

## Land, Business, and Human Rights

June 24<sup>th</sup> and 25<sup>th</sup> 2009, New Delhi, India

### **Context:**

This is the first of a series of consultations on the human rights challenges and dilemmas involved in the acquisition and use of land – held individually or collectively - for private or state-owned business and economic purposes. The aim of the series of consultations is to develop a framework that leads to an end of human rights abuses at any stage of the process – before acquisition, during acquisition, and after operations have commenced and, if necessary, relocation and rehabilitation arranged, and compensation paid.

This requires *strengthening and enforcing* the existing legal mechanisms; *identifying* situations in which the land acquisition should not take place; *highlighting* gaps in administration of laws, practices, and policies; and *recommending* a framework that businesses should follow as part of their land acquisition process.

The purpose of this paper is to inform and stimulate discussion for the human rights and land roundtable. Some of the questions being raised are meant to provoke a robust discussion, and there is no pre-determined outcome.

The Institute aims to organise up to three more consultations of this nature, in different cities, over the next 15 months. Possible locations include Bogota, Colombia; Lagos, Nigeria; and London, UK. The Institute would like to keep you engaged in the process over the next 15 months.

### **Objectives:**

The Institute for Human Rights and Business would like to work with the participants at the consultations over the next 15 months to arrive at insights and concrete proposals in response to a range of these realities – proposals that can enable business practices and economic growth to be informed, designed and implemented with respect for human rights. Specifically, the consultations aim to:

- Identify the key dilemmas in relation to land use for business
- Explore how a human rights approach can enhance current norms and responses
- Propose principles and concrete solutions to the issue moving forward

### **Method:**

The very nature of dilemmas is that they are bound up in diverse and often conflicting agendas, mindsets, narratives, realities, emotions, opinions and beliefs. The subject of land is no exception to this rule – in fact, it may be quintessential example of such complexity and tension. In light of this, The Institute on Human Rights and Business believes that multi-stakeholder dialogue is critical to reaching meaningful and practicable conclusions. Therefore, the two-day session will bring together thought leaders and pioneers from business, civil society, government, academia, and communities for two-days organised in three phases.

- Phase One: Reviewing, sensing and understanding the current reality
- Phase Two: Articulating shared intentions and visions
- Phase Three: Identifying and agreeing key insights, principles and potential solutions

- **Land, Business, and Human Rights: Background note on key issues**

**Background:**

Land has been an important factor in the earliest conflicts<sup>1</sup> between businesses and communities. The economic potential of land and its productive capacity have drawn traders and companies to distant locations, seeking raw materials, natural resources, available labour pool, and markets for their products. Access to land is a critical issue because land is a limited resource with multiple uses, and there are often significant differences of opinions and preferences over what to do with that resource, between various interested parties, which often include those with legitimate title to the land, those with customary ownership of the land, those who buy access to land, and the state, which often exercise eminent domain over that land. If all those differences were settled peacefully, and if the transactions and negotiations were held on terms that respected the dignity and equality of the various parties, with fair and transparent pricing, and in ways that do not undermine international standards and the law, there would presumably be no abuses related to land and human rights. History shows that that has not been the case.

Land has an emotive hold on people across all nationalities and cultures. Land offers a sense of belonging to people: national poets<sup>2</sup> have written eloquently about their land, praising its gifts; painters have captured its expanse; and troubadours have sung songs honouring land. Deepest feelings of nationalism and patriotism are rooted with land. Continued relationship with the land establishes rights. Land gets closely identified with particular groups of people, and they mark borders to establish ownership and where their claims end, and others' begin. Many countries do not allow foreigners to own freehold title to land. Some countries prevent residents of one part of the country from owning land in another part of the country.<sup>3</sup>

Humanity's relationship with land is primeval; indeed, arguably, under some interpretations, the notion of human rights is indelibly linked with property rights.<sup>4</sup> Property, from ancient times, is equated with land, although its reach and scope have since expanded, to include the physical person and intellectual property. History is replete with examples of peasants defying land-owning classes to revolt to assert their claims.<sup>5</sup> The idea of land as commons<sup>6</sup>, as public good, has resonance transcending socio-cultural differences; and according to some experts, the notion of rights originated and expanded<sup>7</sup> from an individual's ownership of a plot of land. Individual or collective, the notion of 'commons' underscores the basis of communal access, such as indigenous groups having access to a forest for food, or to a river to fish, without necessarily emphasizing ownership.

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<sup>1</sup> Litvin, Daniel: *Empires of Profit: Commerce, Conquest, and Corporate Responsibility*. (Texere, 2004).

<sup>2</sup> Some illustrative examples being Walt Whitman's 19<sup>th</sup> century collection of poems, *Leaves of Grass*, Robert Frost's poem, *The Gift Outright*, Rabindranath Tagore's song, *Amar Sonar Bangla* (My golden Bengal) which became the national anthem of Bangladesh.

<sup>3</sup> Singapore does not allow foreigners to own landed property; India does not allow people born outside the state from owning land in the state of Jammu and Kashmir.

<sup>4</sup> Cheneval, Francis, and De Soto, Hernando. *Realising Property Rights*. (Swiss Government, 2004). ISBN 978-3-907625-25-5.

<sup>5</sup> Medieval England experienced Peasants' Revolt in June 1381. To prevent revolts, the church and aristocrats fortified property, building garrisons, and surrounding castles with moats. An army of peasants from Kent and Essex marched on London in 1381 and captured the Tower of London. The Archbishop of Canterbury and the King's Treasurer were killed.

<sup>6</sup> For example, under Scottish law, common good land is land held for the common good of all the residents of that particular burgh and has its origins in the original grants of land to the Royal Burghs of Scotland. This land, held by feudal charter, was intended to provide an income for the burgh and to provide material products for the inhabitants. Over the years, private encroachment has reduced communal space, creating a different kind of conflict between communities and special interest groups.

<sup>7</sup> In *Inventing Human Rights: A History* Lynn Hunt (WW Norton, 2007) shows how property formed the early basis for granting rights, but how a more enlightened view prevailed over time, granting rights to everyone, and not only those who owned property. In *Human Rights: A Very Short Introduction*, Andrew Clapham provides a broader philosophical framework (OUP, 2008).

Indeed, rights are now universal, in that they are not restricted only to those who own land or property, and groups of people, once viewed as ‘property,’ enjoy rights. (Many groups still don’t – many societies place impediments on ownership of property by, and inheritance to, women. Some states even ban ownership by women, citing social and cultural traditions). Modern notions of individual titles on one hand, and customary interpretation of traditions, which give rights to communities, as well as socialist notions of collective rights, often clash.<sup>8</sup> And when large corporations seek access to land, public scrutiny increases, leading, in some cases, to conflict, and unless handled properly, to human rights abuses.

Ownership of land – individually or collectively – solidifies and asserts a community’s identity. Societies have developed their own rules and codes to define ownership – in many parts of the world it is based on individual property rights; in many other parts, ownership may not be codified under the law, and the land is held collectively. Some plots of land may have individual ownership, but a wider ownership may have rights to use that land for livestock grazing, access to another part of the countryside, for a range of uses.<sup>9</sup>

When colonies were established, colonial powers established their hold over the new lands they had conquered, without regard to the population that already lived there. The most glaring example of that is the doctrine of *terra nullius* (Latin for land belonging to nobody).<sup>10</sup> The claims of original inhabitants simply did not matter. Countries coveting resources in the region, and driven by the need for more “living space,” often invaded other countries. The literature about resource-driven wars shows that armed conflict within and between nations over access to resources continues. While that is not the main area of a discussion primarily focused on land, readers may wish to look at the research of Paul Collier<sup>11</sup>, and critical responses<sup>12</sup>. The notion of *lebensraum*, or living space, coined in 1897 by Friedrich Ratzel, was given greater articulation, and implemented ruthlessly, by Adolf Hitler in the last century. Some critics view businesses investing abroad – be it Chinese mining companies in Africa, western oil companies in Latin America, or Middle Eastern companies looking for agricultural land in many parts of the world, as an extension of that contentious historical phenomenon. There is a growing body of literature about “land-grab”, where agribusinesses and governments invest overseas for agricultural purposes, which has implications on the right to food and the right to adequate sustainable living.<sup>13</sup>

Besides cultural and political reasons, land matters because of its economic potential. Economists regard land as one of the four factors of production, the other three being labour, capital and enterprise, or human capital. The economic definition of land views it as an input used to produce goods and services. What determines the value of a parcel of land are the resources it contains, the potential it has, and the use to which it is put. Any parcel of land has alternate uses: agriculture, industry, residential or commercial use, public

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<sup>8</sup> Land titling is a serious issue. Some countries don’t recognize private property. Some countries don’t recognize collectively-owned property. Some countries are ambiguous about “commons” land – whether contiguous parties have ownership, or whether the state can lay claim. And some countries do not have the requisite titling laws in place, recognizing rights.

<sup>9</sup> These uses include *pasture* for livestock to graze; *piscary*, or access to fishing; *turbary*, or the right to use the turf for fuel; *common in the soil*, or the right to use sand and gravel; *mast or pannage*, or permit pigs access to acorn and other nuts; and *estovers*, or the right to use small trees or fallen branches to build a common house.

<sup>10</sup> The concept was used when settlers arrived in Australia, and case law emerged in the 19<sup>th</sup> century, with the decision in *R vs Tommy* which indicated that the native inhabitants were only subject to English law where the incident concerned both natives and settlers. The concept has since been used in Svalbard, Greenland, New Zealand, Scarborough Shoal, Canada, Antarctica, West Bank, and Western Sahara.

<sup>11</sup> Collier, Paul, and Hoeffler, Anke. *Greed and Grievance in Civil War*. Centre for the Study of African Economies, University of Oxford (2004). Abstract available at: <http://oep.oxfordjournals.org/cgi/content/abstract/56/4/563>.

<sup>12</sup> Balletine, Karen, and Sherman, Jake. *The Political Economy of Armed Conflict: Beyond Greed and Grievance*. The International Peace Academy, New York. (Lynne Rainer, 2003).

<sup>13</sup> De Schutter, Olivier (Special Rapporteur on the Right to Food) has recently published core principles, in a document called *Large-scale land acquisitions and leases: A set of Core Principles and Measures to address the human rights challenge*.

purpose (such as parks), and infrastructure (such as highways, airports, or seaports), among other uses. In the wider context of economic and sustainable development, the question of how land is acquired, used and protected is as contentious as it is fundamental.

Negotiations for ownership often occur in a context where the power equations are uneven. As we shall see below, many of the cases involving companies and communities that have blown into human rights crises have arisen because of this unevenness. Those seeking redress are concerned because they claim their specific rights have been abused.

Disputes over land – particularly involving indigenous communities and business – have led to civil society organisations and human rights groups criticizing processes and outcomes, lawsuits filed by victims under tort laws, and, (in some cases, by prosecutors using criminal law), and in some instances, strictures passed by judges. While few tort cases have come up for trial, many companies have learned the lessons of the past, and decided to perform due diligence and undertake risk analysis and impact assessments, before commencing operations, although critics question whether those assessments are sufficient for the protection of human rights.

### ***Legal Issues:***

Human rights law does not explicitly recognize the human right to land *per se*. In many parts of the world, land is “owned” by the state, which grants usage rights – in perpetuity or time-bound – to individuals or groups. In many parts some land is owned communally. But human rights are interdependent, universal, inalienable, and indivisible, and as such, the realization of many rights is closely associated with land ownership and usage, and access to land becomes a pre-requisite for certain rights to be realized.<sup>14</sup> Furthermore, to secure those rights, certain civil and political rights need protection.

Land is a limited resource and property rights include the right to exclude others, land rights grant particular privileges to one group over another, or benefit an individual over others. Those without rights to the plot of land must enter into land use agreements, for any purpose – agriculture, commercial, industrial, residential, or to develop infrastructure. In many societies, land rights are derived from the state or the sovereign. The state derives revenue from those with the right to own, occupy, or use the land in the form of rent or taxes. The state taxes transfers of ownership as well.

## **International Human Rights and Standards**

### **Universal Declaration**

Human rights law recognizes the right to property<sup>15</sup> as well as indigenous communities’ cultural and customary rights. Art. 17 of the Universal Declaration of Human Rights states:

- 1. Everyone has the right to own property alone as well as in association with others.*
- 2. No one shall be arbitrarily deprived of his property.*

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<sup>14</sup> As noted elsewhere, while the right to land is not recognized as such a whole range of rights – life, food, health, and procedural rights such as participation, non-discrimination and information – are inextricably linked with the issue of land.

<sup>15</sup> Property rights have ancient origins. Sumerian and Persian empires protected property rights. Aristotle not only advocated private property, he pointed out the “tragedy of commons,” which suggests that that which is common to the greatest number of people, is taken care of the least. In the 17<sup>th</sup> century, Thomas Hobbes, John Locke, and David Hume explored the philosophical underpinnings of property. Adam Smith wrote about the economic potential, and Frederic Bastiat, about the notion of respect and value for property.

But property ownership does not confer special rights. Art. 2 of the UDHR specifically emphasizes the non-discriminatory aspects, when it says, *inter alia*:

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, **property**, birth or other status. (Emphasis added).*

### International Covenants

Furthermore, Art. 2 and 24 of the **International Covenant for Civil and Political Rights** underscore the same non-discrimination principle, for adults and children. Art. 26 underscores *equality before law*, irrespective of property ownership.

### International Labour Organisation Conventions

Conventions of the ILO range between hard law and soft law. The articles described below underscore the importance of several key principles related to land. These are – **free, prior informed consent (FPIC), relocation, rehabilitation, compensation, return, and procedures to deal with grievances.**

The relevant Convention is C.169<sup>16</sup> concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organisation.

Art. 4 lays the basis of informed consent, when it states that:

*Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.*

Art. 7 offers protection for the indigenous community, recognizing the community's rights, even if there may not be a formal legal title of ownership:

*The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being **and the lands they occupy or otherwise use**, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, **they shall participate** in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. (Emphasis added).*

Art. 13 recognizes the idea of collective ownership:

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<sup>16</sup> More information, including a practical implementation guide, can be found here: <http://www.ilo.org/indigenous/lang--en/index.htm>

*In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of **their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.***

*The use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use. (Emphasis added).*

Art. 14 establishes for legal procedures:

*The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.*

*Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.*

*Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.*

Art. 15 sets out principles for the use of resources:

*The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.*

*In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.*

Art. 16 sets out relocation principles:

*Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.<sup>17</sup> Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.*

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<sup>17</sup> See, for example, the Roundtable on Sustainable Palm Oil and the Forest Stewardship Council, which use a consent standard and try to audit for it.

*Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.*

*When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.*

*Persons thus relocated shall be fully compensated for any resulting loss or injury.*

Art. 17 sets out principles for compensation:

*Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.*

*The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.*

*Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.*

It should be noted that one of the main areas where the equation of unequal power matters is the lack of sufficient information. Communities often face the problem economists have described as asymmetry of information<sup>18</sup> between a seller and a buyer. A market does not take into account the power equation. While a community may be numerous, it does not know the full impact of the company's operations, and the people may not realize that a large industrial project may have consequences that they cannot foresee, in terms of impact on their livelihood, making any compensation negotiation more difficult.

Finally, Art. 18 calls for penalties for unauthorized intrusion:

*Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.*

This convention is binding – as with many other conventions – on those countries which have ratified it. Twenty governments have ratified it.<sup>19</sup> While this means the convention is not “binding international law”, many governments have adhered to the spirit of the convention, including passing similar legislation. States have been reluctant to ratify partly because of their unwillingness to cede sovereign authority within their territory to a specific group. Furthermore, as the ILO's implementation guide makes it clear – as does the convention itself – the State's right of **Eminent Domain**, supersedes. Under that doctrine, the state can override ownership claims of individuals or communities, in order to undertake whatever steps it considers necessary to use the resources. But the State's activities are restrained by the key cornerstones of human rights – no arbitrariness, no force, no discrimination, and equality before law.

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<sup>18</sup> Akerloff, George. *The Market for Lemons: Quality Uncertainty and the Market Mechanism* (1970). Akerloff jointly won the Nobel Prize for Economics in 2001 for his work on information asymmetry, when one part in a transaction has more-and better-information than does the other.

<sup>19</sup> <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>

Negotiating conflicting demands, and choosing what use a plot of land can be put to, is a challenge. Disputes over such decisions are at the heart of some of the conflicts between individuals and state, the wealthy and the less well-off, owners and tenants, communities and individuals, and the principles of private ownership and profit and public purpose.

### ***The Role of Business:***

Businesses are expected to, and required to, operate within the framework of law, and many businesses aim to establish good practices as a matter of due diligence, good practice, compliance with the law, and risk mitigation. It should also be noted that as businesses lack the freedom to operate the way they want, some indigenous groups exploit their vulnerability where the administration of law and order is weak. Business executives are sometimes abducted by rebel groups claiming to represent the will of the people, and some civil society groups may not necessarily represent the interests of the communities they claim to represent. There is a great deal of diversity within communities and opinions within, just as there is a great deal of diversity of opinions and practices within business. Some armed opposition groups claiming to fight for the rights of specific groups have a poor human rights record and are not necessarily democratic; some represent political interests, including of other claimants.

Responsible companies operating in sensitive areas are aware of the context, and have put in place several policies to deal with the issues. These include:

- ⇒ Making an assessment of risks involved to the communities and to the company's operations, prior to commencing a project.
- ⇒ Assessing the social, environmental, and in some cases, human rights impact, before initiating the project.
- ⇒ Listening to communities by consulting widely, including with groups opposed to the project
- ⇒ Proceeding with the project only after settling disputes, after undertaking fair, transparent, and objective negotiations with the communities, preferably with independent supervision.
- ⇒ Disseminating of information, benefits, and the criteria applied for providing the compensation.
- ⇒ Establishing grievance procedures to ensure that disputes are detected early and settled amicably before they escalate
- ⇒ Setting up independent advisory panels to guide a project, or a stakeholder review panel to assess specific issues
- ⇒ Operating in a way that respects local customs without undermining international law.
- ⇒ Empowering local economy by creating jobs and/or by trading with local businesses.

Disputes between companies and communities arise when companies need land to build factories, develop resorts, construct shopping malls, or to explore mineral resources, and there are prior occupants on that land. Some occupants have legal titles, others have ancestral or cultural claims under indigenous practices or customary laws.

Despite the existence of international principles and law, which is often codified in the national legislation of most states that have ratified the conventions, abuses occur with painful regularity. In some cases, consultation is perfunctory, if it takes place at all. In other cases, company officials conducting the consultation are accompanied by armed guards who may have a record of abusive behaviour, making it impossible to ensure that the dialogue will be in an atmosphere free of fear. When communities believe their views are not being heard, and their right to seek, receive or impart information, or their right to participate in the political process, or demonstrate peacefully, is curbed, the community has used force, often illegally.

Some have tried preventing construction, others have protested against inadequate compensation. There are also instances where some communities have abducted company officials or workers, in some cases ill-treating them and abusing their rights, to advance their fight with the company. Often, the state has responded with force, destroying the community's property and homes, displacing them forcibly from their land. Some companies have benefited from the state or paramilitary forces using to displace people against their will. Demonstrators have been beaten up, jailed, and sometimes disappeared or killed.

The statistics are grim. According to Indian experts, the number of people displaced from their homes to make way for development projects or private sector use since India's independence in 1947 ranges between 40 million<sup>20</sup> and upto 55 million<sup>21</sup>. The World Commission on Dams<sup>22</sup> provides similar sobering reading. Global statistics are not available, but the sheer scale of economic activity in areas where vulnerable communities live, indicates that the lives of hundreds of million people have been affected adversely over the past century.

Unresolved disputes between companies and communities lead to further conflict. Companies, keen to implement their projects, have often negotiated with one set of interlocutors, ignoring another set which antagonizes those being ignored, causing friction. This sounds easier than it really is. Companies making sincere effort to identify the right interlocutors often find themselves in a maze of individuals and sub-groups claiming to be the more authentic representatives, as has often happened in the Niger Delta. Companies have often recruited trained and qualified anthropologists to lead such negotiations and find it hard to distinguish between competing claims. Some companies have chosen to adhere to international principles and laws regarding non-discrimination, and find that they are dealing with a social order that either perpetuates social inequities, or one in which particular groups – such as women, minorities, or elderly – are not allowed a voice. Some impacted groups may be hunter-gatherers, without land-title, who gather communally only seasonally. This is when companies feel tempted to turn to external interlocutors to facilitate a dialogue, where different agendas can emerge.

Reliance on the state or private security forces to deal with the more complicated aspects of seeking consent, acquiring land, and resettling people vitiates the atmosphere further. Providing benefits in a discriminatory manner to some and not others have also contributed to increasing the distrust between companies and communities. Urban beautification, too, becomes a reason to evict slum-dwellers. There are many such instances around the world. An Indian Supreme Court judgment, discussed later, provides some jurisprudence. One illustrative example of civil society groups citing the judgment is the slum eviction in Makoko, in Lagos, Nigeria.<sup>23</sup>

Some recent examples of disputes between companies and communities over access to land and resources include:

- The decade-long conflict between U'wa community and oil companies in *Colombia*. In this case, Occidental Petroleum (US)<sup>24</sup> wished to explore oil in Colombia, in a region where the indigenous community, U'wa, lived. The community argued against oil industry activities. Its leaders said oil

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<sup>20</sup> Chakravarti, Sudeep. *Red Sun*, Penguin, 2007.

<sup>21</sup> Roy, Arundhati. *The New American Century*. Speech at the World Social Forum, India, 2004. <http://www.commondreams.org/views04/0122-14.htm>.

<sup>22</sup> Report accessible at: <http://www.dams.org/>

<sup>23</sup> <http://asiapacific.amnesty.org/library/print/ENGAFR440012006>

<sup>24</sup> Waldman, Peter. "U'wa Chieftains carry eco-fight to doorstep of corporate America" *The Wall Street Journal* June 7, 1999. Available at: <http://www.hartford-hwp.com/archives/41/index-mkba.html>.

was “the blood of mother earth,” and if it was extracted, their land would lose its vitality, and their lives would cease to have a meaning. They threatened to commit mass suicide. The company decided to suspend operations there after the community objected, but Ecopetrol, Colombia’s national oil company, is now exploring ways of operating there in a conflict-sensitive way.

- In *Peru* and *Ghana* Newmont Mining has been in dispute with local communities which have protested against mining. Newmont decided to constitute an independent review panel comprising civil society groups and independent experts. In the latter case, the company is working with local groups to arrive at a mutually-satisfactory solution.
- In *Colombia*, the coal mining company Cerrejon (jointly-owned by Anglo-American, Xstrata, and BHP-Billiton) inherited a poorly-administered and implemented resettlement<sup>25</sup> of a community (Tabaco) from the time of its erstwhile owner (Exxon) but has now established a review panel to provide redress to affected communities.
- In *Canada*,<sup>26</sup> First Nations and oil companies and mining companies have had major disputes in the past; over the years they have built a level of trust and credibility to work effectively with one another in some cases.
- In *Bosnia-Herzegovina*, ArcelorMittal had obtained rights to operate a former iron ore mine in Prijedor,<sup>27</sup> but there was a controversy because of persistent allegations that the mine was used during the Balkans wars of 1990s as a mass grave by Serb forces. Following NGO representations, the company safeguarded the disputed area and operates in more neutral territory.
- In *Sudan*, the controversial Merowe dam<sup>28</sup> has placed local communities in dispute with a consortium of companies over allegations of forced displacement and the use of force. ABB, the Swedish-Swiss firm, decided to close its operations in Sudan. Its work included providing supporting infrastructure for the power transmission lines.
- In *Nigeria*, the Ogoni community has been in dispute with Shell and other oil companies operating in the Niger Delta.<sup>29</sup> In 1995, the crisis turned critical after Ken Saro-Wiwa and eight of his colleagues were executed after a trial that failed to meet international standards, during the rule of the dictator, Gen Sani Abacha. The Delta remains violent, with workers being abducted, and security using disproportionate force.
- In *India*, the Tata Group has had two recent challenges in eastern India – first in Kalinganagar,<sup>30</sup> where a tribal group opposed the iron and steel company’s plans, and had a violent altercation with the police force. Then, in neighbouring West Bengal state, in Singur,<sup>31</sup> where the company had hoped to build a plant for the world’s cheapest car, local groups opposed the project, claiming force was used in land acquisition, and inadequate compensation was paid. The state government used force and in the violence that followed, several people reportedly lost their lives. The Tata Group decided to move the project to another state.
- In *India*, in West Bengal, the government faced allegations of human rights abuses over the treatment of local communities which objected to a major petrochemical project Indonesia’s Salim group<sup>32</sup> wanted to set up.
- In *India*, POSCO, the Korean steel company,<sup>33</sup> has faced problems with the local community, whose activists have abducted POSCO workers. The immediate provocation was settled; POSCO claims it has made over 60 adjustments to its plans since they announced it.

<sup>25</sup> <http://www.icmm.com/page/11959>

<sup>26</sup> As an example, see Platinox’s dispute with Kitchenuhmaykoosib Inninuwug First Nation (KI)

<http://www.nationtalk.ca/modules/news/article.php?storyid=2566>

<sup>27</sup> See *Behind Closed Gates*, Amnesty International (2006). <http://asiapacific.amnesty.org/library/Index/ENGEUR630032006?open&of=ENG-BIH>

<sup>28</sup> See UN Global Compact’s case study here: [www.unglobalcompact.org/data/ungc\\_case\\_story\\_resources/doc/EF5ECE7A-C772-4A60-A3C1-458CC74D5765.pdf](http://www.unglobalcompact.org/data/ungc_case_story_resources/doc/EF5ECE7A-C772-4A60-A3C1-458CC74D5765.pdf)

<sup>29</sup> For Shell’s version of events, see [http://www.shell.com/home/content/nigeria/about\\_shell/issues/ogoni/ogoni.html](http://www.shell.com/home/content/nigeria/about_shell/issues/ogoni/ogoni.html). For other versions, see

<http://www.business-humanrights.org/Search/SearchResults?SearchableText=shell+ogoni+nigeria&x=0&y=0>

<sup>30</sup> [http://news.bbc.co.uk/2/hi/south\\_asia/4686638.stm](http://news.bbc.co.uk/2/hi/south_asia/4686638.stm)

<sup>31</sup> <http://www.hindustantimes.com/FullCoverage/FullCoverage.aspx?Special=tata-singurrow>

<sup>32</sup> <http://www.hindu.com/2007/01/11/stories/2007011104511200.htm>

- In the Philippines, indigenous communities have objected to gold mining projects planned by international investors<sup>34</sup> citing violation of religious and cultural rights.
- Large dams constructed in Asia – Narmada in *India* and Three Gorges in *China* – have led to massive displacement of population, often using force.
- In the *United States*, the Supreme Court ruled in a case<sup>35</sup> involving private property owners and a town that wanted to develop a large shopping center and office complex, that the state could override the claims of property owners to permit a project, where the definition of “public purpose” was expanded to include commercial ventures. In *India*, companies prefer the state to acquire land for their ostensibly commercial projects, such as Special Economic Zones.

There are examples of good practices and legal remedies, such as:

- In *Indonesia*, the Tangguh<sup>36</sup> project of BP has been commended by many experts for a well-executed rehabilitation programme.
- In *India*, the Supreme Court ruled, in the 1985 *Olga Tellis* case,<sup>37</sup> that the State must provide alternate accommodation when it forcibly evicts slum-dwellers. In this case, the slum-dwellers were being evicted as part of urban beautification.
- In *Canada*, impact-benefit agreements<sup>38</sup> have often been cited as innovative approaches in dealing with the issue of land policies. These agreements are the result of an extended negotiation process, and lay out how the relations between the company and the community will continue, provide for community monitoring, establish grievance mechanisms, and are transparent about information, significantly reducing the risks of open conflict.

As can be seen in these illustrative examples, the range of industries involved is wide, encompassing oil, mining, automobiles, petrochemicals, infrastructure, irrigation and power, and iron and steel. With land being acquired for SEZs, the scope is limitless; even services would fall under the purview.

### ***The right approach***

As seen earlier, the interplay of land and human rights shows many rights being affected, including:

- The right to property
- The right to adequate standard of living
- The right to seek, receive and impart information
- The right to participate in political processes
- The right to demonstrate peacefully
- The right against discrimination
- The right against arbitrary detention
- The right against forced displacement
- The right against torture

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<sup>33</sup> <http://www.ibtimes.co.in/articles/20071117/posco-south-korea-steel-mining-orissa.htm> provides information about the project. For causes of the dispute, see [http://www.thesouthasian.org/archives/2005/signing\\_away\\_orissa\\_the\\_posco.html](http://www.thesouthasian.org/archives/2005/signing_away_orissa_the_posco.html)

<sup>34</sup> [www.boell.de/downloads/economysocial/Intensified\\_imperialist\\_mining\\_growing\\_peoples\\_resistance\\_Philippines\\_Sept2008.pdf](http://www.boell.de/downloads/economysocial/Intensified_imperialist_mining_growing_peoples_resistance_Philippines_Sept2008.pdf)

<sup>35</sup> <http://www.law.cornell.edu/supct/html/04-108.ZS.html>

<sup>36</sup> <http://www.business-humanrights.org/Links/Repository/790236>

<sup>37</sup> [http://www.escr-net.org/caselaw/caselaw\\_show.htm?doc\\_id=401006](http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401006)

<sup>38</sup> See Sosa, Irene, and Keenan, Karyn. *Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada*. Canadian Environmental Law Association (2001). Available at: <http://www.cela.ca/publications/impact-benefit-agreements-between-aboriginal-communities-and-mining-companies-their-use>

- The right to express opinions freely
- The right to housing
- The right to food
- The right to work

Even though, as noted earlier, there is no specific, codified “right to land”, it is clear that “land” includes a very broad range of rights which the state has the primary obligation to protect, and companies have the responsibility to respect.<sup>39</sup> Most instances of human rights abuses have occurred when the duty-bearers have not lived up to their responsibility.

One way to understand the issues is to separate them into three baskets where rights are at risk. These are:

**ACCESS:** People want *access* to land and resources, whether they have customary rights or legal title to the land. Industrial or agro-industrial use of land, possessing land for infrastructure or other public purposes, and acquiring land for employment generation programmes leads to the state or business taking over land from current occupants. The issue of access is nuanced. A company taking over land from previous owners, users, and occupants is one issue. Many companies prefer that because it allows them full control of the area. But companies often co-exist with communities – an issue Occidental Petroleum and Ecopetrol faced in Colombia, at the La Cira Infantas oil concession.<sup>40</sup> Furthermore, a company’s activities may affect land-related rights of communities around the company, as the Niger Delta experience shows.

**DUE PROCESS AND DIGNITY:** Poorly-designed processes – whether consultation, negotiation, contract allotment, or rehabilitation – often violate due process and other procedure-based rights. They also undermine the dignity of communities. To enforce those contracts, force is often used, leading to violence, and at times, deaths. For many indigenous and rural populations, land is the only tangible asset they have, and they do not see it as tradable commodity.

**ABUSE:** Companies that pollute land, which erect fences and set boundaries without taking into account the community’s needs, are being insensitive to human rights, if not abusing them. Forced displacement, and other uses of force by security forces compound the problem. International law is clear in highlighting activities which could make a company complicit in grave violations of international law.<sup>41</sup>

While the law provides some clarity about what are the obligations of the state and responsibility of companies regarding force and forced displacement, in many cases, human rights protection is limited, if not non-existent. Enforcement is often poor, leading to companies operating as though they are in a law-free zone. Such conditions offer an advantage to companies less familiar with, or less willing, to operate in a way that respects human rights. Here, to paraphrase the Ruggie framework<sup>42</sup>, the state is unwilling or unable to *protect* rights, the companies may not *respect* rights, and there is no *remedy* in sight.

The sheer range of disputes, questions, and possible solutions, reveal the magnitude of the problem and the urgent need to arrive at an equitable, rights-based framework. The need is critical because the ambiguities,

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<sup>39</sup> Ruggie, John. "Protect, Respect and Remedy: a Framework for Business and Human Rights". Report of the Special Representative of the UN Secretary-General. Presented to the UN Human Rights Council, June 2008. Available at <http://www.business-humanrights.org/Documents/RuggieHRC2008>.

<sup>40</sup> See Angulo, Luis Fernando, and Rivas, Angela. Presented at the roundtable.

<sup>41</sup> See the Red Flags guide – [www.redflags.info](http://www.redflags.info).

<sup>42</sup> "Protect, Respect and Remedy: a Framework for Business and Human Rights". John Ruggie, Special Representative of the UN Secretary-General. Presented to the UN Human Rights Council, June 2008. Available at <http://www.business-humanrights.org/Documents/RuggieHRC2008>.

the likelihood of abuses in certain contexts, and the risks companies inevitably face from violence, litigation, and consumer boycotts, in some fragile contexts, responsible companies have stopped operating altogether. Conflict zones are a prime example. This has led to what economists call the *adverse selection* process, whereby countries with poor administrative capabilities and strife end up receiving investment from companies that are not as committed to responsible behaviour, or come from countries which do not have robust civil society movements holding them accountable.

Aware of this, the International Finance Corporation has created an elaborate set of safeguards policies<sup>43</sup> which requires its borrowers to follow certain procedures. While the IFC safeguards are “state-of-the-art”, civil society groups say those safeguards do not go far enough. And while the IFC remains a major provider of finance for projects in the developing world, with the increased role of non-traditional financial sources, such as sovereign wealth funds, private equity, and investments from emerging economies, the role the IFC can play as a standard-setter, gets limited, unless its standards become universal and required.

Questions for further consideration and reflection are:

1. **No-go areas:** What are the contexts in which an acquisition must not go ahead? What are the no-go areas? Is there a need for developing guidelines beyond the “Red Flags” guide for no-go areas?
2. **Consent vs Consult:** Is the company expected to seek free, prior informed consent or consultation? What constitutes consent? Is it a simple majority of a community? Two-thirds majority?
3. **Free expression within communities:** How does the company deal with a situation where a substantial part of the community may not have the right to express opinion freely, or vote? (Examples include the elderly, minorities, and women).
4. **Gender-sensitivity:** How can the consultation process be made more gender-sensitive? (Many societies grant property rights to “the head of the household,” typically men, leaving the women out of the equation).<sup>44</sup>
5. **Divisions within a community:** How does the company negotiate the gap when some community members support the project and others oppose it?
6. **Potential remedies - ILO:** Does the ILO Convention 169 provide adequate remedy? How do the guarantees under the convention square with the Doctrine of Eminent Domain?
7. **Potential remedies - law:** To what extent does the Bhagwati<sup>45</sup> ruling of the Indian Supreme Court provide jurisprudential precedence<sup>46</sup>? Can the State prevail over a community’s refusal to let a project, citing the Doctrine of Eminent Domain?<sup>47</sup>
8. **Potential remedies – rapporteurs:** Do the principles on displacement<sup>48</sup>, as prepared by the Special Rapporteur for the Right to Housing, provide a framework for companies to deal with the situation? Do the principles on land acquisition, as prepared by the Special Rapporteur on the Right to Food, provide a framework for companies to deal with the situation?
9. **Potential remedies – assessments, stakeholder panels:** Does the BP-Tanggung model provide a framework? Have stakeholder panels – Cerrejon and Newmont being two recent ones – been effective?

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<sup>43</sup> <http://www.ifc.org/ifcext/policyreview.nsf/Content/Home>

<sup>44</sup> For a detailed analysis, see: [www.unhabitat.org/downloads/docs/1556\\_72513\\_CSDWomen.pdf](http://www.unhabitat.org/downloads/docs/1556_72513_CSDWomen.pdf)

<sup>45</sup> [www.escr-net.org/usr\\_doc/Decision.doc](http://www.escr-net.org/usr_doc/Decision.doc)

<sup>46</sup> <http://www.indiatogether.org/opinions/rhousing02.htm>. Also see

<sup>47</sup> <http://straylight.law.cornell.edu/supct/html/04-108.ZS.html>

<sup>48</sup> Implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled “Human Rights Council” Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari A/HRC/4/18 (2007).

10. **Beyond-the-box solutions:** Can companies operate under a new paradigm, where the ownership resides with the community, and the community gets access rights and pays a royalty or annuity, to the community, on a leasehold basis? Can access rights (for companies) be auctioned, to ensure the optimal outcome for the communities?
11. **The state – regulator, facilitator, enforcer?** Should the state play any role in land acquisition on behalf of a company? Should companies use the state as an intermediary?
12. **Conflict sensitivity:** What best practices are available for companies to operate in a conflict-sensitive way?

***The way ahead:***

There is no convenient, off-the-shelf formula that can be applied to manage the process. The challenge before us is to help create one.