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NCHR OCCASIONAL PAPER SERIES

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INVESTMENTS AND LAND RIGHTS

*The role of the private sector in ensuring
responsible governance of tenure*

*Based on an international seminar held at NCHR on 13 June 2016, hosted by FoHRC -
Food, Human Rights and Corporations, and FIAN Norway*



Norwegian Centre for Human Rights Occasional Paper Series

About

The NCHR Occasional Paper Series is an open publication channel reflecting the work carried out by the Centre as a whole on a range of human rights topics. It is published on an irregular basis, with contributions in both Norwegian and English from NCHR's researchers, guests, master students, and the various international programmes and thematic working groups.

The objective of the Series is to provide an insight into the work carried out at the Norwegian Centre for Human Rights, and disseminate it both internally and externally. It provides a forum for NCHR's staff and students to publish relevant papers in a freely accessible format. Its scope includes activity reports, thematic reports, conference/seminar papers, master theses, reflective essays or reports on completed projects. The papers are published by submission or invitation.

The papers are published in the name of the author, and their views do not necessarily reflect those of the NCHR.

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The content of this publication can be cited as long as the author and source are specifically cited.

PREFACE

On 13 June 2016 a seminar titled “Investments and Land Rights – the role of the private sector in ensuring responsible governance of tenure” - was held in Oslo, arranged by the interdisciplinary research and action network Food, Human Rights and Corporations (FoHRC) and FIAN Norway.

This was not a typical academic seminar focused on producing academic publications – just as important was to engage with government and civil society, bringing attention to, and learning about the issues raised. In this publication we are proud to present a number of short essays developed from the workshop presentations. They are introduced by Aksel Tømte, who moderated the morning session and here sets the stage for the issues concerned, and also briefly reviews the various contributions to this publication

The programme for the seminar is attached at the end of the publication.

FoHRC is pleased to have the opportunity of utilising the Norwegian Centre for Human Rights Occasional Paper Series (OPS) to offer interested readers this selection of theoretical analyses and practical experiences regarding investments and land rights, in the context of the UN Guiding Principles on Business and Human Rights (UNGPR) and their promotion of the responsibility of the corporate sector to respect such rights.

A similar collection will be published in NCHR OPS from the second FoHRC-FIAN seminar in 2016 (held on 8 December), on “Human Rights and Healthy Diets: Does the food related industry have a responsibility to respect the human right to adequate food and diet-related health?”

FoHRC and FIAN Norway hope these publications will generate interest in an important interdisciplinary field.

Wenche Barth Eide
Coordinator, FoHRC



**Norwegian Centre for Human Rights
Occasional Paper Series**

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Conservation boundary is discussed among members from RKIPN – Rays of Kamoethway Indigenous Peoples and Nature, Myanmar



Farm products from rice farms in Kamoethway, Myanmar

INTRODUCTION

Aksel Tømte, *Head of Business and Human Rights, Norwegian Centre for Human Rights, University of Oslo*

After the global rise in food prices from 2005, there has been increased investment in agriculture globally, leading to increased demand for land. Proponents of such investments point to development and economic growth, and claim that investments are necessary to increase agricultural productivity, and thus strengthen food security. Yet many have voiced concerns about the social and environmental impacts of such investments. Similarly, extractive industries, such as mining and oil extraction, also require large areas of land. These industries can contribute to economic growth and development, yet in many countries they have a history of creating conflicts with local population over land and natural resources. As corporations gain control over increasingly large areas of land, accusations of ‘land grabs’ have become more common.

Weak tenure governance in many of the countries investments are taking place, are underlying these problems. Many places, small-scale farmers and forest dependent people make claims to the lands they traditionally have been living off, but the legal status of these claims is not resolved. Other problems of tenure governance are related to corruption, low transparency and participation, or low capacity of the legal system to correct injustice when it occurs. Land investments often take place in rural areas where civil society is less organized, education levels are lower, and the government agencies has lower capacity to carry out its functions, compared to the national average.

Responding to concerns such as these, The Voluntary Guidelines on responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) was endorsed in 2012 by the Committee on World Food Security after a long process of negotiation. The VGGT aims to eradicate hunger and poverty, support sustainable development and enhance the environment. The VGGT was widely welcomed by a range of different actors, including human rights organizations.

In the work of implementing the VGGT, some actors have put their attention to how corporate entities can align their operations with the VGGT. One of these is the Interlaken Group¹. This informal network consists of leaders and representatives from some very large companies (including Coca-Cola, Rio Tinto and Unilever), some well-established NGOs, (Oxfam, Global Witness, Rights and Resources Initiative, The Forest Trust, Landesa and Forest Peoples Programme), the World Bank’s International Finance Corporation, and the UK’s development

¹ Other actors that have published similar guides include USAID and the G7 New Alliance for Food Security and Nutrition in Africa.

agency DFID. Interlaken group have developed toolkits for companies, that provide practical operational advice on how companies can make their operations in line with the VGGT.

Some examples of what this entails in practice concern: 1) mapping of legitimate tenure rights; 2) grievance mechanisms; and 3) human rights impact assessments. These examples will be briefly discussed below.

Perhaps the most crucial issue concern mapping of legitimate human rights. In many countries, there are customary land claims that are not formally acknowledged by the state, although these claims may locally be perceived as legitimate. For companies operating in such contexts, it may seem necessary to map local land claims in order to avoid infringing upon them. The Interlaken group's guide offers comprehensive and practical advice on how companies can go about mapping such claims.

Another example concerns the setting up of grievance mechanisms. In context where land grabs are taking place, the formal justice systems are often difficult to assess, and public trust in them may be low. Grievance mechanisms set up by companies may arguably be able to respond faster to the issue at hand.

Yet another example concerns impact assessments. Interlaken Group advises companies to conduct social and environmental impact assessments, that include an assessment of the positive and negative impacts that the investment will have on tenure rights, food security, livelihoods, and the environment.

For all these examples, the advice offered by Interlaken group seem in line with the second pillar of the United Nations Guiding Principles on Business and Human Rights, which concerns corporate responsibility to respect human rights, and the third pillar, concerning the provision of remedies. The guiding principles stress the importance of corporate due diligence to avoid causing or contributing to human rights abuse. Impacts assessments are a part of this. (While the UN Guiding Principles especially mentions 'human rights impacts assessments' the terminology used by Interlaken group is 'social and environmental impact assessment', but they are both considered part of corporate due diligence). Mapping of local land claims can also be seen as constituting a part of due diligence. The setting up of corporate-led grievance mechanisms is also specifically mentioned in the UN Guiding Principles.

Yet strong criticism has been directed towards the guides focused on the role of the private sector in implementing the VGGT. Allegedly, these guides mixes up the roles of states, who draw their legitimacy from the people they represent, and companies, who represent the interest of their stakeholders. I will elaborate on this criticism using the above mentioned examples.

While the guide encourages companies to take a leading role in the mapping of 'legitimate' tenure rights, what constitutes 'legitimate' tenure rights is an issue of much controversy, an issue that lies at the core of a number of land conflicts between companies and local communities. No

matter how many ‘safeguards’ that are in place (and Interlaken’s guide contains quite a few), the driving corporate incentive is still to make a profit, a fact which arguably undermines companies’ abilities to act as neutral facilitators. According to the critics ‘Nothing would be more harmful to the recognition and protection of the legitimate tenure rights of marginalized groups than entrusting the very investors that are seeking to get control over their lands, fisheries and forests with such a task, as the guides suggest.’²

Concerning the establishment of grievance mechanisms, critics claim that companies very often have vested interests related to the complaints that may be issued, and that ‘reality shows that powerful investors are often involved in serious abuses against human rights such as forced and violent evictions, killings, arbitrary detention and harassment of communities and people. It is obvious, then, that entrusting the very parties involved in directly or indirectly committing such human rights offences will never provide justice. Also, allowing this to happen formalizes the capture of the state by capital and vested interests’³.

Concerning the conduct of impact assessment, critics point out that while the guides contain advice on how companies should conduct such assessments, the VGGT states that such assessments should be carried out by independent parties⁴. Due to their clear economic interests, companies do not fall into this category. While Interlaken Group advice that ‘companies should hire independent experts to conduct social and environmental impact assessments’, one can question the extent to which experts employed by companies will remain truly independent in matters where the company concerned has a vested interest.

The guides have also been accused of transforming natural resources ‘from a human rights issue into a matter of business’ and ‘imposing a non-existent partnership between corporations and communities’⁵

Addressing these topics, the morning session of the seminar in Oslo asked the question: When states fail to provide adequate rights protection to farmers and forest-dependent communities, should companies be encouraged to take on that role?

This question implies that ideally, the state should take responsibility to uphold human rights, including by protecting against abuse from third parties – such as corporations. The obligation to protect is a fundamental principle of international human rights law, based on a range of treaties and also reflected in the first pillar of the 2012 United Nations Guiding Principles on Business

² See press release of December 10, 2015, signed by 42 organisations, available on: <https://viacampesina.org/en/index.php/main-issues-mainmenu-27/agrarian-reform-mainmenu-36/1933-the-guidelines-on-the-responsible-governance-of-tenure-at-a-crossroads> (last accessed February 10, 2017). The statement is also attached at the end of this publication.

³ Ibid.

⁴ para. 12.10 of the VGGT

⁵ For more elaboration on this criticism see footnote 2 above

and Human Rights. If states around the world managed to carry out this obligation in a satisfactory manner, the need to speak about corporate responsibility would be much weaker. However, the question also implies that protection against corporate abuse in relation to tenure is weak in many part of the world. Thus, what is actually asked is how to best relate to this non-ideal situation.

The afternoon session was about ‘The impact of land and forest investments on food security and small-scale farmers – how to ensure meaningful consultation and participation?’

The following contributions have been developed based (for the most part) on the presentations given at the seminar, reflecting the diverse backgrounds and viewpoints of the participants.

Paul Wisborg and **Aksel Tømte** advocate a human rights approach to questions related to large-scale transnational land acquisition and discuss the VGGT in this perspective. The article elaborates on how land acquisitions and accompanying investments can be analysed and re-designed to aim for the realization of human rights along four axes: governance, fairness of process, justness of outcomes, and development trajectories that can fulfil human rights.

Hans Morten Haugen provides an overview of the legal norms related to the concept of Free, Prior and Informed Consent – a concept originally applied to indigenous peoples, that have been widening in scope, and very much needed to protect human rights when land investments are made.

Henry Thomas Simarmata argues that in spite of the obvious links between tenure governance and food security, internationally the two topics have been discussed in different fora that have been largely disconnected from each other. Further he stresses the importance of the ‘binding’ nature of state obligations under human rights based treaties, as opposed to the ‘voluntary’ guidelines issued under FAO.

Knut Olav Krohn Lakså claims that, in relation to land-demanding investments, the business case for responsible behaviour is strong. While many past CRS-initiatives have been criticized for merely being a marketing strategy, Lakså believes this is changing.

Elin Cecilie Ranum outlines the history of land investment in El Salvador, Guatemala, Honduras and Nicaragua. She finds that agrarian reform initiatives have failed to break the deep injustices inherent in the land ownership structures of these countries. The emergence of food-processing industries favour the existing elites. Further, the tendency to prioritise development of crops for export favour the elites over small scale farmers, and reduces food security.

Frankie Abreu, Director at the Tenasserim River and Indigenous Peoples’ Network (TRIP NET), presents an example of community conservation by the indigenous Karen people from the Tenasserim region in Myanmar.

NOT FREE FOR THE TAKING: A HUMAN RIGHTS APPROACH TO TRANS-NATIONAL LAND ACQUISITIONS

Poul Wisborg, *Associate Professor and Head of Department of International Environment and Development Studies, Noragric, Norwegian University of Life Sciences*, and **Aksel Tømte**

Abstract

Global capitalist expansion is transforming the distribution and governance of agricultural land. This expansion brings opportunities for increased investments and production but may come at the expense of local resource rights, human rights and even social and political stability. Land and human rights have a diverse and complex interface that calls for further normative analysis and policy development. In this synthesis of former work, we advocate a human rights approach to questions related to large-scale transnational land acquisition and discuss the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Security (VGGT) in this perspective. Under such an approach, land acquisitions and accompanying investments can be analysed and re-designed to aim for the realization of human rights along four axes: governance, fairness of process, justness of outcomes, and development trajectories that can fulfil human rights. The challenge of moving from conflict and dispossession to rights-based development processes requires new forms of interaction between states, communities, investors and civil society.

The text is based on the article “Human Rights Against Land Grabbing? A Reflection on Norms, Policies, and Power”, published in the *Journal of Agricultural and Environmental Ethics*, 2013. It is included here to frame the discussion of recent developments concerning business, land acquisitions and human rights.

Land and Human Rights

Human rights is undoubtedly our most comprehensive set of global norms, potentially a “common standard of achievement.”⁶ Agreements to lease or cede large areas of land should under no circumstances be allowed to trump the human rights obligations of the States concerned.⁷ Land and human rights are interconnected in a potentially fortuitous and reinforcing relationship, meaning that human rights based policies; governance and practice promote equitable and secure land tenure which, in turn, strengthens various human rights, such as the rights to employment, livelihood and food. Human rights therefore provide normative standards that could be used to evaluate the processes and outcomes of transnational land acquisitions.

⁶ Universal Declaration of Human Rights 1948

⁷ UN Special Rapporteur on the right to food 2009: 33

Human rights have been applied to land in various contexts—for example when confronting a history of racist dispossession in South Africa,⁸ examining the rights to food and water⁹ considering a human right to property,¹⁰ or collective land tenure.¹¹ Human rights perspectives have in various ways informed civil society critiques of land acquisitions.¹² A variety of recent policy initiatives related to issues of land governance have evoked human rights, most centrally through the consultation and negotiation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests concluded in 2012. However, direct application of human rights by states in their governance of transnational land acquisition remains limited.

In responding to problems associated with transnational land acquisitions, commitment to voluntary norms—codes of conduct, principles of responsible agricultural investment or voluntary guidelines—do not in themselves secure necessary action and change. Applying human rights approaches requires analysis of the material conditions, power relations and political processes to determine whether and how human rights accountability for large-scale, land acquisition can be ensured.

Four dimensions of the interface between land and human rights may be discerned —governance, fair process, just outcomes, and development. Human rights based governance promotes equitable and secure tenure to land; land transactions can be based on rights to fair process; equitable and secure tenure promotes the enjoyment of human rights; if combined and applied with contextual sensitivity and a long-term perspective, these could be used to advance a human rights based development.

Human Rights Based Land Governance

A governance system based on human rights would imply a number of fundamental protective, supportive and democratic institutions in land governance. According to the Universal Declaration of Human Rights (UDHR 28), everyone has a right to an institutional order that protects human rights and, one may safely assume, such an order would contribute to the security of land tenure. Human rights ban discrimination on the basis of, among others, race, colour, gender, and religion (UDHR 1, 2, 7); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD 1, 2); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW 1). Land governance must promote racial equality (UDHR 1, 3, 7; ICERD 1, 2; African Charter on Human and Peoples' Rights (ACHPR) 2, 4, 5) and gender equality (CEDAW 1, 3, 5, 14, 14.2; ACHPR 18.3). Reducing discrimination due to gender, marital status, age, ethnicity, or poverty will increase the tenure security for vulnerable

⁸ Sachs 1990; RSA 1996

⁹ Hellum 2001

¹⁰ van Banning 2002

¹¹ Wisborg 2006

¹² Wisborg 2013

groups and individuals. Supportive measures are also required: The state must support land tenure and governance, for example through education (UDHR 26.1, ACHPR 17), vocational training (CEDAW 10a) and equal access to public services (International Covenant on Civil and Political Rights, ICCPR 25c; ACHPR 13, CEDAW 10–15). Finally, the diverse bodies and processes of land governance must fulfil the democratic rights and principles that are guaranteed in human rights (including UDHR 2, 21.1; ACHPR 3, 9, 10, 11, 13; ICCPR, 26).

It follows from the governance perspective that a human rights approach to land investments and development needs to address and cope with inequality between, as well as within, nations. Reflecting the anti-colonial context in which they were produced, the international covenants of 1966 do indeed share a pivotal commitment: “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence” (ICCPR 1.2, and similarly International Covenant on Economic, Social, and Cultural Rights, ICESCR 1.2). It is reasonable to read here an obligation on the part of global actors, including investors and funding agencies, towards independent nation states, and these states’ obligations to the peoples on their territories. Furthermore, ILO Convention 169 advances the land rights of “indigenous and tribal peoples” (14, 15), bans removals (16), and asserts the right to consultation (17) – placing these rights in the context of the particularly important role that land plays for cultural and physical autonomy. Also central for the protection of peoples and social groups is the right of all individuals to practice their culture, which includes values, norms and practices of land tenure, when and in so far as this culture is consistent with other human rights (ICCPR 27; ILO 169: 8, 12, 14, 15, ICESCR 15).

Whereas ILO 169 enjoyed rather narrow support, in 2007 143 member countries adopted the United Nations Declaration on the Rights of Indigenous Peoples (DRIPS) in which the control and enjoyment of land are core principles. Peoples must “be secure in their enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities” (20) and have the right to protection of the environment and the productive capacity of land (29). States shall obtain free, prior and informed consent before implementing measures that affect them¹³ (19) and provide redress for lands “confiscated, taken, occupied, used or damaged” without their consent (28). Interestingly, the UN Permanent Forum on Indigenous Issues stated that, “the Declaration creates no new rights and does not place indigenous peoples in a special category” (UN News Centre 2007), which suggests that it could have general applicability.

In many respects, it is problems pertaining to governance that increase the risk of unethical ‘land grabbing’, more so than acquisitions being ‘large-scale’ or ‘transnational’. In many of the contexts where large-scale land acquisitions occur, land is often closely interwoven with formal

¹³ For more on Free, Prior, Informed Consent, see article by Hans Morten Haugen in this publication.

and informal systems of authority that external investors have little experience with. A review of large-scale land acquisitions in Africa found that land acquisitions were concentrated in countries and rural areas with weak governance institutions¹⁴. This also appears to be the case elsewhere – in Indonesia large-scale land acquisitions have mostly taken place on the so-called ‘outer islands’ where governance capacities are significantly weaker than the national average. Therefore, questions about the governance system *prior* to the acquisition, investment and development process need to take centre stage for the state as well as other actors. It is of great relevance that many of those most affected by the commercial appropriation of land and natural resources experience geographical, ethnic, economic and other forms of discrimination in national systems of governance, leading to marginalisation. It is important to be aware of who are central, who are involved and who are excluded in the way a deal is initiated, how legitimacy is put at stake and how power relations may change. To avoid reinforcing – and rather try to amend – past, often systemic, discrimination and neglect requires precautionary and pro-active measures. Human rights provide a lens on these governance challenges, centered on everyone’s right to an institutional order that protects human rights (UDHR 28), thus also systems of land governance. A contextual and long-term governance perspective is required – as well as pro-active ‘fairness of process’ that seeks to expand the space for those who have least voice and power.

Fairness of Process

Land acquisitions – and the related investments and land development processes – raise numerous issues of livelihoods, settlement and community, to name some, which require thorough and respectful processes of documentation, consultation and decision-making. Although some companies have been investing significantly in community-based consultations, these have often been insufficient to prevent substantive injustice and conflict.¹⁵ Human rights principles—participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law—are therefore relevant and valid for land change processes and, more specifically, interventions in agriculture and food production.¹⁶ While the full range of civil and political rights apply, rights to equality, to democratic participation and to hold property are central. Individuals have the right to equality before the law (UDHR 7, 10; CEDAW 15). A central requirement is gender equal participation. Women must participate equally with men in rural development, agrarian reform and resettlement (CEDAW 14.2). The Protocol on the Rights of Women in Africa (PRWA 18) requires the “participation of women at all levels in the conceptualization, decision-making, implementation, and evaluation of development policies and programmes.” Although often addressed nominally, women and men’s equal participation in land acquisition processes have often been neglected.¹⁷ Individuals have the right to information, freedom of expression and participation in governance (UDHR 19, 21.1; ICCPR 19; ACHPR 9),

¹⁴ World Bank 2010

¹⁵ Wisborg 2013 ‘Justice and Sustainability’.

¹⁶ FAO 2007.

¹⁷ Behrman, Meinzen-Dick and Quisumbing 2012; Wisborg 2013 ‘Transnational Land Deals and Gender Equality’.

including the complex formal and informal process of land management and transactions. Everyone has a human right to “own property alone as well as in association with others” and not to be “arbitrarily deprived” of this property (UDHR 17). ACHPR (14) confirms that the “right to property ... may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.” Thus, individual, family and community land rights may only be changed on the basis of law that is consistent with human rights (UDHR 17; ACHPR 3, 14, 18). The depth of these human rights principles and guarantees stand in contrast to the situation in many settings where (gender) discrimination is prevalent, democratic institutions and access to information are weak, and property rights unevenly recorded and recognized. One implication is that the work and investment in process required – aimed to achieve legitimacy based on an experienced fairness of process – can hardly be overestimated; a second implication is that the conventional land actors – whether investors or regulators – lack the necessary competence and skills to carry out adequate process of consultation and planning; a third, which follows from the former two, is that the costs of large-scale land investments increase substantially. Better governance could, however, have prevented many investments that later fail due to a variety of economic, environmental, technical and socio-political reasons.¹⁸

Justness of Outcomes

The impact of land acquisitions on access to land and the resources on it, and thereby on livelihoods and food security, has rightfully received considerable attention, and been analysed in a human rights perspective.¹⁹ However, there are also many cases where the impact analysis has been limited and biased towards the interests in economic output from new commercial ventures. For example, secondary or occasional users of land may have been overlooked, or issues linked to residence, movement and water. Another common problem is that promised benefits, for example to communities, are not in the form of guarantees. A human rights approach can contribute to the analysis of outcomes in a number of ways. It indicates the breadth of issues raised, it widens the human scope by including the rights of all who are affected, not just land owners or primary users; and it makes the link to state commitments. As a consequence of these commitments, negative impact on human rights must be prevented or redressed, so that no one is left worse off, and the benefits unequivocal and guaranteed, so that progress is made towards fulfilling human rights to livelihoods, food and water et cetera.

A starting point, again, is the both fundamental and diverse role that land can play in human livelihoods. Equitable and secure land tenure promotes the right to a “standard of living adequate for health and well-being,” including food, clothing, housing, and medical care, with emphasis on vulnerable groups (UDHR 25, CRC 4 and 6). Security of land and tenure facilitates employment (UDHR 23; ICESCR 6, 7; ACHPR 15) and contributes to protecting the rights to

¹⁸ A major land investment in Sierra Leone (Addax Bioenergy, Makeni) exemplifies these points (unpublished work).

¹⁹ E.g. Center for Human Rights and Global Justice, 2010, Cotula 2013, Cotula 2014.

family, privacy, home, security, and freedom of residence (UDHR 3, 12, 13.1; ICCPR 17; CEDAW 15.4; ACHPR 6, 12). Secure land tenure supports the economic and political autonomy that individuals and groups need to participate in democratic society and, it may do so in much more fundamental and complex ways in economies dominated by the primary sector, than in industrialized or post-industrial societies. Human rights analysis must consider diverse groups through multiple stages of land deals from appraisal, to monitoring.²⁰ The elderly, the disabled (ACHPR 18.4) and children require special attention (ACHPR 18.3; CRC 4, 6; Save the Children 2002). Women's rights to secure access to land, fuel and water and food security are emphasized in the Protocol on the Rights of Women in Africa. A balanced human rights assessment must consider that land investments may improve employment, incomes and services.

The strongest recognition of the land–human rights connection concerns food. States must respect, protect and fulfil the human right to food (ICESCR 11), the “physical or economic access, at all times, to adequate food or means for its procurement” (Committee on Economic, Social and Cultural Rights 1999: 6). Land appropriation that deprives people of access to life sustaining resources may violate the human right to food, according to the UN Special Rapporteur on the Right to Food²¹. States must regulate private entities that threaten this right.²² States must also ‘improve methods of production, conservation and distribution of food’ including by “developing or reforming agrarian systems [including land] in such a way as to achieve the most efficient development and utilization of natural resources” (ICESCR 11.2a). Haugen observes that this provision is rarely quoted and applied²³ but the obligation of states to govern global food supply and distribution is as topical as when it was formulated: “Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need” (ICESCR, 11.2b). This commitment makes explicit a broad development agenda – creating a food secure world – in which land transactions and agricultural investments need to be placed.

Human Rights Based Development

In a world of widespread and systemic rights violations, to offer a normative foundation of politics and society that can gain wide acceptance, human rights proponents must be able to outline plausible development paths and future scenarios. This is not least so because in specific cases, including on land and agricultural investments, there will be competing development agendas and priorities, including those that value economic benefit very highly. In theories and policies of human rights based development²⁴, human rights are both standards of change and instrumental to development. The 1966 UN Covenants committed States Parties to creating an “international order” that recognizes self-determination and free disposal of natural resources;

²⁰ Behrman, Meinzen-Dick and Quisumbing 2012.

²¹ UN Special Rapporteur on the Right to Food, 2009: 2, 4

²² Heri 2011: 4

²³ Haugen 2010: 47

²⁴ See, for example: UNDP 1998, Sen 1999

protects individuals against deprivation of the means of subsistence; promotes “international assistance and cooperation”;²⁵ and reforms agrarian systems (ICESCR 11.2). These guarantees suggest development paths that are quite the opposite of “land grabbing.” Large-scale land acquisition and other changes in globalized land–agro–food–energy systems provide renewed urgency to such commitments.

Outlining these four dimensions – governance, fair process, just outcomes, and development – we have argued that land rights and human rights are closely intertwined and that the multi-dimensional nature of *both* requires a comprehensive approach that integrates civil and political rights with the social and economic rights linked to everyday life of home, work, food, gender relations and so on. We often lack explicit recognition of the links between different human rights, as well as comprehensive readings of these links, that make the connection to problems in development contexts. Here too, the reading is mainly legalist, or informed by doctrine, but shows that major human rights instruments and a theoretical understanding of land as a human rights issue can be applied to land acquisitions and the policy challenges they raise. Some of the implications for practice have briefly been pointed out. However, the application of human rights – to land, as in any other field – is subject to political and social processes, and “human rights” and “development” may well remain “ships passing in the night.”²⁶ Human rights can inform alternative ways of thinking about land and development.²⁷ To be politically successful, advocates must envisage and explain alternative plausible human rights-based land scenarios and development paths. Minimally these must involve sustainable production systems, living space for diverse groups and individuals, the ability to provide alternative to those who lose rights and access to resources, and certainty about how individual beneficiaries can have their human rights, such as the rights to food and water, fulfilled in aggregated development outcomes.

The Voluntary Guidelines on Governance of Tenure

It was civil society organizations such as GRAIN, La Via Campesina and FIAN that started drawing public attention to transnational land acquisitions, including by developing the webpage Farmlandgrab.org. This in turn triggered a number of policy initiatives. The reports of the UN Special Rapporteur on the human right to food, Olivier de Schutter, were important in making the link to human rights. The Special Rapporteur proposed eleven core principles to adhere to in land acquisitions,²⁸ arguing that large land deals “should under no circumstances be

²⁵ ICESCR 2.1, ICCPR 1.2, similar guarantees are also found in ACHPR 20, 21

²⁶ Alston 2005

²⁷ De Schutter 2011

²⁸ De Schutter’s eleven principles: 1) Transparency; 2) employ consultation and free, prior and informed consent; 3) safeguard the rights of host communities; 4) ensure that revenues must benefit local population; 5) maximize employment; 6) protect the environment; 7) state clearly investor obligations, sanctions and independent assessment of compliance; 8) sell a minimum of food crop production locally; 9) carry out impact assessments prior to agreements; 10) comply with indigenous people’s rights; and 11) protect workers’ human rights and labour rights.

allowed to trump the human rights obligations of the States concerned”²⁹. The home states of private investors must control the conduct of these investors abroad, particularly if the host states appear unable or unwilling to do so.³⁰ Human rights were also a reference point for civil society organizations campaigning against land grabbing.³¹

Arguably the most central global policy process concerning transnational land acquisitions was the effort by the Committee on World Food Security (CFS) to establish the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Security (hereafter the VGGT). This process had been initiated to address broader concerns about the insecurity of resource tenure in a rapidly changing world, but it became a useful forum for negotiating measures to address land acquisitions, including the incorporation of human rights. Civil society sought to make human rights commitments as explicit as possible. Following global consultations in 2009 and 2010, FAO presented the “Zero Draft” Voluntary Guidelines for public consultation in April 2011.³² The International Land Coalition (ILC) argued that the Zero Draft was “not adequately linked to the existing and binding international human rights framework ... the language used is often vague and ... there is a risk that the VGGT can be used to avoid compliance with international human rights treaties, especially on critical issues, such as investments and concessions, and expropriation and evictions”.³³ In particular, the provisions about transnational land acquisition omitted the human rights obligations of investors, international organizations and financial institutions.³⁴ Based on inputs from a range of actors, the ILC suggested that alienation of land and other natural resources should only take place on the basis of free, prior and informed consent, due diligence by international organizations, gender-disaggregated impact assessment, and access to an independent appeal body by affected parties.³⁵ One may therefore see the VGGT as expressing a movement towards a compromise informed by human rights. ILC found the VGGT to be “firmly anchored in a human rights framework”³⁶ and FIAN³⁷ that the CFS had demonstrated its capacity to promote global policy aimed to resolve conflicts over natural resources.

On *governance*, the VGGT require that “all programmes, policies and technical assistance to improve governance of tenure” must be consistent with the full range of civil, political, economic, social and cultural human rights (1.1, 4.8). “Home states” must ensure that “businesses are not involved in abuse of human rights and legitimate tenure rights” and “business enterprises should act with due diligence to avoid infringing on the human and legitimate tenure rights of others”

²⁹ UN Special Rapporteur 2009: 33

³⁰ UN Special Rapporteur 2009: 5

³¹ FIAN 2010; La Via Campesina et al. 2010; World Social Forum 2011

³² FAO 2011a; Munro-Faure 2011; Hallam 2011

³³ ILC Secretariat 2011: 8

³⁴ ILC Secretariat 2011: 14

³⁵ ILC Secretariat 2011: 16–18, objectives 18–23

³⁶ ILC 2012: 2

³⁷ FIAN 2012

(3.2). The rights of individuals and communities on public lands (8) and indigenous people's land rights should be respected in accordance with human rights (9), with safeguards for all who have unrecorded rights (11.6). States should remove and prohibit all forms of discrimination related to tenure, securing equal rights for women and men (4.6). On these governance aspects, the VGGT is in line with the 2011 UN Guiding Principles on Business and Human Rights, which places the state obligation to protect against corporate human rights abuse as a foundational principle, and outlines the expectation that corporations shall act with due diligence to avoid infringing on the rights of others.

In the process of negotiations civil society organizations tried, but failed, to get the VGGT to define and condemn "land grabbing", as it had been in ILC's 2011 Tirana Declaration.³⁸ Instead, the VGGT deal with transnational land acquisition under the heading "transfers and other changes to tenure rights and duties," and sub-headings "markets," "investments," land reform and expropriation. It is stated that states should "recognize and facilitate fair and transparent sale and lease markets" for tenure rights (11.1), and this could even be interpreted as an obligation on the part of states to facilitate a shift towards market transactions in land rights, rather than for example community rights and informal transactions and relations of interdependence of small-scale users of natural resources. However, governments are also urged to promote investments by right holders (12.2) and consider alternatives to "large-scale transfer of tenure rights to investors" (12.6).

Concerning *fair process*, the VGGT (Part 3) require gender equality (7.4), transparency, adequate information (7.5), and the prevention of forced evictions (7.6). Land appropriation requires prior, independent impact assessment, identification of tenure rights, consultation, information and monitoring (12.10–12.15). States could consider introducing ceilings on the scale of transactions and/or consider requiring parliamentary approval (12.6). ILC notes that the right to free, prior and informed consent under DRIPS is only evoked concerning indigenous people (9.9), not when dealing with communities in general (3B6).³⁹ The VGGT require states to ensure that agreements involving large-scale transactions in tenure rights are enforced and provide mechanisms to raise grievances (12.14), fight corruption and resolve conflicts (21). The VGGT do not, however, specify the responsibilities of states and other actors identified in article 3.2. The responsibility for overseeing implementation, monitoring and reporting is placed with the Secretariat of the Committee on World Food Security (CFS). While a valuable forum for information sharing, advocacy and negotiation, the CFS could prove too distant and overstretched to carry these responsibilities.

Concerning *just outcomes*, the VGGT require that States should "take measures to prevent undesirable impacts on local communities, indigenous people and vulnerable groups that may

³⁸ Personal communication, FIAN representative.

³⁹ ILC 2012: 2

arise from, inter alia, land speculation, land concentration and abuse of customary forms of tenure” (11.2). “Responsible investments” should “do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights” and international labour law (12.4). Investor states should ensure that investments abroad promote food security (12.15). The emphasis on restitution of land to those who lose legitimate tenure rights (14 and 25.6) could mean that the protection against dispossession becomes stronger in the future. More generally, the requirements concerning process, outcomes and impact are mixed together, leaving the responsibility for impact unclear and unattributed. The lack of clarity on attribution of responsibilities in implementing the VGGT has been a key point of civil society criticism.⁴⁰ It may be assumed that benign impact follows from an appropriate process; in fact, the obligation to make impact assessments is very vague (“states should strive to make provisions for different parties to conduct prior independent assessments” 12.10). Impact on the human rights to food, water, livelihoods, and work are not set out. Reference to human rights indicators and standards for human rights impact assessment⁴¹ would have been relevant. Surprisingly, the sections on “Markets” (13) and “Investments,” do not deal with fair and prompt compensation to those who lose (access to) land, which is only explicitly required in the case of expropriation (16.3). Tenure rights acquired “through forceful and/or violent means” are rejected (25.4) but ‘normal’ market transactions may also dispossess.⁴² The Pinheiro Principles on the rights of displaced persons to housing and restitution (United Nations 2005) are mentioned in connection with natural disasters (24.2) and conflicts (25.2) but not the ordinary economic and political processes that cause displacement.

The VGGT are concerned with *development* but does not subscribe to a clearly human rights based conception of development. For example, a major reason given for protecting the tenure rights of small-scale producers is to promote aggregate outcomes of national food security and social stability (11.8), rather than their direct role in individual rights enjoyment. Supporting smallholder investments is justified by their contributions to food security, poverty eradication and environmental resilience (12.2), not smallholder women’s and men’s rights to livelihood and equality, although it is required that “transactions in tenure rights” should promote “sustainable human development focusing on smallholders” (12.3), that is with a priority for those who are often most vulnerable as a consequence of large-scale land acquisitions. Restitution and redistribution are matters for states to consider “where appropriate under national contexts,” whereas these could also have been grounded in human rights (e.g., 15.1). In line with this general orientation, the VGGT do not have a proactive, human rights based agrarian reform agenda. ILC (2012: 5) noted that equitable access is not a guiding principle and that “landlessness” is “still out of the picture”. The CFS Chair anticipated that VGGT would “set the bar for policymakers” and that governments moving to bring their policies and practices into

⁴⁰ CSOs 2015

⁴¹ see UNDP 2006 and Haugen 2010

⁴² Some cases illustrating this point are discussed in Benjaminsen et al. 2009: 28–35, and in Jansen and Roquas 1998: 81–106.

alignment.⁴³ Civil society organizations found the VGGT to represent a gender-sensitive recognition of the tenure rights of peasants, farmers, indigenous groups, fisherfolk, pastoralists, and nomadic people—and a “commitment not to criminalize the social struggles undertaken [by these groups] to defend their natural resources”⁴⁴. One may comment, though, that “not to criminalize” is a rather low “bar for policy makers”. While the VGGT clearly link tenure governance to the binding conventions of international law, it does not specify the requirements that human rights establish for the processes and impacts of land transactions and changes in land governance. This underlines that its impact would depend on further negotiation, power relations and practice globally, nationally and locally.

Conclusion

Global capitalist expansion is transforming the distribution and governance of agricultural land and production, raising both opportunities for increased investments and production as well as causing local resource conflicts, human rights violations and social and political instability. Land and human rights have a diverse and complex interface, creating a need for normative analysis and policy development.

Basing an approach to land on the interdependence and equivalence of human rights, land acquisitions, and accompanying investments can be analysed and re-designed to aim for the realization of human rights along four axes: governance ex-ante, fairness of process, justness of outcomes, and development trajectories that provide sustainable well-being. The challenge of moving from conflict and dispossession to inclusive development processes requires new forms of interaction between states, communities, investors and civil society.

From a human rights perspective, key concerns are that states fulfil their responsibilities and build the capacity to secure democratic land governance; that actors cooperate to ensure that land acquisitions and investments implemented as fair processes of change; that careful attention is paid to the gendered, short and long-term outcomes at micro, meso and macro levels – that is, the wider social and structural changes that changes in land holdings and tenure systems involve; finally, that governance, processes and outcomes are addressed within comprehensive, human rights based development plans that are realistic about the power relations that must be mobilized or changed in order to fulfil rights.

⁴³ FAO Media Centre 2012

⁴⁴ CSOs 2011

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CONSULTATION AND PARTICIPATION BY AFFECTED GROUPS - A WIDER APPLICATION OF THE PRINCIPLES OF 'FREE, PRIOR, AND INFORMED CONSENT' (FPIC)?

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Farming communities are vulnerable, and their properties are often not adequately protected by political authorities that seek to attract investors. Three other categories of communities do actually have stronger protection under international law:

First, indigenous peoples are protected by the ILO Convention 169 on indigenous peoples (1989); which states in Article 16.2 (extract):

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.

This is the only provision found in an internationally legally binding instrument that specifies the FPIC requirement. One national legislation does explicitly recognize FPIC: the Philippines, in its Indigenous Peoples Rights Act of 1997.

Moreover, the non-binding UN Declaration on the Rights of Indigenous Peoples specify the FPIC requirement in 6 provisions, the most explicit stating that “no ... shall take place without the free, prior and informed consent...” – for contexts see Articles 10 (relocation) and 29.2 (storing of hazardous material).⁴⁵ Moreover, the outcome document of the 2014 World Conference on Indigenous Peoples, requires that states shall “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent...”⁴⁶

In addition, jurisprudence from the UN treaty bodies, as well as from the Inter-American Court of Human Rights, recognize FPIC for indigenous people, as will be seen below. Finally, the International Finance Corporation’s Performance Standard 7 and the World Bank’s draft Environmental and Social Standard 7 do recognize FPIC for indigenous peoples.⁴⁷

Second, the FPIC requirement has been found to apply also to descendants from slaves, being distinct and enjoying a special relationship with their ancestral territories.⁴⁸

Third, also forest-dependent communities that “share common characteristics with indigenous peoples...”⁴⁹ are said to enjoy the rights derived from FPIC, as will be made clearer below.

⁴⁵ UN General Assembly 2007.

⁴⁶ UN General Assembly 2014, paras 3 and 20.

⁴⁷ World Bank 2015, 106, para. 17.

⁴⁸ Inter-American Court of Human Rights (IaCtHR) 2007, paras. 78-86; IACtHR 2005, paras. 132-133.

There is no international adopted document specifying FPIC of farming communities, but General recommendation 34 on the rights of rural women says that states must:

*Ensure that rural development projects are implemented only after participatory gender and environmental impact assessments have been conducted with full participation of rural women, and after obtaining their free, prior and informed consent.*⁵⁰

How “their” is to be operationalized is somewhat unclear, particularly if there has to be a separate consultation process with women only, or if “their” refers to the representative body in the affected community. Moreover, the UN Draft declaration on the rights of peasants and other people working in rural areas (“UN Draft on peasants”) has three draft provisions on FPIC: draft article 2(4) (decision-making); draft article 5(6)(b) (natural resources); and draft article 20(5) (hazardous waste).⁵¹ As seen above, UNDRIP recognizes the “strict” FPIC only for relocation and hazardous waste. Among developed countries there is little support for the UN Draft on peasants, as reflected in the report from the third session, held in May 2016.⁵²

On the other hand, the FPIC requirement is not found in treaties, non-binding declarations, jurisprudence or international guidelines to apply to minorities as such. According to the UN Human Rights Committee (UN HRC), the enjoyment of the right to culture – that is exercised by land resources – should include “measures to ensure the effective participation of members of minority communities in decisions which affect them.”⁵³ To understand the effective participation requirement we will first discuss the relationship between free, prior and informed consultation and FPIC.

FPIC v. free, prior and informed consultation

There is no internationally agreed definition of what constitutes free, prior and informed consultation or FPIC. The closest is the report from a Workshop mandated by the UN Permanent Forum on Indigenous Issues (UNPFII).⁵⁴ This report was not formally endorsed by the UNPFII’s 4th session, but was recommended.⁵⁵ This report has been used as a basis for the UN-REDD’s Guidelines for FPIC, with an expanded list of what falls under each of the elements.⁵⁶

⁴⁹ UN-REDD, Guidelines for Free, Prior and Informed Consent, 2013 12 (note omitted)

⁵⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW) 2016, 16, para 54 (e).

⁵¹ UN open-ended intergovernmental working group on rights of peasants and other people working in rural areas 2016. Moreover, draft article 12 specifies the right to participation and information.

⁵² UN Chairperson-Rapporteur 2016.

⁵³ UN HRC 1994, para. 7 (extract).

⁵⁴ UNPFII 2005.

⁵⁵ UNPFII 2005, para. 137; see also para. 25; and para. 69.

⁵⁶ UN-REDD 2013, 18-20.

In general, the first parts of the process are the same. *Free* is essentially about the absence of coercion and manipulation, as well as bribing.⁵⁷

Prior is about ensuring an adequate period between the full presentation of the planned activity and the affected community's decision.

Informed refers not only to the forms of information available, but also to the engagement with the community. The UN-REDD Guidelines specify as one of the requirements: "Reach the most remote, rural communities, women and the marginalized."⁵⁸ Furthermore, according to the UN-REDD Guidelines, "special measures have to be adopted to ensure the participation of women and other vulnerable groups within the community."⁵⁹

If these three requirements are fulfilled, and the communities have been given a possibility to express its position to the proposed project, this constitutes an adequate consultation. The consent requires, on the other hand, the possibility to express one's consent (say "yes") – or withhold such a consent (say "no"). According to the UN-REDD Guidelines, consent is also "including the option to reconsider if the proposed activities change or if new information relevant to the proposed activities emerges."⁶⁰

As no state in the Americas explicitly recognizes FPIC, the jurisdiction of the Inter-American Court of Human Rights (IACtHR) is somewhat cautious. In the 2007 Saramaka judgment, the IACtHR listed three safeguards the State 'must abide by': benefit-sharing, effective participation of the members of the Saramaka people, and a prior environmental and social impact assessment.⁶¹

These three safeguards are not necessarily easy to operationalize, for instance what constitutes adequate benefit-sharing. The safeguard on effective participation has been specified by the UN HRC:

*participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.*⁶²

The UN Development Group (UNDG) has also elaborated on participation: "Participation implies going further than mere consultation and should lead to concrete ownership of projects by indigenous peoples."⁶³ It can also be said that participation is the intra-community process, while consultation is about the community's relationship to external actors.

⁵⁷ On bribing, see German et al. 2011, 19-21.

⁵⁸ UN-REDD 2013, 19.

⁵⁹ Ibid, 33, see also ibid, 44.

⁶⁰ Ibid, 20; see also ibid, 30; specifying that this should not be done arbitrarily.

⁶¹ IACtHR 2007, para. 129.

⁶² UN HRC 2009, para. 7.6 (extract).

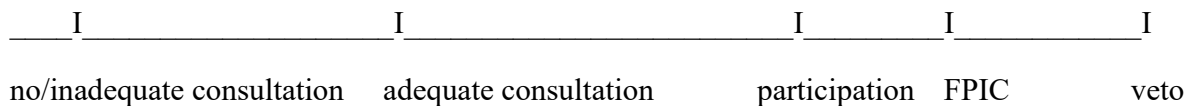
⁶³ UNDG 2008, 27

It is the state, not the investor, that is to facilitate for consultation and giving – or not giving – of consent: “Under current international law, the responsibility to comply with consent is applicable to States, and not private companies. States have the responsibility to hold private companies accountable.”⁶⁴ For an alternative approach, see the UN Guiding Principles on Business and Human Rights, specifying that corporation should engage in “meaningful consultation with potentially affected groups...”;⁶⁵ and FAO’s Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) saying that consultations are to be conducted by «States and other parties...»⁶⁶

Impact assessment is also specified in the VGGT, specifying that:

...States should strive to make provisions for different parties to conduct prior independent assessments on the potential positive and negative impacts that those investments could have... States should ensure that existing legitimate tenure rights and claims, including those of customary and informal tenure, are systematically and impartially identified...⁶⁷

Finally, as concerns FPIC, there is general agreement that it does not include the right to veto, but if a community goes against a proposed project it should have suspensive effect, and the project should be reformulated, if feasible.⁶⁸ The various elements represent a continuum, as illustrated in a figure:



The relationship between FPIC and human rights

The UNDG simply asserts: “The principle of free, prior and informed consent is an integral part of the human rights-based approach.”⁶⁹ As there is no explicit recognition of FPIC in any human rights treaty, and as there is limited *jurisprudential* recognition of FPIC, this might seem somewhat surprising.

Several treaties do, however, include relevant provisions. Collective property right is recognized in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), requiring in Article 5(d)(v) states to “guarantee the right of everyone ... [t]he right to

⁶⁴ Ibid, 23

⁶⁵ UN Human Rights Council 2011, principle 18(b).

⁶⁶ FAO 2012, paras. 9.9 and 12.7.

⁶⁷ FAO 2012, para. 12.10.

⁶⁸ Haugen 2016; Rombouts 2014, 416.

⁶⁹ UNDG 2008, 27.

own property alone as well as in association with others.” The resource dimension of the right to self-determination is recognized in common Article 1(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR). But when these treaties were adopted in 1965 (ICERD) and 1966 (ICESCR and ICCPR), neither environmental nor indigenous peoples concerns were adequately high on the agenda.

As regards their respective treaty bodies, the UN HRC, when making decisions on individual complaints under the First Optional Protocol, applies Article 27 on the rights of persons belonging to minorities, not Article 1 on the self-determination of peoples. While its general comments do not include the FPIC requirement, the UN HRC specifies FPIC in concluding observations. FPIC requirements are also specified by the Committee on Economic, Social and Cultural Rights (UN CESCR), and the Committee on the Elimination of Racial Discrimination (UN CERD), including in a general comment and a general recommendation.⁷⁰

Hence, the FPIC requirement is a procedural right that operationalizes the collective property right provision of ICERD and the right to self-determination of the ICESCR and the ICCPR.

There is, however, no doubt that the FPIC requirement is not equally applicable for farming communities as it is for indigenous peoples. There are three reasons for this:

First, the FPIC requirement is first and foremost to be applied in a non-interrupted presence, ideally preceding the formation of the modern states. There are, however, farming communities that can trace their presence and lineage centuries back.

Second, preservation of a traditional way of living is a key motivation for implementing the FPIC requirement. Many farming communities might be more advanced, but in several parts of the world, farming communities depend upon both harvesting and cultivation.

Third, simply because farmers in a farming community might have different interests and different production modes, a collective decision-making is not necessarily easy to implement, but farmers can speak in a unified voice.

Knowing that many states that are under a legal obligation to comply with FPIC when indigenous peoples are affected are *not* meeting their obligations, it would be unwise to only rely on FPIC in order to secure the rights of farming communities in many countries. This leads to the question of what tools human rights instruments provide.

⁷⁰ UN CESCR 2009, para. 37 (“respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights”); UN CERD, General Recommendation XXIII (1997) para. 4(d) (“no decisions directly relating to their rights and interests are taken without their informed consent”). For a summary of FPIC requests in recent concluding observations from the three treaty bodies, see Haugen 2016.

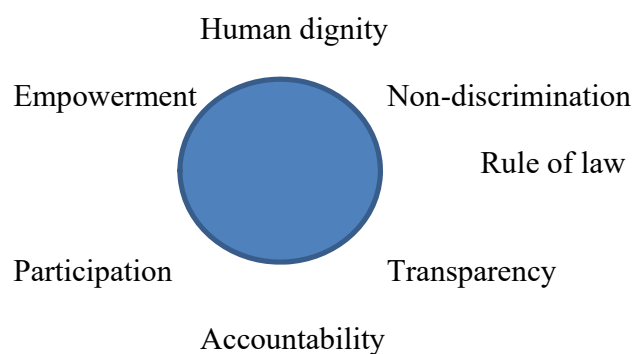
A human rights based approach

A 2003 workshop by the UNDG formulated the essence of a human rights based approach:

*Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.*⁷¹

This so-called “Common Understanding” gives as much space to the principles as to the specific rights (“standards”). Principles are understood differently by different actors.⁷² I understand human rights principles as minimum requirement of conduct in any decision-making process, and exclude terms that describe the *nature* of human rights,⁷³ as these do not specify conduct.

The FAO secretariat has specified human rights principles by the acronym PANTHER: Participation; Accountability; Non-discrimination; Transparency; Human dignity; Empowerment; Rule of law. PANTHER does not specify the relationship between them; this is better done in a model:



In this figure, the circle is to be read clock-wise, starting with human dignity, as human rights “derive from the inherent dignity of the human person...” as formulated in the preamble to the Universal Declaration of Human Rights. Then, four policy measures are listed, where conscious and active citizen participation is important for a good outcome. Said simply, in the context of accountability: somebody has to bring information about inadequate conduct to the relevant body with a mandate to act on this information. On the left hand side are human rights principles involving bottom-up processes; and empowered individuals and empowered communities, including some form of power shifting, should be the end result of any positive development intervention.

⁷¹ UNDG 2003, 1, para. 2.

⁷² Alexy 1992, 145 (“principles are “norms commanding that something must be realized to the highest degree that is actually and legally possible”); Krasner 1982, 187 (“principles and norms define the basic defining characteristics of a regime”).

⁷³ UNDG, 2003, 2: “universality”; “inalienability”; “indivisibility”; “inter-dependence”; “inter-relatedness”.

In the VGGT, the list is somewhat expanded: Two new principles are added: “Holistic and sustainable approach” and “Continuous improvement”. Moreover, there are two principles that address non-discrimination: “Equity and justice” and “Gender equality”. Finally, “consultation” is listed together with – and before – participation.⁷⁴ I believe that this longer list does not add very much to the shorter list, if non-discrimination is understood as also encompassing positive discrimination, in order to achieve greater substantive equality.

Information, consultation, participation

We will now see how consultation and participation is emphasized in the VGGT, and in the other two documents that have a particular emphasis on peasants: first, UN CEDAW’s General Recommendation 34 on the rights of rural women.⁷⁵ Second, the UN Draft on peasants, which specifies the right to participation and information in draft Article 12, covering “Investments”.

Article 3B.6 of the VGGT reads (extracts):

Consultation and participation: engaging with and seeking the support ...; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

Neither this part of the VGGT, nor other parts, give any indication that the difference between participation and mere consultation is adequately reflected.

Moreover, it must be clarified what the phrase “active, free, effective, meaningful and informed participation” means. The phrase is also found in the UN Draft on peasants, paragraph 12.1, and in General Recommendation 34, the latter further specifying that rural women must participate in “political and public life, and at all levels of decision-making.”⁷⁶

As participation has a general recognition in Article 25 of the ICCPR and in several provisions of the CEDAW, including Article 14 on rural women, it must be considered surprising that the USA at the third session of the UN open-ended working group said that “there is no right to participate” and demanded a reference to existing political rights.⁷⁷

Effective is a much-applied term in different judgments by international courts. Participation to be “effective” is operationalised as requiring a process in conformity with the custom and

⁷⁴ FAO 2012, para. 3B.

⁷⁵ Both CEDAW and CERD use the term “General Recommendation” where the other human rights treaty bodies apply “General Comment”, both fulfilling the same function.

⁷⁶ UN CEDAW 2016, para 54.

⁷⁷ Chairperson-Rapporteur, Report of the UN open-ended intergovernmental working group on rights of peasants and other people working in rural areas (2016), 11.

traditions of the affected people.⁷⁸ Moreover, when outlining what is encompassed by effective participation, the Inter-American Court of Human Rights specifies that:

*These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan... The State must also ensure that members of the Saramaka people are aware of possible risks... Finally, consultation should take account of the Saramaka people's traditional methods of decision-making.*⁷⁹

We see that this gives detailed requirements, and that this form of consultation is understood as effective participation. The term “effective” has been analysed by the author elsewhere.⁸⁰

The term “meaningful” is used in various guidance documents.⁸¹ A dictionary understanding of “meaningful” might imply certain requirements to what a decision-making process should encompass.

The “free” and “informed” requirements of participation must be presumed to be similar to the requirements under FPIC, in other words no coercion or manipulation, accessible format and measures to ensure actual access for the least represented and most remote.

Finally, what is the “active” in participation? Participation must be more extensive than merely consultation, as participation entails some forms of active engagement. However, by introducing “consultation” in addition to participation, but at the same time requiring that participation is to be “active”, the VGGT give two different signals; the main message, however, is that there has to be a broad involvement of the affected community in any investment decision processes.

Conclusion

The human rights based approach is applicable to any decision making process, and will – if applied adequately – lead to individual and community empowerment. Moreover, observing the human rights principles will develop mutual responsibilities and accountabilities. This is not to argue against a FPIC approach, but as shown, there are many potential investment projects affecting farmers where the FPIC requirement are not necessarily applicable.

The human rights based approach currently operationalized among business policy makers and lending institutions, both public and private, is “due diligence”. Due diligence is defined in the 2011 OECD Guidelines on Multinational Enterprises as “the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential

⁷⁸ IACtHR 2007, para. 129.

⁷⁹ IACtHR 2007, para. 133.

⁸⁰ For a discussion on the differences between effective and meaningful, see Haugen 2013, 279-283.

⁸¹ FAO, et al. 2010, 11; World Bank 2015, 106, para. 17; International Land Coalition 2011, para. 4(v); UN Expert Mechanism on the Rights of Indigenous Peoples under the Human Rights Council 2012, 9.

adverse impacts...”⁸² The VGGT also affirm the due diligence approach, in para 3.2, outlining it in accordance with the UN Guiding Principles on Business and Human Rights. Due diligence is a risk avoidance mechanism; hence it is a feasible approach for business actors. By seeking to avoid negative impacts and having mechanisms that reduces the harmful impact if they occur, the due diligence approach is welcome. For actors within the state apparatus, merely risk avoidance is not adequate, however. Rather, they should aim for a more comprehensive human rights approach to development, based on human rights principles that facilitate a process seeking to achieve individual and community empowerment. Hence, at least for development projects, the human rights based approach should be preferred over merely a due diligence approach.

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LAND AND HUMAN RIGHTS IN THE AFTERMATH OF FOOD CRISIS

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Land in the world food system

This article will discuss the relationship between international discourses and norms on land tenure, and on food. The term ‘world food system’ covers not only aspects of food “availability” and “production”, but also the normative institutional setting of rights and duty holders. A key question concerns how actors at various levels in the world food system are recognised as legitimate. This is increasingly contentious since corporate actors have strongly increased their roles in the world food system, pushing the system into more commercialised forms.

Under the world economic crisis of 2007-2008, which has also been referred to as the food crisis, the fragility of today’s food system was exposed. The crisis brought attention to some key underlying factors, including the situation of tenure governance, access to natural resources, migration, patterns of consumption, delineation of rights and policies, and the current status of international cooperation. The UN Human Rights Council, as charter body of the United Nations, held a special session in May 2008. This swiftly facilitated a global response to the fundamental causes of the crisis, and set a foundation for international cooperation on governance. The response put food clearly on the agenda, and resulted in, among others, the UN High Level Panel on the Global Food Crisis and the Right to Food under the thematic mechanism of the UN Human Rights Council⁸³. The food crisis posed serious questions to the UN Human Rights Council. The maiden report of the then UN Special Rapporteur on the Right to Food, Dr. Olivier de Schutter pointed out that the hunger and the food crisis took place while food was plenty,⁸⁴ despite sophisticated policy prescriptions and availability of food.

It is pertinent to address the underlying factor that there is fierce competition to arable land. In this competition, rural populations and small-holders (peasants) are discriminated against and marginalised, directly and indirectly.

⁸³ The official deliberations conducted includes High-Level Conference in 26-27 January 2009 convened by the Spanish Government, and Interactive Thematic Dialogue of the UN General Assembly on the Global Food Crisis and the Right to Food, 6 April 2009, New York.

⁸⁴ Report of A/HRC/9/23, 8 September 2008, “Building Resilience: a human rights framework for world food and nutrition security”.

On “state obligations”

The foundation of state obligations pertaining to the Right to Food is formulated, in General Comment no.12 on the Right to Adequate Food, as follow:

15. The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.

The race on gaining arable land, space, and tenurial status poses the challenge of how the state should carry out its obligations. States should develop their own capacities to ensure that the food system within their boundary works well under “normal times”, and is responsive in times of “crisis”. Modern analyses provide many insights, and there are best practices from around the world on how the food system can be improved. Also, in a society where consumption keeps on rising, the capabilities of states should be developed to enable fulfilment of their obligations.

One fundamental function of the state concerns regulation of land tenure. Land tenure evolves along the life of a society, and the state frames it into formal norms, regulations, and institutions. Almost all states in the world are in the concurring position that land tenure should reflect justice and provide long-term equity. International standards set obligations for states that must be carried out within their jurisdictions. The domestic legal framework should reflect existing international norms on land tenure and human rights.

Discrimination in world food system

States should develop their capabilities to carry out anti-discriminatory measures, regardless of system of government. In regard of rural populations, a report presented to UN Human Rights Council, titled “Final study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas” (A/HRC/19/75) found that:

“...despite the existing human rights framework, peasants and other people working in rural areas are victims of multiple human rights violations that lead to their extreme vulnerability to hunger and poverty....”

“Hunger, like poverty, is still predominantly a rural problem, and in the rural population, it is those who produce food who suffer disproportionately.” In a world in which more than enough is produced to feed the entire world population, more than 700 million people living in rural areas continue to suffer from hunger. Describing this situation in its final study on discrimination in the context of the right to food (A/HRC/19/75), the Advisory Committee identified peasant farmers, small landholders, landless workers, fisher-folk, hunters and gatherers as among the most discriminated-against and vulnerable groups.

“The main causes of discrimination and vulnerability of peasants and other people working in rural areas are closely linked to human rights violations: (a) expropriation of land, forced evictions and displacement; (b) gender discrimination; (c) the absence of agrarian reform and rural development policies; (d) the lack of minimum wages and social protection; and (e) the criminalization of movements defending the rights of people working in rural areas.”

This formulation highlighted the poor capabilities of states in developing today’s world food system. However, these poor capabilities do not rule out the imperative that states should perform their obligations. For reasons that the world food crisis 2007-2008 exposed, states need to formulate norms, institutionalise rights and pursue anti-discrimination measures.

Competition on land

The formulation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT) shed lights on how the debates concerning world food security were different from the long standing debates on land governance. The debates also took place in different forums that to a considerable extent were disconnected from one another.

The VGGT was concluded in 2012 by the UN Committee on World Food Security (CFS). The timeline reflects various steps which were taken by various actors in the UN system in the aftermath of the food crisis of 2007-2008. The UN Human Rights Council issued a statement on the impact of food crisis on the right to food, and, afterwards, the process of passing a UN Declaration on Rights of Peasants and Other People Working in Rural Areas was initiated. The UN Special Rapporteur on Right to Food submitted successive reports on the food situation where key human rights foundations are further elaborated on, in particular concerning state obligations.

“Voluntary” is a key term in the VGGT. This term is quite different from the language used in the UN Human Rights Council where the formulations are normative, using terms such as “state obligation”, “rights holder”, “recognition” and “anti-discrimination”.

Understandably, the focus of the VGGT is on mapping situations and actors in the context of food security, and provision of “policy prescriptions” on action that could be taken. However, the VGGT do less to identify and acknowledge the underlying problems. In the context of competition for land, more attention on rights and obligations is needed than what the VGGT provide. Treating vulnerable populations, political clans, corporations and other groups as ‘stakeholders’ on the same level will fail to bring justice and long term equity.

In the competition for access to land, powerful and well capitalised actors are able to involve themselves in land-grabbing, creating situations where discrimination is even more likely to happen, and no recourses are in sight. These actors are even given governance functions in certain states. One might suggest that many states fail to live up to their obligations, and ‘outsource’ them to the corporate sector. This usually is the case in states with weak institutions to uphold rights and ensure rule of law. More efforts should be put on development of state capacities to ensure that their obligations are fulfilled, rather than de facto ‘sub-contracting’ these obligations to the private sector.

Small closing note

Various development reports and economic analysis in different UN organs related to land provide good and constructive insights and policy prescriptions, including the VGGT. But, often, those analyses do not emphasise the matter of “obligations” i.e. who that should be responsible for carrying out the prescribed remedies.

The competition on land poses a difficult challenge towards states in performing their obligations. While states are fundamental and legitimate actors in the world food system, their capabilities vary. The capabilities and capacities of states will always effect how their obligations are carried out and how domestic legal norms and institutional settings are developed. The state(s) with a good legal framework for human rights protection and a well-functioning institutional setting are often the ones that provide best protection of land tenure. Lawful subjects, including citizens, commercial organisations and the wider population, should be in position to exercise their activities towards land if the state can adequately fulfill its obligations.

LAND ACQUISITIONS AND RESPONSIBLE BUSINESS CONDUCT

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Development aid has been an important factor to create economic growth and lift people out of extreme poverty over the past decades. It is still an important source of finance for many development countries, in particular for the poorest and most fragile ones. However, the relative importance of aid has declined. In 1990, aid accounted for 63 % of all capital flows to low income countries and lower middle income countries. In 2013, this figure had been reduced to 21 %.⁸⁵

Private capital is key to foster further development.⁸⁶ However, investing in a development country is associated with higher risk, including the risks of land acquisition. The question is how to lower the risk for private operators, without compromising on responsible business conduct.

Land tenure is important to a variety of issues, including climate change, food security, indigenous peoples' rights, urbanization, and more. Land is vital to promoting economic growth, investments and job creation. It is also a source of livelihood, and it holds meaning beyond mere ownership – linked to people's identities, culture and history. In short, it is a crosscutting issue to a number of human rights, as well as being a commodity. For an investor looking to acquire a piece of land, the usage, management and control is key. But when there is no clear land tenure system, it becomes a complex issue.

Production of commodities in developing countries is usually regulated by concessions, handed out by the national government to a private entity to exploit natural resources. However, in addition to the concession holder, there are often others who claim to have a legitimate right to the land. Such claims are usually based on traditional user rights, not formal property rights. This may lead to harmful conflicts with local constituencies who feel that their rights have been ignored. And people who feel that their rights are threatened, could easily cause severe problems for an investor. It is, simply put, bad for business. Hence, land insecurity is not only an issue between the rural poor and the state, but also poses a significant risk factor for investors. They

⁸⁵ Working together: Private sector development in Norwegian development cooperation — Meld. St. 35 (2014 – 2015) Report to the Storting (white paper) <https://www.regjeringen.no/en/dokumenter/meld.-st.-35-20142015/id2423253/>

⁸⁶ See for instance Financing for Development: <https://www.worldbank.org/content/dam/Worldbank/document/Poverty%20documents/WB-PREM%20financing-for-development-pub-10-11-13web.pdf> and http://www.un.org/esa/ffd/wp-content/uploads/2016/08/ffd3_SideEvents_Commitments.pdf

are however - fairly or unfairly - often caught up in the middle of the tensions and dissatisfaction between a formal property system on the one hand, and customary practices on the other. As Nadia Cuffaro⁸⁷ puts it:

“(...) while in the current land rush foreign enterprise becomes the proxy for discontent, the issue is more fundamentally between people, especially the rural poor, and state.” (2013:8)

Land tenure systems

Most countries have a mix of tenure systems, depending on religion, customs, traditions, level of income, etc. Customary rights are not formal “legal arrangements” *per se*, but encompass various social practices which regulate people’s access to land. Often these rights precede the national state itself. In other words, despite not always having a formalized legal entitlement in place, it does not mean that the land is empty. Most people around the world understand their property rights perfectly well without any reference to a legally formalized property document. These parallel systems of defining property rights create controversies, misunderstandings and disputes. Ideally, all governments should have a comprehensive land tenure policy and enforcement, encompassing both legal and customary rights. In fact, many development projects are intended to improve the services of land administration, thereby improving security of tenure and increasing transferability of land rights (thus contributing to private sector development, access to credit, development of land markets, etc.).⁸⁸

However, despite these efforts, the reliability of national land records in many development countries is typically very limited, with little or no reference made to customary rights. And even when such reference is made, it is often the case that customary rights are harder to claim than a formal entitlement to the land.

Fair settlements

Many developing countries have a national development strategy emphasizing the importance of industrial, modern agriculture, thereby ensuring food security, increasing export revenues, access to external markets, and so on. But in order to do so, investments and acquisition of larger land areas is necessary. And as already mentioned, the challenge is that those lands are often already occupied by local small-holders. A settlement is necessary. And for that settlement to be considered fair, land tenure security is vital.

This is often not the case.

⁸⁷ Large scale land acquisitions in developing countries: property rights and CSR, Nadia Cuffaro (2013)

⁸⁸ Lessons from Land Administration Projects: A review of projects’ performance, World Bank Group (2016)

As an example, Brazil is frequently credited for being a success story when it comes to increased agricultural production, industrialization and export. However, this development has come at a cost. Brazil has also one of the highest levels of inequality of land distribution in the world, with 1% of the population owning 45% of all land.⁸⁹ Poor smallholders without formal property rights are often displaced. This again, is causing thousands of Brazilians to settle in slums and shantytowns in the urban areas – with all the social problems that follow.

Also in many African countries local elites are central to processes of land acquisitions. Even in countries where the legal framework is strongly supporting customary rights, the enforcement is often weak and dominated by influential elites that do not represent the true interest of the local constituencies.⁹⁰ In fact, many country cases show that in processes of land acquisition, the negotiations are often undertaken with local clan leaders or elders with limited or non-existent representativeness or accountability towards local constituencies.⁹¹

Processes of land acquisitions are often messy, and different constituencies have different claims, thereby generating conflicts. Although an investor might be accused, perhaps rightfully so, of exploiting smallholder farmers or other weak and/or marginalized groups, empirical evidence suggest that it is not a profitable approach in the long run.

Conflicts over land

NGOs and media have contributed to the public scrutiny of many investment deals turning sour due to land tenure issues, i.e. forced evictions or displacement of local populations, lack of compensations schemes, negative impacts of large-scale development/infrastructure projects, etc. Such developments i.e. large dams, petroleum installations, industrial agriculture, etc., often lead to a number of social and environmental (negative) impacts which again fuels local opposition. For an investor dependent on acquiring land, this constitutes a kind of risk that is challenging to calculate in advance. The reason might be that that the investor is (mis)led to believe that the host government has proper systems in place for consultations, compensations, grievances, etc. In other cases, the investor may simply seek to cut corners, believing it to be more profitable – at least in the short run.

However, local opposition towards the investor can take many forms, and may vary from discontent with a certain compensation scheme, to conflicts where an investor/developer is cutting off access to water, food, energy, etc., thereby posing an existential threat to the entire local community. Obviously, the latter poses strong incentives for direct disruptions of the operations. And in cases were the investor relies on harsh coercion, supported by the host

⁸⁹ Brazil - Property rights and resource Governance, USAID (2011)

⁹⁰ Large scale land acquisitions in developing countries: property rights and CSR, Nadia Cuffaro (2013)

⁹¹ Land Deals In Africa: What Is In The Contracts? Cotula, L. (2011), IIED, London

government, the conflict tends to escalate. Legal processes can tie an operator up in court for months, i.e. prosecution in international courts for human rights abuses. This will again create bad PR that could damage the operator's ability to do business somewhere else.

In fact, research from the Munden Project⁹² (2012) shows that disregarding customary rights, the need for proper consultations, denying compensations or ignoring dispute resolution, can lead to huge losses. Investors may experience increased operating costs by as much as 29 times, or may have to abandon its operations entirely.⁹³ A case study by Rachel Davis and Daniel M. Franks from 2014 shows that:

“(....) a major, world-class mining project with capital expenditure of between US\$3-5 billion will suffer roughly US\$20 million per week of delayed production in Net Present Value (NPV) terms, largely due to lost sales. Direct costs can accrue even at the exploration stage (for example, from the standing down of drilling programs). The greatest costs of conflict identified through the research were the opportunity costs in terms of the lost value linked to future projects, expansion plans, or sales that did not go ahead. The costs most often overlooked by companies were indirect costs resulting from staff time being diverted to managing conflict – particularly senior management time, including in some cases that of the CEO.”(2014:8)⁹⁴

For the investor, in the absence of land tenure security, it is important to take this complicated landscape into careful consideration. Not paying sufficient attention to land tenure constitutes a high risk, and the investor cannot assume that formal land titling from central government is sufficient. It is not only a moral question, but may in fact also be a question of profitability.

Unfortunately, the lack of good tenure systems in developing countries poses such a high risk that it is likely to chase away potential investors - who could otherwise contribute positively to job creation, development and prosperity. It is for this reason vital that governments and donors continue the efforts to improve land administration and land tenure security. Legal framework and competent institutions is key. However, companies must also do their part.

⁹² Global Capital, Local Concessions: A Data-Driven Examination of Land Tenure Risk and Industrial Concessions in Emerging Market Economies (2013), Leon/Garcia/Kummel/Munden/Murday/Pradela, The Munden Project

⁹³ The Financial risk of insecure land tenure (2012), The Munden Project, prepared for the Rights and Resources Initiative

⁹⁴ Costs of Company-Community Conflict in the Extractive Sector 8(2014) Davis, Rachel and Daniel M. Franks, Corporate Social Responsibility Initiative Report No. 66. Cambridge, MA: Harvard Kennedy School

Decency as a business model

Corporate Social Responsibility (CSR) is a term that has been used on businesses keen on demonstrating a positive social impact. However, CSR has of lately been criticized for simply being a marketing exercise. A fundamental problem is that CSR is considered to be reactionary to concerns from customers, employees and investors to the conduct of business, not addressing sustainability per se. It has often been about “feel-good projects” and activities that “give back” to local peoples. In other words, it is regarded as philanthropy and volunteer work (and perhaps a greenwashing exercise), not core-business.

This is changing.

A study by UN’s Global Compact (2010 of CEOs show that 93 % of these see sustainability as important to the future success of their business.⁹⁵ The consequences for irresponsible business conduct can be significant. With the adoption of international frameworks for responsible business conduct, such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles for Business and Human Rights (UNGP), corporate responsibility can be measured. It has increased the attention towards companies taking more responsibility to avoid potential negative impacts throughout the value chain. Not paying sufficient attention to sustainability can indeed be bad for business.

As an example, British Petroleum had to cover environmental damages from the Deep Water Horizon spill at nearly USD 54 billion.⁹⁶ And the Volkswagen scandal led to their stock falling to a third of its value in less than a week, in addition to costs and penalties of approximately USD 35 million.⁹⁷ Before the fraud scandal, Volkswagen actually used to claim the number one spot on the Dow Jones Sustainability index, but was removed with immediate effect once the scandal was a fact.⁹⁸

Hence, doing good is no longer a voluntary “feel good” project. It is increasingly becoming part of core-business. This is why Peter Bakker, president of the World Business Council for Sustainable Development, declared that, “CSR is dead.”⁹⁹

⁹⁵ A New Era of Sustainability - UN Global Compact-Accenture CEO Study (2010), Accenture, The UN Global Compact

⁹⁶ See: <http://www.wsj.com/articles/bp-agrees-to-pay-18-7-billion-to-settle-deepwater-horizon-oil-spill-claims-1435842739>

⁹⁷ See: <http://www.forbes.com/sites/greatspeculations/2015/09/24/dieselpgate-scandal-could-cost-volkswagen-up-to-35-billion/#607070d83b4d>

⁹⁸ See: http://www.sustainability-indices.com/images/150929-statement-vw-exclusion_vdef.pdf

⁹⁹ See: <https://oecdinsights.org/2016/01/22/2016-csr-is-dead-whats-next/>

So what does this mean for land acquisitions?

It means that investors cannot ignore decent behaviour from its operations, and that in fact, they are likely to lose time and money on not behaving decently. This is not to claim that there are not companies cutting corners and benefiting grossly from exploiting local populations. There are still (too) many examples of that. But as the Munden Project demonstrates, conflicts over land with local communities will often harm the producers in many ways. And it's not just about doing good (but yes, that as well). As it turns out, decency might in fact be good for business.

LARGE-SCALE INVESTMENTS – A THREAT TO CENTRAL AMERICA’S FOOD SECURITY?

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Land is power. Without doubt, Central America¹⁰⁰ is a good case to illustrate this. Land has been the region’s hot potato for more than a century, and continues to be so today. Historically, land ownership has been highly concentrated and constituted a key source of political and economic power. Large-scale estates and export led production have dominated the agricultural sector at the expense of small- and medium scale farmers. Small-scale farmers, who are the main producers of staple crops in the region, have had limited access to land. The land available for small-scale farmers has been in less productive areas, with poor soil and fertility conditions.

Central America has not been able to break its deeply rooted structure of land tenure which continues to cause conflicts. Current investment trends and priorities within the agricultural sector sustain the region’s traditional land tenure structure. The focus on export-led production disfavours the region’s capacity to secure food security and to improve conditions in indigenous- and small-scale farming communities. In recent years, land investments have resurged as a driver of conflict. Farmers, indigenous leaders and environmentalists have risked their lives in the struggle for land and control over natural resources. The model of land investments and large-scale agricultural production is neither economically, environmentally nor socially sustainable. Unless measures to break the historical pattern of land distribution and agricultural production are undertaken, food insecurity and rural poverty are likely to increase in the years to come.

This paper will assess the recent development in land ownership and land investments in Central America, and its impact on food security. It will first provide an overview of the development in structures of land ownership, and assess to what extent agrarian reforms brought about any changes, and if these changes have been sustained. Secondly, it will look into recent trends of land investments; both in terms of expansion in areas and what kind of crops that dominate large scale production. Thirdly, the paper will explore the correlation between land investments and food security. Finally, it will assess the social impact of land investments, arguing that land investments constitute a source of conflicts.

Development of patterns of land ownership

The land-tenure structure in El Salvador, Guatemala, Honduras and Nicaragua has historically been dominated by a latifundio – minifundio system. Relatively few large commercial estates (latifundios) have dominated the agricultural agenda, while a large numbers of small farms (minifundio) have been managed by indigenous and peasant households. Small-scale farming has

¹⁰⁰ Because of their common historical patterns in this topic, this article Central America only refers to Guatemala, El Salvador, Honduras and Nicaragua, excluding Belize, Costa Rica and Panamá.

been mainly subsistence oriented, and a large part of the farmers have depended on seasonal or day labour at the large estates. This latifundio-minifundio land tenure structure has constituted a basis for political and economic power, benefiting large-scale landowners who historically have been among the dominant political and economic ruling elite in the region.

The case of Guatemala illustrates this with 2 per cent of the population owning 74 per cent of agricultural land in 1945, while 76 per cent of the population only had access to 9 per cent of agricultural land (Dunkerley 1990). The land distribution was similar in the other countries, and marked in the same way the main patterns of social, economic and political development. Land has been a main driver of conflict in the region, and one of the main causes for the insurgencies and revolts that erupted into civil wars in Guatemala, El Salvador and Nicaragua. It is therefore crucial for understanding Central America's history and current situation, particularly when it comes to recent developments in land investments, land ownership and food security.

As social revolts intensified throughout the 1960s and 1970s, El Salvador, Guatemala and Honduras launched programmes for redistribution of land.¹⁰¹ The programmes were to a large extent a means to counter insurgency movements and to halt social protest. They were neither successful in preventing popular revolt, nor in significantly altering the squeezed land distribution. In Nicaragua, the Sandinista government launched an ambitious land reform in 1979 after ousting the Somoza regime from power.

The Nicaragua agrarian reform was the most ambitious attempt to alter the distribution of land. It benefitted approximately 60 000 families who received land as individuals or as members of collective agrarian cooperatives. In El Salvador, the third phase of the agrarian reform was implemented in the 1980s, and resulted in an increased number of farmers holding small plots of land. Nevertheless, the scope of the Salvadorian reform was not broad enough to significantly alter the land distribution. In the case of Nicaragua, problems with land certificates, and the handover of nationalised land to its previous owners after the Sandinistas were voted out of power in 1990, limited the impact of the agrarian reform.¹⁰² A large number of farmers lost their land during the 1990s, which constituted a significant setback for the most ambitious effort to alter land distribution in the area.

The structure of land ownership influenced the production systems. The focus on export led production favoured large-scale production units, and maintained a rural economy dependent on agricultural workers and paid labour. Even though some countries like Guatemala, was relatively

¹⁰¹ In Nicaragua, the Somoza regime initiated a limited land reform in the 1960s. It opened the ground for increased agriculture in the Atlantic region, but had no significant impact on land distribution. Given its outreach, the Sandinista agrarian reform, which will be discussed below, is the most relevant for assessing patterns of land ownership in Nicaragua.

¹⁰² Brockett (1998) provides a good overview and discussions on agrarian reforms in Central America

successful in adopting non-traditional export crops such as cardamom, traditional crops such as coffee, sugar, cotton and banana continued to dominate the agricultural export production.¹⁰³

Throughout the same period, agriculture continued to be the backbone of the Central American countries' economies. Strategies on industrialisation in the 1960s did not alter the fundament of economic power. Often, the same economic elites benefited from the emerging domestic industry. Despite some efforts, the agrarian reform initiatives did not significantly change or alter the latifundio-minifundio land tenure structure. The export-led production patterns have been dominant, and there have been few incentives for small-scale farmers and production of staple crops. However, land related conflicts became less visible, and political violence decreased in the transition from civil war to peace and authoritarian rule to democracy.

Current trends in land investments

The focus on export led production continued in the 1990s. During the structural adjustment period in the 1980s and 1990s, Central America was no exception of the liberalisation and economic opening process that dominated the rest of the Latin American countries. Given the limited success in developing competitive industries, primary products continued to be Central America's comparative advantage in a more globalised economy.¹⁰⁴

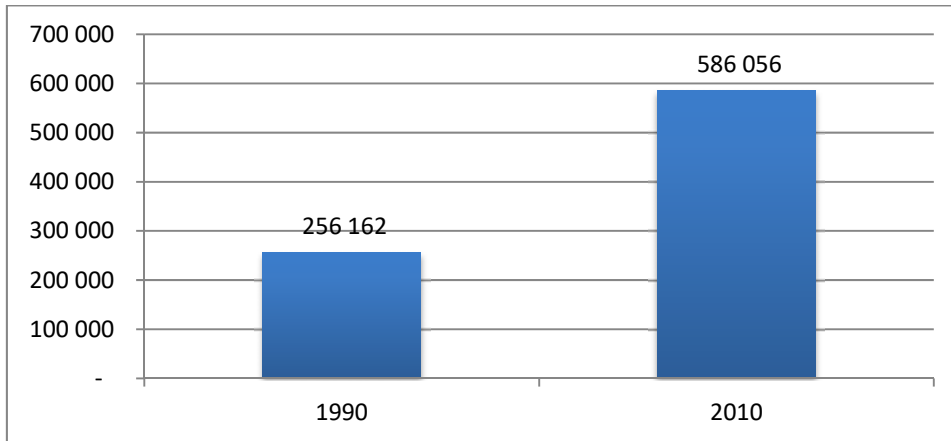
Two products have dominated investments in the export led production since the 1990s; African oil palm and sugar cane. African oil palm is a plant, which is commonly used for producing vegetable oil (palm oil). The oil palm has become an important plantation crop in tropical countries, and global demand for palm oil is high. Both oil palm and sugar cane can be used for biofuel, which is also increasingly demanded on the global market. Since 1990, there has been a huge expansion in the production of African palm and sugar cane. As table 1 shows, the land area used to grow these two products have doubled in the period of 1990 and 2010.

There are huge variations within the region. As table 2 and 3 show, Guatemala accounts for the largest part of expansion in sugar cane cultivation and has the highest increase in percentage of cultivation of oil palm. Honduras is by far the largest grower of oil palm in the region. El Salvador has not yet become a cultivator of oil palm. However, sugar cane cultivation has doubled and is the second most important crop after coffee.

¹⁰³ See Jonas (1994) and Bulmer-Thomas (1983; 1994) for further analysis and details on economic growth and export led agricultural production.

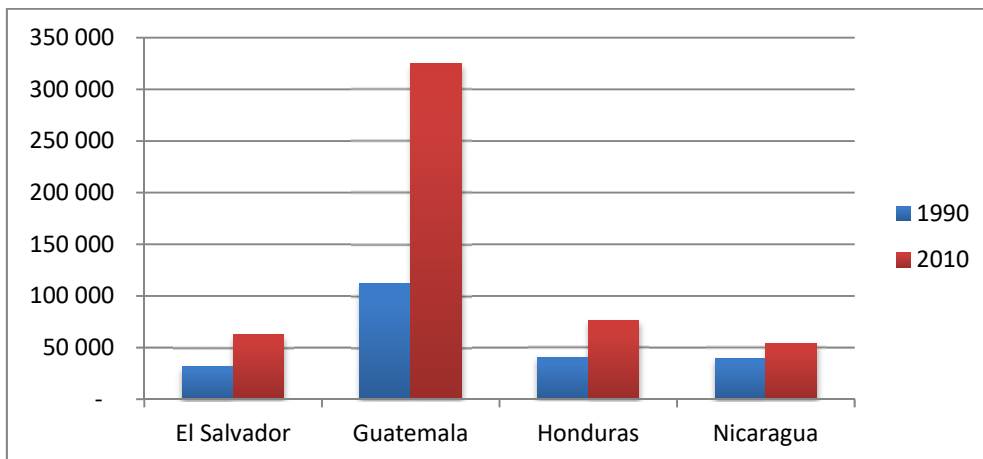
¹⁰⁴ See Bulmer-Thomas (1994; 1996), Barry (1994) for more details on structural adjustment and the new economic model.

Table 1: Total area of cultivation of African oil palm and sugar cane in Central America 1990 – 2010 (in hectares)



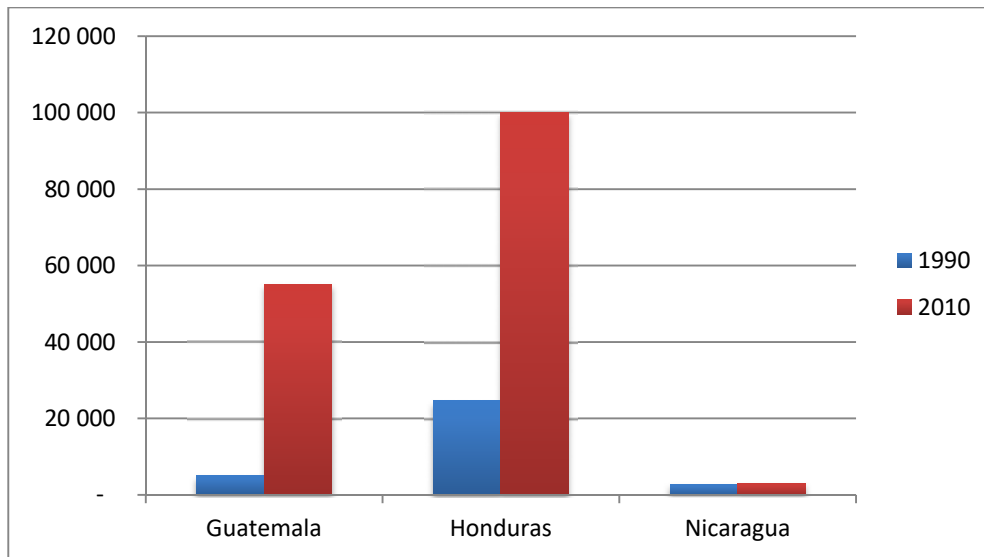
Source: Baumeister (2013)

Table 2: Cultivation of sugar cane (in hectares)



Source: Baumeister (2013)

Table 3: Cultivation of African oil palm (in hectares)



Source: Baumeister (2013)

In the case of Nicaragua, cattle have been the main driver of investment and expansion in agricultural land. The stock of cattle increased from a little below 2.7 million in 2001 to more than 4.1 million in 2011 (Baumeister 2013).

There are significant differences between the new crops and the traditional crops. Particularly African oil palm is less labour intensive. Cultivation of both oil palm and sugar cane generate fewer jobs per area hectare than the traditional export crops. Increased mechanisation of the work reduces the need for labour. However, these products also create new processing opportunities, which to a certain degree can compensate for reduced labour opportunities in the cultivation part of the value chain. This may lay the ground for emerging new industries in the region. However, as large commercial estates dominate the production, it is not likely that the processing industry will favour small- and medium scale enterprises.¹⁰⁵

African oil palm in particular has huge environmental impacts. It is a water intensive crop, and absorbs water resources. African oil palm also heavily reduces the fertility of soil, and it is difficult to remove the crop and use the same land for other crops. It also occupies large areas of land that could have been used to increased effectiveness of other crops, as it can only be produced on flat land areas. Finally, the palm oil industry has been an important driver of deforestation in many countries.

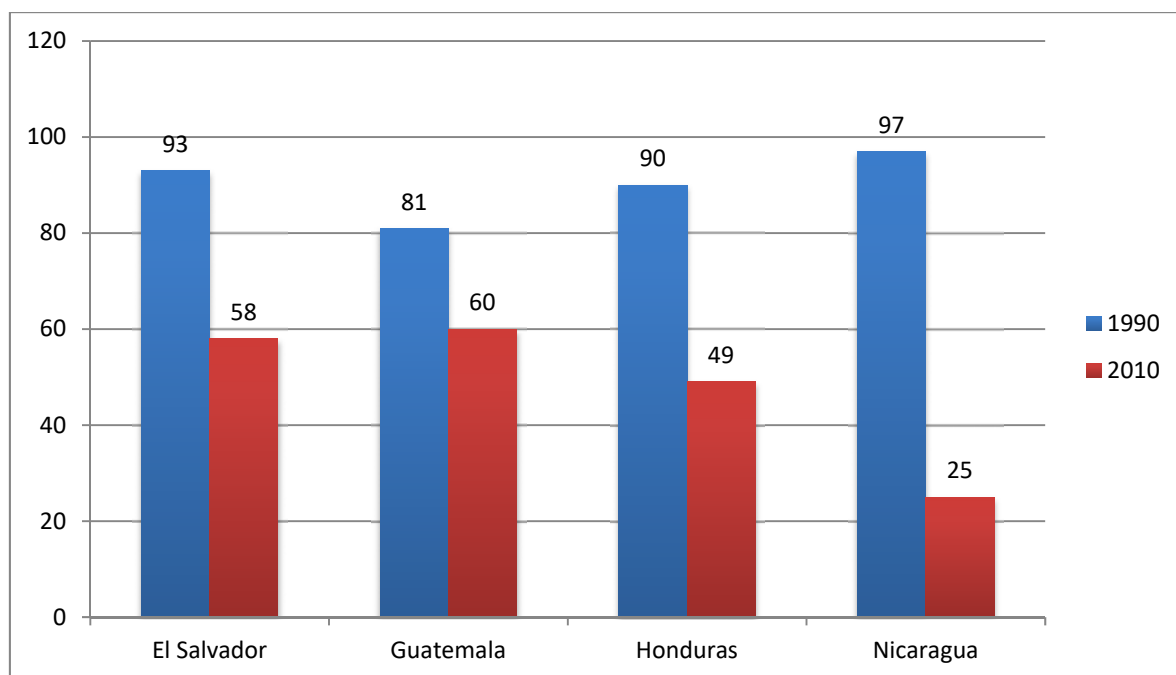
¹⁰⁵ The ownership of the sugar cane processing industry has traditionally been similar to the ownership structure for land. In the case of El Salvador, cooperatives have been able to engage in processing, but only in cases where the cooperatives were established after the agrarian reform.

Impact on food security

Small-scale farmers are the main producers of the most important staple crops in the region, maize and beans. The average size of production units for these basic ingredients in the Central American diet is 1.2 hectares in Guatemala, 1.3 hectares in Honduras and 2.4 hectares in Nicaragua. In Guatemala and Honduras, the average area for maize production units is less than one hectare, while the size of units for bean production varies between 0.5 to 1.5 hectares. Rice, another basic crop in the region, is, with the exception of Honduras, produced mainly by medium-scale farmers (holding more than 5 hectares of land).¹⁰⁶

Central America's capacity to produce food to ensure its food security has been significantly reduced since 1990. During the same period, cultivation production of African oil palm and sugar cane has expanded heavily, and the region has become more dependent on import of cereals.

Table 4: Percentage of cereals produced domestically



Source: Baumeister (2013)

As table 4 shows, the drop is most significant in Nicaragua, which has gone from being almost self-sufficient in cereals in 1990 to meeting only 25 per cent of the domestic demand for cereals in 2010. Honduras has also experienced a severe drop, and produces less than half of the amount that is consumed domestically.

¹⁰⁶ All numbers from Baumeister 2013.

The drop in capacity to meet domestic demands for cereals shows that production has not increased in pace with population growth. Lack of available data makes it difficult to distinguish between different cereals, such as maize or wheat. It is therefore difficult to assess to what extent the drop of capacity to meet the domestic demand is related to new consumption patterns, such as increased consumption of wheat. Given that particularly in urban areas, bread has replaced the traditional maize tortilla in some meals; this should be considered as a contributing factor.

Nevertheless, there are data available that suggest cereal and bean production has not followed the population growth. In Guatemala, the area used for maize and bean production increased from 1,157,422 in 1979 to 1,234,532 in 2003.¹⁰⁷ This represents an increase of 6.5 per cent, far behind the increase in the area used for cultivating sugar cane and African oil palm.¹⁰⁸ In Honduras, the total area used for general agricultural production increased by 43.6 per cent between 1990 and 2010, from 862,514 to 1,238,957 hectares. The increase in the area used for beans and maize production was significantly lower, with only a 21.2 per cent increase (from 556,563 in 1990 to 674,576 in 2010). Maize and bean production accounts today for 54.4 per cent of all agricultural land, a reduction from 64.5 per cent in 1990.¹⁰⁹

The increase of production in export-led crops suggests a prioritisation of export products over crops to secure domestic food security. There are few public incentives to strengthen production of staple crops, such as lack of extension services, limited access to credits and limited facilitation of better and more stable market access for small-scale farmers. Private investors, large-scale companies and landowners continue to set the agenda and define development priorities. In some areas, there is a direct negative impact on food production, as African oil palm and sugar cane production derive water from small farms to the larger estates.

Reduced capacity to ensure domestic food security increases the vulnerability for rising global food prices. Increased global food prices affect in particular the urban lower and middle classes. The Central American countries were severely affected by the financial crisis around 2007-2008. According to the World Bank (2016), poverty jumped from 34 per cent in 2007 to 40 per cent in 2008.

Land investments, land ownership and conflicts

Land investments and focus on export-led production require that the deeply rooted latifundio and minifundio land tenure structure is maintained. The percentage of small farms (under 1.5 hectares) out of the total number of production units has increased from 54 per cent in 1979 to 68 per cent in 2003 in Guatemala. This has also been the case in El Salvador, where small farms

¹⁰⁷ Baumeister (2013)

¹⁰⁸ Although the time periods are not the same, the overlap in time suggests a correlation between expansion of African palm and sugar cane and reduced capacity to meet domestic demand for staple crops.

¹⁰⁹ All numbers from Baumeister (2013).

comprised 71 per cent of all farms in 1971, a number that reached 85 per cent in 2007.¹¹⁰ Although the increase of small farms should, at least in the case of El Salvador, be analysed within the context of agrarian reform, these figures suggest that Central America is far from a transformation of its traditional land tenure structure.

To a certain extent, cultivation of African oil palm and sugar cane has replaced other large-scale monoculture crops, such as cotton and banana. Nevertheless, the expansion of production areas has also taken place at the expense of forests, and in some cases, land used by small-scale farmers for food production. Increase in large-scale production has intensified disputes over land, water and resources.

Consequently, land investments have resulted in the resurgence of land related conflicts. The long struggle for land in the Polochic Valley, in the northern part of Guatemala, is one example of conflicts related to expansion of sugar cane production in indigenous farming areas. Mass land acquisition and derivation of the Polochic River have affected local communities and farmers. More than 10 years after the conflict emerged, and despite rulings from the Inter-American Commission of Human Rights, the situation remains tense and unresolved. In northern Honduras, the conflict in Bajo Aguán is another example on recent land conflicts that originate from historical disputes over distribution and access to land. Since 2009, more than 90 farmers have been killed in the conflict. Additionally, several private guards, commercial agents and at least one police officer have also lost their lives in a conflict that affects thousands of farmers in the area. The two above-mentioned conflicts involve companies and business-persons with close ties to political leaders.¹¹¹ Particularly in Honduras and Guatemala, environmental activists and defenders of indigenous and farmer communities' rights suffer from persecution, assassinations and other kinds of human rights violations. The murder of the acknowledged Honduran environmentalist and indigenous leader, Berta Cáceres, in March 2016, is only one of several examples of how conflicts related to land and natural resources have resurged in the region.

Is Central America trapped in the same old vicious circle?

The current trends of land investments in Central America continue along the same patterns of land ownership that historically have dominated the region. They sustain the traditional latifundio - minifundio land tenure structure. Consequently, the number of land conflicts remains high. The continued focus on export-led production affects the region's capacity to produce staple crops to ensure its food security. As in the past, the current export-led production does not benefit the rural population in terms of increased income and access to basic services. Today's production is less labour intensive than previously, at the same time as its impact on natural resources such as water and soil creates unfavourable conditions for nearby farms and food production.

¹¹⁰ All numbers from Baumeister (2013).

¹¹¹ See Baumeister (2013) for more details.

The future scenario with increased global temperatures result in new challenges for agricultural production in the region. Increased water stress and shifts in precipitation patterns will affect food security. Beans and maize production will fall to zero in some areas, and predictions show a huge drop in food production throughout the region, even if adaptation measures are implemented.¹¹² Business as usual in the agricultural sector will neither be socially, economically or environmentally sustainable. If Central America is to improve its food security, it has to break the traditional pattern of land investments and land ownership.

This requires new answers to old questions. It is necessary to redefine the purpose of land investments, and also redefine who shall be the main beneficiaries of the investments. A reorientation of markets may also be necessary. Export for the global market is not necessarily beneficial for domestic food security and poor farmers, whereas national and regional markets can be a more viable option. It is also crucial to look inside and beyond the companies. Which actors are involved, and what is the political game behind. And finally, investors must follow basic guidelines for responsible investments and respect human rights.

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¹¹² See CEPAL (2010) and Schmit (2012) for more details on the impact of climate change on food security and agriculture in Central America

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AN EXAMPLE OF CONSERVATION OF RESOURCES THROUGH COMMUNITY PLANNING AND ACTION: THE “KAMOETHWAY MODEL”

Frankie Abreu, *Director, Tenasserim River and Indigenous Peoples' Network (TRIP NET), Myanmar*

An example from Myanmar illustrates how conservation of land can be planned and implemented through communities' own capacity and incentives.

The south eastern coastal region Tenasserim in Myanmar has been mapped out for palm oil and rubber production. The indigenous Karen people living along the Tenasserim and Kamoethway rivers have customary rights to the land, but these have been ignored, giving way to land concessions for these agricultural purposes and displacement of the people. Indigenous peoples in Myanmar are thus subjected to landgrab and greengrab, and also destruction of forests. Long-term armed conflict in Myanmar has also resulted in loss of seeds.

The villagers along the rivers live under dual administration – by the Myanmar government and by the Karen National Union (KNU). The inhabitants lack formal land rights, and have lived through 60 years of civil war. Their land and livelihoods are now threatened by palm oil and rubber concessions, mining, and various other forms of economic development. Myanmar seems to be a cake everyone wants to eat! In a country marred by civil war, these land acquisitions obstruct the opportunity for displaced populations to return home. Top-down conservation plans for these forested and biodiversity rich watershed areas pose additional threats to people's land and livelihoods, and thereby their food security.

To counteract these threats the Karen organization TRIP NET (Tenasserim River & Indigenous People Network) and two local Karen partner organizations CSLD (Community Sustainable Livelihood and Development) and RKIPN (Rays of Kamoethway Indigenous Peoples and Nature) are working with local Karen villagers to help the people manage their own resources sustainably. The initiative, analysis and solutions always rest with the villagers, while TRIP NET and the Karen partners follow them up, support and inspire them.

By doing so, TRIP NET, its partner organizations and the villagers demonstrate to the outside world that a rights-based approach, respecting customary collective rights and local conservation models of the Karen people, is the best way forward in a democratizing but still war-torn Myanmar.

What have these efforts led to?

TRIP NET and its partner organizations have contributed to strong local initiatives for river and forest resource management, including village based Local Knowledge Research, Community

Driven Forest Conservation, and Fish Conservation Zones (fish sanctuaries) in core areas. TRIP NET has facilitated the documentation of local management models (especially the Kamoethway model) through a publication, films and posters. The posters, which illustrate local resources, are produced by villagers themselves, with some technical input. Most members of the TRIP NET partners CSLD and RKIPN are themselves living in villages which at some point invited the collaboration of TRIP NET.

The Local Knowledge-Based Research is carried out by village working groups formed by people with special interest and knowledge in a certain field. In Kamoethway, six working groups have been formed on wildlife, forests, vegetables, herbal medicine, handicrafts, and on rotational farming and traditional culture. About one out of four participants in the working groups is a woman. Women's participation is particularly strong in vegetables and herbal medicine groups. The village has also carried out a socioeconomic study, and established a Fish Conservation Zone (fish sanctuary) and a system for Community Driven Forest Conservation.

In order to manage the forest properly, nine categories of land use were demarcated. These are: (1) Wildlife sanctuary; (2) Watershed forest; (3) Agroforestry land; (4) Utilization forest; (5) Umbilical cord forest (a protected forest - through a ceremony the umbilical cords of new-borns are put into bamboo containers and attached to the baby's future forest tree); (6) Culture forest; (7) Herbal forest; (8) Fish sanctuaries; and (9) Cemetery land.

In 2015, the "Kamoethway model" - the achievements of the first village that TRIP NET started working with - was presented and celebrated in Kamoethway.

TRIP NET has subsequently been invited to work with an increasing number of villages along the rivers. As a consequence of the common understanding of threats and common destiny, there is increased interaction among villages along the Tenasserim and Kamoethway rivers. In 2015, the organizations and villagers challenged land grabbing by a big oil palm company, and gathered hundreds of people to peacefully challenge a Chinese gold mining company contaminating the Tenasserim river. In doing so, they also challenged the Myanmar government and the KNU to investigate who had allowed the gold mining company to establish itself on the river.

Who benefits from the results achieved?

Through the initiatives of the villagers, the forest and river management is improved, fish sanctuaries created, and the traditions for watershed management, logging free zones and wildlife sanctuaries strengthened. Several thousand people from villages along the Tenasserim river have become aware of the uniqueness of their knowledge and their management traditions, of their ability to influence their future, and that their voice matters. They have experienced that they may stand up against land grabbing and illegal gold mining. The villagers themselves are

developing strategies, carrying out biodiversity mapping, and making posters and other material. TRIP NET then facilitates celebrations of village led conservation achievements.

In addition to strengthening resource management, the way the project is celebrated contributes to strengthened self-esteem and pride in Karen traditions and culture. Religious leaders from all denominations are invited to bless the achievements. Villagers become heartened to see the Forest Department, local, national and international NGOs, conservation organizations, KNU, researchers, and villagers from upstream and downstream take an interest in their work, listening, learning and showing their support. The projects also build capacity about opportunities to influence decisions made outside the communities, and to demand and contribute to democratic processes.

Why is this result important?

Tenasserim is part of one of the most significant forest biodiversity corridors in South-East Asia. It is also an area mapped out for palm oil and rubber production, and a mega-industrial zone and a deep sea port is planned at the coast. Hundred thousands of refugees now reside in refugee camps in Thailand, and it is now time for them to come back to the area they fled from. At a time when civil war ends, investments increase, and the land rights of local people are still not protected in laws and policies, the local Karen may become victims of large scale development or conservation projects. Land concessions have already been granted for agricultural purposes, like rubber and palm oil, and other development activities threaten local livelihoods and the opportunity of displaced populations to return home.

The hope is that the alternative model of people-centred conservation described by TRIP NET is understood and acknowledged by the Myanmar government, the KNU, and international conservation organizations. Local people would like to show that they can be part of the solution. Not only would this help alleviate local poverty and secure livelihoods, it could also contribute to trust building, peace and reconciliation in a troubled part of Myanmar.

How was the result achieved, and what was the role of the organizations working towards this result?

The alliance facilitated by TRIP NET, which includes local village groups and local development organizations like CSLD and RKIPN, is all Karen. They therefore enjoy trust in the Karen population. This is most likely a key factor for success. By using participatory methods and releasing local initiatives and ideas, the movement has raised much interest during the last years. Another important reason for success, according to TRIP NET, is that the villagers are the ones who make the priorities and provide the solutions, while the supporting organizations follow up the villages regularly and contribute keeping enthusiasm up.

Sources of evidence to document the result can be found e.g. in films posted on YouTube in 2016, such as:

1. *This should not be lost* (English version): <https://youtu.be/K9c4OhDccBE>
2. *Water is life* (English version): <https://youtu.be/WArSgxymrns>
3. *Save our river* (English version): https://youtu.be/pxDA_P73ZDM

Furthermore, in 2016, the book “*We will manage our own resources. Karen People of Kamoethway demonstrate the Importance of Local Solutions and Community Driven Conservation*” was launched and presented in Yangon. This book demonstrates the model developed under the project. The project has also resulted in a wide range of highly professional posters on local biodiversity (local plants, fish, river species etc.) and power point presentations describing the approach.

The work described has been supported by the Rainforest Foundation Norway (RFN) since 2014. RFN hopes to continue providing support to TRIP NET to see their model become nationally accepted.



Nine categories of land use explained by a RKIPN member

The Guidelines on the Responsible Governance of Tenure at a Crossroads

International Statement

10/12/2015

The Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (*Tenure Guidelines*, also referred to as VGGT), adopted by the UN Committee on World Food Security (CFS) in 2012, are a major step towards a human rights based governance of natural resources. The Tenure Guidelines are situated in a context of decades of struggles for peoples' access to and control over natural resources and territories. Since their adoption social movements, civil society organizations and communities have been using them in many ways to support their struggles to attain food and peoples' sovereignty.

More than three years after the adoption of the Tenure Guidelines land and natural resource grabs in all forms continue unabated around the world, visiting their devastating impacts on local communities, environments with related human rights violations. The implementation and application of the Tenure Guidelines, therefore, remains a matter of extreme urgency.

Helping the corporate sector to implement the Tenure Guidelines

The Tenure Guidelines are primarily addressed to states. By adopting the Tenure Guidelines, states have committed to apply them according to their paramount objective: to contribute to the realization of the human right to adequate food by improving the governance of tenure for the benefit of vulnerable and marginalized people and communities.

We, social movements, grassroots organizations and their allies, observe with concern that some states – together with some UN institutions and non-governmental organizations (NGOs) – are not focusing on the rights and needs of the most marginalized, but are concentrating their efforts on helping companies and private investors to use the Guidelines for their business interests.

A series of guides aimed at providing guidance to companies and private investors on how to use the Tenure Guidelines in their business operations have recently been developed by the US development agency USAID, the G7 New Alliance for Food Security and Nutrition in Africa and the so-called Interlaken Group (a group of several companies, banks, the World Bank's International Finance Corporation – IFC, the UK's development cooperation agency DFID and some International NGOs, namely Oxfam, Global Witness, Rights and Resources Initiative, The Forest Trust, Landesa and Forest Peoples Programme).¹ Food and Agriculture Organization of the United Nations (FAO) also has published a guide for government authorities on how to promote agricultural investments by private actors.²

¹ USAID, "Operational Guidelines for Responsible Land-Based Investment," March 2015, available at <http://usaidlandtenure.net/documents/operational-guidelines-responsible-land-based-investment>; New Alliance for Food Security and Nutrition in Africa, "Analytical Framework for Investors under the New Alliance: Due Diligence and Risk Management for Land-Based Investments in Agriculture," August 2015, available at https://www.growafrica.com/sites/default/files/Analytical-framework-for-investors-under-the-new-alliance-20%287%29_0.pdf; The Interlaken Group and the Rights and Resources Initiative (RRI), *Respecting Land and Forest Rights: A Guide for Companies*, August 2015, available at <http://www.interlakengroup.org>. The French Ministry of Foreign Affairs and the French Development Agency (AFD) have also produced a "Guide to due diligence of agribusiness projects that affect land and property rights. Operational Guide," October 2014, available at <http://www.foncier-developpement.fr/publication/guide-to-due-diligence-of-agribusiness-projects-that-affect-land-and-property-rights>. This document is different from the others in as much it is not directly addressed to investors but at AFD officers evaluating private investment projects that affect land tenure. While some of the problems outlined in this statement are also reflected in the MOFA/AFD guide, the comments contained in this statement refer mainly to the guides that are addressed directly to companies and private investors.

² FAO, *Safeguarding land tenure rights in the context of agricultural investment. A technical guide on safeguarding land tenure rights in line with the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, for government authorities involved in the promotion, approval and monitoring of agricultural investments, October 2015, <http://www.fao.org/3/a-i4998e.pdf>. FAO is currently also finalizing a technical guide on the Tenure Guidelines for private investors, working title "Operationalizing the Voluntary Guidelines on the Responsible Governance of Tenure: A Technical Guide for Investors."

These guides lead to a proliferation of interpretations of the Tenure Guidelines that creates confusion and diverts them from their true objectives. We see serious and fundamental problems with these guides:

1. Natural resources are transformed from a human rights issue into a matter of business

The Tenure Guidelines clearly recognize that the access to, and control over natural resources and their governance is a human rights issue. Improving the governance of tenure is a complex process, in which the core issue is finding ways to resolve social, political and economic conflicts. The Tenure Guidelines provide states with crucial guidance about how to deal with these complex issues in accordance with their international human rights obligations. The above-mentioned guides, on the other hand, start from the wrong premise: they are built around the risks that private and corporate investors encounter in acquiring land, fisheries and forests. Companies and private investors are invited to use the Guidelines in order to manage and reduce economic, financial and reputational risks; to ensure a smooth flow for their business activities; and to get a “competitive advantage” by improving their “overall supply-chain efficiency, reliability and market share” (Quotes from Interlaken Group Guide/Brochure)

By focusing on the interests of companies and private investors, and not on the rights of the most vulnerable and marginalized (as explicitly stated by paragraph 1.1 of the Tenure Guidelines), these guides transform the Tenure Guidelines into a tool for business and corporate social responsibility (CSR). Land and resource grabs are legitimized by the exclusive focus on private and corporate investments in the form of land acquisitions (buy or lease) and the interpretation of paragraph 12.4 of the Tenure Guidelines about responsible investments according to a corporate-centered agenda.

Fostering such an understanding and use of the Tenure Guidelines will most probably lead to their misuse by the corporate sector in order to whitewash their business activities. A number of big agrifood transnational corporations (TNCs), such as Coca Cola, PepsiCo, Cargill, Nestlé, Unilever and Illovo have already started to use the Tenure Guidelines for their public relations and CSR purposes by publicly endorsing them and announcing that they will “implement” them through their business operations.

2. “Multi-Stakeholderism” mixes up the role of states and companies

The guides assume that all actors (states, individuals and communities, companies, CSOs etc.) are “stakeholders” at the same level. Accordingly, they wrongly act as though the Tenure Guidelines address states and business in the same way. Moreover, they are largely silent about what the Guidelines have to say regarding states’ obligations vis-à-vis companies. This approach ignores the fundamental differences in the nature, and consequently the roles and responsibilities, of states and companies. States draw their legitimacy from the people who confer on them a mandate to serve the public interest based on the principle of human dignity and human rights. States are accountable to the people. Companies, on the contrary, have no legitimate public governance functions, because they represent solely particular interests and are only accountable to their shareholders or owners. Companies and private investors, first and foremost, have to respect and act in accordance with the law.

The guides implicitly transfer state prerogatives and duties to companies and private investors, especially regarding highly sensitive issues in the context of natural resource governance. One example is the process of identifying and recognizing legitimate tenure rights not currently protected by law, which the Tenure Guidelines strongly call for. The guides suggest that this is something that can be done by investors through “participatory stakeholder mapping” (New Alliance Guide) However, this is one of the most contentious processes in society and is charged with power asymmetries and conflicts. Private investors and companies do not have the necessary legitimacy to carry out such a process. It is part of the mandate given to the state by the people, for which it is accountable to the people. Private investors and companies pursue their own particular economic interests and will try to maximize their profits whenever they are supposed to identify and recognize legitimate tenure rights. Nothing would be more harmful to the recognition and protection of the legitimate tenure rights of marginalized groups than entrusting the very investors that are seeking to get control over their lands, fisheries and forests with such a task, as the guides suggest. It is a clear case of

conflicting interests. This also applies to processes to assess the impacts of business activities (of which para. 12.10 of the Tenure Guidelines clearly says that states have to ensure that these are independent), conducting consultations and negotiations as well as compensating people for losses.

Another example is the resolution of conflicts related to land, fisheries and forests in the context of business operations. The guides assume that this is something that private investors or companies should handle by putting in place “grievance or dispute resolution procedures.” It is true that, in many countries, the formal judicial system does not work very well, especially regarding rural areas. However, the Tenure Guidelines would be rendered meaningless and even harmful by relinquishing the obligation of the state to provide (a) access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights; and (b) effective and promptly enforced remedies that may include restitution, indemnity, compensation and reparation. The guides entrust business with these tasks, yet private investors and companies cannot “resolve land conflicts” (New Alliance Guide), replace the state in providing access to justice, nor can they “supplement more formal [judicial] processes,” as the guides suggest. Reality shows that powerful investors are often involved in serious abuses against human rights such as forced and violent evictions, killings, arbitrary detention and harassment of communities and people. It is obvious, then, that entrusting the very parties involved in directly or indirectly committing such human rights offences will never provide justice. Also, allowing this to happen formalises the capture of the state by capital and vested interests. Investors and businesses cannot be enjoined to “support and supplement the activities of government” (New Alliance Guide).

As social movements and CSOs, we know how difficult it can be to engage with governments and state authorities at all levels. In some cases states are promoting resource grabs (often justified with the need to create an “enabling environment for investments”), or are even acting as grabbers themselves. These are human rights violations for which they have to be held accountable. However, it is the states and their public institutions that have the mandate to serve the public interest and the obligation to protect the people from human rights abuses by companies and private investors through appropriate legal frameworks. This includes the obligation to regulate companies and investors at national and international levels and to sanction them when they commit crimes or impair the human rights of individuals or communities, ensure redress for damages and prevent repetition. This obligation also applies to the home state of companies and private investors when these infringe human rights abroad (extraterritorial human rights obligations). Investment contracts cannot replace laws and it is certainly not the first task of state authorities to “guide” and “shepherd investors,” in order to facilitate land acquisitions by them, or to “solve the problems faced by existing or potential investors” (quotes from FAO Guide for state authorities). We do not believe a word of the commitments to responsible behaviour by the corporate sector and the self-regulation of business.

3. Imposing a non-existent “partnership” between corporations and communities

All the above mentioned guides call upon private investors and companies to seek strong engagement with communities that are affected by their business operations. The underlying assumption is that land acquisition is potentially good for both companies and communities. All that is needed is for private investors do the correct things and engage with affected communities, taking into account their “needs, desires and concerns” (USAID Guide). What is more, the guides suggest that “responsible investments” in the form of land acquisitions by businesses will “bring important benefits to local communities”, “open opportunities” for them and improve their food security (quotes from USAID Guide and Interlaken Group Guide respectively). This line of reasoning follows a corporate-led strategy of considering companies and private investors as main actors for development and food security, thus positioning them as “part of the solution,” rather than the actual problem.

A community and a company or a private investor planning to buy up or lease land, forest or water resources are not the same and cannot be treated as such. This is at the core of the human rights approach of the Tenure Guidelines, which demands a special emphasis on vulnerable and marginalized people. Business enterprises of any kind, including corporations, have as their primary purpose to obtain profit. Investment projects that entail the acquisition of land, fisheries and forests utterly disrupt the daily lives of peasant, indigenous, fishing, pastoralist or urban communities. In all parts of the world, communities are asserting

their rights and resisting corporate resource grabbers. The generalization of companies and private investors, on the one hand, and communities, on the other, as “stakeholders” that negotiate on equal terms on as crucial an issue as the control over natural resources is unfounded and will generate injustice. It also ignores the power asymmetries that exist between the groups. Therefore, it is wrong and dangerous to assume that communities automatically will engage in private or corporate investment projects, if only private investors do the right things and that, as a result, local tenure will not be compromised, affected or undermined. The same applies to an approach that sees state authorities’ role primarily in “facilitating dialogues” between investors and communities. (FAO guide for state authorities)

Companies and private investors planning to buy or lease land also cannot ensure appropriate consultations with affected communities. They are obviously not neutral actors and there are usually huge power imbalances between them and communities. Again, it is the state that has the authority and responsibility to guarantee that the consultations conform to regulations and the standard set by the Tenure Guidelines (paragraphs 3B6 and 9.9). This includes the right of communities and people to withhold their consent if they deem that an investment project is not in their interests.

The putative “partnership” between private investors and communities that the guides construct and try to impose ultimately means that communities are to be included in corporate value and supply chains. Contract farming, out-grower schemes and management contracts figure prominently in the guides as a means to ensure “mutual benefits” of investment projects and “greater returns on investments for all parties involved” (FAO Guide for state authorities). This ignores the real experiences of many communities around the world, who have seen themselves trapped in a situation of complete dependence on powerful companies. While every community has to decide whether or not to engage in contract farming, out-grower schemes or management contracts, it is utterly wrong to stipulate that these are best practices that automatically improve communities’ livelihoods and food security. Small-scale food producers produce most of the food consumed in the world and need to be supported through public investments, as recognized in the Tenure Guidelines (paragraph 12.2). Reducing them to providing a cheap work force at the bottom of corporate-controlled value and supply chains is a crude misinterpretation of paragraph 12.6 of the Tenure Guidelines, which calls for state support for “production and investment models that do not result in the large-scale transfer of tenure rights to investors.”

We do not accept the corporate capture of our natural wealth, resources, human rights and public policies, and will oppose all attempts to establish money- and market-driven governance of natural resources, food and nutrition. We will continue to oppose all forms of land, water, ocean and seeds grabbing, to assert our rights to our resources and territories and to strengthen our struggle for food and peoples’ sovereignty.

We, therefore, call upon:

States, UN agencies, research institutions and NGOs

- to withdraw and refrain from all initiatives that aim at abetting the corporate sector and private investors to use the Tenure Guidelines for the pursuit of business interests, thus supporting the corporate capture of resources, public policy spaces and human rights.

States

- to apply and implement the Tenure Guidelines in accordance with their existing human rights obligations (territorial and extraterritorial), to which they have committed by endorsing them. This means that all efforts have to start from the rights and needs of communities and the most marginalized, instead of particular corporate interests.

This includes to

- pass and enact new laws and/or effectively enforce existing laws that put effective safeguards to large-scale land transactions, such as ceilings on permissible land transactions or parliamentary approval (paragraph 12.6 of the Tenure Guidelines);
 - pass and enact new laws and/or effectively enforce existing laws that regulate companies and investors, and particularly TNCs, with regard to guaranteeing free prior and informed consent (FPIC) as well as prior and independent impact assessments (including human rights impact assessments);
 - hold companies and investors liable if they do not deliver the commitments they make to create employment, local revenue, etc. in the context of land acquisitions;
 - criminally prosecute the offenses and crimes by companies that impair the realization of human rights and the legitimate tenure rights of people and communities;
 - improve the state's capacities to monitor and prosecute these abuses and crimes;
 - prioritize investment policies that develop the investing capacities of small-scale food producers and communities.
- to promote true accountability and monitoring of the implementation of the Tenure Guidelines and governance of tenure by
 - supporting and accelerating the establishment of a robust and innovative monitoring mechanism within the CFS. The CFS will remain truncated and will fail to fulfill the great expectations behind its reform without a monitoring mechanism that allows for reflection, discussion and assessment of the progress made in the coordination of actions by actors at different levels and that ensures accountability in the application of the Tenure Guidelines and other CFS decisions;
 - contributing in a constructive way to the global monitoring event during the 43rd CFS session in 2016, in order to ensure a comprehensive and thorough assessment of the use and application of the Tenure Guidelines.
 - to support and engage in good faith in the process towards the adoption of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights at the UN Human Rights Council, in order to define clear and obligatory international standards on duties of transnational corporations and other business, including rules on impact assessments, due diligence and liability, and hold them legally accountable for human rights abuses and crimes.

FAO

- to provide technical support to the implementation and application of the Tenure Guidelines according to their true objective and in good faith, building on the Guidelines and the principles of implementation contained in them and not lowering the standard the set. Among others, FAO should initiate an inclusive process in order to develop technical instruments that guide states in mandatory regulation of business according to the obligations identified in the Tenure Guidelines and human rights.

Signed by

International Indian Treaty Council – IITC/CITI

International Federation of Rural Adult Catholic Movements – FIMARC

La Via Campesina

Mouvement International de la Jeunesse Agricole et Rurale Catholique – MIJARC

Urgenci – International Community Supported Agriculture Network

World Alliance of Mobile Indigenous Peoples – WAMIP

World Forum of Fish Harvesters and Fish Workers – WFF

World Forum of Fisher Peoples – WFFP

Centre for Environmental Education and Development – CEED, Nigeria

Centro Internazionale Crocevia

Convergence malienne contre l'accaparement des terres – CMAT, Mali

Conseil citoyen Droit à l'Eau et à l'Assainissement – COCIDEAS, Sénégal

Conseil national de concertation et de coopération des ruraux – CNCR, Sénégal

COPAGEN Sénégal

Enda Pronat, Sénégal

European Coordination Via Campesina – ECVC

Fédération Nationale pour l'Agriculture Biologique (FENAB), Sénégal

FIAN International

FIMARC Afrique

Focus on the Global South

Forum Social Sénégalais

Friends of the Earth International

Housing and Land Rights Network-Habitat International Coalition – HIC-HLRN

International Collective in Support of Fishworkers – ICSF

Land Research Center, Palestine

Masifundise Coastal Links, South Africa

Mouvement de solidarité pour le droit au logement – MSP-DRO.L, Burkina Faso

National Fish Workers' Forum – NFF, India

National Women Peasants Association, Nepal

Nepal Landless Dalit Peasants organization

Nepal Youth Farmers Association

Panafricaine pour l'Education au Développement durable – PAEDD

Plateforme d'Innovations pour l'Emploi des Jeunes et des Adultes (PIEJA), Sénégal

Réseau maghrébin des associations de développement local en milieu rural (REMADEL)

RIAO-RDC, Democratic Republic of Congo

South Asia Farmers Forum

South Asia Food Sovereignty Network

South Asia Peasants Coalition

South Indian Coordination committee of Farmers movements – SICCFM, India

Terra Nuova

Transnational Institute – TNI

Union des groupements paysans de Meckhé (UGPM), Senegal

Investments and Land Rights



The role of the private sector in ensuring responsible governance of tenure

A seminar hosted by FoHRC- Food, Human Rights and Corporations, and FIAN Norway

Time: Monday 13 June 09:00 - 15:30

Where: Norwegian Centre for Human Rights (NCHR), Cort Adelers gate 30, Oslo

09:00-09:15 Registration

09:15-12:00 **Morning Session**, moderated by Aksel Tømte, NCHR / FoHRC:
When states fail to provide adequate rights protection to small-scale farmers and forest-dependent communities, should companies be encouraged to take on that role?

09:00-11:00 Welcome by Wenche Barth Eide, Department of Nutrition, UiO / FoHRC Coordinator
Aksel Tømte, NCHR / FoHRC: *Introduction to the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) and the role of the private sector*

Keynote speaker: Andy White, Coordinator of the Rights and Resources Initiative (RRI) and Co-chair of the Interlaken Group: *Working with the private sector to respect local land rights: RRI's approach and the role of the Interlaken Group*

Henry Thomas Simarmata, La Via Campesina:
The Guidelines on the Responsible Governance of Tenure at a crossroads

Poul Wisborg, Noragric, Norwegian University of Life Sciences:
Large-scale land acquisitions and the interdependence of rights

Gunnvor Berge, Section for UN Policy, Norwegian Ministry of Foreign Affairs:
The forthcoming VGGT stocktaking during the Committee on World Food Security (CFS) in October in Rome - what signals for the planning process?

Panel discussion and Q&A

11:00-11:20 Coffee/tea

11:20-12:00 Plenary discussion

12:00-13:00 Lunch

13:00-15:30 **Afternoon Session**, moderated by Kristin Kjæret, Former Executive Director of FIAN Norway:
The impact of land and forest investments on food security and small-scale farmers - how to ensure meaningful consultation and participation?

13:00-14.15 **Hans Morten Haugen, VID Specialized University:** *Consultation and participation by affected groups - a wider application of the principles of 'Free, Prior, and Informed Consent' (FPIC)?*
Elin Cecilie Ranum, The Development Fund:

Large-scale investments, land ownership, and food security in Central America

Frankie Abreau, Tenasserim River and Indigenous Peoples' Network (TRIP NET), Myanmar:
Threats to Karen land and food security in Tanintharyi, Myanmar

Q&A

14:15-15:30 **Eivind Fjeldstad, Norwegian-African Business Association (NABA):**
Norwegian investments in African markets: some perspectives from NABA
Knut Olav Krohn Lakså, Section for Private Sector Development, Norad:
Private sector investments and responsibilities - expectations by Norad

Discussion

Summary and closure