The International Law of Land (Grabbing): Human Rights and Development in the Context of Racial Capitalism

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Abstract

This article investigates the concept of tenure security within international law, emphasizing the global legal architectures that influence and shape land tenure governance at the intersections of international human rights law and development. By tracing the evolution of tenure security from colonial practices to modern development paradigms, the article contends that international development and human rights frameworks often perpetuate dispossession and inequality. It critiques the convergence of human rights and development narratives around the formalization of land tenure, demonstrating how this practice reinforces Western legal frameworks and ontologies of land. The article examines a range of instruments including various UN CESCR General Comments, Reports and Guidelines issued by UN Special Rapporteurs, the Voluntary Guidelines on the Responsible Governance of Tenure, and the Sustainable Development Goals and indicators. It explores the mechanisms through which these international frameworks propose solutions for securing land tenure based on a resource ontology, highlighting how they perpetuate land commodification, marginalize and displace vulnerable populations, and contribute to the proliferation of racial capitalism. It further underscores the limitations of international human rights law mechanisms in addressing the complexities of land tenure security, dispossession, and the neoliberal agendas underlying and driving global land governance. Advocating for a decolonial approach, it challenges some of the foundational assumptions of international law and calls for the unsettling of Eurocentric and capitalist ontologies of land embraced by international development and international human rights law alike.

* Max Weber Fellow, European University Institute, Florence Italy. I wish to extend my sincere gratitude to Katrina M. Wyman, Sally Engle Merry, Gráinne De Burca, and Vasuki Nesiah for their invaluable guidance and dedicated mentorship throughout my doctoral dissertation, which formed the foundation of this Article. I am also deeply thankful to José Enrique Alvarez, Hannah Birkenkötter, Julia Dehm, Sué González Hauck, Neha Jain, Michele Krech, Christopher Roberts, Marcela Prieto Rudolphy, Frank Upham, and the participants at the LSA Early Scholars Workshop in 2023 for their insightful feedback on earlier drafts.

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I. INTRODUCTION

In an article published nearly two decades ago, Philip Alston interrogated the disconnect between the realms of human rights and development, utilizing the Millennium Development Goals (MDGs) as his analytical fulcrum.[1] Along with their successors, the Sustainable Development Goals (SDGs),[2] the MDGs have shaped international and transnational efforts to promote human development.[3] Back in 2005, Alston discerned a parallel, yet, disjointed trajectory between the spheres of human rights and development practice, noting a mutual indifference to the potential synergies and intersections that could—and should—be harnessed. He sharply critiqued the human rights community for its reticence in engaging with the MDGs.[4] Alston's critique has resonated with human rights and development practitioners. Members of the human rights community have been closely engaged in the design of the 2030 agenda, including the SDGs, targets, and corresponding indicators.

The land rights community, in particular, has embraced the SDGs, as their negotiations coincided with increased attention to what became known as the "new global land grab."[5] Following the financial crisis and a global spike in food and commodity prices in 2007–08, processes of land and resource grabbing accelerated and became a focal point in struggles at the intersection of human rights and development. Drawing on Borras et al., I understand land grabbing as "the capturing of control of relatively vast tracts of land and other natural resources tracts of land and other natural resources through a variety of mechanisms and forms that involve large-scale capital that often shifts resource use orientation into extractive character."[6] Large-scale land acquisitions by national governments, private investors, transnational corporations, and

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1 Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755 (2005).

2 G.A. RES. 70/ 1, Transforming Our World: the 2030 Agenda for Sustainable Development (Oct. 21, 2015).

3 *See* Sakiko Fukuda-Parr & David Hulme, *International Norm Dynamics and the "End of Poverty": Understanding the Millennium Development Goals*, 17 GLOB. GOVERNANCE 17 (2011) (providing an in-depth analysis of the normative and strategic frameworks that led to the establishment of the MDGs and their role in shaping international development policies).

4 Alston, *supra* note 1, at 755.

5 Among the first publications to attract widespread attention was a brief report by international NGO GRAIN. GRAIN, *SEIZED! The 2008 Land Grab for Food and Financial Security*, GRAIN (2008), https://perma.cc/X5BH-LDSN.

6 Saturnino M. Borras et al., *Land Grabbing in Latin America and the Caribbean*, 39 J. PEASANT STUD. 845, 851 (2012); *compare* Report of the ILC International Conference and Assembly of Members, *Tirana Declaration: Securing land access for the poor in times of intensified natural resources competition*, INTERNATIONAL LAND COALITION (ILC) 4 (2011) (providing a much narrower definition that limits the concept of 'land grabbing' to involuntary means excluding distress sales, etc.).

international nongovernmental organizations, among others, have led to large-scale displacements and other far-reaching negative consequences on the livelihood and human rights of Indigenous Peoples, marginalized groups, and the urban and rural poor in countries of the Global South and beyond.[7]

In the early 2010s, the human rights community largely succeeded in (re)framing the ongoing "global land grab" within a human rights perspective, as opposed to the more constricted "responsible investment" lens favored by the development sector. In the spirit of collaborative governance, various guidelines and other instruments were adopted traversing the border of international human rights and development law.[8] First, Olivier De Schutter, the former UN Special Rapporteur on the right to food, issued a *Set of Minimum Principles and Measures to Address the Human Rights Challenge* posed by *Large-Scale Land Acquisitions and Leases* in 2009.[9] These were followed by several instruments issued by international organizations involved in the development sector, such as the Food and Agriculture Organization (FAO), the World Bank, and UN-Habitat. One notable example of instruments on human rights and development law is the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests* (hereinafter VGGT),[10] issued in 2012.

Despite the proliferation of international instruments trying to heed Alston's call, global land grabbing and land dispossession continue seemingly unabated in "most of the world."[11] These failures are regularly attributed to poor implementation of international law and disregard of international human rights law by governments in the Global South. Yet, such a diagnosis overlooks the deeper, systemic issues within these frameworks themselves. This Article, thus, turns to the historical and contemporary international legal frameworks that govern land tenure and examines how these have evolved from colonial practices to current development paradigms. Whereas land grabbing is often examined as contrary to and in violation of the international legal and human rights framework,

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7 For a recent overview of the research and debates on contemporary land and resource grabbing, *see, e.g.*, ANDREAS NEEF ET AL., ROUTLEDGE HANDBOOK OF GLOBAL LAND AND RESOURCE GRABBING (2023).

8 Matthew C. Canfield, *Disputing the Global Land Grab: Claiming Rights and Making Markets Through Collaborative Governance*, 52 LAW & SOC'Y REV. 994 (2018).

9 Olivier De Schutter (Special Rapporteur on the Right to Food. Report), Rep. on Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge, U.N. Doc. A/HRC/13/33/Add.2 (Dec. 28, 2009).

10 Food & Agric. Org. of the U. N., Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, FAO DOC. NR CFS 2012/39/4 (May 11, 2012).

11 The notion "most of the world" refers to "those parts of the world that were not direct participants in the history of the evolution of the institutions of modern capitalist democracy." PARTHA CHATTERJEE, THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD 3 (2007).

this Article contends that it is largely a corollary not only of uneven power dynamics but also of an understanding of land as a resource embedded in and reenacted by these frameworks.

Positioning the field of land rights and land tenure governance as an exemplar of a burgeoning convergence of human rights community and development, this Article probes into the nature of this specific convergence. It shows that, counter-intuitively, the adoption of human rights language may indeed promote and perpetuate the implementation of technologies of property and ownership, which alarmingly echo colonialist techniques. Such practices not only undermine the transformative potential heralded by Alston but also risk entrenching existing power dynamics that facilitate the global land grab.

The analytical cornerstone of this exploration is "tenure security," a concept central to the rise of an international "land governance orthodoxy."[12] The provision and strengthening of tenure security—especially when it comes to tenure security for the poor, for vulnerable and marginalized groups, including women, peasants, Indigenous Peoples, and local communities—is almost unequivocally regarded as a desirable goal of public land policy and as crucial for the successful navigation of a plethora of global challenges such as poverty, hunger, and the climate crisis. However, as this Article demonstrates, the notion of tenure security embedded in international law and global governance instruments provides a veneer of legitimacy for practices of formalization that lead to so-called "security" for only few but to dispossession and displacement in and of most of the world (including vulnerable and marginalized populations in what is often referred to as the "Global North").

Even though the evidence for the benefits of land formalization is mixed at best, numerous formalization and titling programs and initiatives have been launched in countries of the "Global South" since the rebirth of land reform as land *tenure* reform in the 1990s.[13] In the late 2000s and early 2010s, the international donor community vigorously promoted formalization as the primary policy solution to address issues of land grabbing.[14] Formalization of rural land has long been considered fundamental to its privatization, commodification, and

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12 LAURA GERMAN, POWER / KNOWLEDGE / LAND: CONTESTED ONTOLOGIES OF LAND AND ITS GOVERNANCE IN AFRICA 81 (2022).

13 Laura A. German & Carla Braga, *Decentering Emergent Truths on Tenure Security: Archaeology of a Global Knowledge Regime*, 48 J. PEASANT STUD. 1228 (2021); Ambreena Manji, *Commodifying Land, Fetishising Law: Women's Struggles to Claim Land Rights in Uganda*, 19 AUSTL. FEMINIST L. J. 81 (2003); AMBREENA S. MANJI, THE POLITICS OF LAND REFORM IN AFRICA: FROM COMMUNAL TENURE TO FREE MARKETS (2006); Catherine Boone et al., *Land Law Reform in Kenya: Devolution, Veto Players, and the Limits of an Institutional Fix*, 118 AFR. AFFS. 215 (2019).

14 Michael B. Dwyer, *The Formalization Fix? Land Titling, Land Concessions and the Politics of Spatial Transparency in Cambodia*, 42 J. PEASANT STUD. 903 (2015); Philip Hirsch, *Titling against Grabbing? Critiques and Conundrums around Land Formalisation in Southeast Asia* (Int'l Conf. on Global Land Grabbing, 2011)).

financialization. And while some consider this process crucial for economic development,[15] many have shown how the systematic formalization of land "breed[s] exclusion and fail[s] in a distributional sense."[16] Systematic land titling and formalization efforts have been described as "mechanism[s] justifying dispossession"[17] leading to "dispossession through land titling" and "licensed exclusions."[18] Similar processes can be observed in many parts of the world, in rural as well as in urban contexts, including in Tanzania,[19] Laos,[20] Ethiopia,[21] Mexico,[22] Papua New Guinea,[23] Bangladesh,[24] and Colombia.[25]

A very vivid picture of the link between formalization and dispossession presents itself in Cambodia, where land titling efforts have led to widespread

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15 In fact, Hernando de Soto understands commodification and financialization as the mechanism that will lift millions out of poverty. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2001).

16 Tor A. Benjaminsen et al., *Formalisation of Land Rights: Some Empirical Evidence from Mali, Niger and South Africa*, 26 LAND USE POL'Y 28, 34 (2009).

17 Faustin Maganga et al., *Dispossession Through Formalization: Tanzania and the G8 Land Agenda in Africa*, 40 ASIAN J. AFR. STUD. 3, 3 (2016); *see also* Festus Boamah, *How and Why Chiefs Formalise Land Use in Recent Times: The Politics of Land Dispossession through Biofuels Investments in Ghana*, 41 REV. AFR. POL. ECON. (2014); Howard Stein & Samantha Cunningham, *Formalization and Land Grabbing in Africa: Facilitation or Protection?*, 15 TANZ. J. OF DEV. STUD. 1 (2017); Linda Engström, Joanny Bélair & Adriana Blache, *Formalising Village Land Dispossession? An Aggregate Analysis of the Combined Effects of the Land Formalisation and Land Acquisition Agendas in Tanzania*, 120 LAND USE POL'Y 106255 (2022).

18 DEREK HALL, PHILIP HIRSCH & TANIA LI, POWERS OF EXCLUSION: LAND DILEMMAS IN SOUTHEAST ASIA 27–59 (2011).

19 Engström, Bélair & Blache, *supra* note 17; Howard Stein & Samantha Cunningham, *supra* note 17.

20 Miles Kenney-Lazar, *Governing Dispossession: Relational Land Grabbing in Laos*, 108 ANNALS AM. ASS'N GEOGRAPHERS 679 (2018); Peter Vandergeest, *Land to Some Tillers: Development- Induced Displacement in Laos*, 55 INT'L SOC. SCI. J. 175 (2003).

21 Mekonnen Firew Ayano, *Understanding the Local Complexities in Land Law Reforms: The Case of Land Inalienability in Ethiopia, 1991–2018*, L. & SOC. INQUIRY 1 (2024); Husen Ahmed Tura, *Land Rights and Land Grabbing in Oromia, Ethiopia*, 70 LAND USE POL'Y 247 (2018); Fouad Makki, *Development by Dispossession: Terra Nullius and the Social-Ecology of New Enclosures in Ethiopia*, 79 RURAL SOCIO. 79 (2014).

22 Luis Urrieta, Jr. & Judith Landeros, *'Until the Land Title Is in My Hands, the Land Is Not Sold!': Land, Violence, and Indigenous Survivance in Michoacán, Mexico*, 19 LATIN AM . & CARIB. ETHNIC STUD. 1 (2024); Ann Varley, *Property Titles and the Urban Poor: From Informality to Displacement?*, 18 PLANNING THEORY & PRAC. 385 (2017); Jessa Lewis, *Agrarian Change and Privatization of Ejido Land in Northern Mexico*, 2 J. AGRARIAN CHANGE 401 (2002).

23 Caroline Hambloch, *Land Formalization Turned Land Rush: The Case of Oil Palm in Papua New Guinea*, 112 LAND USE POL'Y 105818 (2022).

24 Oliver Scanlan et al., *Is "pro-poor land administration" a realistic proposition? How a land survey in Bangladesh reproduced and reconfigured gendered and racialised poverty*, 138 LAND USE POL'Y 107016 (2024).

25 Ali T. Ahmed et al., *Land Titling, Race, and Political Violence: Theory and Evidence from Colombia*, (2020), https://perma.cc/TC2R-K6PA); Lesley Potter, *Colombia's Oil Palm Development in Times of War and 'Peace': Myths, Enablers and the Disparate Realities of Land Control*, 78 J. RURAL STUD. 491 (2020); Frances Thomson, *The Agrarian Question and Violence in Colombia: Conflict and Development*, 11 J. AGRARIAN CHANGE 321 (2011).

displacement and marginalization of rural and Indigenous communities.[26] In Cambodia, programs like the Land Management and Administration Project (LMAP), initiated in the early 2000s with support from international organizations, aimed to formalize land ownership under the assumption that secure property rights would encourage investment and development. However, this initiative instead catalyzed a wave of land grabs by powerful domestic and foreign interests, often in collaboration with government authorities. Rather than providing security, it led to greater insecurity.[27] Spurred by the European Union's "Everything But Arms" initiative, which granted trade benefits for imports from least developed countries, investment interest in Cambodia for agricultural production, primarily rubber and sugar plantations, skyrocketed.[28] Consequently, over the course of only a few years, concessions over nearly 2 million hectares of land were granted to foreign and domestic companies, and millions of people were dispossessed and displaced.[29] Moreover, all efforts to formalize collective land rights of Indigenous Peoples living in the Northeast of the country ultimately failed. While waiting for their collective titles, concessions over vast areas that had been held for centuries by Indigenous communities were granted to corporate investors, and subsequently turned into rubber plantations. These concessions were not illegal or extra-legal. Rather, they were part and parcel of the Cambodian Land Law 2001, a law widely understood to be drafted by international donors and experts.[30] The limited success of collective land titling was to carve out the village areas from the concessions and save them from destruction. Yet, without their hunting and farming grounds, these Indigenous communities had lost the means to sustain themselves, rendering the limited success of protecting village areas from destruction largely meaningless.[31]

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26 Between 2015 and 2019, I spent in total 18 months in Cambodia, first working as a research assistant for Professor Frank K. Upham, and later conducting field research for my doctoral dissertation.

27 FRANK K. UPHAM, THE GREAT PROPERTY FALLACY: THEORY, REALITY, AND GROWTH IN DEVELOPING COUNTRIES 106–30 (2018).

28 ROMAN HERRE & TIMOTHÉ FEODOROFF, CASE DOSSIER: CAMBODIA. SUGAR CANE PLANTATIONS, HUMAN RIGHTS VIOLATIONS AND EU'S "EVERYTHING BUT ARMS" INITIATIVE (2014); David Pred, *Is the European Commission Sweet on Land Grabbing? Trade Benefits, Sugarcane Concessions and Dispossession in Cambodia*, TERRANULLIUS LAND RIGHTS // HUMAN RIGHTS // RULE OF LAW (JUL. 23, 2012), https://perma.cc/S3W4-KUJ4.

29 *See, e.g.*, *Cambodia's Concessions*, LICADHO, (last updated Jul. 30, 3034), https://perma.cc/PW8X-9FLV.

30 Leah M. Trzcinski & Frank K. Upham, *Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia*, 1 ASIAN J. L. & SOC'Y 55 (2014).

31 Esther Leemann & Cari Tusing, *Indigenous Collective Land Titling and the Creation of Leftovers: Insights from Paraguay and Cambodia*, 24 J. AGRARIAN CHANGE 1 (2024). Cari Tusing & Esther Leemann, *Time as the Enemy? Disjointed Timelines and Uneven Rhythms of Indigenous Collective Land Titling in Paraguay and Cambodia*, 12 LAND 1 (2023).

Building on the observation that tenure security spans a range of often conflicting meanings and interpretations, this Article centers on its semantic ambiguity to reveal critical dynamics in international law and governance. At one end of the spectrum, tenure security suggests "a set of relationships . . . that enables one to live in one's home in security, peace and dignity,"[32] while at the other, it denotes "tenure resembling full private ownership."[33] On one end, tenure security is associated with social relationships and the right to live in one's home with stability and peace, emphasizing collective well-being and basic human needs. Here, tenure security serves a social function, rooted in community, relationships, and human rights. On the other end, tenure security reflects an economic, individualistic view of ownership: land as a private, risk-free asset primarily held for investment. This perspective implies a model of tenure that closely resembles full ownership, with exclusive rights to use and transfer land, aligning with more capital-driven or market-oriented interests. In this sense, tenure security prioritizes private property rights, positioning ownership as a fundamental guarantee of security. It is precisely this semantic ambiguity inherent in the concept of tenure security that allows it to both amalgamate and exemplify the diverse and seemingly contradictory approaches to land within contemporary legal and other ordering frameworks. Rather than settling on a single definition of tenure security, this Article explores how its ambiguous language interacts with real-world practices, how aspirations clash with discursive and material limitations, and how both individual and collective agency are constrained by structural forces. This interplay, the Article suggests, can thwart even the most well-intentioned human rights efforts and initiatives, particularly those rooted in liberal ideals and concepts.

Despite considerable debate among scholars in, e.g., economics, [34] development studies,[35] and anthropology,[36] tenure security has, for the most part,

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32 Raquel Rolnik (Special Rapporteur on the Right to Adequate Housing), *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context: Guiding Principles on Security of Tenure for the Urban Poor*, ¶ 5, U.N. DOC. A/HRC/22225/54 (Dec. 30, 2013).

33 John W. Bruce, *Review of Tenure Terminology*, 1 TENURE BRIEF 1, 7 (1998).

34 *E.g.,* Chris D. Arnot, Martin K. Luckert & Peter C. Boxall, *What Is Tenure Security? Conceptual Implications for Empirical Analysis*, 87 LAND ECON. 297 (2011) (emphasizing the critical need for enhanced conceptual clarity to improve empirical studies concerning property rights and development economics).

35 *E.g.*, Franklin Obeng-Odoom & Frank Stilwell, *Security of Tenure in International Development Discourse*, 35 INT'L DEV. PLAN. REV. 315 (2013) (providing an overview and critique of the diverse meanings of security of tenure in international development discourse suggesting that the narrow focus on land titling overlooks diverse legal, economic, and social dimensions).

36 German & Braga, *supra* note 13 (providing an incisive critique of the prevailing global consensus on land tenure security arguing that while progressive language is used the actual policies implemented rarely provide the alleged protection).

escaped the focused scrutiny of international law scholars.[37] Responding to the relative dearth of international law scholarship engaging with this concept, this Article explores how the provision and strengthening of tenure security has become central to agricultural development efforts by leading actors in the development sector, including international organizations [38] and bilateral development agencies, [39] and how tenure security has ultimately become a cornerstone of the land rights agenda enshrined in the SDGs.[40] It makes the case that in a world where colonial legacies persistently shape land relations and where global inequalities are starkly mapped onto landscapes, the ostensibly technical discourse surrounding tenure security must be considered a critical site for challenging the hegemonic structures of international law and must no longer be disregarded by international law scholars.

First, under the guise of promoting tenure security, international organizations and bilateral development agencies have promoted and supported land tenure reforms focused on land formalization and, thereby largely equated tenure security with land alienability.[41] Such reforms most commonly entail the establishment of a liberal property law regime[42] and the implementation of some

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37 A notable exception is Miha Marcenko, *International Assemblage of the Security of Tenure and the Interaction of City Politics with the International Normative Discourse*, 51 J. L. PLURALISM & UNOFFICIAL L. 151 (2019).

38 *E.g.,* KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION (2003); *Land*, WORLD BANK, (last updated Apr. 3, 2023), https://perma.cc/J9DQ-WJKC; Food & Agric. Org. of the U. N., *supra* note 10; *Governance of Tenure,* FAO.ORG, https://perma.cc/E5UB-M4NN (last visited Nov. 10, 2024); *Policy on Improving Access to Land and Tenure Security*, IFAD (Dec. 15, 2008), https://perma.cc/V7WS-EUKE; *Why land tenure is crucial for sustainable food systems,* IFAD, https://perma.cc/5ZY4-8L8Q (last visited Apr 25, 2024); UN-HABITAT, HANDBOOK ON BEST PRACTICES, SECURITY OF TENURE AND ACCESS TO LAND (2003); *Access to Land and Tenure Security*, GLOBAL LAND TOOL NETWORK, (last updated 2023), https://perma.cc/S9H2-VWT7); *Land Tenure Security,* UN-HABITAT, https://perma.cc/FG46-PS3P (last visited Apr. 24, 2024).

39 *E.g.,* M.P. MCPHERSON, USAID POLICY DETERMINATION. LAND TENURE, (1986); Caleb Stevens et al., *A Research Agenda for Land and Resource Governance at USAID*, USAID (2020), https://perma.cc/FV8G-R3BD; *Securing Land Tenure and Property Rights for Stability and Prosperity | Environment, Energy, and Infrastructure | Land Tenure and Property Rights*, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (2023), https://perma.cc/HM7A-N62Q); *E.g.*, GIZ, LAND IN GERMAN DEVELOPMENT COOPERATION: GUIDING PRINCIPLES, CHALLENGES AND PROSPECTS FOR THE FUTURE (2016); BABETTE WEHRMANN & ANDREAS LANGE, SECURE LAND TENURE RIGHTS FOR ALL: A KEY CONDITION FOR SUSTAINABLE DEVELOPMENT. SUCCESSFUL APPROACHES AND THEIR IMPACTS (2019).

40 *E.g.*, LAND TENURE SECURITY AND SUSTAINABLE DEVELOPMENT, (Margaret B. Holland, Yuta J. Masuda, & Brian E. Robinson eds., 2022; Thea Hilhorst, Jaap Zevenbergen & Klaus Deininger, *Land Governance and Tenure Security at Scale: Lessons from the Field*, 110 LAND USE POL'Y 105451 (2021); Tzu-Wei Joy Tseng et al., *Influence of Land Tenure Interventions on Human Well-Being and Environmental Outcomes*, 4 NAT. SUSTAIN. 242 (2020).

41 German, *supra* note 12, at 226–29.

42 For an overview of property law in development, *see, e.g.*, Priya S. Gupta, *Property in Law and Development*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW AND DEVELOPMENT 635 (Ruth Buchanan, Luis Eslava, & Sundhya Pahuja eds., 2023).

form of land registration or land titling.[43] Whereas the link between land formalization and increased agricultural productivity is at best inconclusive,[44] land tenure reforms have been widely criticized for their uneven and often adverse impacts on vulnerable populations.[45] Notwithstanding the questionable economic impact and the serious social drawbacks of such reforms, land formalization remains the "the most utilized tool" within "the toolbox of strategies for strengthening land tenure security,"[46] causing many to wonder "why and how bizarre 'development' ideas gain such immediate and widespread currency."[47]

Second, international human rights instruments and actors subscribe to land formalization as a primary mechanism to provide tenure security despite almost unequivocally rejecting land commodification and financialization. [48]

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43 Land registration generally is understood as an umbrella term encompassing land titling among other practices, Peter Ho & Max Spoor, *Whose Land? The Political Economy of Land Titling in Transitional Economies*, 23 LAND USE POL'Y 580, 581 (2006) (noting that both "[l]and registration or titling generally boils down to answering the following basic questions: whose land; how much land; and where is it located?"). However, Ruth Meinzen-Dick and Esther Mwangi distinguish between land registration and land titling, with the latter referring to "an exercise during which rights to clearly defined land units vested in clearly defined individual or group 'owners' are documented and stored in public registries as authoritative document." Ruth Meinzen-Dick & Esther Mwangi, *Cutting the Web of Interests: Pitfalls of Formalizing Property Rights*, 26 LAND USE POL'Y 36, 38 (2009); *but cf.* Bernadette Atuahene, *Land Titling: A Mode of Privatization with the Potential to Deepen Democracy Respondents*, 50 ST. LOUIS U. L.J. 761, 761 (2005) (describing land titling as the process through which "members of informal communities transition from having one stick in the bundle (possession) to all of the sticks (ownership in fee simple)").

44 *See* Uwacu Alban Singirankabo & Maurits Willem Ertsen, *Relations between Land Tenure Security and Agricultural Productivity: Exploring the Effect of Land Registration*, 9 LAND 138 (2020) (highlighting the limited evidence for any causal link between land registration and productivity and emphasizing the empirical evidence for adverse impacts of land registration on tenure security).

45 For a brief overview of the evidence questioning the link between tenure security and land formalization, *see* German and Braga, *supra* note 13, at 1237–41. Recent examples of empirical studies casting doubt on the desirability of formalization include Caroline Hambloch, *Land Formalization Turned Land Rush: The Case of Oil Palm in Papua New Guinea*, 112 LAND USE POL'Y 105818 (2022); Engström, Bélair & Blache, *supra* note 17; Gabriela Torres-Mazuera, *Dispossession through Land Titling: Legal Loopholes and Shadow Procedures to Urbanized Forestlands in the Yucatán Peninsula*, 23 J. AGRARIAN CHANGE 346 (2023); Sylvia Nam, *Fiction, Fraud, and Formality: The Legal Infrastructure of Property Speculation in Cambodia*, 52 CRITICAL ASIAN STUD. 364 (2020).

46 Margaret B. Holland & Moustapha Diop, *Strategies for Securing Tenure: The Promise and Pitfalls of Formalization*, *in* LAND TENURE SECURITY AND SUSTAINABLE DEVELOPMENT 225, 225 (Margaret B. Holland, Yuta J. Masuda & Brian E. Robinson eds., 2022).

47 Daniel W. Bromley, *Formalising Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady*, 26 LAND USE POL'Y 20, 26 (2009); German, *supra* note 12; German & Braga, *supra* note 13.

48 Land commodification can be understood as the process of transforming land into a commodity, i.e., an object that can be bought, sold, or traded within a market. On land commodification, *see, e.g.*, Harvey Perkins, *Commodification: Re-Resourcing Rural Areas*, *in* HANDBOOK OF RURAL STUDIES 243 (Paul J. Cloke, Patrick Mooney, & Terry Marsden eds., 2006); DAVID HARVEY, THE NEW

Formalization is the go-to policy prescription no matter the narrative underpinning calls for tenure security; whether it is considered crucial to promote investment, productivity, and land markets (commonly associated with development actors), or to support the human rights of peasants and women and Indigenous Peoples' struggles for justice (commonly associated with human rights actors). The human rights framing thus lends renewed legitimacy to "development" interventions that might otherwise face widespread disapproval.

The article further argues that the discourse and practice of tenure security in international law are rooted in colonial ontologies and the technologies of colonial acquisitions that are foundational to global racial capitalism. By embracing land formalization as its primary method, efforts to provide or strengthen tenure security underlie the global proliferation and entrenchment of what Brenna Bhandar calls, "racial regimes of ownership."[49] In other words, the actualization of tenure security through land formalization continues to create and perpetuate racial hierarchies, systemic inequality, and "cultures of dispossession" prevalent across today's world.[50]

The international instruments aimed at the provision of tenure security (such as the VGGT or the SDGs), with their underlying narrow understanding of land and human-land relationships, along with development agencies and human rights actors, are actively implicated in what Tania Murray Li has described as a process of "assembling land as a resource."[51] Human-land relationships are narrowly constructed through ideas of property, ownership, or territory, always implying a relationship of human mastery over nature rooted in Western ontologies shaped in the colonial encounter. In other words, the narrow understandings of land and human-land relationships embedded in contemporary international land governance instruments have distinct colonial roots, which persist to this day.

IMPERIALISM 137–82 (2005); A Haroon Akram-Lodhi, *Land, Markets and Neoliberal Enclosure: An Agrarian Political Economy Perspective*, 28 THIRD WORLD Q. 1437 (2007). Financialization commonly refers to "the increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies." Gerald A. Epstein, *Introduction: Financialization and the World Economy*, *in* FINANCIALIZATION AND THE WORLD ECONOMY 3 (Gerald A. Epstein ed., 2006); on the financialization of land, *see* Jennifer Clapp & S. Ryan Isakson, *Financialization*, *in* HANDBOOK OF CRITICAL AGRARIAN STUDIES 178 (A. H. Akram-Lodhi et al. eds., 2021); Michael Goldman, *Dispossession by Financialization: The End(s) of Rurality in the Making of a Speculative Land Market*, 47 J. PEASANT STUD. 1251 (2020); on the explanatory and analytic limits of financialization, *see* Brett Christophers, *The Limits to Financialization*, 5 DIALOGUES HUM. GEOGRAPHY 183 (2015); *see also* Stefan Ouma, *From Financialization to Operations of Capital: Historicizing and Disentangling the Finance–Farmland-Nexus*, 72 GEOFORUM 82 (2016).

49 Brenna Bhandar, Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership 2 & passim (2018).

50 Brenna Bhandar & Davina Bhandar, *Cultures of Dispossession: Rights, Status and Identities*, DARKMATTER J. 1, 1 (2016).

51 Tania Murray Li, *What Is Land? Assembling a Resource for Global Investment*, 39 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 589 (2014).

By examining the racial capitalist roots of the discourses and technologies that underpin, operationalize, and enact the concept of tenure security today, this Article seeks to dismantle one of the mechanisms through which racial capitalism remains a structuring force in contemporary international law and global governance. International law scholars, especially those who consider themselves part of the Third World Approaches to International Law (TWAIL) movement, have long sought to dismantle the social hierarchies inscribed in and perpetuated by international law and global governance.[52] Unravelling manifold colonial and postcolonial continuities, they underscore the centrality of racial hierarchies within what are "ostensibly neutral international law and institutions."[53] However, until recently, racial capitalism has rarely been foregrounded in this critique. By highlighting how racialized dynamics are embedded in the concept of tenure security enshrined in international instruments, this Article contributes to the emerging body of scholarship exploring the relationship between racial capitalism and international law.[54]

The Article is organized as follows: Part II addresses technologies of dispossession linked to racial capitalism. It shows that the concept of "tenure security" emerged in post-World War II development parlance and has taken center stage in neoliberal land tenure reforms promoted by international organizations and development agencies since the late 1980s. Understanding this historical evolution is crucial for grasping the contemporary dynamics of land tenure reforms, particularly how these reforms intersect with issues of land grabbing and dispossession in the Global South. Part III focuses on the emergence of "tenure security" in international human rights law. It appeared first in the context of the right to adequate housing, initially understood as compatible with neoliberal reforms. Later calls for providing or strengthening tenure security became central in framing large-scale land acquisitions as a human rights issue. While the commodification of land was subsequently understood to lead to the violation of a range of economic, social, and cultural rights, the formalization of land rights is seen as crucial for the realization of various economic, social, and cultural rights, especially for marginalized populations such as peasants and

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52 For a current overview on scholarship engaging with international law's colonialism and imperialism, *see* Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 EUR. J. INT'L L. 7, 34–51 (2023).

53 Makau Mutua & Antony Anghie, *What Is TWAIL?*, 94 PROCEEDINGS ASIL ANN. MEETING 31, 39 (2000); *see, e.g.*, Anghie's examination of the concept of "good governance" Vasuki Nesiah, *The Ambitions and Traumas of Transitional Governance. Expelling Colonialism, Replicating Colonialism*, *in* INTERNATIONAL LAW AND TRANSITIONAL GOVERNANCE: CRITICAL PERSPECTIVES 139, 146 (Emmanuel H. D. De Groof & Micha Wiebusch eds., 2020) (observing that "[s]alient elements of colonial governance technologies carried through the colonial transition and became sedimented into postcolonial global governance ").

54 *See, e.g.*, James Thuo Gathii & Ntina Tzouvala, *Racial Capitalism and International Economic Law: Introduction*, 25 J. INT'L ECON. L. 199 (2022).

Indigenous Peoples. Part IV examines various forms of or visions for land formalization in development and human rights scholarship and practice, excavating the underlying understanding(s) of "land." First, it examines the various conceptualizations of land and land governance in General Comment No. 26 on Land and Economic, Social and Cultural Rights adopted by the U.N. Committee on Economic, Social and Cultural Rights in 2022.[55] Turning to contemporary practices of land formalization, it then argues that while there are crucial differences among the various rationales for formalization (marketability/commodification, protection/secure use-rights, ethno-justice for Indigenous Peoples), contemporary practices of formalization do not reject but reinforce a Eurocentric (post+)colonial[56] ontology of land as a resource. Such an understanding can neither be the basis for efforts of decolonization nor broader social justice projects.

II. INTERNATIONAL LAW AND LAND DISPOSSESSION: FROM COLONIAL GOVERNANCE TO DEVELOPMENT

Part II of this Article seeks to unpack the endurance of colonial narratives, practices, and technologies—their "cultural logics, affects and ways of being"[57]—on contemporary land tenure governance. Proceeding from the recognition that colonial and imperial technologies are evident in contemporary international law, this section posits that some of the colonial practices, techniques, and technologies of appropriation and dispossession, once employed in the assertion of control over territories and peoples, have evolved to remain effective under the guise of promoting tenure security. By examining how colonial and imperial techniques have perpetuated and morphed into seemingly neutral and desirable concepts and technologies embedded in international development, the analysis demonstrates the depth of their entrenchment in the fabric of the international rule of law and development agendas.

It is well established that the dispossession of Indigenous Peoples is not only at the core of settler colonialism but has also been foundational to modern international law and the doctrine of sovereignty.[58] The fact that dispossession is

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55 Comm. on Econ., Soc. & Cultural Rts., General Comment No. 26 on Land and Economic, Social and Cultural Rights, U.N. Doc. E/C.12/GC/26 (Jan. 24, 2023).

56 Emphasizing the persistent and pervasive influence of colonialism, la paperson suggests the notion "post+colonial" explaining that it "refers to the place, people, or cultural arena where colonial activity or duties are carried out. […] At the very least, post+colonial refers to our complicity in empire, in our own colonization and in that of others. It refers to how the categories colonizer and colonized are no longer distinct." la paperson, *The Postcolonial Ghetto: Seeing Her Shape and His Hand*, 1 BERKELEY REV. EDUC., 8 (2010).

57 Bhandar & Bhandar, *supra* note 50, at 1.

58 *E.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005).

not only an inherent feature of international law's past but also its present has, however, received much less attention.[59] Drawing on the work of Brenna Bhandar, Part A focuses on the common roots of modern property law and international law. It outlines how land registration and the ideology of improvement were fundamental to the establishment and proliferation of "racial regimes of ownership." Thereafter, Part B turns to contemporary international law and the role of international property interventions, i.e., land tenure reforms sponsored by international organizations, in enabling or facilitating what became known as "global land grab." This part sets out to demonstrate the peculiar continuity between colonial efforts at land registration and postcolonial land tenure reform.

A. Colonial Blueprints of Dispossession: Race, Rights, and Registration

"[L]ocat[ing] civilization and savagery and identif[ying] the land uses associated with each" was foundational for both modern conceptions of property and modern international law.[60] The conception(s) of property employed in the processes of colonial dispossession, however, did not remain stable. Over almost five centuries of (official) colonialism, the idea of property evolved along with the law of occupation, deeply influenced by notions of European superiority. In fact, it was the colonial encounter itself, and the European discourse legitimating it, that shaped not only what was considered a (legitimate) property right but also the "modern" institution of private property.

In the context of the 17th century British colonization of North America, a Lockean understanding of property as a natural right supported an exclusionary understanding of property. This understanding of property is deeply entwined with the idea of "improvement,"[61] which linked the concept of "civilization" to

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59 Important exceptions include James Thuo Gathii, *Dispossession through International Law: Iraq in Historical and Comparative Context*, *in* DECOLONIZING INTERNATIONAL RELATIONS 131 (Branwen Gruffydd Jones ed., 2006); Matthew Craven, *The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights*, *in* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ACTION 71 (Mashood Baderin & Robert McCorquodale eds., 2007); JOHN REYNOLDS, EMPIRE, EMERGENCY AND INTERNATIONAL LAW 220–21 (2017).

60 Cole Harris, How Did Colonialism Dispossess? Comments from an Edge of Empire, 94 ANNALS ASS'N AM. GEOGRAPHERS 165, 165 (2004).

61 Improvement was, as Martti Koskenniemi points out, "not only a physical phenomenon or a technique. It was a way of organising human relations by allocating rights and duties to those who engaged in activities on the land that were assumed to have a public benefit." MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER 1300–1870, at 707 (2021); *see also* NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW (2020).

an "understanding of property in terms of the exploitation of nature,"[62] thus connecting land use practices with European superiority. It is well known that this served to justify not only the enclosure movement in England but also the appropriation of Indigenous lands in its colonies.[63]

Furthermore, Bhandar argues, by linking ownership and subjectivity, the "conceptualization of value according to specific ideas of improvement" has been embedded into the very fabric of property relations.[64] She further shows that this "ideology of improvement is grafted onto emerging ideas of racial difference, providing both the rationale for the perceived inability of particular populations to enter the pale of industrious, civilized life and the justification for the appropriation of their lands."[65] European colonialism and the racialization of identity and thought,[66] thus, were closely connected to practices of land use. At least since Victoria, European superiority had been associated with a pervasive albeit unstable idea of what constitutes legitimate land tenure associated with civilization, preceding scientific racism.[67] In this way, the concept of property has always been inherently racialized, ultimately leading to the propertization of whiteness in the US.[68]

Beyond ideologies of improvement, Bhandar identifies "logics of abstraction" driven by capitalist rationales as foundational to the establishment of

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62 ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE, 1500–2000, at 59–84 (2014); *see also* Ileana Porras, *Appropriating Nature: Commerce, Property and the Commodification of Nature in the Law of Nations*, *in* LOCATING NATURE: MAKING AND UNMAKING INTERNATIONAL LAW 111 (Julia Dehm & Usha Natarajan eds., 2022) (emphasizing the importance of commerce for turning nature into property available for appropriation in the history of international law).

63 KOSKENNIEMI, *supra* note 61, at 700–12. The idea of improvement was linked to "a new appreciation of material progress as a process which could be investigated and measured" and itself shaped by and shaping the British colonial expansion. PAUL SLACK, THE INVENTION OF IMPROVEMENT: INFORMATION AND MATERIAL PROGRESS IN SEVENTEENTH-CENTURY ENGLAND vii (2015). On the concept of improvement in Locke's theory of property, see Calum Murray, *John Locke's Theory of Property, and the Dispossession of Indigenous Peoples in the Settler-Colony*, 10 AM. INDIAN L.J. 55 (2022); MARGARET DAVIES, PROPERTY: MEANINGS, HISTORIES, THEORIES 93–94 (2007).

64 BHANDAR, *supra* note 49, at 39.

65 *Id.* at 46.

66 Frantz Fanon famously wrote that

> "those who are most responsible for this racialization of thought, or at least for the first movement toward that thought, are and remain those Europeans who have never ceased to set up white culture to fill the gap left by the absence of other cultures" lamenting that "[t]his historical necessity in which the men of African culture find themselves to racialize their claims and to speak more of African culture than of national culture will tend to lead them up a blind alley."

FRANTZ FANON, THE WRETCHED OF THE EARTH 211–13 (Constance Farrington trans., 2002).

67 BHANDAR, *supra* note 49, at 33-75.

68 Cheryl I. Harris, *Whiteness as Property*, 106 HARVARD L. REV. 1707, 1714 (1993) (arguing that "the parallel systems of domination of Black and Native American peoples out of which were created racially contingent forms of property and property rights").

racial regimes of ownership and the commodification of land in settler colonies.[69] It is in the entanglement of property as improvement (inherently linked to European superiority) and the technique of abstraction (through imposition of registration) where Bhandar locates the nexus between property and identity. The severing of people and land and the conceptualization of land as a resource are not only a corollary of colonialism and racism but co-constitutive. She argues that these racial regimes of ownership are continually renewed "through the persistent but differentiated reiteration of a racial concept of humanity defined in relation to logics of abstraction, ideologies of improvement, and an identity-property nexus encapsulated in legal status."[70] Property as a set of legal and bureaucratic techniques creates and secures "colonial appropriation of land and the fashioning of colonial subjectivities."[71]

At the turn of the 20th century, European empires and the U.S. focused intensely on reforming land law and tenure systems in their colonies across Africa and Asia. These reforms, whether or not they embodied the principles of "title by registration," invariably relied on techniques of abstraction, masking the inherent violence of the underlying regimes.[72] This veneer of legitimacy has long obscured the colonial dispossession that these processes enacted. For instance, Timothy Mitchell highlights the "ad hoc, violent, and exceptional character of the law of property" during the British colonization of Egypt, hidden under the guise of abstract, universal rules.[73] Similarly, Irene Watson discusses the Australian legal construct of "extinguishment" of native title, which masked violent colonial foundations with the façade of peaceful settlement by the Crown.[74]

This violent construction of property regimes often accompanied or preceded changes in land distribution. However, the violence associated with

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69 Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 387 (2006).

70 BHANDAR, *supra* note 49, at 13–14.

71 *Id.* at 25.

72 Elisabetta Fiocchi Malaspina, *Universalising Colonial Law Principles on Land Law and Land Registration: The Role of the Institut Colonial International* (1894), 49 HIST. EUR. IDEAS 395, 399–400 (2023). An exception was, for example, Italian Eritrea. Elisabetta Fiocchi Malaspina, *Techniques of Empire by Land Law: The Case of the Italian Colonies (Nineteenth and Twentieth Centuries)*, 6 COMP. LEGAL HIST. 233 (2018). Alvin W -L See notes that attempts to introduce the Torrens system in Singapore date back to 1880 (ultimately succeeding only in 1956); Alvin W -L See, *The Torrens System in Singapore: 75 Years from Conception to Commencement*, 62 AM. J. LEGAL HIST. 66 (2022); Daniel Fitzpatrick, Caroline Compton & Joseph Foukona, *Property and the State or "the Folly of Torrens": A Comparative Perspective Thematic Issue: Conceptions of Ownership*, 42 U.N.S.W.L.J. 953, 963–69 (2019). Similarly, the reforms in Hawaii were driven by ideas of improvement, with the Kuleana Act of 1850 "grant[ing] fee simple titles to commoners 'who occupy and improve any portion' of land." Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 LAW & SOC'Y REV. 273, 291 (2005).

73 Timothy Mitchell, Rule of Experts: Egypt, Techno-Politics, Modernity 57 (2002).

74 Irene Watson, Aboriginal Peoples, Colonialism and International Law: Raw Law 130 (2014).

property is not limited to redistribution alone but is embedded in the very processes of abstraction and formalization. Limiting questions of violence to questions of (re)distribution presumes a universal conception of land as a resource that disregards the fact that the very nature of the human-land relationship is constructed. It is, however, the very construction of the human-land relationship as property that is inherently violence. More specifically, violence is enacted in the processes of abstraction that are fundamental in assembling land as a resource. As Richard Saumarez Smith describes in British colonial land registration in 19th century Panjab, "the most radical change in the concept of land" occurred through processes of abstraction—"the fixing of boundaries, the absolute measurement of area and the classification of soils."[75]

To Bhandar, the "violence of abstraction . . . lies in the production of an object of exchange deracinated of the lived, social relations of occupation, multiple use, spiritual significance, and prior histories that attach to the land."[76] The abstraction that property registration entails not only enabled the commodification of land, but functioned to simultaneously disrupt the prior native/land relationship and erase the violence of this disruption. For example, Bhandar argues that the Australian Torrens system of registration by title, designed in a way to promote easy land transfers and land speculation, was equally "a technique of ownership" as it was "a technique of dispossession."[77] In a similar vein, K-Sue Park has demonstrated that in the U.S. the "relatively unconstrained, widespread, and unilateral mortgage foreclosure first appeared in the context of Indigenous dispossession."[78] This process of abstraction, thus, while inherently violent, serves property's persuasive power, providing a veneer of legitimacy for exclusion.[79] In fact, the spread of techniques of private property and registration across the European colonies was inherently linked to the attractiveness of property as a violent technique capable of erasing the very violence of its constitutional moment.

Driven by ideologies of improvement, techniques of property were increasingly employed across the globe throughout the 19th century, extending

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75 Richard Saumarez Smith, Rule by Records: Land Registration and Village Custom in Early British Panjab 240–41 (1996).

76 Brenna Bhandar, *Property, Law, and Race: Modes of Abstraction Symposium Issue: Law As II, History as Interface for the Interdisciplinary Study of Law: Articles & Essays*, 4 UC IRVINE L. REV. 203, 212–13 (2014).

77 Brenna Bhandar, Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony, 42 J. L. & SOC'Y 253, 257 et seq (2015).

78 K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006, 1010 (2016).

79 On this point see, for example, the vast body of work of critical geographer, Nicholas Blomley. Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid*, 93 ANN. ASS'N OF AM. GEOGRAPHERS 121 (2003).

beyond settler colonies.[80] For example, Austria's adoption of a universal system of title by registration across its empire in 1874 was motivated by distinct modernization ideals.[81] Similarly, various forms of property and land registration, also rooted in ideas of improvement, played a pivotal role in processes of colonization across Africa, the Middle East, and South Asia.[82] Moreover, this technology of registration traveled from the "periphery" to the "metropole," introducing what Alan Pottage describes as a "new grammar of property" in the UK.[83]

Between 1898 and 1905, the *Insitut Colonial International,* a transnational network of experts, devoted to the promotion of "rational and scientific colonization,"[84] produced a series of reports on land ownership and land registration, aiming to establish universal colonial principles on land.[85] The importance of such a "comparative study of the colonial system of modern peoples" was seen as a "necessary and indisputable condition of progress for the science of colonization."[86] These efforts dovetailed with broader calls for more rational and systematic efforts toward the exploitation of the resources of the colonies throughout the early 20th century. However, except for settler colonies, land registration was rarely conducted in a systematic manner. Registration was often formally limited to land held by Europeans or to urban settlements that served as trading centers.[87] Throughout the first half of the 20th century, "the politics of *indirect rule*" prevailed, relying on "the genius of colonial administrators to operate within the structures of kinship and chieftaincy, gently increasing

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80 It is, of course, debatable what constitutes and constituted settler colonies and where settler colonial fantasies dominated colonial endeavors. *See, e.g.*, CHRISTOPHER LLOYD, JACOB METZER & RICHARD SUTCH, SETTLER ECONOMIES IN WORLD HISTORY (2013).

81 C. Fortescue-Brickdale, *Land Registration in Central Europe*, 2 J. SOC'Y COMPAR. LEGIS. 112 (1897).

82 *See, e.g.*, Antony G. Hopkins, *Property Rights and Empire Building: Britain's Annexation of Lagos, 1861*, 40 J. ECON. HIST. 777, 782, 791–92 (1980); SMITH, *supra* note 75; F.G.T. Radloff, *Land Registration and Land Reform in South Africa*, 29 J. MARSHALL L. REV. 809 (1995); Robert Home, *Scientific Survey and Land Settlement in British Colonialism, with Particular Reference to Land Tenure Reform in the Middle East 1920–50*, 21 PLAN. PERSP. 1 (2006).

83 Alain Pottage has argued that this "uncomplicated administrative measure [was] symptomatic of a profound transformation in the process of land transfer" in the sense that "a logic of registration had finally displaced the property logic of contract and conveyance." Alain Pottage, *The Originality of Registration*, 15 OXFORD J. LEGAL STUD. 371, 377 (1995).

84 Elisabetta Fiocchi Malaspina, *Universalising Colonial Law Principles on Land Law and Land Registration: The Role of the Institut Colonial International* (1894), 49 HIST. EUR. IDEAS 395, 396 (2023).

85 Id. at 398–401.

86 Arthur Girault, *'Les Travaux de l'Institut Colonial International: la Main D'Oeuvre'*, 10 REV. ÉCON. POL. 147 (1896), quoted in and translated by Malaspina *supra* note 72, at 401.

87 *See, e.g.*, the case of French Indochina, where with the exception of Cochinchina, land was only surveyed to a very limited degree. PIERRE BROCHEUX & DANIEL HÉMERY, INDOCHINA: AN AMBIGUOUS COLONIZATION, 1858–1954 (2009).

peasant production while maintaining 'customary' law and 'customary' land tenure."[88] This changed during formal decolonization.

It was primarily during the era of formal decolonization that systematic land registration assumed a more prominent role, transforming the colonial approach to land into a tool for asserting individual property rights. While land registration became more formalized during decolonization, its roots and implications were firmly tied to and perpetuated colonial strategies of control that intrinsically linked land use practices with identity. When tasked with developing proposals for the promotion of agricultural and industrial reform in the British colonies in East Africa, the British East Africa Royal Commission noted in its report that "[t]he individual African who wishes to improve his condition looks for security of tenure or ownership of his land, and of his home and of his business."[89] Prefiguring some of the arguments of the 1980s and 1990s, the report emphasized the importance of tenure security through individualized, private land titles as being key for development, and recommended systematic land titling and individualization programs as necessary to provide for sufficient housing or to transition from subsistence to industrial agriculture.[90]

This shift toward systematic land registration during formal decolonization marked a significant transformation in how land was conceptualized and administered in the British colonies. The focus on tenure security and individualized land titles must be understood within the broader context of the emerging concept of "development," which increasingly positioned property rights as essential for economic progress and modernization. This narrative, initially championed by colonial administrators and later adopted by development experts, linked the legal formalization of land ownership with the goals of economic progress and modernization.

These ideological and practical shifts in "land governance" laid the groundwork for contemporary land grabbing processes, where large-scale land acquisitions by foreign investors have become more common. Today, these processes of dispossession often operate within the frameworks and architectures

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88 Frederick Cooper, Development, *Modernization, and the Social Sciences in the Era of Decolonization: The Examples of British and French Africa*, 10 REV. HIST. SCI. HUM. 9, 12 (2004).

89 East Africa Royal Commission, 1953-1955 Report. Presented by the Secretary of State for the Colonies to Parliaments by Command of Her Majesty 195 (1955).

90 *Id.* at 222, 241, 350–54. These recommendations had far-reaching consequences. In Kenya, they resulted in the proposal of the Swynnerton Plan, which "actively sought the consolidation of existing land units and the creation of freehold" and aimed at establishing a wealthy African landed elite along with small-holder peasants. Joseph M. Hodge, *British Colonial Expertise, Post-Colonial Careering and the Early History of International Development*, 8 J. MDN. EUR. HIST. 24, 30–34 (2010); AMBREENA MANJI, THE STRUGGLE FOR LAND AND JUSTICE IN KENYA 38–41 (2020).

of modern, liberal, and democratic systems, rather than outside of them.[91] In fact, the legal formalization of land through registration and titling has been central to the latest iteration of land grabbing. To further explore the role of international organizations and development agencies in promoting development and tenure security in the context of land grabbing, the next section examines the history and theory of land tenure reforms and land titling initiatives endorsed, designed, and funded by these organizations and agencies across the Global South.

B. Development, Tenure Security, and the "Global Land Grab"

1. From land redistribution to neoliberal land tenure reform

In the early post-World War II era, redistributive land reforms were almost universally considered to be crucial for "social and human progress."[92] The UNGA adopted several resolutions on land reform throughout the 1950s, the first of which mandated the FAO in co-operation with the U.N. Secretary-General to prepare a study on the "deficiencies of the agrarian structure of under-developed countries."[93] The resulting study identified a number of "agrarian conditions which obstruct their economic development"[94] including a lack of security of tenure.[95] Land ownership patterns ("the tenancy system"[96]) prevalent in parts of Asia and Latin America were deemed insufficient in providing secure tenure. This insecurity was identified as major obstacle to economic development, as it was considered to discourage productive investment.[97]

During the early years of its existence, the FAO actively promoted land redistribution as a central component of its development. In fact, as Jo Guldi notes, "FAO leaders almost immediately began to advertise their organization as a key player in the global redistribution of land."[98] This commitment stemmed from a widely held belief that addressing unjust land ownership patterns was essential for fostering economic growth, social equity, and political stability in

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91 *See, e.g.*, Liz Alden Wily's analysis of contemporary land grabbing. Liz Alden Wily, *Looking Back to See Forward: The Legal Niceties of Land Theft in Land Rushes*, 39 J. PEASANT STUD. 751 (2012).

92 Jo Guldi notes that in the early 20th century "[l]and redistribution became a theory about poverty, taught in economics programs and sociology courses around the world." JO GULDI, THE LONG LAND WAR: THE GLOBAL STRUGGLE FOR OCCUPANCY RIGHTS 15–22 (2021).

93 Amy Staples, The Birth of Development. How the World Bank, Food and Agriculture Organization, and World Health Organization Changed the World, 1945–1965, at 96 (2006).

94 United Nations Department of Economic Affairs, Land Reform: Defects in Agrarian Structure as Obstacles to Economic Development, 93 (1951).

95 *Id.* at 17-18.

96 *Id.* at 18.

97 *Id.* at 18.

98 GULDI, *supra* note 92, at 72.

newly independent nations. Moreover, Western countries, particularly the U.S., decided early on not to cede the politically potent issue of land and its reform to the communist world. The FAO's efforts were bolstered by the convergence of several factors: the devastation wrought by World War II highlighted the urgent need for food security; the decolonization movement brought demands for economic justice from formerly colonized populations; and prominent economists and social scientists were increasingly recognizing the detrimental impacts of unequal land distribution on economic progress. The FAO engaged in extensive research, producing studies and reports on land tenure systems worldwide, offering technical assistance to member states in designing and implementing land reform programs, and promoting the establishment of agricultural cooperatives to empower smallholder farmers.[99]

At the same time, all efforts by John Boyd Orr, the FAO's first Director General, and his successor Norris Dodd, to structurally transform the global food system were thwarted by the U.S. and its allies.[100] This left Norris Dodd, who took over in 1948, to focus primarily on the provision of technical assistance, which he understood to be necessary in order to increase agricultural production and was simultaneously acceptable to the U.S. and its allies.[101] Technical assistance has been heavily centered on knowledge and technology transfers—primarily the export of industrial agricultural practices from the Global North to the Global South—without disrupting the international trade policies of rich countries.[102] The U.S. and its allies likely did not object because this focus on technical assistance actively benefited their economies.

While technical assistance was largely considered to be compatible with land redistribution,[103] the strategy cleverly sidestepped some of the most contentious issues of land redistribution, such as direct intervention, that had previously sparked conflict. Undergirded by a strong belief in family farms and smallholder agriculture as means to foster democracy, the U.S. did not abandon its efforts to encourage land redistribution in Latin America.[104] As Thomas Sikor and Daniel

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99 For an in-depth history of the FAO's role in land reform, *see id.*

100 Ruth Jachertz & Alexander Nützenadel, *Coping with Hunger? Visions of a Global Food System, 1930–1960*, 6 J. GLOBAL HIST. 99 (2011).

101 STAPLES, *supra* note 93, at 82–104.

102 STAPLES, *supra* note 93, at 83; John H. Perkins, *The Rockefeller Foundation and the Green Revolution, 1941–1956*, 7 AGRIC. & HUM. VALUES 20 (1990); Deborah Fitzgerald, *Exporting American Agriculture: The Rockefeller Foundation in Mexico, 1943-53*, 16 SOC. STUD. SCI. 457 (1986); ROGER BURBACH & PATRICIA FLYNN, AGRIBUSINESS IN THE AMERICAS (1980).

103 In fact, many proponents of technical assistance considered land redistribution to be necessary for its success. GULDI, *supra* note 92, at 75.

104 The U.S. famously supported a series of land reforms in Latin America under its "Alliance for Progress." *See, e.g.*, ALAIN DE JANVRY, THE AGRARIAN QUESTION AND REFORMISM IN LATIN AMERICA (1981).

Müller point out, land redistribution remained rather "popular in international development because it fit the ambitious goal to bring about economic development by way of state action."[105] The U.S. began, however, to actively advocate for a shift away from a narrow understanding of "land reform" toward one that would encompass multiple changes regarding agriculture and land beyond redistribution.[106] By framing assistance as the transfer of knowledge and technology rather than a fundamental restructuring of power dynamics, the U.S. could support development efforts without compromising its own economic interests or those of its corporations. This approach, while seemingly benign, ultimately reinforced existing inequalities by privileging existing power structures and perpetuating dependencies. The promise of increased food production through technology transfer was thus inextricably linked to the maintenance of the existing global economic order, rather than a radical transformation of it. Ultimately, this focus on technical assistance, while seemingly uncontroversial, became a significant factor in the gradual shift away from the more equitable goals of land redistribution that had characterized the early FAO initiatives.

By the late 1960s, redistributive reform had all but disappeared from the agendas of governments and international organizations and was, ultimately, displaced by structural adjustment.[107] Calls for land redistribution by landless subaltern populations did not disappear but the "ambiguity of the word *reform*" was often exploited to appease these deeper redistributive demands.[108] Land reform no longer meant redistributive reforms but denoted land tenure and agrarian reforms, including "anything from agricultural rent control to the introduction of hybrid corn."[109]

In the late 1980s and early 1990s, land reappeared on the agendas of international development organizations and governments, this time as land tenure reforms focused on strengthening property rights, land titling, and tenure security. In this "new wave land reform,"[110] as termed by Henry Bernstein, land

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105 Thomas Sikor & Daniel Müller, *The Limits of State-Led Land Reform: An Introduction*, 37 WORLD DEV. 1307, 1308 (2009).

106 DOREEN WARRINER, LAND REFORM IN PRINCIPLE AND PRACTICE xvi (1969). *See also* Nancy Lapp, *Land Reform in Latin America*, *in* OXFORD BIBLIOGRAPHIES (2015, updated 2019).

107 Only in the early 2000s did a renewed academic debate erupt on the benefits of redistributive versus tenurial reforms for productivity. For a forceful argument in favor of redistributive reform *see* Keith Griffin, Azizur Rahman Khan & Amy Ickowitz, *Poverty and the Distribution of Land*, 2 J. AGRARIAN CHANGE 279 (2002). For a rebuttal *see* Terence J. Byres, *Introduction: Contextualizing and Interrogating the GKI Case for Redistributive Land Reform*, 4 J. AGRARIAN CHANGE 1 (2004).

108 Kenneth L. Karst, *Latin-American Land Reform: The Uses of Confiscation*, 63 MICH. L. REV. 327, 327 (1964).

109 *Id.*

110 For an overview of the history of "land reform" in the 20th century, *see* Henry Bernstein, *Land Reform: Taking a Long(Er) View*, 2 J. AGRARIAN CHANGE 433 (2002).

redistribution played only a marginal role in the form of market-led agrarian reform and was largely supplanted by tenurial reforms.[111] With the end of the Cold War and the waning of the liberation movements in the late 1980s, agriculture was rebranded as rural development and "the 'subsistence farmer' became redesignated as a 'rural entrepreneur.'"[112] Calls for acknowledging communal and collective land rights, which had been part of the Peasants Charter, were replaced by calls for tenure security and individualized, private land titles.[113]

In contemporary development theory and practice, land reform has become synonymous with land *law* or land *tenure* reform.[114] Land tenure reform refers to any changes in the way land is held or owned in a society.[115] Contemporary land tenure reforms are commonly conducted through land law or policy reform and entail efforts to formalize land rights. It is easy to see that the promotion of land law/tenure reforms and land registration/titling over the course of the 1980s and 1990s can be understood as part of "a series of changes in international economics laws, which lay the legal foundation for capital accumulation in the era of globalization."[116]

The revival of land titling was part of the larger "rule of law" and "good governance" agenda promoted by the World Bank since the 1990s, which, at the

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111 For a critical examination of market-led agrarian reform, *see* Edward Lahiff, Saturnino M. Borras & Cristóbal Kay, *Market-Led Agrarian Reform: Policies, Performance and Prospects*, 28 THIRD WORLD Q. 1417 (2007); *see also* A Haroon Akram-Lodhi, *Land, Markets and Neoliberal Enclosure: An Agrarian Political Economy Perspective*, 28 THIRD WORLD Q. 1437 (2007); Saturnino M. Borras, Danilo Carranza & Jennifer C. Franco, *Anti-Poverty or Anti-Poor? The World Bank's Market-Led Agrarian Reform Experiment in the Philippines*, 28 THIRD WORLD Q. 1557 (2007); David A. Atwood, *Land Registration in Africa: The Impact on Agricultural Production*, 18 WORLD DEV. 659 (1990).

112 Peter Gibbon, *The World Bank and African Poverty, 1973–91*, 30 J. MOD. AFR. STUD. 199 (1992).

113 Daniel W. Bromley, *Property Relations and Economic Development: The Other Land Reform*, 17 WORLD DEV. 867 (1989); Adriana Herrera, Jim Riddell & Paolo Toselli, *Recent FAO Experiences in Land Reform and Land Tenure*, land reform / *réforme agraire* / *reforma agrarian*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (1997), https://perma.cc/RP84-GPCN; Bernstein, *supra* note 110; AMBREENA S. MANJI, THE POLITICS OF LAND REFORM IN AFRICA: FROM COMMUNAL TENURE TO FREE MARKETS (2006).

114 For an excellent study of land reform efforts in Africa, *see* AMBREENA S. MANJI, THE POLITICS OF LAND REFORM IN AFRICA: FROM COMMUNAL TENURE TO FREE MARKETS (2006). For an incisive study of land reform in Southeast Asia, *see* DEREK HALL, PHILIP HIRSCH & TANIA LI, POWERS OF EXCLUSION: LAND DILEMMAS IN SOUTHEAST ASIA (2011).

115 The notion "tenure" denotes "relations of resource ownership and control sanctioned in some way by some social institutions." Jesse C. Ribot & Nancy Lee Peluso, *A Theory of Access*, 68 RURAL SOCIOLOGY 153, 157 (2003).

116 B. S. Chimni, International Institutions Today: An Imperial Global State in the Making, 7 EUR. J. INT'L L. 1 (2004).

time, in line with a turn toward new institutional economics, often emphasized the importance of secure property rights for economic development.[117]

Systematic land titling, as propagated by the World Bank and other development agencies, has been viewed as a universal recipe to promote rural development. Tenure security, as a proxy for ownership or property security, was introduced to clarify the incentives of property holders,[118] to encourage investment, and "to foster a more efficient land market."[119]

Despite the alleged importance of tenure security for development, it remains unclear what tenure security is and how it can be strengthened. In practice, however, the promotion of tenure security has been inextricably linked and largely reduced to the provision of land titles. Contrary to ample evidence highlighting the shortcomings of systematic land titling, state-enforced land titles have been advocated as the panacea for securing private property, envisioned as a catalyst for investment and a reliable form of collateral.[120]

Two important and influential publications by USAID and the World Bank put forward a distinctly neoliberal approach toward land.[121] Both publications embedded a market-led, neoliberal approach to land, which encouraged land titling, the liberalization of land markets, and which emphasized the use of land titles as collateral to improve access to credit.[122] Underlying this approach is an evolutionary theory[123] of land and property illustrated by remarks such as that

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117 *See, e.g.*, Tor Krever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model*, 52 HARV. INT'L L.J. 287 (2011). For a sharp critique of the practice of rule of law reform, *see* STEPHEN HUMPHREYS, THEATRE OF THE RULE OF LAW: TRANSNATIONAL LEGAL INTERVENTION IN THEORY AND PRACTICE (2010).

118 Arnot et al., paradigmatically, consider the terms 'tenure security', 'ownership security', and 'security of property' to be synonymous and understand tenure security as proxy for ownership risk. Chris D. Arnot, Martin K. Luckert & Peter C. Boxall, *What Is Tenure Security? Conceptual Implications for Empirical Analysis*, 87 LAND ECON. 297, 297 (2011).

119 Carmen Diana Deere & Magdalena León, *Who Owns the Land? Gender and Land-Titling Programmes in Latin America*, 1 J. AGRARIAN CHANGE 440, 440 (2001).

120 For instance, a 1992 World Bank report on "The World Bank's Experience with Rural Land Titling," which reviewed 12 land titling projects, found that "in virtually all of them, major problems had arisen in the land titling element, which seriously hampered their performance, and substantial cost overruns occurred." Daniel Wachter & John English, *The World Bank's Experience with Rural Land Titling*, Abstract (World Bank Group Environment Department, Working Paper No. 92-35, 1992).

121 USAID, *Policy Determination: Land Tenure* (1986); THE WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE Growth (1989).

122 USAID, *supra* note 121.

123 At a later point it is explicitly noted that "[g]overnments should assist the evolution of land tenure systems by providing legal and administrative mechanisms to ensure greater security of tenure." *Id.* at 107. For the evolutionary theory of land and property, *see, e.g.*, Jean-Phillipe Platteau, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment*, 27 DEV. & CHANGE 29, 42 (1996); James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009-2010).

"[t]itles could also be provided to groups for collective ownership" as "[t]he transition to full land titling will take time to achieve in most African countries."[124] It is in the context of such reforms that the rhetoric surrounding tenure security has pervaded the strategies and discourses of the international development community.

The singular emphasis on land titles is probably best understood through a reading of Hernando de Soto's work, the Peruvian economist who was "breathing life into dead theories about property rights."[125] As Celestine Nyamu Musembi shows, de Soto's prescriptions revived "previously discredited theories on land rights, land tenure reform and productivity," disregarding the abundant empirical data discrediting his arguments.[126] Nonetheless, de Soto's advocacy for formalized and registered property rights as keys to unlocking economic potential and alleviating poverty dovetails with the World Bank's evolving but consistently market-oriented approach to land reform. It is not the security that a land title might provide for the occupant of a home or land, rather, it is the abstraction that the title provides, which, according to de Soto, is at the heart of capitalism.[127]

2. Land titling, marginal land, and land grabbing

Following the global financial crisis and the spike in food and commodity prices in 2007-2008, civil society organizations, the media, and academia focused on a "new" wave of land grabbing.[128] Virtually all characteristics of the new global land grab have been contested in the literature. Already early in the debate, scholars have pointed out that there exist "vast differences in legality, structure and outcomes of commercial land deals" that are often, unfortunately, rather obscured than illuminated by using the catch-all term "land grabbing."[129]

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124 The World Bank, *supra* note 121 at 104.

125 Celestine Nyamu Musembi, *De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights*, 28 THIRD WORLD Q. 1457 (2007). de Soto's work has been discredited by numerous development scholars. *See, e.g.*, Alan Gilbert, *On the Mystery of Capital and the Myths of Hernando de Soto: What Difference Does Legal Title Make?* 24 INT'L DEV. PLAN. REV. 1 (2002).

126 Musembi, *supra* note 125 at 1459.

127 For an excellent examination of legal forms of private property as real abstraction, *see* Brenna Bhandar & Alberto Toscano, *Race, Real Estate and Real Abstraction*, 194 RADICAL PHILOSOPHY 8 (2015).

128 For a recent overview of the literature on the "Global Land Grab," *see* Gustavo de L. T. Oliveira, Juan Liu & Ben M. McKay, *Beyond Land Grabs: New Insights on Land Struggles and Global Agrarian Change*, *in* BEYOND THE GLOBAL LAND GRAB: NEW DIRECTIONS FOR RESEARCH ON LAND STRUGGLES AND GLOBAL AGRARIAN CHANGE 321 (Gustavo de L. T. Oliveira, Juan Liu, & Ben M. McKay eds., 2021). Most recently, Andreas Neef, Chanrith Ngin, Tsegaye Moreda, and Sharlene Mollett have assembled a diverse set of voices on land and resource grabbing in NEEF ET AL., *supra* note 7.

129 Ruth Hall, Land Grabbing in Southern Africa: The Many Faces of the Investor Rush, 38 REV. AFR. POLITICAL ECON. 193, 193 (2011).

Soon after the media and many scholars adopted the NGO GRAIN's claim that a "new global land grab" was taking place, Nancy Lee Peluso and Christian Lund pointed out that, despite a long history of colonial land grabbing, what was new were "new mechanisms of land control, their justifications and alliances of 'taking back' the land, as well as the political economic context of neoliberalism that dominates this particular stage of the capitalist world system."[130] In other words, the "newness" of the "new global land grab" is less about the *what* or the *why* and more about the *how*.

Investment friendly, neoliberal land tenure reforms are integral to the new "how." While not all land grabs are linked to land formalization, the implementation of specific forms of land titles and formalized private property regimes has played a significant role in the most recent wave of global land grabbing. Where land tenure reforms (aimed at land regularization and formalization) have taken place, they have been crucial in the formation of distinctly "racial regimes of ownership," which have often, ultimately, enabled, facilitated, contributed or legitimized distinctly racialized processes of dispossession.[131] As Chakravartty and da Silva have pointed out, the "new territories" of capitalism (in David Harvey's parlance) have been mapped onto previous racial and colonial (imperial) discourses and practices, including discourses and practices around land, property, and registration.[132] Neoliberal land tenure reforms perpetuate an inherently racial system of ownership and subjecthood embedded in capitalism, without the U.S. and Europe necessarily remaining at its core. In other words, even though these "new mechanisms" are in continuity with prior colonial waves of land grabbing,[133] colonial power structures are not simply replicated. While global land grabbing manifests a "clear North-South dynamic that echoes . . . colonialism and imperialism," there is also an "emerging 'South-South' dynamic."[134] Similarly, "local" elites, state actors, and

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130 Nancy Lee Peluso & Christian Lund, *New Frontiers of Land Control: Introduction*, 38 J. PEASANT STUD. 667, 672 (2011).

131 *See, e.g.*, Alden Wily, *supra* note 91, at 768–71.

132 Paula Chakravartty & Denise Ferreira da Silva, *Accumulation, Dispossession, and Debt: The Racial Logic of Global Capitalism—An Introduction*, 64 AM. Q. 361, 368 (2012).

133 Situating the contemporary global land grab in its historical context, Liz Alden Wily has argued that rather than being a "new" phenomenon, it is "a surge in the continuing capture of ordinary people's rights and assets by capital-led and class-creating social transformation." Alden Wily, *supra* note 91, at 751.

134 Saturnino M. Borras et al., *Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction*, 38 J. PEASANT STUD. 209, 209 (2011).

military and paramilitary organizations often play a crucial role in facilitating or conducting land grabs.[135]

Over the course of the past 15 years, many prevalent depictions of the "global land grab meta-narrative" have been revealed as misconceptions. Research by scholars like Carlos Oya has highlighted that many studies are organized around problematic dichotomies such as small family farming vs. large family farming vs. capitalist farming, and national/domestic vs. foreign investment.[136] These dichotomies, Oya argues, create "good"-"bad" scenarios that reproduce serious ideological biases and oversimplify the complex realities of land grabbing.[137] While processes of land grabbing and land dispossession, certainly, differ from one country to the next, similar patterns emerge across different contexts, countries, and continents.[138]

Despite these vast differences, contemporary global land grabbing is generally considered to be intrinsically connected to global capitalism—which, in turn, is inherently linked to international law. Umut Özsu has argued that it is, in fact, "unintelligible absent a theory of capitalism," emphasizing that the processes by which capitalism transforms land and labor cannot be understood without recognizing the periodic waves of legally mediated primitive accumulation that drive it forward.[139] However, in contrast to historical land grabs, contemporary land grabs are "dispossessory projects aim[ed] much more at appropriating land resources than . . . at shaking loose new sources of waged labour."[140]

Borras et al. have pointed out that land grabbing "does not always require expulsion of peasants from their lands; it does not always result in

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135 See, e.g., Ian G. Baird, *The Global Land Grab Meta-Narrative, Asian Money Laundering and Elite Capture: Reconsidering the Cambodian Context*, 19 GEOPOLITICS 431 (2014); Jacobo Grajales, *State Involvement, Land Grabbing and Counter-Insurgency in Colombia, in* GOVERNING GLOBAL LAND DEALS: THE ROLE OF THE STATE IN THE RUSH FOR LAND 23 (Wendy Wolford et al. eds., 2013); Jenniffer Vargas Reina, *Coalitions for Land Grabbing in Wartime: State, Paramilitaries and Elites in Colombia*, 49 J. PEASANT STUD. 288 (2022); Frankline Anum Ndi, James Emmanuel Wanki & Joost Dessein, *Protectors or Enablers? Untangling the Roles of Traditional Authorities and Local Elites in Foreign Land Grabs in Cameroon*, 40 DEV. POL'Y REV. 12572 (2022); Wendy Wolford et al., *Governing Global Land Deals: The Role of the State in the Rush for Land, in* GOVERNING GLOBAL LAND DEALS 1 (Wendy Wolford et al. eds., 2013).

136 Carlos Oya, *Methodological Reflections on 'Land Grab' Databases and the 'Land Grab' Literature 'Rush,'* 40 J. PEASANT STUD. 503, 514 (2013).

137 *Id.*

138 *See, e.g.*, Borras et al., identifying common features across Latin America. Saturnino M. Borras Jr. et al., *Land Grabbing and Global Capitalist Accumulation: Key Features in Latin America*, 33 CAN. J. DEV. STUD. /REV. CAN. ÉTUDES DÉV. 402 (2012).

139 Umut Özsu, *Grabbing Land Legally: A Marxist Analysis*, 32 LEIDEN J. INT'L L. 215, 3 (2019).

140 Derek Hall, *Rural Dispossession and Capital Accumulation*, *in* HANDBOOK OF CRITICAL AGRARIAN STUDIES 515, 515–16 (A. H. Akram-Lodhi et al. eds., 2021).

dispossession." [141] Such statements are, however, premised on a narrow understanding of "dispossession." Dispossession can take many forms, including contamination and pollution.[142] It can also "extend to the appropriation of identity and imagined potential" if land is more than just a resource but a site of collective heritage.[143] Furthermore, in the Black radical tradition, the notion dispossession is also used to refer to the dispossession of the self. This conceptualization extends beyond the mere physical loss of land or territory to encompass a broader spectrum of loss including identity, culture, and the capacity for self-possession and self-determination.[144]

It also refers to the impossibility of self-possession under chattel slavery, which is foundational to subjecthood in the liberal discourse of possessive individualism.[145] Given that "the construction of the American continent as 'empty land' has been central in the fashioning of self-consciousness as the liberal subject itself," it is evident that these two forms of (dis)possession are co-constitutive with the importance afforded to land.[146]

Importantly, dispossession is related to but not synonymous with the concept of expulsion.[147] Saskia Sassen, who popularized the concept of expulsion, had observed "a sharp growth in the number of people, enterprises, and places expelled from the core social and economic orders of our time."[148] The notion of "expulsion" is used to describe "populations who are rendered surplus and

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141 Borras et al., *supra* note 6 at 850. See also Derek Hall, *Primitive Accumulation, Accumulation by Dispossession and the Global Land Grab*, 34 THIRD WORLD Q. 1582 (2013).

142 Hua Li & Lu Pan, *Expulsion by Pollution: The Political Economy of Land Grab for Industrial Parks in Rural China*, 18 GLOBALIZATIONS 409, 409 (2021). See also, Lindsay Ofrias, Invisible Harms, *Invisible Profits: A Theory of the Incentive to Contaminate*, 58 CULTURE, THEORY & CRITIQUE 435, 435 (2017). Tom Perreault, *Dispossession by Accumulation? Mining, Water and the Nature of Enclosure on the Bolivian Altiplano*, 45 ANTIPODE 1050 (2013).

143 A. June Brawner, *Landed Value Grabbing in the Terroir of Post-Socialist Specialty Wine*, 18 GLOBALIZATIONS 390, 392 (2021).

144 These two "ax[es] of dispossession" (land and bodily expropriation) have been vying for recognition as "capitalism's condition of possibility." HUI WANG, CARCERAL CAPITALISM 117 (2018).

145 The Black radical tradition provides a particularly rich literature on self-ownership, self-possession and its link to personhood and subjectivity. *See, e.g.*, SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA passim (1997). ACHILLE MBEMBE, NECROPOLITICS 74–75 (Steven Corcoran trans., 2019); FRED MOTEN, IN THE BREAK: THE AESTHETICS OF THE BLACK RADICAL TRADITION (2003); Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, 3 CR: THE NEW CENTENNIAL REV. 257 (2003); ALIX KATES SHULMAN ET AL., WOMEN'S LIBERATION!: FEMINIST WRITINGS THAT INSPIRED A REVOLUTION & STILL CAN (2021); Cole Harris, *How Did Colonialism Dispossess? Comments from an Edge of Empire*, 94 ANNALS ASS'N AM. GEOGRAPHERS 165, 165 (2004).

146 DENISE FERREIRA DA SILVA, TOWARD A GLOBAL IDEA OF RACE 204 (2007).

147 For a different understanding see Hall, *supra* note 140 at 520.

148 SASKIA SASSEN, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY 1 (2014).

represent no 'utility', those who, for whatever reason, are expelled from possibilities of exploitation and of expropriation."[149] This can be, but is not *necessarily*, the case in the context of contemporary global land grabbing. Contrary to what has been suggested by some,[150] neoliberalism, neoliberal land tenure reform, and contemporary global land grabbing cannot be reduced to the making and management of "surplus populations" (in Marx's words).[151]

Contemporary land grabs regularly take place through or in the shadow of the domestic and international legal framework, rather than outside of it.[152] While non-economic force certainly plays a role in many instances,[153] global and local land markets are central mechanisms through which dispossession takes place.[154] The financialization of urban and rural land markets is crucial to understanding land grabs and dispossession globally.[155] Nancy Fraser has pointed out that it is "largely by means of debt that peasants are dispossessed and rural land grabs are

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149 GARGI BHATTACHARYYA, RETHINKING RACIAL CAPITALISM: QUESTIONS OF REPRODUCTION AND SURVIVAL 37 (2018).

150 David Lloyd & Patrick Wolfe, *Settler Colonial Logics and the Neoliberal Regime*, 6 SETTLER COLONIAL STUD. 109, 111 (2016).

151 Tania Murray Li, *To Make Live or Let Die? Rural Dispossession and the Protection of Surplus Populations*, 41 ANTIPODE 66 (2010). Citing Marx? clarify

152 *See, e.g.*, Daniel Fitzpatrick, *The Legal Design of Land Grabs: Possession and the State in Post-Conflict Cambodia*, *in* LAND GRABS IN ASIA: WHAT ROLE FOR THE LAW? 67–82 (Connie Carter & Andrew Harding eds., 2015).

153 Whether extra-economic force is a necessary characteristic of land grabs has been debated. *See, e.g.*, DAVID HARVEY, THE NEW IMPERIALISM 184 (2005); Michael Levien, *The Land Question: Special Economic Zones and the Political Economy of Dispossession in India*, 39 J. PEASANT STUD. 933, 940 (2012). Derek Hall has pointed out that in definitions of contemporary land grabbing in the literature, "all include capitalist-to-capitalist land purchases and leases, deals which do not involve extra-economic means of accumulation, [and] do not bring anything 'into' capitalism." Hall, *supra* note 140 at 1599.

154 A. Haroon Akram-Lodhi writes that "large-scale corporate farmland acquisition must be located within the development of capitalism in agriculture because domestic land acquisition for farming, either as a result of dispossession by displacement – that is, primitive accumulation – or dispossession by accumulation – that is, market-led exclusion – is a routine and predictable, if not universal part of the process of capitalist development." A. Haroon Akram-Lodhi, *Contextualising Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System*, 33 CAN. J. DEV. STUD. /REV. CAN. ÉTUDES DÉV. 119, 126 (2012).

155 See, e.g., M. Vijayabaskar & Ajit Menon, *Dispossession by Neglect: Agricultural Land Sales in Southern India*, 18 J. AGRARIAN CHANGE 571 (2018); Sarah Rotz, Evan D.G. Fraser & Ralph C. Martin, *Situating Tenure, Capital and Finance in Farmland Relations: Implications for Stewardship and Agroecological Health in Ontario, Canada*, 46 J. PEASANT STUD. 142 (2019); ANNA CHADWICK, LAW AND THE POLITICAL ECONOMY OF HUNGER 49 (2019); Andrea P. Sosa Varrotti & Carla Gras, *Network Companies, Land Grabbing, and Financialization in South America*, 18 GLOBALIZATIONS 482 (2021); Karina Kato & Sergio Leite, *Land Grabbing, Financialization and Dispossession in the 21st Century: New and Old Forms of Land Control in Latin America*, in HANDBOOK ON CRITICAL POLITICAL ECONOMY AND PUBLIC POLICY 144 (Christoph Scherrer, Ana Garcia & Joscha Wullweber eds., 2023).

accorded a veneer of legality in the capitalist periphery."[156] In other words, contemporary land dispossession and land grabbing is a "legal" process rather than an "illegal" or "extralegal" one and is closely linked to financial markets and financial capitalism.

Formalization processes often lead to increased vulnerability of untitled and informally held land. As Nancy Lee Peluso and Christian Lund note

> [t]he institutionalization of private property and the physical fencing off of common or state land turns common property landholders into trespassers by the stroke of a pen. Legalization and institutionalization of this new ownership dispossesses commoners or individual claimants without 'legal titles', and powerful, legitimized, or draconian enforcement turns ordinary people into 'poachers and squatters.'[157]

This effect has been regularly described as an undesirable "side effect" of land titling, attributable to inadequate design and implementation.[158] In contrast, Frank Upham has argued that it is precisely the increased tenure insecurity, i.e. the destruction of property rights and their replacement with a different system, that leads to development. The "dispossession of the relatively weak to encourage large scale investment" is what will be measured in terms of economic growth.[159] Rather than increasing tenure security, land titling and formalization are technologies of land grabbing and dispossession.[160]

This is closely connected to familiar notions such as "available," "degraded," "marginal," and "unutilized" land. These notions are, however, racialized metaphors, only recognizing certain practices and land relations while erasing others. By invoking food scarcity, insufficient resources, climate change, biodiversity loss, and similar global anxieties, "marginal" lands are seen as "empty of owners" and available for appropriation and use.[161] Marginal lands are increasingly seen as an important source for sustainable food and energy

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156 Nancy Fraser, *Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson*, 3 CRIT. HIST. STUD. 163, 176 (2016).

157 Peluso & Lund, *supra* note 130 at 674.

158 Even the World Bank Inspection Panel noted that the land titling efforts in Cambodia promoted by the World Bank proved "ineffective and, in some circumstances, counterproductive, in increasing tenure security in areas where the increase in land values is significant and where this may attract predatory interest." World Bank Inspection Panel, *Investigation Report, Cambodia: Land Management and Administration Project* (Credit No. 3650-KH), Report No. 58016-KH, ¶ 294 (Nov. 23, 2010).

159 FRANK K. UPHAM, THE GREAT PROPERTY FALLACY: THEORY, REALITY, AND GROWTH IN DEVELOPING COUNTRIES 129 (2018).

160 See, e.g., Michael B. Dwyer, *The Formalization Fix? Land Titling, Land Concessions and the Politics of Spatial Transparency in Cambodia*, 42 J. PEASANT STUD. 903 (2015); Michael B. Dwyer, The Fiction of Formalization, in LAND FICTIONS: THE COMMODIFICATION OF LAND IN CITY AND COUNTRY 144 (D. A. Ghertner & R. W. Lake eds., 2021).

161 Wily, *supra* note 91 at 768.

production.[162] As German et al. put it, these metaphors "have become epithets in common usage among proponents of large-scale land acquisitions, discursively rendering landscapes as commodities ready for the taking."[163] Today, the notion of "marginal land" plays a particularly central role in the context of "green grabbing:" processes of land and resource grabbing that are associated with environmental agendas such as biodiversity conservation. Moreover, the provision of tenure security, i.e., the formalization of land, is reflexively linked with narratives of "sustainable development."[164]

These ongoing and contemporary practices of land formalization demonstrate how emerging post-colonial regimes of ownership are deeply tied to the historical legacies of colonialism and the ongoing dynamics of neoliberal and racial capitalism. When assigning legal titles and formalizing land ownership, states, along with development agencies, regularly prioritize certain groups and actors over others.[165] Moreover, contemporary practices of land formalization primarily recognize the rights of land users whose land use practices are deemed valuable and productive from an economic or agricultural expertise standpoint. Contemporary practices of land formalization are thus not dissimilar to colonial practices of dispossession, which operated on the premise that the appropriation of land not directed toward "improvement"—and thus not aligning with the colonial standard of "civilization"—was legitimate under prevailing legal, moral and religious norms. Narratives of "unused," "marginal," or "waste" land awaiting investment and value generation through commercial agriculture or conservation echo colonial discourses of *terra nullius*, where the lands of Indigenous Peoples and other marginalized groups are seen as empty or wasted

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162 Muhammad Aamer Mehmood et al., *Biomass Production for Bioenergy Using Marginal Lands*, 9 SUSTAINABLE PROD. & CONSUMPTION 3 (2017); Ilya Gelfand et al., *Sustainable Bioenergy Production from Marginal Lands in the US Midwest*, 493 NATURE 514 (2013); Madhu Khanna et al., *Redefining Marginal Land for Bioenergy Crop Production*, 13 GCB BIOENERGY 1590 (2021).

163 Laura German, Davison Gumbo & George Schoneveld, *Large-Scale Land Acquisitions: Exploring the Marginal Lands Narrative in the Chitemene System of Zambia.*, 2 QA - RIV. ASSOC. ROSSI-DORIA 109, 109–10 (2013).

164 Hilhorst, Zevenbergen & Deininger, *supra* note 40 at 1.40. In short, the latest iteration of colonization is arguably driven by narratives of ecological scarcity. Julia Dehm's work on REDD+ is particularly insightful in this regard. *See generally* JULIA DEHM, RECONSIDERING REDD+: AUTHORITY, POWER AND LAW IN THE GREEN ECONOMY (2021); Julia Dehm, *Indigenous Peoples and REDD+ Safeguards: Rights as Resistance or as Disciplinary Inclusion in the Green Economy?*, 7 J HUM. RTS. & ENV. 170 (2016).

165 Michael Dwyer termed this the "uneven geography" of land formalization. Michael B. Dwyer, *The Formalization Fix? Land Titling, Land Concessions and the Politics of Spatial Transparency in Cambodia*, 42 J. PEASANT STUD. passim (2015); Michael B. Dwyer, The Fiction of Formalization, in LAND FICTIONS: THE COMMODIFICATION OF LAND IN CITY AND COUNTRY passim (D. A. Ghertner & R. W. Lake eds., 2021). Dwyer, *supra* note 160, at 148; *see also* Cari Tusing & Esther Leemann, *Time as the Enemy? Disjointed Timelines and Uneven Rhythms of Indigenous Collective Land Titling in Paraguay and Cambodia*, 12 LAND 1620 (2023).

until put to use by supposedly more "efficient" or "environmentally conscious" entities.[166] This establishes racial regimes of ownership in two seemingly paradoxical ways. On the one hand, this often legitimizes the dispossession of these communities by erasing/negating their existence in the first place. On the other hand, the formalization of Indigenous Peoples' rights to land and territory are often linked to the idea or rationale that Indigenous Peoples can and should be the protectors of nature in times of global environmental breakdown, an issue I will return to in Part IV.

As Part II showed, the concept of tenure security has played an important role in international development as a driver of land tenure reforms. These reforms have led to dispossession and facilitated land grabbing through the imposition of formal property regimes, reflecting a continuation of colonial expropriation practices. Tenure security, however, has also played an important role in international human rights law. Moving forward, it is crucial to examine how tenure security has been framed within international human rights law and the implications of this framing for vulnerable populations, particularly in the context of the right to adequate housing and Indigenous Peoples' rights. Beginning in the early 1990s and especially in the aftermath of the "global land grab," international actors in the human rights field called for the strengthening of tenure security in the Global South. In Section III, I will thus turn to the emergence and evolution of "tenure security" and land tenure governance as a human rights issue over nearly the past four decades.

III. TENURE SECURITY IN INTERNATIONAL HUMAN RIGHTS LAW: MEETING DEVELOPMENT HALFWAY?

In the realm of *international human rights law*, the concept of tenure security first gained prominence through the U.N. Committee on Economic, Social and Cultural Rights (CESCR), notably in General Comments No. 4 (1991) on the right to adequate housing and No. 7 (1997) on forced evictions. General Comment No. 4 identified "legal security of tenure"[167] as a fundamental element of the right to adequate housing. This was reiterated and specified in General Comment No. 7.[168] While details of the obligation to provide legal security of tenure remain unclear, legal protection against forced evictions contrary to the Covenant is certainly a

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166 Andrew Fitzmaurice, *The Genealogy of Terra Nullius*, 38 AUSTRALIAN HIST. STUD. 1 (2007); Charles Geisler, *New Terra Nullius Narratives and the Gentrification of Africa's "Empty Lands"*, 28 J. WORLD-SYSTEMS RSCH. 15 (2012); Fouad Makki, *Development by Dispossession: Terra Nullius and the Social-Ecology of New Enclosures in Ethiopia*, 79 RURAL SOCIOLOGY 79 (2014).

167 Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4: The Right to Adequate Housing, U.N. Doc. E/1992/23 art. 11.1 ¶ 8 (Dec. 13, 1991).

168 Comm. on Econ., Soc. & Cultural Rts., General Comment No. 7: The Right to Adequate Housing, art. 11.1 ¶ 1, U.N. DOC. E/1998/22 (May 20, 1997).

minimum core obligation.[169] As part of the minimum core of the human right to adequate housing, "legal security of tenure" provides an interesting lens to investigate the interaction and co-constitution of human rights and development. Limiting the analysis to the concept of "legal security of tenure" allows a sharper focus on the potential to transform existing economic, social, and cultural rights.[170]

Mainstream international law scholars almost unanimously see "convergence" between human rights and development as desirable.[171] Critical legal scholars, especially those writing from within a postcolonial framework, have, however, long sought to unsettle this consensus. For instance, Ratna Kapur views (actually existing) human rights as "techniques of governance which discipline and regulate the subject of human rights."[172] As Kapur has put it, the "idea of human rights as a project is already affected by—and overtly and covertly implicated in—structures of power" and, thus, cannot be salvaged as a project of freedom and liberation.[173] Similarly, Upendra Baxi has criticized the appropriation of human rights discourse by global capital, leading to what he calls the emergence of "market-friendly human rights."[174] Sundhya Pahuja further argues that the integration of human rights and development transforms a promised sphere of "rights" into "regulation," thereby negating "the political quality of human rights" and stabilizing the "transcendent space of universality."[175] Importantly, none of these critics abandoned the human rights project. Rather, as Kapur lays out, they seriously engage with it as an important technology of global governance.[176]

Building on these critical perspectives, the next section examines the concept of tenure security within the framework of human rights. This exploration will

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169 The UN CESCR devised the concept of the minimum core to emphasize that the ICESCR contains certain immediate and non-negotiable obligations. Comm. on Econ., Soc. & Cultural Rts, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2.1), ¶ 10, U.N. DOC. E/1991/23 (Dec. 14, 1990). On minimum core obligations, *see, e.g.*, Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 S. AFR. J. ON HUM. RTS. 206, 249–56 (2000).

170 For a recent overview over empirical critiques of human rights, *see* Malcolm Langford, *Critiques of Human Rights*, 14 ANN. REV. L. & SOC. SCI. 69, 69 (2018). Samuel Moyn has recently criticized, what he called, "[t]he selective attention of human rights politics toward a minimum provision" and used the minimum core as an example. SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD xii (2018).

171 Sundhya Pahuja, *Rights as Regulation: The Integration of Development and Human Rights*, *in* THE INTERSECTION OF RIGHTS AND REGULATION 167–68 (Bronwen Morgan ed., 2007).

172 RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL 3 (2018). Ben Golder uses the phrase "actually existing human rights" to describe Kapur's project. Ben Golder, *Critiquing Human Rights*, 12 HUMAN.: INT'L J. HUM. RTS. & DEV. 226, 235 (2021).

173 KAPUR, *supra* note 172, at 2.

174 UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 234–75 (3rd ed. with new preface ed., 2008).

175 Pahuja, *supra* note 171, at 168, 170.

176 KAPUR, *supra* note 172, at 2.

focus on the right to adequate housing as articulated in General Comments No. 4 and No. 7 of the U.N. Committee on Economic, Social and Cultural Rights, as well as on the concept of tenure security incorporated in the United Nations Declaration on the Rights of Indigenous Peoples. Comparing and contrasting these frameworks will allow us to better understand the complexities and contradictions inherent in current international human rights instruments. Subsequently, the analysis turns to international instruments adopted in response to the "Global Land Grab," emphasizing the right to food through reports and principles issued by the Special Rapporteur on the Right to Food, as well as guidelines from international organizations. The section will critically examine how these instruments, despite their security-focused rhetoric, often fall short of providing meaningful safeguards for those most at risk, such as Indigenous communities and marginalized groups. It will also explore how international human rights frameworks frequently reinforce existing power dynamics, failing to challenge the entrenched interests that perpetuate insecurity. Even when human rights frameworks aim to protect land rights, they frequently align with development-oriented strategies that favor formalized, market-compatible systems over alternative land use practices and tenure systems. The human rights promise of equitable land access thus becomes compromised, as securing land rights regularly means subjecting them to market forces, leaving vulnerable communities susceptible to dispossession. Furthermore, this convergence subtly forces Indigenous and local landholders into a legal model that predominantly values land as a resource or asset for exploitation and optimization. In doing so, it continually enacts land as a resource that disregards and potentially erases alternative ontologies, thus, perpetuating economic and social inequalities antithetical to the ethos of human rights.

A. Land and Tenure Security for the Individual or the Collective?

1. "Legal security of tenure" as an aspect of the right to adequate housing

General Comment (GC) No. 4 marked a significant juncture in the work on the International Covenant on Economic, Social and Cultural Rights (ICESCR); this was the first time that the Committee elaborated in a General Comment on substantive aspects of a right. At the heart of GC No. 4 is paragraph 8, which establishes legal security of tenure as the "cornerstone of the right to housing."[177] It is the *legal* dimension of security of tenure that is elevated to an important aspect of the right to adequate housing. Contrary to its usage in the development sector, the CESCR does not consider legal security of tenure as a means to an end. Rather,

[177] Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities*, (Queen Mary Sch. L. Legal Stud. Res. Paper No. 146, 2013).

legal security of tenure must be guaranteed as an inherent part of the right to adequate housing understood as living in "security, peace and dignity."

Paragraph 8(a) GC No. 4 understands legal security of tenure as the "legal protection against forced eviction, harassment and other threats:"

> Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.[178]

The imperative for states is to take "immediate measures aimed at conferring legal security of tenure" to those lacking "legal protection against forced eviction, harassment and other threats."[179] Furthermore, paragraph 18 states that "instances of forced eviction [as] prima facie incompatible with the requirements of the Covenant [that] can only be justified in the most exceptional circumstances."[180] States' obligation to take "immediate measures" implies that the provision of "legal security of tenure" constitutes a "minimum core obligation" that is virtually independent of a state's resource constraints.[181]

Paragraph 8(a) of GC No. 4 does not understand legal security of tenure as the absence of any (risk of) forced evictions (and other threats), but as the existence of effective legal protection against forced evictions. By emphasizing the "variety of forms" that tenure can take, paragraph 8(a) posits a universal entitlement to *legal* protection "against forced eviction, harassment, and other threats," irrespective of the nature of tenure and, certainly not limited to "formalized property." Everybody, whether they have obtained a title deed, a rental contract, or any other formalized documentation of a right to occupy a dwelling or land, must be guaranteed access to legal protection against forced eviction, harassment, and other threats.

Access to legal protection would presumably result in (effective) protection against forced evictions that are unjustifiable under the ICESCR. GC No. 4 remains, however, relatively vague regarding what such "legal protection" entails and does not specify the conditions under which forced evictions can be justified.

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178 Comm. on Econ., Soc. & Cultural Rts, General Comment No. 4, *supra* note 167 ¶ 8.

179 *Id.* Around the same time, the Commission on Human Rights, in similar language to the UNCESCR, urged "[g]overnments to confer legal security of tenure on all persons currently threatened with forced eviction." Office of the High Commissioner for Human Rights, Forced Evictions, Comm'n on Hum. Rts. Res. 1993/77, 67th mtg., ¶ 3, U.N. Doc. E/CN.4/1993/77 (Mar. 10, 1993).

180 Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4, *supra* note 167 ¶ 18.

181 Comm. on Econ., Soc. & Cultural Rts, General Comment No. 3, *supra* note 169 ¶ 10.

The few existing references to concrete measures point to a decidedly procedural understanding of legal security of tenure.[182] It is apparent that the CESCR consider the implementation of (effective) legal procedures and legal remedies as important safeguards when it comes to the provision of tenure security. In other words, GC No. 4 understands legal security of tenure as primarily a procedural issue.

The CESCR returned to the issue of forced evictions in 1997 when it dedicated its GC No. 7 to "determining the circumstances under which forced evictions are permissible and of spelling out the types of protection required to ensure respect for the relevant provisions of the Covenant."[183] For the purposes of GC No. 7, forced evictions are "the permanent or temporary removal against the will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."[184] GC No. 7 outlines criteria for lawful evictions, emphasizing their compliance with legal rights, human rights, and procedural safeguards. It mandates that evictions must not render individuals homeless, requiring the state to ensure adequate alternative housing or resettlement.[185] It also clarifies that the prohibition of forced evictions does not "apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights."[186] In particular, evictions must not render individuals homeless. As a result, states are obligated to ensure adequate alternative housing, resettlement, or access to productive land within its available resources.[187] In other words, if the state ensures that evictions fulfill certain criteria," such evictions are not considered to be "forced" under GC No. 7. In other words, if these largely procedural safeguards are in place, occupants are considered to have the "degree of security of tenure"[188] required by the right to adequate housing.

While GC No. 7 is focused specifically on forced evictions, GC No. 4 attempts to broadly lay out the obligations that states have in the progressive realization of the right to adequate housing for the homeless and poorly housed.[189] The Committee was clearly concerned about these two connected but separate issues: mass forced evictions and displacement, on the one hand, and the broader

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182 Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4, *supra* note 169 ¶ 17.

183 Comm. on Econ., Soc. & Cultural Rts., General Comment No. 7, *supra* note 168 ¶ 2.

184 *Id.* ¶ 3.

185 *Id.* ¶¶ 5, 9, 11, 14, 15.

186 *Id.* ¶ 3.

187 *Id.* ¶ 16; reiterated in *Djazia and Bellili v. Spain,* E/C.12/61/D/5/2015, ¶ 15.2 (21 July 2017).

188 Comm. on Econ., Soc. & Cultural Rts., General Comment No. 7, *supra* note 168 ¶ 1.

189 Comm. On Econ., Soc. & Cultural Rts., General Comment No. 4, *supra* note 169 ¶¶ 2, 4.

issue of "homelessness and inadequate housing"[190] on the other. While the former seemed to be amenable to an easy fix (provide legal protection, legal remedies), the latter seemed trickier.

In its elaboration on states' obligations regarding the progressive realization of the right to housing, the U.N. CESCR has been deeply influenced by the development discourse and practice on housing. GC No. 4 explicitly links the right to adequate housing to the Global Strategy for Shelter to the Year 2000 (GSS) endorsed by the UNGA in 1988.[191] It was through the GSS that the "enabling approach" to housing, primarily developed by the World Bank and driven by the neoliberal market logic of the 1980s, was firmly established within the international housing policy framework. This approach was rooted in the belief that formalized property rights, would unleash private investment in housing by enabling land and homes to be used as collateral in mortgage transactions.[192]

The link to the GSS did not create any direct obligations. It leaves for the state to decide "which means are the most appropriate under the circumstances."[193] However, GC No. 4 encourages states to adopt "enabling strategies," as governments are regularly unable to meet the demands for housing through investments in public housing.[194] The assumption seems to be that especially "developing countries" could benefit from the adoption of an "enabling approach" to housing as they are not otherwise able to fulfill their obligations to progressively realize the right to adequate housing.[195] GC No. 4 also emphasizes the importance of "formal legislative and administrative measures" and, again, points to the GSS for guidance, which highlights the importance of "land registration."[196]

The compatibility of the right to housing and the enabling approach was reiterated by the then Chairperson of the Committee on Economic, Social and Cultural Rights, Philip Alston. In his efforts to eliminate any doubts about the

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190 *Id.* ¶ 4.

191 G.A. Res. 43/181, Global Strategy for Shelter to the Year 2000*,* U.N. DOC. A/RES/43/181 (Dec. 20, 1988).

192 Manuel B. Aalbers, Raquel Rolnik & Marieke Krijnen, *The Financialization of Housing in Capitalism's Peripheries*, 30 HOUS. POL'Y DEBATE 481, 483 (2020).

193 Comm. On Econ., Soc. & Cultural Rts., General Comment No. 3, *supra* note 167 ¶ 4.

194 *Id.* ¶ 14.

195 Scott Leckie, one of the experts invited by the Committee to contribute to the discussion of the right to housing, advocated for an "active cooperation" between the CESCR and UN-Habitat and for the infusion of the right to adequate housing with the core ideas of the Global Shelter Strategy and the enabling approach to housing. Scott Leckie, *The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach*, 11 HUM. RTS. Q. 522, 545, 558 (1989).

196 Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4, *supra* note 169 ¶ 15; G.A. Res. 43/181, *supra* note 191.

existence of an international right to adequate housing in advance of the second UN Conference on Human Settlements, Alston noted that this right is compatible with the "*enablement* approach reflected in the United Nations Global Strategy for Shelter to the Year 2000" as it does not entail "an obligation upon a Government actually to provide every individual with housing."[197] He further notes that "States must above all be encouraged to support self-sufficiency strategies,"[198] while reiterating that forced evictions are *prima facie* a violation of the right to adequate housing.[199] Human rights and development are framed as complementary projects, a position that has been criticized as "preclud[ing] human rights based contestation for economic equity which challenges the economic orthodoxy of the development institutions."[200]

2. Tenure security for Indigenous Peoples under the UNDRIP

Until the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the UNGA in 2007, the International Labor Organization's Indigenous and Tribal Peoples Convention of 1989 (ILO Convention No. 169) was one of the only international instruments aimed at protecting Indigenous Peoples' rights. UNDRIP radically expanded the recognition and protection of Indigenous Peoples under international law. Despite of its nature as a legally non-binding declaration, it is considered to partly reflect both customary international law as well as ratified treaty law including the right to self-determination enshrined in common Article 1 of ICCPR and ICESCR.[201] While Indigenous Peoples' claims are not only derived from traditional, liberal international human rights law,[202] many of the rights articulated in UNDRIP are enshrined in established international human rights law. UNDRIP acts by extending and reaffirming protections to Indigenous individuals

197 Comm. on Econ., Soc. & Cultural Rts., Report on the Twelfth and Thirteenth Sessions, 1–19 May 1995, 20 November–8 December 1995, Annex VII ¶ 14, U.N. Doc. E/1996/22 (1996).

198 *Id.* at Annex VIII ¶ 12.

199 *Id.* at Annex VIII ¶ 15.

200 Pahuja, *supra* note 171, at 189.

201 International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.. On the significance of UNDRIP see, e.g., S. James Anaya, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, U.N. DOC. A/HRC/9/9 ¶ 43 (Aug. 11, 2008); see also, I.L.A., Res. No. 5/2012, Rights of Indigenous Peoples ¶¶ 2–3, 75th Conf. of the I.L.A., Sofia, Bulg., Aug. 26–30, 2012. On the significance of a "Declaration" see Comm'n on Human Rts., Use of the Terms "Declaration" and "Recommendation," Memorandum by the Office of Legal Affairs ¶¶ 4–5, U.N. Doc. E/CN.4/L.610 (Apr. 2, 1962).

202 See, e.g., Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189 (2001).

and groups.[203] Some commentators have argued that UNDRIP "seemingly seeks to 'collectivize'" human rights "that are conventionally understood to attach to individuals only,"[204] such as the right to equality or non-discrimination. Although the relationship between UNDRIP and established international human rights law remains a complicated and contested one, UNDRIP's interpretation of Indigenous Peoples' rights are regularly considered part of international human rights law.

Articles 10, 25, 26, and 27 of UNDRIP are concerned with Indigenous Peoples' rights to lands and territories. Article 10 prohibits the forcible removal of Indigenous Peoples from their lands and territories and Article 25 recognizes their rights to spiritual relationships with their lands.[205] Among the most contentious issues remains whether and how these provisions—in particular Articles 10, 25, 26(1), and 27—apply to lands that are no longer in their possession.[206] While this is of great importance, this Article is not focused on these questions. Rather, it focuses on Indigenous Peoples' rights to lands that they currently possess.

Pursuant to Article 26 paragraphs (2) and (3), states are required to "give legal recognition and protection" to "the right to own, use, develop and control the lands, territories and resources that [Indigenous Peoples] possess."[207] The lack of legal recognition of Indigenous Peoples' land rights and "failure to demarcate indigenous lands" or grant provision of collective titles, has long been perceived as "the greatest single problem" for Indigenous Peoples.[208] Article 26(3) further

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203 Kirsty Gover, *Equality and Non-Discrimination in the UNDRIP: Articles 2, 6 and 7(1), in* THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 179, 181 (Jessie Hohmann & M. Weller eds., 2018).

204 Martin Scheinin & Mattias Åhrén, *Relationship to Human Rights, and Related International Instruments, in* THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 63, 76, footnote 38 (Jessie Hohmann & M. Weller eds., 2018).

205 Among the most prominent provisions of UNDRIP are Articles 26 and 27, with Article 26 being considered to reflect binding international law. *Id.* at 64–65.

206 Claire Charters, *Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27, in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 395, 407–08, 411, 414–18 (Jessie Hohmann & M. Weller eds., 2018).

207 United Nations Declaration on the Rights of Indigenous Peoples, art. 26(2)-(3), G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). Article 26(3) also applies to Indigenous Peoples' rights with regard to the lands no longer possessed by them enshrined in Article 26(1). This is, however, not the focus of this article.

208 Erica-Irene A. Daes (Special Rapporteur), Second Progress Report on the Working Paper: Human Rights of Indigenous Peoples. Indigenous People and Their Relationship to Land, U.N. Doc. E/CN.4/SUB.2/1999/18 ¶ 47 (June 3, 1999). See also S. James Anaya & Robert A. Jr. Williams, *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 75–77 (2001); Andrew Erueti, *The Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law*, 23 ARIZ. J. INT'L & COMP. L. 543 (2006).

stipulates that this recognition must be "conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." This is also reflected in the fact that possession is generally understood to include (traditional) non-intensive patterns of land use.[209] Article 27 requires states to establish procedures to recognize and adjudicate the rights protected in Articles 25 and 26.[210]

Legal recognition is understood to encompass the demarcation, i.e., "the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground,"[211] and the provision of land titles over these lands. These obligations reflect standards developed by a variety of international bodies,[212] and refined by the Inter-American Court of Human Rights in several consecutive cases.[213] Demarcation and titling is understood to be imperative for the provision of security of tenure. In the words of former U.N. Special Rapporteur on the Rights of Indigenous Peoples James Anaya: "The fundamental goal of a land titling procedure is to provide security for land and resource rights in accordance with indigenous and tribal peoples' own customary laws and traditional land and resource tenure."[214] He further notes that "the procedure for land demarcation and titling would contain, at a minimum, the following components: (a) identification of the area and rights that correspond to the indigenous or tribal community, or group of communities, under consideration; (b) resolution of conflicts over competing uses and claims; (c) delimitation and demarcation; and

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209 *See, e.g.*, Charters, *supra* note 206, at 418–19, *referencing Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 21, 2001).

210 Article 27 plays a more prominent role in the context of right no longer in Indigenous Peoples' possession (Article 26(1)), *cf.* Charters, *supra* note 206, at 402–03, 422–24.

211 U.N. Dep't of Econ. & Soc. Affs., State of the World's Indigenous Peoples: Rights to Lands, Territories and Resources, vol. 5, U.N. DOC. ST/ESA/371, 104 (2021). *See generally*, Erica-Irene A. Daes (Special Rapporteur), *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship to Land*, U.N. DOC. E/CN.4/SUB.2/2001/21 ¶ 50 (June 11, 2001).

212 *See, e.g.*, Comm. on the Elimination of Racial Discrimination, General Recommendation No 23: Indigenous Peoples ¶ 5, U.N. Doc A/52/18, Annex V (Aug. 18 1997); ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383, art. 14(2).

213 *See, e.g.*, *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 ¶ 164 (Aug. 21, 2001); *Case of the Moiwana Community v. Suriname,* Inter-Am. Ct. H.R. (ser. C) No. 124 ¶ 209 (June 15, 2005); *Case of the Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172 ¶ 214(5) (Nov. 28, 2007).

214 James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Report on Measures Needed to Secure Indigenous and Tribal Peoples' Land and Related Rights in Suriname* ¶ 36, U.N. Doc. A/HRC/18/35/Add.7 (Aug. 18, 2011).

(d) issuance of title deed or other appropriate document that clearly describes the nature of the right or rights in lands and resources."[215]

B. International Instruments Adopted in the Wake of the "Global Land Grab"

1. The Special Rapporteur on the right to food's Minimum Human Rights Principles

In 2009, Olivier De Schutter, then U.N. Special Rapporteur on the right to food, articulated a set of *Minimum Human Rights Principles Applicable to Large-Scale Land Acquisitions or Leases* (Minimum Principles), put forward as an annex to his report entitled "Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge" (hereinafter LSLA report).[216] De Schutter had drafted these Minimum Principles with the intention to infuse the VGGT and the Principles for Responsible Agricultural Investment (PRAI), which were still under preparation. By situating these principles within the broader framework of the human right to adequate food, De Schutter attempted to shift the discourse from a purely economic or investment-focused perspective. However, consequently, he did not understand the Minimum Principles as establishing new rights but rather as "follow[ing] from existing international human rights norms.[217] As Priscilla Claeys and Gaëtan Vanloqueren note, the Minimum Principles "interpreted the possible negative impacts of land grabbing as a human rights issue" and "made clear that the human right to food would be violated if communities depending on land for their livelihoods lost access to land."[218]

The Minimum Principles are based on the assumption that "[l]arge-scale investments in farmland can work to the benefit of all parties concerned . . . [if] an appropriate institutional framework is in place."[219] While they touch upon a variety of issues, a main concern is how to prevent forced evictions and displacement in the context of "large-scale investments in land." Principle 2 emphasizes the importance of "free, prior and informed consent of the local communities" and the general prohibition of forced evictions under international law. Principle 3 is more directly concerned with the legal protection of land rights.

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215 *Id.*

216 De Schutter, *Report on Large-Scale Land Acquisitions and Leases*, *supra* note 9.

217 De Schutter, *Report on Large-Scale Land Acquisitions and Leases*, *supra* note 9 ¶ 5.

218 Priscilla Claeys & Gaëtan Vanloqueren, The Minimum Human Rights Principles Applicable to Large-Scale Land Acquisitions or Leases, 10 GLOBALIZATIONS 193, 194 (2013).

219 De Schutter, *Report on Large-Scale Land Acquisitions and Leases*, *supra* note 9 ¶ 33.

The Minimum Principles refer specifically to the Basic Principles and Guidelines on Development-Based Evictions and Displacement and to General Comment No. 7, instruments outside the realm of the right to food. These *Basic Principles and Guidelines* were put forward by then-U.N. Special Rapporteur on the right to adequate housing Miloon Kothari in 2007.[220] Primarily addressed at states, they reiterate the general prohibition of forced evictions under international human rights law and specify state obligations in this context. Central to these guidelines is the recognition that forced evictions often stem from a lack of legally secure tenure. These occurred despite the Guidelines on Development-Based Evictions and Minimum Principles shining a light on "preventive measures to avoid and/or eliminate underlying causes of forced evictions, such as speculation in land and real estate."[221]

However, while these guidelines focus on the vulnerability of marginalized groups to forced evictions and displacement, they do not fully address the socio-economic and political context that influences tenure security. Rather, they are built upon the assumption that forced evictions are regularly connected to weak governance and the absence of clear land tenure rights. The Guidelines reiterate the obligation to "take immediate measures aimed at conferring legal security of tenure" to everyone "including all those who do not have formal titles to home and land."[222] This wording cannot necessarily be reduced to the provision of land titles. Other measures could be granting legal recognition of customary land rights or a moratorium on evictions. However, read in conjunction with the very next paragraph, the provision of land titles seems to occupy a prominent place among possible measures: "States must ensure the equal enjoyment of the right to adequate housing by women and men. This requires States to adopt and implement special measures to protect women from forced evictions. Such measures should ensure that titles to housing and land are conferred on all women."[223] This implies that the provision of land titles should be considered at least one among various possible 'immediate measures aimed at conferring legal security of tenure.' They, again, prioritize legal frameworks over these broader contexts, potentially overlooking the complex dynamics that shape tenure security, especially for marginalized groups. At the very least, the Guidelines' emphasis on legal recognition and protection as the primary means of securing tenure aligns with land tenure strategies that prioritize formalization and legal recognition, recordation, and regularization.

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220 Miloon Kothari (Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living), *Basic Principles and Guidelines on Development-based Evictions and Displacement*, U.N. DOC. A/HRC/4/18 (Feb. 5, 2007).

221 *Id.* ¶ 30.

222 *Id.* ¶ 25. *See also*, De Schutter, *supra* note 9 ¶ 25.

223 *Id.* ¶ 26.

Similarly, as Special Rapporteur Olivier De Schutter elaborates in his LSLA report, the Minimum Principles assume that the primary factor in tenure insecurity is "legal uncertainty" in "developing countries."[224]

The LSLA report recites the full obligation to "take immediate measures aimed at conferring legal security of tenure" as elaborated in the Guidelines (based on GCs No. 4 and No. 7).[225] As mentioned above, though this wording does not necessarily equate such immediate measures with the provision of land titles or formalization of tenure rights, it clearly implies a close connection. This is supported by the fact it is immediately followed in the LSLA report by an elaboration on individual titling, its limitations, and possible alternatives. The LSLA report emphasizes that "[i]ndividual titling is certainly desirable in many circumstances, particularly in order to encourage land-related investment, to lower the cost of credit by allowing land to be used as collateral, and to encourage more sustainable farming, particularly by the planting of trees and more responsible use of the soil and water resources."[226] However, De Schutter also recognizes the limitations of individual titling, particularly in scenarios where macroeconomic conditions might lead to smallholders being priced out or where the creation of property rights markets could catalyze distress sales. In these situations, collective registration is proposed as a more equitable alternative, premised on the principle of the free, prior, and informed consent of local communities.[227] This seems to reflect considerable skepticism on the part of the Special Rapporteur on the right to food toward how best to approach secure land rights, security of tenure, and various forms of formalization of land.

The primary focus of the LSLA report and the Minimum Principles was to "promote the full realization of the right to food."[228] However, whereas "legal security of tenure" had already been established as a cornerstone of the right to adequate housing in 1991, the CESCR did not rely on this concept in GC No. 12 on the right to adequate food. The focus was rather on "access to land"; besides relying on markets, access to land is the second-most important avenue for people to access food.[229] Thus, the obligation to "fulfil (facilitate)" the right to food "means the State must pro-actively engage in activities intended to strengthen

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224 De Schutter, *supra* note 9 ¶ 23.

225 *Id.* ¶ 17.

226 *Id.* ¶ 26.

227 *Id.*

228 Human Rights Council Res. 6/2, Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People ¶ 2(a), U.N. DOC. A/HRC/RES/6/2 (Sept. 27, 2007).

229 Comm. On Econ., Soc. & Cultural Rts., General Comment No 12: The Right to Adequate Food (Art. 11) ¶ 12, U.N. DOC. E/C.12/1999/5 (May 12, 1999).

people's access to and utilization of resources and means to ensure their livelihood, including food security."[230]

Thus, security of tenure was certainly considered relevant for the realization of the right to food. For example, the very first Special Rapporteur on the right to food, Jean Ziegler, touched on the subject in his first report. Drawing on the work of the non-governmental organization Food First Information and Action Network International (FIAN International), he suggested that the obligation to respect "should include the prohibition of forced eviction" and the obligation to protect "the guarantee of security of land tenure and other productive resources."[231] However, calls for tenure security and secure land rights seem to act as a double-edged sword. For example, in his second report on the right to food, Jean Ziegler devoted a substantial part to "access to land and agrarian reform" where he expressed deep concern about the lack of international and national efforts to redistribute land (which would combat land concentration and inequality).[232] While he emphasizes that "[s]ecure property titles . . . have also been essential efforts in successful reforms," this is certainly not his primary concern.[233] He identifies a tension between security of tenure often understood as "secure property," which he is clearly concerned about:

> Property rights are generally granted clear protection under the Constitutions and legislations of many countries. In many cases, however, a severe tension exists between the protection of property rights and the call for the right to land, access to land or agrarian reform. Protecting property rights can mean protecting large, concentrated landholdings, and therefore can constitute a challenge to agrarian reform.[234]

This tension, identified by the Special Rapporteur, on the right to food sits inherently at the core of the concept of tenure security. Historically, the notion of tenure security has been closely aligned with private property rights over land. It has also played an important role in international development cooperation by providing a veneer of legitimacy to international property and land tenure interventions. These were done with systematic land-titling campaigns and with the support of international organizations and bilateral development agencies. As Ziegler points out in his second report on the right to food published in 2002,

> "many of the programmes for tenure reform undertaken by the World Bank and others—mapping, cadastres, land registers and individual title—have been implemented without trying to respond to local customary and

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230 *Id.* at 33.

231 Jean Ziegler, Special Rapporteur on the Right to Food, *Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food* ¶ 95 (a)-(b), U.N. DOC. A/56/210 (July 23, 2001).

232 Jean Ziegler, Special Rapporteur on the Right to Food, *Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food* ¶ 6, U.N. DOC. A/57/356, (Aug. 27, 2002).

233 *Id.* ¶ 25.

234 *Id.* ¶ 32.

> traditional forms of land tenure, but rather with the aim only of creating conditions for functional land markets."[235]

Almost a decade later—and a year after putting forward the Minimum Principles—Olivier De Schutter reiterated this sentiment in his 2010 report. He focuses on three groups of landholders: "indigenous peoples," "smallholders and herders," and "pastoralists and fisherfolk," and notes that the situation of Indigenous Peoples is "specific insofar as the right of such peoples to have their lands demarcated and protected is recognized under international law."[236] His "key message" is that "while security of tenure is important and should be seen as crucial to the realization of the right to food, individual titling and the creation of a market for land rights may not be the most appropriate means to achieve it."[237]

The LSLA report also addresses Indigenous Peoples rights to land. Referencing relevant articles of the ILO Convention No. 169 and UNDRIP, the report reiterates the obligation of states to "give legal recognition and protection to these lands, territories and resources, with due respect to the customs, traditions and land tenure systems of the indigenous people concerned"[238] with free, prior, and informed consent (FPIC).[239] Principle 10 explicitly addresses Indigenous Peoples' rights to lands, territories, and resources including the right to free, prior, and informed consent.

2. Human rights-based development instruments

a) *The Voluntary Guidelines on the Responsible Governance of Tenure*

As mentioned above, the Minimum Principles were not only intended to frame the debate on land grabbing in human rights terms. They were also intended to impact the international instruments responding to land-grabbing that were under preparation in 2009. They can be considered partially successful in this goal. Whereas the Principles for Responsible Agricultural Investment (PRAI), adopted in 2010, do not appear to have been influenced by a human rights lens, human rights clearly influenced the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), adopted in 2012.[240] In contrast to the investment-centric approach of the PRAI, the VGGT's focus is not limited

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235 *Id.* ¶ 37.

236 Olivier De Schutter, Special Rapporteur on the Right to Food, *Report of the Special Rapporteur on the Right to Food* ¶ 10, U.N. DOC. A/65/281 (Aug. 11, 2010).

237 *Id.*

238 Olivier De Schutter, Report on Large-Scale Land Acquisitions and Leases, *supra* note 9 ¶ 27.

239 *Id.* ¶ 28.

240 *See* Christophe Golay & Irene Biglino, *Human Rights Responses to Land Grabbing: A Right to Food Perspective*, 34 THIRD WORLD QUARTERLY 1630 (2013); Anna Katharina Kramer et al., *Strengthening Accountability for Responsible Land Governance: Linking Governance of Tenure to Human Rights*, 13 SUSTAINABILITY 11113 (2021).

to large-scale land investments. Rather, they seek to "provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security."[241] Thus, while the VGGT are not a human rights instrument per se, they are a human rights-*based* instrument. Based on the observation that "[t]he livelihoods of many, particularly the rural poor, are based on secure and equitable access to and control over these resources," the VGGT are primarily aimed at regulating the systems which "determine who can use which resources, for how long, and under what conditions."[242]

In other words, land is framed as a resource. Despite their ostensibly distinct goals, this framing highlights the convergence of human rights and development paradigms and underscores a fundamental and pervasive perspective within both international human rights law and development practices. Human rights law, with its focus on equity and justice, and development practices, driven by economic growth, coalesce around the notion of land as a resource that needs to be optimized. By viewing land primarily as a resource, the dominant legal and developmental frameworks emphasize its economic and use value. This perspective inherently aligns with neoliberal ideologies that prioritize commodification, market integration, and property rights, often at the expense of more complex and culturally embedded understandings of land.

This convergence perpetuates colonial legacies by reinforcing Western ontologies of land revealed by a shared underlying logic: formalizing land tenure. By institutionalizing these Western frameworks, the international community often marginalizes alternative land governance systems and land ontologies that reflect local customs and histories. The dominant Western ontologies prioritize individual property rights and formal legal recognition over communal, Indigenous, and customary land tenure systems. Consequently, despite land formalization being framed as measures to secure tenure and professional development, its practices frequently lead to dispossession and displacement of vulnerable populations.

The VGGT were conceptualized by the FAO Tenure Division and endorsed by the Committee on World Food Security (CFS).[243] Often praised for their inclusive development process,[244] they have garnered widespread support from a

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241 FAO, Voluntary Guidelines on Tenure, *supra* note 10, at iv.

242 *Id.*

243 Comm. On World Food Security, 38th Sess., CFS 2012/38/2 (May 11, 2012).

244 *See* Philip Seufert, *The FAO Voluntary* GUIDELINES *on the Responsible Governance of Tenure of Land, Fisheries and Forests*, 10 GLOBALIZATIONS 181, 182–84 (2013); Nora McKeon, *'One Does Not Sell the Land Upon Which the People Walk': Land Grabbing, Transnational Rural Social Movements, and Global*

variety of entities including the U.N. General Assembly[245] and the Rio+20 Conference[246] along with praise from civil society and global peasant organizations such as La Via Campesina.[247]

In their scope and ambition, the VGGT transcends the traditional boundaries of tenure governance. They apply to both rural and urban contexts, integrating goals like poverty eradication, sustainable livelihoods, social stability, and housing security. The VGGT stand as the first "soft law" instrument explicitly by addressing the complexities of land tenure and tenure security. This alignment with the FAO's mandate on the right to food underscores a significant shift toward more integrated and rights-based approaches to land tenure and its role in global social and economic development. They are distinguished by their human rights-based approach and aim to enhance the governance of tenure to realize the right to adequate food. This approach is underpinned by incorporating key human rights or related principles, including human dignity, non-discrimination, and gender equality.

Simultaneously, the Guidelines put development considerations at the forefront, highlighting the intrinsic connection between secure tenure rights, broader development objectives, and equitable access to land, fisheries, and forests. The preface explicitly acknowledges the centrality of land in development, noting that secure and equitable access to land and other natural resources is not only vital for food and shelter, but also forms the bedrock of social, cultural, and religious practices, and economic growth. The emphasis on responsible governance of tenure is seen as a catalyst for sustainable social and economic development, with the potential to play a significant role in eradicating poverty and fostering responsible investment.

A central aspect of the VGGT's approach is the concept of "legitimate tenure rights."[248] States are called upon to recognize and respect all legitimate tenure rights holders and their rights, safeguarding them against threats and infringements. This includes protection against arbitrary loss of tenure rights and forced evictions inconsistent with national and international law obligations. States should "take reasonable measures to identify, record and respect legitimate

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Governance, 10 GLOBALIZATIONS 105, 109–11 (2013); Lorenzo Cotula, *International Soft-Law Instruments and Global Resource Governance: Reflections on the Voluntary Guidelines on the Responsible Governance of Tenure*, 13 L., ENV'T & DEV 115, 119–20 (2017).

245 U.N. General Assembly, Res. 67/228, U.N. Doc. A/RES/67/228 ¶ 31(Dec. 21, 2012).

246 U.N. Conference on Sustainable Development, The Future We Want, U.N. Doc. A/CONF.216/16 ¶ 115(June 22, 2012).

247 *See* Pierrick, *The Voluntary Guidelines on the Tenure of Land Fisheries and Forests Are Complete: Via Campesina*, La Via Campesina (2012), https://perma.cc/5ASC-26EL; Zoe W. Brent et al., *The 'Tenure Guidelines' as a Tool for Democratising Land and Resource Control in Latin America*, 39 THIRD WORLD QUARTERLY 1367 (2018).

248 FAO, *Voluntary Guidelines on Tenure, supra* note 10, at principle 3.1.

tenure right holders and their rights, whether formally recorded or not."[249] The VGGT, thereby, do not only protect tenure rights that are legally recognized by the state, but also rights that are considered "socially legitimate."[250] However, unlike Raquel Rolnik's 2013 Guiding Principles (see below), the VGGT do not presume that everybody who occupies land or property to fulfill their right to adequate housing has a legitimate right.. It remains up to the state to "define through widely publicized rules the categories of rights that are considered legitimate."[251] The VGGT, however, emphasize that they "should be interpreted and applied consistent with existing obligations under national and international law,"[252] including the categories of legitimate rights. Thus, Indigenous Peoples' rights to land, as recognized in the ILO Convention No. 169 and UNDRIP, must be considered legitimate land rights.[253] Lorenzo Cotula and Rachael Knight identify three further categories of "legitimate tenure rights," that are given special consideration by the VGGT: customary land rights, overlapping rights, and women's land rights.[254] Nonetheless, this provision largely leaves it to the state to determine which categories are worthy of protection and which are not.

Similar to the PRAI and the Minimum Principles, the VGGT presume that the root of tenure insecurity lies in weak governance.[255] This perspective shapes the VGGT's approach to achieving tenure security with a primary focus on the legal recognition and formalization of tenure rights.[256] The very first among several "general principles" calls on states to take "reasonable measures to identify, record and respect" such tenure rights.[257] However, legal recognition and formalization—"to identify, record, and respect"—can take various forms and serve different purposes within the VGGT framework.[258] Legal recognition can be understood as providing Indigenous communities an inalienable, communal, or collective land title over (ancestral) territory. The VGGT devote a substantial part "to the legal recognition of tenure rights of indigenous peoples and other communities with customary tenure systems,"[259] This reiterates obligations under

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249 *Id.* at principle 3.1.1.

250 Lorenzo Cotula & Rachael Knight, *Protecting Legitimate Tenure Rights: From Concepts to Practice*, FAO Legal Brief 3 (2021).

251 FAO, *Voluntary Guidelines on Tenure*, *supra* note 10, at principle 4.4.

252 *Id.* at principle 2.2.

253 *Id.* at principle 9.3.

254 Cotula & Knight, *supra* note 250, at 4–6.

255 FAO, *Voluntary Guidelines on Tenure*, *supra* note 10, at v.

256 *Id.* .at principle 10.1.

257 *Id.* at principle 3.1.1.

258 *Id.*

259 *Id.* at 11.

UNDRIP and ILO Convention No 169, including free, prior, and informed consent.[260]

Formalization can, however, also take the form of alienable, individual private property titles, which are considered beneficial for markets, investments, and economic development. The VGGT underscore the necessity of establishing "appropriate and reliable recording systems" to heighten tenure security and decrease transaction costs and risks.[261] They further encourage states to recognize and facilitate "efficient and transparent" (land) markets as well as the importance of public and private investments.[262] In this way, the VGGT conceptualize tenure security in a manner akin to property security, thus advocating the formalization and recognition of tenure rights for these purposes. The focus, at least in part, is on securing tenure rights to promote and facilitate land markets and "responsible" investments.[263]

This dual approach highlights inherent tensions within the framework of international land governance. On the one hand, the use of human rights, especially Indigenous rights, carries emancipatory and transformative potential. Such rights-based approaches emphasize protecting the cultural, social, and economic aspects of land tenure. It also advocates for the recognition of collective and customary rights that resonate deeply with the identities and livelihoods of Indigenous and marginalized communities. [264] These rights challenge the conventional, commodified understanding of land by emphasizing its multifaceted significance beyond mere economic value.

On the other hand, reliance on property, markets, and investment introduces conflicting dynamics. The formalization of land tenure often promotes alienable, individual property titles, integrating land into formal market systems.[265] While this presumably attracts investment, it can simultaneously undermine communal and customary land systems. This market-driven approach tends to commodify land, potentially leading to dispossession and displacement of vulnerable communities who may lack the resources or legal recognition to secure their tenure within these formal systems.

These tensions are further complicated by the broader relationship between human rights and development. While human rights frameworks aim to protect individuals and communities, fostering social justice and equity, development agendas often prioritize economic growth and market efficiency. The convergence

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260 *Id.* at principles 9.3, 9.9, 12.7.

261 *Id.* at principle 11.5.

262 FAO, *Voluntary Guidelines on Tenure*, *supra* note 10, at principles 11, 12.

263 *Id.* at principle 12.

264 *Id.* at principle 8.2, 9.

265 *See e.g.*, Alice B. Kelly & Nancy Lee Peluso, *Frontiers of Commodification: State Lands and Their Formalization*, 28 SOCIETY & NATURAL RESOURCES 473 (2015).

of these two domains within the context of land tenure security reveals the complexities of international land governance. In practice, land formalization policies illustrate how the coalescence of human rights and development frameworks frequently privileges the commodification of land, displacing vulnerable populations and disregarding alternative, co-existing ontologies of land. Human rights-based approaches seek to empower and protect. But when they are intertwined with development-driven formalization processes, they can inadvertently perpetuate inequalities and dispossession.

The real-world implications of these frameworks reveal the limits of international human rights protections when entangled with development goals. While land formalization programs are designed to secure tenure, they frequently prioritize investment potential, turning land into a tradable asset. This commodification of land, under the guise of security, often displaces those without formalized titles, ironically leaving the very populations human rights frameworks aim to protect more vulnerable. The development narrative, thus, clashes fundamentally with the goals of equity and social justice.

b) *SDG Land Indicators: tenure security and women's ownership in agricultural land*

This spirit of collaborative governance continued into the efforts to negotiate the new post-2015 development agenda. An amalgamation of human rights organizations, bilateral and multilateral organizations, and research clusters vigorously advocated for the inclusion of land targets and land indicators in the SDGs.[266] A self-declared "broad coalition of global and national organizations, civil society, and experts," led by Landesa, recommended the Inter-Agency Expert Group on SDGs (IAEG-SDGs) adopt "a meaningful and universal land rights indicator."[267]

These efforts culminated in the inclusion of land indicators in the SDGs, which was celebrated within the land rights community.[268] Indicators 1.4.2 ("tenure security indicator") and 5.a.1 ("women's ownership of agricultural land'), for example, have been embraced by prominent land rights organizations as

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266 Central to this has been the role of the Global Land Tool Network (GLTN), a "multisectoral alliance of international partners committed to increasing access to land and tenure security for all" founded in 2006, led by U.N. Habitat. Global Land Tool Network, *About GLTN*, GLTN, https://perma.cc/5K2Y-CKQE (last visited Jan. 21, 2024). The GLTN convened the first Expert Group Meeting (EGM) on land targets and land indicators in April 2013. *SDGs*, LAND PORTAL, https://perma.cc/A87S-MRWC (last visited Jan. 21, 2024).

267 Stakeholder Consultation Responses to Goal 1, Target 1.4, *IAEG-SDGs Second Meeting*, U.N. STATISTICS DIVISION, https://perma.cc/BQ9S-VAKH (last visited Jan. 13, 2024).

268 *See e.g.*, Michael Taylor of the International Land Coalition calling it "historic." *Making the SDG's Count for Land Rights*, RURAL 21, https://perma.cc/XN5Q-JZEN (last visited Feb. 25, 2024).

crucial to their work .[269] Land indicators have been described as having a potential "sea change in economic and social empowerment prospects..."[270] Several civil society organizations, along with donors and U.N. agencies, have since formed an "SDG Land Momentum Group" that focuses on "advocacy, lobbying and campaigning efforts at national, regional and international levels for effective monitoring of SDG land indicators."[271]

When looking closely at Indicators 1.4.2 and 5.a.1, though, a different picture emerges. Both indicators proved contentious during negotiations. Indicator 1.4.2 was criticized for not explicitly including Indigenous Peoples' land rights.[272] The narrow understanding of protected human-land relationships was also heavily criticized.[273] UNEP suggested that secure tenure should include economic security.[274] The FAO suggested an alternative to Indicator 5.a.1, which would have narrowly focused on ownership of agricultural land but encompassed gender equality in this context. They suggested that it would be "based on a broad definition of ownership" including not only "officially titled ownership" but also "other proxies, such as the right to use, sell or bequeath the land."[275]

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269 *Full Implementation of the SDGs Land Rights Indicators Needed to Ensure a Successful Agenda 2030*, LANDESA (Nov. 6, 2017) https://perma.cc/WEV8-9X53 (last visited Nov. 5, 2024). For a list of all SDG Indicators, *see* Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development, U.N. Doc. A/RES/71/313 (modified to include annual refinements through 2024), https://perma.cc/L8SF-YZFD (last visited Nov. 5, 2024).

270 Co-founder of Landesa, Tim Handstad, wrote in a blog post: "A relatively obscure and technical determination earlier this week by a relatively little-known international body could mean a sea change in economic and social empowerment prospects for hundreds of millions of women and their families. Insecure rights to land constrain opportunity for over 2 billion people living in urban and rural informality. And women fare the worst." *Moving the Needle Forward on Land Rights and the Sustainable Development Goals*, LANDESA, https://perma.cc/FV7H-BR5G (last visited Jan. 23, 2024).

271 *See, e.g., SDG Land Momentum Group,* INTERNATIONAL LAND COALITION, https://perma.cc/C6A4-T44D (last visited Jan. 23, 2024).

272 Stakeholder Statement, 26 October 2015, 2nd meeting of the IAEG-SDGs; Indigenous Peoples Major Group, *Indigenous Peoples Major Group Position Paper on Proposed SDG Indicators* (2015), https://perma.cc/GQ86-SHNH (last visited Mar 4, 2024).

273 Various stakeholders had already advocated for deleting any reference to the concept of "ownership" in Targets 1.4 and 5.a, and this debate carried over to the indicators. Stakeholder Consultation Responses, *supra* note 267.

274 The measure of perceived tenure security "summarizes in one measure the economic, social, and political risks affecting individuals, their households, and their communities as they perceive them." The proposal explicitly mentions certain threats to people's land rights such as land loss "due to adverse economic circumstances, to conflict in their communities, to large scale land acquisitions, or as it is often the case for women, to intra-family dynamics such as losing a husband." United Nations, *Inputs from Agencies and Other Entities on Indicator Proposals and Metadat*a (June 15, 2015), First meeting of the IAEG-SDGs, UNITED NATIONS STATISTICAL DIVISION, Inputs on Goal 1, International UN Agency Inputs, UNEP Metadata Goal 1.

275 United Nations, *Inputs from Agencies and Other Entities on Indicator Proposals and Metadata* (June 15, 2015), First meeting of the IAEG-SDGs, UNITED NATIONS STATISTICAL DIVISION, Inputs on Goal 1, International UN Agency Inputs, FAO Metadata Goal 1.

The final indicators, however, did not reference Indigenous Peoples' land rights or acknowledge collectively held land. The metadata documents of Indicators 1.4.2 and 5.a.1 provide the detailed methodologies from competent U.N. agencies for measuring and interpreting each SDG indicator. These methodologies clearly show incorporation of a private property approach.[276] Specifically, the model of a land tenure system and human-land relationship envisioned by the drafters of these documents is based on private property following an ownership model. Both Indicator 1.4.2 and Indicator 5.a.1 focus on tenure security in terms of land markets, investment, and economic development. Calls by the U.N. Permanent Forum on Indigenous Issues to include legally recognized customary and collective land rights in the indicators or the metadata instruments have been largely disregarded.

The fact that Indicator 1.4.2 measures not only the percentage of people with "legally recognized documentation"[277] over land but also the percentage of people who "perceive their rights to land as secure"[278] has been interpreted as a victory by some.[279] However, measuring tenure security as perception emphasizes its roots in economic theory. Acknowledging the perception of tenure security does not diminish the fact that Indicator 1.4.2 endorses formalization by considering "legally recognized documentation" as a complementary sub-component of the indicator that is of equal weight.[280]

Even more strikingly, the metadata document of Indicator 5.a.1, which measures women's land rights over agricultural land, establishes that "ownership or security rights" exist if any one of the three proxies—legally recognized documents in the name of the individual, right to sell, or right to bequeath—is present.[281] In other words, the existence of a legally recognized document and the right to sell are, on their own, considered measures of secure land rights.

Compared to the SDG indicators, international human rights law has a broader understanding of formalization and legal recognition of land rights and land tenure systems. In practice, these different approaches to formalization are,

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276 *Metadata for Indicator 1.4.2: Proportion of Total Adult Population with Secure Tenure Rights to Land*, UNITED NATIONS STATISTICAL DIVISION (last updated Aug. 1, 2021) https://perma.cc/TH39-UV3M; *Metadata for Indicator 5.a.1: Proportion of Total Agricultural Population with Ownership or Secure Rights over Agricultural Land, by Sex; and Share of Women Among Owners or Rights-Bearers of Agricultural Land, by Type of Tenure*, UNITED NATIONS STATISTICAL DIVISION (last updated July 29, 2024), https://perma.cc/YQ46-Z95H.

277 *Metadata for Indicator 1.4.2, supra* note 276.

278 *Id.*

279 Jérémie Gilbert & Corinne Lennox, *Towards New Development Paradigms: The United Nations Declaration on the Rights of Indigenous Peoples as a Tool to Support Self-Determined Development*, 23 INT'L J. HUM. RTS. 104, 114 (2019).

280 *Metadata for Indicator 1.4.2, supra* note 276.

281 *Metadata for Indicator 5.a.1, supra* note 276.

however, often mutually supportive and co-constitutive. Part IV, thus, turns to one of the most recent international human rights instruments, GC No. 26 on Land and Economic, Social and Cultural Rights and its conceptualization of land before examining various visions of land formalization.

IV. LAND FORMALIZATION TODAY: PROMOTING DEVELOPMENT AND THE REALIZATION OF HUMAN RIGHTS?

The formalization and legal recognition of land rights is still considered an important technique for the legal empowerment of the poor' and for the realization of human rights. This includes the rights of peasants, women, rural communities, and Indigenous Peoples. For example, the World Bank states that it "invests in security of tenure by assisting countries to recognize equitable land and property rights for all; improve policies and laws; title, survey, and register land; resolve land conflicts; and develop digital land administration services."[282] The focus remains on land titling, land surveying, and land registration.

While this approach has significant implications that warrant a deeper examination, such an examination is becoming increasingly complex as the practice(s) of formalization have changed. The late 1990s marked both the zenith of land titling and individualized private property rights and the onset of a shift toward more inclusive methodologies. The evolving mainstream discourse on land tenure within international development circles began to acknowledge the significance of legally pluralist systems, collective land rights, and customary tenure systems. Simultaneously, as we have seen in Part III, international human rights law has changed considerably since the early 1990s; the rights of Indigenous Peoples especially have gained prominence. While U.N. CESCR GC No. 4 on the right to housing, adopted in 1991, does not mention Indigenous Peoples, today their rights are ubiquitous across international human rights law. Most recently, the U.N. Committee on Economic, Social and Cultural Rights adopted GC No. 26, highlighting the importance of land for the realization of economic, social, and cultural rights for various populations, with special attention to Indigenous Peoples. Attempting to straddle the line (or contradiction) between land as resource and land as more-than-resource, GC No. 26 reiterates states' obligations to provide secure land tenure through formalization and legal recognition.

The World Bank has slowly expanded to include more nuanced approaches—including communal land titling and registration of Indigenous Peoples' customary rights. However, the private property paradigm remains intact. The development sector has incorporated and co-opted (parts of) the critique from the human rights community by approaching "formalization as

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282 *Understanding Poverty/Topics 'Land': Strategy,* WORLD BANK GROUP, https://perma.cc/JQ77-7FUY (last visited Feb. 27, 2024).

development" with formalization emerging as an "empty institution."[283] In this way, GC No. 26, along with other human rights instruments, risks further entrenching an understanding of land and human-land relationships that provides tenure security for the few while leading to dispossession in and of most of the world.

Section A examines contemporary practices of land formalization as embedded in international human rights law and practiced in contemporary development practice. The first part of Section A focuses GC No. 26, exploring how it concomitantly incorporates an approach to land as a resource and land as more than a resource. The second part then turns to the role that the formalization of land plays in the context of these two approaches, focusing on their impact on the commodification of land, market dynamics, and the realization of secure use-rights and ethno-justice.

A. General Comment No. 26 on Land and Economic, Social and Cultural Rights

GC No. 26 on Land and Economic, Social and Cultural Rights, short of recognizing a general right to land, emphasizes the importance of "access to, use of and control over land for individuals and communities" for the realization of a variety of rights enshrined in the ICESCR.[284] This is primarily derived from an understanding of land as a "natural resource," as provided for in Article 11(2) ICESCR.[285] The Committee, however, draws attention to two international instruments that have recognized a right to land for specific populations, namely the UNDRIP (2007) and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP, 2018). It acknowledges that "secure land tenure systems are important to protect people's access to land as a means of guaranteeing livelihoods and avoiding and regulating disputes."[286] But it simultaneously highlighting that "[i]n many parts of the world, land…also constitutes the basis for social, cultural and religious practices and the enjoyment of the right to take part in cultural life."[287] In other words, land is seen as a resource but also as more than just that.

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283 Louis Putzel et al., *Formalization as Development in Land and Natural Resource Policy*, 28 SOC'Y & NAT. RES. 453 (2015); Kees Krul & Peter Ho, *Beyond 'Empty' Forms of Formalization: The Credibility of a Renewed Attempt at Forest Titling in Southwest China*, 110 GEOFORUM 46 (2020).

284 Comm. On Econ., Soc. & Cultural Rts., General Comment No. 26, *supra* note 55 ¶ 1.

285 *Id.* ¶ 7.

286 *Id.* ¶ 1.

287 *Id.*

It is in the context of understanding land as a natural resource that the CESCR emphasizes the importance of agrarian reform and land (re)distribution,[288] of "reforming agrarian systems,"[289] and of secure access to land for those who are landless,[290] especially for women.[291] However, the Comment acknowledges that especially for "Indigenous Peoples and other local communities living traditional lifestyles," land is also linked to the right to internal self-determination, a self-determination that is also recognized in the Declaration on the Right to Development.[292] However, in both cases, security of tenure and "secure access to, use of and control over land" is to be achieved through the formalization and legal recognition of land rights.

GC No. 26 reiterates the obligation to "take immediate measures aimed at conferring legal security of tenure" enshrined in GC No. 4.[293] It stipulates that

> [t]he legal recognition and allocation of tenure rights to individuals shall be carried out systematically, without discrimination on the basis of gender, family and community and in a way that ensures that those living in poverty and other disadvantaged and marginalized individuals and groups have every opportunity to acquire legal recognition of their current tenure rights.[294]

The same GC calls not only for the recognition of collective and customary land but also for the legal recognition of Indigenous Peoples' rights, including collective ownership of lands, territories and resources.[295] It states that "the collective ownership of lands, territories and resources of Indigenous Peoples shall be respected, which implies that these lands and territories shall be demarcated and protected by States parties."[296] GC No. 26 further stresses the importance of states recognizing and protecting the "communal dimensions of tenure," where there exists "a material and spiritual relationship."[297] This entails ensuring Indigenous Peoples' "collective rights of access to, use of and control over lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired."[298] GC No. 26 further reiterates an obligation to respect and recognize the legitimate tenure rights of individuals and communities,

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288 *Id.* ¶ 36.

289 *Id.* ¶ 37.

290 Comm. On Econ., Soc. & Cultural Rts., General Comment No. 26, *supra* note 55 ¶ 32.

291 *Id.* ¶¶ 13–14.

292 *Id.* ¶¶ 10–11.

293 Comm. On Econ., Soc. & Cultural Rts., General Comment No. 4, *supra* note 167 ¶ 8(a); Como. On Econ., Soc. & Cultural Rts., General Comment No. 26, *supra* note 55 ¶ 27.

294 Comm. On Econ., Soc. & Cultural Rts., General Comment No. 26, *supra* note 55, ¶ 33.

295 *Id.* ¶¶ 11 25, 26, 27, 35.

296 *Id.* ¶ 11.

297 *Id.* ¶ 27.

298 *Id.*

even within customary systems, when the state owns or controls land. It emphasizes that all forms of collective land management and land use systems should be "identified, recognized and registered."[299] Finally, GC No. 26 reiterates state obligations to "recognize the social, cultural, spiritual, economic, environmental and political value of land for communities with customary tenure systems" and to "respect existing forms of self-governance of land."[300]

These passages from GC No. 26 highlight the critical need for states to acknowledge and protect the diverse and complex relationships that Indigenous Peoples and traditional communities have with their lands. By emphasizing the recognition of collective rights and customary tenure systems, GC No. 26 underscores the importance of preserving the cultural, spiritual, and social dimensions of land that are essential to these communities' identities and livelihoods. This approach challenges the conventional notion of land as a mere economic resource, advocating instead for a more holistic and inclusive understanding of land tenure that respects and incorporates Indigenous and communal perspectives.

By acknowledging the complexities of Indigenous Peoples' and other communities' relationships with land, GC No. 26 highlights the importance of formalizing tenure rights while respecting cultural and spiritual dimensions. However, it also brings to light the inherent contradictions within the current international legal framework, which often prioritizes formalization through a Western lens, potentially undermining the very rights it seeks to protect. This critical examination reveals the need for a perspective shift that embraces diverse ontologies of land, paving the way for a more inclusive and equitable approach to land governance. With this in mind, it is crucial to explore how international instruments and practices can be re-envisioned and transformed to reflect, respect and uphold the diverse relationships that communities have with their land.

B. Land Formalization: Commodification, Markets, Secure Use-Rights, and Ethno-Justice?

The different understandings of land in GC No. 26 can be mapped onto different approaches to formalization in development. Catherine Boone distinguishes three visions of 'legal empowerment' in contemporary development practice that align with different rationales for land registration and titling. First, land registration for marketization/commodification (marketability-based approach);second, user-securization (secure use-rights approach); and finally, the recognition of communal land rights for ethno-justice and territorial autonomy

299 *Id.* ¶ 25.

300 *Id.*

(ethno-justice-based approach).[301] Notwithstanding the contradictions between these approaches, I argue that they are, in practice, co-constitutive. Marketability-based and secure use-rights approaches often enable and stabilize one another by providing legitimacy to practices that would otherwise be considered socially unacceptable. In practice, they often lead to a similar outcome: the commodification of land. The secure use-rights approach, in its pursuit of legal recognition and protection of tenure, can inadvertently pave the way for the integration of land into formal market structures potentially aligning with the marketability-based approach. This convergence is a practical manifestation of how tenure security is operationalized within development projects: where the end goal often becomes the creation of land markets and the strengthening of individual property rights.

Both marketability and secure use-rights approaches are based on an understanding of land and property that is deeply entrenched in Western, Eurocentric and capitalist ideologies. Land is understood as a resource that is subject to human mastery. Thus, the secure use-rights approach to tenure security equally reinforces a narrative that privileges Western legal and economic frameworks, perpetuating a Eurocentric worldview of land and property. Epitomized in the "continuum of land rights," this approach endorses an evolutionary perspective of land tenure systems, where informal, communal, or customary systems are seen as preliminary or suboptimal stages in a progression toward the ideal of formalized, individualized private property rights.

1. Marketability and secure use-rights approaches

The marketability-based approach promotes land as a commodity— an economic asset to be leveraged within the market economy. This perspective champions the individualization, formalization, and privatization of land rights, positing these elements as catalysts for economic development and efficiency. It operates under the premise that clear, formalized property rights, often through land titling, are fundamental to the creation of efficient land markets, incentivizing investment and ultimately driving economic growth. Conversely, the security-based or rights-oriented approach advocates for land tenure security as a means of ensuring stable livelihoods, human dignity, and social justice.[302]

However, in the operational dynamics of development practice, the rights-based lens frequently converges with the marketability approach. This particularly occurs in the strategies employed to actualize tenure security, namely, the

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301 Catherine Boone, *Legal Empowerment of the Poor through Property Rights Reform: Tensions and Trade-Offs of Land Registration and Titling in Sub-Saharan Africa*, 55 J. DEV. STUD. 384 (2019). *See also*, Willem Assies, *Legal Empowerment of the Poor: With a Little Help from Their Friends?*, 36 J. PEASANT STUD. 909 (2009).

302 *E.g.,* Jude Wallace & Ian Williamson, *Building Land Markets*, 23 LAND USE POL'Y 123 (2006); Ho & Spoor, *supra* note 43.

formalization of individualized, alienable land titles. This convergence is evident in instruments like the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT), which, despite their human rights-based framework, emphasize the legal recognition and formalization of tenure rights as a means to secure tenure.[303] The VGGT's approach acknowledges collective and customary rights. However, it ultimately aligns with neoliberal objectives by promoting efficient and transparent land markets and encouraging public and private investments. Similarly, the inclusion of tenure security indicators in the Sustainable Development Goals (SDGs) reflects a narrow understanding of land tenure that prioritizes formal, market-oriented property rights over communal and customary systems. As demonstrated above, the SDGs' tenure security indicators, Indicators 1.4.2 and 5.a.1, focus on individual land ownership, ignoring and communal and customary systems.[304] This focus on individual, alienable, formalized land rights inadvertently facilitates and reinforces the commodification and financialization of land. This alignment of human rights and development frameworks around formalization underscores the inherent contradictions and reinforces the commodification of land, often to the detriment of marginalized communities.

There has been growing consensus among development scholars and practitioners that rather than dismantling diverse tenure systems, integrating them into state legal frameworks is a more prudent approach. For example, in their 2003 revision of the World Bank land policy, economists Klaus Deininger and Hans Binswanger acknowledged that formal titles are not always synonymous with tenure security and recognized the importance of more comprehensive approaches.[305] These alternatives, however, are still aligned with the broader rationale of formalizing tenure relations, namely to promote a more effective and efficient land tenure system for economic development. They suggest more cost-effective methods of achieving the same end—the regularization of land tenure rights—without necessitating comprehensive legislative reforms or extensive titling programs. Furthermore, while the Bank's economists have acknowledged the potential effectiveness of communal tenure systems, their recognition is couched in language that suggests a gradual evolution toward individualization of property rights.[306] This perspective positions communal and customary systems as preliminary stages in a progression toward the ideal of individualized, formalized private property rights.

The metaphor of the "continuum of land rights," which has been promoted by U.N.-Habitat, embodies a similar evolutionary perspective. The "continuum of

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303 FAO, *Voluntary Guidelines on Tenure*, *supra* note 10, principles 7–9.

304 *See supra* Part III.B.2.b).

305 Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy. Principles, Experience, and Future Challenges*, 14 WORLD BANK RES. OBSERVER 247, 247–48 (1999).

306 *Id.* at 28–51.

land rights" emerged from under the umbrella of the Global Campaign for Secure Tenure and was understood to be in line with a human rights-based approach to housing and land.[307] In 2005, in a document prepared for the Global Land Tool Network (GLTN), Clarissa Augustinus stated that "UN-HABITAT advocates a continuum of land rights and legal instruments, with land titling being only one of the legal instruments."[308] Augustinus included the "continuum of land rights" in an "initial agenda" of "pro poor land tools,"[309] which became part of the GLTN, and has since become influential in the development sector.[310]

While the continuum of land rights ostensibly acknowledges the 'plurality' of land rights, it tends to normatively prioritize formal, individualized, and registered property rights. This framework suggests that consolidating control rights, encompassing both the rights to alienate and exclude, is the ideal end-goal, aimed at facilitating efficient land allocation and incentivizing investment. As Michael Barry argued, the continuum of land rights has become "a platform to advocate for change and a normative device to indicate what that change should look like."[311] The standard understanding of the continuum of land rights clearly considers formal land rights superior to informal land rights.[312] Second, it implies the superiority of formalized, individualized, registered, indefinite property rights over other types of land rights. Beyond visualizing evolutionary property theories grounded in evolutionary development thinking, the continuum of land rights also implicitly connects formalization with privatization, individualization, and alienability.[313] The consolidation of control rights is understood to be desirable: consolidating the right to use, possess, alienate, and exclude in one individual right holder is considered to be superior to recognizing communally held rights. Such

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307 The language of a continuum of land rights appears for the first time in the Handbook on Best Practices, Security of Tenure and Access to Land. U.N. HUMAN SETTLEMENTS PROGRAMME, HANDBOOK ON BEST PRACTICES, SECURITY OF TENURE AND ACCESS TO LAND: IMPLEMENTATION OF THE HABITAT AGENDA 7 (2003). *See also*, Clarissa Augustinus & Marjolein Benschop, *Security of Tenure: Best Practices*, UN-HABITAT, (2003).

308 Clarissa Augustinus, *Global Network For Pro Poor Land Tools*, UN-HABITAT 3, 8 (2005).

309 *Id.*

310 *See, e.g.*, Clarissa Augustinus, *The Continuum of Land Rights*, Presentation at FIG Working Week, FIG WORKING WEEK, SOPHIA, BULGARIA (June 17–21, 2015); Stig Enemark et al., *Fit-for-Purpose Land Administration: Guiding Principles for Country Implementation*, UN-HABITAT 2 (2016); Klaus Deininger et al., *The Land Governance Assessment Framework: Identifying and Monitoring Good Practice in the Land Sector*, WORLD BANK (2013).

311 Michael Barry, *Property Theory, Metaphors and the Continuum of Land Rights*, UN-HABITAT 3 (2015).

312 *Id.* at 6.

313 "At one end are formal land rights, where the owner is an individual, who holds a set of registered rights to a parcel of land that is enshrined in law: the parcel is delineated on a map; held in a record office; the owner has the right to occupy the land, build on it (subject to approvals), sell it, rent it out, transfer it to his or her heirs, and prevent other people from coming on to it." *Handling Land, Innovative Tools for Land Governance and Secure Tenure*, UN-HABITAT 12 (2012).

consolidation would, according to neo-institutional economics, facilitate the efficient allocation of land and incentivize investment. Individuals with (near) absolute control over land will be more likely to sell or otherwise transfer land toward more productive uses than a community.[314]

This paradigm still dominates thinking on land reform in development today.[315] In 2021, economists associated with the World Bank stated that "[n]ew technologies allow more flexible registration and full coverage, while capturing several layers of rights and restrictions that may overlap. This enables a near-costless transition between tenure systems to resemble a 'continuum of rights' and achieve scale."[316] Thus, the suggested alternatives to land-titling are not outside the mainstream rationale of formalization but suggest lower-cost alternatives to "large-scale, systematic regularization" without sweeping legislative changes and nationwide land titling programs. Crucially, the degree of representation and abstraction that such formalization allows might not be categorically different from systematic land-titling programs focused on the provision of individualized land titles.

These alternatives are not a rejection of neoliberal reforms but rather strategically adapt them to strengthen neoliberal governance and neoliberal states. Admos Chimhowu contends that many reforms of customary tenure are neoliberal, reshaping power dynamics among rural institutions in Africa.[317] Neoliberalism is not about "rolling back the state"[318] but (re)designing institutions to protect private property and to support global markets, as Quinn Slobodian notes.[319] "Neoliberalism is," as Nicholas Blomley notes, "in part, a language of property."[320] It is, however, also about the creation of the right kind of civil society.[321] Thus, as Jamie Peck explains, the process of neoliberalization focuses

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314 For a succinct overview of this line of thinking, *see* Platteau, *supra* note 123.

315 *See also*, Admos Chimhowu, *The 'New' African Customary Land Tenure. Characteristic, Features and Policy Implications of a New Paradigm*, 81 LAND USE POL'Y 897, 898 (2019).

316 Hilhorst, Zevenbergen & Deininger, *supra* note 40.

317 He identifies five neoliberal key processes (privatization, marketisation, deregulation, re-regulation, and the creation of "'flanking and supporting mechanisms"') that characterize contemporary reform of customary land tenure. Chimhowu, *supra* note 315, at 899, 902.

318 QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 2 (Harvard Univ. Press, 2018).

319 *Id.* at 2. Slobodian notes that there has long been a consensus that "[w]orld economic order depends on the protection of dominium (the rule of property) against the overreach of imperium (the rule of states)." *Id.* at 271.

320 Nicholas Blomley, *Un-Real Estate: Proprietary Space and Public Gardening*, 36 ANTIPODE 614 (2004).

321 As Rose and Miller put it: "Neo-liberalism re-codes the locus of the state in the discourse of politics. The state must be strong to defend the interests of the nation in the international sphere, and must ensure order by providing a legal framework for social and economic life. But within this framework autonomous actors – commercial concerns, families, individuals – are to go freely about their

simultaneously on reducing and expanding state functions, replacing traditional structures with "a *reorganized* state apparatus."[322] Understanding private property in land as a technique of indirect governance reveals why land *tenure* reforms are crucial dimensions of neoliberalization. That is, processes of land registration and the creation of private property rights always entail the "expansion and intensification of the role and presence of the state in land administration."[323] As Peluso and Lund point out, "even with reductions in state spending and regulation, state institutions and actors remain involved privately in land control and in land allocations for industrial agriculture, forestry and conservation."[324]

Neoliberal reforms embody specific processes of state formation and territorialization. Nicholas Blomley noted that "[n]eo-liberalism is, in part, a language of property."[325] However, the creation of institutions (such as through the formalization of property rights) is aimed at encasing and strengthening markets rather than liberating them.[326] The formalization of land rights is about the creation of a specific type of state and civil society/state structure. As Rose and Miller argue, the neoliberal state is not about the liberation of civil society but the creation of "*the right kind* of civil society."[327]

Similarly, Wendy Larner argues that neoliberalism should be viewed as a policy framework, an ideology, and through a "lens of governmentality."[328] Focusing on "technologies of government" rather than ideology or policy means theorizing neoliberalism as an active governance process. Such theorization requires an analysis of "the strategies, techniques and procedures through which different authorities seek to enact programmes of government in relation to the materials and oppositions anticipated or encountered."[329] The construction of the neoliberal state does not necessarily mean to implement a specific, prefabricated vision of a state. Larner notes that neoliberalism is often presented as a homogenous, unified project and that we tend to highlight the similarities

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business, making their own decisions and controlling their own destinies." Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 BRIT. J. SOC. 173, 199 (1992).

322 Jamie Peck, *Neoliberalizing States: Thin Policies/Hard Outcomes*, 25 PROG. IN HUMAN GEOGRAPHY 392, 447 (2001).

323 Catherine Boone, *Legal Empowerment of the Poor Through Property Rights Reform: Tensions and Trade-Offs of Land Registration and Titling in Sub-Saharan Africa*, 55 J. OF DEV. STUD. 384, 397 (2019) (citing Platteau, *supra* note 123).

324 Peluso & Lund, *supra* note 130, at 673.

325 Nicholas Blomley, *supra* note 320, at 614.

326 *Id.*

327 Rose & Miller, *supra* note 321 at 199.

328 Wendy Larner, *Neoliberalism: Policy Ideology, Governmentality in* 63 STUDIES IN POLITICAL ECONOMY 6 (2000); Wendy Larner, *Neoliberalism?* 21 ENV. & PLAN. D: SOCIETY & SPACE 509 (2003).

329 Nikolas Rose, *Governing 'Advanced' Liberal Democracies, in* FOUCAULT AND POLITICAL REASON 41 (Andrew Barry et al. eds., 1996).

between neoliberal projects rather than the differences. This often leads to a "silence on the techniques of neoliberalism, the apparently mundane practices through which neoliberal spaces, states, and subjects are being constituted in particular forms."[330]

The formalization of land rights serves as a prime example of how neoliberal governance processes manifest within the spheres of human rights and development, often masking profound power imbalances and systemic inequalities under the guise of seemingly neutral technical reforms. By framing land formalization as a pathway to tenure security, these processes ostensibly promote stability and economic development, yet they frequently reinforce existing hierarchies and disenfranchise marginalized communities. This complex interplay highlights the contradictions inherent to aligning human rights with neoliberal development agendas. The implementation of formal land rights can thus be seen as part of a broader strategy that prioritizes market efficiencies and neoliberal state control over questions of equity and social justice. This nuanced understanding of neoliberalism provides a crucial context for exploring contemporary land formalization practices. Despite their progressive rhetoric, these processes often perpetuate dispossession and inequity, a theme that will be further examined in the following section.

Formalization of land rights within a neoliberal framework has implications that extend beyond economic development, touching upon human rights and development in complex ways. The recognition of customary and Indigenous land rights, often seen as a progressive move towards protecting marginalized communities, can also be viewed as a strategy to integrate these lands into the state-controlled legal framework, thereby reinforcing state power and market-driven policies. This formalization, while ostensibly inclusive, often subsumes autonomous legal traditions under a state-centric model, subtly reshaping the power dynamics between the state and civil society. This interplay between formalization, human rights, and development underscores the need for a critical examination of how land tenure reforms are framed and implemented, paving the way for a deeper exploration of collective and Indigenous land titles in the next section.

2. Collective/Indigenous land titles: Territory? Property? Ethno-Justice?

Since the early 1990s, with the backing of the adoption of ILO Convention No. 169 and later UNDRIP, there has been a growing movement to ensure the recognition of Indigenous rights and the inclusion of Indigenous perspectives in global environmental and human rights agendas. This led the World Bank to push for and finance programs aimed at demarcation and legal recognition of collective

330 Larner, *Neoliberalism?, supra* note 328, at 511.

land rights in the Global South. However, the proliferation of Indigenous land titles has been heavily debated. Examining collective titling in Latin America, Karl Offen identified a "territorial turn."[331] He argues that "[t]erritorial claims are not simply a land or collective property claim that seeks to 'plug into' the existing institutional arrangements governing private property."[332] Rather, they "are about power, an assertion of identity, autonomy, and a measure of control over encompassed natural resources."[333] Offen contends this is not external to the World Bank's neoliberal agenda but a part of it, which it sees as "necessary to stabilize property regimes in developing countries."[334]

Policies promoting the formalization of tenure rights can be interpreted as part of the neoliberal state-building process. Formalization is not a neutral or benign administrative act. It is inherently political, delineating recognized rights and reshaping the dynamic between the state and civil society. Formal recognition of customary land tenure systems often signals the subsumption under state law, implying that only state-sanctioned legal systems carry validity. The formal inscription of customary rights integrates them into a state-centric legal framework, rather than truly recognizing their autonomous normative authority.[335] This includes the formalization of Indigenous lands, which, while initially perceived as a protective measure, later became integral to the neoliberal project, reinforcing state power and deepening capitalist relations.

"Neoliberal multiculturalism," as Charles R. Hale describes it, involves the strategic, limited recognition and incorporation of cultural rights within a neoliberal economic and governance framework that primarily benefits dominant power structures. Hale emphasizes that although on its surface neoliberal multiculturalism appears to empower marginalized groups by acknowledging their cultural differences, it often uses this recognition to depoliticize their demands and integrate them within a neoliberal model that reinforces inequality.[336] The limited recognition and integration restricts the scope of legitimate rights and

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331 Karl H. Offen, *The Territorial Turn: Making Black Territories in Pacific Colombia*, 2 J. LATIN AM. GEOGR. 43, 48 (2003).

332 *Id.* at 47.

333 *Id.*

334 *Id.* at 51.

335 *See also,* Roger Merino, *The Land of Nations: Indigenous Struggles for Property and Territory in International Law, in* 115 SYMPOSIUM ON THE IMPACT OF INDIGENOUS PEOPLES ON INTERNATIONAL LAW 115 Cambridge Univ. Press 129 (2021); Roger Merino, *Reinventing Sovereignty: Removing Colonial Legacies, Opening Plurinational Futures, in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW AND DEVELOPMENT (Ruth Buchanan, Luis Eslava & Sundhya Pahuja eds., 2023); Roger Merino, *Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America*, 31 LEIDEN J. INT'L L. 773 (2018).

336 Charles R. Hale, *Neoliberal Multiculturalism*, 28 POL. & LEGAL ANTHROPOLOGY REV. 10, 10, 25–26 (2005).

political actions available to Indigenous communities. This results in the very understanding of Indigeneity being reshaped, remaking the racial hierarchy.[337] Similarly, Tania Murray Li argues that human rights advocates frequently promote collective land titling as a "communal fix." Inalienable collective titles are supposed to protect the individuals from dispossession. However, rather than "attempt[ing] to reverse the dispossessory effects of capitalism overall …, they seek to erect a wall …guarded by the insistence that Indigenous peoples' landholding is collective and inalienable."[338] Joel Wainwright and Joe Bryan further argue that recognizing Indigenous land relations as formal property constrains these relations, reinforces state power, and deepens the integration of Indigenous land tenure into the market economy and into capitalist social structures.[339] Neoliberal governance adapts and incorporates diverse forms of property and land tenure systems, not to negate them but to transform and utilize them in service of its objectives. It redefines customary land rights within a neoliberal framework, maintaining the fundamental ethos of private property and market-oriented governance. It is a subtle yet powerful mechanism of control, one that presents an illusion of inclusivity and diversity in land tenure systems while quietly perpetuating and legitimizing the neoliberal state.

Global pressure to protect Indigenous Peoples' rights to land and to act in the face of multiple concurrent environmental crises led to the latest reconfiguration of neoliberal governance. Penelope Anthias and Sarah Radcliffe suggest the notion of an 'ethno-environmental fix' encapsulating a dual function: safeguarding Indigenous communities from market forces while framing them as custodians of biodiversity.[340] The World Bank's recent report "Land Policies for Resilient and Equitable Growth in Africa," exemplifies this approach by advocating for formalized Indigenous land rights primarily as a measure to curb deforestation, explicitly linking Indigenous communities' well-being to their role in environmental preservation.[341] Formalized Indigenous land rights are beneficial not only for Indigenous Peoples but also, and mostly, for broader conservation goals. This focus situates Indigenous communities within a framework that aligns their assumed cultural and environmental knowledge with global environmental goals, while implicitly reshaping their identities and land into commodifiable assets. This approach integrates Indigenous territories into the global discourse of

337 *Id.* at 20–24.

338 Tania Murray Li, *Indigeneity, Capitalism, and the Management of Dispossession*, 51 CURR. ANTHROPOLOGY 399 (2010).

339 Joel Wainwright & Joe Bryan, *Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-Mapping in Nicaragua and Belize*, 16 CULTURAL GEOGRAPHIES 153, 154 (2009).

340 Penelope Anthias & Sarah A. Radcliffe, *The Ethno-Environmental Fix and Its Limits: Indigenous Land Titling and the Production of Not-Quite-Neoliberal Natures in Bolivia*, 64 GEOFORUM 257 (2015).

341 Klaus Deininger & Aparajita Goyal, *Land Policies for Resilient and Equitable Growth in Africa*, WORLD BANK RESEARCH OBSERVER 185–89 (2024).

environmental conservation and sustainable development, while reconfiguring and re-entrenching global racial capitalism.[342] Through the norms and practices inscribed in international law, an 'exoticized' version of Indigenous Peoples' cultural practices and onto-epistemologies are assigned value for their contributions to global conservation, embedding their 'racial value' within their capacity to safeguard biodiversity and protect nature. Rather than prioritizing Indigenous self-determination, this approach links Indigenous communities' rights and territories to their environmental function, obscuring the profound colonial history and present dynamics of land dispossession and control. Indigenous Peoples' practices and onto-epistemologies are not only romanticized and exoticized but largely placed outside the past and present of racial capitalism, thus, inadvertently reproducing global racial hierarchies in which Indigenous rights are secondary to capitalist interests.[343]

Rather than realizing any "radical potential of multicommunal territories,"[344] international human rights law and international development re-entrench old and create new global and local racial hierarchies.[345] The frequent failure to successfully "confront state power by mimicking state institutions"[346] is not least rooted in the limited, Eurocentric understanding of (territorial) sovereignty inscribed in international law. Based upon an understanding of land-as-property or land-as-resource, the practice of formalization of territorial and property claims to land are only partially irreconcilable with relationship-based approaches to land. This process of reductionism and reification not only reenacts colonial land governance structures but also reproduces racialized identities. However, Clint Carroll argues that only "[i]n speaking the language of 'resources,' indigenous nations are able to assert some form of sovereignty over them" and continues that "[a]s flawed as this discourse may be, commensurate within it are Indigenous assertions of territory and resource control."[347] In his study of the Cherokee Nation, Caroll shows how "Cherokees are reversing past theoretical frameworks

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342 *See* Skye Niles, Shawhin Roudbari & Santina Contreras, *Neoliberal Multiculturalism and Changing Colonial Racial Hierarchies in International Development*, 10 SOCIOLOGY OF RACE & ETHNICITY 249, 250 (2023) (observing the reformulation of "colonial racial hierarchies in development by suturing racial value to adherence to neoliberal ideals" under the guise of multiculturalism).

343 *See* Penelope Anthias & Kiran Asher, *Indigenous Natures and the Anthropocene: Racial Capitalism, Violent Materialities, and the Colonial Politics of Representation*, ANTIPODE (2024); David Chandler & Julian Reid, *Becoming Indigenous: The 'Speculative Turn' in Anthropology and the (Re)Colonisation of Indigeneity*, 23 POSTCOLONIAL STUDIES 485 (2020).

344 Hale, *supra* note 336, at 25.

345 *Id.*; *see also* Taiaiake Alfred & Jeff Corntassel, *Being Indigenous: Resurgences Against Contemporary Colonialism*, 40 GOVERNMENT AND OPPOSITION 597 (2005).

346 Alfred & Corntassel, *supra* note 345, at 603.

347 CLINT CARROLL, ROOTS OF OUR RENEWAL: ETHNOBOTANY AND CHEROKEE ENVIRONMENTAL GOVERNANCE (2015).

by requiring that the state itself reconfigure the way in which it makes sense of the world."[348]

Land is understood—or rather assembled—as a resource: presupposing not only its ontology and affordances but also human-land relationships.[349] An understanding of land as a resource takes the non-human world as subservient to human needs. Max Liboiron succinctly articulates this paradigm, observing that "[i]n colonial understandings of Nature, (certain) humans can protect, extend, augment, better, use, preserve, destroy, interrupt, and/or capitalize on robust-within-limits Nature . . In a colonial worldview, a Resource relation is good and right."[350] This perspective normalizes an extractive relationship, rendering land's value solely in terms of its utility to human objectives. la paperson critiques this construction of "land" as "natural resource" as one of the "most chillingly undisguised . . exercises of supremacist sovereign power of life and death."[351] Assembling land in this way is not a neutral act but a powerful manifestation of colonial logic where the ontological multiplicity of land is obscured, leaving it vulnerable to domination, exploitation, and commodification. This approach flattens complex ecological and cultural dimension into a resource to be managed and extracted, reinforcing structures of hierarchy and supremacy that privilege certain human interests while subordinating non-human entities, as well as human-land relations that do not conform to economic imperatives. Such a monolithic conceptualization of land as a resource cannot provide the basis for an equal and equitable land tenure system.

My point is not merely that international human rights and/or development instruments do not adequately acknowledge Indigenous Peoples' relationships with land, but rather that these instruments also create and perpetuate unequal structures that grant security for very few while leading to insecurity for marginalized people around the world. As Laura German and Carla Braga have pointed out, "what we have achieved is not so much increased security of rights, access or livelihoods, but instruments of 'polite dispossession' in which (narrowly defined) rights and (nominal) agency are extended to customary rights holders, but outcomes are nonetheless dispossessory over time."[352]

V. CONCLUDING REMARKS

Through the lens of the concept of tenure security, this article has sought to excavate the contradictions embedded in the international legal framework(s)

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348 *Id.* at 173.

349 Murray Li, *supra* note 51, at 590.

350 Max Liboiron, POLLUTION IS COLONIALISM 62–63 (2021).

351 LA PAPERSON, *Land is the Biopolitical Target, in* A THIRD UNIVERSITY IS POSSIBLE 14 (2017).

352 German & Braga, *supra* note 13, at 1250.

governing human-land relations as well as the co-constitutive nature of international human rights law and international development. Far from a dialogic disconnect of international development and human rights introduced by Philip Alston, this article has revealed a complex entanglement of "bizarre development ideas" [353] and international human rights law. The article argues that the international development and human rights frameworks often perpetuate the very structures they ostensibly seek to unravel, leading to further marginalization of the already vulnerable. More specifically, the concept of tenure security embedded in international human rights and Indigenous rights law inadvertently reinforces and legitimizes land formalization practices that disproportionately secure the few while dispossessing many globally, including vulnerable populations in the "Global North."

The convergence of development and human rights narratives in promoting land formalization reveals a crucial aspect of international land governance and the "emergent land governance orthodoxy." [354] Despite the fundamental differences in their origins and aims—where development agencies focus on market efficiency and economic growth, human rights actors emphasize equity and justice—their strategies coalesce around the formalization of land. The formalization of land as a contemporary practice of land tenure security is deeply rooted in colonial ontologies and technologies of acquisition. Through the establishment of regimes that incorporate a narrow ontology of land as resource and that prioritize Western ideas of property, these reforms create and perpetuate racial inequalities and hierarchies thereby enacting racial regimes of ownership.

In this way, international law and global governance instruments on land tenure carry forward colonial legacies that were primarily designed to extract and exploit resources from the colonies. Land formalization initiatives often transform land into a resource ready for investment, thereby increasing its accessibility in global markets. This process often results in the displacement of local communities who do not hold formal titles to their land, or whose cultural ties and claims to land are disregarded in formal legal frameworks. These laws continue to manifest colonial mindsets by prioritizing Western legal frameworks and understandings of property at the expense of Indigenous and communal understandings of human-land relations that do not align neatly with such models. This approach not only further marginalizes these communities but also strips them of their rights to land. Furthermore, the racial capitalist underpinnings of global land governance and, especially, the colonialist ontology of land as resource, as property to be owned, has led to the systemic dispossession of marginalized populations.

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353 Bromley, *supra* note 47, at 26.

354 German, *supra* note 12, at 81.

Decolonization, understood as "the rematriation of land, the regeneration of relations, and the forwarding of Indigenous and Black and queer futures,"[355] however, requires the recognition of Indigenous Peoples' rights to land as more than resource or property claims.[356] Even beyond Indigenous Peoples' rights to land, it requires the recognition of human-land relationships beyond property relationships. This is not to exploit Indigenous Peoples' onto-epistemologies but rather to unsettle the dominant Eurocentric understandings of land, territories, and tenure security entrenched in dispossessory racial capitalism. As Shelley Cavalieri and Lua Kamál Yuille have recently voiced, "the essential disposition—the very *esprit*—of property . . is inherently raced and gendered."[357] Hence, we must reject and unsettle these understandings of property and land along with the "premise that Black people in the Americas are dispossessed from connection to land through slavery in such a way that past and future connections to land are foreclosed."[358] Unsettling post+colonial concepts, categories, and techniques—including the concept of tenure security, the category of land as resource, and the technique of legal formalization as panacea for tenure (in)security—is, however, imperative for both projects of decolonization and human/ civil rights-based social justice projects.[359] That is, beginning "from these categories [is to] concede to a world that is how the settler-enslaver wishes it to be. We *must* unsettle these definitions of land."[360]

While it is essential to move beyond these racialized and capitalist conceptions of land, doing so does not preclude the strategic invocation of international human rights law.[361] Legal systems and rights-based frameworks, while rooted in colonial ideologies, can be appropriated to support struggles for

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355 PAPERSON, *supra* note 351.

356 It is not just about *property*, it is about "the actual ground itself that is the ground through which Indigenous peoples know our pasts, presents, and futures as relational and as pedagogical." Jodi A. Byrd, *Weather with You: Settler Colonialism, Antiblackness, and the Grounded Relationalities of Resistance*, 5 CRIT. ETHNIC STUD. 207, 209 (2019).

357 Shelley Cavalieri & Lua Kamal Yuille, *The White Androcentric Disposition of Capitalist Property*, 2 J. L. POL. ECON. 253 (2022).

358 Andrew Curley et al., *Decolonisation Is a Political Project: Overcoming Impasses between Indigenous Sovereignty and Abolition*, 54 ANTIPODE 1043, 1048 (2022).

359 Tuck and Yang have called for an "ethic of incommensurability, which recognizes what is distinct, what is sovereign for project(s) of decolonization in relation to human and civil rights based social justice projects." Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUCATION & SOCIETY 1, 28 (2012).

360 Curley et al., *supra* note 358, at 1048. *See also,* AILEEN MORETON-ROBINSON, THE WHITE POSSESSIVE: PROPERTY, POWER, AND INDIGENOUS SOVEREIGNTY (2015).

361 As Maldonado-Torres put it: "This does not mean that human rights cannot be used strategically in the struggle for decolonization if they proved helpful. But this strategic use is not a defense of human rights in principle or a commitment with any particular formulation." Nelson Maldonado-Torres, *On the Coloniality of Human Rights*, 114 REVISTA CRITICA DE CIENCIAS SOCIAIS 117, 132 (2017).

decolonization. Yet, this use must be cautious and intentional, recognizing that such frameworks are embedded within the post+colonial, racial capitalist structures that continue to perpetuate inequalities. Thus, interrogating these frameworks and excavating their contradictions, shortcomings, and onto-epistemological bases, is essential for navigating their limitations. This involves recognizing and grappling with the fact that while international human rights law may offer limited protection in as far as demands and subjects can be made visible to it, they can simultaneously uphold the very forms of dispossession they are invoked to challenge.

In scrutinizing the centrality of formalization, this article has shown that international instruments such as the VGGT and the SDGs inherently prioritize formal legal frameworks that often fail to protect the rights of vulnerable populations. By revealing how these instruments perpetuate a narrow, formalized approach to land tenure that aligns with colonial and capitalist paradigms, the article calls for a profound rethinking of land governance. This rethinking must move beyond formalization to embrace diverse and inclusive understandings of land and tenure that truly reflect and respect the varied relationships communities have with their land. This paradigm shift is essential for advancing decolonial praxis and achieving equity and justice in global land law and governance.