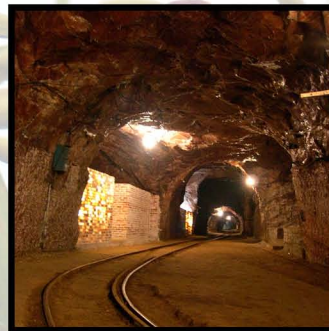


Preventing Conflicts over Land:

Exploring the role of business and the value of human rights approaches



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Draft Position Paper
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1. BACKGROUND

The Institute for Human Rights and Business convened a consultation on the theme of land-business, and human rights in Manesar, outside New Delhi, on June 24-25, 2009. The 25 participants were selected to represent a cross-section of opinion and experience on human rights issues relating to land and business, from within and outside India. Participants included lawyers, human rights experts, business executives, civil society representatives, and other experts, including a writer, an economist, and activists.¹ The meeting was held under the Chatham House Rule² and the discussions were frank and open.

The report below does not purport to be an exhaustive report of the meeting. Rather, it sets out the key issues regarding the contentious issue of land, business, and human rights; raises questions that require further thinking, reflection, and deliberation; and suggests recommended steps. In keeping with the Institute's methodology, there will be more convenings of this nature at other locations in 2010, and at the end of 18 months, in early 2011, the Institute will publish its completed findings on the subject. Views will evolve and grow as the process unfolds. The time-bound dialogues will be supplemented by research projects and ongoing interaction among a global network of individuals from business, civil society and governments. Towards that end, the Institute will soon create a discussion group on its website, which will be open to those who participated in the meeting in India as well as future participants in the process and others who express an interest and wish to be engaged in dialogue on this subject.

An iterative process

Significant gaps in global and national governance result in companies sometimes operating in places without clarity regarding their responsibilities. With governments often abdicating their obligations, companies find themselves acting in some cases in roles, which should be played by the State, without accountability, mandate, expertise, or authority. There is a clear need for governments to carry out their duties but business must also improve its practices so that human rights protection is not undermined. Arriving at shared understandings of what such practices should include is difficult but progress can be made through sustained dialogue and an iterative process which unfolds over time and involves all relevant actors. The Institute for Human Rights and Business seeks to support such a process concerning the issue of land acquisition. The Institute comes to this subject with no pre-conceived position beyond acknowledging the supremacy of the law where it is clear, and wishing to promote best-practices, which are consistent with international human rights standards and principles. This pragmatism allows the Institute to be driven and directed by those who engage in the process. The guiding principles of the Institute's working methods can be found at its website, www.institutehrb.org.

2. INTRODUCTION

Business, civil society, and governments have a common interest in developing a framework that prevents human rights abuses at all stages of business' relationship with land – before acquisition, during acquisition, and after operations have commenced and, if necessary, concerning appropriate relocation, rehabilitation and compensation.

¹ This paper is based on the two-day consultation the Institute for Human Rights and Business organized at Manesar in India, with Partners in Change. It is drawn from the dialogue and reflections at the meeting and extensive consultations with participants. In particular, the Institute thanks the contributions of Mark Hodge, Wambui Kimathi, and Amy Lehr.

² "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed". Source: See <http://www.chathamhouse.org.uk/about/chathamhouserule/>

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

The challenge is huge. Land ownership laws around the world are highly complex. Some countries permit individual ownership, others do not. Some countries allow land titles for particular periods; others grant certain rights in perpetuity. In almost all countries, the state reserves the right, under the doctrine of Eminent Domain, to acquire land for public purpose. The definition of “public purpose” is often context-specific. Some countries recognise the rights of indigenous people and prior occupants (whether or not indigenous), but laws are ambiguous about respecting those rights over the rights of other claimants.

Land has economic value. Its economic potential and productive capacity have drawn traders and companies to distant locations, seeking raw materials, natural resources, available labour pool, and markets for their products. Governments have an interest in making productive use of land. Businesses are interested in the economic potential and opportunities that land represents. Individuals and communities live on the plot of land in which the State and companies have an interest because it contains natural resources, or is located near a highway, or where it might make economic sense to set up a factory. If the land under consideration contains natural resources, the state claims sovereign rights to those resources, and allows economic actors, such as companies, the right to exploit those resources under certain conditions. If that plot has other strategic uses – such as creating infrastructure or building a manufacturing plant that could create jobs – the State wants to take over the plot for “public purpose”. But in many cases, there are communities living on that land, in some cases for many generations, who wish to continue living there, or have differing views on how that plot of land should be used and how benefits from it should be shared.

3. THE CONFLICT OVER LAND:

Conflict over land-use arises because land has alternative uses, alternative values, and alternative significance. Indeed, land has been an important factor in the earliest conflicts³ between businesses and communities. If all those differences had settled peacefully, and if the transactions and negotiations had taken place 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, then presumably there would have been 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 poets⁴ 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 the idea of land – countries are called “motherland” or “fatherland” with reason. People establish rights over land through Continued relationship. People identify closely with land, and they mark borders to establish ownership and territory, or where their claims end, and others’ begin. So rooted is the notion of land with nationhood, that 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.⁵

Humanity’s relationship with land is primeval. Some thinkers, notably economists, assert that the notion of human rights is indelibly linked with property rights.⁶ History is replete with examples of peasants defying land-owning

³ Litvin, Daniel: *Empires of Profit: Commerce, Conquest, and Corporate Responsibility*. (Texere, 2004).

⁴ Some illustrative examples being Walt Whitman’s 19th 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.

⁵ Singapore does not allow foreigners to own landed property; India does not allow people born outside the state from owning land in the state India calls Jammu and Kashmir.

⁶ Cheneval, Francis, and De Soto, Hernando. *Realising Property Rights*. (Swiss Government, 2004). ISBN 978-3-907625-25-5.

classes to revolt to assert their claims.⁷ The idea of land as commons⁸, as public good, has resonance transcending socio-cultural differences; and according to some experts, the notion of rights originated and expanded⁹ 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.¹⁰

Human rights are no longer restricted to those who own land or property, and the historical inequity of slavery (and its modern forms), under which groups of people are viewed as 'property,' and hence lacking rights, have ended in most parts of the world – indeed, slavery is now considered a crime against humanity. But inequities abound: Many societies place impediments on women's right to own or inherit property, citing social and cultural traditions.

Land ownership – individual or collective - solidifies and asserts a community's identity. Even individually-held plots of land could have a range of collective uses.¹¹ There is often a clash between 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, on the other hand.¹² Emerging Inter-American jurisprudence shows the interlinking of individual and collective rights such that they are not opposed to one another, but interdependent.¹³ In the *Saramaka* case of 2007 dealing with Suriname, the Inter-American Court held:

“Furthermore, in analyzing whether restrictions on the property right of members of indigenous and tribal peoples are permissible, especially regarding the use and enjoyment of their traditionally owned lands and natural resources, another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members. That is, under Article 21 of the Convention, the State may restrict the Saramakas' right to use and enjoy their traditionally owned lands and natural resources only when such restriction complies with the aforementioned requirements and, additionally, when it does not deny their survival as a tribal people.”¹⁴

⁷ 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.

⁸ 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.

⁹ 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).

¹⁰ A new Indian law codifies those rights. While Britain recognizes land titles, it has the so-called “right to roam” which allows people access through private land in the countryside.

¹¹ 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.

¹² 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.

¹³ Inter-American Commission on Human Rights, *Report 75/02, Case 11.140. Mary and Carrie Dann. United States*, December 27, 2002, para. 128 (observing that “continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples”)

¹⁴ The Inter-American Court of Human Rights in the *Saramaka* Case, judgment of Nov 27, 2007.

The power asymmetry between State and communities, between private economic interests and individuals or groups, often becomes the determining factor in shaping the land ownership dilemma. The use of power was most blatant during the colonial era, when imperial powers established their hold over new lands without regard to the rights, aspirations, or claims of the population that already lived there, as with the doctrine of *terra nullius* (Latin for land belonging to nobody).¹⁵ Countries coveting resources in the region, and driven by the need for more space even invaded other countries. The literature on war economies 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 Collier¹⁶, and critical responses¹⁷ it has evoked. The notion of *lebensraum*,¹⁸ was given greater articulation, and implemented ruthlessly, by Adolf Hitler in the last century. Some critics view businesses investing abroad – be they Chinese mining companies in Africa, western oil companies in Latin America, or Middle Eastern state-connected 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.¹⁹

Beyond these 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. Land’s value is determined by the resources it contains, the potential it has, and the use to which it is put. As noted earlier, any parcel of land has alternate uses: agriculture, industry, residential or commercial use, public purpose (such as parks), and infrastructure (such as highways, airports, or seaports) being among them. 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.

Land negotiations often occur in a context where the power equations are uneven, and that asymmetry has led to human rights abuses in many instances. Disputes over land – particularly involving indigenous communities and business – have led to civil society organisations and human rights groups criticizing processes and outcomes, and victims have filed suits using tort laws. While only a few tort cases have passed pre-trial scrutiny and negotiations, some 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 sufficiently robust and rigorous to protect human rights. While many of the processes companies follow today constitute “best practices,” the legacy of past conduct by other companies, and the cumulative impact on human rights over a long record of abuses committed by others (or even the same company) in the past, has led to a huge distrust between communities and companies. The asymmetrical nature of power relationships does not make the process any easier. This is why, when large corporations seek access to land, public scrutiny increases, leading, in some cases, to conflict, and unless handled properly, to human rights abuses.

¹⁵ The concept was used when settlers arrived in Australia, and case law emerged in the 19th 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.

¹⁶ 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>.

¹⁷ Balletine, Karen, and Sherman, Jake. *The Political Economy of Armed Conflict: Beyond Greed and Grievance*. The International Peace Academy, New York. (Lynne Rainer, 2003).

¹⁸ Literally, “living space,” a term coined in 1897 by Friedrich Ratzel.

¹⁹ 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*.

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 information²⁰ between a seller and a buyer. Markets do not take into account the power equation – the typical economic response to one party becoming too powerful is to expect competition, in the form of other parties getting involved, lowering costs and prices. In the land context it would mean if one large company tried to buy a particular plot of land and if it was getting a good deal, other companies would also stake a claim, improving the deal for the community. But that assumes that the community wants to sell. And it also assumes that companies won't collude (and if they do, the State would regulate). But what happens when the State and the company are working together? Who will guard the guardian? Markets assume companies will play by the rules, and when some companies don't, other players will find out about it, and factor it in the price – and cost – of doing business with such companies. But that logic does not serve the interests of communities which are not part of the market economy, or do not wish to be part of it. It should also be noted that not everyone in a community has a unified view of what the group wants – the human rights discourse of land, communities, and companies, assumes that everyone within a community has identical needs. That is often not the case: some in the community may wish to leave the community, sell their plot of land, and move elsewhere, in order to realize other rights, which a group-based solution fails to provide. Be that as it may, this reinforces the need for companies to act with great care and sensitivity, and for an effective regulatory framework to be in place to protect rights – property as well as all other human rights.

Certain aspects of communities need further reflection. Despite its proximity, a community does not necessarily 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, such as impact on their livelihood, which makes any compensation negotiation more difficult.

Furthermore, the idea of realizing the economic potential of land sometimes clashes with those who do not subscribe to the idea of economic development and growth as being of prime importance, preferring alternative lifestyle of subsistence. Even if a community is aware that its subsistence lifestyle is not sufficient to realize all rights, it may have well-founded reasons to be suspect of any change, due to past behaviour of other companies. While economic growth certainly generates wealth that improves the aggregate economy, it is by no means certain that the growth is shared evenly, or that the specific community might benefit. And while human rights law does not call for equal distribution of wealth or growth, the friction and tensions caused by uneven distribution can have human rights consequences. The rights of the poor are more likely to be violated, than the rights of those who are better off.²¹ Respect for human rights is based on equal access and non-discrimination; in practical terms it means equal opportunities. Even if outcomes may not be equal, opportunities must be. But the asymmetric nature of the relationship between the state or companies on one hand, and communities on the other, complicates the context further.

The extraction of natural resources – oil, gas, and mining – has commanded considerable attention in the area of business and human rights, but other businesses – tourism, manufacturing, infrastructure projects, power plants, public highways, irrigation projects, and even urban office complexes and supermarkets require land. Different rights-holders involved in each case, and different industries have approached their human rights contexts and challenges differently. Some companies prefer to be at the front-end of negotiations with the affected parties and want to keep governments out of the process; others prefer governments to acquire land for them. The impact on human rights is felt much before business operations begin – even when a company expresses its intention to develop a project in a particular area, there are human rights implications, because of raised expectations within a community, leading to divisions and competitiveness within the community which can – and have – sometimes turn violent.

²⁰ 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.

²¹ Khan Irene, *Unheard Truths*. (WW Norton and Amnesty International, 2009).

The right to access the land is not restricted by a narrow interpretation of property rights. The rights-holders have human rights, which may not include land-ownership rights, partly because some countries do not recognise individual property rights, and partly because some people may not have legal title to the land on which they live or work, but may have customarily done so for years, if not generations. That aspect has huge significance for the landless and other rights are also involved. It affects those with land rights, and those who work on the land, such as sharecroppers, and those who use land seasonally, such as pastoralists or informal businesses common in many parts of Africa. These groups often correlate with those that are already the most vulnerable groups in society (e.g. due to gender, caste or age discrimination). Their not owning property rights does not mean they do not have rights – as has been found in Latin America and India, it is difficult to rely on official maps outlining land ownership.

4. LAND RIGHTS: THE HUMAN RIGHTS CONTEXT

Human rights are interdependent, universal, inalienable, and indivisible. The range of rights involved in the context of land acquisition²² is wide. 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.²³ Furthermore, to secure those rights, certain civil and political rights require protection. While there is no specific, codified “right to land” under human rights law, 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.²⁴ Human rights law does not explicitly recognize the human right to land *per se*.

Businesses increasingly operate across borders. National laws and jurisdictions vary; in such contexts companies often struggle with practices in order to reconcile international law, their own codes of conduct, and national practices. Often, their codes are based on aspirations, representing ideal situations or principle-based approaches. Frequently there is consensus among diverse nations that can help build momentum towards strengthening international law.

The rights identified in the draft paper the Institute had prepared for the convening in India in June, 2009 are illustrative, and not exhaustive, and those rights are:

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

²² For a detailed study of the law, readers are encouraged to look at the papers prepared for the New Delhi consultation, in particular the Institute’s background paper and the legal analysis of Elisabeth Wickeri and Anil Kalhan.

²³ 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.

²⁴ 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>.

- The right to food
- The right to work

Applicable International Human Rights and Standards

Universal Declaration of Human Rights and International Covenants

Human rights law recognizes the right to property²⁵ 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.*

Property ownership does not confer special rights. Art. 2 of the UDHR specifically emphasizes this non-discriminatory aspect, 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).*

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

The Declaration on the Rights of Indigenous Peoples (2007)

The UN General Assembly passed the Declaration in 2007, with 143 votes in favour, four against, and 11 abstentions. At the Human Rights Council, 30 voted in favour, two against, 12 abstained, and three countries were absent at the vote. The Declaration sets out individual and collective rights, including on matters of education, health, culture, language, and identity, aims to prevent discrimination and promote participation, and recognizes their right to pursue development as per their traditions. A declaration is not binding law, but represents "dynamic development" of international norms in directions that reflect the commitment of the UN's member-states.

The Declaration emphasizes sustainable development, and challenges the way the global economy functions. Key provisions of the Declaration relevant for land-related issues are:

- **Free Prior and Informed Consent:** (Art. 10, 19, 28 and 29): The provisions require that indigenous peoples should be consulted in all matters that affect them, with sufficient time and information, so that they can make an informed decision about the proposed activity on their territory, without any force being used against them.
- **Indigenous Development:** (Art. 32): This article affirms the indigenous peoples' rights to set their own priorities. Commentators have noted that if indigenous communities so desire, their sustainable farming methods may take precedence over larger agricultural projects.
- **Collective Indigenous Land Rights** (Art. 26): This article upholds the indigenous peoples' claims to their territories and resources "to own, use, develop, and control" their lands, territories, and resources.

²⁵ 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 17th 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.

International Labour Organisation Conventions

Articles in ILO Conventions 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.

ILO Convention 169²⁶ concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organization includes the several important references, outlined in Annex I.

As with other conventions, this convention is binding on those countries, which have ratified it. As at July 2009, only 20 some governments have ratified it.²⁷ While this means the convention is not “binding international law”, many governments have adhered to the spirit of the convention, by passing similar legislation. There may be several reasons why states have not ratified the conventions – some states may have more progressive laws in place than what the convention requires. Some states may be 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 clear – as does the convention itself – the State’s right of Eminent Domain, supersedes the ILO convention. As noted earlier, 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 human rights experts and corporate executives agree that the State’s activities are restrained by the key cornerstones of human rights – no arbitrariness, no force, no discrimination, and equality before law. Some companies believe that even if the state acquires land legally under its own laws, and that it has followed its understanding of consent, good corporate conduct requires that the company should operate in a particular space only if it is welcome by the local community, and it has the “social licence to operate.” Disregarding community concerns can only cause problems for the company in the longer run.

Negotiating conflicting demands, and choosing what use should be made of a plot of land, 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 potential of conflict and the vulnerability of people sharpen the need to look at the human security aspects of this issue inasmuch as it brings together human rights and development paradigms.

Questions requiring further reflection with regard to rights and rights-holders:

- ❖ This section identifies a range of rights affected by land. Is the list comprehensive?
- ❖ Does the discourse on property rights provide a useful framework? Is it appropriate to view the situation through the property lens? Would a fully-fledged private property regime result in more equitable land acquisition and use? If desirable, is such a regime possible in practice? When might a shift to land titling be helpful, and when might it harm the poor?
- ❖ What is the relative relationship and importance of the right to property and the right to housing regarding evictions related to business activity?

²⁶ More information, including a practical implementation guide, can be found here: <http://www.ilo.org/indigenous/lang--en/index.htm>

²⁷ <http://www.ilo.org/ilolex/cgi-lex/ratfice.pl?C169>

5. GENERAL DILEMMAS & QUESTIONS REQUIRING FURTHER EXPLORATION:

Free, Prior and Informed Consent (FPIC)

Ongoing engagement with the community is a critical element of achieving and maintaining informed community consent. In fact, informed consent probably cannot exist without ongoing engagement. Ongoing engagement, however, can exist without consent. Business and civil society need to seek agreement regarding whether there are different project milestones at which point formal consent needs to occur. There should be provisions in the process to deal with sudden, unexpected, and significant changes to the project, which may require renewed consent.

Given the state's right to eminent domain, there is some confusion over the meaning of FPIC – does the “C” stand for “consent” or “consultation”? There is growing realization among progressive companies that even if law only requires or permits “consultation” and not “consent”, the company is better off with the agreement of communities, for longer term conflict-free relations with the community. Recent experience also suggests that when the consensus is forced, it sows the seeds of future conflict. At the same time, there is no general agreement regarding what constitutes consent.

The “I” needs to be given as much weight in every situation. How are information asymmetries being dealt with? How is the right to information legislated for and protected by the state in various jurisdictions? What grievance mechanisms are in place in cases of misrepresentation or silence on material facts? What essential facts are necessary for a decision to be informed? When the state does not provide some critical information, should the company do so? Are there processes, such as jointly run impact assessments and monitoring and grievance mechanisms that can ensure the community is regularly informed (and believes the facts it is given)?

Are there good practices or standards regarding the nature and form of information dissemination and communication e.g. local languages, visual maps etc, that can be made applicable more widely?

Information dissemination and seeking consent take time and affect the project's schedule. Are there examples of what investment and time this takes, whether carried out by the state or private actors? How does this relate to time-scales predicted and expected by states?

When does a community's refusal become non-negotiable? Do communities have the right to veto? Can a community revoke the consent?

When and why might companies want to seek consent of the people whose land is being acquired?

Economic growth and industrialization

Economic growth is necessary – but not sufficient in itself - for the alleviation of poverty and the realization of many economic and social rights. The nature of growth and the model of economic development can influence and/or determine approaches to land and outcomes of contestation. How do competing approaches in terms of industry (agricultural, infrastructure, utilities, extractives...) and scale (large, medium, small) fare with regards to realization and abuse of rights relating to land?

Ongoing discussions regarding sustainability and climate change add a new layer of nuance and contestation to the nature of growth models pursued and the way land is used, as well as the way industries operate. Related is the use of water and concerns about long-term cross-generational soil depletion and reduced biodiversity. Human rights implications of these activities may not be clear, but forward-thinking businesses need to factor those concerns in their calculations.

Companies have often acquired land beyond their immediate needs. Such land remains unused. Communities which have given away their rights resent such corporate practices, considering some practices predatory and hostile. Are there objective and transparent ways in which the amount of land needed can be calculated? Several activists have argued that companies should limit the land they use and therefore acquire only so much land as is necessary for their foreseeable needs. Is there any human rights basis for that argument? How can such decisions be made in a rights-consistent way?

Attitudes to land and ownership

In many cases specific sites have spiritual and cultural relevance. Identity dynamics are also involved. Traditional modes of earning livelihood – farming, fishing, hunting – may be affected because of economic activity planned in the area. These traditional activities should not be ignored. Nor should they be given disproportionate significance because those are rarely the sole interests of an individual or a community in relation to land. There are examples of creative coexistence of projects and communities²⁸, as well as shifting holy sites and revised transportation plans.

Companies need to recognize, however, that the issue is not only about monetary compensation and negotiations. The issue involved is often that of human security and vulnerability in the face of sudden, transformative change with sociological consequences.

Is it possible to consider alternative models and language to deal with the situation? Instead of acquisition and ownership, is it possible to build a new model of co-ownership, joint stewardship, and trusteeship, which may dramatically reduce, and perhaps even eliminate, human rights abuses? Do such models exist²⁹? Can the community “own” part of the project and derive returns from it on a consistent basis, through the lifetime of the project?

How is the land being returned at the end of the project?

International human rights law

It is critical to note the distinction between legality and legitimacy. Not all countries have ratified the relevant UN and ILO conventions. Effective implementation is an even more complicated matter. This creates tension between local and national laws, as well as national laws and international norms or laws.

- ❖ What role do customary laws and local approaches play in this regard? Should the human rights community be focusing on only international and “modern” structures?

Some international instruments, like the UN Declaration on the Rights of Indigenous Peoples look to traditional decision-making structures. But there are several instances where traditional structures conflict with human rights in areas such as non-discrimination.

²⁸ Zandvliet, Luc, and Mary Anderson: *Getting It Right: Making Corporate-Community Relations Work* (Greenleaf, 2009)

²⁹ One illustrative example is the profit-sharing agreement between the Xstrata Nickel company and Makvik Corp., an entity representing the Inuit community, to share the profits from the Raglan mine in the Nunavik territory of Northern Québec. Yearly profit-sharing is part of the Raglan Agreement, a comprehensive agreement signed in 1995 by the Raglan operation and Makivik and local Inuit communities. The agreement supports the harmonized relations and fostering of opportunities between Xstrata Nickel and local populations and their representatives in areas such as training, hiring of local businesses and environmental management.

Different roles and inherent tensions regarding national, regional and local governments

Companies have to negotiate the differences in the approaches of local, regional, and national governments. There may be times when an approach consistent with international human rights standards would require that a company may have to act in a way that supports a local community, or a local government, against claimed national interests.

- ❖ Can – or should – companies help build states’ capacity to update and maintain transparent land records?
- ❖ What skews the land acquisition process is the fact that business can, and does, resort to state assistance to complete the acquisition process. How can it be ensured that the state acts in ways that meet their primary obligation, of protecting human rights?
- ❖ As regional standards may vary, a mapping exercise is necessary to identify African³⁰, Inter-American and European human rights standards with regard to land-related issues, as well as other applicable national standards.

Two other aspects need to be noted. There have been cases in which companies have waited for the state to acquire land, then stepped in to commence operations, and claimed no responsibility for the way the state may have acted earlier. In other instances, companies have acted showing a greater degree of respect for human rights when the government is absent or unwilling/unable to intervene, and attempted to perform certain functions, which should have been carried out by the state. But that generates its own cycle of expectations from communities, which bypass the state.

- ❖ What lessons can be drawn from regional agreements such as those being discussed in East Africa, and how to avoid the pitfalls of poorly-thought inward investment schemes, as in Australia, Ghana, and India?

Power dynamics, pre-existing land claims and conflict

As noted earlier, there is an imbalance in power between the state, companies, and communities. This creates asymmetries that have human rights consequences.

Given the history of mistrust and insecurity, communities often feel that the only way they can ensure their interests is by withholding consent. Communities’ insecurity can be exaggerated, and in some instances, exploited by other political actors.

Some communities may feel resigned to their fate, and surrender their rights, aware that they have limited leverage. Corporate intervention on communities’ lives may appear paternalistic. How can companies avoid that, so as to minimize resentment? At the same time, how can companies – and the state – insist upon non-negotiable international standards (such as non-discrimination principles within the community)?

³⁰ At the 13th meeting of the African Unions’ Heads of Government, Africa’s leaders decided to review their land sectors with a view to develop comprehensive policies taking into account their peculiar needs; to build human, financial, and technical capacities to support policy development and implementation; and take iterative steps outlined in the Framework and Guidelines for Land Policy in Africa.

- ❖ How can companies balance the tension between individual and collective rights? In several instances, individuals within a community may wish to leave the area to secure better futures for them elsewhere. What is the basis of requiring that communities should be kept together at all times?

Issues and human rights abuses around land can pre-date the attempt to acquire and use land for new purposes. Special attention should be given to the relationship between land and conflict and vice-versa. A rigorous conflict impact assessment is often essential.

In some conflict-affected areas, the notion of “territory control” adds a different dimension, in that those in control of the territory may not legally own the land.

Misalignment of policies and practice within companies and with external groups

Companies need to “join up” their departments, so that those acquiring land, designing the project, maintaining security, and those working with communities, as well as CSR experts and public affairs professionals, work together. Companies should identify the corporate functions which should be engaged in this issue.

There is a subsequent lack of learning within companies (and across industry) when problems are dealt with and resolved, and a lack of investment/retention of community engagement skills. Different departmental agendas and targets often result in consultation and community engagement taking place too late in the process e.g. much after business planning, feasibility, and exploration stages.

There is also cultural and linguistic misalignment between companies and external stakeholders (in particular communities).

There is often tendency among company executives to have dialogue with friendly community leaders, leading to dividing communities and sowing seeds of conflict. The work of Collaborative for Development Action, International Alert, and Monkey Forest Consulting, should inform this part of the work.

In order to prevent conflicts that cause human rights abuses, the following steps are essential as pre-requisites.

- Map the full diversity of perspectives and areas of contention;
- Articulate critical questions and fault-lines;
- Identify circumstances under which the state can legitimately acquire land;
- Identify processes which are necessary for the state to take land legitimately;
- Identify situations under which business should walk away from an acquisition process because it does not meet basic human rights standards;
- Establish minimum acceptable compensation practices from a human rights standpoint;
- Set up best-practices;
- Establish circumstances under which people’s consent is essential.

6. SPECIFIC DILEMMAS & QUESTIONS RELATING TO LAND ACQUISITION:

Eminent Domain

The state has the right to take over land for public purpose. While states have used this doctrine usually to build highways, power plants, irrigation projects, and other major infrastructure development projects, lately states have begun acquiring land for commercial ventures. In India, the state acquired land for the construction of an automobile factory; in the United States, the state took over private property for the construction of a retail and office complex because it would create jobs.

There is no clarity and alignment about the idea of “public good” from a human rights perspective. At the time of an emergency the state has the legitimate right to acquire private property – disaster relief and armed conflict are obvious examples, but there are other public purposes for which the state does acquire land.

- ❖ Are there ways to distinguish legitimate activities for public good versus purely economic activities?
- ❖ What constitutes the public? The public is not a homogenous block, but a population with competing interests. Who creates the definition of “public” and “public purpose”? How is this currently played out in different countries?
- ❖ What actions taken in the name of “public purpose” or for “public good” constitute practices unacceptable under human rights law?
- ❖ How does the application of the eminent domain doctrine differ in countries in different regions of the world?
- ❖ What sort of due process should be used before eminent domain is exercised? And when it is exercised, what sort of notice and support must be given to those evicted, looking at this from a human rights perspective?³¹

Compulsory Acquisition

The doctrine of Eminent Domain allows the state to acquire land for public purpose. Given that:

- ❖ When can the state legitimately take over land?
- ❖ What processes are necessary for the state to take land legitimately?
- ❖ Are there circumstances under which business should withdraw from a project because the state is not meeting its minimal human rights responsibilities with regard to the taking over of land?

The process of land acquisition

One observation often made in the context of land acquisition is that while the majority of a community may agree to the negotiated price, a minority may hold out, either because of unwillingness to move, or to get a better price. How real is this problem? How have companies dealt with that situation? Does the last seller get an unfair advantage over others who have voluntarily sold their land?

- ❖ How different are the problems and processes in dealing with individual owners versus collective ownership?

Resettlement

- ❖ Does Amartya Sen’s “freedom as development” approach, which interlinks rights and argues for empowerment to claim rights, help clarify the rights-based approach?
- ❖ Are there examples of good resettlement practices, where communities are better off, or in the same situation as they were before resettlement? What has worked, and what hasn’t?

³¹ See for example *The Guidelines on Forced Eviction* – UN SR Right to Housing.

Compensation

The fundamental problem with compensation is that there is usually a lack of clarity regarding the way the compensation is calculated and the way it is awarded, as well as a lack of transparency about who gets what compensation. While there are privacy issues regarding naming individuals and the amount of compensation they may have received, it should be possible for companies to make the criteria of awarding compensation (as indeed contracts and recruitment policies) to be transparent and in the public domain.

- ❖ What are the minimum acceptable compensation practices for a human rights standpoint?
- ❖ What are the best practices? Do the World Bank policies offer an appropriate starting point?
- ❖ Can the UN Protect-Respect-Remedy Framework for business and human rights be applied in this regard?
- ❖ With whom should compensation negotiations take place? Who represents the community, and how do companies negotiate the difficult terrain of competing interests within a community, so that they do not end up reinforcing existing discrimination?
- ❖ How do companies deal with the impact of opportunistic migration?

On what time-scale and scenario should “adequate” be defined? Should definitions of what is adequate take into account macro economic trends and sustainability of livelihoods? The guiding principles are the SRSR framework, Sen’s doctrine of empowerment, and human security.

- ❖ How effective are income restoration plans? Is land-for-land a workable proposition?

7. PRACTICAL GUIDANCE

This document has sought to set out the diverse range of issues relating to land, business and human rights. It is important at this stage to explore and deepen conceptual clarity, and in light of the dilemmas raised above, begin the process of preparing mutually-reinforcing and consistent sources that can help create a body of concrete, practical guidance for business. This section highlights some considerations related to such a resource.

Purpose and process

- ❖ Further guidance should prescribe normative practices but not simplify the areas of contestation and difficulty;
- ❖ It should contain clear operational requirements under some well-defined operational categories for companies;
- ❖ Guidance for business needs to reflect the views and ideas not only of business but also governments, communities or affected groups, human rights and corporate lawyers, NGOs, minority and indigenous groups, civil society organisations, academics, and other experts.
- ❖ Any such effort should not “reinvent the wheel” and should build on existing good practice materials (See Appendix)

- ❖ Any emerging set of baseline expectations and guidance should also be supported with evidence of best practices.

Once minimum standards regarding when governments can exercise eminent domain are identified, the guidance note should help companies identify practices where they should do more. This includes in the areas of compensation, recruitment, contract awards, and consultation on a non-discriminatory basis, among other issues. It should also clarify no-go zones, as, for example, the Red Flags do, in the context of operating in high-risk zones.

In addition it may be desirable to assist in developing guidance for the state in exercising eminent domain for economic/commercial purposes. Human rights and civil society communities too need to improve engagement strategies with business and government. The role of national human rights institutions should be explored in this regard. The capacity of civil society in monitoring consent processes, mapping land usage, supporting grievance mechanisms, supporting the community constructively during the grievance process with technical and negotiating advice, should be strengthened. How civil society participation can be funded also needs fresh thinking, given that many civil society organizations do not accept funding from companies and/or governments.

Furthermore, the Institute is exploring work in three specific areas, which it is hoped will provide further clarity on these issues. These are:

- * An interdisciplinary, cross-sectoral consultation on “free, prior, informed consent”
- * A background paper to understand the notion of eminent domain, in order to clarify its implications with regard to business purposes, and
- * A policy brief on whether the idea of “public purpose” includes commercial usage of land, and if so, under what circumstances.

8. APPENDICES: RESOURCES AND PRESENTATIONS

In the coming weeks, on the Institute will develop an online portal supporting participant interactions, discussions and a shared resource library. Please share other relevant materials with us.

PRIMARY READING

- ❖ Land, Business and Human Rights by Salil Tripathi;
- ❖ Human Rights as Property Rights by Frances Chenneval;
- ❖ Land, Business and Human Rights, The Indian Context by Rwitika Bhattacharya and Smita Singh;
- ❖ Land/Territory, Business and Human Rights by Luís Fernando de Angulo, Centre for Sustainability of Strategic Sectors and Ángela Rivas Gamboa, Fundación Ideas para la Paz
- ❖ Land and Human Rights Law by Elisabeth Wickeri (Fordham University) and Anil Kalhan (Drexel University);

PRESENTATIONS

- ❖ UN Basic Principles and Guidelines on Development-based Displacement and Evictions from Miloon Kothari;
- ❖ Challenges, Dilemmas and Opportunities Roundtable on Land and Human from Luc Zandvliet;

FURTHER READING

- ❖ Red Flags: Liability Risk for Companies Operating in High Risk Zones by International Alert and Fafo;
- ❖ Summary: The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises;
- ❖ Women's Rights to Land and Property by Marjolein Benschop, Legal Officer, Land & Tenure Section, UN-HABITAT;
- ❖ Extractive companies and Conflict: an overview Prepared for Newmont Mining by International Alert, December 2007;
- ❖ Interview with Frances Chenneval, Commission for Legal Empowerment for the Poor (chair of Working Group on Property Rights);
- ❖ "If He Asks Me to leave this place, I WILL Go" the challenge to secure equitable land rights for rural women by Robin Nielsen;
- ❖ Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge by Mr. Olivier De Schutter, UN Special Rapporteur on the right to food.

ANNEXE: Articles of ILO C. 169 and how that applies to land-related issues

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:

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 legal procedures:

The rights of ownership and possession of the peoples concerned over the lands, which they traditionally occupy, shall be recognized. 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.³² 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.

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.

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

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

³² See, for example, the Roundtable on Sustainable Palm Oil and the Forest Stewardship Council, both of which use a consent standard and attempt to audit for it.