ‘to forceful displacement and relocation of 45,000 indigenous households in Gambella and 90,000 households in Benishngul Gumuz of Ethiopia through the program known as ‘villagization and resettlement’.<sup>52</sup> There is also report from Bako in Oromia that ‘many farmers lost 10,000 hectares of land to Karuturi farm.<sup>53</sup> In most of the cases, the relocation was made without consultation and adequate compensation on ground of lack of title deed.’<sup>54</sup> That way, large scale land investment in the country undermined farmer’s right to land by arbitrary evicting them, annulling their right to use and transfer their right to their descendants, and denying their right to property which is essential to their livelihood.

### **The Right to Food**

The right to food is clearly recognized as human right under the international bill of rights and other soft laws.<sup>55</sup> In Ethiopia, though the FDRE constitution lacks clear provision on right to food, the right could be enforced implicitly as part of other rights protected by the constitution<sup>56</sup> or through the instrumentality of international human right instruments ratified by the country.<sup>57</sup> Against these legal frameworks, ‘large scale land transfer in Ethiopia displaced poor and vulnerable populations which, in turn, exacerbated poverty and food insecurity’.<sup>58</sup> It snatched away fertile land ideal for cultivation from the farmers and curtailed their ability to feed themselves.<sup>59</sup> Moreover, forest clearing for the purpose of agricultural investment has further undermined food security as resources like nuts, seeds, fruit and wildlife provide sources of food when harvests fail.<sup>60</sup> Even worse, such commercial agricultural investments are designed for

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<sup>50</sup> Art 40(4&5) of the 1995 FDRE constitution states peasants and pastoralists have the right to acquire land free of charge, the right to not be evicted from their possessions and a right to use the land for an indefinite period.

<sup>51</sup> See Federal Rural Land Proclamation No. 456/2005, Arts 5, 7

<sup>52</sup> Oakland Institute (n.13)40

<sup>53</sup> Ibid 43

<sup>54</sup> Ibid

<sup>55</sup> See UDHR, art 25; ISECR, art 11; Art 15 of Declaration on right of peasants

<sup>56</sup> The right to food is pre condition to exercise the right to life and right to an improved standard of living recognized under Arts 15 & 43 of FDRE constitution.

<sup>57</sup> In this regard, Art 9(4) of FDRE constitution states that international treaties signed by the country are integral part of the country’s law of land.

<sup>58</sup> Grant & Das (n.10)12

<sup>59</sup> Ibid

<sup>60</sup> Oakland Institute (n.13)



export and not used for local consumption to ensure food security in Ethiopia.

### **The Right to Development**

As has been discussed under section 2 above; right to ‘development is proclaimed as inalienable right under DRD<sup>61</sup> and further reinforced directly or indirectly under the declaration on right of indigenous people and declaration on right of peasants. Such right to development and improved standards of living is also recognized under Art 43 of the FDRE Constitution. However, the existing wave of large-scale land investment in the country seriously undermined and nullified all elements of right to development of the local community. As has been highlighted above, large scale land investment in Ethiopia resulted in forced eviction of local community without their consultation and effective compensation. It is obvious that livelihood of the rural community in Ethiopia is closely linked with access to land, and accesses to land is pre condition to improving their living standard and achieve sustainable development. And hence, it follows that forced eviction that is short of compensation or replacement land directly affects right to development. Moreover, the revenues collected from large scale land investment rarely provide direct benefit to affected community.

### **The Right to Culture**

This right is clearly recognized as human right under various binding and non-binding human right instruments as well as FDRE constitution.<sup>62</sup> However, the practice of large-scale land investment in Ethiopia posed serious impacts on cultural and religious rights of local communities. For the Ethiopian, ‘loss of land, whether farmland, communal or grazing areas have of religious or cultural value’.<sup>63</sup> Since their cultural and religious rituals are enjoyed in relation to their ancestral land, eviction of the indigenous community from the land is simply uprooting identity of the people from their ancestral heritage.<sup>64</sup> It is also reported that the ‘investor uprooted large trees located on religiously symbolic site frequently used for cultural and religious event.’<sup>65</sup> That way, large scale land investment in the country seriously affected cultural and religious right of local community recognized under the FDRE constitution and the international instruments.

### **Labor Rights**

Labor right has been explicitly recognized under relevant international instruments as well as Ethiopian law. The UDHR and the ICESCR affirm the right to freely choose an occupation, to enjoy a just and favorable remuneration, to work in safe and healthy conditions, and to form and join a trade union.<sup>66</sup> However, the practice of large-scale land investment in Ethiopia undermined

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<sup>61</sup> While none of the three bills of human right made express reference to a right to development, many of the principles and rights specified therein are crucial to an understanding of such right.

<sup>62</sup> See Art 27 of UDHR; art of 15 of ICESCR; Art 26 of Declaration on right of peasants; Art 41 of FDRE constitution.

<sup>63</sup> Oakland Institute (n.13)38

<sup>64</sup> Abebe(n.11)

<sup>65</sup> Ramato(n.10)24.

<sup>66</sup> See art 23 of UDHR; art 6-7 of ICESCR.

labor right of the worker. It is observed that local communities did not benefit from employment opportunity and most employees came from other parts of the country.<sup>67</sup> Even in areas where local community are employed, the majority of the jobs are labourer positions, they are often seasonal and short term, workers are not fully paid, or the rate of wages is very low, i.e. not commensurate with the service rendered by the workers; and even the costs of living cannot be guaranteed.<sup>68</sup> Moreover, the large-scale land investor is reported to discriminate and harass the female employees, demoralize the workers, deny them access to health facility and safety conditions, provide no training opportunity or skill transfer, and undermine other rights of the workers.<sup>69</sup>

### **Environmental Rights**

Despite the absence of any international human rights treaty proclaiming the right to clean and healthy environment, the right is clearly recognized under Art 18 of the Declaration of the rights of peasants and Art 44 of the FDRE constitution. Moreover, the right to environment could be implied under the right to life, the right to health and other related rights recognized under international bills of human rights. However, large scale land investment has seriously affected environmental rights of local community in Ethiopia. The potential environmental damage resulting from large scale land investment in the country includes destruction of soil fertility, loss of biodiversity and draining of wetlands, air and water pollution, spread of invasive alien species, and toxic wastes.<sup>70</sup> Aggressive use of fertilizers and other chemicals by large scale agricultural investors may also affect the environment. That way large scale land investment implemented without proper environmental impact assessment in the country threatened the environmental rights of local community.

### **The Right to self Determination**

This right is boldly recognized under different international human right instruments<sup>71</sup> as well as the FDRE constitution.<sup>72</sup> The people's right to self-determination includes the 'right to exercise the inalienable right to full sovereignty over all their natural wealth and resources and the right to freely dispose of their natural wealth and resources, and by virtue of that right people freely determine their political status and freely pursue their economic, social and cultural development'.<sup>73</sup> Art. 1 of both ISESCR and ICCPR state that 'no people may be deprived of its own means of subsistence'. However, in Ethiopia, the arrival of large-scale land investors marginalized and forcefully uprooted the people from their land and effectively denied their right

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<sup>67</sup> Rahmato(n.10)22

<sup>68</sup> Ibid

<sup>69</sup> Ibid 25

<sup>70</sup> Ibid 44

<sup>71</sup> The right to self-determination enshrined under Art 1 of both ICCPR & ICESCR. It is also referred under other soft laws such as DRD, declaration on right of indigenous people, Declaration on right of peasants.

<sup>72</sup> Art 39 of the FDRE constitution

<sup>73</sup> Arts 1 & 2 of ICCPR ; Arts 1 & 2 of ICESCR

to self-determination.<sup>74</sup> It is believed that ‘there is a strong correlation in many societies between the decision-making powers that a person enjoys and the quantity and quality of land rights held by that person’.<sup>75</sup> Hence, such eviction from land and other natural resources through the decision of the Federal Government affected peoples’ right to self-determination.

### **Procedural Rights at Stake**

Procedural rights refer ‘to constitutional and statutory legal rights that focus on the Procedural aspects of governance, are essential to realize the substantive rights.’<sup>76</sup> These procedural rights principally involve the right to public participation, prior informed consent and access to information and justice. These rights are recognized under various binding and non-binding intentional instruments<sup>77</sup> and the FDRE constitution.<sup>78</sup> However, the existing wave of large scale land investment in Ethiopia operates with disregard to indigenous peoples and local communities’ active participation in decision making, denying them access to key information about land deals, and abrogating their constitutional right to free and prior informed consent, compensation and legal redress.<sup>79</sup> In practice, large scale land investment deals were secretly negotiated and permitted by the Federal Government; the local peoples were never consulted, and even worse, the local officials were not consulted in most of the decision to transfer the land to investors.<sup>80</sup> Moreover, none of the victims were able to bring their matters before the court and obtain effective remedy or redress.

### **Implementing the Right Based Approach to Large Scale Land Investment Governance in Ethiopia: Closing the Gaps**

A Human right based approach is a ‘conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.’<sup>81</sup> In essence, the rights-based approach integrates norms, standards and principles of the international human rights system into the plans, policies and

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<sup>74</sup> Abebe(n.11)884

<sup>75</sup> Ibid 882

<sup>76</sup> JCN Ashukem, ‘A rights-based approach to foreign agro-investment governance in Cameroon, Uganda and South Africa’ (PhD Thesis, North-West University, 2016)

<sup>77</sup> These procedural rights are stressed under different international instruments including the bills of right, DRD, Declaration on Rights of Indigenous People, the FAO Principles, and the AU principles. See discussion under section 2

<sup>78</sup> Art 43(2) of the FDRE constitution states ‘Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community; Art 92(3) of the constitution adds ‘People have the right to full consultation and to the expression of views in the planning and implementations of environmental policies and projects that affect them.

<sup>79</sup> Nykiaw Ochalla [2013]< <https://intercontinentalcry.org/ethiopias-land-grabs-stories-displaced-20830>> accessed 9 July 2019

<sup>80</sup> Oakland institute(n.13)

<sup>81</sup> HRBA Portal(n.2)

processes of development.<sup>82</sup> The right based approach sets the achievement of human rights as an objective of development project and considers human rights as benchmarks of development policies and programs.<sup>83</sup> It pinpoints ‘right holders and their entitlements and corresponding duty-bearers and their obligations, and works towards empowerment of the rights holders to make their claims and of duty bearers to meet their obligations’.<sup>84</sup> The key element of rights based approach includes express linkage to human right, accountability, empowerment, participation, equality and equity, and attention to vulnerable group and marginalized parts of the community.<sup>85</sup>

In the context of large-scale land investment governance, human right based approach entails integration of human right issue in the investment regulation and administration. A right based approach to large scale land investment governance encompasses the ‘responsibilities of development actors to respect, protect, and fulfill fundamental rights of people involved with or affected by large scale agricultural land deals as well as the need to achieve human rights during large scale land investment regulation’.<sup>86</sup> This suggests that applying the right based approach to large scale land investment governance is expected to be a means to ensure and promote inclusive, transparent responsible and sustainable large scale land investment activities, and protect, respect and fulfill both substantive and procedural rights of those communities potentially affected by such investments.<sup>87</sup> Hence, the implementation of right based approach to large scale land investment could serve as a tool to ensure large scale land investment contribute to socio-economic improvement of the people while respecting their fundamental rights.

In Ethiopia, there is a constitutional basis for human right based approach that provides legitimacy to implement right based approach to large scale land investment governance so as to rectify the tragic human right consequences of large-scale land acquisition prevailing in the country. The human right based approach is clearly articulated under the preamble of the FDRE constitution which recognizes the fulfillment of human rights as precondition for the realization of economic and social development.<sup>88</sup> In addition, Art 43 of the Constitution which recognizes the right to sustainable development<sup>89</sup> and public participation and consultation in development process as

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<sup>82</sup> Ibid.

<sup>83</sup> HRBA Portal(n.4)

<sup>84</sup> HRBA Portal (n.2)

<sup>85</sup> Ibid.

<sup>86</sup> Ashukem(n.76)114.

<sup>87</sup> Ibid

<sup>88</sup> Para 1& 2 of the preamble reads ‘We, Nations, Nationalities and Peoples of Ethiopia: Strongly committed, to building a political community founded on rule of law and capable of ensuring lasting peace, guaranteeing democratic order, and **advancing our economic and social development**; Firmly convinced that the fulfillment of this objective requires full respect of individual and people’s **fundamental freedoms and rights...**’ As can be inferred from this preambular objective, advancing economic and social development with due respect to fundamental right and freedom of all individual and people is considered key objective of establishing Ethiopian Federation.

<sup>89</sup> The 2002 Johannes Barge Declaration on Sustainable development considers Sustainable development as embracing three mutually reinforcing and interdependent pillars; economic growth, social development (including human right protection) and environment protection.

human right to reinforce right based approach to development. Human right as integral part of development can also be inferred from Chapter Three of the Constitution which provides a list of inalienable and inviolable human rights, and dictates interpretation of these rights in accordance with the international human right instruments to which the country is party. In light of this, Ethiopia ratified major international human rights treaties including the ICCPR and ICESCR, and all ratified treaties are considered integral part of the law of the land reflecting the country's commitment to human rights.<sup>90</sup> That way, the Constitution subscribed to the right based approach as derived from international human right standards, and this could be implemented in large scale land investment governance.

Even though the ideology of developmental state<sup>91</sup> claimed to be pursued by the ruling party has a potential of frustrating the right to sustainable development enshrined in the constitution, the principles of rule of law dictate the ruling party to give up the ideology and uphold the right based approach to investment governance advocated by the Constitution. This is because the ideology lacks constitutional legitimacy as the Constitution guaranteed all three generation rights without prioritizing one right over the other, while the ideology prioritizes economic growth over civil and political freedom.<sup>92</sup> Ended, economic growth is not an end in itself as the ultimate goal is improvement of the living standard of people based on respect for human right and public participation.<sup>93</sup> Consequently, development actors of the government should not be influenced by the claimed ideology of developmental state to prioritize economic gains of large scale land investment over the human right of local community while promoting, regulating and administrating large scale land investment.

Hence, taking this firm recognition of right based approach under the Constitution as opportunity, and given the existing human right impacts of large-scale land investment in the country, it is extremely useful and workable to adopt right based approach to large scale land investment governance in Ethiopia. To this end, the government and all other duty bearer and stake holders engaging in large land deals in the country shall work towards effective implementation and integration of both substantive and procedural rights incorporated under the international bills of human rights, the pertinent UN declarations, and the FDRE Constitution, and guided by the UN Guiding principles on business and human rights, FAO Principles, and AU Guiding principles in all course of large-scale land deals.<sup>94</sup> In light of this, the human right based approach requires the

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<sup>90</sup> See Art 9(4) of the FDRE constitution

<sup>91</sup> Developmental state stresses on 'economic growth first right next' paradigm with the flawed assumption that that civil right and political freedom make little sense in the society hit by poverty. see Assefa Fiseha, 'Development with or without Freedom', in '*Human Right And Development: Legal Perspective From And For Ethiopia*', 101 -138 (Eva Brems, Christophe Van der Beken and Solomon Abay Eds., international studies of human rights; volume 111, 2015)144

<sup>92</sup> Ibid 133

<sup>93</sup> See Art 43 of the constitution

<sup>94</sup> As can be inferred from the discussion under section 2 above, all instruments support a right based approach to large scale land investment and guides toward and calls for need to respect, protect, and fulfill both substantive

Government to put in place a system of large-scale land investment governance grounded on principles of good governance.<sup>95</sup> Good governance in the context of large-scale land investment requires the Government to protect, respect and integrate all potentially invoked substantive and procedural rights of local and indigenous communities discussed this paper.

In particular, effective implementation of procedural right to public participation, prior informed consent, access to information and access to justice and effective remedy for violations of rights in the course of large-scale land deals are at the heart of right based approach to large scale land investment governance. Effective implementation of these procedural rights is important not only as an end in themselves but also as means to safeguard substantive rights of affected community. For instance, implementation of right to access to information could provide opportunity for the communities to take important decisions on matters that affect them in view of the need to protect and enhance both their procedural and substantive rights. Effective enforcement of right to public participation could also enable local communities to effectively engage with the relevant authorities during large scale land investment decision making processes with the hope of preventing the harmful impacts of such developments or seeking redress after the event. Moreover, respect for and the promotion of human rights, whether substantive or procedural, can be effectively guaranteed by means of access to justice. Hence, the government shall disclose all information about large scale land investment deals to local communities and all affected stakeholders as early as possible, and ensure their effective participation, and stick to their prior informed consent in all courses of large-scale land investment deals and its implementation.

Moreover, the government should take necessary steps to ensure that its large scale land deals respect substantive human right of local community including land right, right to food, right to development, right to culture, labor rights, environmental right, and right to self-determination enshrined under the relevant international instruments applicable to responsible agricultural investment.<sup>96</sup> Most importantly, the government should recognize the existing use or ownership rights to land, whether statutory or customary, formal or informal, communal or individual.<sup>97</sup> This entails the identification of all right holders; legal recognition of all rights and uses, negotiation with land holders/users; fair and prompt payment for all acquired rights; and independent avenues for resolving disputes or grievances.<sup>98</sup> In line with this requirement, the government should stop its worst practice of expropriating the land before it can be transferred to investors thereby blocking

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and procedural rights recognized under the international bills of rights and other specific instruments in the course of large-scale land deals. In most of the cases, the rights and principles or guidelines provided under each instrument's overlaps, reinforces, complement and supplement one another toward one and the same goal.

<sup>95</sup> The good governance for large scale land investment entails the existence the transparent, efficient, democratic, participatory, inclusive and accountable processes and institutions in formal and informal regulatory setting that govern large scale land investment initiatives while protecting rights and interests of affected local communities according to minimum standards set by law and legal contracts. See Ashukem(n.76)114.

<sup>96</sup> These are the main substantives right of local community seriously undermined by the practice of large-scale land investment as depicted under section 3 above.

<sup>97</sup> FAO principles, Principle 1

<sup>98</sup> Ibid



direct negotiation between the right holder and the investor. The Government should also be honest in providing compensation as well as relocation assistance to those who have been displaced due to large scale agricultural investment. By respecting all these elements of land right, the Government can indirectly promote the related rights, right to self-determination, right to culture, right to food, and right to development.

With view to protect the other frequently invoked rights such as right to development, right to work, right food, and environmental rights<sup>99</sup>, the Government shall put in place laws, regulations, directives or clauses in lease agreement addressing large scale land investor's obligation regarding performance requirement,<sup>100</sup>benefit sharing, labor and environmental standards, and human right obligation in general. Hence, through these arrangements, investors should be required to establish and promote farming systems that are sufficiently labor intensive to contribute to employment creation, and prioritize local community in employment, provide adequate wages and ensure protection of labor rights of the agricultural workers consistent with the applicable ILO instruments. In addition, there shall be mechanism that encourages the evicted right holder as a result of investment to be a shareholder in investment in question or make the affected community a direct beneficiary of the investment agreement revenues, or provide other means to ensure benefit-sharing between the investor and the community to assist their right to development, and then right to food.

The other important measure that needs to be undertaken by the Government before granting concessions to large scale land investors is to put in place the investor's obligation to conduct human right impact assessment.<sup>101</sup> The human right impact assessment should cover all potential human right impacts of the proposed investment including land right, right to food, right to culture, labor rights, rights of indigenous peoples, and environmental rights, and this assists to ensure the investment to respect the human rights of local community. The assessment shall be made in consultation with the affected people and secure their free and prior informed consent; be open to the public, media, and civil society, and ensures their access to its recommendations in the assessment and the review and results of the monitoring processes; provide effective grievance procedure and effective remedies for those whose rights are violated or who may suffer harm

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<sup>99</sup> See requirements under FAO principle, principles 2; AU principles, Principles 1.

<sup>100</sup> In particular , performance requirement such as local content requirement that requires the large scale agricultural investor to prioritize local community in employment; requirement to achieve a specific level of local jobs, local selling of a certain quantity of its crops to support food security; requirement to engage in training workforce and technology/skill transfer requirement to local farmer, requirement to conduct research and development; achieving better environmental or social outcomes, infrastructural development; and requirement to form a joint venture with local partner/farmer to make the investment could be used to make large scale investment in line with and support right to local community's right development, right to food, right environment, and other.

<sup>101</sup> Human right impact assessment (human rights due diligence) is defined as 'the process through which companies 'identify, prevent, mitigate and account for how they address their adverse human rights impacts, and it 'should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed' UN guiding Principles for Business and Human rights, principles 17.

as a result of the investment.<sup>102</sup> Moreover, the assessment shall be a requirement for application, issuance, renewal and expansion of investment permit.

Finally, the government shall put in place efficient and transparent monitoring, evaluation, and dispute resolution mechanism that ensure accountability of all stakeholders.<sup>103</sup> The authority in charge of this activity should review the plan of the impact assessment, and use it as a baseline for the ongoing monitoring of the performance of investments. Moreover, noncompliance with the plan shall be considered as a ground for revocation of investment permit or entails investor's accountability for any harm sustained by the community. Besides, there shall be strong, accessible, transparent, and speedy mechanism to resolve all disputes arising from large scale land investments. What is more, the government shall invest in empowering rural community to know their rights, and be able to organize themselves to safeguard their human rights<sup>104</sup>, and encourage civil society, activists, nongovernmental organizations, media and all other human right actors to promote the rights of rural communities in all courses of large-scale land investment.

### **Conclusion and the Key Forward**

Human rights are universal, inalienable and inviolable rights naturally given to all human beings imposing duty to promote, protect and respect on states. However, the new waves of large-scale land investment reportedly undermined the human rights of local community in Africa, and so more in Ethiopia. Ethiopia has been chosen for these large-scale deals considering availability of cheap labour and arable land, and Government's support to such investments. The Ethiopian government has welcomed these large-scale investments with the expectation that it will boost productivity, provide job opportunity and transfer technologies to local farmers; yet, the critics are concerned more about human rights' impacts of such investments on local community. This article explored the human right impacts of large-scale land investment in Ethiopia and suggested the key forward to reach a win-win solution.

Accordingly, from the reviews and analysis of the relevant international instruments, soft laws, and principles applicable to large scale land investment as well as FDRE Constitution, the study established that these instruments recognized substantive and procedural rights, and dictated respect and integration of these rights in development process. To the contrary, the study confirmed that large scale land investment in Ethiopia operates at the expense of local community's substantive right including land right, right to food, right to development, right to culture, labor rights, and environmental right and right to self-determination. Moreover, the investment disregarded procedural right to participation, prior informed consent, and access to information and justice.

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<sup>102</sup> Ibid; AU principles, principle 15

<sup>103</sup> See FAO principles, Principle 3; AU principles, principle 8; Even though the Ethiopian Agricultural Investment Land Administration Agency is currently entrusted with similar function, the agency is meant to facilitate and promote the investment for economic growth ignoring its social and human right dimension.

<sup>104</sup> AU principles, principle 10

From now on, based on relevant international guidance and requirement under the FDRE Constitution, this study will advocate for the human right based approach to large scale land investment governance that respects and integrates both substantive and procedural rights of affected community. In particular, the Government shall ensure respect for land rights, and put in place laws or clauses in lease agreement addressing investor's obligation regarding performance requirement, benefit sharing, labor and environmental standards, and human right impact assessment as required under relevant international guidance to make sure that its large-scale land deals respect and promote all substantive rights at stake. It shall also stick to the procedural right to public participation, prior informed consent, and access to information and justice. Lastly, the Government shall put in place effective monitoring and dispute resolution mechanisms, and empower local community and other stake holders to safeguard rights of affected community.