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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report of the Special Rapporteur on the right to food, Olivier De Schutter

Addendum

Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge

Summary

In this addendum to his report, the Special Rapporteur analyses a trend that has accelerated following the 2008 global food price crisis: large-scale acquisitions and leases of land.

It is estimated that between 15 and 20 million hectares of farmland in developing countries have been subject to transactions or negotiations involving foreign investors since 2006. The Special Rapporteur examines the potential impact on the human right to adequate food, recalling the relevant obligations imposed on States under international human rights law.

On the basis of this analysis, the Special Rapporteur proposes a set of core principles and measures for host States and investors. These principles are intended to inform current initiatives such as the adoption of guidelines on land policies and governance by international and regional organizations. Their main aim is to ensure that negotiations leading to land acquisitions and leases comply with a number of procedural requirements, including the informed participation of local communities. They also seek to ensure adequate benefit-sharing, and a proviso that under no circumstances should such transactions be allowed to trump the human rights obligations of States.

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I. Introduction

1. The Special Rapporteur on the right to food, Olivier De Schutter, presents this addendum to his annual report, submitted under Human Rights Council resolution 10/12. The addendum is based on a draft released in June 2009 that attracted considerable attention from a range of stakeholders and served as a source of inspiration to the round table on the promotion of responsible investment in agriculture convened on 23 September 2009 in the margins of the sixty-fourth session of the General Assembly.¹

2. Large-scale acquisitions and leases have accelerated following the 2008 global food price crisis. Some major food-importing, capital-exporting countries appear to have lost confidence in global markets as a stable and reliable source of food. Private investors, including investment funds, are increasingly attracted to agriculture, and increasingly speculate on farmland. In this addendum to his report, the Special Rapporteur analyses how these investments could impact on the right to food. Recalling the obligations of States under international human rights law, he seeks to provide guidance to ensure that these investment agreements do not lead to violations of the human right to adequate food.

3. Under article 11 of the International Covenant on Economic, Social and Cultural Rights, every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate, and safe to ensure their freedom from hunger.² The obligations of the State are threefold: to respect, protect and fulfil the human right to food. The State is obliged to refrain from infringing on the ability of individuals and groups to feed themselves where such an ability exists (respect), and to prevent others — in particular private actors such as firms — from encroaching on that ability (protect). Finally, the State is called upon to actively strengthen the ability of individuals to feed themselves (fulfil).

4. The right to food framework contributes important lessons to the debate on large-scale land acquisitions or leases. The arrival of investors in agriculture may present certain opportunities, but there are also important human rights challenges, and investments that can affect land rights are a particular source of concern. The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor. In concluding agreements on large-scale land acquisitions or leases, States should take into account the rights of current land users in the areas where the investment is made, as well as the rights of workers employed on the farms. They should also be guided by the need to ensure the right to self-determination and the right to development of the local population.

5. A number of principles based on existing human rights law are put forward by the Special Rapporteur in the annex to this report, in order to inform current initiatives, such as the adoption of guidelines on land policies and governance by international and regional

¹ The round table was co-chaired by the Government of Japan, the World Bank, the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD), and the United Nations Conference on Trade and Development. It involved 31 governments and 13 organizations.

² See Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food (art. 11), para. 14.

organizations. But neither host States nor investors should wait until such guidelines are adopted, to act in accordance with human rights. The home States of private investors are also under an obligation to regulate the conduct of these investors abroad, particularly if the host State appears unwilling or unable to do so.³ Development banks, including the World Bank and its private sector arm, the International Finance Corporation, which are bound by international human rights law as part of general international law,⁴ should immediately make their support to any large-scale investment in farmland conditional upon compliance with the minimum principles described below. These principles are not optional; they follow from existing international human rights norms.

6. An initiative is currently under way within the Food and Agriculture Organization of the United Nations (FAO), in collaboration with its partners, including UN-Habitat, the World Bank, the International Fund for Agricultural Development, governments, and civil society, to work towards voluntary guidelines on responsible governance of tenure of land and other natural resources. The process of elaboration of these guidelines is inclusive, and it seeks to build ownership of the guidelines, in particular by States, through a number of regional consultations. The Special Rapporteur is fully supportive of this process. The minimum human rights principles set out below and summarized in the annex to this report should be seen as a minimum safeguard and not as a substitute for more operational guidelines; nor do they compete with such guidelines. Like FAO and its partners, the Special Rapporteur is convinced that it is in the interest of all, investors (whether public or private) and host States alike, that investments in land are made responsibly. Otherwise they will not be sustainable and may increase social conflict. These principles should be seen as a contribution to the broader and more inclusive process, leading to more operational and detailed guidelines, which the Special Rapporteur welcomes.

7. Three provisos are in order. First, the debate on large-scale land acquisitions or leases, which this addendum seeks to inform, should not distract us from acknowledging that, to a large extent, the rush towards farmland in developing countries is the result of our own failures. We have failed in the past to adequately invest in agriculture and rural development in developing countries, particularly sub-Saharan Africa. We have failed to promote means of agricultural production which do not deplete the soils and exhaust groundwater reserves. And we are failing today to establish well-functioning and more reliable global markets for agricultural commodities. It would be unjustifiable to seek to

³ See, e.g., Committee on Economic, Social and Cultural Rights, general comments No. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), para. 39 and No. 15 (2002) on the right to water (arts. 11 and 12), para. 31. In general comment No. 14, the Committee affirms that States parties should “prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law”. Similarly, in 2007 the Committee on the Elimination of Racial Discrimination called on Canada to “... take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable” (CERD/C/CAN/CO/18, para. 17). See also report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/8/5, para. 91).

⁴ International Court of Justice, Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt, Advisory Opinion (20 December 1980), p. 73, at pp. 89–90, para. 37 (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law ...”).

better regulate agreements on large-scale land acquisitions or leases, without addressing also, as a matter of urgency, these circumstances which make such agreements look like a desirable option.

8. Second, the Special Rapporteur has consistently insisted on the need for agricultural systems to support, as a priority, the production of food to respond to local needs. It is only to the extent that investments can improve local food security by increasing productivity and serving local markets, while avoiding an increase in inequalities of incomes in rural areas, that they are justified. It is this concern for local food security that guides, in particular, principle 8 of the set of principles listed in the annex to this report.

9. Third, the Special Rapporteur insists on the fact that the principles listed in the annex are minimum principles. This means that a large-scale investment in land will not necessarily be justified even though it may comply with the various principles listed. Indeed, these principles call for governments to carefully examine the opportunity costs involved in ceding land to an investor (principle 1); to examine alternatives to agreements that have an impact on land tenure (principle 4); and to perform a participatory impact assessment prior to the conclusion of such agreements (principle 9). In the vast majority of cases of large-scale investments examined by the Special Rapporteur, the benefits of the investment (in terms of creation of infrastructure, marketing opportunities, and access to credit) could be achieved — and work for the benefit of both the investor and the producer — by the use of other business models such as contract farming, without any change being made to the rights over the land. Such alternatives should be explored prior to any shift in rights over the land. Unless such alternatives are prioritized, the development of large-scale land acquisitions or leases will result in nothing less than an agrarian counter-reform; such a consequence would be completely unacceptable and run directly counter to the realization of the right to food, further marginalizing the communities that depend on access to land for their livelihoods.

10. The principles listed in the annex are relevant to large-scale investments in farmland by foreign investors, whether private or public. But the current speculation on land and commercial pressures on land users stem, for the most part, from national investors, particularly in a context in which the renewed interest in agricultural investment threatens to increase land concentration. While these principles are not applicable in full to such pressures, the Special Rapporteur intends to prepare a thematic report on the issue of land rights for presentation to the sixty-fifth session of the General Assembly.

II. The context

11. Over the past three to four years, private investors and governments have shown a growing interest in the acquisition or long-term lease of large portions of arable land (above 1,000 ha) in a number of countries, mostly in the developing world. According to an estimate from the International Food Policy Research Institute (IFPRI), between 15 and 20 million hectares of farmland in developing countries have been the subject of transactions or negotiations involving foreign investors since 2006. This figure is equal to the total area of farmland in France and to a fifth of all the farmland of the European Union. The land which has been most in demand is that which is close to water resources and can therefore be irrigated at a relatively low cost in terms of infrastructure, and land which is closest to markets and from which produce can be easily exported. Among the main target countries in sub-Saharan Africa are Cameroon, Ethiopia, the Democratic Republic of the Congo,⁵

⁵ China is said to have acquired 2.8 million hectares in the Democratic Republic of the Congo to create the world's largest oil palm plantation (*New Zealand Herald*, 14 May 2009).

Ghana, Madagascar,⁶ Mali,⁷ Somalia, Sudan,⁸ United Republic of Tanzania⁹ and Zambia. But target countries are also in Central Europe, in Asia and in Latin America; among them are Brazil, Cambodia,¹⁰ Indonesia, Kazakhstan, Pakistan,¹¹ the Philippines,¹² Russia and Ukraine.¹³ Developing countries in general, and sub-Saharan Africa in particular, are targeted because of the perception that there is plenty of land available, because the climate is favourable to the production of crops, because local labour is inexpensive and because the land is still relatively cheap. In 2003, FAO estimated that an additional 120 million ha — an area twice the size of France or one-third that of India — will be needed to support the growth in food production by 2030, without considering the compensation required for what are certain to be losses resulting from unsustainable forms of agricultural production.¹⁴ This expansion will occur mainly in developing countries. Since about 95 per cent of the cropland in Asia has already been utilized, it is in Latin America and Africa that most of the demand for increased arable land will be concentrated. Indeed, it is in these regions that the 2002 joint FAO/International Institute for Applied Systems Analysis Global Agro-ecological Assessment suggests that most of the world's reserve agricultural land (up to 80 per cent) is located.¹⁵

12. The development of large-scale land leases or acquisitions can be explained by (a) the rush towards the production of agrofuels as an alternative to fossil fuels, a development encouraged by fiscal incentives and subsidies in developed countries; (b) the growth of population and urbanization, combined with the exhaustion of natural resources, in certain

⁶ In Madagascar 465,000 ha of land have been leased to an Indian company, Varun International, to grow rice for consumption in India. The status of this deal is now unclear, however. A deal between the South Korean firm, Daewoo Logistics, for the 99-year lease of 1.3 million ha in the country was negotiated but ultimately not confirmed.

⁷ Libya has leased 100,000 ha in Mali for rice production.

⁸ South Korea has acquired 690,000 ha of land in Sudan to grow wheat. The United Arab Emirates have invested in excess of 400,000 ha to grow corn, alfalfa, wheat, potatoes and beans. Egypt has secured a similar surface to grow wheat. See *New Zealand Herald*, 14 May 2009; *The Economist*, 23 May 2009, p. 60; *The Guardian*, 2 July 2008.

⁹ Saudi Arabia is seeking to lease 500,000 ha in Tanzania, according to press reports (*New Zealand Herald*, 14 May 2009).

¹⁰ D. Montero, "Insecurity drives farm purchases abroad", *Christian Science Monitor*, 22 December 2008.

¹¹ S. Kerr and F. Bokhari, "UAE investors buy Pakistan farmland", *Financial Times*, 11 May 2008.

¹² C. Maceda, "UAE signs MoU with Philippines to ensure food supply", *Gulf News*, 22 July 2008, available at <http://tinyurl.com/5uts7a>.

¹³ Unless other sources are cited, the list, which is non-exhaustive and in permanent evolution, is based on IFAD, "The growing demand for land: risks and opportunities for smallholder farmers", a discussion paper prepared for the round table organized during the thirty-second session of the IFAD Governing Council (18 February, 2009), available at <http://www.ifad.org/events/gc/32/roundtables/2.pdf>; J. von Braun and R. Meinzen-Dick, "'Land Grabbing' by Foreign Investors in Developing Countries: Risks and Opportunities", IFPRI Policy Brief 13, April 2009; V. Songwe and K. Deininger, "Foreign investment in agricultural production: opportunities and challenges", *Agriculture and Rural Development Notes*, World Bank, 2009; Reuters, "Factbox: foreign forays into African farming", 20 March 2009; GRAIN, "Seized! The 2008 land grab for food and financial security", October 2008; for Ethiopia, Ghana, Madagascar and Mali, L. Cotula and others, *Land Grab or Development Opportunity? Agricultural Investments and International Land Deals in Africa* (London/Rome, the International Institute for Environment and Development (IIED), FAO and IFAD, 2009).

¹⁴ FAO, *World Agriculture: Towards 2015/2030, an FAO Perspective* (London, Earthscan, 2003), section 4.3.2.

¹⁵ G. Fischer and others, *Global Agro-ecological Assessment for Agriculture in the 21st Century*, Rome, FAO, and the International Institute for Applied Systems Analysis (IIASA), 2002.

countries, which therefore see large-scale land acquisitions as a means to achieve long-term food security; (c) increased concerns of certain countries about the availability of fresh water, which in a number of regions is becoming a scarce commodity; (d) increased demand for certain raw commodities from tropical countries, particularly fibre and other wood products; (e) expected subsidies for carbon storage through plantation and avoided deforestation;¹⁶ and (f) particularly as far as private investors are concerned, speculation on future increases in the price of farmland. While this phenomenon is not entirely new, it has accelerated since the global food price crisis of 2007–2008, because the markets for agricultural commodities are seen to be increasingly unstable and volatile, and therefore less reliable for net food-importing countries, particularly following the decision by a number of large food-exporting countries to ban exports or to raise export levies during the spring of 2008. As a result, resource-poor but cash-rich countries have turned to large-scale acquisitions or rent of land in order to achieve food security.¹⁷ This has also led private investors, including large investment funds, to acquire land for merely speculative motives, because of the conviction that the price of arable land will continue to rise in the future.

13. This development presents certain opportunities. For many years, agriculture has been neglected, both in domestic public policies and in development cooperation, and has failed to attract foreign direct investment, particularly in sub-Saharan Africa. It is in principle welcome that this is changing. More investment in rural areas can be particularly effective in reducing poverty, where it is concentrated. The arrival of investment has the potential to create employment, both on and off farm (in associated processing industries, for instance); to lead to transfer of technologies; to improve the access of local producers to markets at domestic, regional and international level; and to increase public revenues through taxation and export duties. For countries purchasing or leasing land abroad in order to grow staple crops, this means increased food security, since they will be less dependent on the international markets to acquire the food they need to feed their populations. The risks of lower productivity in agriculture in subtropical regions entailed by climate change and, in the future, increased costs of freight, may partially offset this advantage.

14. There are, however, also important risks in this development. In setting out the minimum human rights principles on which large-scale land acquisitions or leases should be based, the Special Rapporteur aims to provide guidance to States hosting such investments, in particular in their negotiations with foreign investors. States should be aware that, under certain conditions, foreign investors may seek to rely on existing investment agreements protecting them from expropriation and guaranteeing them fair and equitable treatment, in order to seek compensation for any loss of revenues which would result from restrictions imposed on their freedom to operate, unless such restrictions are clearly provided for in the investment agreement at the time it is concluded. It is therefore crucial that such circumstances be fully anticipated.

¹⁶ This is the case particularly under the clean development mechanism (CDM) provided for in article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The CDM allows a country with an emission-reduction or emission-limitation commitment under the Protocol (Annex B Party) to implement an emission-reduction project in developing countries, in order to earn certified emission reduction (CER) credits, each equivalent to one ton of CO₂. The CERs may be traded and can be counted towards meeting Kyoto targets.

¹⁷ See footnote 13 above for sources. Although it focuses on Ethiopia, Ghana, Madagascar and Mali, the joint study by IIED, FAO and IFAD constitutes to this date the most in-depth study of this development.

III. The human right to adequate food

15. Under article 11 of the International Covenant on Economic, Social and Cultural Rights, every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate, and safe to ensure their freedom from hunger.¹⁸ States would be acting in violation of the human right to food if, by leasing or selling land to investors (whether domestic or foreign), they were depriving the local population of access to productive resources indispensable to their livelihoods. They would also be violating the right to food if they negotiated such agreements without ensuring that this will not result in food insecurity, for instance because this would create a dependency on foreign aid or on increasingly volatile and unpredictable international markets (as large proportions of the food produced as a result of the foreign investment would be shipped to the country of origin of the investor or sold on the international markets), or because the revenues of the most marginal local farmers would decrease as a result of the competition consequent on the arrival of such investors. During the global food price crisis of 2007–2008, the impacts of high food prices on international markets were significantly larger in countries with fewer domestic alternatives to internationally traded grains, whose prices increased the most (maize, wheat, and rice).¹⁹ Governments should be aware of the increased vulnerability which may result from increasing their dependency on international markets to achieve food security; the volatility of prices on international markets appears likely to increase and would make them even less reliable in the future than they have been in the past.

16. The need to preserve food security within the host country should be taken into account proactively in the negotiation of the investment agreements concerned. Depending on the circumstances of each country, specific provisions may have to be included: for instance a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets, and that this percentage may increase, in proportions to be agreed in advance, if the prices of food commodities on international markets reach certain levels. Complementary measures may also have to be adopted by the host government, in support of local production; where local producers risk being negatively impacted by the arrival of low-priced food on the domestic markets as a result of the increased production made possible, at competitive prices, by foreign investment, support measures should be adopted allowing them to improve the productivity of local farmers.

17. In addition, the realization of the right to food may be pursued more effectively if host States and investors agree on a certain number of conditions according to which the investment will be made.

18. First, in countries facing high levels of rural poverty and in the absence of employment opportunities in other sectors, investors should be encouraged to establish and promote farming systems that are labour-intensive rather than focused on achieving the highest productivity per hectare. This requirement will ensure that investment agreements contribute to the fullest extent possible to reinforcing local livelihood options and in particular provide access to a living wage for the local population involved. It is important in this respect to note that, contrary to a widespread myth, large-scale plantations are not necessarily more productive than small-scale, family-operated farms: although there are economies of scale in the processing and marketing of agricultural production, for most

¹⁸ Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food (art. 11), para. 14.

¹⁹ The World Bank, *Global Economic Prospects. Commodities at the Crossroads*, 2009 (based on evidence available up to 30 November 2008), p. 96.

crops there are no economies of scale in agricultural production. Since, in addition, family farms are much more labour-intensive, the interest of the local population may be better served, taking employment effects into account, by outgrower schemes than by the establishment of plantations operated by wage labour,²⁰ although such schemes should comply with a number of conditions outlined in the main report of the Special Rapporteur on agribusiness and the right to food (A/HRC/13/33, paras. 43–45).

19. A recent study based on large-scale land leases or acquisitions in four sub-Saharan countries notes in this regard that “the vast majority of documented projects continue to be run as large plantations based on concessions or leases. As large areas of land are commonly offered on very favourable terms, an incentive is created for establishing company-managed plantations rather than promoting contract farming approaches. Even ‘local content’ provisions requiring prioritisation of the local workforce in recruitment, common in extractive industry contracts, appear rare [...]. There is enormous scope here for governments to develop systems of incentives to promote more inclusive business models among large-scale investors”.²¹

20. Second, it is vital that high environmental standards are complied with. A number of United Nations agencies, including the United Nations Environment Programme,²² FAO and the United Nations Conference on Trade and Development, have underscored the potential of sustainable farming to meet the growth in demand.²³ Recently, the seventeenth session of the United Nations Commission on Sustainable Development adopted a resolution recognizing that “sustainable agricultural practices as well as sustainable forest management can contribute to meeting climate change concerns”, and that “sustainable soil, land, livestock, forest, biodiversity and water management practices, and resilient crops are essential”;²⁴ it also called for the creation of an enabling environment for sustainable agriculture.²⁵

²⁰ As noted by V. Songwe and K. Deininger (see footnote 13 above) referring to N. Key and D. Runsten, “Contract farming, smallholders, and rural development in Latin America: the organization of agro-processing firms and the scale of outgrower production”, *World Development*, vol. 27, No. 2 (March 1999), p. 381, in situations in which “land is less abundant, labour costs are low, and the quality of the product is a practical priority, contracts that provide producers with technical assistance and access to markets, specialized inputs and financial instruments are often preferred. This type of contract can generate substantial employment and other local opportunities, and enable farmers to manage the risks involved in producing non-traditional crops”.

²¹ L. Cotula and others, *Land Grab or Development Opportunity?*, cited in footnote 13 above, ch. III, section 3.4, p. 86.

²² C. Nelleman and others, eds., *The Environmental Food Crisis. The Environment’s Role in Averting Future Food Crises*, United Nations Environment Programme (UNEP) rapid response assessment, February 2009.

²³ See, e.g., the 2006 annual report of the Nairobi-based World Agroforestry Centre, or the 2008 FAO-UNEP report, *Organic Agriculture and Food Security in Africa*. This claim is also supported by a rapidly growing scientific literature: see, e.g., J. Pretty and others, “Resource-conserving agriculture increases yields in developing countries”, *Environmental science and technology*, vol. 40, No. 4, 2006, p. 1114; or N. Uphoff, ed., *Agroecological innovations. Increasing Food Production with Participatory Development* (London, Earthscan, 2002).

²⁴ Resolution 17/1, E/2009/29-E/CN.17/2009/19, p. 5.

²⁵ In the final declaration of the G-8 Ministers of Agriculture at their meeting in Cison di Valmarino (Italy), 18–20 April 2009, they also emphasized “the importance of increasing public and private investment in sustainable agriculture, rural development and environmental protection in cooperation with international organisations”, and the need to “tackle climate change impacts and ensure sustainable management of water, forests and other natural resources, while considering demographic growth”.

21. The development of more sustainable farming approaches is directly linked to the right to food, because of the strong link between the state of the environment and food production.²⁶ Crops are dependent on soil nutrient availability, on water (ground and surface water for irrigation), on climate and on weather (rainfall and growth season), on the availability of insects for pollination, and on the abundance and effects of certain pests, such as pathogens, insects and weeds, which have a major impact on crops worldwide, particularly in Africa.²⁷ Agricultural productivity thus depends on the services rendered by the ecosystems. Unless it shifts from being one of the major causes of climate change and soil degradation to being a net contributor to the maintenance of the environment, agricultural production will undergo significant declines in the future.²⁸ Assuming a 4.4° C increase in temperature and a 2.9 per cent increase in precipitation, it has been estimated that by 2080, global agricultural output potential is likely to decrease by about 6 per cent (or 16 per cent without carbon fertilization, the impacts of which are disputed). The decline will vary between 10 and 25 per cent across regions, but it is projected that by 2080, agricultural output potential may be reduced by up to 60 per cent for several African countries, and on average 16 to 27 per cent for others in Africa, dependent upon the effect of carbon fertilization.²⁹ It is therefore vital that, as agriculture intensifies in order to meet the growing demand for food, it does so in ways which are environmentally sustainable.³⁰

22. For these reasons, both investors and host States should cooperate in identifying ways to ensure that the modes of agricultural production respect the environment, and do not accelerate climate change, soil depletion, and the exhaustion of freshwater reserves. Depending on the circumstances and, particularly, on the local agro-ecological conditions, they may have to explore low external input farming practices as a means to meet this challenge.

IV. The rights of land users, and indigenous peoples in particular

23. In many developing countries and particularly in sub-Saharan Africa, the rights of land users are not properly secured. Much of the land is formally owned by the State, and the land users have no property titles to the land they cultivate. In many cases too, a complex combination of property rights and users' rights results in a situation in which those who cultivate the land do not own it, although they may or may not be paying rent in cash or kind or may or may not have a formal agreement with the nominal owner. This situation is the source of legal uncertainty. It also implies that land users will not have access to legal remedies, and receive adequate compensation, if they are evicted from the land they cultivate, for instance after the Government has agreed that foreign investors take

²⁶ See guideline 8E, para. 8.13 of the FAO Voluntary Guidelines on the right to food encouraging States to "protect ecological sustainability and the carrying capacity of ecosystems to ensure the possibility for increased, sustainable food production for present and future generations, prevent water pollution, protect the fertility of the soil, and promote the sustainable management of fisheries and forestry".

²⁷ Pedro A. Sanchez, "Soil fertility and hunger in Africa", *Science*, vol. 205, No. 5562 (March 2002), p. 2019.

²⁸ Yield reduction in Africa due to past soil erosion may already range from 2 to 40 per cent, with a mean loss of 8.2 per cent for the continent. See J. Henao and C. Baanante, "Agricultural production and soil nutrient mining in Africa. Implications for resource conservation and policy development", summary paper, International Centre for Soil Fertility and Agricultural Development, Alabama, USA, 2006.

²⁹ These effects are in addition to general water scarcity as a result of melting glaciers, change in rainfall patterns, or overuse.

³⁰ W.R. Cline, *Global Warming and Agriculture: Impact Estimates by Country* (Washington D.C., Center for Global Development and Peterson Institute for International Economics, 2007).

possession of the land. It is also important to recognize other use rights on land such as grazing and gathering wood, which are often critical sources of livelihood, especially for women. The rights of pastoralists in particular are generally neglected in public debates. Yet, as drylands constitute nearly half of the land area of sub-Saharan Africa, pastoralism is of particular importance for the continent: almost half of the total number of about 120 million pastoralists/agro-pastoralists worldwide reside in sub-Saharan Africa, where the largest pastoral/agro-pastoral populations (of 7 million each) are in Sudan and Somalia, followed by Ethiopia with 4 million.³¹ In this context, there is a real risk that land considered “empty” or “idle” will be sold or leased to investors, including foreign investors, without taking into account the important services it renders to the local population.

24. It is essential therefore that no eviction takes place which would not comply with human rights requirements, as clarified in general comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing (article 11 (1) of the Covenant): forced evictions, and in the basic principles and guidelines on development-based evictions and displacement presented in 2007 by the former Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living.³² These guidelines provide a practical tool to assist States and agencies in developing policies, legislation, procedures and preventive measures to ensure that forced evictions do not take place, and to provide effective remedies to those whose human rights have been violated, should prevention fail. They are based on the principle that no eviction shall take place unless “(a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the ... guidelines”.³³ They provide guidance to States and agencies about which steps need to be taken prior to, during and after evictions, in order to minimize the negative impact of evictions on human rights.

25. According to the guidelines, “In order to secure a maximum degree of effective legal protection against the practice of forced evictions for all persons under their jurisdiction, States should take immediate measures aimed at conferring legal security of tenure upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land.”³⁴

26. Individual titling is certainly desirable in many circumstances, particularly in order to encourage land-related investment, to lower the cost of credit by allowing land to be used as collateral, and to encourage more sustainable farming, particularly by the planting of trees and more responsible use of the soil and water resources. However, individual titling may not offer sufficient protection where adequate macroeconomic conditions are not present, and when smallholders risk being priced out. Unless smallholders receive adequate support, the creation of markets for property rights over land may in fact lead to distress sales by smallholder farmers facing debts, for instance after a bad harvest, or to farmers being expelled from land used as collateral to guarantee repayment of a loan, and thus result in more land concentration. In addition, individual titling is not a solution for those land users who do not cultivate the land, for instance pastoralists. It may increase the risk of conflicts rather than limiting it, if important gaps exist between customary and traditional usage rights over land and the formal rights guaranteed through titling. Individual titling

³¹ N. Rass, *Policies and Strategies to Address the Vulnerability of Pastoralists in Sub-Saharan Africa*, PPLPI (Pro-Poor Livestock Policy Initiative, FAO), working paper No. 37, 2006.

³² A/HRC/4/18, annex I.

³³ *Ibid.*, para. 21.

³⁴ *Ibid.*, para. 25.

may not protect adequately the access of local communities to common goods; as noted by the Commission on Legal Empowerment of the Poor in its final report, “In some legal cultures community-based ownership in natural resources such as grazing lands, forests, water, fisheries, and surface minerals are traditional and effective ways to grant control and proprietary rights to persons who have little or no other property. These systems should be both recognised and fully protected against arbitrary seizure.”³⁵ An alternative to individual titling may therefore be collective registration, by local communities, of the land they use, in order to ensure that the land can only be converted to new uses with their free, prior and informed consent, and that they are fully involved in any negotiation with potential investors.

27. Access to land for indigenous peoples has been given specific forms of protection under international law. Articles 13 to 19 of ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries relate to land rights. Under article 8, paragraph 2 (b), of the United Nations Declaration on the Rights of Indigenous Peoples, “States shall provide effective mechanisms for prevention of, and redress for, ... any action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories or resources.” Under article 10 of the Declaration, they are guaranteed the right not to be forcibly removed from their lands or territories, and no relocation shall take place without their free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return. Articles 25 and 26 of the Declaration, in addition, recognize the distinctive spiritual relationship of indigenous peoples with their traditionally owned or otherwise occupied and used lands, and that they have the right to own, use, develop and control these lands. States must therefore give legal recognition and protection to these lands, territories and resources, with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

28. Perhaps most relevant here, article 32 of the Declaration embodies the principle of free, prior and informed consent. Paragraph 2 provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” Indigenous peoples have often been victims of discrimination and marginalization; they have been ignored in public policies and excluded from the State. When governments enter into negotiations with an outside entity, whether private or governmental, there is a real risk that their interests and rights will not be taken into account, unless procedural safeguards are scrupulously complied with.

V. The human rights of agricultural workers

29. Among the people who are most vulnerable to food insecurity are the nearly half a billion women and men who help produce the food we all depend on: waged agricultural workers. Ensuring an adequate protection of this category of persons would constitute a major contribution to the alleviation of hunger. This is a challenge which is made more pressing by the increased investments in large-scale agricultural projects, in order to ensure food security and for the production of agrofuels. Reference is made to the challenges identified and recommendations made with regard to agricultural workers in the main

³⁵ Commission on Legal Empowerment of the Poor/United Nations Development Programme, final report, 2008, p. 65.

report of the Special Rapporteur on agribusiness and the right to food (A/HRC/13/33, paras. 12–19).

VI. The negotiation of large-scale leases or acquisitions of land and the rights of local populations

A. The right to self-determination and the exploitation of natural resources

30. In article 1, paragraph 2, of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights the right to self-determination, defined as the right of all peoples to freely dispose of their natural wealth and resources, is recognized, and both covenants stipulate that no people may be deprived of its own means of subsistence. As regards indigenous peoples, this principle is further reaffirmed by article 3 of the United Nations Declaration on the Rights of Indigenous Peoples. As recognized by the African Commission on Human and Peoples' Rights, the right to self-determination imposes on governments an obligation to protect individuals under their jurisdiction from being deprived of their access to productive resources, for instance as a result of the arrival of domestic and foreign investors.³⁶ This corresponds to what the Committee on the Elimination of Racial Discrimination refers to as the internal aspect of the right to self-determination, understood as the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. This right presents clear links with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination³⁷ and article 25 of the International Covenant on Civil and Political Rights, as well as with the rights of minorities, which are recognized in article 27 of the Covenant.³⁸ This further strengthens the principle already referred to above in section 3 according to which no people's land, including in particular indigenous peoples, can have its use changed without prior consultation.³⁹

B. The right to development: transparency and accountability in the use of revenues

31. It is essential that land leases or purchases are fully transparent, and that the revenues are used for the benefit of the local population. It would appear that, in some cases, land is leased at very low rents, or sold below market prices, or even given away against vague promises of employment creation or transfer of technology. However, while States have a right to engage in economic affairs, it is a corollary under the Declaration on the Right to Development that they should "formulate appropriate national development

³⁶ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, communication No. 155/96 (2001), para. 58.

³⁷ See Committee on the Elimination of Racial Discrimination, general recommendation 21 (1996) on the right to self-determination, para. 4.

³⁸ See, e.g., Human Rights Committee, *Chief Ominayak and the Lubicon Lake Band v. Canada*, communication No. 167/84 (CCPR/C/38/D/167/1984), final views of 26 March 1990.

³⁹ Human Rights Committee, concluding observations on the report of Sweden, 7 May 2009 (CCPR/C/SWE/CO/6), para. 20.

policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom”.⁴⁰ Development should be seen as a process which should benefit “the entire population and ... all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”.⁴¹ This requires that States ensure the adequate participation of the local communities concerned by land leases or purchases, and that the decision-making process is fully transparent.⁴² Participation is key to ensuring long-term sustainability and the success of investments.⁴³

32. The revenues gained from these agreements should serve to fulfil the rights of the population, consistent with the duty of States to “ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income”.⁴⁴ Indeed, referring to the link between foreign direct investment and the fulfilment of Millennium Development Goal No. 8 to develop a global partnership for development, the Working Group on the right to development noted that the right to development “implies that foreign direct investment (FDI) should contribute to local and national development in a responsible manner, that is, in ways that are conducive to social development, protect the environment, and respect the rule of law and fiscal obligations in the host countries. The principles underlying the right to development, as mentioned above, further imply that all parties involved, i.e. investors and recipient countries, have responsibilities to ensure that profit considerations do not result in crowding out human rights protection. The impact of FDI should, therefore, be taken into account when evaluating progress in Goal 8 in the context of the right to development”.⁴⁵ This argument is further strengthened by the obligation of all States to ensure the progressive realization of the right to adequate food, to the maximum of all available resources, as stated in article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights. In addition, the State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and the means to ensure their livelihood, including food security; it would be acting in violation of this obligation if it did not use the revenues available to move as expeditiously as possible towards that goal.⁴⁶

VII. Conclusion

33. Large-scale investments in farmland can work to the benefit of all parties concerned, but that presupposes that an appropriate institutional framework is in place. If that is not the case at the time of the investment, the arrival of large investors may in fact make it less likely, not more, that such a framework will be set up in the future, since large investors may gain sufficient influence to avoid regulation that

⁴⁰ General Assembly resolution 41/128, annex, art. 2, para. 3.

⁴¹ Ibid., preambular para. 2.

⁴² Ibid., arts. 6, para. 3 and 8, para. 2.

⁴³ See Cotula and others, *Land Grab or Development Opportunity?*, cited in footnote 13 above.

⁴⁴ General Assembly resolution 41/128, annex, art. 8, para. 1. On the human rights-based economic development which is prescribed by the Declaration on the Right to Development, see M.E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford, OUP, 2007), pp. 129–132.

⁴⁵ Report of the Working Group on the right to development (E/CN.4/2006/26), para. 59.

⁴⁶ Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food (art. 11), paras. 15–16.

could curtail the pursuit of their own interests. It is therefore vital that the negotiations leading to such agreements comply with a number of procedural requirements ensuring informed participation of the local communities and therefore adequate benefit-sharing, and that the agreements themselves take into account human rights which could be negatively impacted by such investments. Agreements to lease or cede large areas of land should under no circumstances be allowed to trump the human rights obligations of the States concerned. The host State is obliged to ensure the protection of human rights under its jurisdiction, and the investor has a responsibility to respect such rights and not to create obstacles to the State discharging its obligations under international law. Particularly where the investor is a private entity and the host State is unable or unwilling to act in accordance with its obligations, the home State of the investor must ensure that these obligations are complied with. The minimum principles listed in the annex seek to ensure that these responsibilities are met.

Annex

Minimum human rights principles applicable to large-scale land acquisitions or leases

Principle 1: The negotiations leading to investment agreements should be conducted in a fully transparent manner, and with the participation of the local communities whose access to land and other productive resources may be affected as a result of the investment agreement. In considering whether or not to conclude an agreement with an investor, the host government should always balance the advantages of entering into such an agreement against the opportunity costs involved, in particular when other uses could be made of the land available, which could be more conducive to the long-term needs of the local population concerned and the full realization of their human rights.

Principle 2: In general, any shifts in land use can only take place with the free, prior and informed consent of the local communities concerned. This is particularly important for indigenous communities, in view of the discrimination and marginalization to which they have historically been subjected. Forced evictions should only be allowed to occur in the most exceptional circumstances. They are only allowable under international law when they are in accordance with the locally applicable legislation, when they are justified as necessary for the general welfare, and when they are accompanied by adequate compensation and alternative resettlement or access to productive land. Prior to carrying out any evictions or shifts in land use which could result in depriving individuals of access to their productive resources, States should ensure that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to resort to evictions. In all cases, effective legal remedies or procedures should be provided to those who are affected by eviction orders.

Principle 3: In order to ensure that the rights of local communities will be safeguarded at all times, States should adopt legislation protecting these and specifying in detail the conditions according to which shifts in land use, or evictions, may take place, as well as the procedures to be followed. Moreover, States should assist individuals and local communities in obtaining individual titles or collective registration of the land they use, in order to ensure that their rights will enjoy full judicial protection. Such legislation should be designed in accordance with the basic principles and guidelines on development-based evictions and displacement presented in 2007 by the former Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living,⁴⁷ and with general comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing (article 11 (1) of the Covenant): forced evictions.

Principle 4: The local population should benefit from the revenues generated by the investment agreement. Investment contracts should prioritize the development needs of the local population and seek to achieve solutions which represent an adequate balance between the interests of all parties. Depending on the circumstances, arrangements under which the foreign investor provides access to credit and improved technologies for contract farming, against the possibility to buy at predefined prices a portion of the crops produced, may be preferable to long-term leases of land or land purchases, although contract farming itself should comply with the conditions set out in the report of the Special Rapporteur on agribusiness and the right to food (A/HRC/13/33, paragraphs 43–45).

⁴⁷ A/HRC/4/18, annex I.

Principle 5: In countries facing important levels of rural poverty and in the absence of employment opportunities in other sectors, host States and investors should establish and promote farming systems that are sufficiently labour-intensive to contribute to employment creation. Labour-intensive modes of production can be highly productive per hectare. Investment agreements should contribute to the fullest extent possible to reinforcing local livelihood options and in particular provide access to a living wage for the local population affected, which is a key component of the human right to food.

Principle 6: Host States and investors should cooperate in identifying ways to ensure that the modes of agricultural production respect the environment, and do not accelerate climate change, soil depletion, and the exhaustion of freshwater reserves. Depending on local conditions, they may have to explore low external input farming practices as a means to meet this challenge.

Principle 7: Whatever the content of the arrangement, it is essential that the obligations of the investor be defined in clear terms, and that these obligations be enforceable, for instance by the inclusion of predefined sanctions in case of non-compliance. For this mechanism to be effective, independent and participatory ex post impact assessments should be made at predefined intervals. The obligations of the investor should not be limited to the payment of rents, or — in the case of land purchases — to a monetary sum. They should include clear and verifiable commitments related to a number of issues which are relevant to the long-term sustainability of the investment and to its compliance with human rights. In particular, such commitments may relate to the generation of local employment and compliance with labour rights, including a living wage as far as waged employment is concerned; to the inclusion of smallholders through properly negotiated outgrower schemes, joint ventures or other forms of collaborative production models; and to the need to make investments in order to ensure that a larger proportion of the value chain can be captured by the local communities, for instance by the building of local processing plants.

Principle 8: In order to ensure that they will not increase food insecurity for the local population, particularly as the result of increased dependence on international markets or food aid in a context of higher prices for agricultural commodities, investment agreements with net food-importing countries should include a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets, and that this percentage may increase, in proportions to be agreed in advance, if the prices of food commodities on international markets reach certain levels. Appropriate support schemes may also have to be put in place to increase the productivity of local farmers, in order to ensure that they will not suffer income losses as a result of low-priced produce arriving on the local markets, which has been produced under more competitive conditions on the large-scale plantations developed by foreign investors.

Principle 9: In order to highlight the consequences of investment on the enjoyment of the right to food, impact assessments should be conducted prior to the completion of the negotiations on (a) local employment and incomes, disaggregated by gender and, where applicable, by ethnic group; (b) access to productive resources by local communities, including pastoralists or itinerant farmers; (c) the arrival of new technologies and investments in infrastructure; (d) the environment, including soil depletion, the use of water resources and genetic erosion; and (e) access, availability and adequacy of food. Only through such impact assessments, which should include a participatory dimension, can it be ensured that the contracts providing for the lease or sale of land will distribute the benefits equitably between the local communities, the host State, and the investor.

Principle 10: Under international law, indigenous peoples have been granted specific forms of protection of their rights to land. States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources,

particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Principle 11: Waged agricultural workers should be provided with adequate protection and their fundamental human and labour rights should be stipulated in legislation and enforced in practice, consistent with the applicable ILO instruments. Increasing protection of this category of workers would contribute to enhancing their ability, and that of their families, to procure access to sufficient and adequate food.
