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Transforming Adversary to Ally: Mobilizing Corporate Power for Land Rights

Diana Kearney

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TRANSFORMING ADVERSARY TO ALLY: MOBILIZING CORPORATE POWER FOR LAND RIGHTS

DIANA KEARNEY

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I. INTRODUCTION

“They cut me, left me for dead and took my land,” Sam explained.¹ Frustrated by his repeated refusal to sell his family’s 13-acre plantation in Uganda, three employees from Formosa Tree Planting ambushed Sam with machetes, hoping that his death would leave the land unprotected.² When Sam survived, Formosa managers paid him a visit in the hospital.³ They would buy his land at a fraction of its market value, they explained, so that he could afford his hospital treatment.⁴ In desperate need of cash, Sam relented.⁵ Without the income from his coffee and banana crops, Sam and his family found themselves homeless and in dire economic straits.⁶

1. Benon Herbert Oluka, *Uganda: Chinese Firm Accused of Land Grabbing*, ALL AFR. (May 23, 2016), <http://allafrica.com/stories/201605231544.html>.

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

In June 2016, members of Brazil's indigenous Guarani-Kaiowá community came together to repossess their ancestral lands from the farmers who had displaced them.⁷ The loss of land had devastated the Guarani, pushing them into such desperate living conditions that Guarani children were dying of starvation.⁸ Negotiations between the Guarani and settlers broke down, however, and the farmers reached for their guns.⁹ They opened fire on the crowd, seriously wounding five—including a twelve-year-old boy—and killing Guarani health worker Clodiody de Souza.¹⁰ As community leader Tonico Benites observes, the land conflict's ever-mounting death toll indicates that "[a] slow genocide is taking place."¹¹

A wealthy cohort of locals agreed to build an air strip and deep water shipping port to attract tourists in Casiguran, Philippines.¹² The plans were complicated, however, by the thousands of Filipino farmers and fishing families living on the land slated for construction.¹³ To pave the way for the development, the project managers evicted hundreds of families from their homes.¹⁴ For the farmers and fisherfolk who subsisted off the land, such evictions were tantamount to losing one's home and job in one fell swoop.¹⁵

Tragedies like this have grown increasingly common.¹⁶ Accounts of businesses evicting smallholder families with violence, threats,

7. Bruce Douglas, *Dispute Turns Deadly as Indigenous Brazilians Try to Retake Ancestral Land*, THE GUARDIAN (July 14, 2016), <https://www.theguardian.com/global-development/2016/jul/14/dispute-turns-deadly-indigenous-brazilians-ancestral-farmland-guarani-kaiowa>.

8. *Guarani Indian Children Die of Starvation*, SURVIVAL INT'L (Feb. 22, 2007), <http://www.survivalinternational.org/news/2231>; Paulo Victor Chagas, *Poverty and Hunger Kill Indigenous Guarani-Kaiowá People of Brazil*, AGÊNCIA BRAZ. (Sept. 17, 2016, 3:28 PM), <http://agenciabrasil.ebc.com.br/en/direitos-humanos/noticia/2016-09/poverty-and-hunger-kill-indigenous-guarani-kaiowa-people-brazil>.

9. Douglas, *supra* note 7.

10. *Id.*

11. Rick Kearns, 'A Slow Genocide': Gunmen Attack Indigenous Again in Brazil, INDIAN COUNTRY TODAY (June 16, 2016), <http://indiancountrytodaymedianetwork.com/2016/06/16/slow-genocide-gunmen-attack-indigenous-again-brazil-164811> ("A slow genocide is taking place. There is a war being waged against us. We are scared. They kill our leaders, hide their bodies, intimidate and threaten us . . . We are fighting always for our land.") (quoting Guarani-Kaiowá leader, Tonico Benites).

12. *Land Grabs in the Philippines: "It's Like They Have Killed Us Already"*, OXFAM INT'L, <https://www.oxfam.org/en/countries/land-grabs-philippines-its-they-have-killed-us-already> (last visited May 8, 2018).

13. *Id.*

14. *Id.*

15. *Id.*

16. See Jina Moore, *Resolving Land Disputes: Can Governments Keep Land Quarrels from Turning Violent?*, 5 CQ RESEARCHER 421, 421 (2011), <http://library.cqpress.com/cqresearcher/document.php?id=cqrglobal2011090600> (commenting that "[c]onflicts over land ownership are intensifying around the globe").

and coercion no longer shock the informed reader.¹⁷ These are paradigmatic examples of “land grabs,” or land acquisitions that are undertaken without the evicted party’s consent, or that otherwise violate their human rights.¹⁸ Despite the international community’s recognition that “forcible transfer of population” constitutes a crime against humanity,¹⁹ they are accelerating in pace.²⁰ Such displacement generates ripple effects that extend long past whatever violence accompanies eviction itself, leaving victims homeless and without access to their usual sources of income, food, water, and community ties. While such grabs violate a spectrum of human rights, they have proven particularly dangerous for the rights to food and water. With smallholder farmers producing 80% of the food consumed in sub-Saharan Africa and Asia,²¹ encroaching on these plots places famished regions at an even greater risk of hunger. The fact that 60% of food produced on grabbed land is exported, rather than used to feed local communities,²² further underscores the destructive impact that land grabs have upon local

17. See, e.g., *The Suffering of Others*, OXFAM INT’L 4–15 (Apr. 2015), https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-suffering-of-others-international-finance-corporation-020415-en.pdf (documenting corporate use of violence and threats of violence against local communities resisting land grabs in Cambodia, Laos, Honduras, Guatemala, and India); Friends of the Earth, *Land Grabbing, Palm Oil & Violence in Honduras: The Case of Grupo Dinant*, https://1bps6437gg8c169i0y1drtgz-wpengine.netdna-ssl.com/wp-content/uploads/wpallimport/files/archive/Issue_Brief_7_Hondus_and_Grupo_Dinant.pdf (last visited May 8, 2018) (recounting Dinant-funded assaults and murders against members of the local population); *Violent Corporate Land Grabbing in Papua New Guinea*, OAKLAND INST. (Dec. 1, 2013), <http://www.oaklandinstitute.org/violent-corporate-land-grabbing-papua-new-guinea> (discussing the beatings, arrests, and physical intimidation that corporate security guards use against locals protesting their displacement); Oluka, *supra* note 1 (recounting the rape of a woman who refused to sell her land to Formosa Tree Planting).

18. The most widely cited definition of “land grab” comes from 2011’s Tirana Declaration, which identifies grabs as acquisitions or concessions which do one or more of the following: (i) violate human rights, particularly the equal rights of women; (ii) were not preceded by the free, prior, and informed consent of the affected land users; (iii) are not based on thorough impact assessment, or the social and environmental impacts, including gendered impacts; (iv) are not grounded in transparent contracts that specify clear and binding commitments about activities, employment, and benefits sharing; or (v) were not concluded via effective democratic planning, independent oversight, and or the meaningful participation of affected communities. *Tirana Declaration*, INT’L LAND COALITION ¶ 4 (May 26, 2011), <http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf>.

19. Rome Statute of the International Criminal Court art. 7(1)(d), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. For the forcible transfer of a community to qualify as a crime against humanity, it must also be part of a widespread or systematic attack against a civilian population and the actor must have knowledge of the attack.

20. Kerstin Nolte & Wytske Chamberlain, *Africa Remains a Target as Global South Land Rush Moves to Production*, THE CONVERSATION (Oct. 11, 2016, 2:50 AM), <http://theconversation.com/africa-remains-a-target-as-global-south-land-rush-moves-to-production-66345>.

21. Kanayo F. Nwanze, *Smallholders Can Feed the World*, IFAD (Feb. 2011), <https://www.ifad.org/documents/10180/ca86ab2d-74f0-42a5-b4b6-5e476d321619>.

22. *The Truth About Land Grabs*, OXFAM AM., <https://www.oxfamamerica.org/take-action/campaign/food-farming-and-hunger/land-grabs/> (last visited Mar. 7, 2018).

food security, as does the fact that two-thirds of land grabs take place in food insecure regions.²³ Even if incoming landowners grow a larger volume of food than the smallholders they displace, agricultural growth fights malnutrition far more effectively if that growth is concentrated in the hands of the smallholders themselves.²⁴ Thus, land grabs are deadly not only because of the violence that so often accompanies forced evictions, but because of the long-term impacts on hunger, malnutrition, and the communities' ability to earn a living.

In light of these grave consequences, one might reasonably ask how these expulsions have become so commonplace. This is due in large part to the enabling environment that has developed: first, billions of people do not hold formal title²⁵ to the land that they live and rely upon, exposing them to claims that the land is not truly "theirs." Indeed, a mere 10% of land used collectively by communities are formally titled.²⁶ This insecure tenure leaves communities vulnerable to predation by outsiders who are interested in taking advantage of the gap between formal and informal land tenure.

Second, the spike in corporate grabs is illustrative of a larger trend in global relations. The power of transnational corporations (TNCs) vis-à-vis the state has climbed markedly over the past sixty years, with TNCs now exercising so much control that "the most powerful law is not that of sovereignty but that of supply and

23. Sarah Small, *The Land Battle: 15 Organizations Defending Land Rights*, FOOD TANK, <http://foodtank.com/news/2015/07/the-land-battle-15-organizations-defending-land-rights> (last visited May 8, 2018).

24. Mike Roth, *USAID Issue Brief: Land Tenure and Food Security*, USAID 3 (June 2013), <https://www.land-links.org/wp-content/uploads/2016/09/Land-Tenure-and-Food-Security.pdf>.

25. Formal tenure rights can be defined as "those that are explicitly acknowledged by the state and which may be protected using legal means." This stands in contrast to informal land rights, which "are those that lack official recognition and protection." FAO, *FAO LAND TENURE STUDIES 3: LAND TENURE AND RURAL DEVELOPMENT* 7–11 (2002), <http://www.fao.org/3/a-y4307e.pdf> [hereinafter *FAO LAND TENURE STUDIES 3*]. While this distinction is instructive, it glosses over the fact that certain agencies within a government may recognize land as formally held, whereas other branches of the government refuse to recognize it as such. For example, the Brazilian Constitution recognizes ancestral indigenous peoples' lands as theirs to possess and use. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231 (Braz.). However, Brazilian courts and police instead enforce the conflicting claims of more recent land developers. *UN Rights Expert Urges Brazil Not to Evict Guarani and Kaiowá Indigenous Peoples from Their Traditional Lands*, UN OHCHR (Aug. 11, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16308&LangID=E> (discussing a Federal Court order to evict indigenous peoples from their territory and detailing the role that police play in carrying out these forced removals) (last visited May 8, 2018).

26. *Why a Global Call to Action?*, LAND RIGHTS NOW, <http://www.landrightsnow.org/en/about/> (last visited May 8, 2018).

demand.”²⁷ Sixty-nine of the world’s 100 largest economies belong to corporations rather than states,²⁸ fashioning a world order in which the long-accepted norms of who can be a “global superpower” have become unsettled.²⁹ As Benjamin Barber observes,

[b]y many measures, corporations are today more central players in global affairs than nations. We call them multinational but they are more accurately understood as transnational or postnational or even antinational. For they abjure the very idea of nations or any other parochialism that limits them in time or space.³⁰

This sharp rise in corporate power leaves TNCs with mounting influence over the lives of individuals and governments alike.³¹ This holds particularly true in low-income states, where corruption tends to run high and rule of law skews low.³² At times, the growing corporate footprint can be positive: businesses entering less-developed regions can create jobs, introduce technology, and spur economic growth in ways that benefit the local community.³³ But

27. Parag Khanna, *These 25 Companies Are More Powerful than Many Countries*, FOREIGN POL’Y (Mar. 15, 2016), <http://foreignpolicy.com/2016/03/15/these-25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power/> (forecasting that “corporations are likely to overtake all states in terms of clout.”).

28. Duncan Green, *The World’s Top 100 Economies: 31 Countries; 69 Corporations*, WORLD BANK (Sept. 20, 2016), <https://blogs.worldbank.org/publicsphere/world-s-top-100-economies-31-countries-69-corporations>.

29. Khanna, *supra* note 27.

30. BENJAMIN R. BARBER, JIHAD VS. MCWORLD: TERRORISM’S CHALLENGE TO DEMOCRACY 23 (2010).

31. See SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS 149 (2012) (discussing the rising influence that corporations have over the lives of individuals and the enjoyment of their human rights); see also JOINT COMMITTEE ON HUMAN RIGHTS, ANY OF OUR BUSINESS? HUMAN RIGHTS AND THE UK PRIVATE SECTOR, 2009-10, HL 5-I & HC 64-I, at 22 (UK) (“The globalisation of the world economy has made the corporate sector a more important influence on human rights for good or ill than almost any other constituency. Through its spreading supply chains it touches directly the lives of millions.”) (quoting Sir Geoffrey Chandler, former Director of Shell International).

32. See Vinay Bhargava, *The Cancer of Corruption*, WORLD BANK GLOBAL ISSUES SEMINAR SERIES 2 (Oct. 2005), <http://siteresources.worldbank.org/EXTABOUTUS/Resources/Corruption.pdf> (“[m]easures of corruption and poor governance are negatively correlated across countries with income per capita and with scores on the UN Human Development Indicators. That is, richer countries and countries with higher human development ratings tend to have less corruption and better functioning governments.”); WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2016, at 24–25 (2016), https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (providing a systematic ranking of countries’ rule of law by income group, and demonstrating that countries in the low and lower-middle income groups have significantly weaker rule of law scores than countries in the upper-middle and high-income groups).

33. *Entrepreneurs and Small Businesses Spur Economic Growth and Create Jobs*, WORLD BANK (June 20, 2016), <http://www.worldbank.org/en/news/feature/2016/06/20/entrepreneurs-and-small-businesses-spur-economic-growth-and-create-jobs>; see also Beata

this mutually beneficial relationship is rare—or at least, the advantages are overrun by the problems that investors introduce. Typically, “the relation between human rights and money, between moral and economic globalization, is more antagonistic, as can be seen, for example, in the . . . practices of the large global corporations.”³⁴ In the context of land grabs, the consequences of this hostile relationship have become painfully clear: TNCs across the globe have been grabbing land from local communities at ever-faster rates, leaving a trail of human devastation in their wake.

Yet “land grabber” and “rights abuser” is not the role that corporations are doomed to play. Though the corporate idolatry of the shareholder leads us to assume that financial calculations inevitably take precedence over human rights,³⁵ the two ends are not diametrically opposed. Business is not a zero-sum game in which CEOs are forced to select between profit and respecting human rights.³⁶ Over the past few decades, more sophisticated TNCs have begun to appreciate the value of burnishing their image as a responsible actor on human rights. Executives now recognize that a strong record of corporate social responsibility (CSR) attracts consumers,³⁷ retains high-performing employees,³⁸ and mitigates

Javorcik, *Multinationals Indeed Bring Good Jobs to Host Countries – Here’s Why*, WORLD BANK (July 17, 2015), <http://blogs.worldbank.org/developmenttalk/multinationals-indeed-bring-good-jobs-host-countries-here-s-why>; Darrell M. West, *Technology and the Innovation Economy*, BROOKINGS (Oct. 19, 2011), <https://www.brookings.edu/research/technology-and-the-innovation-economy/> (discussing the economic benefits that accrue when new technologies are introduced to economies).

34. MICHAEL IGNATIEFF ET AL., HUMAN RIGHTS AS POLITICS AND IDOLATRY 7 (Amy Gutmann ed., 2001); see also PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 1461 (2012).

35. See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (2002) (contending that the social responsibility of corporations is only to maximize profit).

36. See generally ANDREW W. SAVITZ WITH KARL WEBER, THE TRIPLE BOTTOM LINE (2nd ed. 2013) (exploring the mutual benefits that companies, communities, and shareholders receive from strong corporate human rights practices).

37. *Global Consumers Are Willing to Put Their Money Where Their Heart Is When It Comes to Goods and Services from Companies Committed to Social Responsibility*, NIELSEN (June 17, 2014), <http://www.nielsen.com/us/en/press-room/2014/global-consumers-are-willing-to-put-their-money-where-their-heart-is.html>; see also *Consumers Favour Fairtrade as Ethical Label of Choice*, FAIRTRADE FOUND. (Sept. 3, 2013), <http://www.fairtrade.org.uk/en/media-centre/news/september-2013/consumers-favour-fairtrade-as-ethical-label-of-choice> (noting the consumer preference for goods they believe have been ethically sourced); *Cadbury: An Ethical Company Struggles to Insure the Integrity of Its Supply Chain*, YALE SCH. MGMT. (Aug. 2008), <http://som.yale.edu/our-approach/teaching-method/case-research-and-development/cases-directory/cadbury-ethical-company> (detailing Cadbury’s abrupt change in cocoa sourcing after consumer outrage over child labor in their supply chain hurt sales).

38. Wesley Cragg, *Human Rights and Business Ethics: Fashioning a New Social Contract*, 16 NEW ENG. J. PUB. POL’Y 109, 112–13 (2001) (“Many corporations have discovered that substantial positive benefits can flow from building a reputation as an ethical company. Employees prefer to work for ethical companies. A reputation for ethical business practices attracts better qualified, better motivated job applicants.”). Jeroen van der Veer, Committee of Managing Directors of Shell, echoes this sentiment: “In my view the successful companies of the future will be those that integrate business and employees’ personal values. The best

against the expensive prospect of conflict with local communities.³⁹ The converse is also true: the reputational stain of abusive human rights practices inflicts very real damage onto a company's bottom line.⁴⁰ What is more, the steady rise in transparency for corporate behavior occurring in regions that companies once considered invisible means TNCs are increasingly incentivized to behave in ethical ways toward marginalized communities. In today's marketplace, it pays to be nice. As former Unilever CEO Niall FitzGerald explained, "[c]orporate social responsibility is a hard-edged business decision. Not because it is nice to do or because people are forcing us to do it . . . but because it is good for our business."⁴¹

Given the ever-larger shadow that corporations cast over global affairs, TNCs are poised to play a transformative role in stemming the tide of human rights violations—including land grabs. By conducting rigorous due diligence on land acquisitions,⁴² refusing to cooperate with governments that sell land off occupied lands as “unowned,” and advocating for improved government and corporate policies on land, TNCs can curtail the global land grab pandemic. When considering the steady rise in power that TNCs exercise over governments, particularly in less developed regions, corporations are perhaps the only actor wielding sufficient influence to make this happen. The business sector can thus be instrumentalized as a vector for positive change in land rights and beyond. To date, civil society has largely failed to exploit this potential; companies “have been minimally engaged by civil society, governments, and multilateral institutions as potential

people want to do work that contributes to society with a company whose values they share, where their actions count . . .” Bill Holland, *Corporate Social Responsibility and Employee Engagement “Making the Connection,”* MANDRAKE (June 2011), http://www.mandrake.ca/bill/news/articles_june_2011.asp.

39. For an excellent examination of the costs that companies bear when their operations lead to conflict with local communities, see RACHEL DAVIS & DANIEL FRANKS, *COSTS OF COMPANY-COMMUNITY CONFLICT IN THE EXTRACTIVE SECTOR* (2014), https://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf.

40. See generally DON TAPSCOTT & DAVID TICOLL, *THE NAKED CORPORATION: HOW THE AGE OF TRANSPARENCY WILL REVOLUTIONIZE BUSINESS* (2003) (arguing that greater transparency in corporate operations is inevitable and increasingly demanded by an array of stakeholders, leading to increased accountability for corporate behavior and an incentive to reshape their values).

41. Larry Elliot, *Interview: Niall FitzGerald, Co-Chairman and Chief Executive, Unilever*, *THE GUARDIAN* (July 4, 2003, 9:24 PM), <https://www.theguardian.com/business/2003/jul/05/unilever1>.

42. “Rigorous due diligence” means a company looks beyond national title registries to ensure that it is not investing in land that local communities rely upon. In addition to looking at formal title, it means accounting for customary tenure practices and ensuring that marginalized populations like women, minorities, and other groups are protected from discriminatory land tenure practices.

partners in atrocity prevention” and other efforts to ward off human rights abuses.⁴³ This can and must change.

This article proceeds in three parts. First, it reviews the global land grab phenomenon, detailing the scope of the conflicts and what TNCs have done to accelerate the rate of dispossession. This includes an examination of the role that secure land tenure plays in warding off evictions of smallholder farmers, and highlights the advantages and pitfalls of formally titling property. Part III then explores corporate human rights obligations around human rights in general and land rights in particular. Though land has traditionally been viewed as the exclusive domain of the state—indeed, control over territory is one of the hallmarks of statehood⁴⁴—this article posits that business will have a vital role to play in protecting land rights in the years ahead. Given this emerging reality, civil society would thus be well advised to engage a new actor, TNCs, in a domain that has been historically dominated by governments. Part IV thus concludes with a blueprint for how TNCs can be transformed from the architects of widespread human rights abuses into land rights—and, in turn, human rights—allies.

II. THE GLOBAL LAND RUSH

A. *The Scale*

The past twenty years have witnessed a surge in land investments across the developing world, with wealthy governments and businesses snapping up land for large-scale food production, financial speculation, and other profit-generating activity. The 2008 food crisis accelerated the scramble.⁴⁵ With global food prices almost tripling between 2000 and 2008,⁴⁶ arable land transformed into a much sought after commodity almost overnight.⁴⁷ Rather than benefitting from the spike in property values, however, local communities have been trampled underfoot. In a rush to acquire land, TNCs have displaced an estimated 15

43. *Policy Dialogue Brief: The Power of the Private Sector in Preventing Atrocities and Promoting the Responsibility to Protect*, STANLEY FOUND. 2 (Oct. 26–28, 2016), https://www.stanleyfoundation.org/publications/pdb/PowerofthePrivateSector_SPC1216.pdf.

44. LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW* 376 (5th ed. 2009) (“[I]n order to qualify as a state, an entity must have a defined territory. Sovereignty over a specific territorial area is therefore an essential element of statehood.”).

45. Sue Branford, *Food Crisis Leading to an Unsustainable Land Grab*, (Nov. 21, 2008, 7:01 PM) *THE GUARDIAN*, <https://www.theguardian.com/environment/2008/nov/22/food-biofuels>.

46. Dep’t of Econ. & Soc. Affairs, *Rep. of the Global Social Crisis*, at 61, U.N. Doc. ST/ESA/334 (2011), <http://www.un.org/esa/socdev/rwss/docs/2011/rwss2011.pdf>.

47. See Branford, *supra* note 45.

million people across the Global South annually,⁴⁸ and have cut millions more off from access to the natural resources that they depend upon for survival.⁴⁹ While not all such large-scale acquisitions are land grabs—for example, a company may have taken care to ensure that all affected communities gave free, prior and informed consent; were fully and fairly compensated; and endured no human rights abuses—an extraordinary number are just that.

In addition to the number of people displaced, the scale of the global land rush is also remarkable in terms of acreage. The Oakland Institute estimates that 500 million acres have been bought or leased in the developing world over the past decade,⁵⁰ an area larger than Mexico. Each transaction typically involves the transfer of 10,000 hectares of land or more, or the equivalent of 5,000 small farms; given that these small farms produce food almost exclusively for local consumption, whereas the majority of investors grow produce exclusively for export, such land transfers have grave implications for local malnutrition rates.⁵¹ Bank speculation has likewise threatened food security. Only 12% of land acquired by financial industry actors is put under production,⁵² cutting off invaluable food sources for local populations. And as alluded to above, the hungriest regions of the world have been disproportionately impacted. Africa, Southeast Asia, and Latin America have been targeted for the largest number of grabs, with Sub-Saharan Africa bearing the brunt of the loss.⁵³ Some countries have ceded an astonishing percentage of their territory to investors. Sierra Leone, for example, has sold off 32% of its landmass over the past ten years alone.⁵⁴ Given that the majority of these land deals are unfolding in states already beset

48. CHRISTOPHER McDOWELL, CAN COMPENSATION PREVENT IMPOVERISHMENT? REFORMING SETTLEMENT THROUGH INVESTMENTS AND BENEFIT-SHARING 20 (Michael M. Cernea & Hari Mohan Mathur eds., 2008). More recent estimates are difficult to find from reliable sources; however, given that the speed of large scale land acquisitions is accelerating, it is likely that this figure is significantly higher in 2017.

49. See Kyle F. Davis et al., *Land Grabbing: A Preliminary Quantification of Economic Impacts on Rural Livelihood*, 36 POPULATION & ENV'T 180, 180 (2014).

50. Anuradha Mittal & Nickolas Johnson, *We Harvest—You Profit: African Land LTD's Land Deal in Sierra Leone*, OAKLAND INST. 4 (June 2014), <http://www.oaklandinstitute.org/we-harvest-you-profit>.

51. Oxfam International, *A Beginner's Guide to Land Grabs*, YOUTUBE, at 0:44 seconds (Oct. 4, 2012), <https://www.youtube.com/watch?v=ExCQlobfAUU>.

52. Pan African Parliament et al., *Making Investment Work for Africa: A Parliamentary Response to "Land Grabs,"* INT'L INST. SUSTAINABLE DEV. (IISD) 3 (July 21–22, 2011), http://www.iisd.org/pdf/2012/land_grabs_africa_en.pdf.

53. *Global Map of Investments*, LAND MATRIX (2016), <http://www.landmatrix.org/en/get-the-idea/global-map-investments/> (last visited May 8, 2018).

54. Fatmata S. Kabia, *Behind the Mirage in the Desert—Customary Land Rights and the Legal Framework of Land Grabs*, 47 CORNELL INT'L L.J. 709, 710-11 (2014).

by serious hunger problems,⁵⁵ land grabs are on track to exacerbate malnourishment across the Global South.

But who exactly are these investors? Understanding just who is buying up land, and displacing tens of millions in the process, is essential to crafting effective strategies for minimizing land grabs and the human toll they exact.

B. *The Cast*

A range of actors, from the predictable to the surprising, is implicated in land conflicts. First, private investors lease or purchase property for a variety of business ventures. Agribusiness companies buy farmland for large-scale agricultural production;⁵⁶ extractive companies acquire resource-rich properties for oil, gas, and mine extraction;⁵⁷ hydropower companies take control of rivers and the surrounding shores;⁵⁸ and timber and palm oil companies snap up forests to harvest trees.⁵⁹ Even the seemingly benign tourism sector has been accused of land grabs, evicting local populations to develop hotels and other attractions.⁶⁰ Still, other private investors, like banks and pension funds, buy land merely for speculation, leaving the soil untouched and gambling that it will rise in value.⁶¹ Public entities have likewise joined in the global land

55. *A Beginner's Guide to Land Grabs*, *supra* note 51, at 0:55 seconds.

56. Grain, *Land Grabbing by Global Agribusiness*, GLOBAL RES. (June 14, 2016), <http://www.globalresearch.ca/land-grabbing-by-global-agribusiness/5530797> (providing a snapshot of recent agribusiness land grabs).

57. Philippe Sibaud, *Opening Pandora's Box: The New Wave of Land Grabbing by the Extractive Industries and the Devastating Impact on Earth*, GAIA FOUND. 8 (2012), <http://www.gaiafoundation.org/wp-content/uploads/2015/11/Opening-Pandoras-Box.pdf> (“The extent and the scale of the increase in extraction over the last 10 years is staggering . . . Across Latin America, Asia and Africa, more and more community lands, rivers and ecosystems are being despoiled, displaced and devoured by mining activities. . . . The rights of farming and indigenous communities are increasingly ignored in the race to grab land and water.”).

58. See, e.g., E. Zerrouk, *Water Grabbing/ Land Grabbing in Shared Water Basins: The Case of Salween River Hatgyi Dam*, 2 J. WATER RESOURCES & OCEAN SCI. 68 (2013) (describing the displacement resulting from a hydroelectric dam construction and operations).

59. Diana Parker, *Indigenous Communities Demand Forest Rights, Blame Land Grabs for Failure to Curb Deforestation*, MONGABAY (Mar. 25, 2014), <https://news.mongabay.com/2014/03/indigenous-communities-demand-forest-rights-blame-land-grabs-for-failure-to-curb-deforestation/>.

60. See generally Benjamin Gardner, *Tourism and the Politics of the Global Land Grab in Tanzania: Markets, Appropriation and Recognition*, 39 J. PEASANT STUD. 377 (2012) (presenting tourism-motivated land grabs that displaced the Maasai people in Kenya); *Land Grabbing*, FRIENDS EARTH EUR., <http://www.foeeurope.org/land-grabbing> (“Land grabs are also driven by the . . . tourism industr[y.]”) (last visited May 8, 2018).

61. See *Farming Money: How European Banks and Private Finance Profit from Food Speculation and Land Grabs*, FRIENDS EARTH EUR. 7, 24 (Jan. 2012), https://www.foeeurope.org/sites/default/files/publications/farming_money_foee_jan2012.pdf.

rush.⁶² Governments of food-importing states like the United Arab Emirates, China, and Israel seek to secure a reliable source of food for their populations by purchasing land overseas.⁶³ All of these direct investors, public and private alike, have obligations under international human rights law to ensure that they are not adversely impacting local communities, particularly those displaced by their acquisitions.

Those responsible for physically removing communities from their ancestral lands are not the only ones charged with respecting their human rights. The United Nations Guiding Principles on Business and Human Rights (UNGPs), a soft law instrument governing corporate human rights obligations, mandates that companies further down the land grabbers' supply chains must also ensure that they are neither causing nor contributing to human rights violations.⁶⁴ This means that traders, factory owners, retailers, and every business in between must conduct due diligence on the products that it purchases, so that they avoid inadvertently purchasing goods from a company that grabbed land.⁶⁵ Coca Cola, for example, must ensure that the sugar it adds to its soft drinks was not cultivated on stolen property. Otherwise, the company risks profiting off the hunger, violence, and other indignities that displaced families endure.

The UNGPs recognizes that different companies face varying degrees of difficulty in carrying out this due diligence obligation.⁶⁶ Conducting a rigorous inquiry into the origin of one's products may be simple for those close to the input's point of origin. For example, a refinery that purchases raw sugar cane directly from a plantation down the road may have little trouble investigating the land's title and ownership history. These investigations prove far more

62. It should be noted that many of the TNCs which are technically part of the private sector enjoy the tacit or express support of their governments in making these overseas land purchases, blurring the line between "corporate" and "government" land grabs.

63. Brad Plumer, *Chinese Firms and Gulf Sheiks Are Snatching Up Farmland Worldwide. Why?*, WASH. POST (Jan. 26, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/26/chinese-firms-and-gulf-sheiks-are-grabbing-farmland-worldwide-why/>.

64. According to the U.N. Guiding Principles on Business and Human Rights, "The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts." John Ruggie (Special Representative of the Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 13, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs]. Though the UNGPs remain soft law, they are widely referenced and viewed as the most authoritative source on corporate human rights obligations worldwide.

65. *Id.* at Principles 15(b), 17.

66. *Id.* at Principle 17(b).

complicated, however, for a high-volume sugar trader that buys from multiple refineries. It may not even know where its sugar was grown. Tracing sugarcane back to its fields becomes increasingly fraught as the product passes through multiple hands—from refinery, to trader, to syrup factory, to retailer, and so on—leaving the producer of the final product with no easy task. A grocery store may have little idea where the syrup it sells was refined, much less grown.

Regardless of the complexity, the UN General Assembly affirmed that corporations have human rights obligations to assess actual and potential human rights impacts of their operations, a responsibility which demands monitoring both its own production processes and those of their business partners.⁶⁷ Absent such obligations, companies would be free to profit off the human rights abuses that others directly commit. A plantation owner can charge less for his crops if the land was stolen rather than purchased at a fair price, for example, which allows him to sell his produce at reduced prices, which ultimately increases sales. The UNGPs ensure that ignorance—or willful blindness, as is so often the case—does not shield corporations from responsibility for the abuses that line their pockets. Thus, businesses of all stripes have human rights obligations towards communities fighting off land grabs.

In a counter-intuitive twist, conservation groups have also intensified the pandemic with something called “green land grabs,” or forcible displacement motivated by environmental concerns.⁶⁸ In an effort to protect delicate ecosystems from human interference, environmental activists strive to maximize the total acres classified as conservation land. This is, of course, an admirable goal. Yet some NGOs have developed an unrestrained zeal for preservation, and “protect” land by encouraging governments to evict indigenous communities from territories that they have lived upon, and

67. *Id.* at Principle 17. International organizations have promulgated standards that articulate how private sector actors can implement these obligations with respect to land rights. See, e.g., *Voluntary Guidelines on the Responsible Governance of Tenure*, FAO 1, 4, 23 (2012), <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (articulating the responsibilities that non-state actors have with respect to securing land tenure rights); *Principles for Responsible Investment in Agriculture and Food Systems*, COMM. ON WORLD FOOD SEC. (CFS) (2014), http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf (last visited May 8, 2018).

68. Chris Lang, *Green Grabs are Not the Solution to Land Grabs*, REDD (July 7, 2016), <http://www.redd-monitor.org/2016/07/07/green-grabs-are-not-the-solution-to-land-grabs/> (lamenting the trend in which “big environmental organisations, and charities are buying up land in the Global South in the name of conservation. . . . Far too often this has involved ‘forest conservation’. Tens of thousands of people have been evicted from wildlife parks and protected areas.”).

painstakingly cared for, over centuries.⁶⁹ This conservation-at-all-costs mentality has proven a dangerous form of idolatry. Environmental groups have incited violence in the name of conservation, convincing governments to deploy armed forces to forcibly remove indigenous communities from their customary lands.⁷⁰ The plight of Cameroon's Baka hunter-gatherer community illustrates such a tragedy. The tribe has periodically clashed with "anti-poaching squads" funded by the World Wildlife Federation (WWF), leading to violent conflict that has left members of the indigenous community dead and many others evicted from their homelands.⁷¹ Kenya's Ogiek tribe is facing similar pressures, periodically fending off attempts by Kenyan police to remove them from their ancestral home in the Mau Forest; though the Ogiek often hold their ground, other times they are unsuccessful and their homes are burned to the ground.⁷² While some fear that the Ogiek's presence will degrade the environment, the community has been exemplary stewards of the forest for generations.⁷³ For many conservation organizations, however, the mission to maximize land demarcated as "preserved" supersedes all other considerations—even human. Such a myopic perspective not only ignores the human suffering that will take place upon eviction, but overlooks the conservation skills that native groups have honed over generations.

Finally, government ministers and tribal leaders are likewise implicated in land grabs. Governments may grant concessions to TNCs or other investors on the premise that land is uninhabited, when in reality communities either (1) reap the land's resources but

69. See Marcus Colchester, *Conservation Policy and Indigenous Peoples*, 28-1 CULTURAL SURVIVAL Q. MAG. (Mar. 2004), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/none/conservation-policy-and-indigenous-peoples>; Gina Cosentino, *Governing the Global Commons: How UNSR Anaya's Study on Extractive Industries Can Inform a New Global Human Rights Regulatory Regime for Transnational Conservation NGOs Operating on or Near Indigenous Territories*, 32 ARIZ. J. INT'L & COMP. L. 209, 228-29 (2015) (detailing the pressures that environmental NGOs have placed on indigenous communities' lands).

70. *Corporate Monitor: Illegal Evictions in Kenya*, FIRST PEOPLES WORLDWIDE (Jan. 2014), <http://www.firstpeoples.org/first-peoples-corporate-monitor.htm> (discussing the evictions of the Sengwer, Masaai, and Batwa people from areas in Kenya and Uganda earmarked for national parks, and noting that such evictions "have been traced to government partnerships with large international environmental NGOs.").

71. *Two NGOs Clash Over the Rights of a Tribe in the Cameroons*, TRT WORLD (Feb. 8, 2017), <https://www.trtworld.com/nea/two-ngos-clash-over-the-rights-of-a-tribe-in-the-cameroons-293143>.

72. Rachel Savage, *Kenya's Ogiek People Forced from Homes amid 'Colonial Approach to Conservation'*, THE GUARDIAN (Aug. 18, 2016, 5:38 AM), <https://www.theguardian.com/global-development/2016/aug/18/kenyas-ogiek-people-are-seeing-their-land-rights-brutalised>.

73. See *Ogiek: Forest Beekeepers*, SURVIVAL INT'L, <http://www.survivalinternational.org/tribes/ogiek> (last visited May 8, 2018).

live elsewhere;⁷⁴ (2) use the land seasonally, as is the case for nomadic populations;⁷⁵ (3) are allowing the land to lie fallow for soil regeneration;⁷⁶ or (4) live upon the land under communal tenure, but do not hold formal title.⁷⁷ Government ministers are often well aware of such uses, but do not advertise these land patterns to investors in an effort to facilitate the sale.⁷⁸ Unscrupulous traditional leaders have also facilitated land grabs. These leaders may present themselves as the only authority that must be consulted before communal land is sold.⁷⁹ In such cases, these chiefs may receive the price of land that was theirs to hold in stewardship, not to sell.

Myriad actors are responsible for contributing to the land crisis. Given the apparent lack of accountability these grabbers face, one might reasonably assume that this bleak picture—in which communities are pushed off their lands and into poverty, smallholder farmers square off against the some of the world’s

74. *Land Grabbing: Is Conservation Part of the Problem or the Solution?*, IIED BRIEFING (Sept. 2013), <http://pubs.iied.org/pdfs/17166IIED.pdf> (“Allocated land is often considered empty or vacant because it lacks permanent settlements or signs of agriculture. But much is in fact used by local communities for livestock grazing, seasonal or shifting cultivation, subsistence hunting and for harvesting forest products.”).

75. Safia Aggarwal & Mark S. Freudenberger, *USAID Issue Brief: Tenure, Governance, and Natural Resource Management*, USAID 4 (Apr. 2013), <https://land-links.org/wp-content/uploads/2016/09/Tenure-Governance-and-Natural-Resource-Management.pdf>.

76. *A-B-C’s of Land Tenure and Property Rights: Definitions are Important!*, USAID, https://www.land-links.org/wp-content/uploads/2017/02/USAID_Land_Tenure_ABCs_of_Land_Tenure.pdf (last visited May 8, 2018) (noting that fallow land has “less clear tenure and [leads to conflicting] latent [property] claims.”); see also Mark Freudenberger, *USAID Issue Brief: The Future of Customary Tenure*, USAID 5 (Apr. 1, 2011), https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Customary_Tenure_Brief_0-1.pdf (“In many countries, the state claims ownership over all land that has not been farmed or developed, while communities believe that they have customary claims to forests and ancient fallows.”).

77. Econ. Comm’n for Afr., *Land Tenure Systems and Their Impacts on Food Security and Sustainable Development in Africa*, at 28, U.N. Doc. ECA/SDD/05/09 (2004) [hereinafter *Land Tenure Systems*] (“In contrast to this, the majority of rural producers gain their land on the basis of customary rights rooted in notions of community and kinship, and through derived rights - a series of informal contractual relations (such as sharecropping) with those who hold primary rights. While the State has a predisposition towards the emergence of formal statutory systems, it lacks the capacity to create a comprehensive system of land administration which would impose control within a formal land tenure regime over the rural areas.”); see also Aggarwal & Freudenberger, *supra* note 75, at 4 (“Customary land tenure systems operate in many dryland areas, and communal tenure is a common feature with overall authority for land vested in traditional leaders.”).

78. OLIVIER DE SCHUTTER, *TAINTED LANDS: CORRUPTION IN LARGE-SCALE LAND DEALS* 25 (2016), <https://www.globalwitness.org/en/reports/tainted-lands-corruption-large-scale-land-deals/> (“In addition to bribery, local elites—such as government ministers or senior public officials, their family members, or powerful companies—may be tempted to use their positions of power to influence land demarcation in order to get beneficial treatment and increase their own land holdings at the expense of less powerful members of society, including indigenous persons or ethnic minorities.”) (footnote omitted).

79. See *id.* at 28 (discussing the type of corruption in which “chiefs or other community leaders . . . acting as ‘representatives’ of their communities, give away communal land.”).

wealthiest corporations, and local police fuel the violence—stands to deteriorate further still. Yet land rights advocates have several promising solutions in their tool belt, each of which can be strengthened through partnering with TNCs: small-scale landowners can register their land in formal systems; corporations can conduct vigorous due diligence on the land rights practices of their business partners; and TNCs can promote respect for community land rights among governments and other companies. Each of these solutions will be considered in turn.

C. *The Titled Solution*

As alluded to above, the land grab phenomenon persists in large part because of the disjuncture between formal and informal land tenure.⁸⁰ Many countries have yet to recognize traditional land rights in their formal property registries,⁸¹ increasing the risk of land dispossession:⁸² if a prospective buyer relies upon these registries to view the current owner, and no party is listed, this enables the would-be buyer to claim that the land is “unowned.” Even in countries where governments do recognize the right to customary land tenure in national legislation, many fail to take the next step and register each plot of land into the formal systems, similarly leaving communities exposed to land grabs.⁸³ The troubles

80. The exploitation of the gap between formal and informal land tenure began when colonizers introduced a “formal” system into their overseas colonies, and considered property held under traditional patterns to be “informal” and inferior. Indeed, throughout much of Africa, the “colonial powers alienated local populations . . . [by] declaring them tenants on crown land as a way to collect taxes and/or extract labor.” Stein T. Holden & Keiji Otsuka, *The Roles of Land Tenure Reforms and Land Markets in the Context of Population Growth and Land Use Intensification in Africa*, 48 *FOOD POLY* 88, 89 (2014). The newly independent African states adopted this model of elevating what they characterized as “formal” land rights and subordinating “informal” land rights. In Cote d’Ivoire, for example, the French colonial powers “largely ignored customary institutions, declaring all unused land property of the state, and the postcolonial Ivorian state continued the policy of marginalizing customary institutions in the de jure legal regime.” Ryan Bubb, *The Evolution of Property Rights: State Law or Informal Norms?*, 56 *J. L. & ECON.* 555, 556 (2013).

81. The ways in which African states approach property rights can be broadly divided into two camps: those “communal regimes,” which uphold communal tenure (e.g., Ghana), and “user rights regimes,” which eschew traditional rights in favor of enforcing the land claims of whatever party is currently farming the land (e.g., Cote d’Ivoire). Catherine Boone, *Property and Constitutional Order: Land Tenure Reform and the Future of the African State*, 106 *AFRICAN AFF.* 557, 563–64 (2007).

82. Holden & Otsuka, *supra* note 80, at 90 (“Lack of recognition of customary land rights in statutory law represents a severe threat to tenure security and future livelihood opportunities for marginalized groups.”).

83. DE SCHUTTER, *supra* note 78, at 15–16 ([C]ustomary and traditional forms of land tenure are often not recognized by law within such countries. Even when they are recognized on paper, customary land rights may be poorly protected in practice . . . Many governments fail in particular to register or recognize . . . communal lands, thus making land grabbing easier.”).

of Brazil's Guarani-Kaiowá population illustrate this phenomenon. While the Brazilian Constitution guarantees indigenous persons exclusive rights to their ancestral lands,⁸⁴ authorities have largely failed to formalize their occupancy in national title registries.⁸⁵ This has created a system of dual claims, with ranchers snapping up the "empty" lands and marginalizing the Guarani in the process. Brazilian courts have ruled in favor of the ranchers holding formal title,⁸⁶ sending the Guarani's constitutional protections up in smoke.

TNCs have regularly exploited the chasm between informal and formal tenure rights, purchasing or leasing land used by communities but not held under formal title. With an astonishing proportion of land held under customary property regimes—the World Bank estimates that only 2-10% of African land is held under formal title,⁸⁷ for example—the opportunity for investors to profit off tenure insecurity looms large. This is because

[i]t is far easier to evict the present occupiers of land intended for leasing if they cannot establish or enforce legal title and have no access to justice.

The states where land grabs have occurred have largely been ones where property interests of the

84. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231 (Braz.) (committing Brazil's government to demarcating all indigenous lands, and to protecting and ensuring respect for their property).

85. For example, as of 2015, the government has only registered 0.7% of the Guarani-Kaiowá's traditional territory as indigenous. Kristina Kroyer, *Resource Conflicts Between Landholders and Indigenous People in Mato Grosso do Sul, Brazil: Policies, Sources, and Consequences in a Historical Perspective*, 3 REVISTA NĀNDUTY 131, 132 (2015); see also Iago Morais de Oliveira, *Indigenous Peoples and Land Demarcation in Brazil: A Never-Ending Process?*, OXFORD HUM. RTS. HUB (Dec. 13, 2016), <http://ohrh.law.ox.ac.uk/indigenous-peoples-and-land-demarcation-in-brazil-a-never-ending-process/> ("Even though there is a chapter in the Brazilian Constitution dedicated to Indians (Chapter VIII), which formally recognizes their right to have the lands they traditionally occupy demarcated (article 231), violations of their right to property are increasing."); Fiona Watson, *Brazil's Treatment of Its Indigenous People Violates Their Rights*, THE GUARDIAN (May 29, 2013, 11:46 AM), <https://www.theguardian.com/commentisfree/2013/may/29/brazil-indigenous-people-violates-rights> (observing that the Brazilian government has failed to protect indigenous land rights, that they are in fact considering a new piece of legislation that would further hamper their ability to demarcate land as indigenous, and that displaced communities are "tired of waiting for the federal authorities to take action.").

86. See, e.g., *Guarani and Kaiowá Apyka'i Community Risks Imminent Eviction*, FIAN INT'L (May 19, 2016), http://www.fian.org/library/publication/guarani_and_kaiowa_apykai_community_risks_imminent_eviction/ (discussing the eviction of indigenous groups from lands they re-occupied after being forced off their ancestral homes); John Vidal, *Brazil's Guarani Indians Killing Themselves over Loss of Ancestral Land*, THE GUARDIAN (May 18, 2016, 12:18 PM), <https://www.theguardian.com/environment/2016/may/18/brazils-guarani-indians-killing-themselves-over-loss-of-ancestral-land> (detailing a recent court ruling that ordered the indigenous group off their ancestral land).

87. KLAUS DEININGER, *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION* xxi (2003).

current occupants, although recognized by the local population, are not legally enforced or not enforceable.⁸⁸

Tenure insecurity breeds land grabs.

Fortunately, this problem has at least one solution: given the nearly universal belief that formal land rights override informal land rights on the ownership hierarchy,⁸⁹ enshrining tenure rights into formal registry systems has become a critical safeguard for many communities.⁹⁰ And registering land does not just deter evictions. Secure tenure⁹¹ encourages smallholders to invest in their land, incentivizes the use of environmentally sustainable farming methods, and creates job opportunities, all of which boost local food security.⁹² Indeed, states that have invested in programs designed

88. Lea Brilmayer & William J. Moon, *Regulating Land Grabs: Third Party States, Social Activism and International Law*, in *RETHINKING FOOD SYSTEMS* 123, 133 (Nadia C.S. Lambek et al. eds., 2014).

89. Kabia, *supra* note 54, at 714.

90. Land Tenure Systems, *supra* note 77, at 28 (commenting on the popularity of the “approach [that] argues that most land policy frameworks in Africa advocate formal statutory land titling as the ideal form of landholding for the promotion of development . . . [and that] the State has a predisposition towards the emergence of formal statutory systems.”).

91. Secure tenure often, but not always, means formally registering rights to land. Tenure is considered secure if rights to use, or transfer, or inherit, or otherwise control the property are recognized by the powerful actors in that society. *See Land Tenure Security*, IFAD 1 (Feb. 2015) <https://www.ifad.org/documents/38714170/40196966/Scaling+up+results+in+land+tenure+security.pdf/9be8e8e7-1a76-4b2c-9ab6-328f6c20df67> (defining tenure security as “people’s ability to control and manage land, use it, dispose of its produce and engage in transactions, including transfers.”); *FAO LAND TENURE STUDIES* 3, *supra* note 25, at 19 (observing that the sources of tenure security “vary from context to context,” and may include recognition of property rights from powerful groups including government actors, the community itself, farmers associations, the administrative state, or even warlords). The term “powerful actors” often refers to governmental bodies, but in certain contexts, it may refer to other actors, such as the community itself, farmers’ associations, or local warlords. *See id.* at 19–20. Secure tenure rights may refer to “freehold” property rights, in which there is full private ownership. *See id.* at 18–19 (writing that some argue that there can only be full tenure security “when there is full private ownership (e.g., freehold)”). It may also refer to an array of lesser associated land rights, such as usufruct rights (the right to use the property for a particular purpose), tenancy rights, a right to derive income from the land, a right to transfer the land to one’s inheritors, a right to exclude others from the land, and so on. *See id.* at 10.

92. *See Primer: Land Tenure and Property Rights*, USAID (Mar. 2014), https://www.usaidlandtenure.net/wp-content/uploads/2016/09/USAID_Land_Tenure_Primer_2014-updated.pdf [hereinafter *Primer*]. Though definitions of what constitutes “customary land rights” vary, it typically refers to communal land access that is enjoyed by an entire group, in which families exercise individual use of residential and agricultural plots and joint use of pastoral plots, but are not at liberty to sell the land held in common. *See supra* note 77. Land is regarded as an intergenerational asset. This stands in contrast to formal or private property rights, in which formalized land titles bequeath ownership to the named individual. *See also* Holden & Otsuka, *supra* note 80, at 95 (“It is also obvious that formal recognition of customary tenure rights for poor and marginalized groups can have a huge impact on their future livelihoods opportunities.”); *FAO LAND TENURE STUDIES* 3, *supra* note 25, at 18 (“Without security of tenure, households are significantly impaired in their ability to secure sufficient food and to enjoy sustainable rural livelihoods.”).

to ensure equitable land tenure administration⁹³ have enjoyed higher rates of growth, improved food security, and more favorable health outcomes.⁹⁴ Secure land rights likewise have become the foundation for the social fabric of many rural communities, serving as “a source of prestige and often power.”⁹⁵

Of course, security of tenure is not always an antidote for malnutrition.⁹⁶ Other factors like favorable climatic conditions, availability of seeds and fertilizers, and the absence of armed conflict all play important roles in agricultural productivity. And caution is warranted, as poorly designed or implemented titling schemes can make things worse. Formalizing tenure may result in a failure to recognize crucial land use rights, effectively erasing such rights in the process.⁹⁷ Registration introduces a “contested terrain, since [it] involve[s] decisions about who counts and who does not.”⁹⁸ This risk runs particularly high for women, whose rights are less likely to be recognized in the formalization process.⁹⁹ Formalizing customary tenure also opens the door to potential “distress sales,” in which the owner fends off a short-term emergency like famine by selling the land at an undervalued price, despite the long-term net loss such a sale creates.¹⁰⁰ Furthermore, a community may have relied upon communal tenure as a form of protection, relying upon this ownership structure to prevent investors from identifying who has the authority to sell the land.¹⁰¹ And even if the rights are flawlessly recorded, legal recognition on paper cannot guarantee

93. This refers not only to ensuring that customary lands are formally recognized, but that women within these communities enjoy equal access rights, inheritance rights, and other land use rights that feed into tenure security.

94. See FAO LAND TENURE STUDIES 3, *supra* note 25, at 6.

95. *Id.* at 5.

96. See, e.g., Saturnino M. Borras & Jennifer C. Franco, *From Threat to Opportunity? Problems with Codes of Conduct for Land Grabbing*, in RETHINKING FOOD SYSTEMS 147, 158 (Nadia C.S. Lambek et al. eds., 2014) (“Gaining legal recognition of poor people’s land rights has never alone guaranteed that they will actually be respected and protected in the courts or on the ground; for the rural poor, there remains a difficult and contested process involving struggles to actually claim those rights and ‘make them real’ in fact.”).

97. FAO LAND TENURE STUDIES 3, *supra* note 25, at 20 (“[T]itling and registration projects, if poorly designed, can reduce security of many rural residents by failing to recognise certain rights, often held by women and the poor, and allowing them to be merged into simplistically conceived ‘ownership’ rights. The rights to important uses of the land, for example, to gather minor forest products or to obtain water, may not be recognised by the legal system and may be effectively destroyed”).

98. Borras & Franco, *supra* note 96, at 158.

99. See generally *Land Rights and Food Security*, LANDESA RURAL DEV. INST. (Mar. 2012), <http://www.landesa.org/wp-content/uploads/Landesa-Issue-Brief-Land-Rights-and-Food-Security.pdf> (discussing the myriad roadblocks women face in continued use of land when property rights become formalized).

100. FAO LAND TENURE STUDIES 3, *supra* note 25, at 21.

101. For example, land titling schemes that force individuals to be named “owners” can threaten the ability for indigenous and other local groups to confront would-be land grabbers as a collective whole that must be consulted. DE SCHUTTER, *supra* note 78, at 16.

that the benefits of formalized rights will be realized, as courts and security forces may fail to enforce those rights.¹⁰² Still, the fact that it remains an imperfect solution does not mean formalizing tenure is bad; it simply means that context matters. In certain settings, “secure tenure” may be better achieved through means other than formal registration of full ownership rights, such as ensuring that land use or seasonal rights are recognized by relevant authorities, as is outlined in Footnote 91 *supra*. It also means that rather than embracing any land formalization scheme as a universal good, we must qualify this truism to hold that well-designed and well-executed land formalization creates an enabling environment for small-scale farmers to flourish.¹⁰³ The litany of benefits associated with formalizing tenure¹⁰⁴ means that it is an important avenue to explore.

The increasing influence of TNCs over states suggests that business can play a critical role in advocating for respect for communities’ land rights. Regardless of the specific context, or whether formalization is the best way to secure tenure, TNCs’ clout positions them to ensure respect for community land rights. The urgency of channeling business influence to protect land tenure for smallholders becomes clear when we consider that (1) there is a clear connection between secure land tenure and improved nutrition and development outcomes for low-income communities, and (2) corporate power is climbing compared to states—a power which impacts the enjoyment of property rights. Corporate operations have come to play an outsized role in the lives of untold millions, particularly in regions where ineffectual rule of law has left a power vacuum. Yet given that land registries and assigning formal title officially remain the domain of the state—indeed, sovereign control over territory is perhaps the state’s most defining characteristic¹⁰⁵—the role of business in securing tenure is not immediately clear. How, then, can corporations promote secure rights?

III. CORPORATE OBLIGATIONS ON LAND TENURE

Despite the traditional dominance of governments over the enjoyment of the right to land, TNCs can promote stable land use, and in turn, help communities realize the concomitant human

102. See FAO LAND TENURE STUDIES 3, *supra* note 25, at 21.

103. See *id.* at 6.

104. See, e.g., *Primer*, *supra* note 92; Holden & Otsuka, *supra* note 80, at 93.

105. DAMROSCH ET AL., *supra* note 44, at 376. This truism is perhaps undergoing the first hints of change, with companies controlling massive portions of state territory on which they behave, for all intents and purposes, as a sovereign.

rights benefits in at least two ways. First, corporations can uphold their obligations under international human rights law to respect the human rights of those communities affected by their operations. This obligation asks companies to follow the “do no harm” principle, a deceptively simple command that swells into a Herculean task for companies with complex supply chains. Second, corporations can promote security of tenure by reaching beyond the minimum dictates of international law, inciting governments and other companies alike to fight for secure tenure for smallholders. This “human rights plus” approach will be explored in part IV.

*A. Corporate Due Diligence:
Current Practice and International Human Rights
Law Obligations*

First, companies can support secure tenure rights by adhering to their international human rights law obligations to conduct human rights due diligence on their operations and those of their business partners. Under the UNGPs, corporations have an obligation to respect the human rights of people affected by their operations, to remedy those who have been harmed, and to seek to prevent or mitigate adverse human rights impacts committed by their suppliers and business partners.¹⁰⁶ These obligations require companies to conduct “human rights due diligence.” Traditionally, of course, companies have not conceptualized due diligence as a way to screen for human rights violations. Rather, due diligence has been viewed as a means of minimizing the risk of bad investments, legal liabilities, or other financial drains.¹⁰⁷ This increasingly

106. UNGPs, *supra* note 64, at Principle 13.

107. In the corporate context, due diligence can be broadly defined as “a process of discovery that is relevant in key business transactions, as well as operational activities. . . . [it is] ‘. . . mainly a legal and financial course of action, first designed to avoid litigation and risk, second to determine the value, price and risk of a transaction, and third to confirm various facts, data and representations.’” LINDA S. SPEDDING, *DUE DILIGENCE HANDBOOK: CORPORATE GOVERNANCE, RISK MANAGEMENT AND BUSINESS PLANNING 3* (2008) (ebook) (quoting Charles Bacon, CEO of Due.Com).

archaic¹⁰⁸ vision of “due diligence” is rooted in the assumption that a company’s only duty is to maximize returns to shareholders.¹⁰⁹

Recent developments in international law and the rising costs of committing human rights violations have turned this conventional wisdom on its head. The past decade has seen international law’s purview turn toward corporations. This is evident from recent decisions in regional human rights courts, in which judges have begun to constrain corporate behavior through the back-door mechanism of state accountability. The African Commission on Human and Peoples’ Rights (ACHPR) and West Africa’s ECOWAS Community Court of Justice (ECCJ), for example, have both found states liable for failing to prevent corporations from committing human rights abuses in their territory.¹¹⁰ Increasing willingness to hold corporations accountable for human rights abuses is also reflected in the International Criminal Court’s (ICC) September 2016 Policy Paper on Case Selection, in which the Prosecutor

108. For example, Allstate Corp. Chairman and CEO Tom Wilson writes, “For decades, corporations have been expected to concentrate on one mission: Maximizing profits for shareholders. While that might have been appropriate decades ago, it isn’t now. The emphasis on profits has widened the trust gap between corporations and society, resulting in an adversarial relationship between the private and public sectors. Let me be clear: Shareholders must get a good return, but at the same time corporations must work to be a force for good in society.” *How Corporations Can Be a Force for Good*, WASH. POST (Sept. 29, 2016), https://www.washingtonpost.com/opinions/how-corporations-can-be-a-force-for-good/2016/09/29/08e99268-7ac4-11e6-ac8e-cf8e0dd91dc7_story.html?utm_term=.493925a59047.

Along similar lines, Pepsi CEO Indra Nooyi recently penned an article explaining her company’s increased attention to corporate social responsibility, writing: “Ten years ago, as my colleagues and I were thinking about the future of our company, we saw some major changes on the horizon. People were increasingly looking for healthier foods. Environmental issues like water scarcity and climate change were threatening ecosystems, livelihoods, and economies around the world. And the competition for the next generation of talent was becoming more intense than ever. We had a choice to make. Continue with business as usual. Or fundamentally transform our business, turning obstacles into opportunities. We chose the latter approach, and it has propelled our company forward ever since.” Indra Nooyi, *10 Years Ago, I Said PepsiCo Had to Be About More than Making Money. Here’s What’s in Store for the Next 10*, LINKEDIN (Oct. 17, 2016), https://www.linkedin.com/pulse/10-years-ago-i-said-pepsico-had-more-than-making-money-indra-nooyi?trk=eml-b2_content_ecosystem_digest-hero-22-null&midToken=AQHINQmMS2kQBQ&fromEmail=fromEmail&ut=3lFOVMXZ2FAns1. While critics may argue that this is mere lip service to improved behavior, the very fact that CEOs feel such statements are valuable indicates the turn away from the shareholder-idolatry model.

109. See, e.g., Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), <http://umich.edu/~thecore/doc/Friedman.pdf> (writing that the “primary responsibility” of a business is to the shareholder, which demands that companies maximize profit within the bounds of the law).

110. See, e.g., Social and Economic Rights Action Center v. Nigeria, Communication 155/96, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.] (Oct. 27, 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf (finding that Nigeria violated its human rights obligations by failing to prevent oil companies from committing widespread human rights abuses in the Niger River Delta); SERAP v. Nigeria, ECW/CCJ/JUD/18/12 (Dec. 14, 2012), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf (finding the same outcome as mentioned above).

announced her prioritization of land grab, resource grab, and environmental destruction cases.¹¹¹ She continued on to affirm her interest in investigating “organisations [sic] (including their structures) and individuals allegedly responsible for the commission of the crimes.”¹¹² Though legal persons as an entity cannot be prosecuted under the Rome Statute, the announcement indicates an interest in prosecuting corporate executives and investigating the role of the corporate structures.¹¹³ Even ostensibly “pro-private” adjudicatory bodies, like the International Centre for Settlement of Investment Disputes (ICSID), are embracing corporate human rights obligations: an ICSID panel recently rejected a company’s argument that human rights duties apply only to states, noting that guaranteeing the right to water and respecting others’ rights to adequate housing and living conditions are, in fact, private sector obligations.¹¹⁴ As the panel opined,

[I]nternational law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.¹¹⁵

111. Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, ¶ 41, Int’l Crim. Ct. (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (“[T]he Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”).

112. *Id.* at ¶ 42.

113. *Company Executives Could Now Be Tried for Land Grabs and Environmental Destruction*, GLOBAL WITNESS (Sept. 15, 2016), <https://www.globalwitness.org/en/press-releases/company-executives-could-now-be-tried-land-grabbing-and-environmental-destruction-historic-move-international-criminal-court-prosecutor/>; Shehab Khan, *CEOs Can Now Be Tried Under International Law at The Hague for Environmental Crimes*, INDEPENDENT (Sept. 19, 2016), <http://www.independent.co.uk/news/business/news/ceos-hague-international-law-tried-environmental-crimes-icc-a7315866.html>. Though the prosecutor has always had the mandate to prosecute corporate executives, should he or she have so chosen, this new Policy Paper is perceived as signaling an increased willingness to actually exercise that power.

114. Urbaser S.A. & Consortium de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 1193–1210 (Dec. 8, 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

115. *Id.* at ¶ 1195 (footnote omitted).

As an arbitration body tasked with protecting corporate investment interests, ICSID's acknowledgment that the private sector has human rights obligations carries significant weight.

Fifteen years ago, the idea that companies have human rights obligations was unthinkable. What caused this shift? The major sea change in international law's approach toward corporations came with the introduction of the 2011 UNGPs. These Principles demand that (1) states require companies to conduct human rights due diligence where the nature of their business operations pose significant risk to human rights;¹¹⁶ and (2) businesses conduct human rights due diligence processes to "identify, prevent, mitigate and account for how they address their impacts on human rights[,] [and install] [p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute."¹¹⁷ Principles 17-21 outline what such due diligence processes must entail in concrete terms, which includes vetting all corporate operations linked to its supply chain and business relationships;¹¹⁸ implementing an ongoing due diligence process rather than treating it as a one-time exercise;¹¹⁹ ensuring meaningful consultation with populations that may be impacted by their operations;¹²⁰ and mitigating against or preventing any human rights violations that the due diligence process uncovers.¹²¹

Though still in soft law form, the UNGPs have already started to influence corporate behavior in real, albeit limited, ways.¹²² Civil society has strengthened implementation further still, drafting guidance documents that help businesses translate these legal norms into actionable steps.¹²³ The UNGPs thus stand apart as the single most important development on corporate liability under international law. Parallel developments in international criminal law, regional human rights decisions,

116. UNGPs, *supra* note 64, at Principle 4 and Commentary.

117. *Id.* at Principle 15(b) and (c).

118. *Id.* at Principle 17.

119. *Id.* at Principle 17(c).

120. *Id.* at Principle 18(b).

121. *Id.* at Principle 19.

122. Civil society members have successfully used the UNGPs as a tool to convince corporations that they must adhere to these standards. Caroline Rees & Rachel Davis, *Where We're at: Taking Stock of Progress on Business and Human Rights*, SHIFT (Aug. 2016), <http://www.shiftproject.org/resources/viewpoints/taking-stock-progress-guiding-principles/> (writing "Five years later [after the signing of the UNGPs], significant progress on business respect for human rights has been made," and continuing on to outline the ways in which the UNGPs have improved corporations' human rights awareness and track records).

123. *See, e.g., Doing Business with Respect for Human Rights: A Guidance Tool for Companies*, BUS. RESPECT HUM. RTS. (2016), https://www.businessrespecthumanrights.org/image/2016/10/24/business_respect_human_rights_full.pdf.

and UN declarations are all expanding the scope of corporate liability for human rights violations further still.

Second, as Footnote 64 details, the idea that corporations have human rights obligations has become more palatable as the private sector's "short-term profits at all costs" mentality erodes. This is due in large part to the increased visibility of behavior overseas, raising consumer awareness about the social footprint of their purchases.¹²⁴ Such visibility makes human rights abuses an increasingly expensive prospect. For brand-conscious companies in particular, the financial burden of a tarnished image can be enormous.¹²⁵ David Kinley and Junko Tadaki explain the financial pressures that induce companies to respect human rights, writing:

[I]ncreasing exposure of human rights infringements by corporations has clearly signaled to businesses that alongside other reasons, it may well be in their commercial interest to rethink their actions and policies in terms of their social impact. Thus, on the negative side, a tarnished brand image and loss of consumer goodwill is not good for business; on the positive side, corporate respect for human rights will not only engender goodwill, but will eventually contribute to a stable, rule-based society in host states, which in turn promotes the smoother and more profitable operation of business.¹²⁶

Countless examples illustrate these dynamics. The financial damage inflicted by reports on child slavery in the cocoa supply chain has forced chocolate producers like Cadbury's,¹²⁷ Mars,¹²⁸ and

124. James Epstein-Reeves, *Consumers Overwhelmingly Want CSR*, FORBES (Dec. 15, 2010, 9:58 AM), <https://www.forbes.com/sites/csr/2010/12/15/new-study-consumers-demand-companies-implement-csr-programs/#466b8c6c65c7> (reporting that 88% of consumers surveyed wanted companies to try to improve society and the environment, and that 83% of consumers believe that companies should provide financial support to charities).

125. STANLEY FOUND., *supra* note 43, at 6 ("Large corporations are accountable to their shareholders, and they need to maintain their reputations. The onset of atrocities imperils all elements of business success."). See generally SAVITZ WITH WEBER, *supra* note 36 (detailing the financial ruin that can result from a poor corporate image).

126. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 953 (2004) (footnote omitted).

127. *Cadbury: An Ethical Company Struggles to Insure the Integrity of Its Supply Chain*, YALE SCH. OF MGMT. (Aug. 2008), <http://som.yale.edu/our-approach/teaching-method/case-research-and-development/cases-directory/cadbury-ethical-company>.

128. FAIR TRADE INT'L & MARS INC., *Mars and Fairtrade International Announce Collaboration*, INT'L LABOR RTS. FORUM (Sept. 27, 2011), <https://www.laborrights.org/releases/mars-and-fairtrade-international-announce->

Hershey¹²⁹ to source from Fairtrade certified cocoa; backlash over sweatshops in its supply chain spurred Nike to transform itself into an apparel industry leader in monitoring factories for labor violations;¹³⁰ and Citigroup committed to financing charitable projects in low-income countries after enduring a barrage of negative coverage over its socially destructive investments.¹³¹ Bad press can and does force companies to end abusive practices.

In addition to backlash from customers, dissent within the adversely affected communities likewise exacts a high cost on companies' bottom line. The expense of failure to avoid conflict with local communities has been well documented:¹³² extractive industry companies Newmont and Buenaventura, for example, lost an estimated \$1.69 billion in profits after conflict with the local populations halted production at their Peruvian mine;¹³³ Meridian Gold sank \$350 million into developing a mine in Argentina that never became operational, because the community successfully resisted their attempts to relax local health and environmental regulations;¹³⁴ and local protests over water usage for the Pascua Lama copper mine in Chile eventually led the company to stop construction on the \$8.5 billion project.¹³⁵ TNCs must account for the reaction that both consumers and those living near their operations are likely to have to corporate human rights violations, and mitigate against their very real expense.

The converse is also true: Just as there is pressure to avoid a poor human rights reputation, so too there is a growing recognition of the financial advantages of cultivating an admirable human rights reputation.¹³⁶ Consumers respond positively to stories of

collaboration (noting Mars' commitment to source 100% of its chocolate from fair trade producers by 2020).

129. *Raise the Bar, Hershey! Campaign Welcomes Hershey's Announcement to Source 100% Certified Cocoa by 2020*, INT'L LABOR RTS. FORUM (Oct. 3, 2012), <http://www.laborrights.org/releases/raise-bar-hershey-campaign-welcomes-hersheys-announcement-source-100-certified-cocoa-2020>.

130. Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUS. INSIDER (May 9, 2013, 10:00 PM), <http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5>.

131. GEOFFREY HEAL, WHEN PRINCIPLES PAY: CORPORATE SOCIAL RESPONSIBILITY AND THE BOTTOM LINE 69–70 (2008).

132. For an excellent report on the cost of conflict in the extractive industry, see DAVIS & FRANKS, *supra* note 39.

133. Steven Herz et al., *Development Without Conflict: The Business Case for Community Consent*, WORLD RESOURCES INST. 40–44 (Jonathan Sohn ed., 2007), http://www.wri.org/sites/default/files/pdf/development_without_conflict_fpic.pdf.

134. *Id.* at 27–32.

135. *Conflict with Communities a Big Cost to Business*, U. OF QUEENSL. (May 13, 2014), <https://www.uq.edu.au/news/article/2014/05/conflict-communities-big-cost-business>.

136. JULIA RUTH-MARIA WETZEL, HUMAN RIGHTS IN TRANSNATIONAL BUSINESS: TRANSLATING HUMAN RIGHTS OBLIGATIONS INTO COMPLIANCE PROCEDURES 214 (2015) (observing that corporations that have developed an advanced understanding of human rights issues “will grant them a competitive advantage in new markets where similar human rights

companies implementing strong corporate policies on human rights,¹³⁷ and TNCs have taken note: an impressive 84% of companies with revenue over \$10 billion USD have implemented human rights policies.¹³⁸ This was not the case ten years ago, illustrating the increased attention major TNCs are forced to pay to human rights.

Thus, the twin pressures of emerging legal obligations and rising financial costs are pushing TNCs to expand their corporate due diligence to account for a new form of risk: human rights violations. Given the egregious human rights abuses that flow from land conflict, corporations must extend this rigorous due diligence to vetting new and existing land acquisitions, both in their own operations and throughout their supply chain. But what does due diligence look like in the context of land?

B. Due Diligence on Land

Conflicting land claims require companies to look beyond the narrow confines of national land title registries. While these registries contain information that corporations no doubt should review, all too often they fail to account for the land's customary use.¹³⁹ This leaves a dangerous gap in ownership rights, particularly when the country has no national legislation clarifying the relationship between customary and formally registered land rights.¹⁴⁰ As discussed above, registries may overlook communal land rights, indigenous rights, seasonal or nomadic rights, natural resource collection rights, and other longstanding land uses that authorities characterize as "informal."¹⁴¹ And in many parts of the

issues prevail, compared to those corporations who have not implemented a human rights strategy The benefits of a human rights policy will go beyond reputation and assurance processes, fostering business growth and commercial opportunities by granting access to new markets, new suppliers and, most importantly, new consumers.”)

137. *Id.* See generally SAVITZ & WEBER, *supra* note 36.

138. James Wood, *The New Risk Front for GCs – Nearly Half of Contracts Have Human Rights Clauses*, *LB Research Finds*, LEGAL BUS. (Sept. 8, 2016, 8:46 AM), <https://www.legalbusiness.co.uk/blogs/the-new-risk-front-for-gcs-nearly-half-of-contracts-have-human-rights-clauses-lb-research-finds/>. This figure falls to 46% when taking into account companies that earn below \$10 billion in revenue. *Id.*

139. Rachel S. Knight, *Statutory Recognition of Customary Land Rights in Africa*, FAO LEGIS. STUDY vi (2010), <http://www.fao.org/docrep/013/i1945e/i1945e00.pdf>.

140. See, e.g., Jennifer Duncan, Michael Lufkin & Reem Gaafar, *The Land Bill (Draft 3): Analysis and Policy Recommendations*, LANDESA RURAL DEV. INST. 7, 14, 17 (Oct. 2013), <https://s24756.pcdn.co/wp-content/uploads/Ghana-Land-Bill-Final-Landesda-Report-23-Oct-13.pdf> (critiquing a Ghanaian land bill for failing to clarify the relationship between traditional tenure and formally registered land rights).

141. Liz Alden Wily, *Customary Land Tenure in the Modern World*, RIGHTS & RES. 3 (Nov. 2011), <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/7713/customary%20land%20tenure%20in%20the%20modern%20world.pdf?sequence=1&isAllowed=y> (noting that

world, only a fraction of the land is held under formal title. In sub-Saharan Africa, for example, an estimated 90% of the land remains untitled.¹⁴² This leaves a massive region vulnerable to competing claims and leads to conflict when investing companies do not investigate the realities of land use beyond national registries.

As a corollary to the inadequacy of checking public registries, investors must also remain aware that due diligence requires more than securing government approval to acquire land. Government sanctioned concessions in no way guarantee against land conflict. According to the Munden Project, between 93 and 99% of territories granted to companies are populated,¹⁴³ meaning that these concessions will engender land conflict with local communities almost as a matter of course. Yet public officials have every incentive to advertise untitled land as “unused,” as they stand to reap all of the financial benefits and suffer none of the attendant losses of land investments, which will instead be borne by the displaced community.¹⁴⁴ Responsible companies must remain aware of these dynamics and investigate land use patterns in practice, not just on paper, if they want to avoid displacing local populations.

Inspecting true land use patterns, then, requires direct outreach to local communities to gauge just who would be adversely impacted by a land acquisition. It bears emphasis that “community” means the entire community, not simply approval from a powerful subsection therein: just as businesses cannot rest assured that government approval means they have complied with their human rights obligations, approval from traditional community leaders likewise does not suffice. The reason for this is twofold: first, a traditional leader may succumb to the same temptations as his governmental counterpart: money. A chief may sell “his” property to an investor and pocket the money for himself, when in reality the land belongs to the community as a whole and is not truly the chief’s to sell.¹⁴⁵ This form of corruption runs rampant.

“[f]ew commons are acknowledged as the property of the communities in national land laws” and discussing the failure of national registries to account for communal land tenure).

142. Mark Bowman, *Land Rights, Not Land Grabs, Can Help Africa Feed Itself*, CNN (June 18, 2013, 6:17 AM), <http://www.cnn.com/2013/06/18/opinion/land-grabs-africa-mark-bowman/>.

143. Andrea Alforte et al., *Communities as Counterparties: Preliminary Review of Concessions and Conflict in Emerging and Frontier Market Concessions*, RIGHTS & RES. 1 (Oct. 30, 2014), http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL_Oct-21.pdf.

144. For an excellent discussion of the corruption that fuels transactions between transitional investors and local government officials, see generally DE SCHUTTER ET AL., *supra* note 78.

145. *Id.* at 6 (noting that petty corruption surrounding land grabs involves “exchanges of small amounts of money or favors (i.e. bribes) and most often involves local . . . community leaders, such as village chiefs.”).

As a second but related concern, companies investing in land should remain aware that traditional leadership structures may marginalize constituencies whose preferences TNCs must account for under international human rights law. Women's voices, for example, are unlikely to be heard if an investor only seeks input from customary leaders.¹⁴⁶ The interests of ethnic minorities, children, the elderly, and other less influential groups are also prone to being ignored by the local elite.¹⁴⁷ Borrás and Franco detail a typical pattern in which communities are effectively stripped of their land rights by their own leadership:

[T]he question of representation of social groups, especially in rural communities in the South, is problematic, uneven, and politically contested—whether negotiations are transparent or not. In many places, a minority elite section of a community often claims to represent the poor even when it does not. On many occasions in many countries, local elites forge formal contracts with investors in the name of their communities despite having no real consultative process and mandate. Often in such situations, the rural poor have little opportunity to set the record straight, while other, more powerful, stakeholders have little interest in ensuring that oppositional voices are even heard, much less taken into consideration, if doing so could mean scuttling the deal altogether.¹⁴⁸

As such, corporations must take pains to ensure that they are investigating the impact that their land acquisitions have on all local groups, powerful and powerless alike. Checking with the local

146. Victoria Tauli-Corpuz, *Indigenous Women Are Raising Their Voices and Can No Longer Be Ignored*, RTS. & RESOURCES, <http://rightsandresources.org/en/publication/view/the-guardian-indigenous-women-are-raising-their-voices-and-can-no-longer-be-ignored/> (“While indigenous people worldwide struggle to secure their collective and individual land and resource rights, customary . . . laws typically restrict indigenous women’s access to land . . . [Indigenous] communities can be discriminatory as well. It is important that laws recognising community tenure ensure women’s rights. ‘Custom’ does not grant immunity to those who marginalise and abuse women.”) (last visited May 8, 2018); see also Duncan, Lufkin & Gaafar, *supra* note 140, at 4 (“[C]ustomary rules typically discriminate against women’s land rights.”).

147. See, e.g., Irit Tamir & Diana Kearney, *Community Voice in Human Rights Impact Assessments*, OXFAM AM. 31 (2015), https://www.oxfamamerica.org/static/media/files/COHBRA_formatted_07-15_Final.pdf (observing that to grasp a real understanding of a community’s attitude toward an incoming company, the business must reach “beyond traditional leadership to ensure that the voices of vulnerable groups like women, children, the elderly, and minorities have been afforded an opportunity to be heard”).

148. Borrás & Franco, *supra* note 96, at 159 (footnote omitted).

chief is simply not enough. Fortunately, businesses interested in capturing the “community voice”—to the extent that they are able, given that uniformity of opinion may not exist—may reference guidelines on how to conduct human rights impact assessments.¹⁴⁹ And no one is better positioned to help companies implement these guidelines than lawyers.

*C. The Lawyer’s Role:
Implementing UNGPs and Land Due Diligence*

Fulfilling the requirements of the UNGPs and performing adequate due diligence on land acquisitions may, at first blush, feel overwhelming. Not only would this require monitoring of land acquisitions in one’s own operations, but it would require companies to vet suppliers and business partners to safeguard against buying products from companies that have land grabbed themselves; this appears to be a daunting and prohibitively expensive task. And for many companies, this is true. While it is relatively simple for a business to ensure that its own factory operations are not generating human rights abuses, it is more challenging to ensure that none of their suppliers or business partners are committing such violations. This holds especially true for companies with complex supply chains, in which each input it buys has passed through multiple manufacturers. Adidas, for example, may have no idea which plantation grows the rubber used in its sneakers, or even which country or part of the world it originates from; all Adidas may know is which large multinational commodity trader sold the rubber to them. Such is the reality of modern day supply chains.

Fortunately, civil society groups have drafted guidance documents that outline the concrete steps involved in due diligence processes, both for the UNGPs¹⁵⁰ as a whole, and for land rights¹⁵¹

149. See, e.g., Caroline Brodeur, *Community-Based Human Rights Impact Assessment: The Getting It Right Tool Training Manual*, OXFAM AM., https://www.oxfamamerica.org/static/media/files/COBHRA_Training_Manual_-_English.pdf (last visited May 8, 2018); Faris Natour & Jessica Davis Pluess, *Conducting an Effective Human Rights Impact Assessment*, BSR (Mar. 2013), https://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf.

150. See, e.g., *Doing Business with Respect for Human Rights*, *supra* note 123; Natour & Pluess, *supra* note 149 (explaining how a company can carry out human rights impact assessments (HRIAs), which are a critical portion of carrying out adequate due diligence); *Business and Human Rights: A Five-Step Guide for Company Boards*, EQUALITY & HUMAN RIGHTS COMM’N (May 2016), https://www.equalityhumanrights.com/sites/default/files/business_and_human_rights_web.pdf (instructing British companies how to uphold the UNGPs and respect human rights, reviewing both international human rights law obligations and British regulations).

151. See, e.g., *Respecting Land and Forest Rights: A Guide for Companies*, INTERLAKEN GROUP & RTS. & RESOURCES INITIATIVE (Aug. 2015), https://www.ifc.org/wps/wcm/connect/31bcd8049facb229159b3e54d141794/InterlakenGroupGuide_web_final.pdf?MOD=AJPERE

in particular. And these guidance documents are not just directed at companies' corporate social responsibility departments: lawyers play an integral role in the due diligence process,¹⁵² and are increasingly expected to help a company navigate its human rights obligations.¹⁵³ A recent survey of 275 General Counsel's offices found that legal is now the primary department assigned to handle human rights issues, surpassing compliance, social responsibility, or social and environmental affairs departments.¹⁵⁴ In-house lawyers have also seen a sharp rise in human rights clauses inserted into commercial contracts, and nearly half of respondents confirm that their company has a human rights policy in place.¹⁵⁵ This figure climbs to 84% when considering only companies that earn over \$10 billion in revenue.¹⁵⁶ As John Ruggie observes, "[w]here previously corporate counsel expressed deep skepticism about the implications of the UN Guiding Principles, corporate in-house legal leaders are now challenging their outside counsel to proactively advise them on human rights risks."¹⁵⁷ Unlike their predecessors, transactional lawyers are now expected to develop competence in international human rights obligations.

To help them decipher private sector obligations under international human rights law, NGOs have drafted guidance documents tailored for attorneys.¹⁵⁸ Law firms are likewise striving

S; Karol Boudreaux & Yuliya Neyman, *Operational Guidelines for Responsible Land-Based Investment*, USAID (Mar. 2015), https://www.land-links.org/wp-content/uploads/2016/09/USAID_Operational_Guidelines_updated-1.pdf; OECD & FAO, *OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS* (2016), <http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf> (discussing a range of human rights obligations shouldered by agribusiness, including land rights).

152. Transactional lawyers that are familiar with the UNGPs are poised to make significant positive impacts on investment and business decisions that affect land rights. However, in-house legal counsel may face serious constraints in applying the UNGPs. For many in-house counsels, the pressures of positioning oneself not only as a competent lawyer, but also as a skilled businessperson, creates a disincentive for applying the UNGPs when doing so threatens short-term profits. Executives may frown upon suggestions that raise expenses over the short-term, such as purchasing from ethical producers or conducting vigorous due diligence. Law firms advising these companies may not face the same level of pressure to suggest the cheapest short-term options.

153. John F. Sherman III, *The UN Guiding Principles: Practical Implications for Business Lawyers*, IN-HOUSE DEF. Q. 50, 54–57 (2013), <http://www.shiftproject.org/media/resources/docs/UNGPSimplicationsforlawyers.pdf>.

154. Wood, *supra* note 138.

155. *Id.*

156. *Id.*

157. John G. Ruggie, *Corporate Lawyers and the Guiding Principles*, SHIFT PROJECT (Nov. 2013), <http://www.shiftproject.org/resources/viewpoints/corporate-lawyers-un-guiding-principles/>.

158. See, e.g., *IBA Practical Guide on Business and Human Rights for Business Lawyers*, INT'L BAR ASS'N (May 28, 2016), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=d6306c84-e2f8-4c82-a86f-93940d6736c4>; *The UN Guiding Principles on Business and Human Rights: A Guide for the Legal Profession*, ADVOCATES INT'L DEV. (2013), [http://www.l4bb.org/reports/A4IDBusinessandHumanRightsGuide2013\(web\).pdf](http://www.l4bb.org/reports/A4IDBusinessandHumanRightsGuide2013(web).pdf).

to ensure that their lawyers review transactions through a human rights lens. In November 2016, White & Case, Debevoise & Plimpton, Clifford Chance, Hogan Lovells, and several other elite firms released a report outlining their approach to UNGP implementation.¹⁵⁹ Lawyers in positions that are not traditionally associated with human rights compliance will increasingly find themselves as the first line of defense against abuses. As such, educating the legal profession is crucial. These guides offer invaluable insights into how companies can begin to approach the intricate task of human rights due diligence.

Despite these advances in the international legal framework, and the private sector's growing recognition of such obligations, international human rights law remains an inadequate tool for protecting human rights. As a soft law instrument, the UNGPs lack a binding framework for corporate accountability. Furthermore, as human rights lawyers are painfully aware, what laws exist might be flouted with impunity by governments and business alike. When international law is unable to protect populations from abuse, then alternative advocacy strategies must be considered. Business has become a critical ally to that end. A "human rights plus" approach, where civil society pushes companies beyond their human rights obligations and transforms them into human rights advocates, has proven a promising avenue.

IV. TRANSFORMING ADVERSARY INTO ALLY

Civil society can—indeed, must—transform transnational corporations from recurrent human rights abusers into human rights champions. Advocates should not view corporations as a homogenous lot, conjuring images of evil empires that drive toward profit while crushing local populations underfoot. This caricature is rooted in some truth, of course. But the perception of the private sector as "the enemy" is so dangerous because it becomes a self-fulfilling prophecy. This assumption exacerbates distrust between civil society and the private sphere, and in "certain forums that address the nexus between business and human rights . . . there is a lack of participation from business actors because there is a general perception that they are often targeted as negative actors or adversaries and not appreciated as potential partners."¹⁶⁰ Fortunately, we are not predestined to live in a world where

159. Allen & Overy et al., *Law Firm Business and Human Rights Peer Learning Process*, BUS. HUM. RTS. (Nov. 2016), <https://business-humanrights.org/sites/default/files/documents/Law%20Firm%20BHR%20Peer%20Learning%20Process%20Report%20-%20FINAL%20ONLINE.pdf>.

160. STANLEY FOUND., *supra* note 43, at 3.

business is inevitably incompatible with human rights. NGOs should take advantage of the changing attitude toward corporate responsibility and help channel the ever-growing influence that TNCs wield in order to protect human rights.

But how? As rational actors,¹⁶¹ companies can calculate when the gains of a prospective violation outweigh the costs. For those who have grown accustomed to impunity, the benefits of stealing land or committing another abuse can dwarf the consequences they regularly face: which is to say, none. Thus, it is no surprise that NGOs advocating for improved human rights practices and respecting the land rights of local communities are frequently met with stiff resistance from governments, companies, and other actors whose behavior they seek to change. The NGOs' message may thus fall on deaf ears.

Other private sector actors, however, can deliver that same message of respecting land and other human rights with far more success. Because the North Star for business is maximizing profit, if a company demonstrates that it can respect human rights and still earn money—or better yet, that respecting human rights is more profitable than violating them—this message becomes far more persuasive to other businesses calculating the financial impact of its behavior. Where an NGO's message may be perceived as “preaching,” and thus viewed with skepticism, a corporate land rights champion is likely to be perceived as a credible voice by companies and governments alike.

A. Private Sector Influences Private Sector

TNCs are well positioned to exert influence over other businesses, particular those within the same industry. Companies compare themselves to their competitors. If one company adopts a socially responsible practice or speaks out against a human rights abuse, other companies are encouraged to follow suit, lest they get left behind in the court of public opinion. Publicly promoting and enacting responsible behavior also illustrates to competitors that there are very real financial benefits to be gained from respecting

161. Social scientist Jon Elster defines a rational actor as one who “chooses the action that best realizes his or her desires, given their beliefs about what their options are and about the consequences of choosing them The beliefs are themselves inferred from the available evidence by the procedures that are most likely, in the long run and on average, to yield true beliefs.” John Elster, *Emotional Choice and Rational Choice*, in OXFORD HANDBOOK OF PHILOSOPHY OF EMOTION 1, 3 (Peter Goldie ed., 2009), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199235018.001.0001/oxfordhb-9780199235018-e-12>. Of course, many companies and governments may behave in irrational or short-sighted ways. However, this article assumes that the majority of such actors are in fact rational in attempting to maximize their conception of the good.

human rights. As discussed above in Part I, consumers prefer to purchase from socially conscientious companies, and when a business markets itself as such, competitors may be forced to mimic them. This ignites a race to the top.

These dynamics have already played out in the context of land grabs. In November 2013, Coca Cola committed to a zero tolerance policy for land grabs in its supply chain;¹⁶² its chief competitor, PepsiCo, adopted the same policy several months later.¹⁶³ Other agribusiness giants like General Mills, Associated British Foods, Unilever, and Nestlé made similar land commitments soon thereafter.¹⁶⁴ No agribusiness company wanted to be viewed as regressive on the land grabbing issue, spurring them all to progress.¹⁶⁵ A similar pattern unfolded in the Australian banking industry. After National Australia Bank (NAB) released a policy statement promising to respect land rights in June 2014, rival bank Westpac took note and made a virtually identical commitment just one week later.¹⁶⁶ In both of these cases, civil society made that first critical step, pushing Coca Cola and NAB to make that initial commitment, and their competitors could not afford to be left behind. Companies that had previously ignored these human rights obligations were thus—unwittingly—refashioned into human rights advocates within a matter of months.

In addition to generating positive influence through peer pressure, TNCs can also improve the private sector's human rights practices through intra-industry collaboration. Businesses have formed coalitions to combat specific human rights abuses endemic to their trade. Groups of companies can be emboldened to push for advancements that individual businesses would hesitate to advocate for on their own.¹⁶⁷ Brazilian companies that trade in ethanol, for example, have joined forces to fight child labor in the grain ethanol supply chain.¹⁶⁸ There are also a growing number of

162. *The Coca-Cola Company Declares "Zero Tolerance" for Land Grabs in Supply Chain*, OXFAM INT'L (Nov. 8, 2013), <https://www.oxfam.org/en/pressroom/pressreleases/2013-11-08/coca-cola-company-declares-zero-tolerance-land-grabs-supply-chain>.

163. *PepsiCo Declares "Zero Tolerance" for Land Grabs in Supply Chain*, OXFAM INT'L (Mar. 18, 2014), <https://www.oxfam.org/en/pressroom/pressreleases/2014-03-18/pepsico-declares-zero-tolerance-land-grabs-supply-chain>.

164. STEFANIA BRACCO, *THE ECONOMICS OF BIOFUELS: THE IMPACT OF EU BIOENERGY POLICY ON AGRICULTURAL MARKETS AND LAND GRABBING IN AFRICA* 110 (Nick Hanley ed., 2016).

165. *See id.*

166. *Banking on Shaky Ground: One Year On*, OXFAM AUSTL. (May 5, 2015), <https://www.oxfam.org.au/2015/05/banking-on-shaky-ground-one-year-on/>.

167. *See* Office of the High Commissioner of Human Rights (OHCHR), *Business and Human Rights: A Progress Report*, OHCHR (2000), <http://www.ohchr.org/Documents/Publications/BusinessHRen.pdf>.

168. *Id.*

multi-stakeholder initiatives (MSIs) that aim to address a range of sustainability issues that their industry encounters. The palm oil industry's Roundtable on Sustainable Palm Oil (RSPO),¹⁶⁹ the mining industry's International Council on Mining & Metals (ICMM),¹⁷⁰ and the sugar industry's Bonsucro¹⁷¹ represent just a few of the MSIs that bring together influential companies to draft industry-wide human rights standards. While the effectiveness of these MSI-driven commitments vary, the growing recognition that these companies need to at least appear respectful of human rights bodes well for eventual, if not immediate, implementation.

B. Private Sector Influences Public Sector

Companies can also influence a state's human rights practices. The financial might of large TNCs can persuade a government to rethink virtually any of its policies. Traditionally, companies have exercised this influence to extort favorable treatment from governments: Barrick Gold convinced the Papua New Guinean government to amend environmental regulations so it could legally dump an astounding level of toxic mining waste into rivers;¹⁷² Exxon contracted with the governments of Cameroon and Chad to absolve itself of human rights obligations to populations living near its pipeline project;¹⁷³ and British company Soco International has extracted oil exploration permits on nominally "protected" lands in the DRC, in violation of Congolese and international law.¹⁷⁴ No government is immune from heavy corporate influence. And as history has shown time and again, those governments that refuse to kowtow have paid the price. The nationalization of British Anglo-Iranian Oil Company sparked the 1953 overthrow of Iran's Prime

169. *About Us*, ROUNDTABLE ON SUSTAINABLE PALM OIL, <http://www.rsपो.org/about> (last visited May 8, 2018).

170. *About Us*, INT'L COUNCIL ON MINING & METALS, <http://www.icmm.com/en-gb/about-us> (last visited May 8, 2018).

171. *About Bonsucro*, BONSUERO, <https://www.bonsucro.com/what-is-bonsucro/> (last visited May 8, 2018).

172. *Support for Mining Over Democratic Principles in Papua New Guinea*, MINING WATCH CAN. (July 18, 2010, 7:23 AM), <http://miningwatch.ca/blog/2010/7/18/support-mining-over-democratic-principles-papua-new-guinea>.

173. *Chad-Cameroon Pipeline: New Report Accuses Oil Companies and Governments of Secretly Contracting out of Human Rights*, AMNESTY INT'L U.K. (Sept. 8, 2005, 12:00 AM), <https://www.amnesty.org.uk/press-releases/chad-cameroon-pipeline-new-report-accuses-oil-companies-and-governments-secretly>.

174. Melanie Gouby, *Democratic Republic of Congo Wants to Open Up Virunga National Park to Oil Exploration*, THE GUARDIAN (Mar. 16, 2015, 12:51 PM), <https://www.theguardian.com/environment/2015/mar/16/democratic-republic-of-congo-wants-to-explore-for-oil-in-virunga-national-park>.

Minister Mohammad Mossadeq,¹⁷⁵ for example, while the United Fruit Company laid waste to so many Latin American administrations that it “had possibly launched more exercises in ‘regime change’ on the banana’s behalf than had even been carried out in the name of oil.”¹⁷⁶ That TNCs wield significant power over governments is beyond dispute.

This authority does not always have to drive toward nefarious ends, however. Companies can channel their influence to force better human rights practices, a tactic that has proven particularly appealing when a company’s financial considerations align with greater respect for human rights. The tech industry has a strong financial stake in promoting free speech in repressive countries, for example. China’s censorship alone costs companies like Google, Facebook, and Snapchat billions in lost revenue,¹⁷⁷ giving their CEOs every reason to advocate for the rights to expression and free speech. Other times, companies may lobby on behalf of human rights initiatives in order to burnish their public image, which in turn boosts their bottom line. Irish clothing retailer Primark, for example, publicly advocated for the UK to adopt transparency rules surrounding the use of forced labor in corporate supply chains.¹⁷⁸ No doubt this commitment was made only after careful consideration of the financial gains to be reaped from appealing to conscientious consumers. And business support for the 2015 UK Modern Slavery Act contributed to the law’s eventual adoption,¹⁷⁹ underscoring the substantial impact that corporate respect for human rights can have upon governments. It is clear that “[b]y virtue, specifically, of their economic and political muscle, TNCs are uniquely positioned to affect, positively and negatively, the level of enjoyment of human rights.”¹⁸⁰ Human rights advocates must pounce on any opportunity to use this influence for the greater good.

175. Saeed Kamali Dehghan & Richard Norton-Taylor, *CIA Admits Role in 1953 Iranian Coup*, THE GUARDIAN (Aug. 19, 2013, 2:26 PM), <https://www.theguardian.com/world/2013/aug/19/cia-admits-role-1953-iranian-coup>.

176. Daniel Kurtz-Phelan, *Big Fruit*, N.Y. TIMES (Mar. 2, 2008), <http://www.nytimes.com/2008/03/02/books/review/Kurtz-Phelan-t.html> (quoting Peter Chapman).

177. Julie Makinen, *Chinese Censorship Costing U.S. Tech Firms Billions in Lost Revenue*, L.A. TIMES (Sept. 22, 2015, 2:00 AM), <http://www.latimes.com/business/la-fi-china-tech-20150922-story.html>.

178. See *Primark Stores Ltd. Modern Slavery Statement 2016*, PRIMARK (Dec. 2016), <https://www.primark.com/-/media/ourethics/modern-slavery-act/primark-msa-statement.ashx>.

179. *Sustaining Momentum: Bold Leadership to Combat Forced Labour and Human Trafficking*, Issue in *Top 10 Business & Human Rights Issues in 2016*, INST. FOR HUM. RTS. & BUS., <https://www.ihrb.org/library/top-10/top-ten-issues-in-2016> (last visited May 8, 2018).

180. Kinley & Tadaki, *supra* note 126, at 933.

While individual companies can pressure governments to improve human rights practices, this influence is magnified further still when companies pool their influence to confront a government as a group. For cash-strapped states in particular, ignoring a faction of businesses that can move their operations abroad is an expensive prospect. Clothing retailer H&M recently assembled such a team. When Cambodia's garment factory workers protested to raise the nation's abysmal minimum wage, H&M collaborated with other apparel industry companies to pressure the Cambodian government to listen to the workers' demands.¹⁸¹ Eight TNCs wrote an open letter to the Cambodian Deputy Prime Minister, urging him to respect collective bargaining rights and institute a living wage for garment workers, while reassuring him that the companies would factor the higher wages into their retail prices rather than move operations overseas.¹⁸² The Cambodian government raised the minimum wage by 28% two weeks later.¹⁸³ Because the nation's economy relies so heavily upon the garment sector, these TNCs exercised outsized influence over the government's policies. Companies can thus be transformed into powerful advocates for improving others' human rights.

C. Self-Reinforcement: Private Sector Influences Itself

Finally, it bears mention that the very exercise of convincing others to respect human rights—be they companies, governments, or other actors—ingrains this respect for human rights into an organization's own DNA. Businesses that preach socially conscious behavior begin to absorb this attitude into their corporate identity, which leaks into other facets of its operations.¹⁸⁴ As discussed above in Part I, companies that are perceived as socially responsible attract and retain high performing employees, who want to view

181. Miles Brignall, *Fashion Retailers Agree to Raise Minimum Wage in Cambodia*, THE GUARDIAN (Sept. 21, 2014, 10:22 AM), <https://www.theguardian.com/business/2014/sep/21/fashion-retailers-offer-raise-minimum-wage-cambodia>.

182. Letter from Philip Chamberlain, Head of External Stakeholder Engagement, C&A, et al. to H.E. Keat Chhon, Permanent Deputy Prime Minister, Cambodia, http://www.industrial-union.org/sites/default/files/uploads/documents/Cambodia/letter_to_dpm_cambodian_government_september_2014.pdf.

183. Associated Press, *Cambodia Increases Garment Industry Minimum Wage*, BUS. FASHION (Nov. 12, 2014, 5:05 PM), <https://www.businessoffashion.com/articles/news-analysis/cambodia-increases-garment-industry-minimum-wage>.

184. For a discussion on organizational identity, including how organizational culture and behavior form, see Stuart Albert & David A. Whetten, *Organizational Identity*, 7 RES. ORGANIZATIONAL BEHAV. 263 (1985).

themselves as “doing good,”¹⁸⁵ a trend which is particularly on the rise among millennials.¹⁸⁶ Ford Motor chairman Bill Ford observes,

A company has to be more than just a paycheck. It has to give people something more

If you don’t have a culture that means something, then you’re just going to have the experience of a bunch of transient employees who go to the next company . . . and they won’t give it a second thought.¹⁸⁷

Championing human rights can become a self-reinforcing exercise, attracting employees that care about the moral fiber of their employer.

D. Importing These Lessons to Land Rights

Land rights advocates should apply these lessons to safeguard against land grabs and help communities strengthen their tenure security, both of which stand to improve nutrition and a host of development outcomes. This means working with companies not only to ensure that their own land transactions protect the rights of impacted communities, but to transform them into land rights champions.

Becoming a land rights champion includes both passive resistance and active lobbying. TNCs can refuse to cooperate with governments that sell off indigenous and communally held lands as “unowned,” in recognition that public registries do not account for the full range of land rights that are actually being exercised on any given plot. Without their corporate customers, governments lose the incentive to push communities off of their ancestral lands.¹⁸⁸ TNC

185. See DAVIS & FRANKS, *supra* note 39, at 23.

186. See Jeanne Meister, *The Future of Work: Corporate Social Responsibility Attracts Top Talent*, FORBES (June 7, 2012, 11:03 AM), <https://www.forbes.com/sites/jeannemeister/2012/06/07/the-future-of-work-corporate-social-responsibility-attracts-top-talent/#22e266363f95> (finding that 53% of total respondents surveyed, and 72% of respondents who are students about to enter the workforce, are seeking a job where they can make a positive societal impact).

187. Julie Bort, *Ford Chairman: Employees Voluntarily Worked with No Pay to Keep Us out of Bankruptcy in 2008*, BUS. INSIDER (Mar. 13, 2017, 5:34 PM), <http://www.businessinsider.com/ford-chairman-employees-worked-with-no-pay-to-thwart-bankruptcy-2017-3>.

188. A company’s refusal to buy land held only under customary tenure will save the land for the local community when it is the only prospective customer; in other cases, however, the government may have enough prospective buyers that the government minister may simply find an alternate buyer, rendering the first company’s “passive resistance” ineffective in saving the land for the local community. Thus, the eventual impact of passive resistance on any particular plot of land depends upon the context. Nevertheless, a company should not

land champions can also actively lobby governments to pursue titling programs and related measures designed to maximize tenure security. The motives do not have to be purely altruistic. There are very real financial benefits to having a complete picture of the existing land rights and uses,¹⁸⁹ whether formal or informal. As detailed above, the cost of conflict is high: not only can it lead to a disruption in production and potential legal fees, but negative publicity can exact a heavy toll on corporate image, and in turn, the TNC's bottom line. It is in a TNC's own self-interest to operate in contexts where land rights are clearly mapped out,¹⁹⁰ and to avoid regions where the legal pluralism surrounding land rights can engender conflict with local communities. Civil society can play upon these financial considerations—highlighting both the financial benefits of a positive human rights reputation and the high costs of conflict with community—in order to mold businesses into land rights champions.

V. CONCLUSION

As an actor that wields considerable influence over governments and other private sector actors, TNCs have a critical role to play in promoting respect for land rights, and in turn, improving food security in some of the world's most impoverished regions. Their financial might makes them uniquely positioned to encourage governments to strengthen land tenure and respect existing rights. The private sector's unique "role in providing a variety of services to state governments and citizens puts it in an important intermediary position that can be used to promote messaging for peace or complicate attempts to organize and form violent movements."¹⁹¹

buy into the false logic that it is not contributing to an action that it knows will cause widespread human rights violations simply because if it does not do it, another organization will.

189. *The Financial Risks of Insecure Land Tenure: An Investment View*, MUNDEN PROJECT 3 (Dec. 2012), http://rightsandresources.org/wp-content/uploads/2014/01/doc_5715.pdf ("Our initial examination shows the potential for bottom-line financial damage range from massively increased operating costs – as much as 29 times over a normal baseline scenario, according to our modeling – to outright abandonment of an up-and-running operation. And this modeling finds firm empirical support in the case studies we analyzed. . . . [that] risk provides a strong incentive for the private sector to contribute to clarifying and securing tenure rights.")

190. *Id.* Despite the fact that clearly defined land rights can safeguard company money, in other contexts, companies may find that operating in states with such clearly demarcated property has become too expensive, encouraging them to purchase land in regions with overlapping land claims. *Id.* at 23. Such an approach often winds up being short-sighted; TNCs may believe they are saving money by purchasing land in less expensive regions where prices are depressed by their ability to displace, rather than buy land from local land users; however, as noted above, this can also lead to costly conflict.

191. STANLEY FOUND., *supra* note 43, at 2.

Despite historical challenges, civil society should not be fatalistic about the prospect for getting business to adopt responsible human rights practices and push their competitors to do the same. Companies are a varied lot whose financial calculations are forever changing according to prevailing social norms, and should be approached as such. TNCs increasingly recognize the benefits of corporate social responsibility.¹⁹² As Don Tapscott and David Ticoll conclude, today “[s]takeholders have historically unprecedented opportunities to . . . scrutinize the corporate world. They have new power to influence performance or even cripple companies almost overnight.”¹⁹³ Now more than ever, civil society can harness the power that has so often been a destructive force for good.

This is especially true in the realm of land rights. In an arena crowded with such a diverse set of actors, “[e]fforts to secure land and property rights in an effective and inclusive manner must rely on multi-stakeholder partnerships between government, private sector, and civil society actors, and must operate at all levels, from the local to the global.”¹⁹⁴ By conducting rigorous due diligence on land acquisitions,¹⁹⁵ refusing to cooperate with governments that sell land off occupied lands as “unowned,” and advocating for improved government and corporate policies on land, TNCs can curtail the global land grab pandemic. Civil society must do its part to transform these companies into human rights champions.

192. Tracey Keys et al., *Making the Most of Corporate Social Responsibility*, MCKINSEY & CO. (Dec. 2009), <http://www.mckinsey.com/global-themes/leadership/making-the-most-of-corporate-social-responsibility>.

193. TAPSCOTT & TICOLL, *supra* note 40, at xiii.

194. Roth, *supra* note 24, at 1.

195. “Rigorous due diligence” means a company looks beyond national title registries to ensure that it is not investing in land that local communities rely upon. In addition to looking at formal title, it means accounting for customary tenure practices and ensuring that marginalized populations like women, minorities, and other groups are protected from discriminatory land tenure practices.

