Leiden Journal of International Law (2019), **32**, pp. 235–253
doi:10.1017/S0922156519000128

ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY: SYMPOSIUM ON LAND-GRABBING

A false promise? Regulating land-grabbing and the post-colonial state

Ntina Tzouvala*

Melbourne Law School, 185 Pelham Street, Carlton, VIC, Australia, 3053
Email: konstantina.tzouvala@unimelb.edu.au

Abstract

Since 2008, a global 'land rush' has been unfolding and so have efforts by international, national and regional actors to position themselves as the principal authorities in the determination of appropriate usages of land. This article examines three of the most influential 'soft law' instruments: the Principles for Responsible Agricultural Investment; the Principles for Responsible Investment in Agriculture and Food Systems and; the Voluntary Guidelines on the Responsible Governance of Tenure. Despite their substantive differences, all three documents share a specific form of state-centrism. They imagine the host state of such large-scale investments as internally unitary and externally independent and entrust it with the bulk of responsibilities regarding the management of land investments. However, I argue that this particular form of state-centrism obscures the legal and administrative realities of the post-colonial state that is often legally bifurcated and subject to pervasive forms of international authority. Rather, an appreciation of the multitude of actors who claim jurisdiction over the lands of the South enables a better understanding of the legal mechanics of land-grabbing. Sierra Leone, which has been positioned as a 'poster child' for the implementation of such 'soft law' instruments, serves as the focal point of this jurisdictional approach to land-grabbing. In this context, the promise of 'soft law' instruments to make the post-colonial state the guarantor of universally beneficial large-scale land acquisitions is shown to be a false one.

Keywords: colonialism; land-grabbing; international law; international organizations; soft law; state-centrism

1. Introduction

Even though the technicalities, impact and even the scale of the global 'land rush' that has been unfolding since 2008 are open to debate and contestation,[1] the fact that it has given rise to an ever-expanding multi-disciplinary literature seems beyond doubt. Critics of these large-scale acquisitions that take place predominantly in the Global South and Eastern Europe associate the trend with the interlocking food-fuel-climate-financial crises of our times and employ the term 'land-grabbing' to emphasize the illegitimacy, violence and, often, the neo-colonial dimensions of the phenomenon.[2] International lawyers have also turned their attention to this phenomenon

*ARC Laureate Postdoctoral Fellow in International Law, Melbourne Law School. My thanks are due to Julia Dehm, Sara Dehm, Souheir Edelbi, Kathryn Greenman, Jessie Hohmann and Sarah Nouwen, as well as to the organizers of this symposium and the anonymous reviewers for their instructive comments. The usual caveats apply.

[1] On the dilemmas and uncertainties surrounding mapping and documenting land-grabs see I. Scoones et al., 'The Politics of Evidence: Methodologies for Understanding the Global Land Rush', (2013) 40 *Journal of Peasant Studies* 469.

[2] For a discussion of different terminologies and their politics see M.E. Margulis et al., 'Land Grabbing and Global Governance: Critical Perspectives', (2013) 10 *Globalizations* 1.

© Foundation of the Leiden Journal of International Law 2019

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

and examined its interplay with different international legal regimes, including human rights, international trade, and international investment law.[3]

This contribution interrogates the efforts of different actors, including the state itself, but also the World Bank, and the Food and Agriculture Organization (FAO), and the Clean Development Mechanism (CDM) Executive Board of the UN Framework Convention on Climate Change (UNFCCC) to claim authority over the determination of the appropriate usages of land in post-conflict Sierra Leone. In doing so, I question approaches that differentiate sharply the 'global' and 'local', the 'international' and 'national', and assign to either pole unambiguously positive or negative valence.[4] The 'soft law' instruments which aim to regulate land-grabbing adopt precisely this approach, since they single out the state as the primary bearer of responsibilities. This particular state-centric approach ignores both the fact that many post-colonial states are characterized by legal pluralism and that in the Global South statehood has been constantly shaped and reconfigured by international forms of authority, including international investment and trade law as well as the impact of conditionalities imposed by the international financial institutions.[5] To substantiate this point, I first examine such 'soft law' instruments for the regulation of large-scale land acquisitions, emphasizing the way in which they allocate responsibilities and authority regarding land. Secondly, I turn my attention to the governing of land in Sierra Leone through an emphasis on the multiple actors who claim authority over such land. I will also consider the influence of legal pluralism as well as the ways in which international legal mechanisms, such as the pro-investor reforms promoted by the World Bank, and the Clean Development Mechanism.

In general, I argue that we need to be attentive to the multiple sites in which international legal authority regarding land-grabbing is articulated.[6] This methodological intervention is intrinsically linked to the core substantive argument of this article: At the heart of contemporary attempts to regulate land-grabbing, notably 'soft law' instruments, lies a false promise. This promise is centred around the possibility of mobilizing the state to make large-scale land acquisitions a universally beneficial process. In this context, the substantive responsibilities allocated to host states are often well-intentioned and in the abstract capable of delivering positive change. However, these responsibilities are in tension with the legal legacies of colonialism, notably legal pluralism in regard to land tenure, but also with already existing 'hard' legal obligations of the said states, and with the very state model promoted by the international financial institutions (IFIs). In this regard, my contribution aligns with Olivier De Schutter's argument that certain ways of framing

[3]Amongst many: O. De Schutter, 'The Green Rush: The Global Race for Farmland and the Rights of Lands Users', (2011) 52 *Harvard International Law Journal* 503; J. von Bernstorff, 'The Global "Land-Grab", Sovereignty, and Human Rights', (2013) 9 *ESIL Reflections* 1; L. Cotula 'The New Enclosures? Polanyi, International Investment Law, and the Global Land Rush', (2013) 34 *Third World Quarterly* 1605; F.R. Jacur, A. Bonfanti and F. Seatzu (eds.), *Natural Resources Grabbing: An International Law Perspective* (2015); O.A. Badaru, 'The Right to Food and the Political Economy of Third World States', (2014) 1 *The Transnational Human Rights Review* 106; L. Cotula, 'Land, Property and Sovereignty in International Law', (2017) 25 *Cardozo Journal of International and Comparative Law* 219; H. Zeffert, 'The Lake Home: International Law and the Global Land Grab', (2018) 8 *Asian Journal of International Law* 432.

[4]For a critique of this approach see A. Orford, 'Locating the International: Military and Monetary Interventions After the Cold War', (1997) 38 *Harvard Journal of International Law* 443.

[5]For an account the colonial lineages of legal pluralism in post-colonial Africa that focuses heavily on questions of land see M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996), especially Ch. 4. For the ongoing preoccupation of international law and institutions with the internal structures of the state, especially in regards to questions of land and food in the Global South see, amongst many: M. Fakhri, *Sugar and the Making of International Trade Law* (2014); A. Orford, 'Food Security, Free Trade and the Battle for the State', (2015) 11 *Journal of International Law and International Relations* 1, at 23; N. Tzouvala, 'Food for the Global Market: The Neoliberal Reconstruction of Agriculture in Occupied Iraq (2003–2004) and the Role of International Law', (2017) 17 *Global Jurist* 1.

[6]On the importance of the coexistence of multiple and conflicting authorities as a lens for understanding international law see: A. Orford, *International Authority and the Responsibility to Protect* (2011); S. Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', (2013) 1 *London Review of International Law* 63; S. Dehm, 'Framing International Migration', (2015) 3 *London Review of International Law* 133.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

land-grabbing and its governance can be ineffective or even outright harmful.[7] I share De Schutter's intuition that instead of piling responsibilities onto host states, we need to deeply rethink investment in land.[8] I am, however, sceptical of his uncritical and unelaborated reliance on the idea of the 'weak state' in the South.[9] Instead of relying on such simplistic schemes, I trace the specific ways in which the legal legacies of colonialism and the juridical interventions of international organizations constantly reshape the state in the South in ways that prioritize the promotion of investment, market-based solutions to climate change, and the commodification of the land.

2. The allocation of authority and responsibility in 'soft law' responses to land-grabbing

One way of thinking about international law and land-grabbing is by focusing on the voluntary guidelines produced by international organizations, such as the World Bank or FAO, under the growing pressure by international NGOs and transnational peasant movements. Indeed, the World Bank positioned itself at an early stage as a source of authority in questions of land after 2008. The Bank was in fact the institution favoured by the G8 for producing 'a joint proposal on principles and best practices for international agricultural investment'.[10] Assuming a central role in the promulgation of such guidelines was also consistent with the techniques used by the Bank to expand its own authority over the last three decades, since, as Sinclair has demonstrated, particular perceptions of rural poverty had been crucial for the Bank's assumption of jurisdiction over questions of 'governance'.[11]

Notably, when the Bank addressed the question of large-scale land acquisitions, it did so by centring its analysis on the concept of 'responsible investment'. The Principles for Responsible Agricultural Investment (PRAI) were finalized in early 2010 and they assume that '[p]roductivity growth through entrepreneurial activity, capital deepening, and innovation is the primary driver of economic progress'.[12] In fact, the PRAI focus was the protection of investment in land from 'lack of clarity as to property rights, difficulty in enforcing contracts, rent-seeking behavior, red tape, slow judicial processes, and so on'.[13] On the other hand, PRAI paid little attention to the protection of societies from the potentially detrimental effects of such investments, which were understood to be mainly attributable to the deficiencies of the host state: 'where rights are not well defined, governance is weak, or those affected lack voice, there is evidence that such investment can carry considerable risks of different types'.[14] PRAI was explicitly situated within a broader range of corporate social responsibility initiatives, such as the Extractive Industry Transparency Initiative (EITI), the Equator Principles, and the Santiago Principles.[15] Moreover, the language of 'responsible investment' directly echoes schemes of corporate social responsibility in the financial sector, where the shaping and direction of investments in a 'responsible' way is the prerogative of the corporation and not the subject of state or international regulation. Within this context, external regulation of corporate activity, be it national or international in origin, is seen to be either impracticable or normatively

[7] O. De Schutter, 'How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland', (2011) 38 *Journal of Peasant Studies* 249.

[8] Ibid., at 272–3.

[9] '[T]he institutional and governance frameworks in host states remain weak and generally ill-equipped to adequately protect the rights of land users whose livelihoods may be threatened by the arrival of investors offering to develop agricultural land'. Ibid., at 267.

[10] Group of Eight, 'Responsible Leadership for a Sustainable Future', available at www.mofa.go.jp/policy/economy/summit/2009/declaration.pdf.

[11] See G.F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017), at 237–41.

[12] 'Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources: Extended Version', *World Bank*, 25 January 2010, available at siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf at 8.

[13] Ibid.

[14] Ibid., at 1.

[15] Ibid., at 1.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

undesirable, while self-regulation and self-monitoring are seen as welcome alternatives.[16] Therefore, the framing of the problem in PRAI as one of 'responsible investment' elevates both the Bank itself and the relevant corporations into sources of authority about the best usages of land.

This unreserved endorsement of private investment and prioritization of corporate authority was not welcomed by many NGOs and transnational peasant movements, with the latter resisting the elevation of PRAI into the global blueprint for the regulation of land-grabbing.[17] After all, the exclusionary negotiating process and the corporate and investment-friendly approach of PRAI directly clashes with the emphasis which *La Vía Campesina*, the most prominent transnational peasant movement, has placed on food sovereignty, and the capacity of all peoples, nations and states to democratically control their food and agricultural policies.[18] In fact, it was thanks to such reactions against PRAI by social movements and NGOs, both in the Global North and in the South, that other 'soft law' instruments emerged. Therefore, even though the World Bank has attempted to position PRAI as the authoritative source of 'soft' regulation of land investments and the G8 and G20 have endorsed PRAI, the overall picture of relevant 'soft law' is much more complicated and fragmented.

For example, the UN Committee on World Food Security (CFS) in its 2014 Principles for Responsible Investment in Agriculture and Food Systems (CFS-rai) adopted an approach that diverges from PRAI in significant respects, but also replicates the above-mentioned patterns of allocation of responsibility and authority over land.[19] To begin with, the voluntary character of the Principles raises questions about their deference to contemporary trade and investment law. Indeed, it is explicitly stated that '[t]he Principles should be interpreted and applied consistently with existing obligations under national and international law'.[20] Moreover, much like PRAI, the CFS-rai vest the host state with a wide range of responsibilities. These include the safeguarding of the 'responsible' character of investments, the provision of services linked to such investments, such as infrastructure, energy or education and, more fundamentally, the achievement of food security and the progressive realization of the right to adequate food.[21] In fact, the state is envisaged as the primary bearer of such responsibilities.

The responsibilities of other actors are only dealt with epigrammatically and they are not nearly as detailed as those of the host states. Nonetheless, the CFS-rai hint at a richer understanding of authority and responsibility regarding the usages of land. For example, paragraph 45 is dedicated to financial institutions, donors and funds, acknowledging the unique influence exerted nowadays by those in control of financial capital: 'The provision of finance allows these institutions a unique leveraging position where they can communicate with a broad range of stakeholders about their roles, responsibilities, and actions to facilitate implementation of the Principles.'[22] Similarly, paragraph 44 urges regional and intergovernmental organizations to 'take appropriate measures' so as to ensure that their support for investors does not endanger human and legitimate tenure rights.[23] Finally, business enterprises are 'encouraged to inform and communicate with other stakeholders, conduct due diligence before engaging in new arrangements, conduct equitable and transparent

[16]S. Borras, Jr. and J. Franco, 'From Threat to Opportunity? Problems with the Idea of a "Code of Conduct for Land grabbing"', (2014) 13 *Yale Human Rights and Development Journal* 507.

[17]'Facilitating the long-term corporate (foreign and domestic) takeover of rural people's farmlands is completely unacceptable no matter which guidelines are followed.' 'Stop Land Grabbing Now!', *La Vía Campesina, FIAN, Land Research Action Network (LRAN), GRAIN*, 22 April 2010, available at www.fian.org/fileadmin/media/publications_2015/stop_landgrabbing_now.pdf.

[18]See A.A. Desmarais, *La Via Campesina: Globalisation and the Power of Peasants* (2007), at 34–40; N. Bellinger and M. Fakhri, 'The Intersection Between Food Sovereignty and Law', (2013) 28 *Natural Resources & Environment* 45.

[19]Committee on World Food Security, 'Principles for Responsible Investment in Agriculture and Food Systems', 15 October 2014, available at www.fao.org/3/a-au866e.pdf. *La Vía Campesina* was an active participant in the negotiation process: I. Gaarde, *Peasants Negotiating a Global Policy Space La Vía Campesina in the Committee on World Food Security* (2017).

[20]CFS-rai, *supra* note 19, at para. 13.

[21]Ibid., at paras 41, 38 and 32 respectively.

[22]Ibid., para. 45.

[23]Ibid., at para. 44.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

transactions, and support efforts to track the supply chain'.[24] Arguably, these responsibilities are minimal and vague. However, they incorporate an understanding that the design and implementation of domestic policies on land is heavily overdetermined by the operation of international financial institutions, such as the IMF and the World Bank, as well as by donors and other private actors.

Finally, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security (VGGTs) were drafted by the FAO and negotiated at an inter-governmental level at the Committee on World Food Security.[25] They stand out when compared to other 'soft law' instruments since they were in the making before global land-grabbing gained international attention, originating in the 2006 International Conference on Agrarian Reform and Rural Development. As their title also indicates, the VGGTs adopt a conceptually broader approach to questions of land. While issues of investment are central, they are not the sole prism through which the question of land use is addressed. Moreover, the VGGTs adopt a more deferential and pluralistic approach to questions of public lands and public investment: 'States should determine which of the lands, fisheries and forests they own or control will be retained and used by the public sector, and which of these will be allocated for use by others and what conditions.'[26] This is in contrast with PRAI's advocacy for privatization as the default rule, unless 'externalities' justify public ownership.[27] Furthermore, the VGGTs entertain the possibility of states imposing 'ceilings on permissible land transactions', a measure virtually unthinkable within the market-orientated framework of PRAI.[28] It is, therefore, not surprising that transnational peasant movements, such as *La Vía Campesina*, were far more sympathetic toward the VGGTs, while simultaneously stressing that the document was the result of compromise and that in their current form the VGGTs seek to mitigate some of the most detrimental effects of land-grabbing rather than putting an end to them.[29]

Leaving the substantive content of the VGGTs aside for a moment, I am interested in the way they allocate responsibilities and authority between different actors. The VGGTs make it clear that the authority of existing international legal regimes relating to land-grabs, such as international trade or investment law, is not challenged: 'Nothing in these Guidelines should be read as limiting or undermining any legal obligations to which a State may be subject under international law.'[30] This is, after all, a logical corollary of the voluntary character of the Guidelines. It also means that the Guidelines at their core do not challenge the authority of contemporary international investment law, which has consistently subjected nature to the imperatives of capital.[31] Moreover, the specific ways in which VGGTs allocate rights, responsibilities, and law-making authority are also consequential in their own right, since states, international financial institutions, investors, and those resisting land-grabs regularly invoke the Guidelines to direct, or at least to justify, their actions. Host states are the primary bearers of the bulk of the (not-legally-binding) responsibilities, while the home states of transnational corporations participating in land-grabs are mentioned briefly and the scope of their respective responsibilities remains vague:

[24]Ibid., at para. 51.

[25]'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security', *UNFAO*, 2012, available at www.refworld.org/docid/5322b79e4.html.

[26]Ibid., at para. 8.5.

[27]CFS-rai, *supra* note 19, at 5.

[28]'Voluntary Guidelines', *supra* note 25, at para. 12.6.

[29]'People's Manual on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security: A Guide for Promotion, Implementation, Monitoring and Evaluation', *UNFAO*, available at www.foodsovereignty.org/wp-content/uploads/2016/06/peoplesmanual.pdf, at 19.

[30]'Voluntary Guidelines', *supra* note 25, at para. 2.2.

[31]See K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013).

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

> Where transnational corporations are involved, their home States have roles to play in assisting both those corporations and host States to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights.[32]

All other actors are addressed in the VGGTs under the generic rubric of 'non-state actors' or 'other parties' and it is difficult to disaggregate and assign concrete responsibilities to investors, international organizations or bodies of accreditation. In fact, Section 12, which deals with investments, is centred around the concept of 'responsible investment', a concept that, as we saw above, relies heavily on the idea of corporate self-regulation in ways that allocate authority to private actors, much like in PRAI.[33] Moreover, international organizations such as the World Bank are present in PRAI and in the VGGTs as sources of authority, but not as subjects of responsibilities, save for the generic references to 'other parties' mentioned above.

In a landscape characterized by intense competition amongst different actors and sets of 'soft law' for positioning themselves as the authoritative sources of regulation of large-scale land-acquisitions, the creation of administrative apparatuses for the implementation and monitoring of soft law is crucial. Sierra Leone was designated by the VG-Tenure Secretariat hosted by FAO as one of the 'pilot' countries that have been receiving international support toward the implementation of the VGGTs. Moreover, the country has been chosen for a detailed evaluation of the said support programme.[34] Procedurally speaking, Sierra Leone put in place a multi-stakeholder platform, a technical VGGT steering committee as well as an inter-ministerial task force and concluded a partnership agreement with Germany and FAO, in order to implement the VGGTs. In terms of substance, Sierra Leone's:

> new National Land Policy approved by the Cabinet in 2015 include the full set of VGGT principles and refers to VGGT in more than 90 paragraphs. In addition, the Government is using VGGT as the main reference document for tenure governance reform by screening acts and bills from a VGGT perspective.[35]

Therefore, Sierra Leone has been central in the effort to elevate the VGGTs into the primary framework of governing large-scale land acquisitions, while the language of the VGGTs has also become central in the way the Sierra Leonean state frames issues of land governance. Therefore, the country is a good case study for examining the potential and limitation of the approach pioneered by the VGGTs.

The next section interrogates the very actors that these 'soft law' instruments have neglected. Focusing on Sierra Leone, I reflect on the limits of the state-centric approach incorporated in these three soft-law instruments. My analysis places at its centre international forms of authority and their significance in reconfiguring the state along lines that enable land-grabbing as well as the ongoing implications of legal dualism dating back to the colonial era. In this way, I argue that by relying upon a model of statehood oblivious to the realities of the post-colonial condition, these instruments make unfulfillable promises about the potential of such states to act as a guarantors of universally beneficial land deals.

[32] 'Voluntary Guidelines', *supra* note 25, at para. 3.2.

[33] Ibid., at paras. 12.1–12.15.

[34] See 'Final Evaluation of the Global Programme to Support the Implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (2012–2016)', *UNFAO*, November 2017, available at www.foodsovereignty.org/wp-content/uploads/2016/06/peoplesmanual.pdf.

[35] Ibid., at 26.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

3. Beyond state-centrism: Colonial lineages of land management in Sierra Leone

3.1 The imaginary of the unitary state and post-colonial legal pluralism

Efforts to manage and govern land in Sierra Leone take place in an environment of legal pluralism that is directly linked to the colonial past of the country. Immediately prior to independence in 1961, what later became Sierra Leone consisted of two separate entities, a British colony and a British protectorate. The region known as the Western Area, where Freetown is located, was a hub of transatlantic trade, including the slave trade in the nineteenth century, and a place of settlement for freed slaves. In 1791 the Saint Georges Bay Association was founded, and in 1799 it was granted a royal charter and the Governor-in-Council was vested with legislative powers. However, the Company ran into trouble and in 1808 the Western Area was proclaimed a Crown Colony, in which all land belonged to the Crown and following independence, to the post-colonial state. The British considered the lands adjacent to the Crown Colony as foreign territories until 1896. Given the intensified competition between Britain and France in the region, a proclamation of a protectorate allowed the British Crown to exercise limited authority over these lands (currently known as the 'Provinces') without ever claiming *dominium* over them.[36] There have never been any Crown (now state) lands in the former protectorate. Hence, in and around Freetown, English law governed land tenure. By contrast, outside this limited area, customary law was applicable, since Britain established a regime of indirect rule over the protectorate.[37]

In Sierra Leone, as elsewhere in Africa, colonial powers fundamentally reshaped rural life and vested paramount chiefs with novel and important administrative responsibilities and powers, including the management of land.[38] Relatedly, the applicable customary law was not simply the uninterrupted remnant of pre-colonial juridical practices but became the subject of fierce negotiation, imposition, and contestation.[39] As Mamdani has argued, this apparent deference to customary law and authorities and the initiation of legal pluralism in the colonies, 'was more an expression of power relations in a colonial society than a recognition and tolerance of any multicultural diversity'.[40] In trying to find an answer to the 'native question' colonial powers – in this case Britain – concluded that civil law was only appropriate for white settlers or for a very limited number of culturally and economically Westernized Africans:

> As a class, however, the true Sierra Leoneans are distinguishable from the natives of the Protectorate by the fact that they have for generations lived a non-native mode of life, and have neither an African language nor tribal affinities ... Their social outlook is directed to making as near an approach as their circumstances permit to a European manner of living.[41]

On the contrary, indirect rule was seen as the best way of maintaining law and order in the Protectorate, which was imagined to be backwards, violent, and tribal in nature. Within this racialized universe, the differences between settlers and natives were considered immutable and legal pluralism precisely reflected these supposedly deep, natural differences.[42]

---

[36] A. Renner-Thomas, *Land Tenure in Sierra Leone: The Law, Dualism and the Making of Land Policy* (2010), at 18.

[37] See F.J.D. Lugard, *The Dual Mandate in British Tropical Africa* (1965 [1922]). For the impact of indirect rule on land tenure in Sierra Leone see A.J. Njoh and F. Akiwumi, 'Colonial Legacies, Land Policies and the Millennium Development Goals: Lessons from Cameroon and Sierra Leone', (2012) 36 *Habitat International* 210.

[38] Ministry of Lands, Country Planning and the Environment, 'Draft National Land Policy of Sierra Leone: Version 6', *Ministry of Lands, Country Planning and the Environment, Sierra Leone*, 1 August 2015, at 15, available at extwprlegs1.fao.org/docs/pdf/sie155203.pdf.

[39] In the Provinces, for example, the proclamation of the Protectorate had been preceded by rapid social change and intensified warfare that made the content of customary law uncertain and contested.

[40] Mamdani, *supra* note 5, at 111.

[41] W.M. Hailey, *Native Administration in the British African Territories* (1951), at 286.

[42] Karuna Mantena has argued that violent resistance to the British Empire in Ireland, Jamaica and India in the mid-nineteenth century brought about a deep disenchantment with the liberal, universalizing, civilizing mission amongst British elites.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

In 1901, 1903, and 1905 the British passed ordinances (the Protectorate Ordinance 33 of 1901, the Protectorate Courts Jurisdiction Ordinance 6 of 1903, and the Protectorate Native Law Ordinance 16 of 1905) initiating a system in which:

> [t]ribal Authority is the primary unit of local rule, both for the maintenance of law and order and for the provision of local services. The Tribal Authority is defined as meaning the Paramount Chief, the Chiefs, the Councillors and men of note elected by the people according to native law and custom, when appointed by the Governor as the Tribal Authority for any specified area.[43]

In the process of vesting chiefs with authority over land, three main acts of mis-recognition and reconfiguration of land rights took place in Africa: first, communal rights over land were imagined to be exclusive and proprietary, a mere variation of Western private rights over land; second, the religious and limited communal authority of the chiefs was reconfigured into extensive authority over the allocation land; and third, local community was equated with 'tribe'. This final move ethnicized the system of land tenure, even though local communities had not been ethnically homogeneous before colonialism. The consequence of this development is that in the provinces of Sierra Leone 'strangers' not belonging to such tribes are still excluded from land rights and their access to land is subject to the arbitrary will of paramount chiefs. In the case of Sierra Leone in particular, the exclusion of 'strangers' from land rights has been thought to have contributed to the outbreak of the civil war, since large numbers of young men were excluded from the most basic means of subsistence and inter-generational tensions ran – and remain – high.[44]

The ongoing implications of the continuation of this bifurcated structure in the post-independence era[45] have been elucidated by recent ethnographic work. For example, both Millar and Ryan have drawn attention to the fact that large-scale land deals both rely on and deepen inequitable gender relations.[46] Their research focuses on the North of the country and highlights how the exclusion of women from traditional decision-making processes and the patrimonial character of land rights meant that decisions to lease the land were generally taken without the contribution of women, did not consider the specific interests of women on the land, or usages of the land that are linked to the care work typically performed by women. At the same time, the monetary compensation for the leased lands was mostly handed to and handled by men in the communities.[47] More specifically, compensation flows are usually channeled through the paramount chiefs or district councils, thereby consolidating their privileged position in the community and accentuating patterns of inequality.[48] Importantly, the paramount chiefs mobilize their role as custodians of customary law to legitimize the presence of foreign investors in their community. For example, Millar observes that '[a]t the community meetings ... the paramount chiefs always lauded the

This disappointment gave rise to indirect rule as a method of maintaining imperial rule. Within this context the comparative legal method of Henry Maine offered the rationale for hierarchical legal pluralism: K. Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (2010).

[43] Ibid., at 320.

[44] See, for example, E. Mokuwa et al., 'Peasant Grievance and Insurgency in Sierra Leone: Judicial Serfdom as a Driver of Conflict', (2011) 110 *African Affairs* 339.

[45] Mamdani argues that the basic difference between conservative and radical post-colonial states in Africa was that the latter dismantled the ethnicized system of land tenure while the former maintained it. See Mamdani, *supra* note 5 at 25–6.

[46] G. Millar, '"We Have No Voice for That": Land Rights, Power, and Gender in Rural Sierra Leone', (2015) 14 *Journal of Human Rights* 445; C. Ryan, 'Large-scale land deals in Sierra Leone at the intersection of gender and lineage', (2017) 39 *Third World Quarterly* 189.

[47] 'While the women interviewed have had varying experiences — including beneficial, neutral, and negative socioeconomic impacts — all report being excluded from initial decisions regarding acceptance or rejection of the project and later decisions regarding the use of land payments.' Millar, *supra* note 46, at 446.

[48] Ryan, *supra* note 46, at 196.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

actions of the company and warned the residents of the land-lease area against any disruption of the company's operations', and that:

> [a]t the beginning of every meeting the attending paramount chief (or his representative) would thank the company for including them, and for respecting the tradition of chiefly rule. They would reiterate that the company had come to the chiefs first and negotiated the land lease with them, and this, they would reiterate, was a sign of respect for local tradition and for Sierra Leonean culture.[49]

Therefore, conceptualizations of the state as a unitary sovereign that has exclusive legal and factual control over land do not register the colonial legacies of legal dualism and customary authority that are still in operation both in Sierra Leone and elsewhere in Africa. Customary authority over land is an indispensable part of the legal landscape in many post-colonial settings, including Sierra Leone and an assumption that the only valid and functional law emanates from the state is not only inaccurate or due to simplistic Westphalian imaginaries, but it is unable to capture the on-going synergies between such customary law and the functions of international capital.

3.2 The illusion of the independent state and the role of international financial institutions

This image of the unitary state offered by the 'soft law' instruments examined above is, however, only half the story. On top of that, these documents (with the partial exception of CFS-rai) also rely on an image of the state as the independent creator of land-related policies, free from external interference. This particular form of state-centrism perceives the state as unitary and independent in ways that are factually and legally tenuous both in general and in regard to the Global South in particular. Apart from its bifurcated character, the state of Sierra Leone is a good example of the aporias of this approach, since international organizations, notably the World Bank, have assumed a central role in the design and implementation of policies pertaining to land. As we will see below, these changes not only affected substantive land law and policy, but also the specific ways in which the state enacts its authority over the land in the first place.

State authority in Sierra Leone is reconfigured after the image of the private sector and its subordination to norms of competition, auditing, and 'free choice', as well as to the vocabularies and aesthetics of private business. These reconfigurations have been identified by many critics as a core effect of the global ascendance of neoliberalism. Neoliberalism is here understood as an intellectual and political project that arose as a reaction to a crisis of nineteenth-century classical liberalism and the rise of the redistributive state, as well as a particular regime of capitalist accumulation that emerged as a response to the profitability crisis of the 1970s.[50] Seen as an intellectual project the 'neoliberal thought collective' came into being as an oppositional force to such state-led redistribution, either in the form of the Keynesian state, socialism, or the developmental post-colonial state.[51]

Despite its deep historical lineages going back to the interwar period, neoliberalism became hegemonic on an international scale in the course of the 1990s. The 1973 oil crisis had triggered significant changes both in Western Europe and the US and in the Global South. The most relevant here is the 1976 'Sterling crisis' in the UK and the decision of the Labour government to turn to the IMF for assistance. It was from this point that the IMF assumed a proactive role in

[49] G. Millar, 'Co-opting Authority and Privatizing Force in Rural Africa: Ensuring Corporate Power over Land and People', (2018) 83 *Rural Sociology* 749, at 760.

[50] For two Marxist accounts of neoliberalism that stress its character as a regime of capitalist accumulation see D. Harvey, *A Brief History of Neoliberalism* (2007); D. Cahill, *The End of Laissez-Faire? On the Durability of Embedded Neoliberalism* (2014).

[51] On the idea of a self-conscious 'neoliberal thought collective' see P. Mirowski and D. Plehwe (eds.), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (2009). On the opposition to post-colonial developmentalism as a central preoccupation of the 'neoliberal thought collective' that also highlights the role of racial hierarchies for neoliberal thinkers, see Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018), at 146–81.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

prescribing pro-cyclical, austerity policies as conditionalities for the provision of loans.[52] Further, the 'debt crisis' in the course of the 1980s signalled the death knell of the South's effort to push for a New International Economic Order,[53] since a number of peripheral states that had advocated for it were obliged to implement neoliberal reforms, in order to be assisted by the IMF or the World Bank.[54] The collapse of the USSR solidified the trend by providing neoliberal theorists and policy-makers with unprecedented confidence. In this respect, the ascendance of neoliberalism in the Global South has always been overdetermined by patterns of imperial domination and exploitation as materialized, amongst other things, through the disciplining functions of international law and institutions.[55] International law has also been profoundly transformed along these neoliberal imperatives that re-imagine public power along the lines of private business. Since the 1990s international institutions, such as the IMF and the World Bank, have embarked on comprehensive missions to quantify and rank legal systems. Even international institutions and areas of international law that are not directly linked to economic issues, such as international criminal courts, have adopted practices reminiscent of private enterprises, such as 'branding'.[56]

To return to our specific context, immediately after the end of the Sierra Leonean civil war of 1991–2002, the World Bank acknowledged the role of public investment in post-conflict recovery, both in its own right and as a means of attracting private investors.[57] However, the early post-conflict interventions of the Bank were along more familiar neoliberal lines. Following an invitation by the government, the World Bank Group's Facility for Investment Climate Advisory Services (FIAS) devised the Removing Administrative Barriers to Investment (RABI) Program, which mobilized a rhetoric surrounding the devastation of the civil war to promote a deregulation agenda as a means to FDI-promotion and economic recovery, which were treated as largely synonymous. Notably, since the early years of post-war reconstruction, agriculture had been identified, along with mining, as the most promising sector for systematic FDI promotion by both the government and the International Finance Corporation (IFC).[58] This trend was further consolidated after the election of the All People's Congress (APC), the pronouncements of the new

[52]'The new Prime Minister, James Callaghan, and Chancellor of the Exchequer, Denis Healey, were Atlanticists who were in favour of negotiations with the IMF, which had already provided temporary assistance. Further help, however, would only come with strings attached. When they prevailed, it was much more than a defeat for the British left, the unions, and the working class. It was the first step in the capitalist reconstruction of the West.' M. Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (2012), at 346.

[53]For the demands and methods of this effort, as well as for some accounts of its failures see M.E. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice', (2013) 62 *International and Comparative Law Quarterly* 31; A. Anghie, 'Legal Aspects of the New International Economic Order', (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, 145.

[54]'The final dagger would be the Latin American debt crisis in 1982: bailing out indebted southern states was not done in charity but conditionally dependent on structural adjustments designed explicitly to weaken the reach of the state. The result was a "lost decade" in Latin America, and then another in Africa when the same policies were applied there.' N. Gilman, 'The New International Economic Order: A Reintroduction', (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1, at 8.

[55]A. Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World', (2000) 32 *New York University Journal of International Law and Politics* 243; Sinclair, *supra* note 11.

[56]For example: T. Krever, 'Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense', (2013) 34 *Third World Quarterly* 13; C. Schwöbel-Patel, 'The Rule of Law as a Marketing Tool: The Inter-national Criminal Court and the Brand of Global Justice', in C. May and A. Winchester (eds.), *Research Handbook on the Rule of Law* (2018).

[57]'Sierra Leone - Public Expenditure Review: From Post-Conflict Recovery to Sustainable Growth', World Bank Report No29075-SL, 31 August 2004, available at openknowledge.worldbank.org/handle/10986/15694?locale-attribute=en.

[58]'Rebuilding Business and Investment in Post-Conflict Sierra Leone: How the World Bank Group's Program *Removing Administrative Barriers to Investment* Helped Build Helped Build a Regulatory Framework for Easier Business and Investment in a Post-Conflict Environment', *World Bank Group Investment Climate Advisory Services*, 18 February 2011, available at documents.worldbank.org/curated/en/418921501149124716/pdf/117456-WP-SL-Rebuilding-business-PUBLIC.pdf.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

president that he would run the country 'like a business', and the singling out of agriculture as a sector particularly suitable for large-scale foreign investment.[59]

This emphasis on the privatization of land as a motor for development is anchored to a rhetoric of 'abundance' and 'idle land' that has become central to the way the World Bank approaches questions of land in Sierra Leone, and Africa more generally. By talking about the abundance of vacant lands in Africa both states and international organizations elide the potential of conflictual interests over land-usage. An influential report about agribusiness in Africa by the World Bank exemplifies this approach:

> Africa is land rich. At a time when much of the world, especially Asia, faces an acute scarcity of land and water to expand agricultural production, Africa has an abundance of both. Many private companies interviewed for this report pointed to the growing scarcity and rising cost of land in Asia. Almost half of the world's uncultivated land considered suitable for expanding crop production—nearly 450 million hectares that is not forested, protected, or densely populated—is in Africa.[60]

This rhetoric is taken up by governmental agencies such as the Sierra Leone Investment and Export Promotion Agency (SLIEPA), to which I will return shortly, or the Ministry of Agriculture, Forestry and Food Security (MAFFS):

> Around 5.4 million hectares, or 74 percent of the total land area, is considered suitable for cultivation of which only 15 percent under cultivation. The availability of land is especially notable in the highly fertile lowland where less than 15 percent of the area is cultivated.[61]

Even though such pronouncements are presented as statements of pure fact, they embody particular ways of thinking about land and its appropriate uses that are centred around private profitability and the maximization of productivity:

> [C]concepts such as "idle" land often reflect an assessment of the productivity rather than existence of resource uses: these terms are often applied not to unoccupied lands, but to lands used in ways that are not perceived as "productive" by government ... Low-productivity uses may still play a crucial role in local livelihood and food security strategies.[62]

In the case of Sierra Leone, 'under-utilized' lands were leased to corporations, even though in reality they were essential to the survival of local communities. For example, the collection of herbs for medicinal purposes, access to wood for fuel, cattle-grazing, the planting of trees, and the performance of spiritual tasks are dependent upon access to such lands, and their lease has had detrimental effects to the community, particularly to women who had gained both resources and social status from performing the related tasks.[63]

Importantly, such arguments about the availability and inefficient use of land replicate a long history of imagining the land as vacant, under-utilized, and abundant to authorize appropriation. In the context of both the enclosures in Britain and of colonial expansion abroad, the argument

[59] M.S. Wai, 'Running Sierra Leone as a Business is an Impractical Proposition', *Sierra Express Media*, 27 September 2012, available at sierraexpressmedia.com/?p=48018.

[60] D. Byerlee et al., 'Growing Africa: Unlocking the Potential of Agribusiness', (2013) 1 *World Bank Report No. 5663*, at 16.

[61] 'National Sustainable Agriculture Development Plan: Smallholder Commercialisation Programme Investment Plan', *Ministry of Agriculture, Forestry and Food Security, Sierra Leone*, 2010, available at www.resakss.org/sites/default/files/pdfs/sierra-leone-smallholder-commercialisation-program-45326.pdf, at 14.

[62] L. Cotula et al., 'Land grab or development opportunity? Agricultural investment and international land deals in Africa', 2009, available at www.fao.org/3/a-ak241e.pdf, at 62.

[63] Ryan, *supra* note 46, at 197.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

that current occupiers of the land were not using it productively and therefore those who could do so had a right, or even a duty, to do so was deployed to assume control over the land and develop it to its supposed full potential. As Brenna Bhandar has recently argued, a certain 'ideology of improvement' has historically characterized colonial appropriations of land. According to this logic, only '[t]hose communities who lived as rational, productive economic actors, evidenced by particular forms of cultivation, were deemed to be proper subjects of law and history'.[64] Therefore, the discourse of the World Bank quoted above about the purported availability of land in Africa replicates patterns of thought about land that render the lands of racialized peoples who have not been fully incorporated into the circuits of private property and capitalist accumulation 'vacant' and therefore, ready for appropriation.[65]

Even though the rhetoric of 'vacant lands' is old, the specific techniques that enact, legitimize, and concretize it constantly change. In fact, the rhetorical moves of the World Bank are accompanied by a multitude of juridical techniques that reshape the state and give material expression to its particular vision of the land.[66] These juridical techniques have a profound impact on the structure and outlook of the state and challenge directly the secondary role of the responsibilities assigned to international organizations by the 'soft law' instruments examined above. To bring but one example, SLIEPA, the agency most closely involved with land investments, was founded in 2007 as a project of the International Finance Corporation (IFC) of the World Bank, and it formed part of the Bank's RABI strategy that was mentioned earlier. Three years later, the IFC assisted the establishment and funding of an Agribusiness Investment Task Force under the auspices of SLIEPA, which, apart from other functions, performs a mediating role between investors and local communities. More broadly, SLIEPA plays a key facilitating role in land investment. The agency is the first point of contact for potential investors, providing them with a detailed analysis of the procedure to be followed, an overview of the legal framework, template lease agreements, and pre-identified land for large projects of over 10,000 hectares.[67] Thus, far from simply regulating or reacting to supposedly spontaneous market developments, the Sierra Leonean state – or, to be precise, those of its branches that are deeply shaped by the involvement of the World Bank – is a major facilitator of agribusiness expansion. Notably, the state has assumed functions reminiscent of private business instead of public authority, or, more precisely, it is going through a profound transformation of its functions and aesthetics. For example, the way that Sierra Leonean authorities talk about the land are closer to advertisement than to public authority:

> Sierra Leone is ideal for agriculture. It has over 4.3 million hectares of cultivable land available, plentiful aquatic resources, a tropical climate, rich soil, and lowland and highlands areas. A current base of production in staple foods (rice, cassava, vegetables), cash crops (sugar, cocoa, coffee, ginger and cashew), and tree crops (oil palm, coconut), has potential for significant expansion.[68]

[64] B. Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (2018), at 8. The most coherent philosophical account of this argument is, of course, that of John Locke: J. Locke, *Second Treatise of Government* (2004 [1690]).

[65] Bhandar also highlights the gendered representations of land in such discourses: 'colonial representations of indigenous land as feminized, available for appropriation, or as waste land in need of being rendered fertile through cultivation, inform the discussion'. Bhandar, *supra* note 64, at 30.

[66] I here use the term 'juridical' in the way Bhandar does: 'My use of the term "juridical" denotes the fabrication of legal techniques that define legality and illegality, produce legal subjects, operate as a form of governance, and in all of these guises functions as a form of disciplinary power.' Ibid., at 12.

[67] See 'Leasing Agricultural Land in Sierra Leone: Information for Investors', *SLIEPA*, March 2010, available at www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Reference%20Sierra%20Leone%20SL_agrilandleasing_09March.pdf.

[68] 'Agriculture: What can Sierra Leone offer', *Embassy of the Republic of Sierra Leone in the Federal Republic of Germany*, available at www.slembassy-germany.org/?page_id=36.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

Relatedly, state authorities are deeply invested in promotional events such as the Sierra Leone Trade and Investment Forum. This event took place in London in 2009 and 2016, and numerous state officials used the opportunity to promote investment in the country, especially in the agricultural sector, by presenting even harmonious inter-faith relations as a factor conducive to foreign investment.[69]

Indeed, for a state to start 'seeing like a business' significant disciplining work is required.[70] For example, the World Bank's *Doing Business* indicators perform precisely such a function. Premised on the idea that businesses and by consequence entire economies and societies benefit from 'fewer, cheaper, and simpler regulations',[71] the index adopts 'the firm's private point of view' when assessing the 'burden of regulation'. In doing so, *Doing Business* not only evaluates domestic legal systems and state infrastructure rewarding 'de-regulation',[72] but is also explicitly designed to foster competition between states. For example, the 2009 *Doing Business* report for Sierra Leone clarifies early on that '[t]hese graphs allow a comparison of the economies in each region not only with one another but also with the "good practice" economy for each indicator'.[73] The index has been criticized on technical, ideological, legal and epistemological grounds.[74] While this article was being drafted, the *Doing Business* indicators gained international notoriety, with Bank authorities admitting and then denying that it was manipulated to impact negatively the rankings of the centre-left government in Chile.[75] Nonetheless, *Doing Business* is highly influential both in general and in the case of Sierra Leone in particular.[76] Both the World Bank and the government have used the country's rankings as a yardstick to evaluate the legal system, as a reference point for setting reform goals and as a measure of the success of these reforms:

> [D]uring the implementation of the AfC, Government implemented several reforms, policies, programs and projects aimed at improving the competitiveness of the economy. These include removing administrative barriers to investment and strengthening the legal and regulatory environment for private sector development, aimed at reducing the cost of doing

[69] Sierra Leone Investor Presentation, available at www.developingmarkets.com/sites/default/files/04%20B%20-%20Raymond%20Gbekie%20-%20SLIEPA%20v1.pdf, at 3.

[70] The concept of 'discipline' emphasizes the positive, creative effects of power: '[we] must cease once and for all to describe the effects of power in negative terms: it "excludes", it "represses", it "censors" ... [i]n fact, power produces: it produces reality; it produces domains of objects and rituals of truth'. M Foucault, *Discipline and Punish: Birth of the Prison* (1991 [1975]), at 194. I use here the framework of 'discipline' even though I remain unconvinced about Foucault's repudiation of any examination of the repressive functions of power. I rather suggest that we need to be attentive of how the two dimensions work in tandem in the facilitation of land-grabs.

[71] 'Doing Business, An Independent Evaluation: Taking the Measure of the World Bank-IFC Doing Business Indicators', *Independent Evaluation Group, World Bank*, 2008, available at siteresources.worldbank.org/EXTDOIBUS/Resources/db_evaluation.pdf, at xi.

[72] Here the word 'deregulation' is used somewhat schematically to summarize neoliberal reforms recanted around the imperatives of capitalist accumulation. For a more nuanced approach to the question of (de)regulation and agriculture under neoliberalism see M. Grasten and N. Tzouvala, 'The Political Economy of International Transitional Administration: Regulating Food and Farming in Kosovo and Iraq', (2018) 24 *Contemporary Politics* 588.

[73] 'Doing Business 2009: Country Profile for Sierra Leone', International Bank for Reconstruction and Development, World Bank, 2008, available at documents.worldbank.org/curated/en/915351468103772730/pdf/459370WP0Box331LIC10Sept29120081SLE.pdf, at 1.

[74] See Krever, *supra* note 56; A. Perry-Kessaris, 'The Re-co-construction of legitimacy of/through Doing Business Indicators', (2017) 13 *International Journal of Law in Context* 498; M. Riegner, 'Towards an International Institutional Law of Information', (2015) 12 *International Organizations Law Review* 50; D. Van Den Meerssche 'International Organizations and the Performativity of Measuring States Discipline through Diagnosis', (2018) 15 *International Organizations Law Review* 168.

[75] 'Chile slams World Bank for bias in competitiveness rankings', *Reuters*, available at www.reuters.com/article/us-chile-worldbank/chile-slams-world-bank-for-bias-in-competitiveness-rankings-idUSKBN1F20SN.

[76] For a recent study on the influence of the rankings on investors and states see R. Doshi et al., 'The Power of Ranking: The Ease of Doing Business Indicator as a Form of Social Pressure' (Prepared for presentation at the Wharton School, University of Pennsylvania, 2 September 2016), available at www.sss.ias.edu/sites/sss.ias.edu/files/pdfs/Rodrik/workshop%2014-15/EDB_Wharton_04.19.2017.pdf.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

> business. This culminated in significant improvement in the country's ranking in the World Bank's Doing Business Report.[77]

As is the case with other indexes of the Bank, the 'abstract numerical form' of this indicator carries a claim to objectivity and truth.[78] In claiming to record reality, the World Bank instead shapes it by exercising forms of authority that are often invisible but discipline states according to particular imperatives of entrepreneurship and competition. For instance, in a 2011 report, the Bank stated that:

> [i]n 2009, Sierra Leone was ranked the quickest and easiest place to start a business in West Africa and was considered one of the top five countries in Sub-Saharan Africa for investor protection – a remarkable turnaround only seven years after a civil war that had all but destroyed the economy. Sierra Leone's climb in the Doing Business rankings is thanks to the government's strong backing for reform and to the support of the RABI Program, and a number of other donor partners.[79]

By equating economic recovery to good performance in the *Doing Business* rankings, the World Bank essentially elevates itself to an all-encompassing standard-setting and evaluating authority. Although this example is but one in a series of disciplining functions performed by the international financial institutions in regard to post-colonial states, it serves to elucidate their profound influence in the constitution, reproduction, and constant reform of the state in the South.

This section highlighted the ways in which colonially inherited legal dualism and the profoundly influential role of international forms of authority, such as the World Bank, make the image of the state at the heart of 'soft law' on land-grabbing difficult to sustain. Moreover, it raised questions about the placing of such a state at the heart of the allocation of responsibilities in regards to the land. Rather, appreciating the multitude of authorities that seek to determine the legitimate usages of the land is essential in order to grasp the specific jurisdictional nexuses that enable land-grabbing, particularly in post-colonial settings. In the next section I will further elaborate on this point by focusing on one particular lease in the Northern Province of Sierra Leone and the ways in which a nexus of international and transnational laws heavily circumscribe post-colonial states' willingness and ability to regulate investments in land for the benefit of their people.

3.3 The Makeni power project and international authority over the lands of the South

As we saw earlier, there are differences between PRAI, CFS-rai and the VGGTs, involving both the framing of the problem and the solutions they offer. However, these three sets of principles exhibit significant similarities in the way they allocate rights and responsibilities amongst different actors. Both for PRAI and the VGGTs, the responsibility to manage and contain the worst effects of land-grabbing lies with host states, while CFS-rai offers a somehow richer account which, however, is also anchored to this particular form of state-centrism. At the same time, authority over land is allocated to the host states, but also, in subtler ways, to transnational corporations and international organizations. However, the post-colonial state that is often called upon to apply those principles is also disciplined by international trade and investment law as well as by the international financial institutions (IFIs) in ways that designate competitiveness, market-making, and the attraction and protection of foreign investment as the primary *raison d'état*.

[77]'Agenda for Prosperity: Road to Middle Income Status', *Government of Sierra Leone*, available at www.sierra-leone.org/Agenda%204%20Prosperity.pdf, at 87.

[78]Van Den Meerssche, *supra* note 74, at 193.

[79]'Rebuilding Business', *supra* note 58, at 4.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

These dynamics were precisely at play in the case of the Makeni power project in the Northern Province of Sierra Leone. Addax Bioenergy Sierra Leone, the subsidiary of a Swiss company specializing in sugarcane-based bioenergy, submitted a project proposal to the Executive Board of the Clean Development Mechanism (CDM) funder the UN Framework Convention on Climate Change (UNFCCC).[80] The project entailed setting up a sugarcane plantation and a bio-ethanol distillery in Makeni, Sierra Leone, with a stated purpose of selling bioethanol to the European market as well as providing energy to cover local needs.[81] A memorandum of understanding (MOU) was signed between the government of Sierra Leone and Addax and in 2010, Addax secured a 50-year lease with a potential extension of 21 years.[82] Reading the MOU, the imbalance between rights and duties of the two parties becomes apparent. First, article 7 submits all the differences arising from the MOU to commercial arbitration in London under the Rules of Arbitration of the International Chamber of Commerce[83] and explicitly prohibits the parties from appealing the arbitral award in domestic courts.[84] This predominance of commercial law is also linked to the fact that in paragraph 6 of the same article the government 'acknowledges that the execution, performance and delivery by each Party of this Memorandum shall constitute a private commercial transaction entered entirely in its commercial capacity',[85] a provision with direct consequences for the jurisdictional and executional immunities of Sierra Leone. Importantly, Article 13 provides that in case of any legislative change in Sierra Leone that 'has a material adverse effect'[86] on Addax's ability to perform the assumed obligations or the cost and/or returns from doing so, the state is obliged to make sure that the company is not adversely affected. Crucially, it is the commercial arbitrators specified in Article 7 that have exclusive jurisdiction over determining which legislative changes have such an adverse effect. Even though such 'stabilization clauses' are the norm when it comes to contracts signed by non-OECD states, it is worth noting that full freezing clauses, like this one, constitute the most extensive form of stabilization clause available and foreclose the possibility to effectively regulate land investments in the future once their devastating effects become apparent or when social struggles and political pressure tilt the balance of power.[87] Such clauses are also particularly important to the extent that land-related investments tend to have long-term horizons and many were signed before the detrimental effects of land-grabbing became widely acknowledged, or social movements and local communities had the opportunity to mobilize against them.

In 2013, following a validation report by a private service provider, TUV Nord, the project received accreditation under the CDM.[88] This accreditation process is important for the ways we understand the constitution of authority over land in the Global South. The CDM is one of the 'flexibility mechanisms' under the Kyoto Protocol and the only one that involves non-Annex I states, namely developing states. The core idea behind such flexibility mechanisms is that market-based solutions are the best way of mitigating climate change, and should be given preference over other options, involving, for example carbon taxes, punitive measures for exceeding

[80]For the full project proposal, see cdm.unfccc.int/Projects/DB/RWTUV1359583902.25/view.

[81]Ibid., at 2.

[82]Memorandum of Understanding and Agreement between the Government of Sierra Leone with Addax Bioenergy Sierra Leone Limited and Addax & Oryx Holdings BV (9 February 2010). The text of the MOU is available at www.farmlandgrab.org/post/view/18025-mou-and-agreement-between-sierra-leone-and-addax.

[83]Ibid., art. 7(i).

[84]Ibid., art. 7(iv).

[85]Ibid., art. 7(vi)(a).

[86]Ibid., art. 7(vi)(b).

[87]See 'Stabilization Clauses and Human Rights: A research project conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights', *IFC*, 2009, available at www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES, at 9.

[88]For all the related dates and documents see cdm.unfccc.int/Projects/DB/RWTUV1359583902.25/view.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

emissions, or repayment of the 'ecological debt' owed by the developed countries.[89] Within this framework, the goal is to achieve maximum emission cuts at the minimum (monetary) cost. Accordingly, the right to emit greenhouse gas (GHGs) is reconceptualized as a scarce economic resource. In order to meet the reduction targets agreed upon internationally, many states allocate to their polluting industries GHG credits setting an upper limit to emissions.[90] If polluters cannot meet these targets by reducing their emissions at home, for example by investing in green technology, while maintaining their profit rates, they are given the option to buy emission credits elsewhere. The underlying premise is that what matters is the overall reduction of emissions, not where, specifically, these reductions take place. This is 'a *globalist* frame and way of seeing and way of knowing the problem of climate change based on an understanding of the global climate system as an ontologically unitary system'.[91] The Clean Development Mechanism, which was established by Article 12 of the Kyoto Protocol, is one manifestation of such a carbon market. If a project that takes place in the Global South can be shown to have 'real, measurable, and long-term benefits' in regards to climate change mitigation and if through this project reductions in emission will occur that can be shown to be 'additional to any that would occur in the absence of the certified project activity', then the project receives credits that can be bought by developed states to help them meet their reduction targets.[92]

A variety of criticisms have been addressed towards the CDM, including that the required 'additionality' of the said reductions is based on unprovable counterfactuals,[93] and that carbon markets divert attention, energy and resources away from the urgent need to fundamentally alter the patterns of production, circulation and consumption in the Global North, which are responsible for climate change in the first place.[94] What is particularly relevant from the perspective of international law and land-grabbing is, however, the jurisprudential critique that 'new forms of international authority over land are authorized by the climate regime'.[95] Article 12 of the Kyoto Protocol creates a legal link between the lands of the South and economies activities in the North whereby land in the South is enlisted so that the unsustainable patterns of production and consumption as well as the profitability of corporations are maintained. The CDM Executive Board, transitional biofuel corporations such as Addax, private accreditation bodies such as TUV Nord, international institutions, and governments, that are fixated with ideas of development through foreign investment such as the one of Sierra Leone, enact and give concrete existence to this legal link created by the Kyoto Protocol. Take for example, the report by the African Development Bank, which co-funded the Makeni project. The report paints a bleak picture of ecological devastation and abandonment. The land is reportedly degraded and 'vegetation has been cleared or

[89]The idea of imposing fines on those developed states that exceeded their emission targets and using the funds to finance green technologies in the Global South was, in fact, at the core of Brazil's proposal for a clean development fund, which was subsequently transformed to the CDM under the pressure of such rich states. On the concept of 'ecological debt' and how to repay it see P. Bond, 'Repaying Africa for Climate Crisis: "Ecological Debt" as a Development Finance Alternative to Emissions Trading', in S. Böhm and S. Dabhi (eds.), *Upsetting the Offset: The Political Economy of Carbon Markets* (2009).

[90]According to Art. 3 of the Kyoto Protocol developed states assumed the obligation to reduce 'their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012'.

[91]J. Dehm, 'One Tonne of Carbon Dioxide Equivalent', in J. Hohmann and D. Joyce (eds.), *International Law's Objects-Emergence, Encounter and Erasure through Object and Image* (2018), at 305.

[92]Kyoto Protocol Art. 12, para. 5 (b), (c).

[93]A 2009 study that examined 93 CDM-accredited projects concluded that the mechanisms for assessing additionality were flawed and in need of revision: L. Schneider, 'Assessing the Additionality of CDM Projects: Practical Experiences and Lessons Learned', (2009) 9 *Climate Policy* 242.

[94]For a comprehensive set of criticisms see Böhm and Dabhi, *supra* note 89. For a TWAIL critique of the CDM see J. Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective', (2016) 33 *Windsor Yearbook of Access to Justice* 129.

[95]Ibid., at 138.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

burnt to make way for irregular use for pastures and subsistence farming'.[96] On the other hand, the project is presented as a force of modernization and development and it is argued that employment and training by Addax will compensate fully for the loss of farmland.[97] The same is the case with the report of TUV Nord and the Project Design Document submitted to the CDM Executive Board. The two documents echo each other closely in their assertions that currently biomass residue is left unused and thereby wasted in Makeni and therefore, the energy production process will simply mobilize a previously neglected resource:

> As demonstrated in section B.4 "Alternative scenarios for the use of biomass residues", categories 2 and 3 of biomass residues are sources internally and could not be sold or utilized without the project activity. Besides, there are abundant surplus of biomass residues in Sierra Leone which are not utilized.[98]

Furthermore, Addax Bioenergy also invoked the prospect of 2,000 additional jobs to argue for the social advantages of the project,[99] even though it subsequently transpired that only a few hundred seasonal jobs were open to Sierra Leoneans and even fewer to the affected community.[100] In this context the social and economic costs of offsetting emissions in the EU through the usage of land and other resources in Sierra Leone are presented as minimal. Therefore, the fact that land, labour and water can be accessed cheaply in Sierra Leone, coupled with dubious assessment of additionality, means that it will always be more attractive to offset emissions at home through mobilizing the resources of the South. The fact that these lands are constantly imagined to be empty, under-utilized or degraded and the faith placed by the IFIs and domestic governments in foreign investments, almost means that the social costs of these projects are easily minimized or bracketed. This has also been the case with the Makeni project, since the local community has reported an aggravation of hunger, and a stark mismatch between promised and actualized job opportunities.[101] Indeed, the Makeni project has been widely criticized as a form of 'green-grabbing'[102] that did not deliver the promised developmental goals and led to increased food insecurity, power disparities amongst the community and social tensions, and it was eventually abandoned in 2015.

Importantly, the legal link between the lands of the South and economic activities in the North is made possible by the idea of equivalence between emissions reductions regardless of how and where they occur. As Dehm has argued: 'These carbon markets, which have become central to international climate mitigation efforts, are constitutively dependent on being able to make very different actions in different places commensurable, substitutable and exchangeable.'[103] The international law of climate change in its current form facilitates processes of abstraction whereby very different methods of emissions reduction, for example the dispossession of Sierra Leonean peasants from their lands and the reduction of corporate profits through pollution restrictions, are

[96]'Addax Bioenergy Project: Executive Summary of the Comprehensive Resettlement Policy Framework and the Pilot Phase Resettlement Action Plan', *African Development Bank Group*, available at www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/Addax%20Bioenergy%20-%20RAP%20summary%20-%20Final%20EN.pdf, at 1.

[97]Ibid., at 4.

[98]TUV Nord, 'Validation Report: Addax Bioenergy Management SA, Makeni Power Project', *TUV Nord*, 30 March 2013, available at cdm.unfccc.int/Projects/DB/RWTUV1359583902.25/view, at 29. See also Project Design, *supra* note 80, at 7–8.

[99]Ibid., at 4.

[100]A. Wedin et al., 'Food versus Fuel: The Case of the Makeni community in Sierra Leone', (2013) 170 *WIT Transactions on Ecology and the Environment* 37, at 45.

[101]Ibid.

[102]Fairhead et al. define as land-grabbing instances of large-scale land acquisitions when '[t]he commercial deal is thus intended to serve "green" ends – whether through biodiversity conservation, biocarbon sequestration, the protection of ecosystem services, ecotourism or "offsets" related to any and all of these'. J. Fairhead et al., 'Green Grabbing: A New Appropriation of Nature', (2012) 39 *Journal of Peasant Studies* 237, at 239.

[103]Dehm, *supra* note 91.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

equalized by becoming exchangeable in a global carbon market.[104] In turn, this legal framework is enacted and facilitated by the various methods of seeing and knowing used to assess the risks and opportunities of land investment. In the case of Makeni in particular, aerial photography was used to determine the condition and current usages of the land in question.[105] Despite its association with ideas of objectivity and scientific accuracy, aerial photography produces a static image of a place from above that renders invisible the complicated, fragile nexus between people and things in Makeni. For example, as Millar has shown, the use of aerial photography as a primary source of knowledge about place displaces other forms of knowledge that are more attentive to practices of shifting cultivation, nomadic pastoralism, the gathering of herbs or vegetables as well as the spiritual significance of the land or its importance for the status and economic position of women.[106] Visually stripping a place from the social relations that constitute it enables this process of abstraction inherent in the CDM.

4. Conclusion

This article sought to present the multiple ways in which legal pluralism as well as international and private forms of authority determine the usages of land in the Global South and in Sierra Leone in particular. The fractured and complicated picture of legal pluralism, World Bank reports, internationally-sponsored administrative reforms, internationally-sanctioned carbon markets and private corporations challenges the imaginary of the state that is at the heart of 'soft law' initiatives to regulate land-grabbing and puts into question the placing of the post-colonial states at the heart of the bundle of responsibilities enumerated in such instruments. Therefore, I did not seek to paint such a complicated picture because I find complication to be aesthetically pleasing, or the accumulation of detail to be intellectually superior or inherently critical. Rather, my main point is a simple one: such 'soft law' instruments rely on a particular state-centric model that conceptualizes the state as the primary bearer of responsibilities regarding the regulations of land-grabbing. However, this imaginary of the state as legally unitary and externally independent bears little resemblance to the legal realities of statehood in much of the post-colonial world, as the case of Sierra Leone indicates. Indeed, the post-colonial state in Africa is characterized by the ongoing relevance of ethnicized customs that was historically a necessary component of 'indirect rule'. Nowadays, the post-colonial state is mobilized by transnational corporations in order to gain control over land. Moreover, international forms of authority, such as the World Bank or the CDM, constantly seek to make and remake the state in the Global South according to particular imperatives of market-friendliness, competitiveness and entrepreneurship. In doing so they also position themselves as sources of authority about the appropriate usages of land. One could situate the above observations within a broader trajectory of ambivalence about the emancipatory potential of the (post-colonial) state that characterizes the work of many Third World Approaches to International Law (TWAIL) scholars.[107] In this respect, my intervention could be read as a commentary on the 'cruel optimism' that characterizes much international legal scholarship, orthodox or heterodox, in regards to the potential of the state (post-colonial or otherwise) and of contemporary international law to guarantee socially equitable and environmentally sustainable usages of

[104]This equalization of socially, environmentally or morally diverse practices is at the heart of the Marxian critique of the capitalist mode of production, the historical specificity of which is precisely this rule by abstraction: 'The abstractness of abstract labor is posited practically in the fact that the function of labor is entirely separate from, and, at a certain level, indifferent to, the specific product that a particular form of labor actually produces.' A. Sartori, 'Global Intellectual History and the History of Political Economy', in S. Moyn and A. Sartori (eds.), *Global Intellectual History* (2015), at 112.

[105]Wedin et al., *supra* note 100, at 44.

[106]G. Millar, 'Knowledge and Control in the Contemporary Land Rush: Making Local Land Legible and Corporate Power Applicable in Rural Sierra Leone', (2016) 16 *Journal of Agrarian Change* 206, at 215.

[107]See B.S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach', (2007) 7 *Melbourne Journal of International Law* 499.

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press

the land, and more broadly, of the planet's natural resources. It is, indeed, a plausible conclusion of the above observations that things that many of us desire, namely state and international legal interventions in regards to land-grabbing are 'actually an obstacle to [our] flourishing'.[108] However, another way of concluding the above reflections could be that '[b]y identifying places where decisions are being made, this scholarship may be used by the governed to identify hidden or distant places where decisions are made that profoundly affect their lives'.[109]

Author ORCIDs. Ntina Tzouvala 0000-0003-3908-841X

[108] L. Berlant, *Cruel Optimism* (2011), at 1.

[109] M. Fakhri, 'Food as a Matter of Global Governance', (2015) 11 *Journal of International Law and International Relations* 68, at 77.

Cite this article: Tzouvala N (2019). A false promise? Regulating land-grabbing and the post-colonial state. *Leiden Journal of International Law* **32**, 235–253. https://doi.org/10.1017/S0922156519000128

https://doi.org/10.1017/S0922156519000128 Published online by Cambridge University Press