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## The Global 'Land-Grab', Sovereignty and Human Rights

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Over the past ten years, foreign investments in agricultural land, especially those located in the Global South and in Eastern Europe, have dramatically increased.<sup>1</sup> This involves an empirically proven global trend of land acquisition which is complex and multi-dimensional. The so-called “green rush” brings with it risks as well as opportunities for local populations. Those who seek to acquire control of the land could be states as well as private investors. A large proportion of investors are made up of states from all five continents, especially countries such as India, South Korea, China, Saudi Arabia and other states of the Persian Gulf region, as well as European and American investment funds. Investors would lease, and to a lesser extent purchase, large swathes of farmland, especially in African, Latin-American, Asian and Eastern European States, and use them for various purposes: Partly to secure food supplies of the investor-country and often as a strategy of profitable production of food, biofuels or other agricultural products for sale on the global market.

There are two political interpretations of this sudden jump in land acquisition: The first view, which is held prominently among members of international civil society, interprets these developments as a danger for the countries of the South: *Land-grabbing* leads to the forced displacement of small-scale local farmers, upon whom hundreds of millions of people world-wide depend for supply and sustenance. The consequences are further impoverishment of these small-scale farmers and the related growth of slum settlements in the megacities of the South. In addition, local populations of countries which receive this type of investment, who often are already desperately in need of economic development, rarely benefit from the resulting profits. The main concern voiced by many critics of this trend is the loss of local decision-making power over vast areas of the agricultural sector and its earnings, especially when the country in question is at the

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<sup>1</sup> On this phenomenon see the special issues *Journal of Peasant Studies* (JPS Forum on Global Land Grabbing Part 2: on methods, Vol. 40 (3), 2013, pp. 469-609) and of *Globalizations* (Land Grabbing and Global Governance, Vol. 10 (1), 2013, pp. 1-209).

same time dependent on UN food aid and the import of food from abroad, thus being exposed to price volatility in the global food markets. The second view on the matter, as taken by the World Bank, emphasizes the opportunities of foreign investments. Starting from the assumption that in the past decades the agricultural sectors of the Global South have suffered from under-investment, increased investment in the starved agricultural sectors of these countries is interpreted as a chance for economic growth and thus greater affluence for the local populations, as well as the opportunity to improve agricultural infrastructure.

For the purposes of this contribution, I shall for the moment leave this political dispute on one side, and instead concentrate on two aspects related to general discursive shifts in the realm of international law. Somewhat paradoxically, the language of international law is on the one hand complicit in the structures that make the global land-grab possible, and on the other hand it is a language used to challenge and contest the negative effects of the phenomenon of land-grabbing.

### **I. Complicity**

Institutions created by international law, such as the World Bank and the IMF, have since more than twenty years through various interventions opened up markets in the Global South for these large scale investments, be it through structural adjustment programs, which put an end to domestic public investment into national agriculture in many countries of the Global South or through simultaneously pushing for market access for foreign investments. Neoliberal structural change, which was demanded of, and imposed on highly indebted Third World countries, had in the view of civil society organizations decreased public investment in the agricultural sectors and thus has led to the destruction of public agricultural infrastructure in many developing countries. The affected countries as a consequence often entirely lost their ability to produce basic food products, ending up completely reliant on global markets. The forced opening by the World Bank of national agricultural markets to foreign investors, who are often protected by a highly efficient bilateral investment treaty regime, have then made the large-scale sale and lease of land possible.

The second aspect, which can be raised in this context is the sovereignty principle. Sovereignty comes into play in two discursive dimensions. The first dimension is its static use. Sovereignty in this usage signifies the locus of ultimate authority, control or decision-making power over the territory and the inhabitants. It is the classic notion of sovereignty, which in the late nineteenth century is attributed to a state, consisting of a clearly delineated territory, inhabitants and an effective government. Sovereign states in this sense are considered equals. With the aim of preserving the status quo this notion of sovereignty privileges individuals, groups and national institutions, who effectively control the territory and their inhabitants. Sovereignty in its static notion facilitates the global land-grab in various, complex and unforeseen ways.

In the second half of the twentieth century, the newly decolonized states in Africa and elsewhere sought to use the sovereignty concept of international law, which is European in origin, as a tool through which they could engage with other states in the

international system on equal terms. The new governments would replace the colonial powers and claim to be the ultimate authority over their territory and the population. By accepting the *uti possidetis* doctrine, they became rulers over a specific territory, the boundaries of which had been the result of power struggles and negotiations between European colonial powers at the end of the nineteenth century. It is well known that these territorial boundaries as a result often did not correspond to the traditional boundaries between ethnic groups, clans or languages, often cutting across traditional nomadic routes. Particularly in Africa, it can be observed that the land which will be given to foreign investors often is the land of the other tribe or ethnic group that is currently not in power or in a permanent minority position in the respective state. Another factor, which is conducive to the global land-grab, is the historical fact that the newly decolonized states replaced the colonial power as the official owner of the land. In Africa most of the land, which can be used for agriculture is formally state property. Thus, in sharp contrast to the development of property relations in Western states, smallholders in former African colonies generally do not possess formalized tenure or property over the lands they have for centuries cultivated or used for animal husbandry.

It is through their status as sovereign entities and owner of most of the land, which can be used for agricultural purposes, official governments are in a position to enter into contractual relations with foreign investors for the notorious large-scale land deals. At the same time, territorial sovereignty is affected for instance if large parts of the territory is leased to foreign governments for a period of 99 years, which is a standard clause in these land deals. While formally retaining ultimate jurisdictional control over these parts of the territory, foreign state entities or private investors gain the right to exploit the land and to dispose of its agricultural products, hereby effectively diminishing domestic control over vital land resources. Thus, while enabling the phenomenon of land-grabbing, the government's formal authority and decision-making power over the territory itself contributes to the creation of a "structural hole in the tissue of national sovereign territory".<sup>2</sup> What will in the longer run be the implications for international law as a legal system, if the state-territory nexus will be considerably weakened by the forces of global market liberalization? What will replace the traditional state-territory nexus as the central ordering principle of international law? And how can ideals of democratic self-rule be realized, if all natural and cultural resources, including the land itself, have been commodified and are to a great extent owned or controlled by foreign entities acting as profit-oriented investors in a globalized economic system?

## **II. Contestation**

Due to its political and legal ambivalence, the sovereignty concept is also being used to challenge the right of governments to transfer large portions of land resources to foreign governments and foreign private investors. Here the dynamic and emancipatory

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<sup>2</sup> Sassen, Saskia, *Land Grabs Today: Feeding the Disassembling of National Territory*, 10 *Globalizations* 2013, pp. 25-46 (43).

dimensions of the sovereignty term, which discursively work *against* the status quo, come to the fore.

In its emancipatory dimension the sovereignty concept is amalgamated with the idea of self-rule and self-determination. The bearer of sovereignty in this discursive usage is a collective entity, the people or the nation. While this notion is deeply rooted in the philosophical tradition of the Enlightenment through Rousseau and Kant, it has found a more specific expression in international law and UN history in the decolonization era, but is also present in other areas of international law, such as in the law of occupation corroborating the right to self-rule of occupied peoples. In the context of struggle for decolonization, the G-77 countries within the UN fought for what was termed “*permanent sovereignty over natural resources*”. In the 1960s and 70s the disputed right to permanent sovereignty over natural resources was to be seen as a product of newly acquired independence and was designed to repel the economic exploitation of mineral resources by European and American companies.<sup>3</sup> It was not mere coincidence that the newly independent states linked the permanent sovereignty claim to the concept of self-determination. Self-determination of the people and control over natural resources were merged into a dynamic concept that challenged the existing *economic* status quo. During decolonization permanent sovereignty over natural resources was thus construed as a right to resist and end foreign political and economic domination.

Arguably, the current *Food-Sovereignty* movement can be partly, if not entirely, interpreted in this tradition. Critics in international civil society seek to use the elusive concept of food sovereignty to counter international regulatory interventions with or without the complicity of the respective home states leading to the global landgrab. A popular definition is as follows:

*„Food Sovereignty is the Right of peoples, communities, and countries to define their own agricultural, labour, fishing, food and land policies, which are ecologically, socially, economically and culturally appropriate to their unique circumstances.*

The *Food Sovereignty* - approach claims the right of populations to decide over their own present and future food supply. It encourages national and local self-determination on issues of food security, including regaining the country’s ability to feed its population alongside or against detrimental global regulatory frameworks and associated decisions of national governments. Similar to the 1960s and 70s permanent sovereignty over natural resources claim, the bearer of sovereignty is not the state but the people or to be more precise the affected populations. Put into effect, the *Food Sovereignty* - claim would amount to a right of local communities to opt out or to veto the implementation of foreign investments in land, which in one way or another endanger collective food-security and traditional livelihoods.

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<sup>3</sup> On the concept see Pahuja, Sundhya, *Decolonising International law, Development, Economic Growth and the Politics of Universality*, 2011, pp. 95-171; Schrijver, Nico J., *Sovereignty over natural resources. Balancing rights and duties*, 1997, pp. 36-113.

Sovereignty claims in their dynamic notions aspire to a collective right to end external domination and to establish self-rule. This holds true for both the meanwhile historic permanent sovereignty claim as well as for the new food sovereignty claim. The difference is that external domination in the food sovereignty and land-grabbing discourse originates from one's own executive branch, international institutions and foreign public and private investors and their complex interactions.<sup>4</sup> This is also an important difference compared to the era of decolonization where external domination and resources exploitation was mainly exercised by a handful of colonial powers and their extractive industries.<sup>5</sup> Today the globalized leviathan is a complex network of faceless national and international bureaucracies, regulatory frameworks and standards, as well as globally operating company headquarters serving and taking advantage of liberalized global markets. The rise of this global constellation over the last 20 years is questioning the very basis of the modern international legal order based on sovereign nation states and their democratic and emancipatory potential. Due to its polycentric axes of power and complex legal and political structures, this regulatory global constellation can neither be understood by realist assumptions of unilateral hegemonic power, nor by liberal network approaches. Theories of unilateral hegemonic rule underestimate the multitude of actors and semantic contributions constructing this constellation, whereas liberal network theories as well as many pluralist approaches tend to bestow the rule of the polymorphic Leviathan with a pseudo-democratic dignity they do not deserve. What in the eyes of the beneficiaries looks like rational and decentered self-organization of global markets or globalized checks and balances through multilevel regulation can constitute a hydra-like devastating structure for those living in extreme poverty.

Another discursive trend to contest the global land-grab and its negative effects is to phrase the problem in human rights terms. It is well known that in the two principal human rights covenants, the drafters at the height of the decolonization era explicitly included the right of all peoples to self-determination and the right to freely dispose of their natural wealth and resources. Interestingly, the common Art. 1 para 2, sentence 2 also stipulates in great clarity the following: "In no case may a people be deprived of its own means of subsistence". Apart from this rather exceptional collective dimension, which unsurprisingly the UN Human Rights Committee for a long time found very difficult to integrate in its jurisprudence, large-scale investment in land in the context of the global land-grab can lead and have led to violations of individual human rights set out in the two Covenants: the right to an adequate standard of living, which includes the right to adequate food and water. Forced evictions before handing over the land to the investor can also be violations of the right to adequate housing, the right to physical

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<sup>4</sup> On complex forms of interaction from a Global Governance-perspective: Margulis, Matias E./ McKeon, Nora/ Borrás Jr., Saturnino M., Land Grabbing and Global Governance: Critical Perspectives, 10 Globalizations 2013, pp. 1-23

<sup>5</sup> Cf. Sassen, (Fn 2).

integrity and the right to life.<sup>6</sup> As a result of intensive NGO-lobbying during the negotiations within the Committee on World Food Security, the 2012 FAO-Voluntary Guidelines on the Governance of Tenure, the first global standard addressing problems of land-grabbing, have incorporated human rights as general principles to be respected by any investment in land. The same non-binding FAO-document has stopped short of granting local communities affected by large scale land deals a right to veto these transactions by insisting on “meaningful prior consultations” only.

In sum, sovereignty claims are claims to decision-making authority, whereas human rights claims refer to fundamental experiences of injustice. Whereas modern sovereignty claims are advanced in the name of collective entities, human rights claims are voiced in the name of the individual, usually the victim of an alleged violation. In other words, sovereignty claims defend, contest or aim to gain ultimate decision-making authority for a collective entity, while rights claims denounce the individualized effects of specific authoritative decisions as unjust. In this sense, rights claims are politically more modest since they do not challenge existing power constellations as such. As long as decision making authorities respect fundamental rights their position as the bearer of decision-making power is not challenged. Through their focus on individual violations, the rights discourse is also less capable of addressing structural root causes of fundamental experiences of injustice. Even if human rights claims can direct attention to systemic causes through “scandalization” they do not provide as such for remedies that may induce structural changes in the global economic system. It is this powerlessness vis à vis systemic root courses of structural injustices that significantly diminishes the revolutionary appeal and emancipatory potential of the human rights discourse.

By their universalist framing, however, rights claims on the other hand are much more difficult to dismiss than particular local claims to authority and self-rule. They find their evident moral justification in the unjust violation itself. At the same time, the rights discourse is for the above mentioned reasons still struggling with deducing clear obligations of political actors from structurally induced experiences of injustice, in particular if – as in the case of the global land-grab – there are various loci of decision making, involving a number of internal and external actors and their interactions. For the strength and resilience of the globalized leviathan lie in its diffuse and polycentric loci of authority and its evasive and deformed structures of responsibility.

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<sup>6</sup> On land-grabbing and human rights see De Schutter, Olivier, *The Green Rush: The Global Race for Farmland and the Rights of Lands Users*, in 52 *Harvard International Law Journal* 2011, pp. 503-559.