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Land, Property and Sovereignty in International Law

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Land, Property and Sovereignty in International Law

Lorenzo Cotula*

Abstract: This paper discusses the important but often neglected connections between international law and land claims. Tracing evolutions since the very origins of international law, the paper explores the articulation between sovereignty and property as the two key legal categories that have traditionally framed control over land. These two categories have historically intersected and cross-fertilised, and underpin important tensions in contemporary international law. While for centuries international law primarily considered land rights in the context of changes in, and disputes over, territorial control, the legal boundaries of sovereignty in land matters are now mainly shaped by international norms that discipline the internal exercise of sovereign powers over property rights. In extending its reach to land issues previously left to domestic jurisdiction, international law has reframed the relationship between private rights and public authority. The analysis highlights the changing nature and role of land issues in the development of international law. It also provides insights for debates on the emancipatory potential, or imperialistic underpinnings, of international law, and on the interplay between different branches of international law.

Keywords: Land, territory, human rights, investment, environment, soft law, history.

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1. The Place of Land in International Law

Land is life for billions of people worldwide, central to livelihoods, culture and social identity. It provides the basis for economic activities that sustain employment and food security, including small, medium and large-scale farming, but also herding, foraging and eco-tourism, for example. Land hosts many of the world’s ecosystems. In many societies, it has important social, cultural and spiritual values, and landholding is intimately connected to traditional ways of life, systems of belief and the collective sense of justice. Land has a special place in international law. Because territory is a constitutive element of statehood,¹ land effectively provides the basis of political organisation – there is currently no state without land, and land often constitutes the most important measure of the space where state sovereignty is exercised. The International Court of Justice (ICJ) has developed extensive jurisprudence on claims relating to landed territory and overland borders,² and so have

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international arbitral tribunals. In addition, sovereign states have concluded agreements to lease land for commercial projects, for example for transport and agriculture. More generally, contestation over land has been an important issue in some of the world’s most difficult international disputes – including in relation to the confiscation or destruction of agricultural land in occupied territories; and to handling property claims in post-conflict situations, reflected in legal developments on property restitution in peace treaties and international jurisprudence. Yet, few international treaties of general application explicitly address land issues. Rights to land feature in some human rights treaties. They feature particularly prominently in international instruments concerning indigenous peoples, though these instruments have had few ratifications to date. Some environmental law treaties refer to land management, though these treaties have had a relatively low profile in international environmental diplomacy. By and large, the political and often emotive significance of land has led states to maintain land governance within the exclusive preserve of domestic jurisdiction. Unlike other natural resources that form the object of substantial bodies of international law, particularly resources with significant transboundary dimensions (e.g. water, fisheries), land continues to be primarily regulated by national law. Partly in connection with these trends, land has tended not to feature prominently in international legal scholarship, with important exceptions for instance concerning indigenous peoples. The relatively low profile of land in international law debates contrasts with the prominence of land issues in legal scholarship throughout the historical development of international law – particularly at the time of

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6 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) 9 July 2004, paras. 132-134.
8 See e.g. the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW; New York, 18 December 1979), Article 14(2)(g).
10 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD; Paris, 17 June 1994), for instance Articles 2(2) and 4(2)(d) and Annex I: Regional Implementation Annex for Africa, Article 8(3)(b)(i) and (c)(iii).
colonisation, when providing a legal justification for the acquisition of sovereignty and property over colonised lands was an important concern for international jurists.\footnote{M. Craven, “Colonialism and Domination”, in B. Fassbender, A. Peters, S. Peter and D. Högger (eds), \textit{The Oxford Handbook of the History of International Law} (Oxford University Press, 2012), pp. 862-889.}


While these social, economic and political evolutions have not yet resulted in substantial shifts in the nature, content and penetration of international law in land governance arrangements, or in substantial development of land-related international law scholarship, soft-law instruments are making inroads into areas where international policy would previously not venture.\footnote{See for example \textit{Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe}, Award, 22 April 2009, ICSID Case No. ARB/05/6.} In addition, growing recourse by private actors to international redress has highlighted the direct relevance of international law to land disputes. This includes numerous cases brought under international human rights treaties,\footnote{See e.g. in the Americas, \textit{Mayagna (Sumo) Awas Tingni Community v. Nicaragua}, 31 August 2001, Inter-American Court of Human Rights (IACHR); \textit{Yakye Axa Indigenous Community v. Paraguay}, 17 June 2005, IACHR, \textit{Sawhoyamaxa Indigenous Community v. Paraguay}, 29 March 2006, IACHR; \textit{Saramaka People v. Suriname}, 28 November 2007, IACHR.} and several investor-state arbitrations brought under international investment treaties.\footnote{See for example \textit{Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe}, Award, 22 April 2009, ICSID Case No. ARB/05/6.} Today, land is an
increasingly important issue in international law – one the importance of which is likely to
grow as competition for the world’s valuable lands tends to increase in the coming years.

This paper discusses the important but often neglected connections between international
law and land claims. Tracing evolutions since the very origins of international law, the paper
explores the articulation between sovereignty (imperium) and property (dominium) as the two
key legal categories that have traditionally framed control over land.21 These two categories
have historically intersected and cross-fertilised, and underpin important tensions in
contemporary international law. The paper argues that, while for centuries international law
primarily considered land rights in the context of changes in, and disputes over, territorial
control, the legal boundaries of sovereignty in land matters are now mainly shaped by
international norms that discipline the internal exercise of sovereign powers over property
rights. In extending its reach to land issues previously left to domestic jurisdiction,
international law has reframed the relationship between private rights and public authority.
The analysis highlights the changing nature and role of land issues in the development of
international law. It also provides insights for debates on the emancipatory potential, or
imperialistic underpinnings, of international law, and on the interplay between different
branches of international law.

The paper is structured as follows. In a nod to the “historiographical turn” of recent
international legal scholarship,22 Section 2 discusses the place of land in the historical
development of international law, examining how the formation of the law governing the
acquisition of land and territory involved shifting emphases and complex relations between
property and sovereignty. The subsequent sections explore the place of land in selected
bodies of international law. Due to limited space, this part is not intended to be
comprehensive, and it is recognised that some relevant issues are not covered. Priority is
given to those areas of international law that have proved particularly dynamic in recent
years, and that promise to have the most far-reaching implications for the articulation
between property and sovereignty. In particular, Sections 3 to 5 discuss international human
rights law, international investment law and international environmental law. Section 6
outlines recent developments in soft law, focusing on the Voluntary Guidelines on the
Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National
Food Security, and locating soft-law instruments within wider debates about trends towards
more “informal” international law making. The conclusion (Section 7) distils a few more
general insights for broader debates about international law.

2. Land and Territory in Historical Perspective

In this age of finance and industry, it is easy to forget just how important land was in the
historical development of international law – a reflection of the central role of land in
sustaining livelihoods throughout human history. Since the dawn of history, many wars have
been fought over land, leading to numerous peace treaties that dealt with land and territorial
claims. In fact, the oldest known historical document concerns the settlement of a conflict

21 M.R. Cohen, “Property and Sovereignty” (1927) 13 Cornell Law Quarterly 8; L.B. Ederington, “Property as a
Natural Institution: The Separation of Property from Sovereignty in International Law” (1997) 13 American
University International Law Review 263, at 267. See also Malaysia v. Singapore (Sovereignty over Pedra
Branca / Pulau Batu Puteh, Middle Rocks and South Ledge), I.C.J. 23 May 2008, paras. 138-139 and 222.
22 See e.g. M. Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–
1960 (Cambridge University Press, 2001); B. Fassbender, A. Peters, S. Peter and D. Högger (eds), The Oxford
Handbook of the History of International Law (Oxford University Press, 2012); and S. Neff, Justice among
over disputed agricultural land between the Sumerian city-states of Lagash and Umma. This war, and the ensuing solemn commitment by the ruler of Umma not to encroach on the contested land, is recorded in the “Stele of the Vultures” – a masterpiece of cuneiform inscriptions and tantalising reliefs dating back to around 2450 BC. Two thousand years later, the ancient Greeks applied recognisable rules to resolve territorial disputes between city states – a finding that led some forward-looking scholars to talk of the “beginnings” of international law. These early developments already highlighted the intersections between claims of property and of public authority, as the rules used in ancient Greece to tackle territorial disputes drew on modes of acquisition largely based on property law.

In keeping with a brutal world where land, war and plunder often went hand in hand, the Romans made extensive use of the “right of conquest”, subjecting defeated enemies to land confiscation, and developing legal arrangements to regulate the distribution of conquered lands (ager publicus) to Roman citizens. In other words, the acquisition of territory unleashed dramatic reconfigurations of property relations too. Legal disputes played a role in these processes, and the Romans proved skilful manipulators of international arbitration. In the infamous, and most likely fictitious, proceeding concerning land disputed between Ardea and Aricia, the Roman people called upon to arbitrate the case decided that the contested land really belonged to Corioli, and that since Rome had now conquered Corioli, the land belonged to Rome.

In more recent times, the formative years of modern international law accompanied successive waves of European colonisation of the Americas, Oceania, Asia and Africa. The need for the European colonisers to relate to the populations of the newly colonised territories was an important driver of the development of modern international law. This need involved not only providing legal legitimacy to the brutal acquisition of territorial sovereignty. It also involved managing the encounter between different land tenure concepts and systems – those of the colonisers, shaped by the imperatives of an increasingly capitalist economy, and those of the colonised, which often emphasised the spiritual and collective dimensions of landholding.

Echoing semi-feudal conceptions of landed property, some early international jurists conflated sovereignty (imperium) and property (dominium), framing colonisation in terms of the acquisition of land ownership more than of territorial annexation. The distinction between sovereignty and property became clearer in the 18th century, with the demise of feudalism and the rise of new forms of Foucaultian governmentality that brought authorities to be concerned with population as a productive resource, reshaping public action concerning

25 Ibid.
28 Titus Livius, *Ab Urbe Condita*, 3.71-72. For another reference to inappropriate behaviour by a Roman arbitrator in a dispute between Nola and Naples, see Cicero, *De Officis*, 1.10.33.
29 Craven, “Colonialism and Domination”, supra, p. 869.
economic activities and productive assets. In this changed context, European nation-states articulated ever more explicit claims to territorial sovereignty over the lands they colonised. However, the coexistence of *imperium* and *dominium* remained central to the colonial project. For example, the Royal Proclamation of 1763, issued by King George III to claim the North American territories ceded by France to Britain through peace treaties at the end of the Seven Years War, established and empowered government structures to exercise sovereign powers in the newly acquired territories. But it also regulated the acquisition of land ownership from the natives, prohibiting private transactions and granting the Crown the exclusive right to acquire land and distribute it to the settlers.

At that time, an important concern of international jurists involved developing the legal cloak to legitimise the colonial appropriation of land and territory. Among the legal arguments debated by Spanish jurists in the 1500s were papal grants, just war and the *dilatatio* principle whereby conquest was necessary to promote the religious conversion of the natives. When the English and the Dutch launched their own colonial endeavours in the 1600s and 1700s, they primarily relied on cession (the derivative acquisition of title through treaty) and occupation (the original acquisition of *terra nullius*, i.e. land belonging to nobody). The doctrine of *terra nullius*, loosely based on (reinterpreted) Roman law, was endorsed by some of the leading jurists of the time – including Emmerich de Vattel, who considered uncultivated land to be open to appropriation.

There is controversy about the extent to which the *terra nullius* doctrine was used to justify territorial acquisition in the 19th-century colonisation of Africa. In its Advisory Opinion in the *Western Sahara* case, the ICJ found that, by the late 19th century, “[…] territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius. […].” In the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through ‘occupation’ of *terra nullius* by original title but through agreements concluded with local rulers. However, research suggests that in fact the colonial powers made extensive use of the *terra nullius* doctrine. In a sense, *terra nullius* constituted the implicit premise of the 1885 General Act of the Berlin Conference – a key milestone in the European colonisation of Africa.

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35 Classical Roman law used the concept of *res nullius* in relation to movable objects only, and did not allow acquisition of land through occupation. The extension of the doctrine to land took place in the low Middle Ages. See Neff, *Justice among Nations*, supra, p. 128; and R. Lesaffer “Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription” (2005) 16(1) *European Journal of International Law* 25, p. 45.
37 *Western Sahara (Advisory Opinion)*, I.C.J. 16 October 1975, para. 80. In this sense, see also Craven, “Colonialism and Domination”, supra, p. 883.
39 General Act of the Berlin Conference on West Africa (Berlin, 26 February 1885).
rules whereby colonial powers could acquire and maintain sovereignty over the coastal territories of Africa, Article 34 of the General Act required those powers to notify the other state parties of new acquisitions “in order to enable them, if need be, to make good any claims of their own”. According to some readings, the implied assumption of this provision was that territories in Africa were (if not necessarily unoccupied at least) non-sovereign domains where the Europeans could establish territorial sovereignty through original rather than derivative title. However, the many protectorate agreements that the British concluded for example in Uganda, Gambia, Sierra Leone and Somaliland illustrate the diversity of the legal arrangements underpinning colonisation, and question sweeping generalisations casting terra nullius as the primary foundation of colonial claims to territory.

The coexistence of imperium and dominium, and the property dimensions of colonialism, remained a central feature of the 19th-century European colonisations. In addition to sustaining claims to territorial sovereignty on the international plane, the notion of terra nullius was instrumental for colonial authorities to establish arrangements in municipal law that enabled them to claim ownership of land in many colonies. Firstly, the colonial powers re-interpreted pre-existing tenure systems, which often involved complex social, cultural and spiritual dimensions, through the prism of European property concepts. In that process, rights based on these systems were deemed to establish usufruct rather than ownership rights, meaning that the land was deemed to have been effectively without owners in the period prior to colonisation. Secondly, colonial authorities enacted legislation that vested ownership of this “vacant” land with the colonial state. In other cases, comparable outcomes were achieved through asymmetrical agreements with the natives.

However, the 19th century also saw the emergence of a new concern about protecting pre-existing property rights when territorial sovereignty changed hands. This is reflected in the court jurisprudence of the time. In a landmark case, for example, the United States Supreme Court held that a change in sovereignty does not affect property claims. Also, some treaties dealing with state succession or territorial acquisitions committed the states parties to respect

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40 This issue formed the object of much debate at the time, particularly as legal opinion differed on the legal value of agreements concluded with local chiefs, and whether these could provide the basis for the acquisition of derivative title. See M. Craven, “The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law”, in M. Vec and L. Nuzzo (eds), Constructing International Law: The Birth of a Discipline (Klosterman, 2012), pp. 363-403, p. 391. Commentators have noted the ambivalent character of the Berlin General Act: if on the one hand it regulated colonial claims to territory, it restricted these rules to coastal areas, and aimed to safeguard freedom of commerce and navigation in important river basins (the Congo and the Niger) against the particularistic claims of individual European powers. See Craven, “Colonialism and Domination”, supra, pp. 880-881.
41 Craven, “Colonialism and Domination”, supra, p. 885.
42 See e.g. the Privy Council decision *Amodu Tijani v. The Secretary, Southern Nigeria* (1921) 2 A.C. 399, pp. 403, 409-410.
44 See e.g. the Agreement between His Majesty’s Commissioner for the East Africa Protectorate and the Chiefs of the Masai Tribe (10 August 1904, *Http://Www.Masaikenya.Org/MAASAI_COLONIAL_AGREEMENT_1904.Pdf*), whereby Maasai “representatives” agreed that the Maasai would settle into reservations and vacate the prime land of the Rift Valley for European settlement.
45 *United States v. Percheman*, 32 US 51 (1832), 87. The case concerns a claim to 2,000 acres of land granted to an individual by the Spanish governor of Florida, which United States authorities initially rejected following their acquisition of the territory from Spain.
existing land rights. At the 1885 Berlin Conference, states emphasised the obligation for new colonial powers “to insure the establishment of authority […] sufficient to protect existing rights” acquired by nationals from other Western countries. While the concept of \textit{terra nullius} exposed the natives to dispossession, a concern about protecting private property held by people of European descent laid the foundations for a clearer separation between property and sovereignty in international law, so that changes in territorial sovereignty do not in themselves affect land ownership and the new sovereign has a legal obligation to uphold pre-existing property rights. The Hague Regulations of 1907, which are widely considered to reflect customary international law, require occupying powers to respect private property, thereby extending the imperative to respect existing land rights to situations not involving changes in territorial sovereignty. An even more far-reaching blow to the old “right of conquest” came in the mid-20th century, when conquest stopped being considered a lawful means to acquire territory.

These legal evolutions point to the important place of land in the development of modern international law and to the historical emergence of the articulation between property and sovereignty in framing control over land. The consequences of these evolutions are still being felt to this day. When the former colonies obtained independence, the application of the principle of respect of borders existing on achievement of independence, coupled in many cases with the continued application of colonial-era land legislation, meant that the colonial legacy had a powerful influence on the legal configuration of the newly independent states. At a deeper level, the complex relationship between sovereignty and property remains a key feature of contemporary international law. On the one hand, these two concepts are conceptually distinct; the acquisition of territory is mainly governed by international law, while property is primarily allocated under national law; and it is well established that territorial acquisitions do not in themselves affect land ownership. On the other hand, there remain close inter-connections between sovereignty and property. For example, some of the modes of acquisition of territory, including cession and effective occupation of \textit{terra nullius},

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47 General Act, supra, Article 35. See also Ederington, “Property as a Natural Institution”, supra, p. 297.

48 \textit{Settlers of German Origin in Poland (Advisory Opinion)}, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10), p. 36. See also Ederington, “Property as a Natural Institution”, supra, pp. 267 and 310.

49 Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907), Article 46. See \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, supra, paras. 89 and 132.


51 See Resolution A/HG/Res. 17(I) adopted by the First Ordinary Session of Assembly of Heads of State and Government of the Organization of African Unity, (Cairo, 17-21 July 1964); and Article 4(b) of the Constitutive Act of the African Union (Lomé, 11 July 2000). See also \textit{Burkina Faso v. Republic of Mali (Frontier Dispute)}, supra, para. 22; and \textit{Benin v. Niger (Frontier Dispute)}, supra, para. 23.


53 As Brennan J. put it in the Australian case \textit{Mabo v. Queensland (No 2)}, [1992] HCA 23, para. 45: “The acquisition of territory is chiefly the province of international law; the acquisition of property is chiefly the province of the common law. The distinction between the Crown's title to territory and the Crown's ownership of land within a territory is made as well by the common law as by international law".
are loosely based on property law. Sovereignty disputes can be intertwined with disputes over rights to land and resources. Property taxation and the administration of property sale contracts can constitute evidence of effective occupation for the purposes of sovereignty claims. And the establishment and life cycle of land leases between sovereign states can affect evolutions in territorial sovereignty.

For centuries, concerns about providing legal legitimacy to the acquisition of land and territory were prominent in international law, leaving many other important land issues to domestic jurisdiction. In more recent times, further evolutions have expanded the reach of international law to a wider range of land issues, reconfiguring relations between states, citizens and business, and creating new dimensions in the articulation between sovereignty and property.

3. International Human Rights Law

To discuss the relevancy of international human rights law to land relations is to document the many cases of human rights violations connected to land, but also the ways in which people treated unjustly have resorted to human rights arguments and instruments to advance their land struggles. While international human rights law has emerged since World War II, its jurisprudential underpinnings date back further in time. In Europe and North America, these underpinnings draw on constitutional developments since the 18th century, when the ideas of the Enlightenment and political change epitomised by the French Revolution led to a reconfiguration of the relations between citizen and state, and of the very construction of state sovereignty. Control over land featured prominently in those evolutions, including in connection with the affirmation and contestation of the human right to property as a bulwark against the arbitrary exercise of sovereign powers. While the law governing the acquisition of territory concerns the external boundaries of sovereignty, human rights law reshapes the internal foundations of the social contract between citizens and state.

The past few decades have witnessed growing activation of international human rights law in connection with land claims. These developments are reflected in the work of the United Nations Office of the High Commissioner for Human Rights, in sessions of the United Nations (UN) bodies that receive and comment on periodic reports submitted by states

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57 A well-known example of a land lease concluded between states is the Convention between the United Kingdom and China Respecting an Extension of Hong Kong Territory (Peking, 9 June 1898). Negotiations between the United Kingdom and China in the run-up to the expiry of this land lease resulted in the transfer to China not only of parts of Hong Kong under lease, but also of areas over which the United Kingdom had acquired sovereignty. See the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Beijing, 19 December 1984).
59 See e.g. Article 17 of the French Declaration of Rights of Man and the Citizen of 1789, which defines the right to property as “inviolable et sacré”, and the nearly contemporaneous Fifth Amendment to the Constitution of the United States.
on the implementation of human rights treaties;\(^{61}\) in the work of UN Special Rapporteurs;\(^{62}\) and in litigation before international human rights courts.\(^{63}\) This growing body of international jurisprudence has clarified the close if complex relationship that exists between land rights and human rights. To start with, these two concepts need to be clearly distinguished. Land rights include rights to hold, access, use, manage or transact a particular piece of land. They are granted to identified legal or natural persons, or to identified groups, on the basis of national law or in some cases local (“customary” but continuously evolving and reinterpreted) tenure systems. Human rights, on the other hand, protect the universal rights and freedoms deriving from the inherent dignity of the human person,\(^{64}\) and are recognised by international law and national constitutions to all human beings, or particular groups such as indigenous peoples.\(^{65}\)

Activists have called for the recognition of a human right to land as a mechanism to respect, protect and fulfil existing or even prospective land rights, for example within the context of agrarian reform. The “right to land and territory” features prominently in the “Declaration of Rights of Peasants – Men and Women” adopted by international peasant movement La Via Campesina.\(^{66}\) Such a human right would create particularly direct linkages between land rights and human rights. Partly as a result of La Via Campesina’s advocacy, the United Nations Human Rights Council established an open-ended inter-governmental working group to negotiate a UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.\(^{67}\) This experience is a reminder that the catalogue of internationally recognised human rights is the product of historically determined negotiation processes, and that there may be scope for future evolutions that depart from the traditional Western human rights canon.\(^{68}\) It is also a reminder of the role that social movements can play in the development of international law.\(^{69}\)

In terms of positive law, however, existing international human rights law does not recognise a human right to land as such: no treaty affirms such a right in general terms, and


\(^{63}\) See the cases cited further below.

\(^{64}\) See the preamble of the Universal Declaration of Human Rights (UDHR; Paris, 10 December 1948), the International Covenant on Civil and Political Rights (ICCPR; New York, 16 December 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR – New York, 16 December 1966).


there is little jurisprudence to suggest that a shift may be underway.\textsuperscript{70} At the same time, it is widely recognised that land rights are closely linked to the realisation of several human rights, including the rights to property, to food and to housing, and the rights of indigenous peoples.\textsuperscript{71} These human rights have diverse political and intellectual origins, and are based on diverse legal sources, so that international human rights law can host tensions and trade-offs between different human rights – for example, where struggles for land reform mobilise the right to food and enter into tension with the right to property of landowners.\textsuperscript{72}

The human right to property has historically provided a particularly important site for linking land rights to human rights. While affirmed in the Universal Declaration on Human Rights,\textsuperscript{73} the right to property is absent from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As a result, it is primarily protected by regional human rights systems where these exist, particularly in Europe, Africa and the Americas.\textsuperscript{74} There are important differences in treaty formulation and jurisprudence, reflecting the diverse realities of property, and of land relations, in different social, economic and political contexts. The European Court of Human Rights has developed extensive jurisprudence on the right to property, including cases concerning land owned by individuals,\textsuperscript{75} companies,\textsuperscript{76} or religious bodies.\textsuperscript{77} In this jurisprudence, the Court has emphasised the notion of a “fair balance” that must be struck between individual and collective interests, and recognised that national authorities enjoy a “margin of appreciation” in implementing their international commitments. In the Americas, the Inter-American Court of Human Rights has developed considerable jurisprudence on the collective right to property of indigenous and tribal peoples, placing particular emphasis on the spiritual and cultural dimensions of land.\textsuperscript{78} In Africa, use of the African Charter on Human and Peoples’ Rights in relation to land issues has been more limited but is growing, again with an emphasis on collective landholdings.\textsuperscript{79}

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\textsuperscript{71} See the provisions cited below.
\textsuperscript{72} For a fuller discussion, see L. Cotula, “Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law”, 11(2) International Journal of Law in Context 113-134, pp. 120-122.
\textsuperscript{73} UDHR, supra, Article 17.
\textsuperscript{75} E.g. Scordino v. Italy (No. 1) (Grand Chamber), 29 March 2006; Ucci v. Italy, 22 June 2006. While Protocol 1 protects “peaceful enjoyment of possessions”, the European Court of Human Rights has interpreted this expression as equivalent “in substance” to the right to property: Mareck v. Belgium, 13 June 1979, para. 63.
\textsuperscript{76} E.g. Pine Valley Developments Ltd and Others v. Ireland, 29 November 1991.
\textsuperscript{77} Holy Monasteries v. Greece, 9 December 1994.
\textsuperscript{78} See e.g. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra; Yakye Axa Indigenous Community v. Paraguay, supra; Sawhoyamaxa Indigenous Community v. Paraguay, supra; Saramaka People v. Suriname, supra.
\textsuperscript{79} Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya, 25 November 2009, Communication 276/03, African Commission on Human and Peoples’ Rights. See also the pending African Court on Human and Peoples’ Rights case African Commission on Human and Peoples’ Rights v. The Republic of Kenya, Application 006/2012, concerning the land claims of the Ogiek. Violations of the right to property linked to a land conflict were alleged in the ACHPR case Bakweri Land
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So while the right to property has historically emerged in connection with a liberal political tradition that emphasised individual land ownership, recent international jurisprudence has broadened the relevance of that human right to a wider set of tenure models. Indeed, beyond the specificities of each regional human rights system, international jurisprudence has made it clear that the right to property protects both individual and collective landholdings, and applies irrespective of whether the land rights in question are formally titled and legally recognised as property under national law. It is equally clear that the right to property protects not just land ownership but also a wider range of use rights. And while the specific contours of the legal protection of the right to property (compensation requirements and standards, for example) vary depending on applicable regional treaties, expropriations must usually be non-discriminatory, for a public purpose and accompanied by payment of compensation. Therefore, arbitrary, uncompensated or discriminatory takings of land rights could violate the right to property. In this respect, the international protection of the right to property establishes parameters of quality for the internal exercise of state sovereignty in land matters.

In fact, this reconfiguration of sovereignty is at the heart of international human rights law as a whole, as the obligation to comply with human rights treaties in itself redesigns space for lawful public action. Further, international human rights law as it applies to land rights does not frame this reconfiguration of sovereignty solely or even mainly in proprietary terms. Several human rights relevant to enjoyment of land rights emphasise the protection of livelihoods and culture, and space for participation in public decision making. Firstly, international jurisprudence has taken the normative content of the right to property beyond the classical proprietary contours of the liberal tradition. For example, jurisprudence on the rights of indigenous and tribal peoples to their ancestral lands within the context of natural resource investments has connected the protection of the right to property to environmental and social impact assessment requirements; to benefit-sharing arrangements that allow participation by indigenous people and rural communities in the benefits generated by the investments; and, in the case of indigenous peoples, to free, prior and informed consent.

Secondly, other human rights beyond the right to property are relevant to the protection of land rights. When applied to land relations, these human rights emphasise non-proprietary dimensions. For example, the right to an adequate standard of living, including food and housing, primarily frames its close connection to land rights in terms of livelihoods. Indeed, where people depend on land and natural resources for their food security, secure land rights

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Claims Committee v. Cameroon, African Commission on Human and Peoples’ Rights, 4 December 2004, Communication 260/02, but the complaint was declared inadmissible due to non-exhaustion of domestic remedies ( paras. 5 and 55).

Holy Monasteries v. Greece, supra, paras. 6, 58, 60, 61, 66; Dogan and Others v. Turkey, ECtHR, 29 June 2004, para. 139; Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra, paras. 146, 148, 149, 153; Sawhoyamaxa Indigenous Community v. Paraguay, supra, paras. 117-121; Saramaka People v. Suriname, supra, para. 91; Mwiwana Community v. Suriname, IACHR, 15 June 2005, paras. 130-134; and Centre on Housing Rights and Evictions (COHRE) v. The Sudan, 29 July 2010, Communication No. 296/2005, African Commission on Human and Peoples’ Rights, para. 205.

See e.g. Chiragov, supra, paras. 146-149, and Sargsyan, supra, paras. 202-203.

Unlike Article 21 of the ACHR, Article 14 of the ACHPR does not require payment of compensation for expropriations of property – it merely requires compliance with applicable law. Article 1 of Protocol 1 of the ECHR is also silent on compensation, but the ECtHR held that compensation is implicitly required and must be “reasonably related” to market value. See James and Others v. United Kingdom, 21 February 1986, 8 EHRR 123, para. 54; Lithgow and Others v. United Kingdom, 8 July 1986, 8 EHRR 329, para. 121.

Saramaka v. Suriname, supra, para. 134.

Among other sources, the right to an adequate standard of living is recognised by Article 25 of the UDHR, supra, and Article 11 of the ICESCR, supra.
are essential to the progressive realisation of the right to food. Therefore, land dispossessions would violate the right to food if people are deprived of the land on which they depend for their livelihoods without a suitable alternative. Depending on context, realising the right to food could also involve redistributive reforms – a connection explicitly made in Article 11(2) of the ICESCR.

The right to adequate housing, which like the right to food is part of the wider right to an adequate standard of living, also has implications for security of land rights. Particularly important in this regard is the jurisprudence restricting use of relocations and forced evictions: forced evictions constitute *prima facie* violations of the right to housing, while international instruments on development projects call on states to ensure “full and prior informed consent regarding relocation”. In effect, the rights to food and to housing protect property not as an end in itself, but as a means to protect livelihoods and realise socio-economic rights. Similarly, the prohibition of discrimination against women in access to land is part of a wider effort to promote equality in gender relations, including by “modify[ing] the social and cultural patterns of conduct of men and women”.

Thirdly, where indigenous peoples are involved, international human rights law connects the protection of land rights to issues of territory, culture and self-determination, creating new complexities in the interface between property and sovereignty. These dimensions reflect the special place of land in indigenous societies, including its often special spiritual value and its intimate link to traditional ways of life and systems of belief. In this context, Convention No. 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries requires states to recognise the rights of ownership and possession of indigenous peoples over the lands they traditionally occupy, and to safeguard these people’s rights to land they have has access to even if they do not occupy the land exclusively. Establishing a strong connection between land rights and public decision making, the Convention also requires states to consult indigenous peoples on proposed measures or programmes that may affect them or their land rights, in good faith and “with the objective of achieving […] consent to the proposed measures”. It is worth noting that expropriation of lands providing the basis of

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85 Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, 11 August 2010, UN Doc. A/65/281. The report is specifically devoted to the relationship between land access and the right to food.
90 CEDAW, supra, particularly Articles 2, 14(2)(g) And 5(a).
92 ILO Convention No. 169, supra, Article 14.
traditional ways of life could also violate the right of minorities to enjoy their own culture, affirmed in Article 27 of the ICCPR.\(^\text{94}\)

Fourthly, land issues are eminently political, and often emotive, particularly – but not only – in societies where land provides an important basis for economic activity, social relations and political power. This dimension can connect land rights to the exercise of political rights, including the rights of freedom of expression, assembly and association. For example, UN Special Rapporteurs have scrutinised cases where the award of large-scale commercial land concessions was associated with repression to quell local resistance or silence activists, and with ensuing compressions of political rights.\(^\text{95}\) Human rights organisations have also documented cases of repression, intimidation or harassment of land rights defenders in contexts of polarised politics and authoritarian regimes, exposing violations of the rights to life and to physical integrity.\(^\text{96}\) In Laos, the disappearance of a prominent activist working on “land grabbing” led to the several UN Special Rapporteurs writing a public letter to the government of Laos.\(^\text{97}\)

The foregoing analysis points to the multiple human rights and international instruments that may be relevant to land relations. In contexts of increasing pressures on land, it also points to growing recourse to international human rights institutions for land disputes, and to growing attention being paid to land issues by international human rights bodies. These developments involve a reconfiguration of the legal construction of state sovereignty, and link the protection of land rights not only to respecting the human right to property but also to realising socio-economic and cultural rights and promoting participation and accountability in the exercise of public authority. In practice, the extent to which international human rights law can help to advance struggles for land is still to be properly assessed. In the recent wave of “land grabbing”, numerous documented instances of land dispossession in contested situations have not activated the operation of international human rights law. In addition, the record of compliance with human rights decisions is mixed, and many important decisions have not been implemented.\(^\text{98}\) More fundamentally, some commentators have asked probing questions about the emancipatory potential of international human rights law. These commentators have argued that human rights law provides a one-size-fits-all, legalistic, a-


\(^{96}\) E.g. FIDH, Land and Environmental Rights Defenders in Danger: An Overview of Recent Cases (FIDH, 2013).


\(^{98}\) See e.g. Resolution Calling on the Republic of Kenya to Implement the Endorois Decision (Banjul, 5 November 2013).
political and largely individualising framing, and raised concerns that this framing might crowd out other emancipatory strategies.  

There are nonetheless several examples where legal and political action leveraging international human rights law has helped right holders to advance their land claims. In *Sawhoyamaxa v. Paraguay*, years of legal wrangling, national advocacy, a favourable judgment of the Inter-American Court of Human Rights and ultimately farm occupations led to the adoption of a law providing for land restitution to the Sawhoyamaxa indigenous community. In addition, NGO wielding of a damning UN Special Rapporteur report on commercial land concessions in Cambodia fed into an advocacy campaign targeting the European Union (EU), a key export market, and led to supportive resolutions by the European Parliament and to fact-finding work by EU authorities to assess displacement claims. While an assessment of the emancipatory potential of international human rights law requires in-depth socio-legal research, these experiences suggest that the power of human rights law is strongest where action by human rights bodies is accompanied by legal ingenuity and by politically savvy mobilisation strategies.

4. International Investment Law

Over the past few years, the spread and deepening of economic globalisation has highlighted the ever closer connections between the international legal arrangements governing the global economy on the one hand, and claims to land and natural resources on the other. Several arbitrations brought by investors against states under international investment law involved challenges to the legality of state conduct affecting land relations, and compensation claims for actual and projected losses. The measures challenged included land reform programmes, handling of farm occupations and termination of land transactions. These developments illustrate the important bearing that international investment law can have on land governance – depending on perspectives and circumstances, as a bulwark of the rule of law in the face of arbitrary state conduct, or as an obstacle to socially desirable land policies.

While the recent proliferation of investment treaties and arbitrations has made investment law one of the most dynamic branches of international law, the connections between land rights and the international law protecting foreign investment date back a long time. Historically, international norms protecting the landholdings of foreign nationals emerged as part of wider legal developments in the customary international law regulating diplomatic protection and state responsibility for internationally wrongful acts. These evolutions preceded the development of international human rights law, and laid the foundations of contemporary international investment law. Landmark land-related disputes from the 19th and


early 20th centuries include a diplomatic dispute and aborted arbitration concerning the expropriation of urban land owned by a British national in Greece; arbitral awards concerning the expropriation of foreign-owned land, real estate and religious properties in Portugal; and an arbitration concerning the expropriation of residential land and property owned by a US citizen in Cuba.

Agrarian reforms and land occupations in Latin America also formed the object of early international disputes. In the 1930s, the expropriation of land owned by US nationals as part of Mexico’s agrarian reform triggered celebrated diplomatic correspondence between the US and Mexican governments. In that correspondence, then US Secretary of State Cordell Hull argued that customary international law required states to pay prompt, adequate and effective compensation where foreign investment is expropriated. This standard of compensation has come to be known as the “Hull formula”, and is widely used in contemporary investment treaties. These evolutions reflect the important role that land disputes played in the historical development of international investment law.

Today, a vast network of bilateral and, increasingly, regional investment treaties protects the landholdings of foreign investors. Indeed, investment treaties usually protect “assets” that typically include immovable property, natural resource concessions and shares in landholding companies. And while nowadays many arbitrations relate to sectors with limited connections to land rights (e.g. banking, telecommunications), land continues to form the object of investment disputes—in relation not only to agriculture (which accounts for a mere 4 per cent of arbitration claims taken to the International Centre for Settlement of International Disputes, ICSID) but also to extractive industries, real estate development or tourism. The recent wave of “land grabbing”, discussed above, could result in more investors bringing claims for land-related disputes. By establishing standards of treatment and means of international redress, this network of investment treaties has reconfigured spaces for the lawful exercise of sovereign powers affecting foreign landholdings. As pointed out by an arbitral tribunal in its discussion of an alleged expropriation, “while a sovereign

102 Great Britain v. Greece (George Finlay Claim), 39 British and Foreign State Papers 410 (1849). This dispute is briefly discussed in J. Ridley, Lord Palmerston (Macmillan, 2013).
103 Great Britain, Spain and France v. Portugal (Expropriated Religious Properties Arbitration), Awards rendered on 2 and 4 September 1920, I RIAA 7.
104 Walter Fletcher Smith v. The Compañía Urbanizadora del Parque y Playa de Mariano, Award, 2 May 1929, II RIAA 913-918.
108 See e.g. Article I(2) of the Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Colombia (Colombia-UK BIT; Bogotá, 17 March 2010).
State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. […] [T]he rule of law, which includes treaty obligations, provides such boundaries.”

Land reform programmes can create some of the most obvious intersections between land rights and investment law: in several investor-state arbitrations, investors have claimed that state conduct in connection with land reform violated the fair and equitable treatment, full protection or security or expropriation clauses that are typically included in investment treaties. Arbitral jurisprudence includes arbitrations where foreign investors challenged state conduct effecting expropriations aimed at reallocation property to disadvantaged groups (redistribution), or to people advancing historical claims (restitution). The relationship between investment law and land restitution has also emerged in international human rights jurisprudence, particularly where a state resisted the land restitution claim of an indigenous people on the ground that the claim “collide[d] with a property title which has been registered”, lastly with a German investor protected under an applicable investment treaty.

Besides land redistribution and restitution, land privatisation schemes have also come up in investor-state arbitration. Land tenure reforms affecting the nature, content or duration of land rights could activate investment treaties too – for example, reforms that change the duration of land leases or convert ownership into long-term leases; or reforms that introduce more stringent community consultation or compensation requirements, thereby increasing business costs or delaying project implementation. While land tenure reform has not yet resulted in publicly known investor-state arbitrations, tenure reform in the mining sector has formed the object of arbitration. Full protection and security claims are particularly relevant where investors argue that authorities failed to protect landholdings from invasions or occupations, including by people advocating for land reform.

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111 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, Award, 2 October 2006, ICSID ARB/03/16, para. 423. The case does not concern land relations.

112 Publicly known investor-state arbitrations relating to land redistribution include Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe, supra. They also include the ongoing arbitrations Bernard Von Pezhold and Others v. Zimbabwe (ICSID Case No. ARB/10/15); Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe (ICSID Case No. ARB/10/25); and Vesty Group Ltd v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/06/4). Landowners have also invoked investment treaties in litigation on land redistribution before national courts, for example in Namibia (e.g. Günter Kessl, Heimaterde CC and Martin Joseph Riedmaier v. Ministry of Lands and Resettlement and Others, High Court of Namibia, Judgment, 6 March 2008, para. 106), though scope for this depends on the extent to which national law allows courts directly to apply international treaties.

113 There are no known investor-state arbitrations directly relating to land restitution. But one recent arbitration concerning Romania partly hinged on public action to return a historical building confiscated during the communist era: Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa EL Corporation v. Romania Award, 2 March 2015, ICSID Case No. ARB/10/13.

114 Sawhoyamaxa Indigenous Community v. Paraguay, supra, paras. 115(b), 125 and 137. The Inter-American Court on Human Rights noted that the investment treaty did not prohibit expropriation – it merely subjected its legality to certain conditions, including public purpose; that land restitution aimed at realising the human rights of indigenous peoples could constitute public purpose; and that investment treaties must be applied consistently with international human rights law (para. 140).


116 In one undisclosed arbitral award, the tribunal reportedly found that South Africa breached the full protection and security standard for failure to protect the landholding of a foreign investor against incursions from nearby
Under customary international law and investment treaties, states typically have the right to expropriate landholdings for land reform programmes, so long as expropriation complies with certain conditions, including payment of compensation usually at full market value.\textsuperscript{118} National legislation and international human rights law may also protect the landholdings of foreign investors, and would typically require payment of compensation. However, depending on their formulation investment treaties can establish more stringent requirements. For example, while international human rights law may allow multiple considerations to affect compensation amounts, investment treaties tend to tie compensation standards to full market value.\textsuperscript{119}

There is considerable diversity in the compensation standards established by national constitutions. Some constitutions tie compensation primarily or exclusively to market value, but others provide a degree of flexibility. For example, the South African Constitution requires payment of “just and equitable compensation”, which must reflect “an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances”.\textsuperscript{120} These circumstances include the market value of the property, but also the current use of the property, the history of its acquisition and use, and the purpose of the expropriation.\textsuperscript{121} On the other hand, investment treaties tend not to allow arbitral tribunals to consider the history or current use of the property, and one arbitral tribunal has ruled out that the nature of the public purpose could justify lower compensation.\textsuperscript{122} As a result, depending on the jurisdiction international investment law could require more stringent compensation standards than may be applicable under national law, or even under international human rights law.

The standards of protection applicable under investment treaties have raised concerns that investment law could crystallise historical injustices.\textsuperscript{123} Empirical evidence that investment treaties discourage socially desirable land governance action is difficult to find, partly because information is not in the public domain; counterfactuals (whether authorities would have acted differently in the absence, or presence, of an applicable investment treaty) are not available; and biases undermine the evidence base (e.g. we can more easily find out about the cases where authorities did act, resulting in publicly reported investor-state disputes).\textsuperscript{124} At the very least, the financial implications of investment disputes raise questions about how the costs of socially desirable measures should be distributed between public and private actors.

The interface between land and international investment law is not limited to land reform or compensation issues. Land valuation has come up in investor-state arbitration,\textsuperscript{125} including

\textsuperscript{118} See e.g. Article VI of the Colombia-UK BIT, supra. See also \textit{Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica}, supra, para. 205.
\textsuperscript{119} For a comparison of protection standards under international investment law and international human rights law, see Cotula, “Property in a Shrinking Planet”, supra, pp. 124-127.
\textsuperscript{120} Constitution of South Africa of 4 December 1996, Section 25(3).
\textsuperscript{121} Ibid.
\textsuperscript{122} \textit{Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica}, Final Award, 17 February 2000, ICSID Case No. ARB/96/1, paras. 71-72. This case is not based on an investment treaty.
in relation to land transactions allegedly awarded by government at favourable terms and then rescinded after a regime change. The termination of land leases for failure to develop the land within prescribed timeframes has also resulted in investor-state arbitration, as have failure to transfer all the land necessary for project implementation, the direct or indirect expropriation of land to create natural parks, and lack of inter-ministerial coordination in connection with investment approval and land use zoning requirements.

In some respects, there is significant convergence between international investment law and international human rights law as they apply to land relations. Both bodies of international law establish international standards and remedies for private actors to seek review of the legality of public conduct that adversely affects land rights. In this sense, both protect landholdings against the arbitrary exercise of state sovereignty. Depending on the nationality of the landholders and on applicable treaties, the same land reform programme has given rise to international disputes based on international human rights law, and international investment law. The convergence between the two bodies of international law is particularly evident in the (so far rare) cases where an investor’s claim under investment law rests significantly on human rights law.

In Hesham Talaat M. Al-Warraq v. The Republic of Indonesia, a case not concerning land relations, the arbitral tribunal found that state

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conduct violating international human rights law breached the fair and equitable treatment standard included in the investment treaty on which the arbitration was based.\textsuperscript{134}

However, international human rights and investment law also present important differences. While international human rights law connects property to human dignity and is centred on global and regional multilateral regimes, international investment law protects assets held by foreign nationals, through reciprocal treaties aimed at facilitating cross-border investment flows between the states parties. While international human rights law recognises the important socio-cultural dimensions of land and ties land relations to self-determination and realisation of socio-economic rights, international investment law primarily conceptualises land as a commercial asset the value of which is expressed in monetary terms. There are also important differences in the protection standards, legal remedies and interpretive approaches applicable under international human rights and investment law.\textsuperscript{135} In addition, the activation of investment treaties in the context of land redistribution or restitution can create encounters and tensions between different claims to the same land – from the ancestral rights of indigenous peoples and the aspirations of the landless poor to the landholdings of commercial farmers and global capitalists. The Inter-American Court of Human Rights case \textit{Sawhoyamaxa v. Paraguay}, concerning an indigenous people’s restitution claim targeting land owned by a foreign investor and protected under an investment treaty, illustrates how international human rights and investment law can protect competing land claims.\textsuperscript{136} As pressures on valuable lands increase, there is potential for tension as well as convergence in the relationship between international human rights and investment law.

5. International Environmental Law

Growing concerns about the pressures that humankind is placing on the world’s natural resources have led to important developments in the field of international environmental law. The sustainable management of land as an environmental resource has been an important concern underpinning these developments. The multilateral conventions adopted at, or stemming from, the 1992 United Nations Conference on Environment and Development – namely, the Convention on Biological Diversity (CBD),\textsuperscript{137} the United Nations Framework Convention on Climate Change (UNFCCC),\textsuperscript{138} and the United Nations Convention to Combat Desertification (UNCCD)\textsuperscript{139} – all have a direct or indirect bearing on land relations, and so do several other environmental treaties concluded over the past four decades.

Developments in international environmental law have affected both sovereignty and property. The reconfiguration of sovereignty is evident in international instruments that reaffirm the sovereign right of states to exploit their natural resources, on the one hand, but also balance this right with the responsibility of states “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas

\textsuperscript{134} Hesham Talaat M. Al-Warrag v. The Republic of Indonesia, Final Award, 15 December 2014, United Nations Commission on International Trade Law (UNCITRAL), para. 621.

\textsuperscript{135} For a more detailed discussion of these issues, see Cotula, “Property in a Shrinking Planet”, supra, pp. 124-127.

\textsuperscript{136} Sawhoyamaxa Indigenous Community v. Paraguay, supra.

\textsuperscript{137} Convention on Biological Diversity (Rio de Janeiro, 5 June 1992).


\textsuperscript{139} United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 17 June 1994).
beyond the limits of national jurisdiction”, on the other.\textsuperscript{140} Authorising harmful land uses could expose states to international litigation and liabilities – for example, in connection with the development of industrial installations and agricultural plantations.\textsuperscript{141} On the other hand, the property dimensions emerge, for example, in international environmental law provisions that call for securing land tenure rights as a means to create incentives favouring sustainable land use; for conducting environmental impact assessments in public decision-making processes, which would include decisions to allocate land rights for agro-industrial projects; and for respecting land rights in the context of conservation efforts. The next few paragraphs discuss these provisions.

The UNCCD is the multilateral environmental agreement presenting the most obvious connection to land. While early misperceptions in government and the scientific community fuelled popular images of “advancing deserts”, research over the past 40 years has resulted in a more fine-grained understanding that emphasises patterns of land degradation not associated with desert encroachment, and driven by both climatic and anthropogenic factors.\textsuperscript{142} The UNCCD reflects this more nuanced understanding, defining desertification as “land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities”.\textsuperscript{143} Unlike some other environmental treaties, the UNCCD takes a holistic approach to environmental problems, envisaging strategies that simultaneously improve land productivity, promote conservation and sustainable land management, and lead to improved living conditions.\textsuperscript{144} More than some other environmental treaties, the Convention also emphasises bottom-up, participatory approaches to dealing with environmental issues.\textsuperscript{145} Another distinctive feature of the UNCCD is the use of regional implementation annexes for different regions, reflecting the diversity of issues and challenges associated with desertification in different parts of the world.

The UNCCD establishes differentiated obligations for its state parties. On the one hand, it requires affected country parties to “give due priority to combating desertification”, and to developing strategies and programmes to that effect.\textsuperscript{146} On the other, it requires developed country parties to “provide substantial financial resources and other means of support to assist affected developing country parties, particularly those in Africa”.\textsuperscript{147} In this context, the Convention established a “Global Mechanism” to facilitate the mobilisation of financial

\begin{enumerate}
\item See e.g. *Argentina v. Uruguay (Pulp Mills on the River Uruguay)*, I.C.J. 20 April 2010. The case concerns the development, in Uruguayan territory, of a pulp mill and eucalyptus plantations to supply the mill. The case is primarily based on a bilateral treaty setting the legal regime for the River Uruguay. The ICJ found that Uruguay breached some procedural obligations but did not violate any substantive obligations. Among other things, Argentina alleged that the tree plantations had an impact not only on soil and woodlands in Uruguayan territory, but also on the quality of the waters of the Uruguay River. The ICJ dismissed this contention due to lack of evidence (paras. 178-180).
\item UNCCD, supra, Article 1(a).
\item Ibid., Article 2(2).
\item See e.g. Article 3(a).
\item Article 5.
\item Article 6.
\end{enumerate}
resources. These core features of the UNCCD, coupled with scientific controversy over the nature and extent of desertification, are among the causes of the difficult political life of the Convention. On the one hand, dryland developing countries pushed hard for adopting the Convention in the early 1990s, and expressed frustration over the priority granted by global diplomacy to environmental conventions that then reflected primarily the concerns of developed countries. On the other hand, many developed countries resisted demands for significant financial commitments, and the Global Mechanism was designed as a brokering rather than financing institution. The central place of financial and technical assistance in the framing of the Convention also led to a predominance of institutional issues at the Conferences of the Parties (COPs), often at the expense of substantive issues. In 2002, the Global Environmental Facility (GEF) officially became the financial mechanism to assist implementation of the UNCCD.

While the entire Convention is devoted to land degradation, which as discussed is the central element of the definition of desertification, some provisions specifically deal with land tenure as part of strategies to promote sustainable land use. For example, the Regional Implementation Annex for Africa requires African country parties to “sustain and strengthen reforms currently in progress toward greater decentralization and resource tenure”. The rationale underpinning this provision is that more secure tenure rights are more likely to create incentives for landholders to use land sustainably – though empirical evidence problematises this assumption and highlights that customary systems can provide greater tenure security than national legislation. The Regional Implementation Annex for Africa also directs national action programmes to ensure integrated and sustainable management of agricultural and pastoral land. These are among the rare provisions of a widely ratified multilateral treaty that deal so explicitly with land issues. Overall, however, the UNCCD remains relatively marginalised in environmental diplomacy, and does not appear to be a key locus of international environmental negotiations.

The Convention on Biological Diversity is a comprehensive agreement for “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”. The Convention provides for in-situ conservation, though it also deploys ex-situ conservation as a

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148 Article 21(4). The Global Mechanism acquired some notoriety in international law circles in connection with an ICJ advisory case ultimately rooted in an employment dispute: Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion), I.C.J. 1 February 2012. The International Fund for Agricultural Development hosts the Global Mechanism of the UNCCD.

149 Toulmin, “The Desertification Convention”, supra.

150 Ambalam, “United Nations Convention to Combat Desertification”, supra. The aim of the Global Mechanism is “to increase the effectiveness and efficiency of existing financial mechanisms” (Article 21(4) of the UNCCD, emphasis added).


152 This was effected through UNCCD COP Decision 6/COP.6 (Havana, 7 November 2003, ICCD/COP(6)/11/Add.1). See also UNCCD COP Decision 6/COP.7 (Nairobi, 25 November 2005, ICCD/COP(7)/16/Add.1, http://www.unccd.int/Lists/OfficialDocuments/cop7/16add1eng.pdf#page=16).

153 Article 4(2)(b) of the UNCCD’s Regional Implementation Annex for Africa.


155 Ibid., Article 9(3)(b)(i).

156 CBD, supra, Article 1.
complementary means.\textsuperscript{157} In addition, the Convention commits states, “as far as possible and as appropriate”, to require “environmental impact assessment of […] proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects”.\textsuperscript{158} Several CBD COP Decisions provide more specific guidance on environmental impact assessments.\textsuperscript{159} These provisions are of direct relevance to land, including in relation to the conduct of impact assessment studies as part of decision making on land concessions for agribusiness plantations or natural resource projects. Some COP Decisions also deal with conservation on dry and sub-humid lands, including through closer synergies with the UNCCD.\textsuperscript{160}

The UN Framework Convention on Climate Change (UNFCCC) also presents connections to land issues, though these have primarily emerged through COP Decisions rather than the text of the Convention itself. The most obvious of these connections concerns the initiative “Reducing Emissions from Deforestation and Forest Degradation, and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries”, also known as REDD+.\textsuperscript{161} This mechanism aims to address carbon emissions linked to activities affecting forests, which can both remove important carbon sinks and increase carbon emissions, for instance where forest clearings occur through burning. In 2010, concerns that REDD+ initiatives might encroach on the land rights of indigenous peoples and rural communities led to a new COP Decision establishing “guidance and safeguards” for implementing REDD+. Among these safeguards is “[r]espect for the […] rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples”.\textsuperscript{162} The implication is that REDD+ programmes should respect the land rights of indigenous peoples and local communities in line with international law and instruments.

In addition to these “core” multilateral environmental agreements, other treaties can have important reverberations for the management of land. Limited space prevents a comprehensive discussion. To mention one example, the Ramsar Convention on Wetlands of International Importance requires states parties to designate and promote the conservation of wetlands of international importance.\textsuperscript{163} Depending on the country context, these wetlands may represent strategic resources. In Mali, for example, the government has designated as a Ramsar site the Inner Niger Delta, which in addition to its conservation value is a strategic

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\textsuperscript{157} Ibid., Articles 8-9.

\textsuperscript{158} Ibid., Article 14(1)(a).

\textsuperscript{159} E.g. CBD CO6 6 Decision VI/7 (The Hague, 19 April 2002); CBD COP 8 Decision VIII/28 (Curitiba, 31 March 2006); and CBD COP 7 Decision VII/16F Annex (Kuala Lumpur, 20 February 2004), containing the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or Which Are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

\textsuperscript{160} See e.g. CBD COP 9 Decision IX/17 (Bonn, 30 May 2008) and CBD COP 10 Decision X/35 (Nagoya, 29 October 2010).


\textsuperscript{163} Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar, 2 February 1971).
resource for farming, herding and fishing. Designation as a Ramsar site entails important conservation obligations, with repercussions for the management of land, water and associated natural resources.

Overall, there is a clear trend towards greater international regulation of the environmental dimensions of land, emerging through international conventions and COP Decisions. As in the areas of human rights and investment law, developments in international environmental law affect both sovereignty and property in the governance of land. Some (emerging) norms of international environmental law protect land rights in the face of conservation efforts, or as part of strategies to promote more sustainable land use. It is equally clear, however, that translating these international norms into real impacts on the ground is riddled with difficulties – not only practical and political, but often also linked to the lack of legal mechanisms to monitor compliance and sanction non-compliance. The vast body of research highlighting the lack or inadequacy of environmental impact assessments in the recent wave of “land grabbing” deals for agribusiness plantations in Africa and Asia is a stark reminder of this reality. The challenge ahead is to translate international commitments into real changes both in the statute books and on the ground.

6. Developments in Soft Law

The previous sections discussed bodies of international law that, while not primarily designed to address land governance, are directly relevant to it. Recent years have witnessed the emergence of international instruments – primarily soft-law instruments – that tackle land issues more explicitly. This trend reflects growing international recognition of the supranational and transnational dimensions of land issues. At the global level, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), endorsed in 2012 by the United Nations Committee on World Food Security, have catalysed much international debate and enjoy particular momentum – not least due to the widespread expressions of high-level political support for the VGGT; to ongoing technical programmes to support the implementation of the VGGT; and to civil society appropriation of the VGGT in their advocacy strategies. Important developments have occurred at the regional level too. In

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165 See e.g. Deininger and Byerlee, Rising Global Interest in Farmland, supra, p. 57; Cotula and Oya, “Testing Claims”, supra, pp. 917-918.

166 This section draws on insights I gained through leading the preparation of a technical guide for lawyers on the Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security (VGGT). The guide was commissioned, and is being published, by the Food and Agricultural Organization of the United Nations (FAO). Thierry Berger, Rachael Knight, Thomas McInerney and Peter Deupmann were also in the drafting team, and Margret Vidar ensured overall direction by the FAO Legal Office.


168 See e.g. UN General Assembly Resolution No. 67/228 of 21 December 2012, UN Doc. A/RES/67/228, para. 31; G20 Leaders Declaration (Los Cabos, 19 June 2012), para. 58; and The Future We Want – Outcome Document of the Rio+20 Conference (Rio de Janeiro, 22 June 2012), para. 115.

Africa, the African Union has developed Framework and Guidance on Land Policy in Africa, and more specific subsequent guidance on selected topics. Given the prominence and global relevance of the VGGT, this section focuses particularly on that instrument.

Soft-law instruments do not create legal obligations and are not part of binding international law. The VGGT formed the object of inter-state negotiation. However, the title of the document (Voluntary Guidelines) and its consistent wording (“should”, rather than “shall”) make the non-binding nature of the document very clear. The VGGT dispel any remaining doubts by expressly stating that they are voluntary. However, non-binding instruments can still have some legal significance. For example, they could influence national law reform, and in fact several VGGT provisions explicitly call for law reform. Some VGGT provisions, for instance on gender equality, are widely recognised to be aligned with existing obligations under international human rights law. In addition, the possibility cannot be ruled out that courts might refer to soft-law instruments, for example to interpret provisions contained in binding national or international law. Finally, recent developments in the area of business and human rights, namely the United Nations Guiding Principles on Business and Human Rights, have arguably increased the awareness of lawyers about the importance of integrating in legal practice considerations based on instruments that fall short of creating legally binding and enforceable obligations.

In this sense, the VGGT are best understood as an example of what some international law scholars have termed “informal international law making” – that is, forms of international cooperation that fall short of the international law canon in terms of process (e.g. lack of formal adoption or ratification), actors (multi-stakeholder consultation involving private sector and civil society, beyond the traditional role of states in shaping international instruments) or outputs (“Voluntary Guidelines”, rather than a treaty). These informal law-making processes seem particularly in use in UN specialised agencies, the mandate of which covers some of the most difficult socio-economic and political issues linked to economic globalisation (e.g. global health, food security, pressures on natural resources), leading some commentators to contrast the “international law of New York” (the seat of the UN) with that of Geneva (intended as shorthand for specialised agencies).

The highly political nature of land issues, and difficulties in reaching global consensus on often context-dependent challenges, are among the factors that might explain the preference of states for soft-law instruments. It has been pointed out that soft-law instruments do not necessarily enjoy lesser legitimacy than “formal” international law. Treaties draw legitimacy on state consent, but there is no guarantee of democratic legitimacy (for example, due to

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171 See e.g. the Guiding Principles on Large-Scale Land-Based Investments in Africa (Addis Ababa, November 2014).
172 Paragraph 2.1 of the VGGT.
173 See e.g. paras. 4.4 and 5.3, calling for the protection of legitimate tenure rights not currently protected by national law.
174 See VGGT paragraph 3B.4 and the CEDAW, supra, particularly Articles 2 and 14.
authoritarian regimes or secret negotiations). Conversely, inclusive multi-stakeholder processes might result in significant perceived legitimacy even in the absence of formal requirements for the adoption and ratification of the legal instrument. The widespread expressions of support for the VGGT, mentioned above, seem to corroborate this consideration.

The VGGT contain detailed, extensive guidance on multiple aspects of land governance. Respect for, and protection of, “legitimate tenure rights” is a central pillar of the VGGT. This includes recognising and respecting all legitimate tenure rights; safeguarding all legitimate tenure rights against threats and infringement; promoting and facilitating the enjoyment of legitimate tenure rights; and providing access to justice to deal with infringements of legitimate tenure rights. While lawyers are often accustomed to defining tenure rights in terms of positive law, the VGGT explicitly consider as “legitimate” not only those tenure rights formally recognised by national law, but also those rights that are considered to be socially legitimate in local societies – even if these rights currently have no legal recognition. For example, the VGGT call on states to safeguard customary and unrecorded rights in land allocation processes; to protect the land rights of indigenous peoples; and to acknowledge informal tenure. The VGGT also provide guidance on land-based investments and on land redistribution and restitution.

The VGGT appear to reinforce the norms of international human rights law and international investment law. For example, they explicitly recognise the strong connection that exists between land rights and human rights. The convergence with international investment law relates primarily to the VGGT’s emphasis on respect for the rule of law and international obligations in redistributive reforms. However, tensions with international investment law could also emerge, not least because, as discussed, compensation standards may vary between national law, international human rights law and international investment law, and because action to protect legitimate tenure rights could adversely affect ongoing investments. For example, action to extend legal recognition to “legitimate tenure rights not currently protected by law” could increase costs for investments that involve significant land acquisition. The introduction of ceilings on permissible land transactions, of more stringent standards of local consultation and participation, or of more robust impact assessment studies covering social impacts, could affect or delay the implementation of investment projects. Application of free, prior and informed consent could stall project implementation. Depending on circumstances and applicable treaties, the possibility cannot

179 Ibid., at 750.
180 VGGT para. 3.1.
181 Ibid. Recognition, respect and protection of legitimate tenure rights are also referred to in numerous other provisions of the VGGT; see e.g. paras. 4.4, 4.5, 5.3, 7.1, 8.2, 8.4, 8.7, 9.4, 9.5, 11.6, 12.4, 12.6, 12.10, 12.15, 14.1 and 16.1.
182 See e.g. VGGT paras. 4.4 and 5.3.
183 VGGT section 7.
184 VGGT section 9.
185 VGGT section 10.
186 VGGT sections 12, 14 and 15.
187 See e.g. VGGT para. 3.2.
188 See e.g. VGGT para. 15.9. See also paras. 14.1 and 15.4.
189 VGGT para. 9.9 and 12.7.
be ruled out that investors might claim that public action in these directions breached international investment law standards, raising issues about how the costs of implementing the VGGT should be shared between public and private actors.

While the VGGT enjoy widespread support among government, civil society and the private sector,\(^{194}\) they do present some limitations. These are linked not only to the voluntary nature of the VGGT, but also to their relatively unspecific text at times interspersed with caveats and qualifications. These features reflect the political sensitivity of land issues, and the need for the text to be relevant to diverse natural resources (fisheries and forests as well as land) and national and regional contexts. Importantly, while the VGGT contain some guidance on how to identify the tenure rights deemed to be “legitimate”,\(^ {195}\) the absence of a specific definition of “legitimate” tenure rights can limit the reach of the VGGT. This is because whether certain land claims are “legitimate” often forms the object of contestation – for instance, where governments deny the legitimacy of the tenure claims of transhumant pastoralists or shifting cultivators.\(^ {196}\)

Despite these limitations, the VGGT constitute a major step forward in international efforts to tackle land issues. They are the first and by far the most detailed global instrument providing guidance to states and non-state actors on issues that were long regarded to fall within the exclusive remit of domestic jurisdiction. While the VGGT are not legally binding, the very fact that states agreed to negotiate international guidance on land governance is a reflection of how perceptions about the exercise of sovereign powers in property matters have shifted in recent years. The fact that it was possible to obtain unanimous endorsement by the Committee on World Food Security, accompanied by numerous statements of high-level political support is itself a remarkable achievement. Ultimately, the impact that the VGGT will have on shaping land governance in the longer term will largely depend on how governments, civil society, development agencies and the private sector will appropriate and use them in the coming years.

7. Conclusion

In a globalised world, land governance is shaped by international as well as national regulation. And in the context of growing pressures on the world’s natural resources, land features increasingly prominently in international law. This trend is reflected in the legal and jurisprudential developments affecting land in the context of international investment law, international human rights law and international environmental law. It is also reflected in the emergence of soft-law instruments to tackle land issues in more explicit ways. The trend vindicates the important role that land issues played since the very beginnings of international law, epitomised in modern times by juristic concerns about territorial sovereignty and land ownership during successive ways of European colonisation.

The place of land in international law reflects its close relationship with issues of territory and sovereignty. But it also embodies the often neglected importance of private rights in international law. While international law has traditionally been associated with inter-state diplomacy, private ordering has been an important feature since the early days of modern

\(^{194}\) See e.g. the commitments by some global beverage companies to ensure compliance with the VGGT in their sugar supply chains: http://www.fao.org/news/story/en/item/224619/icode/ (14 April 2014).

\(^{195}\) VGGT paras. 4.4, 5.3 and 9.4.

\(^{196}\) See e.g. L. Alden Wily, The Tragedy of Public Lands: The Fate of the Commons under Global Commercial Pressure (International Land Coalition, 2011).
international legal scholarship. The place of private rights in contemporary international law emerges in the tensions about land claims that may arise between foreign investors, local communities and sovereign states, and that may find expression in the jurisprudence of international human rights bodies or investor-state arbitral tribunals. Private ordering in land relations is also evident in soft-law instruments that call for the legal recognition of land tenure rights and that tackle the interface between transnational investment flows and local land rights – particularly the VGGT.

The interconnectedness of multiple public and private interests in the framing of the international norms relating to land provides insights for debates about the emancipatory potential, or imperialistic underpinnings, of international law. In recent years, early enthusiasms about the “civilising mission” of international law, and early optimism about the potential for international law to contribute to a more just and peaceful world, have been contrasted by more sceptical analyses that emphasise the strong connection between the development of international law and colonial and postcolonial domination. The place of land in international law epitomises this coexistence of emancipatory potential and legitimisation of imperialistic strategies both old and new.

On the one hand, the long-term historical trajectory from decolonisation to the development of the legal architecture underpinning economic globalisation, of which international investment law constitutes an important part, reflects a reconfiguration of systems for resource control – away from forms of authority based on territorial sovereignty, and towards models that facilitate control over resources through regulating the terms of investment and trade. In some respects, this historical trajectory can be understood as a transition from sovereignty (whereby colonial powers claimed territorial sovereignty over their colonies, mobilised international law to provide legal legitimacy to their territorial acquisition and protected private rights through the colonial legal order) to property (whereby international legal arrangements protect privately held rights to exploit natural resources). Arguably, contemporary struggles for control over the world’s valuable resources are fought less through claims of sovereignty over territories, though this dimension remains important; and more through the establishment and protection of privately held rights over natural resources. This shift is in some ways opposite to 17th and 18th-century evolutions from privatistic appropriation (dominium) to territorial sovereignty (imperium).

On the other hand, international law also provides new arenas for local-to-global emancipatory struggles to obtain recognition for the land rights of indigenous peoples, rural communities, peasant farmers and small-scale rural producers. The story of land and international law illustrates how new actors are becoming more involved in the making and enforcement of international law, including social movements calling for international instruments to protect the land rights of peasant farmers, and NGOs bringing cases to international human rights bodies. International human rights law provides an important site for this advocacy, as does the emergence of soft-law instruments the legitimacy of which rests, at least in part, on multi-stakeholder processes.

Some of these advances remain confined to international instruments that, while not devoid of legal significance, are not legally binding, or are not assisted by effective

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199 See above, and more generally Craven, “Colonialism and Domination”, supra, pp. 869, 878-879.
enforcement mechanisms. This situation contrasts with the relatively effective legal arrangements developed to protect foreign investment. As growing pressures on land bring competing claims into contest, imbalances in legal frameworks raise probing questions about whose rights are being protected and how. But despite these significant limitations, contemporary international law provides legal levers to protect the land rights of the most vulnerable to an extent that is unparalleled by historical standards. Anecdotal evidence indicates that legal ingenuity and political savvy can help to make the most of these legal levers – for example, in action to advocate for land restitution or seek justice for perceived abuses in the context of “land grabbing”.

In these rapidly evolving contexts, the relationship between property and sovereignty underpins some of the most important tensions in contemporary international law. For centuries, international law primarily tackled land rights in the context of changes in, and disputes over, territorial control. Today, contestation about the legal boundaries of sovereignty in land matters is shaped less by competing territorial claims, and more by international norms that discipline the internal exercise of sovereign powers over private rights. The most pressing questions now facing international jurists are about the interface between sovereignty and property within a state’s internal jurisdiction. In extending its reach to a wider range of land issues previously left to domestic jurisdiction, international law has reframed the relationship between private rights and public authority – for example, with regard to the contours of the sovereign right of states to expropriate assets and regulate activities. The norms promoting gender equality in land relations, cited above, illustrate how international law has come to address property issues that affect the very fabric of society.

Considered in this “internal” dimension, land rights issues underpin important tensions between sovereignty and property in contemporary international law. Examples include tensions in international investment law between the exercise of sovereign powers to implement land reform or improve regulation of land-based investments on the one hand, and the protection of land rights held by foreign investors on the other. Examples also include tensions in international human rights law between government claims to sovereign control over land as a means to harness resources for national development on the one hand, and respect for fundamental human rights, which land may be instrumental to, on the other. In these processes, different bodies of international law (environmental, investment and human rights law) reflect diverse conceptions of land (respectively, as an environmental resource, a commercial asset or a basis for livelihoods, culture and social identity), with implications for the framing of different international norms affecting land.

At the same time, the coexistence of both “emancipatory” and “imperialistic” genes in the DNA of international law, and the fact that one piece of land may have environmental, commercial and socio-cultural value at the same time, create fertile ground for potential tensions between the different forces underpinning the development of the international law norms applicable to land. This includes potential tensions between obligations under different branches of international law (international human rights law and international investment law, for example), but also between different rights within international human rights law (e.g. the right to property and the right to food, in situations where realising the latter might require bold land redistribution).

As a result, the articulation among multiple bodies of international law becomes particularly important. This issue has attracted considerable attention in connection with
debates about fragmentation in international law. There is significant scope for clarifying that articulation, including at treaty-making stage, and including through creating bridges between hitherto separate bodies of international law. One example might involve including in any new investment treaties clauses that commit the states parties to implement the VGGT and to protect legitimate tenure rights in the context of investments covered by the treaty. Legal scholarship is often confined in neatly defined disciplinary spaces. But discussing the international law norms relevant to land highlights the close links that exist between different bodies of international law in real-life situations, and calls for a more holistic approach to the design and implementation of international law.