



## Land and human rights: Towards a rights-based approach for addressing commercial pressures on land

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Lorenzo Cotula, IIED

Land is life for millions of people worldwide, providing the basis for livelihood activities, social identity, political organisation and the collective sense of justice. But socio-economic changes at local to global levels are exacerbating pressures on land. Law plays a key role in shaping these pressures and their impacts, often undermining the land rights of marginalised people. In providing authoritative interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), a General Comment on land and human rights can offer strategic direction for efforts to secure land rights and tackle the pressures, both in law and in practice – but only if it properly addresses the deep-seated challenges.

### Pressures on land are growing

Contexts vary widely, and it is impossible to reflect the very diverse local to global factors that drive pressures on land in different settings. Global processes acquired greater prominence from the early 2000s, when public policies and market forces sustained a surge in commercial investments across the natural resources sectors – including agriculture, mining and petroleum.<sup>1</sup> Many investments have occurred in low and middle-income countries where private enterprise is badly needed, and governments of different political stripes saw the wave of investments as an economic opportunity – to promote economic development, create jobs and generate public revenues. But the deals have also prompted public concerns about the development pathway and the types of investment being pursued, and how the costs and benefits were being distributed in practice.

On the ground, the land footprint of the deals has exacerbated competition for valuable lands. A vast body of research has documented land conflict and dispossession, at different scales and under diverse terms, associated with agribusiness plantation projects,<sup>2</sup> and with extractive industry operations,<sup>3</sup> producing differentiated impacts based on age, gender, status, wealth and other socio-economic parameters.<sup>4</sup> Many commercial ventures found themselves embroiled in difficult disputes, with diverse social actors challenging the deals, or the underlying public policies, to seek better terms or demand their termination.<sup>5</sup>

More recently, deal making slowed, partly as a result of changing commodity prices. In agriculture, for example, new agribusiness plantation deals continue to be signed, but the pace of deal making has significantly slowed compared to the peak of 2008-2012.<sup>6</sup> At the local level, however, the pressures continue to be felt, particularly in strategic hotspots where minerals, petroleum, fertile soils, freshwater and infrastructure are concentrated. Many abandoned projects left behind a legacy of disputes,<sup>7</sup> and the impacts of projects now under implementation have become more visible. Many governments continue to identify the natural resource sectors as a foundation for national development, and most analysts expect that global population growth, rising incomes and changing consumption patterns will fuel demand for commodities in the longer term.

<sup>1</sup> GRAIN (2008); De Schutter (2011); Anseeuw *et al.* (2012); Scoones *et al.* (2013); Borras *et al.* (2016); Cotula (2016).

<sup>2</sup> E.g. Schoneveld *et al.* (2011), on Ghana; UNHRC (2012), on Cambodia; Kenney-Lazar (2012), on Laos; FIAN (2012), on Kenya and Mozambique.

<sup>3</sup> E.g. on mining: OCMAL (2015); Pichler and Brad (2016).

<sup>4</sup> See e.g. Behrman *et al.* (2012).

<sup>5</sup> E.g. Alonso-Fradejas (2015); Gingembre (2015); Grajales (2015); Moreda (2015).

<sup>6</sup> Cotula (2016).

<sup>7</sup> See e.g. Sulle and Nelson (2013) and Schwartz *et al.* (2019), in relation to a discontinued biofuel project in Kilwa district, Tanzania.

Meanwhile, other factors are also driving competition for valuable lands. These range from longstanding processes of land concentration in the hands of local and national elites, for example in areas connected to growing urban markets, or as part of farm consolidation or land speculation processes;<sup>8</sup> all the way to public policies that promote industrial and infrastructural development, including a renewed momentum for the establishment of special economic zones.<sup>9</sup> These processes involve different phenomena and raise distinctive issues. But they have in common their potential to exacerbate a resource squeeze on socially or politically marginalised groups. People with more limited rights, or more limited say, in land governance, are particularly at risk – including, in many agrarian societies, women, youths and migrants.

### Law underpins exclusionary processes

Pressures on land are driven by socio-economic changes at local to global levels – from demographic growth, urbanisation and changing consumption patterns and expectations, to shifts in supply chain relations. Corruption often oils the transactions,<sup>10</sup> while shrinking political space exposes land rights defenders to repression.<sup>11</sup> But features of the law influence the way commercial pressures manifest themselves and underpin their often exclusionary outcomes.<sup>12</sup>

Social and legal contexts are extremely diverse, and it is impossible to generalise. But many national laws do not properly recognise, and they thus ultimately undermine, local systems of rights, beliefs, institutions and practices. Although evidence shows that many traditional land use practices are resilient and sophisticated, and while recent years have witnessed reforms to legally recognise customary rights,<sup>13</sup> local resource rights enjoy variable but often limited legal protection in practice – including in jurisdictions where legislation or even the constitution formally affirms those rights.<sup>14</sup> For example, many land laws condition actual protection to proof of “productive use”, and skewed notions of productivity undermine the resource claims of shifting cultivators, pastoralists and hunter-gatherers, as well as control over lands of spiritual or religious value.<sup>15</sup>

Also, many compulsory acquisition laws grant authorities broad powers to expropriate privately held resources and reallocate them to commercial operators; they exclude important types of rights from legal protection; they do not establish stringent enough compensation requirements; or they do not provide effective avenues for redress.<sup>16</sup> And where legal reforms do seek to address these fundamentals, tensions can arise between the formal “social contract” reflected in the law, and the informal sociopolitical processes that determine how authority is exercised in practice – so implementation is often undermined by a *de facto* policy thrust that hollows out from within any innovative legal concepts.<sup>17</sup> This legal marginalisation of local tenure rights facilitates the wrong types of investments, enabling businesses or elites to acquire vast land areas through relations with the state, and it exposes many people to dispossession with little consultation, benefit or compensation.

Meanwhile, concerns about inequality in land relations<sup>18</sup> raise questions not only with regards to the skewed distribution of economic assets, and the ensuing concentration of market and political power within society,<sup>19</sup> but also in relation to inequality of rights and obligations. While the law often undermines local land claims, many national law reforms have strengthened the rights or streamlined the procedures whereby businesses access land.<sup>20</sup> At the international level, a global network of investment treaties allows foreign investors to bring arbitration claims against states and seek compensation for state conduct adversely affecting their business. Often described as instruments of the rule of law, these international treaties can protect foreign investors’ resource rights, and even their expectations, against public action to redistribute or restitute land, or to withhold, reopen or revoke commercial concessions in the face of local opposition.<sup>21</sup>

In sharp contrast with the complex constellations of actors that typically characterise land-based investments, the international investment regime centres both substantive rules and dispute settlement around a binary investor-state relationship that inherently marginalises local landholders.<sup>22</sup> And while

<sup>8</sup> See both case studies (e.g. Djiré 2007) and aggregate-level analyses (e.g. Jayne *et al.* 2014) concerning different contexts in sub-Saharan Africa.

<sup>9</sup> UNCTAD (2019).

<sup>10</sup> De Schutter (2016).

<sup>11</sup> Global Witness (2016); Oxfam (2016); RRI (2017).

<sup>12</sup> Cotula (2016).

<sup>13</sup> E.g. Knight (2010).

<sup>14</sup> German *et al.* (2013).

<sup>15</sup> See e.g. Nguiffo *et al.* (2009).

<sup>16</sup> Gebremichael (2016); Tagliarino (2017); Schwartz *et al.* (2018).

<sup>17</sup> Guevara Gil and Cabanillas Linares (2019).

<sup>18</sup> Guereña and Wegerif (2019). In many contexts, processes of concentration coexist with fragmentation, with marginalised groups being pushed on smaller and more fragmented plots (Jayne *et al.* 2014).

<sup>19</sup> Glenn *et al.* (2019).

<sup>20</sup> GRAIN (2015).

<sup>21</sup> Cotula (2015, 2016); Cordes *et al.* (2016).

<sup>22</sup> Perrone (2016).

many people see land as a basis for social identity and cultural value, the international investment regime tends to conceptualise land as a commercial asset the value of which is expressed in monetary terms.<sup>23</sup> Meanwhile, international norms to ensure the accountability of businesses for any land-related human rights violations are yet to crystallise, compounding imbalances in legal frameworks.<sup>24</sup>

Taken together, these features of relations between citizens and public authorities, and between different resource claimants, tend to facilitate extractive models of resource development, and to expose millions of people to the risk of dispossession.

### A General Comment can help address these issues

Because law plays an important role in constituting commercial pressures on land, a General Comment that articulates the land governance implications of the ICESCR, including in terms of addressing gaps in national legal systems, can help tackle the challenges. In clarifying these implications, the General Comment can build on important normative developments. For example, the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) provide guidance on how to recognise, respect and protect socially legitimate tenure rights, including those not currently protected by law. International instruments and jurisprudence on indigenous peoples' rights, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), highlight the socio-cultural dimensions of land and tie land-related rights to free, prior and informed consent. And in explicitly recognising a human right to land, the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) establishes a more direct connection between land and human rights, one that is not mediated by the role land can play in providing public goods such as access to food, and that is connected to restructuring the modes of production.<sup>25</sup>

### The need for a holistic agenda

The Issues Paper prepared for this consultation identifies a few specific questions for discussion. The first two questions interrogate lessons learned from titling programmes, and ways to recognise customary land rights. After longstanding attempts to eradicate or co-opt customary systems, there is now broad-based support, crystallised in the VGGT, for the notion that national governance should build on local practice and recognise tenure rights that people consider socially legitimate, including customary rights where relevant.

Experiences with formalising tenure rights, including customary rights, are extremely diverse, partly responding to different policy aims (e.g. increasing agricultural production, improving social cohesion, devolving governance functions), and to different contexts (e.g. small-scale farming, pastoralism, indigenous lands), and evidence of their outcomes is mixed. In many jurisdictions, formalisation provides the basis for enhanced legal protection – but the process often involves risks, including manipulation by the better off, simplification of complex tenure systems, and ultimately dispossession of disadvantaged groups.<sup>26</sup>

Programme design and implementation do matter – for example, the extent to which social issues such as gender and differentiation are properly addressed.<sup>27</sup> Evidence provides pointers on advancing accessible, effective and sustainable systems to secure local tenure forms, including by building on experiences with participatory mapping of collectively held lands.<sup>28</sup> There is also experience with addressing social differentiation within communities, including based on gender, age, income, wealth, status or socio-economic profession, and including in contexts where customary systems are prevalent, for example through strengthening women's representation in traditional or statutory land governance institutions.<sup>29</sup>

But as the foregoing discussion illustrates, formalisation is just one element of a broader set of issues affecting the extent to which national governance systems recognise, respect and protect tenure rights. Formalisation would not improve tenure security if rights can be expropriated with little compensation or consultation. This calls for a broader agenda that would also consider, for example, the substantive content of the land rights the law recognises to different actors; the effectiveness of safeguards in compulsory acquisition; redistributive reform where relevant; dispute settlement and access to justice; and arrangements for voice, representation and accountability in land-related decision making.

<sup>23</sup> Cotula (2013).

<sup>24</sup> Ferrando (2017).

<sup>25</sup> Cotula (forthcoming / 2020).

<sup>26</sup> E.g. Chauveau and Lavigne Delville (2012).

<sup>27</sup> English *et al.* (2019).

<sup>28</sup> Knight *et al.* (2016); Rainbow (2018).

<sup>29</sup> E.g. Salcedo-La Viña and Morarji (2016); Sutz *et al.* (2019).

The third question identified in the Issues Paper concerns ways for ensuring “that investments in land shall not worsen inequalities and result in depriving local communities from access to natural resources on which they depend”. The nature and scale of land disputes associated with large-scale land-based investments, including investments that applied “best practice” systems based on the International Finance Corporation’s Performance Standards (IFC-PS), suggest that existing due diligence and operating systems do not ensure that land rights issues are identified in a timely way, or effectively addressed. The VGGT differ from the IFC-PS: for example, they identify people as right holders rather than passive beneficiaries; promote consensual approaches based on partnership rather than involuntary resettlement; and call for rethinking investment models, beyond merely establishing safeguards.<sup>30</sup>

There is a need to upgrade existing systems in the light of the VGGT and human rights norms. Beyond addressing problems in prevailing investment patterns, there is also a need for a more proactive agenda that, by securing legitimate tenure rights, and improving arrangements for voice and accountability in land-related decision making, enables right holders to advance their own vision of investment from the ground up. The VGGT and their calling on states to recognise all legitimate tenure rights; the UNDRIP and its emphasis on free, prior and informed consent; and the UNDROP and its affirmation of a human right to land all provide a rich tapestry of concepts and approaches the General Comment can draw upon. The vested interests and power imbalances that tend to characterise land-based investments mean that making rights real is likely to require sustained support not only for regulators and implementers, but also for local landholders as they engage with government and businesses.

The General Comment can also add value by addressing issues surrounding: the repression of land rights defenders, often in connection with land-based investments; the responsibility of businesses to respect human rights, and access to redress for those affected; and problems concerning the international investment regime, which land-based investments vividly illustrate – including the effects that ill-formulated investment protections could have on measures to protect local land rights, implement land reform or strengthen land governance; the lack of arrangements for conditioning any protections to compliance with responsible investment standards, including with regards to land rights; and the lack of arrangements, in the context of investor-state dispute settlement, to meaningfully protect the rights of landholders affected by an investment or dispute.

## Concluding remarks

In recent years, wide-ranging critiques have questioned the viability of human rights as a vehicle for emancipatory action.<sup>31</sup> The response of the global human rights system to public concerns about land is likely to be a test case for the perceived ability of human rights to advance a truly emancipatory agenda. The General Comment provides an opportunity to rise to this challenge.

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<sup>30</sup> Windfuhr (2017); Cotula (2019).

<sup>31</sup> For a discussion, see Cotula (forthcoming/2020).

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