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Land Rights and the
Millennium Development
Goals: How the Legal
Empowerment Approach
Can Make a Difference

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LAND RIGHTS AND THE MILLENNIUM DEVELOPMENT GOALS

HOW THE LEGAL EMPOWERMENT APPROACH CAN MAKE A DIFFERENCE

Hamid Rashid¹

Executive Summary

This chapter explores the linkages between land rights and the Millennium Development Goals (MDGs) and explains how legal empowerment of the poor - understood as a process of systemic change and a bottom-up approach that seeks to strengthen the identity, voice, choice and participation the poor - can accelerate achievement of the MDGs. It argues that improving access to land and enhancing tenure security of the poor must define the fight against rural poverty, particularly given that close to half a billion people - almost half of the world's poor - are landless or near-landless. Three of the eight MDGs - reduction of poverty and hunger, gender equality and environmental sustainability - critically hinge on access to land and tenure security, which may also impact the achievement of two others - universal primary education and combating HIV and other diseases. As the deadline for reaching the MDGs is just around the corner and as many goals remain off-target, it is argued that a participatory approach to land governance can play a significant role in accelerating and sustaining their achievement.

Effective land governance and the realization of land rights can yield a multitude of benefits for the poor and can therefore be crucial in fighting poverty. Benefits can range from stimulating long-term investment, increasing agricultural productivity and employment, facilitating restorative and redistributive justice in access, use and ownership of land to improving food security, incentivizing sustainable land use and facilitating climate change adaptation.

Section 1 of this chapter presents evidences on the relationships between property and land rights, economic development and poverty reduction. It underscores the imperative of recognizing the right to land as a fundamental human right. Highlighting the importance of community-level deliberations, it argues that the poor require not just legal instruments - titles and records, but also community-level recognition to secure their land rights. Open and inclusive community-level discourses can play a key role in reducing the asymmetries in power relations that undermine their land rights.

Section 2 identifies some of the key challenges to the enjoyment of land rights, including disputes over inheritance, demarcation, registration and records, undervaluation of land, increased commercial pressures on land and how they affect realization of the MDGs. Drawing on the experiences of effective community-level management of common pool resources, the final section presents a framework of equitable land governance and argues that community-based organizations, representing the land rights of the poor, must be an integral part of an effective land governance system. It further argues that from an empowerment perspective, the realization of land rights must be premised on the notion of justice, seeking to reduce, if not eliminate, unjust and unsustainable practices that hurt the poor. An equitable land governance system, the chapter concludes, must also ensure cost-effective dispute resolution mechanisms that will reduce transaction costs and deliver equitable remedies to the poor.

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Introduction

With the deadline for reaching the Millennium Development Goals (MDGs) just around the corner and many goals remaining off-target, the development community is looking for new impetus, strategies and approaches to accelerate MDG achievements. Given that three of the MDGs – reduction of hunger, gender equality and environmental sustainability – directly and critically hinge on effective use of land, it is not surprising that land is gaining prominence, albeit belatedly, in the discourse on MDGs. Equitable and efficient governance of land can also indirectly contribute to the achievement of the MDGs on universal primary education and reduction of HIV/AIDS.² The recent episodes of food and energy price volatility and the subsequent rise in commercial pressures on land also triggered renewed interest in land. The World Food Summit of 2008 unequivocally recognized that land management is critical to enhancing and sustaining global food security. With 75 percent of the world's poor living in rural communities³ and depending on land and agriculture for their livelihoods, one can hardly overestimate the role that land rights can play in meeting the MDG targets.

Given that a quarter of the world's 1.1 billion poor people are landless, improving access to land and protection of land rights of the poor must define the fight against rural poverty. An additional 200 million – the near-landless – do not have access to sufficient land to earn a decent standard of living.⁴ Since a significant portion of the income of rural people, including the poor comes from farming, land rights must receive greater attention to achieve the goal related to full and productive employment and decent work for all, including women and young people (MDG, Target 1B). Protecting the land rights of the poor and democratizing access to and control over common pool resources,⁵ including land and water, will therefore be crucial for promoting productive employment and ending poverty.

Land provides the basis for livelihoods, a safety net from absolute impoverishment and destitution. Access to land and security of tenure is fundamental for ensuring material security and human dignity. Tenure insecurity and uncertainty undermine incentives for longer-term investments in land, which in turn, affects the income that people receive from their landholdings. Long-term investment in land is feasible only when clear land rights exist. Smallholders and poor farmers will only invest in their land if they know they will possess it long enough to benefit from such investments. Investment in land, leading to higher level of agricultural productivity, will increase their income and contribute to reducing poverty.

The global food crisis in 2008, on the other hand and quite expectedly, has led to a sharp increase in foreign direct investment (FDI) in agricultural land in a number of developing countries, leading to transfers of large tracts of land to foreign investors. FDI in agriculture can increase the overall production of crops, which may be beneficial for the local population if foreign investors are required to sell a certain amount of their output locally. Land-related FDI may also increase the productivity of local farmers through diffusion of new farming

² International Land Coalition, *The Importance of Land and Resource Rights in Achieving the MDGs* (2007) available at <http://www.landcoalition.org/pdf/MDG_05flyer.pdf> at 11 January 2010.

³ The World Bank, *World Development Report 2008: Agriculture for Development* (2007) 45.

⁴ IFAD, *Land Statistics*, Rural Poverty Portal

<<http://www.ruralpovertyportal.org/web/guest/topic/statistics/tags/land>> at 11 January 2010.

⁵ A common pool resource has two characteristics: (i) it is very costly to exclude potential beneficiaries from accessing and exploiting the resource; and (ii) resource exploitation or utilization represents a zero-sum game, i.e. the resource-use is not 'non-rival'. Thus, it shares the first characteristic with public goods (the cost of exclusion) and the second with private goods (zero-sum and rival).

knowledge and technology.⁶ On the other hand, capital-intensive foreign investments in agriculture may decrease demand for local labor, increase rural unemployment and depress household incomes. On the balance, foreign investment in agriculture can improve food security of a recipient country provided its government can manage to prevent marginalization of small farmers and redistribute productivity gains.⁷ Given that food is scarce in many developing countries and that they are often net food importers or emergency food aid recipients,⁸ governments of these FDI receiving countries must also ensure that local populations have access to food produced by foreign investors, especially during the time of a food crisis.

Effective land management can be a critical factor in addressing the challenges of climate change mitigation and adaptation. According to the United Nations Framework on Climate Change, over 20 percent of global CO₂ emissions come from deforestation, forest degradation and land-use change, while the World Bank estimates that illegal logging has caused governments to lose US\$15 billion per year.⁹ A well-functioning and responsive land governance system can ensure sustainable use of land and natural resources and facilitate an optimal climate change response for mitigation and adaptation. It is widely recognized that securing land rights can be a fundamental strategy for dealing with environmental and climate change concerns.¹⁰ For individuals and groups, effective and secure access to land resources can incentivize users to pursue sustainable land management practices.¹¹ Secure access to land resources can also contribute to reducing abuse or over-harvesting common pool resources.

Effective land governance can ensure restorative and redistributive justice in ownership and use of land. Restorative justice – repairing the harm inflicted by illegal takeover and eviction – can help prevent mistrust, dissatisfaction and conflict. As noted by Elster, the state's failure to hold the wrongdoers accountable could lead to loss of legitimacy and increase in extremist movements.¹² The redistribution of land, ensuring more equitable access, can address challenges regarding highly skewed distribution of wealth and income in many developing countries.¹³ As argued by Stiglitz, high rates of economic growth are unsustainable without simultaneous processes to redistribute assets, with land being the primary asset in developing countries.¹⁴ Equity in access to, and ownership of, land can play

⁶ UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (2009) 160.

⁷ J Elster, *Land and Peace*, PRIO Policy Brief (2009)

⁸ S Daniel and A Mittal, *The Great Land Grab* (2009) 16.

⁹ A Contreras-Hermosilla, R Doornbosch and M Lodge, *The Economics of Illegal Logging and Associated Trade* (Background paper for OECD Roundtable Discussion on Sustainable Development, Paris, 8-9 January 2007, 4); D Brack, *Illegal Logging*, Briefing Paper (2007).

¹⁰ Sida, *Natural Resource Tenure: A Position Paper* (2007); DFID, *Land: Better Access and Secure Rights for Poor People* (2007); K Deininger, *Land Policies for Growth and Poverty Reduction: Key Issues and Challenges Ahead* (2004) available at http://www.fig.net/pub/mexico/papers_eng/ts2_deininger_eng.pdf at January 12 2010; G Thomas, 'Land: Better Access and Secure Rights for Poor People' (speech delivered at the launch of the DFID Policy Paper of the same name 19 July 2007) available at <http://www.dfid.gov.uk/Media-Room/Speeches-and-articles/2007-to-do/Speech-Land-Better-access-and-secure-rights-for-poor-people/> at January 12 2010.

¹¹ UNDP, *Land Degradation and ownership of or access to Land*, Environment and Energy <http://www.undp.org/drylands/gov-ltenure-more.html#ldegradation> at January 12 2010.

¹² J Putzel, 'Managing Land and the Prevention of Violent Conflict' (Presentation given at the Conflict Prevention and Development Co-operation in Africa Workshop, November 2007, 10) available at http://www.humansecuritygateway.info/documents/WILTONPARK_ManagingLand_PreventionViolentConflict.pdf at January 12 2010. The author argues that "understanding patterns of access to land, the institutions governing how land is used and patterns of production on the land must be central in any plans to develop foreign assistance programs that aim to prevent the outbreak of violent conflict."

¹⁴ E Teófilo, *Economic Theory, Land and Development* (2004) available at <http://www.landcoalition.org/events/05aom/teofilo.pdf> at January 12 2010.

a significant role in improving incentives for the realization of many development goals, including the MDGs.

A competent, responsive and accountable land governance system, ensuring access to land and tenure security of the poor, will remain central to poverty reduction efforts (MDG 1).¹⁵ Higher household income in a more stable and predictable environment of tenure security – induced by the confidence that one’s land or home is actually one’s own and cannot be taken away on a whim – can contribute to the realization of MDGs related to poverty and hunger, employment, education, health, HIV/AIDS gender equality and environmental sustainability. As households begin to earn more, the demand for child labor to keep families afloat will diminish. This can lead to an increase in enrolment of boys and girls in primary schools (MDG 2, Target 1). Similarly, improved agricultural income can increase the likelihood that girls will be able to attend primary and secondary school, as they are usually the ones who are compelled to drop out (MDG 3, Target 1). With effective land governance in place, foreign investment in agriculture will contribute to boosting agricultural productivity and halving the proportion of people who suffer from hunger (MDG 1, Target 3). Clearly defined individual and communal land rights, ensuring ownership, incentives and responsibilities, will prevent illegal and harmful exploitation of land and enhance environmental sustainability (MDG 7, Target 1).

MDGs enjoy a universal appeal because they present measurable, reportable and verifiable targets. But for understandable reasons, they do not define processes that will make the targets incentive compatible at the local level and ensure their timely and bottom-up realization. They also do not define how goals and targets, if and when achieved, will be sustained in the post-2015 period. MDGs do not necessarily focus on community-level participation, empowerment, substantive freedom, and human capabilities, which can be critical for achieving and sustaining the development goals. Drawing extensively on Amartya Sen’s¹⁶ seminal work on human capability and justice, and Elinor Ostrom’s¹⁷ illuminating field research on common pool resources, the chapter argues that a community-based and community-driven, participatory approach to land governance – ensuring voice, choice and legal empowerment of the poor¹⁸ to realize their land rights – can play a significant role in accelerating the achievement of the MDGs.

Section 1 of this chapter will present theoretical and empirical evidence on the relationship between property rights, economic development and poverty reduction, define land rights as fundamental human rights and underscore the importance of tenure security. Section 2 will identify some of the key challenges to the enjoyment of land rights and how they affect the realization of the MDGs. The final section will present an empowerment framework for equitable land governance, drawing on the example of community-level management of common pool resources, which will protect and promote land rights of the poor and create an enabling environment for MDG achievements.

¹⁵ See: R Prosterman et al, *Secure Land Rights as a Foundation for Broad-Based Rural Development in China: Results and Recommendations from a Seventeen-Province Survey*, NBR Special Report 18 (2009). The authors argue that China’s rural people lag behind in most economic and social measures in large part due to most Chinese farmers’ insecure rights to land.

¹⁶ Amartya K. Sen, Harvard University, winner of the 1998 Nobel Memorial Prize in Economics.

¹⁷ Elinor Ostrom, Indiana University, winner of the 2009 Nobel Memorial Prize in Economics.

¹⁸ Legal empowerment of the poor, in the context of this chapter, is meant to denote a process of systemic change and a bottom-up approach that will strengthen the identity, voice, choice and participation the poor for full realization of their economic and social rights.

1. Property rights, land rights and poverty reduction

For the majority of the world's population, secure property rights is not a reality.¹⁹ The right to property, however, is a fundamental right.²⁰ It is fundamental to dignity, material security, social connection and citizenship. The right to property – ownership of tangible or intangible assets – fosters the quality of being worthy of respect. Furthermore, mutual recognition of rights and responsibilities established through property rights systems forms the basis for social cohesion and creates social capital.

The Commission on Legal Empowerment of the Poor recognizes that ownership of property, alone or in association with others, is a human right. Its final report²¹ underscores the following:

A fully functioning property system is composed of four building blocks: a system of rules that defines the bundle of rights and obligations between people and assets reflecting the multiplicity and diversity of property systems around the world; a system of governance; a functioning market for the exchange of assets; and an instrument of social policy. Each of these components can be dysfunctional, operating against the poor.

But what exactly is the right to property? For Kant and many others in the Contractarian tradition,²² the right to property is not a natural right of isolated individuals, but a social creation depending on mutual acceptability of claims. The state, according to Kant, exists primarily to make claims to property rights both determinate and secure, and anyone claiming property rights thus has both the right and the obligation to join in a state with others. Since property exists only by mutual consent, and the state exists to secure that consent, the state necessarily has the power to permit only those distributions of property rights sufficiently equitable to gain general consent.²³ Although the social contract approach to property rights supports a strong institutional focus, it also implicitly recognizes the role individuals and communities can play to ensure mutual recognition of, and respect for, property rights.

The right to property is, in fact, a "bundle of rights". The law defines the specific features and rights that are included in this bundle. The right to property can be any right that positive law recognizes as such. For example, indigenous knowledge about a medicinal herb can be defined as property rights if the law says so. In practical terms, the term "property right" refers to a broad set of "use rights", which allows the right holder to use an asset for consumption and/or to generate income. It can also include "transfer rights" – to sell, donate or bequeath. A property right also entitles the right holder to rent, mortgage or pledge the asset for use and enjoyment by others.

Property rights generally signify private ownership of assets, which can exclude others from enjoying the property. By virtue of enforcing exclusion, property rights can align the incentives for protection and investment. Economists identify three transmission channels

¹⁹ Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone: Vol. 2* (2008) 64.

²⁰ F Cheneval, 'Property Rights as Human Rights' in de Soto and Cheneval, *Realizing Property Rights* (2006) 11-17.

²¹ Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone: Vol. 1* (2008).

²² The school of thought premised on the theory of "social contract".

²³ P Guyer, 'Kant, Immanuel', *Routledge Encyclopedia of Philosophy* (2004)
<<http://www.rep.routledge.com/article/DB047SECT10>> at January 12 2010.

through which property rights can improve economic efficiency. Effective property rights can:²⁴

- eliminate or reduce “expropriation risk” and increase tenure security, allowing individuals to realize the fruits of their investment and efforts, and contributing to economic benefits;
- reduce “transaction costs” that individuals must incur to defend their property, which can be economically unproductive; and
- provide fungibility of assets, facilitating exchange, gains of trade and access to credit.

It is not surprising that poor and vulnerable populations generally face higher risks of expropriation and higher transaction costs in defending their property rights. A property rights system that can eliminate expropriation risk, enhance security of contracts and reduce transaction costs, which can be regressive for the poor, can have significant impact in accelerating economic growth and reducing poverty and hunger.

1.1 Property rights and poverty reduction: empirical evidence

The benefit of effective property rights is evident in land users’ investment incentives. Feder (2002)²⁵ finds a doubling of investment, and a 30 to 80 percent increase in land values with more secure tenure. Enforceable property rights increase transferability of land, allowing transactions between less and more productive users of land due to increased development of the non-agricultural economy and rural-urban migration²⁶. Higher tenure security also helps reduce the need for resources, including time that individuals spend on securing their land rights, allowing them to invest these resources more productively. Also, numerous studies have found that where there is effective demand for credit, enforceable property rights can facilitate access to credit and improve the functioning of financial markets.²⁷ At the aggregate level, Besley and Ghatak find a strong negative correlation between property registration (the summary ranking of each country’s performance across three indicators: cost of registration, number of procedures and time) and income per capita in a dataset covering 172 countries.²⁸

The “Property Rights and Rule-based Governance” indicator of the World Bank²⁹ assesses the extent – in a scale of 1 (very poor) to 6 (excellent) – to which private economic activity is facilitated by an effective legal system in which property and contract rights are reliably respected and enforced. Our analysis finds a strong positive correlation between net reduction in poverty³⁰ headcounts and the Property Right Index for 68³¹ low- and middle-income countries. The correlation coefficient (+.368) and the slope of the trend line confirm

²⁴ T Besley and M Ghatak, ‘Property Rights and Economic Development’ in Rodrik and Rosenzweig (eds.), *Handbook of Development Economics* (2009) available at <<http://econ.lse.ac.uk/staff/tbesley/papers/pred.pdf>> at January 12 2010.

²⁵ G Feder, ‘The Intricacies of Land Markets: Why the World Bank Succeeds in Economic Reform through Land Registration and Tenure Security’ (Paper presented at the Conference of the International Federation of Surveyors, Washington DC, April 19–26, 2002).

²⁶ K Deininger, T Yamano and D Ayalew, *Legal knowledge and economic development : the case of land rights in Uganda*, World Bank Policy Research Working Paper No. 3868 (2003).

²⁷ Deininger, above n 10.

²⁸ Besley and Ghatak, above n 24.

²⁹ Available at <<http://siteresources.worldbank.org/IDA/Resources/CPIA2003.pdf>>.

³⁰ Net change in poverty headcounts (percentage of the population living under US\$1.25/day in PPP terms) between two furthest reporting years (1990 and 2007).

³¹ Property rights and rule-based governance rating (1=low to 6=high) data is available for 68 countries in Country Policy and Institutional Analysis (CPIA) data series of the World Bank (The World Development Indicators, 2009).

this strong correlation between property rights and poverty reduction. Without assuming any causality³² between property rights and poverty reduction, the correlation signifies that property rights and poverty reduction can be conflated and mutually reinforcing.

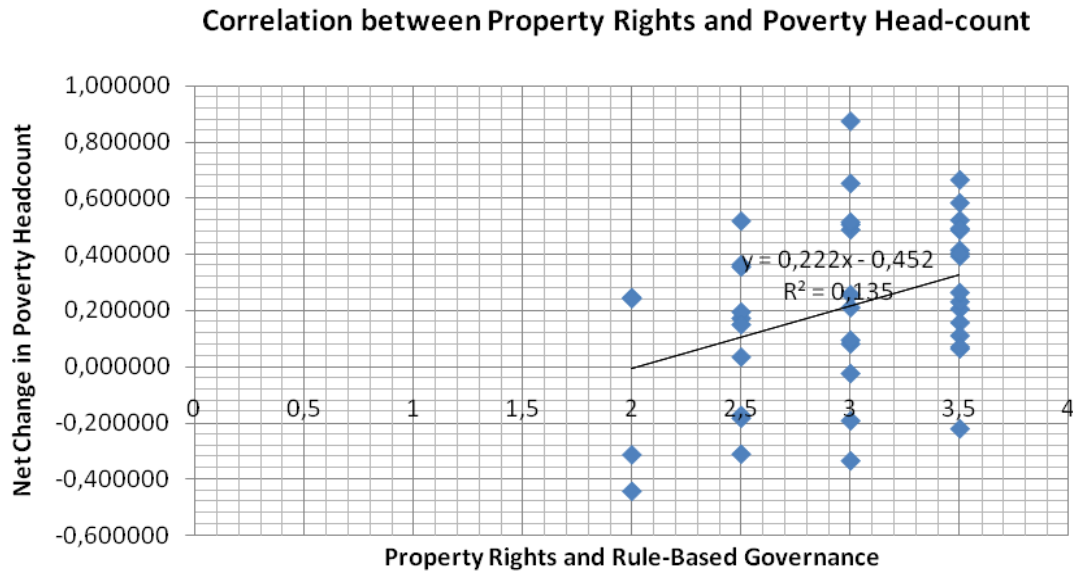


Figure 1: Correlation between property rights and Poverty Headcount, estimated by the author, with data from the World Bank, *World Development Indicators* (2009).

1.2 Land rights as human rights

Land is the primary source of sustenance and a factor of production for the majority of the world's population.³³ But its significance goes beyond being an economic input. Land accommodates and shelters individuals, communities and societies. Identity, a sense of belonging, inclusion and human dignity are fundamentally linked to ownership of land. Land also connects people and is the foundation for mutual interdependence and co-existence. Political citizenship is inextricably linked to land. In many countries, the right to vote and to participate in political processes can depend on having a physical address, which, in turn, is linked to ownership or possession of land. Land is an enormous political resource in defining power relations between and among individuals and groups under established governance systems.³⁴

The landless, near landless and those with insecure tenure rights often constitute the poorest and most marginalized groups in both rural and urban societies³⁵. In many developing countries, most people lack legally recognized rights to the land they call home,

³² A regression analysis, controlling for GDP growth rates and other instrumental variables, also confirms the significance of property rights and rule-based governance in reduction of poverty headcounts.

³³ See, for example, M Rugadya, E Obaikol and K Herbert, *Critical Pastoral Issues and Policy Statements For the National Land Policy in Uganda* (2005). The authors argue that land is the single most important source of livelihoods for pastoral communities in Uganda.

³⁴ International Land Coalition, *Land and Vulnerable People in a World of Change* (2008).

³⁵ Ibid.

from subsistence farms to shacks in urban slums. Without title deeds to their homes, families live under constant threat of eviction by public officials or invasion by violent gangs.³⁶ Rising demand for land and increased land values, on the other hand, are encouraging many developing country governments to implement mass eviction drives and remove informal settlements. Even though these families have no legal titles to those lands, they do have a fundamental claim to tenure security.

Although tenure security and equitable access to land are central to poverty reduction, they are generally neglected aspects of development³⁷. Land tenure creates security and stability, and facilitates the ability to invest, obtain services, and grow a business – all elements critical to poverty reduction. With limited and insecure land rights, it is difficult, if not impossible, for the poor to overcome poverty. Even when one holds legal title to land, this does not guarantee that the tenure is secure. Tenure security requires the law and practices to clearly identify the recognized interests in land. The rules of tenure determine who can use what resources of the land, for how long, and under what conditions³⁸. But even if strong legislation on land rights exists, actual enjoyment of land rights often depends on local conditions and the power relations at the local level.

Land rights are those property rights that pertain to land. Because land is a limited resource, and property rights generally include the right to exclude others, land rights are also exclusionary. Land rights can also be seen as a practice of social norms and conventions that regulate the distribution of the benefits accruing from specific uses of a certain piece of land.³⁹ From this perspective, land rights can go beyond individual property rights and ownership, and include common resource properties, which are essentially non-exclusionary but rival goods. Land rights are also considered in the context of the right to basic shelter, the right to tenure security, the right to decent housing, the right to a home etc. Each of these rights differs in the specific interests and protections they provide to the owner(s) of such rights.

United Nations documents – the Charter, human rights instruments and resolutions – contain almost no reference to land rights. Land rights, however, can be linked to the broader notion of property rights, as enshrined in Article 17 of the Universal Declaration on Human Rights. Since all aspects of land rights are not governed by specific legal instruments, land rights broadly fall under the purview of economic and social rights. The Preamble of the International Covenant on Economic, Social and Cultural Rights states that economic and social rights derive from the inherent dignity of human beings.⁴⁰ It is argued that economic and social rights – the so-called “second generation rights” or the livelihood rights – encompass the basic needs of life and survival, and are critical to preventing material insecurity. The critical focus on livelihood rights is justified on the ground that their protection and promotion can significantly enhance poor people’s enjoyment of civil, political and cultural rights. Tenure security of a home, the right to own and use tangible and intangible properties to pursue economic and social well-being, decent wages and job security, and the freedom and opportunity to choose a vocation, including self-employment and entrepreneurship are the basic livelihood rights that are *sine qua non* for the realization of all fundamental human rights.

³⁶ M Robinson, *Property Rights are Human Rights* (2007).

³⁷ International Land Coalition, above n 34.

³⁸ International Land Coalition, *Land Tenure: Voluntary Guidelines*, <<http://www.fao.org/nr/tenure/voluntary-guidelines/en/>> at October 25 2009.

³⁹ Deininger, above n 10.

⁴⁰ International Land Coalition, above n 34.

To legal purists, rights that are not defined by a recognizable and enforceable legal deed or title are nothing but mere claims. For a claim to count as a right, it must have legal force. Land rights, therefore, may not necessarily qualify as legally defensible rights. In defending broader social and economic rights as fundamental human rights, Sen challenges the notion that a right must be institutionalized to count as a legal obligation. It is argued that, a right - such as land right - is still a legal right and a human right even if it does not correspond to precisely formulated duties and responsibilities. There are others who would tend to discount land rights as infeasible, arguing that even with the best of efforts, it may not be feasible to realize the land rights for all. Sen dismisses both these arguments:

The confusion in dismissing claims to human rights on grounds of incomplete feasibility is that a not fully realized right is still a right, for remedial action. Non realization does not, in itself, make a claimed right a non-right. Rather, it motivates further social action. The exclusion of all economic and social rights from the inner sanctum of human rights, keeping the space reserved only for liberty and other first generation rights, attempts to draw a line in the sand that is hard to sustain.⁴¹

Acknowledgement of land rights as fundamental human rights will be critical to ensure their full and effective realization and to fight poverty, expand fundamental freedom and human capability. An effective land governance system – seeking to enhance access to and tenure security of land - must promote land rights as fundamental human rights. Moving beyond the narrow focus on legal instruments and institutionalization of land rights – which may be a necessary but not a sufficient condition for access and tenure security – land governance must ensure that land rights of the poor are also recognized and respected at community levels. The poor require not just legal recognition, but also social or community-level acceptance of, and respect for, their land rights. A strong role for communities, which are not necessarily legal institutions, will be an imperative to protect and promote land rights of the poor. Land governance must also ensure that the poor have the capacity to organize themselves, build political citizenship, secure participation in decision-making processes and influence new and existing land laws to realize their land rights.

Effective land governance must also take into account the complexities of land rights in local contexts, acknowledge the role and importance of customary practices and of collective rights of indigenous communities, and at the same time, improve the functioning of formal property rights systems to ensure mutual co-existence of different systems of property and land rights. Research findings show that land governance systems that implement successful property rights reform recognize the complexity and uniqueness of existing property environments and recommend discrete and context-specific interventions.⁴² Successful reforms have also focused on creating flexible and resilient land rights systems that can adapt to changes in costs, technologies and social circumstances, rather than a static configuration of laws and social contracts.⁴³

⁴¹ A K Sen, *The Idea of Justice* (2009) 384-385.

⁴² K Boudreaux and P D Aligica, *Paths to Property: Approaches to Institutional Change in International Development*, Institute of Economic Affairs Monographs Hobart Paper No. 162 (2007) 15.

⁴³ *Ibid*, 16.

2. Challenges to full realization and enjoyment of land rights

In developed countries, property and land rights are often taken for granted. They are secure and inviolable, except in the interest of national security or eminent domain. But the situation is significantly different in many developing countries, where land rights are often ad hoc, tentative and precarious. While equitable access to land can foster economic growth and improve collective well-being, inadequate land rights keep many in a permanent state of insecurity and uncertainty. In many developing countries, the key challenges to the full enjoyment of land rights involve disputes over inheritance, registration and titles, demarcation, undervaluation of land, and the rising commercial and investment pressures on land. Each of these factors contributes to undermining tenure security and affecting the livelihoods of the poor. As a result, they also impede, directly and indirectly, realization of many of the MDG targets.

2.1 Disputes over inheritance

Inconsistencies between customary and formal justice systems – the laws and their application – are most often the cause of disputes over inheritance. These disputes are generally rooted in the cultural and traditional practices of communities and in their interpretations by traditional leaders. Women suffer disproportionately from the discriminatory application of customs and traditions that involve ownership of land. Of the more than one billion people in the world who are inadequately housed, women constitute the majority. The Centre on Housing Rights and Evictions (COHRE) conducted surveys on the law and practices related to women's inheritance rights in ten sub-Saharan Africa countries⁴⁴ and eight countries in the Middle East and North Africa (MENA) region, and found striking similarities in the reasons for denying – and methods used to deny – women their inheritance rights.

Disputes over, and often the denial of, inheritance rights have a particularly severe impact on women. When they are unable to own, control and inherit property, they fundamentally lack access to wealth.⁴⁵ Women and their dependents – children and elderly alike – can face homelessness, loss of livelihood and shelter, and deprivation at any time. This potential loss of integrity of the family unit detracts from the realization of many of the MDGs. Women without a husband or a male guardian often face discriminatorily treatment, which perpetuates gender inequality (MDG 3). Instability and displacement may inhibit their ability to access maternal and child health services (MDGs 4 and 5), and increased material insecurity may prevent children from attending school (MDG 2).

Lack of equal rights to land for women also contributes to the spread of HIV and weakens their ability to cope with the consequences of this deadly epidemic. Women's deep-rooted and pervasive tenure insecurity, often worsened by eviction and landlessness, can significantly limit their ability to produce and access food, consequently forcing them to resort to transactional sex for survival, which can trigger the spread of HIV.⁴⁶ Dependence on men due to unequal inheritance rights can also increase women's vulnerability to HIV, as they lack the power to negotiate safe sex with their male patrons.⁴⁷ Cost-effective measures

⁴⁴ COHRE, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women* (2004).

⁴⁵ COHRE, *In Search of Equality: A Survey of Law and Practice Related to Women's Inheritance Rights in the MENA Region* (2006).

⁴⁶ A Knox and R Giovarelli, *Land Tenure, Property Rights, and HIV/AIDS*, USAID Property Rights and Resource Governance Program Report (2008).

⁴⁷ COHRE, above n 44.

for strengthening women's inheritance rights will contribute to the fight against the spread of HIV (MDG 6).

Community-level dialogues on customary laws of inheritance and how they relate to formal laws can be a critical factor in ensuring that the poor and the marginalized can effectively voice their concerns and access cost-effective resolution of inheritance-related disputes at the local level. While such dialogues can be necessary and helpful, they will surely be insufficient to protect the inheritance rights of vulnerable women and the poor. Strengthening the capacity of community-based organizations to provide legal aid to the poor, engagement of non-traditional leaders – including village elders, teachers and healers – in mediation and alternative dispute resolution processes will ensure more equitable outcomes for the poor. Development efforts at the local level should support mechanisms for peer and partner review of decisions coming out of customary forums to discourage judgments that hurt the poor. There should also be provisions of cash and non-cash incentives and training of customary leaders to encourage judgments that protect the inheritance rights of the poor, including that of vulnerable women and children.

2.2 Disputes over land records and titles

Poor land records and complex titling processes often lead to disputes over land, which can significantly reduce the time that the poor need to spend on productive endeavors. Many countries have multiple laws on how to register properties, creating overlapping and conflicting interests in land. Widespread formal titling of land is often politically and economically infeasible in countries with a strong customary land rights system. Customary land rights often prevail in practice, while the formal justice system only recognizes formal titles, adding inconsistencies and complexities in dispute resolution.

Many factors discourage people from obtaining formal titles. Registration and titling of land are often procedurally and financially very costly, especially for the poor. Where domestic legal systems limit enforcement of titles only in formal courts, titling of land becomes unattractive to individuals who do not want to subject them to formal adjudication process. Land titling may also appear less attractive because of the possibility of future taxation, expropriation of land, and loss of ownership if used as collateral to access credit.

Accessible and acceptable land records that accurately reflect land interests are critical for enhancing tenure security. Absence of clear land records exacerbates uncertainties, because those seeking to purchase land are unable to determine who has existing interests and those seeking to transfer land may be inhibited by other land users with or without justifiable rights. To sustainably secure land rights, registration processes offering title-deeds are often not enough - land rights, conferred by a title, must be protected against competing claims. *Ex post* transaction costs and the poor's capacity to pay for such costs must be taken into account to effectively uphold their land rights.

Minimizing title-related disputes will offer a number of positive outcomes. Undisputed land titles will help to secure shelter and land use and encourage investment by providing security from seizure, transferability, extended collateral opportunities, and improved housing quality and agricultural productivity. It will also allow people to go to work and engage in productive enterprises, instead of staying home to protect their land and homes, or traveling to courts (MDG 1, Target 2). Titles, ensuring tenure security, can also promote sustainable use of the land (MDG 7). A reliable and updated land registry that is accessible, transparent, simple and affordable can also be used to track the identity of polluters and deter environmental pollution (MDG 7).

2.3 Disputes over demarcation

When land ownership is not secured by a title and survey records, disagreements over boundary and demarcation can occur and undermine the land rights of the parties concerned. The effectiveness and validity of formal title is also contingent on mutual and collective acceptance of land boundaries. Accurate land delimitation requires accurate survey as well as a depository of possession and ownership information at the land registry, which can be facilitated by community-level engagement. As asymmetries in power relations between disputing parties often determines the outcomes of boundary disputes, open discourse at the community-level can help to reduce the imbalances in bargaining power. The benefits of overcoming demarcation disputes are similar to those of disputes over land registration, because they lay the groundwork for tenure security, which is critical for goals of poverty reduction, employment generation, universal education and environmental sustainability (MDGs 1, 2, 7).

There is a strong need for supporting systematic demarcation and adjudication of land boundaries at the community level. This is likely to occur when the collective benefit for the community from systemic demarcation of all land boundaries and peaceful resolution of all competing claims outweighs the benefits that some community members, usually the powerful ones, may reap from maintaining the *status quo* of wrangles over land.

It is unlikely that an institutional approach, focusing on provision of formal titles and cadastre, will resolve all demarcation and titling disputes. While widespread formal titling of land remains costly and infeasible, customary certificates of ownership and other forms of semi-formal titles can reduce incidences of demarcation disputes and help enhance tenure security without imposing high costs on the poor. Given that the validity of a land title is contingent on mutual and collective acceptance of individual land boundaries, it is critical to ensure open and inclusive community-level discourse on boundary disputes. Such dialogues will, not only redress the asymmetries in power relations but also help to identify the costs and benefits of systematic demarcation and resolution of demarcation disputes. Effective land governance must also involve provision of cash and non-cash transfers and other forms of support to incentivize resolution of demarcation and titling disputes, especially when the perceived social benefit of peaceful demarcation is negative. There should also be strong support to enhance community level knowledge of land surveys and cartographic literacy to ensure that the poor can understand land records and appropriately defend their land rights.

2.4 Undervaluation of land

Whether land is transferred through a negotiated settlement or by forced eviction, displaced individuals and communities are entitled to compensation for loss of their land rights. Standards may vary from "full and fair compensation"⁴⁸ to "just and fair",⁴⁹ but the application of these standards can be subjective. The calculation of compensation undoubtedly incorporates the value of the land itself. However, given the varying ways land can be valued, disputes over valuation are prevalent. The most common approach is the willing-buyer, willing-seller model, where the market value is the amount the buyer would be willing to pay in an open market with multiple options. Other approaches used include the replacement cost model and tax valuations; in some countries, transaction data reported as part of the registration process serve as the basis for land value.⁵⁰ These

⁴⁸ United Nations, Basic Principles and Guidelines on Development-based Evictions and Displacement, A/HRC/4/18, para 21.

⁴⁹ ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989).

⁵⁰ FAO, *Compulsory Acquisition of Land and Compensation*, FAO Land Tenure Studies 10 (2008) 28-29.

valuation approaches tend to undervalue land from the seller's perspective, failing to take into account subjective interests in land. Often sellers of the land, or those who encounter forced takeover, are poor and severely cash-constrained. They often agree to give up their claim to the land at a minimum price, when they are offered hard cash.

Net present value (NPV) – the difference between today's value of the added returns and today's value of the added costs – is rarely used for land valuation purposes. However, it provides a more accurate assessment of the value of the land because it can capture the value of social capital. Social networks create a web of relationships and cooperative action that can produce significant economic and social welfare gains for a geographically defined community.⁵¹ Therefore, when the land of individuals or communities is transferred to another owner, be it voluntarily or involuntarily, the social capital is often lost. If this cost is not taken into account in the valuation of the land, the poor stand to lose out the most.

Accurate land valuation, although costly, will reduce the number of disputes over valuation and ensure fair compensation for the poor (MDG 1). More accurate valuation of land will also facilitate access to credit and contribute to generating more farm and non-farm income. With more income, people may start businesses (MDG 1), send their children to school (MDG 2), or simply have enough material security to avoid risky behavior that could lead to the transmission of HIV (MDG 6).

2.5 Commercial and investment pressures on land

Communities are increasingly facing threats of encroachment and non-consensual takeover of their land by outside entities, often aided by local and central authorities. These takeover deals are characterized by a severe lack of transparency, low levels of community consultation, and increasing governmental involvement in negotiations.⁵² The scale, terms, and speed of land acquisitions have provoked opposition in a number of countries.⁵³ Investors seeking to acquire large tracts of land are increasingly coming into direct conflict with local populations, because these deals often harm the interests and rights of poor and marginalized communities, and fail to bring the expected benefits. In this context, lack of tenure security has accelerated the displacement and vulnerability of poor land users, with many losing access to their homes and means of subsistence, which may also lead to their marginalization as land is often the foundation of their relationship to a community..

The enforcement of these investment agreements –ensuring that the land rights of the poor are protected– can increase food security, improve employment opportunities, decrease poverty and improve environmental sustainability (MDGs 1, 7). Effective community-level participation of all, including the poor, and open deliberations that can rank order the net benefit of various valuation approaches and investments can contribute to protecting the land rights of the poor. Effective land governance should seek to build the capacity of community-based organizations and non-governmental organizations that represent the interests of the poor so that they understand different valuation methods and can negotiate compensation and investment agreements. Broadening the informational base of the poor and strengthening their capability to negotiate better deals for themselves will remain keys to ensuring that large-scale investments in land actually make the poor better off.

⁵¹ D Halpern, *Social Capital* (2004) 1-9.

⁵² M Taylor and T Bending, *Increasing Commercial Pressure on Land: Building a Coordinated Response*, ILC Discussion Paper (2009) 9.

⁵³ J von Braun and R Meinzen-Dick, "Land Grabbing" by Foreign Investors in Developing Countries: Risks and Opportunities, IFPRI Policy Brief (2009) 1.

3. Legal empowerment for promoting land rights

Legal empowerment, predicated on the concepts of fundamental freedom, seeks to enhance the poor's ability to secure their identity, participation and voice and realize their individual and social choices. It also wants to ensure that individuals – rich and poor – are capable of making choices in a discursive process. Legal empowerment seeks to avoid a narrow institutional focus and is aimed at ensuring that individuals and communities have greater control over the processes that affect their lives and that institutions effectively respond to their needs and evolve as necessary. Without seeking to establish a perfect set of institutions, legal empowerment focuses on the interactions between individuals and institutions that optimally advance the rights of the poor.

Legal empowerment of the poor does not support a property rights orthodoxy that ignores the importance of equity and assumes zero transaction costs. It also does not assume perfect information and perfect bargaining power among various economic actors, which also assumes efficient economic outcomes for all when property rights are effectively enforced.⁵⁴ On the contrary, the legal empowerment approach recognizes that an efficient and equitable system of property rights cannot be realized without a functioning, responsive and accountable system of land governance, which can ensure effective participation of individuals and communities in various decision-making processes.

The ultimate objective of legal empowerment is enhancing human capability and the choices people have to realize their rights. By focusing on substantive freedom – identity, voice and participation, and freedom from fear and hunger - an empowerment approach can also ensure that people not only care about their own rights, but also those of others. It can help communities to recognize the inter-dependence of rights and that individuals must respect the rights of others if they are to protect and advance their own rights, going beyond the maxims of individual utility maximization.

Enhancing human capability is a must for protecting and promoting the land rights of the poor. Once the poor have identity, information and voice, they will be in a position to effectively engage in decision-making processes and choose the best possible alternatives available to them. In a deliberative process, the poor can express their preferences – between customary and formal tenure systems, between individual and community titles, and between various investment and compensation options – and rank different options, which reconcile their individual and social preferences. A social choice approach that represents the collective preferences of all people involved can yield a socially equitable outcome and ensure full realization of the land rights of the poor. This is not to suggest that decisions concerning land rights should always be driven by a majority rule or by consensus. In fact, a majority rule approach can impose outcomes that can make the poor worse off. A legal empowerment approach can ensure that concerns of the poor are taken into account in the decision-making process and that a reasoned alternative is made available to them. As Sen would argue, open-minded engagement in public reasoning is central to the pursuit of justice for the poor⁵⁵, which can ensure what he calls “reasoned progress”.

For the poor to effectively participate in a bargaining process, it is imperative that they have full information and understand the consequences of various alternatives. They must know who wins and who loses, and by how much, and the possible effects of various alternatives that are available to them. Without full information, it would be impossible for them to make

⁵⁴ The Coase Theorem on Property Rights is attributed to Ronald Coase from the University of Chicago Law School, USA, winner of the 1991 Nobel Memorial Prize in Economics.

⁵⁵ A K Sen, *Development as Freedom* (1999).

a rational social choice. In any negotiation, it is not likely that everyone will expect the same costs and benefits from a proposed alternative. Some may perceive positive benefits after all costs have been taken into account, while others may perceive net losses. Consequently, the final social choice will be favored by some and opposed by others but there will be a collective ownership of the decision if the process is inclusive and transparent. A legal empowerment approach will ensure that the poor are part of the process that determines the optimal social decision that affects their land rights.

3.1 Common pool resources and the tragedy of the commons: an empowerment approach in practice

Garrett Hardin first used the term “the tragedy of the commons” to explain a coordination failure in the use of common pool resources that led to over-harvesting and ecological collapse. In his 1968 article, he describes a situation where individual herders kept adding animals to an open-access pasture and received an immediate individual benefit. They collectively suffered delayed costs from over-exploitation as the pasture soon became unsuitable for grazing. Hardin concludes:

Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.⁵⁶

Ostrom’s theoretical work and extensive field research show that communities can develop effective arrangements to manage their common pool resources. Such an arrangement usually reflects a collective decision-making process and realization of social choices. She identifies the following factors for ensuring stable and equitable management of common pool resources:

- Common pool resources must have clearly defined boundaries and must effectively exclude external un-entitled users.
- Rules governing the use of common resources must be adapted to local conditions and must be generally acceptable to the resource users.
- Social choice rules must ensure that resource users are able to effectively participate in decision-making processes.
- Effective monitoring of the use of resources must be in place and the monitoring system must be part of, or accountable to, resource users.
- Mechanisms for conflict resolution must be easy and affordable.

Ostrom shows that communities will adopt new rules and procedures, and make optimal social choices for managing their resources if net benefits from adopting them are positive for at least some users. Each resource user – whether he or she benefits from a new system or not – would need to estimate three types of costs:

- The up-front costs of time and effort to devise and agree on new rules;
- The short-term costs of adopting new resource appropriation strategies;
- The long-term costs of monitoring and maintaining a self-governed system.

⁵⁶ G Hardin, *The Tragedy of the Commons* (1968).

If the sum of these expected costs for all users exceeds the benefits to be derived from a new arrangement, no user will invest the time and resources to create a new system of governance. For any social choice rule to work, such as unanimity or majority-rule, there must be a minimum coalition of users who would agree to adopt new rules. If a minimum winning coalition does not find net benefits greater than the sum of the costs, no new operational rules will be adopted.⁵⁷

Ostrom's work is extremely relevant to promote the land rights of the poor, not only in the context of using common pool resources, but also to ensure that they can fully enjoy their land rights and resolve disputes related to inheritance, demarcation, records, valuation and/or investment. The tragedy of the commons becomes inevitable where resource users are alienated from one another or cannot communicate with each other effectively. A different kind of tragedy of the commons can occur when poor people are unable to share information on the consequences of their actions and inactions, and are unable to participate in an inclusive decision-making process that addresses the issues of inheritance rights, disputes related to demarcation and land records, undervaluation of land, as well as challenges related to compensation and investments in land. Identity, voice and participation – leading to rational social choices – can be a key to avoiding the tragedy of the commons, where the poor are embroiled in costly land-related disputes and are unable to fully realize their land rights.

3.2 Land governance for securing the land rights of the poor

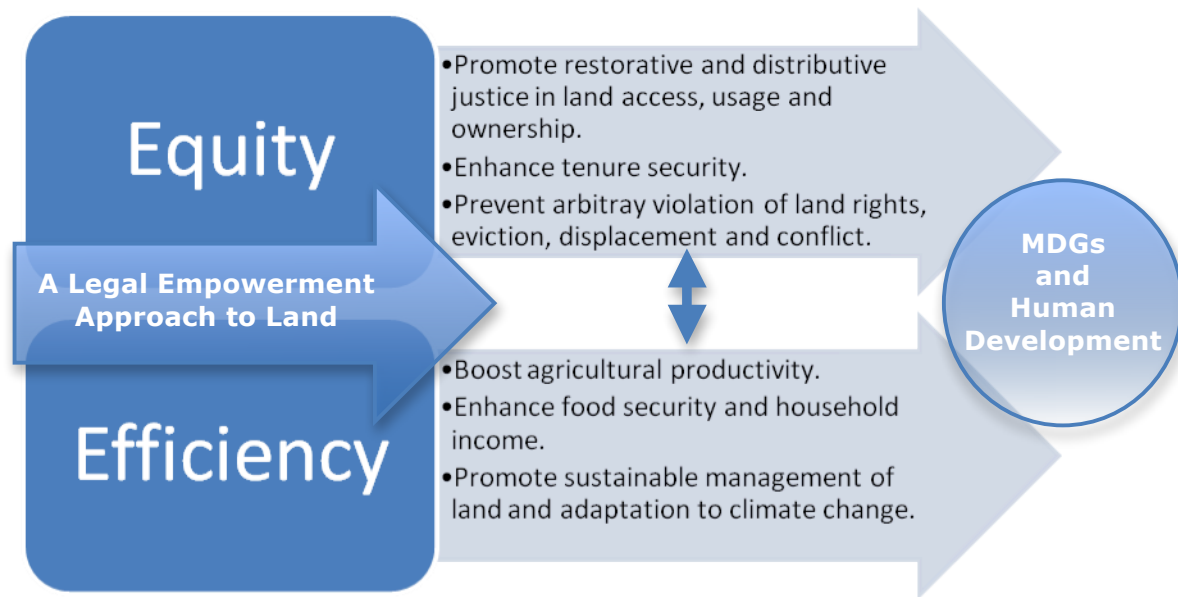
With limited or insecure land rights, the poor cannot reap the many rewards of holding interests in land, which contributes to perpetuate their vulnerability, hunger and poverty. Land governance must be bottom-up and demand-driven if it is to protect and promote the land rights of the poor, which can play a critical role in reducing poverty and hunger. Legal empowerment can ensure a systematic and participatory approach to land governance, taking into account constraints, both on the demand and the supply side, and understanding the motivations of various actors and the incentives they respond to. More specifically, a legal empowerment approach in land governance can ensure:

- The poor have an identity and a voice, and are organized to demand and realize their land rights;
- Legal and administrative institutions – court system, local government bodies, etc. – have both the capacity and the incentives to uphold the land rights of the poor and that they engage at the community level to ensure open and inclusive processes of deliberations;
- Land policies are products of an inclusive deliberative processes and geared towards the realization of the land rights of the poor.

There are irrefutable equity and efficiency arguments for improved and effective land governance. A responsive land governance system can promote land access, ensure restorative and redistributive justice for the full realization of land rights and enhance tenure security, prevent arbitrary land takeover, eviction, displacement and conflict, and support sustainable land management. Ensuring access to land and enhancing tenure security must be the critical elements of a well-functioning land governance system.⁵⁸

⁵⁷ H Nagendra and E Ostrom, 'Governing the Commons in the New Millennium: a Diversity of Institutions for Natural Resource Management' in C J Cleveland (ed.), *Encyclopedia of Earth* (2007).

⁵⁸ *Land Governance and Security of Tenure in Developing Countries*, French Development Cooperation White Paper (2008).



In addition to equity objectives, effective land governance can increase agricultural productivity, enhance food security, improve household income, and promote environmental sustainability and climate change adaptation. Clear, recognizable, and enforceable interests in land within a functioning land governance system are critical for efficient and sustainable use of land.

In the absence of an accountable and responsive land governance system, people may be rendered landless without justifiable cause and without adequate compensation, and left impoverished with no means to improve their conditions. Forced evictions documented by COHRE are generally characterized by violence, lack of legal and judicial remedies and of compensation, and loss of livelihoods for the poorest and most marginalized.⁵⁹ Unless there is a land governance system that recognizes and protects land rights, and a state that is accountable to the people, arbitrary takeovers, evictions and displacement can make those who are already vulnerable homeless.⁶⁰

Poverty is in part due to a lack of usable capital, and land is arguably the most valuable asset of the poor. Without effective tenure security, their ability to use this asset to leverage access to other resources is often curtailed.⁶¹ An accountable land governance system will also enable individuals to access credit and facilitate more substantial investments in land. Recognized and enforceable land rights will enable the poor to increase their incomes, becoming more self-reliant and better able to capitalize on new opportunities.

An equitable land governance system must create platforms for community-level and inclusive discourse to ensure effective participation and to strengthen the voice of the poor. It must also ensure that existing and new land policies take into account the equity, environmental, economic and conflict prevention dimensions as well as trade-offs and opportunity costs of various policy options. The land governance system must also ensure cost-effective arbitration, adjudication and dispute resolution mechanisms that will deliver equitable and income-sensitive remedies to the poor. For all these, community-based

⁵⁹ COHRE, *Causes of Forced Evictions*, <http://www.cohre.org/view_page.php?page_id=100> at January 12 2010.

⁶⁰ CESCR, General Comment No. 7 (1997) paras. 16-17 (prohibiting evictions that render people homeless).

⁶¹ ILC, *Turning Assets in LDCs into Useable Capital to Enhance Resources to Achieve the MDGs*, Issue Paper for ECOSOC (2004).

organizations and non-governmental organizations defending the land rights of the poor must become an integral part of the land governance system. Development support – from both within and outside – must strengthen the capacities of these organizations so that they can effectively represent and defend the land rights of the poor.

Realization of land rights must be fundamentally premised on the notion of justice, seeking to reduce, if not eliminate, unjust and unsustainable practices that hurt the poor. An equitable land governance system must seek to protect and promote the land rights of the poor by focusing on their perspectives and the incidences of chronic injustice that they encounter. Realization of their land rights cannot be contingent on the existence of perfect institutions and fully compliant behavior by all, which seldom exist in the real world. In the world of second-best, protection and promotion of land rights of the poor must rely on community-level discourse and participation that will ensure inclusion, transparency and optimal social choices.

Given the critical role that land can play in combating hunger, averting conflict and preventing climate change, an effective land management system must empower the poor and ensure their participation, voice and choices. Land rights contribute to the realization of fundamental human rights and promote identity, social inclusion, and human dignity and capabilities. A land governance system that promotes a human rights-based approach to development and recognizes obligations to respect, protect, and fulfill land rights will create an enabling environment for accelerated achievement of the MDGs.