FROM ERODING TO ENABLING THE COMMONS: THE DUAL MOVEMENT IN INTERNATIONAL LAW

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ABSTRACT

This paper first recalls that the primitive phase of international law is deeply entangled with that of the commons as a way of governing resources and of organising community life: in the work of Vitoria and, later, of Grotius, the founders of the discipline, the notion of 'commons' and the theory of property rights were used instrumentally, either to justify the occupation of land or the travel along routes that were considered to belong to no one in particular (and not to be subject of sovereign control), or to support the idea that the non-Western peoples were less civilized (since property rights were a mark of the more advanced societies) and that colonization thus held the promise of 'development' and should be seen as benefiting them. Section II of the paper argues that the idea of development, in its contemporary versions, remains heavily indebted to this view of 'progress'. In this perspective, the process of individualization (or "de-communisation") is an indicator that a polity is arriving at maturity; and the process of privatization -- the gradual erosion of common-property regimes -- is equated with modernity and with the promise of greater economic efficiency. Section III argues, however, that doubts have emerged concerned both the inevitability of this movement, and its desirability: starting in the late 2000s, a counter-movement has emerged, in search of an alternative. The rolling out of titling schemes, understood as certification of property rights leading to the commodification of land, was the main battlefield on which these two tendencies clashed. Section IV then assesses the contribution to the most recent developments of international human rights law to protecting the commons, and enabling common-property regimes to resist the general trend towards commodification. Section V argues that this counter-movement in international law shall be successful if it can strike the right balance between recognizing such regimes and enabling them to function, on the one hand, and on the other hand, providing them with the 'constitutional framework' -- the ground rules -- required to ensure that they shall be both legitimate and equipped to sustainably use the resources on which the community depends.

From Eroding to Enabling the Commons:
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I. Introduction

The history of international law is deeply entangled with that of the commons as a way of governing resources and of organising community life. The inaugural moment of the discipline was in the successive attempts by Francisco de Vitoria and Hugo Grotius to recruit natural law to justify Spain's conquest of the 'New World' and, later, the expansion of the Dutch East India Company and the West India Company. The idea that the territories to be 'civilized' and converted to Christianism were functioning as a 'commons', in which land was neither subject to property rights nor controlled by a political sovereign deserving to be called a 'State' (since the control over a territory was seen as a definining characteristic of State sovereignty), was central to this project. Despite his humanitarian credentials, Vitoria was the first author to propose an elaborate defense of Spanish penetration of the New World by asserting that 'it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would. Now this was not to be taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common user which prevailed among men, and indeed, in the days of Noah, it would have been inhuman to do so.' (Vitoria (1917 (1532)), p. 151, cited by Anghie (2005), p. 20). In other terms, the lands which the Spanish conquistadores sought to control were considered 'available', because they were neither exploited by private owners nor subject to State control, and thus has retained their original status as 'common' to all mankind.

During this primitive phase, the notion of 'commons' and the theory of property rights were used instrumentally, either to justify the occupation of land or the travel along routes that were considered to belong to no one in particular (and not to be subject of sovereign control), or to support the idea that the non-Western peoples were less civilized (since property rights were a mark of the more advanced societies) and that colonization thus held the promise of 'development' and should be seen as benefiting them. These ideas were developed at greater length in the major work of Hugo Grotius, *De jure belli ac pacis*, which he published in three volumes in 1625. Grotius borrowed from Vitoria the idea that there exists a natural right to travel across the Earth and the right to wage just war when this is denied. But he also presented the shift from the 'commons' to property rights as inherent in the process of development:

> God gave to mankind in general, dominion over all the creatures of the Earth, from the first creation of the world; a grant which was renewed upon the restoration of the world after the deluge. All things, ..., formed a common stock for all mankind, as the inheritors of one general patrimony. From hence it happened, that every man seized to his own use or consumption whatever he met with; a general exercise of a right, which supplied the place of private property. So that to deprive any one of what he had thus seized, became an act of injustice. [This state of affairs however] could not subsist but in the greatest simplicity of manners, and under the mutual forbearance and good-will of mankind. An example of a community of goods, arising from extreme simplicity of manners, may be seen in some nations of America, who for many ages have subsisted in this manner without inconvenience... [A 'community of lands for pasture' continued even after the destruction of the tower of Babel and the subsequent ' dispersion of mankind, who took possession of different parts of the earth'.] For the great extent of land was sufficient for the use of all occupants, as yet but few in number, without their incommoding each other. ..., it was deemed unlawful to fix a land mark on the plain, or to apportion it out in stated limits. But as men increased in numbers and their flocks in the same proportion, they could no longer with convenience enjoy the use of lands in common, and it became necessary to divide them into allotments for each family (Grotius (1925 (1625)): Book II, chap. 2).

In Grotius' view, property rights over land are therefore established as population increases and as it becomes necessary to clarify the boundaries of what belongs to each, in order to make the progress of civilization (and the division of labor) possible. This understanding of civilization and of the original role of the State (which is to protect the boundaries of private property) was commonplace at the time: it would be reiterated (indeed, almost literally reproduced) in chapter V of John Locke's *Second Treatise on Civil Government*, first published in 1690. But Grotius was anxious to reconcile his defense of property rights with the need to favor the expansion of the great trading companies (the Dutch East India Company in particular, which was for a time his paymaster (Borschberg (1999); van Ittersum (2010)). His solution was to state that the reasoning according to which property rights are a mark of civilizational progress does not apply to the seas, since:

> Notwithstanding the statements above made, it must be admitted that some things are impossible to be reduced to a state of property, of which the sea affords us an instance both in its general extent, and in its principal branches. ... For the magnitude of the sea is such, as to be sufficient for the use of all nations, to allow them without inconvenience and prejudice to each other the right of fishing, sailing, or any other advantage which that element affords. ... The same appellation of common may be given to the sand of the shore, which being incapable of cultivation, is left free to yield its inexhaustable supplies for the use of all. There is a natural reason also, which renders the sea, considered in the view already taken, incapable of being made property: because occupancy can never subsist, but in things that can be confined to certain permanent bounds (Grotius (1925 (1625)): Book II, chap. 2).

Moreover, Grotius added, 'among Theologians also it is a received opinion, that if in urgent distress, any one shall take from another what is absolutely necessary for the preservation of his own life, the act shall not be deemed a theft' (Book II, VI); and 'another right [is also generally acknowledged], which is that of making use of the property of another, where such use is attended with no prejudice to the owner' (Book II, XI). This justifies the right to travel, even through areas that are effectively occupied by a sovereign people, for the purpose of trade: 'It is upon the same foundation of common right, that a free passage, through countries, rivers, or over any part of the sea, which belongs to some particular people, ought to be allowed to those, who require it for the necessary occasions of life; whether those occasions be in quest of settlements, after being driven from their own country, or to trade with a remote nation, or to recover by just war their lost possessions' (Book II, chapter XIII).

It would be a mistake to see these views as idiosyncratic. Grotius was a highly influential author, read and discussed by the political elites of the period, and he was not merely expressing ideas of his own: he was describing with great clarity what the received understanding of the times was. Nor should they be dismissed as mere historical relic: in fact, though the wording may have changed and a process of euphemization taken place, they have remained very much central to international law to this day. This is obvious, perhaps unsurprisingly, when one considers the arguments for the establishment of the mandates system under the supervision of the League of Nations. The Covenant of the League of Nations described the exercise by the colonial powers of their 'tutelage' of peoples still 'not yet able to stand by themselves' as 'a sacred trust of civilisation', to be exercised under the supervision of a Permanent Mandates Commission of the League. Article 22 of the Covenant emphasizes the duty of the colonial powers to extend to those peoples the benefits of civilisation:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their

> geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

At the time when the Permanent Mandates Commission started to exercise its functions, Frederick Lugard, a former employee of the British East Africa Company and of the Royal Niger Company, and former Governor of Nigeria for the British Government, was at the apex of his prestige as a theorist of colonial rule. He published *The Dual Mandate in British Tropical Africa* in 1922, just as he joined the Permanent Mandates Commission as a representative of the United Kingdom. The major question the colonial powers were confronted with was how to reconcile the 'duty' to ensure economic development of the territories under control with that of 'securing the welfare of the natives': 'The problem', Lugard wrote in a report to the PMC on 'Economic Development of Mandated Territories in Its Relation to the Well-Being of the Natives', 'is how these two duties should be reconciled without, on the one hand, subordinating policy to a purely utilitarian outlook or, on the other hand, adopting a standpoint too exclusively philanthropic' (PMC, *Seventh Session*, p. 197, cited by Anghie (2005), p. 159).

There was a convenient way to address this problem, however. It was to recast the interests of the 'natives' as residing not in the preservation of their existing social relationships (which were communitarian, centred around the tribe, rather than individualistic) or in that of their relationships to nature (which was a potentially huge, but largely untapped, source of wealth), but in exploitation itself: not only should 'their raw materials and foodstuffs -- without which civilization cannot exist -- ... be developed alike in the interests of the natives and of the world at large' (Lugard (1922), p. 60), but in addition the natives should be co-opted, as providers of cheap labour, into the capitalist system, in order to allow them to 'escape the confines of their communities' (Anghie (2005), p. 162). Exploitation of both labour and land, perhaps, benefited to colonial powers and 'the world at large', since it allowed the creation of wealth and extended the division of labour to the territories under mandate; but it also brought progress to the natives themselves, who would gradually become 'liberated *homini oeconomici*' -- freed from the obstacles that formerly blocked their economic progress, and freed *thanks to very fact that they were being exploited*. The disruption of communal social relationships and the shift to an exploitative relationship to nature, in that view, was not the price to pay for economic development to proceed: they were the definition of progress itself, and were to be treated as benefits, not harms.

The following section of this chapter shall try to illustrate that the idea of development, in its contemporary versions, remains heavily indebted to this view of 'progress'. In this perspective, the process of individualization -- the shift from *Gemeinscaft* to *Gesellschaft*, to borrow from the F. Tönnies' terminology (Tönnies (2001(1887)) -- is an indicator that a polity is arriving at maturity; and the process of privatization -- the gradual erosion of common-property regimes -- is equated with modernity and with the promise of greater economic efficiency. Section III argues, however, that doubts have emerged concerned both the inevitability of this movement, and its desirability: starting in the late 2000s, a counter-movement has emerged, in search of an alternative. The rolling out of titling schemes, understood as certification of property rights leading to the commodification of land, was the main battlefield on which these two tendencies clashed. Section IV then assesses the contribution to the most recent developments of international human rights law to protecting the commons, and enabling common-property regimes to resist the general trend towards commodification. Section V argues that this counter-movement in international law shall be successful if it can strike the right balance between recognizing such regimes and enabling them to function, on the one hand, and on the other hand, providing them with the 'constitutional framework' -- the ground rules -- required to ensure that they shall be both legitimate and equipped to sustainably use the resources on which the community depends. A brief conclusion is offered.

II. The Movement towards Property Rights

The defence of colonial expansion as a process of civilization may sound exotic; in fact, the similarities are striking with the current period. In the 1950s and 1960s, 'developmentalism' was premised on the idea that development went through stages, from 'backward' and predominantly agrarian societies to

societies in which the accumulation of capital would allow a transition of large parts of the population to the manufacturing and services sectors: though authors such as W. Arthur Lewis (1954) and Walt W. Rostow (1960) provide different versions, they shared this dominant narrative. In that ideological context, poor countries were expected to first identify there comparative advantage (which was predominantly in the exploitation of their natural resources and of cheap labour), in order to be able, later, to "climb up" the ladder of development. Western capital was to facilitate this, first by encouraging the industrialization of agricultural production (thus allowing the emergence of an agricultural sector competitive on global markets), and then by financing the secondary and tertiary sectors of the economy. In low-income countries however (a category defined by the World Bank that largely overlaps with the least-developed countries listed by the UN Economic and Social Council[1]), only the first part of this script was followed. Agriculture was increasingly channelled towards export markets after the 1960s, thus perpetuating the international division of labour that these countries inherit from the colonial period. In many of these countries, agriculture came to be understood as an extractive enterprise: it was seen as a means to ensure a steady flow of cheap raw commodities to industrialized countries, and it was developed with that purpose in mind despite the highly problematic impacts - from the agronomic and the environmental point of view - of monocultures, typical of export-led agriculture.

The substitution of a Western conception of property rights to the commons has been an integral component of this programme. Of course, one major difference between the immediate post-colonial era and the current period is that we now have developed a greater awareness about the accelerated depletion of natural resources; indeed, on an increasingly crowded planet where a growing part of the population entertains the prospect of attaining the lifestyle of those living in the affluent West, fears about scarcity have suddenly re-emerged -- triggered, for instance, by the global food price crisis of 2007-2008. Yet, paradoxically perhaps, far from leading us to slow down the process of natural resources exploitation and the push towards economic efficiency by deepening the international division of labour, we are seeking to speed up both, in the name of overcoming these very threats. Now, more perhaps than ever in human history, the exploitation of natural resources through means that are as rational and as efficient as possible is described as an urgent task, reminiscent of the 'sacred trust of civilisation' at the heart of the Mandates system of the interwar period, in order to to able to quench the thirst for more despite the limitations imposed by a finite planet. The strong push towards the formalization of property rights over land, as a means to encourage economic growth and to create an investment-friendly climate, is largely perceived as an essential tool in this regard.

In that perspective, the 'commons' -- the communal ownership of pastures, fishing grounds or forests, allowing all community members to enjoy access to shared natural resources -- are perceived not as an essential safeguard against extreme deprivation for those who are landless or land-poor, but instead as an obstacle to development. Development in turn is understood as the maximization of wealth creation, *inter alia* by favouring the exploitation of natural resources which -- precisely because we are facing the threat of scarcity -- should be turned into economic assets, tradable if possible, in order to ensure that they shall benefit the most efficient users. The prescription is clear: to strengthen private property rights wherever possible, and where this cannot be done, to ensure that natural resources shall be used rationally by establishing strong State control.

It is against this background that we can understand the insistence on the rolling out of titling schemes as a development tool, to favour the globalization of the Western conception of property rights. The promoters of such schemes see them as presenting a number of advantages. First, the security of tenure

[1] The classification of countries as "low-income", "lower middle income", "upper middle income" and "high-income", is published on http://data.worldbank.org and is revised once a year on July 1st, at the start of the World Bank fiscal year. Such classification is made on the basis of the GNI per capita of each country, using a three year average exchange rate to avoid the classification being influenced by short-term changes in currency values. The list of least-developed countries (LDCs) is decided upon by the United Nations Economic and Social Council and, ultimately, by the General Assembly, on the basis of recommendations made by the Committee for Development Policy, using a set of criteria including per capita GNI, a human assets index and an economic vulnerability index (see *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures* (United Nations publication, Sales No. E.07.II.A.9). Available from: http://www.un.org/esa/analysis/devplan/cdppublications/2008cdphandbook.pdf).

favoured through titling should encourage individual landowners to make the necessary investments in their land, thus improving their living conditions and, in rural areas, enhancing the productivity of the cultivated plot: the occupants, it is supposed, shall not invest in their land unless they are certain to be protected from the risk of losing it. One major argument in favour of this view was put forward by the Peruvian economist Hernando de Soto, whose Institute for Liberty and Democracy (ILD) took a leading role in developing a major titling programme in Peru after 1998: in *The Mystery of Capital*, in which he attributes the failure of developing countries to grow to undeveloped property regimes (de Soto (2000)), de Soto forcefully argues that titling of their property allows the owners to mortgage their land, and thus to obtain access to credit, allowing them to make such investments. In what he calls the 'capitalisation process', 'dead (physical) assets'—'where assets can not be readily turned into capital, can not be traded outside narrow local circles where people know and trust each other, can not be used as collateral for a loan, and can not be used as a share against an investment'— are turned into live capital, which can be mobilised for investment (de Soto (2000), p. 6).

Perhaps unsurprisingly, de Soto's views found a warm reception within the World Bank which, during the previous decade, had been assisting with the large-scale and rapid privatisation of the formerly socialist economies of Central and Eastern Europe. Indeed, already in 1993, the World Bank had presented a report entitled *Housing: Enabling Markets to Work*, in which—while it warned against costly titling programmes—it underscored the importance of 'systems of property registration and titling and workable systems of foreclosure and eviction', as these were considered 'necessary to ensure the collateral security of mortgage loans' (Mayo and Angel, 1993, 46). The emphasis in that report was more on ensuring security of tenure than on titling as one means of achieving it, but it did include a strong recommendation for the removal of any restrictions on the emergence of a market in property rights over land (Mayo and Angel, 1993, 117; and see Feder and Feeny, 1991). Ten years later, and after de Soto's contribution to the debate, the World Bank referred in the following terms to a study by the McKinsey Global Institute on the conditions of growth in India:

> With fewer assets in the formal sector, more entrepreneurs are excluded from using property as a collateral, and less credit is allocated. The possibility of getting loans is the only reason to take on the daunting task of registering in some countries […] But when it is too difficult, few bother. Entrepreneurs will invest less if their property rights are less secure. Inefficient registration is associated with lower rates of private investment. And it leads to lower productivity, since it is harder for property to be transferred from less to more productive uses. The result is slower growth. One study estimates that restrictive land market regulations cost 1.3% of annual economic growth in India. (World Bank, 2004a, 40; see also World Bank, 2004b, 78)

According to this first argument in favor of titling schemes, thus, registered property can be used as collateral to obtain credit; but it can also be seen as a signalling device that provides information about the trustworthiness of the borrower: research in Indonesia illustrates this by relating titling to the practice of local banks, who tend to see titling of property as proof that the household will be able to repay the loan, independently of the use of the property as collateral (Castañeda Dower and Potamites, 2012).

Second, the clarification of property rights should encourage the emergence of efficient land markets: lowering transaction costs, it is supposed, shall result in the land going to the most productive user, thus maximising the productivity of land as an economic asset (Feder and Noronha, 1987). The World Bank notes, thus, that 'secure and unambiguous property rights […] allow markets to transfer land to more productive uses and users' (World Bank, 2007, 138). The intellectual roots of this argument can be found in the work of Ronald H. Coase, according to which if transaction costs are low enough (and, ideally, reduced to zero), the freedom of transactions shall result in solutions that are most economically efficient (Coase, 1960). The basic reasoning is simple enough: buyers of property will pay the price they considers reasonable, taking into consideration the streams of income that are expected to flow from making productive use of the assets acquired; therefore, if such assets are transferred to the highest bidder, as an efficiently functioning market for property rights should allow, they should ultimately be

captured by the economic actors who can use them most productively, thus contributing to general economic growth.

Third, the clarification of property rights and the development of markets for land rights should attract foreign investors. This is why the *Doing Business* rankings of the World Bank, which use a series of indicators to measure the quality of the 'investment climate' of the countries surveyed, include among their criteria the time and cost of transferring a property title from one seller to the buyer—from the moment the buyer has a copy of the seller's title to the moment when the transfer is opposable to third parties, so that the property can be resold or used as collateral when approaching a bank (Chavez Sanchez et al., 2014). The easier it is to register property rights, the faster and the cheaper the procedures are for transferring property rights, and the more investors will be willing to enter the country concerned and thus, it is hoped, to contribute to its development (although the automaticity of this relationship has of course been questioned: see De Schutter et al., 2012).

Fourth, the formalisation of property rights over land allows public authorities to increase their tax revenues, and where necessary to deliver certain public services that depend on fees being paid by the users. As de Soto remarks, once they are formally registered, assets provide 'an accountable address for the collection of debts and taxes' as well as 'the basis for a creation of reliable and universal public utilities' (de Soto, 2000, 6). The two arguments are combined where public services are provided against the payment of users' fees: only where users have registered property can they be taxed (preferably, at a rate that will depend on the value of the property that they own) in order to finance the provision of water, telephone lines or electricity to the areas in which they live. For cash-strapped countries, struggling to provide basic infrastructure to their populations in large part due to their inability to collect taxes efficiently, this is not of minor significance.

These are apparently powerful arguments in favour of titling programmes, and they have indeed been highly influential since the 1990s. The enthusiasm for the expansion of a Western concept of property rights was perhaps fuelled by a more general trend towards market-based solutions, following the collapse of the State-led economies of the socialist camp. But it was also a failure of political imagination. It betrayed an inability to think beyond the market and the State, beyond private property rights and centrally-controlled forms of management of natural resources. And, as a means to reduce poverty in developing countries, it appears in retrospect as extraordinarily naïve. Less than a decade after the push for titling schemes started, the conditions were right for a counter-movement to emerge.

III. The Counter-Movement: Doubts about the Diffusion of Western-style Property Rights

As more lessons could be drawn from a series of titling programmes implemented in the developing world during the 1990s, a number of ambiguities gradually came to the surface. A turning point was the establishment, in 2005, of the Commission for the Legal Empowerment of the Poor (CLEP). Launched at the initiative of a range of governments from different regions, working together with the United Nations Development Programme (UNDP) and the United Nations Economic Commission for Europe, the CLEP was established under the co-chairmanship of Hernando de Soto and Madeleine Albright. It was tasked with studying the relationship between 'informality' and poverty. The concept note presenting the initiative states:

> One of the staggering facts about poverty, which is not addressed explicitly in the MDGs, is that the vast majority of the world's poor live their daily lives in what is often referred to as the *informal* or *extralegal* sector, often excluded from the benefits of a legal order. [The work of Hernando de Soto shows that] legal exclusion, in the sense that the assets and transactions of the poor are not legally protected and recognised, produces and reproduces poverty throughout the developing world and in former communist societies (CLEP, 2005, 3–4).

The process of 'capitalisation', through which 'dead capital' is brought to life, was central to the inquiry of the commission. Indeed, to many, the CLEP was seen as an opportunity to validate the findings of

Hernando de Soto and his conclusion that underdevelopment had much to do with the failure to establish reliable systems for property rights through the registration of assets, especially immovable assets. It therefore came as a surprise to most that, when it presented its final report in June 2008, the CLEP felt compelled to note a number of problems associated with titling schemes. The CLEP referred to the risks associated with 'elite capture': '[i]n many countries,' it noted, 'speculators pre-empt prospective titling programmes by buying up land from squatters at prices slightly higher than prevailing informal ones. Squatters benefit in the short term, but miss out on the main benefits of the titling programme, which accrue to the people with deeper pockets' (CLEP, 2008, 80, citing Platteau, 2000, 68; on the risks of elite capture, see also Firmin-Sellers and Sellers, 1999). The commission also identified, as one of the failures of titling programmes as they had been implemented in the past, that these programmes tended to neglect the role of collective rights and of customary forms of tenure: such forms of tenure, the commission conceded, could be highly legitimate and effective in guaranteeing security of tenure (CLEP, 2008, 52).

The CLEP concluded that the benefits of titling schemes may have been exaggerated in the past, and that it may be inappropriate to simply transplant the Western concept of property rights into the legal systems of developing countries, the legal traditions and needs of which may be markedly different:

> 'Promoting a truly inclusive property-rights system that incorporates measures to strengthen tenure security requires learning from the mixed experience with past individual titling programmes. To ensure protection and inclusion of the poorest, a broad range of policy measures should be considered. These include formal recognition, adequate representation, and integration of a variety of forms of land tenure such as customary rights, indigenous peoples' rights, group rights, and certificates. Success depends greatly upon comprehensively reforming the governance system surrounding property rights [...] These systems need to be accessible, affordable, transparent, and free from unnecessary complexity. Above all, the poor must be protected from arbitrary eviction by due process and full compensation' (CLEP, 2008, 65).

These statements are significant, both because the initial bias of the CLEP clearly was in favour of following de Soto in his optimistic views about the virtues of titling, and of course because—although not a member of the working group on property—he was the co-chair of the commission. But the conclusions of the CLEP were foreshadowed by a number of studies published in the interim, after the first large-scale titling programmes had been launched (Firmin-Sellers and Sellers, 1999; von Benda-Beckmann, 2003; Unruh, 2002). Indeed, the World Bank itself noted in 2006 that 'most policy analysts now no longer simply assume that formalization in a given context necessarily increases tenure security, and leads to collateralized lending. The original assumptions have now become questions for empirical research' (cited in Payne et al., 2007, 3).

The very terms of 'clarification' and 'formalization', which are used to refer to the improvements to property rights regimes that titling should allow, increasingly came to appear as ambiguous and perhaps even misleading. The purpose of titling schemes is, ostensibly, to confirm existing use rights. But these use rights are often complex. It is not unusual for conflicting claims to exist over any piece of land. And there are various types of land users, not all of who are 'dormant landowners' awaiting an opportunity to register the land they occupy.

Moreover, prior to the formalisation of property rights through titling, tenure generally is regulated by custom. Customary forms of tenure are often highly legitimate and, as recognized by an influential report authored in 2003 by Klaus Deininger for the World Bank, they can ensure a high level of security of tenure (Deininger, 2003, 53; AU-ECA-AfDB (2009), para. 3.1.3.). They also can deliver the same services as formalised property rights, including by favouring in certain cases efficiency-enhancing exchanges (Deininger, 2003, 31–32) or by allowing for the emergence of rental markets, which can improve access to land particularly for land-scarce and labor-abundant households with little education (Deininger et al. (2007)). Research has highlighted that, in fact, traditional (or customary) systems of tenure in many cases allow for the individualisation of ownership, and that even where communal

ownership subsists, such systems allow for cultivation and possession to remain with individual households (Feder and Noronha, 1987). The superimposition of titling on these pre-existing, customary forms of tenure may result in more conflicts rather than in more clarity, and in less security rather than in improved security (Toulmin and Quan, 2000).

In addition, and of more immediate relevance here, customary forms of property may provide security for those depending on the commons—such as pastoralists, artisanal fishers, or those with small herds—for whom classic property rights are generally not an appropriate solution. As a result, we find ourselves today in a paradoxical situation. On the one hand, we have witnessed in recent years an increased competition for land land other natural resources. In cities, this competition is encouraged by the gentrification of certain areas and the financialization of housing markets, both of which encourage speculation and price inflation. In rural areas, competition for arable is the combined result of demographic growth, urbanization and the sprawl of urban areas, pressures resulting from large-scale development projects, and the reservation of land for tourism and other purposes. Land degradation due to unsustainable agronomic practices and climate change, together with a growing demand for agricultural commodities for food, bioenergy, fiber and feedstock, increase the tensions between industrial agriculture, conducted on a large scale and often for export commodities, and agriculture practiced on a smaller scale to meet the needs of local communities, further encouraging speculation over land. Against this background, concerns have been expressed in particular about the impacts of "land grabs", fuelled by fears about the volatility of agricultural prices and facilitated by weak governance of tenure and corruption in land administration (De Schutter, 2011a and 2011b). The rolling out of titling schemes is the generally preferred solution to the risks associated with land grabs: such schemes have been widely seen as the best way to protect otherwise disempowered landusers from the fear of dispossession without compensation, whether by large private landowners or by the State.

On the other hand however, such titling schemes may in fact fuel new forms of dispossession of their own. This may seem paradoxical, since one of the very purposes of clarifying property rights is precisely to provide security of tenure: to allow slum dwellers to be recognised as owners of their home in the informal settlement where they are staying, or to allow those operating small farms to be protected from eviction from the land which they cultivate. Yet, as noted above, the clarification of property rights has also been justified by the need to establish a market for land rights, allowing a more fluid transfer of property rights—a lowering of transaction costs increasing the liquidity of these markets.[2] These two objectives may in fact be contradictory, as becomes clear once we realise that the commodification of property rights can be a source of exclusion and increase insecurity of tenure. First, as already seen, the process of titling itself may be captured by the elites—in addition to the risk of 'pre-emptive speculation' noted by the Commission on the Legal Empowerment of the Poor, titling schemes may be manipulated or tainted by corruption; or the formalisation of property may be too costly or complex for the poorest segment of the population to benefit. Second, once property has been formalised and land demarcated, taxes may be imposed, and more easily collected, by public authorities. This may present an opportunity to better finance public services, as also noted above. But it may also have exclusionary effects: it may occur that the poorest are not able to pay those taxes and are forced to sell off their land as a result. Third, whether to pay those taxes or to make the necessary investments in their houses or on their cultivated lands, the poor (who by definition have no capital of their own) shall be tempted to mortgage their land in order to have access to credit. But even if this works—even if, that is, lenders are willing to provide loans—the risk is that the debts will accumulate, and that the land will finally be seized by the lender: the commodification of land, in such a case, shall have made the loss of land possible, rather than protecting the land user from such a risk. Fourth, the rural poor may be tempted to sell off land in order to overcome temporary economic hardship such as a bad harvest or a fall in the 'farm gate prices' received for their crops. In its 2003 report on land rights, the World Bank clearly recognised that land markets could encourage such 'distress sales', thus potentially increasing insecurity of tenure, rather than reducing it (Deininger, 2003, 96–98; see also Cousins et al., 2005, 3).

[2] The expansion from the former conception of 'security of tenure' to include the latter appears in a 1987 study by two authors from the World Bank, where they note that 'the ability of an occupant to undertake land transactions that would best suit his interests' should be considered part of 'security of tenure' (Feder and Noronha, 1987, 159).

This risk of dispossession following the rolling out of titling schemes, it is worth noting, should not be seen as *failure* of the system, or as a problem that should be remedied in order for the system to proceed more smoothly. Instead, it is *inherent in the very process of commodification of property rights* that gives property its value. It has been written that, in de Soto's view, the problem of informal forms of tenure is not so much too little security of tenure, but instead *too much*: the problem of 'dead capital' is that is cannot be lost, because it cannot be sold or mortgaged (Mitchell, 2006, 7). Indeed, de Soto is explicit about this, noting that one of the benefits of formal property systems is that they make people 'accountable', encouraging people 'in advanced countries' to 'respect titles, honor contracts, and obey the law', because of 'the possibility of forfeiture' (de Soto, 2000, 55–56). In other terms, the counterpart of the improved security of tenure that formalisation of property allowed was the insecurity resulting from the possibility of losing property—whether because the household finds itself unable to reimburse the lender after having mortgaged the land, because the level of taxes makes paying those taxes unaffordable and forces the family to leave, or (where rural farming households are concerned) because the household finds it impossible to expand its property following the speculation fuelled by the titling process, and thus cannot achieve the economies of scale required to be competitive on the markets.

These dangers associated with the generalization of tradeable property rights are increased in a context in which fears of scarcity favor speculation over land and other natural resources. Indeed, there emerges a vicious cycle in which scarcity of resources increases commercial pressures over land, leading to accelerate titling processes (ostensibly in order to protect landusers from dispossession), which in turn encourages speculation due to the inflated prices of land, thus further worsening the risks of scarcity. The further markets for land rights develop, the more there is a risk that the price of land shall increase as a result of speculation. Speculation means that capital that could be put to productive uses, for instance for creating employment, will be immobilised. Even if we hypothesise that the 'speculative' part of price-setting can be separated from the 'market' price, the price of land following titling shall increase, by at least 25 per cent according to most studies available (Payne et al., 2007, 15–16). In principle, that represents a benefit for those who can register their land. But things look quite different when examined in a dynamic perspective: the poorest households may in fact be tempted to sell their land either to overcome a temporary shock or to profit from the opportunity resulting from sudden increases in the price of land, only to discover that the prices of other parcels too have become unaffordable, as the increased price of titled land creates ripple effects making all land more expensive (Payne et al., 2007, 16).

The speculation on land that follows registration processes, leading to inflated prices for land, leads one to question not only the de Soto hypothesis according to which such processes should benefit the poor by allowing them to use their (until then 'dead') assets as capital, but also the Coase hypothesis, which anticipates that, as markets for land rights develop, land will go to the most 'productive' users. As we have seen, these two narratives to a certain extent contradict each other: whereas the latter emphasises the benefits to the poor of the formalisation of property rights, the former emphasises property's contribution to economic growth when in the hands of the most efficient actors. Yet, remarkably, both these narratives fail to take into account the impacts that result from the highly unequal distribution of purchasing power in many of the societies where such formalisation processes take place. One implication of speculation over land is that the poorest landowners will be priced out of land markets, and that even those who manage to register their property may soon lose it, as a result of incurring unsustainable debts or because they seek to benefit from the 'windfall' effect that follows. Another implication is that where land is transferred it does not necessarily go to the most productive user, thus leading to efficiency gains and improving average productivity; rather, it goes to those who have the strongest purchasing power. Indeed, as interest for agricultural land has been rising significantly in recent years, the risk of the poorest being priced out of increasingly speculative land markets is higher now even than in the past.

Titling is therefore not the magic bullet it sometimes has been imagined. It does not truly protect the rural poor against the risks of dispossession of land; nor does it ensure that land shall be used either most

efficiently or more sustainably. The search for alternatives has now begun. Instead of the diffusion of the Western concept of individual property rights and the creation of a market for land rights, we might seek to strengthen the institutions on which customary forms of tenure currently rely, including in particular for the governance of common-pool resources. Indeed, it is remarkable that an important share of the land on which the rural poor rely in the developing world is governed through customary forms of tenure (see generally Dell'Angelo et al. (2017)). This is the case especially in Africa where, according to some estimates, about 70% of the land that is currently used is customary common property (Wily, 2011a, 2011b and 2012). Since the commercial pressures on natural resources increase, threatening in particular the rural poor, but since we have become aware of the dangers entailed by the commodification of land through the creation of a market for land rights, it is in this direction, perhaps, that we should move. Could international law help?

IV. Reviving the Commons: the New Frontiers of International Human Rights Law

It is perhaps not by accident that the most recent advances of international human rights law seek to rehabilitate the idea that common-property regimes, established as customary forms of tenure, should be better protected. In part, this may be interpreted as an attempt to move beyond the dilemma discussed above: it would be unacceptable to leave current landusers (and, more generally, communities depending on access to natural resources for their livelihoods) without a legal protection, since this would expose them to the risks of dispossession; but the extension of individual property rights through titling programmes present their own lacunae, and may in fact legitimize and accelerate forms of dispossession of their own.

But the shift towards the recognition of common-property regimes also has been encouraged by considerations for the sustainability of the management of natural resources. At the height of the developmentalist ideology, the general view was that users of natural resources would behave as rational economic agents, eager to maximize their individual utility and driven by a short-term urge to increase their revenue: it was on this utilitarian anthropology that Garrett Hardin founded his pessimistic view about the viability of shared resources, what he famously referred to as the 'tragedy of the commons' (Hardin (1968)). Since the 1990s however, a large number of studies have demonstrated that under certain conditions, local communities are capable of managing common resources, and might even do so in ways that are more sustainable and more effective than if such management were left either to individual owners following a process of privatization, or to the State. These communities, after all, are ideally positioned to design the governance system that is best suited to the local conditions. The rules they shall set shall be perceived as highly legitimate by the members of the community. Since community members shall have contributed to shaping the governance regime, they shall have a strong incentive in contributing to the enforcement of the rules. And to a large extent, as the rules shall be set with a view to improving the situation of the community as a whole rather than that of individual members, they may be designed in order to minimize negative externalities and to preserve the long-term viability of the resource, thus improving sustainability (Ostrom (1990); Agarwal (2001); Cox et al. (2010)).

International human rights law is gradually recognizing the importance of strengthening common-property regimes based on customary forms of tenure. This occurs through a variety of channels. It can consist in reinterpreting existing rules of international law to provide for such a recognition. Perhaps the most obvious route through which common-property regimes can be recognized is through the right to property, as protected in particular under Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination and under Article 21 of the American Convention on Human Rights.[3] The right to property, indeed, is not limited to the right to *individual* property.

[3] Article 21 establishes, *inter alia*, that: "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36; *see also* International Convention

According to the Committee on the Elimination of Racial Discrimination, it includes the "rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources".[4] The Inter-American Court of Human Rights has been explicit in noting that property should not be understood in a restrictive sense but can be an attribute of the group or the community. In 2001, it noted in the Case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* that "indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land 'is not centered on an individual, but rather on the group and its community'".[5] The African Court on Human and Peoples' Rights similarly considers that "although addressed in the part of the [African Charter on Human and Peoples' Rights] which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities; in effect, the right can be individual or collective".[6]

Other norms of international human rights law are perhaps even more relevant to duties of States to ensure that common-property regimes are strengthened under their jurisdiction. The right to self-determination of peoples and, specifically, the right of all peoples to freely dispose of their natural wealth and resources, as stipulated under Article 1 of both 1966 Covenants implementing the Universal Declaration of Human Rights,[7] has been relied upon for that purpose.[8] In the case of *Apirana Mahuika et al. v. New Zealand* for instance, the Human Rights Committee reads Article 1(2) of the International Covenant on Civil and Political Rights as allowing an arrangement concerning the management of fishing resources, emphasizing that the Maori people "were given access to a great percentage of the quota, and thus effective possession of fisheries was returned to them," and that the new control structure put in place ensures not only a role for the Maori in safeguarding their interests in fisheries but, in addition, their "effective control." [9] Similarly, in its interpretation of the rights of minorities under the Covenant, the Human Rights Committee observed that "minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture[, which] may consist in a way of life which is closely associated with territory and use of its resources". This, the Committee added, "may particularly be true of members of indigenous communities constituting a minority."[10]

Of course, it shall be easier to recognize collective ownership where indigenous groups are concerned, not only due to the specific relationship to land and territories of indigenous peoples,[11] but also because

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on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A, U.N. Doc. A/RES/2106A, art. 5(d)(v) (Dec. 21, 1965).

[4] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Guyana*, CERD/C/GUY/14, para. 16 (Apr. 4, 2006).

[5] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 70, para. 148 (judgment of 31 Aug. 2001); see also *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 146, para. 120 (judgment of 29 March 2006).

[6] African Court of Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Kenya (in the case of the Ogiek Community of the Mau Forest)*, Appl. No. 006/2012, Judgment of 26 May 2017, para. 123.

[7] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. Doc. A/RES/21/2200A, art. 1 (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. Doc. A/RES/21/2200A, art. 1 (Dec. 16, 1966).

[8] The African Charter of Human and Peoples' Rights **(**adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986) has an equivalent norm in Article 21, which provides in particular that: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it". As noted by the African Commission on Human and Peoples' Rights, the origins of that provision "may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. [In adopting Article 21,] the drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society" (***The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria,* African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), para. 56)**. For a comment, see Nwobike (2005)).

[9] See *Apirana Mahuika et al. v. New Zealand*, Hum. Rts. Comm., Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993, para. 9.7 (2000).

[10] Human Rights Committee, *General Comment No. 23: The Rights of Minorities (Art. 27)*, U.N. Doc. CCPR/C/21Rev.1/Add.5, §§ 1, 3.2 (Aug. 4, 1994).

[11] ILO Convention (n° 169) concerning Indigenous and Tribal Peoples in Independent Countries, which entered into force in 1991, provides for a number of guarantees related to land. Although it has been poorly ratified, this is compensated, in part, by

the boundaries of the community shall presumably be easier to define. National courts have routinely held that, by virtue of traditional occupation and use, the ownership of natural resources is vested collectively in an indigenous people. Thus, the practice of the Supreme Court of Canada is to assess claims of "arboriginal title" by focusing on "the occupation and use of the land as part of the aboriginal society's *traditional way of life*. In pragmatic terms, this means looking at the manner in which the society used the land *to live*, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc."[12] Similarly, in the case of *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Cmty. and Others*, the South African Constitutional Court expressed the view that "the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface".[13] In the *Case of the Ogiek Community of the Mau Forest*, the African Court of Human and Peoples' Rights derived from article 21 of the African Charter on Human and Peoples' Rights, which guarantees the right to self-determination, a number of rights of the Ogieks to their ancestral land, "namely, the right to use (usus) and the right to enjoy the produce of the land (fructus), which presuppose the right of access to and occupation of the land"; it found the said provision to be violated "since the Ogieks have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands".[14]

However, this component of the right to self-determination should not benefit indigenous peoples alone, nor should it only benefit recognized as "minorities" with a distinct ethnic, religious or linguistic identity. The requirements applicable to indigenous peoples are now extended to at least certain traditional communities that entertain a similarly 'profound and all-encompassing relationship to their ancestral lands' centered on 'the community as a whole' rather than on the individual : this, the Inter-American Court of Human Rights noted in the Case of the *Moiwana Community v. Suriname*, applies for instance to the Maroon communities living in Suriname, which are not indigenous to the region, but are tribal communities of former African slaves that settled in Suriname in the 17th and 18th century.[15] In the Case of *Saramaka People. v. Suriname*, where is was faced with a challenge to the granting of logging and mining concessions within the traditional territory of a tribal community (consisting, as in the *Moiwana Community* case, of descendants of self-liberated African slaves), the Inter-American Court explicitly noted that its jurisprudence regarding indigenous peoples' right to property 'is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival'.[16]

Perhaps even more telling than these interpretations of international human rights law by domestic, regional and international bodies, is the fact that recent instruments have explicitly referred to common property regimes based on customary forms of tenure, with a view to ensuring that such regimes shall be protected from encroachment. Such regimes are spectacularly endorsed, for instance, in the *Voluntary*

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the adoption of the Declaration on the Rights of Indigenous Peoples **by General Assembly Resolution 61/295 on 13 September 2007, which reflects the existing customary law on this issue (A/RES/61/295). The Declaration provides in** Article 8(2), b), that States should prohibit 'any action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories or resources', a requirement that replicates Article 18 of the ILO Convention (n° 169). It also prohibits any forcible removal of indigenous peoples from their lands or territories, imposing requirements of free, prior and informed consent, agreement on just and fair compensation and, where possible, the option of return, for relocations (Art. 10). For detailed comments on the status of land in the Declaration, see Errico (2011 and 2007).

[12] Supreme Court of Canada, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 194 (11 Dec. 1997) (emphasis in the original) (La Forest, J., writing also on behalf of L'Heureux-Dubé, J.).

[13] *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Cmty. and Others*, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC), para. 62 (14 Oct. 2003).

[14] African Court of Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Kenya (in the case of the Ogiek Community of the Mau Forest)*, Appl. No. 006/2012, Judgment of 26 May 2017, para. 201.

[15] *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*, Inter-Am. Ct. H.R. (ser. C) No. 124, paras. 132-133 (judgment of 15 June 2005).

[16] *Saramaka People. v. Suriname,* Judgment of 28 November 2007, § 86.

Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, adopted in 2012 by the Committee on World Food Security. These guidelines provide that States should "ensure that policy, legal and organizational frameworks for tenure governance recognize and respect, in accordance with national laws, legitimate tenure rights including legitimate customary tenure rights that are not currently protected by law" (guideline 5.3). The specifically note

> that there are publicly-owned land, fisheries and forests that are collectively used and managed (in some national contexts referred to as commons), States should, where applicable, recognize and protect such publicly-owned land, fisheries and forests and their related systems of collective use and management, including in processes of allocation by the State. (guideline 8.3).

Though the terminology of "voluntary guidelines" may seem quite modest, such endorsement is significant, considering both the role of the CFS in global governance and the process through which the guidelines were adopted. Initially established in 1974 following the first World Food Conference as an intergovernmental committee within the United Nations Food and Agriculture Organization (FAO), the CFS was reformed in 2009 in order to become "the foremost inclusive international and intergovernmental platform for a broad range of committed stakeholders to work together in a coordinated manner and in support of country-led processes towards the elimination of hunger and ensuring food security and nutrition for all human beings."[17] It has since then been operating as a highly visible intergovernmental forum, with a strong legitimacy due to the fact that it involves in its deliberations, in addition to the governments as full Members, civil society organisations, representatives of the private sector and of philanthropic organisations, and the most important international agencies whose mandates relate to food security. In other terms, the CFS expresses the consensus across the international community as to how global food security should be addressed, and the documents it adopts -- such as the 2012 Voluntary Guidelines on the Governance of Tenure (VGGT) -- are the result of complex intergovernmental negotiations, with a view to achieving a consensus across all the member States of the FAO.

Two years after the adoption by the CFS of the VGGT, another intergovernmental committee of the FAO, the Committee on Fisheries (COFI), adopted the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF guidelines). The guidelines are the outcome of a three-years long participatory process conducted between 2010 and 2013 involving more than 4,000 representatives of governments, small-scale fishers, fish workers and their organizations, researchers, development partners and other relevant stakeholders from more than 120 countries in 6 regional and more than 20 civil-society organization-led national consultative meetings. They provide that "States, in accordance with their legislation, should ensure that small-scale fishers, fish workers *and their communities* have secure, equitable, and socially and culturally appropriate tenure rights to fishery resources (marine and inland) and small-scale fishing areas and adjacent land, with a special attention paid to women with respect to tenure rights" (guideline 5.3). Like the VGGT, which were an important source of inspiration for the SSF guidelines, they encourage States to recognize forms of co-management of fisheries based on customary forms of tenure:

> Local norms and practices, as well as customary or otherwise preferential access to fishery resources and land by small-scale fishing communities including indigenous peoples and ethnic minorities, should be recognized, respected and protected in ways that are consistent with international human rights law. (guideline 5.4).

Indeed, very much for the same reasons why the generalization of individual property rights through titling schemes has been challenged as regards land tenure, the attribution of fishing rights based on the allocation of quotas -- in particular, with a view to avoiding overfishing -- has been questioned in the organization of the fishing sector. For many years, the dominant view was that a clarification and

[17] Committee on World Food Security, Reform of the Committee on World Food Security para. 4, U.N. Doc. CFS:2009/2Rev. 2 (Oct. 2009).

strengthening of access rights, including by the use of transferable fishing quotas, would increase economic efficiency and avoid overfishing (see, for instance, World Bank (2004); or Cunningham et al. (2009)). But another, opposite view has now emerged, according to which priority should go to poverty-reduction objectives and to improving access to fishing rights to the communities who need it most -- and who could be best placed to manage the common pool resources concerned and monitor catches at the local level. This alternative approach to the allocation of fishing rights emerged from the concern that individual transferable quotas systems may lead to rent capture by certain actors in a privileged position, an outcome which is difficult to reconcile with poverty-reduction objectives, and which the Human Rights Committee found to be a potential source of discrimination in violation of Article 26 of the International Covenant on Civil and Political Rights[18] -- a conclusion mirrored in the famous *Kenneth George* case presented to the South African courts.[19]

The shift to co-management of fisheries vesting collective rights with fishing communities is also based on the broadly positive assessment made of the establishment of fishing zones (whether lakes or coastal areas in seas) reserving fishing in these areas to local communities, allowing them to manage access rights (Sharma (2011)). Indeed, one of the contributions that influenced the adoption of the 2014 SSF guidelines (see Ratner et al. (2014)) was a report presented in 2012 the United Nations Special Rapporteur on the right to food which, explicitly addressing the negotiations that were then being launched on this new instrument, noted that 'top-down management strategies have been unsuccessful for the small-scale sector', and that 'the active and meaningful participation by communities in the management of fisheries as well as the integration in decision making of local or traditional knowledge on fish and marine habitats held by fishers is paramount' (Special Rapporteur on the right to food (2012), para. 58). The report cited a 2011 study which, comparing 130 co-management schemes (covering 44 developed and developing countries), demonstrated how local communities have often been able to develop legitimate institutions of self governance and established sustainable approaches to managing fishing intensity and ecosystems impacts, provided strong community leaders emerge and robust social capital exists to monitor compliance with individual or community quotas (Gutiérrez et al. (2011)). Other studies highlighted that co-management schemes could be successful provided certain conditions are present (Townsend (2008); Béné et al. (2009)), including in particular an enabling institutional enviroment at national level (Nielsen et al. (2010); Lewins et al. (2014)) and a tradition of cooperation within the community (Jamu et al. (2011)). Building on this literature, the report continued:

> Failures in co-management are partly explained by the fact that communities have been involved only in the implementation of policy, rather than in setting objectives of policy and ensuring that policy-making and evaluation are based on local knowledge on fish and marine ecosystems. The failure to integrate fishing communities in the design of policies affecting them, the top-down creation of community based organizations to carry out functions for the State, approaches that are excessively donor-driven or that are captured by elites, have disappointed expectations. The solution to these difficulties is not to abandon co-management: it is to build it in a more participatory way, based on the needs of the fishing communities. This in turn will only be successful if the livelihoods of fishers are also better secured, taking into account that the environment in which they operate, and the markets on which they depend, are increasingly risky. Only by linking fisheries management to the broader improvement of the economic and social rights of fishers, in a multisectoral approach that acknowledges how fishing fits into the broader

[18] The Human Rights Committee found that the system established by the Iceland Fisheries Management Act No. 38/1990, in which the quotas originally held "can be sold or leased at market prices instead of reverting to the State for allocation to new quota holders in accordance with fair and equitable criteria," could result in discrimination in violation of article 26 of the International Covenant on Civil and Political Rights (Human Rights Committee, *Haraldsson and Sveinsson v. Iceland*, Communication No. 1306/2004, dec. of 24 Oct. 2007, CCPR/C/91/D/1306/2004).

[19] See South Africa, High Court, *Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, Order 2007, ordering a revision of the Marine Living Resources Act and requiring the development of a new framework take into account "international and national legal obligations and policy directives to accommodate the socio-economic rights of [small-scale] fishers and to ensure equitable access to marine resources for those fishers." This resulted in the adoption of a new Small-Scale Fisheries Policy in May 2012, which recognizes the importance of small-scale fisheries in contributing to food security and as serving as a critical safety net against poverty.

> social and economic fabric, can progress be made towards solutions that are robust and sustainable. (Special Rapporteur on the right to food (2012), para. 59 (references omitted))

Finally and most recently, the revival of the commons in international human rights law can be seen in the proposal for a Declaration on the rights of peasants and other people working in rural areas, initially submitted by Bolivia within the Human Rights Council, and strongly inspired by the *Via Campesina*, the transnational network of small-scale food producers (for background of this attempt, see Claeys (2015) and Golay (2015)). At the time of writing, the proposal was under negotiation within an Intergovernmental Working Group of the Council. Article 5(1) of the draft Declaration (in the latest available version[20]) refers to the right of peasants and other people working in rural areas 'to have access to and to use the natural resources present in their communities that are required to enjoy adequate living conditions' and to their right 'to participate in the management of these resources and to enjoy the benefits of their development and conservation in their communities'. Under the heading 'Right to land and other natural resources', Article 17(1) provides that 'Peasants and other people living in rural areas have the right, *individually and collectively*, to the lands, water bodies, coastal seas, fisheries, pastures and forests that they need to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures' (emphasis added); and in wording clearly inspired by the 2012 VGGT, Article 17(3) adds:

> States shall provide legal recognition for land tenure rights, including customary land tenure rights, not currently protected by law. All forms of tenure, including tenancy, must provide all persons with a degree of tenure security that guarantees legal protection against forced evictions. States shall recognize and protect the natural commons and their related systems of collective use and management.[21]

Thus, a counter-movement is emerging within international human rights law, as a reaction to the push towards privatization and enclosures of which, literally since centuries, international law has been an instrument (see also Bakker (2007)). A number of challenges emerge, however, as the counter-movement develops.

V. The Challenges of the Counter-Movement

The first challenge, undoubtedly, is how to reconcile the autonomy of local communities in the collective management of resources with the risks of exclusion of certain members of the community. Customary forms of tenure which support common property regimes have been found in many cases to exclude certain marginalized members of the community, including in particular women. Thus, in line with the requirements of human rights law,[22] the VGGT provide (in guideline 9.2) that:

> Indigenous peoples and other communities with customary tenure systems that exercise self-governance of land, fisheries and forests should promote and provide equitable, secure and sustainable rights to those resources, with special attention to the provision of equitable access for women. Effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems. Where necessary, communities should be assisted to

[20] Draft declaration on the rights of peasants and other people working in rural areas presented by the Chair-Rapporteur of the Working Group, U.N. Doc. A/HRC/WG.15/4/2 (6 March 2017).

[21] Article 21(3) uses a similar formula with respect to access to water: 'States shall respect, protect and ensure access to water, including in customary and community-based water management systems ...'

[22] The Convention on the Elimination of All Forms of Discrimination against Women has a specific provision on women in rural areas. Article 14(1) provides that "States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas". Article 14(2) then sets out the implications, including a requirement that States Parties ensure to women in rural areas "to participate in all community activities" (f) and to "equal treatment in land and agrarian reform as well as in land resettlement schemes" (g). The CEDAW Committee also adopted a General Statement on Rural Women (Decision 50/VI, adopted on 19 October 2011 at the fiftieth session of the Committee (A/67/38, Annex II)).

increase the capacity of their members to participate fully in decision-making and governance of their tenure systems.

A clear choice was made, in the negotiation of the guidelines, to prioritize full compliance with international human rights law, including as regards the prohibition of discrimination against women, in situations of conflict with customary forms of tenure: 'Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems' (guideline 9.6). This was also the choice made in the preparation of the United Nations Declaration on the Rights of Indigenous Peoples, articles 21 and 22 of which call for special attention to the needs of indigenous women and the adoption of special measures to protect them against all forms of violence and discrimination. Indeed, this constitutional priority the VGGT recognize to human rights over customary rules is affirmed more broadly, for the benefit of all 'vulnerable and marginalized members' of the communities affected, whose 'full and effective participation' States should ensure 'when developing policies and laws related to tenure systems of indigenous peoples and other communities with customary tenure systems' (guideline 9.7).

Similarly, the draft Declaration on the rights of peasants and other people working in the rural areas affirms the primacy of human rights, dedicating a specific provision to the rights of women peasants (article 4), who are 'often denied tenure and ownership of land' (Preamble, para. 9) and who in particular shall 'have equal access to, use of and control over land and natural resources, independently of their civil and marital status and of particular tenure systems, and equal or priority treatment in land and agrarian reform and in land resettlement schemes' (article 4(2)(h); see also, as regards women's right to land, article 17(2)).

More generally, the recent recognition that international law should facilitate the recognition of common-property regimes based on customary forms of tenure -- and, thus, the governance of the "commons" by local communities -- raises the question of the 'constitutional framework' that should be established in order to strengthen the ability of these communities to manage resources, in order to ensure that the outcomes are beneficial to societies as a whole. Based on her case studies on the management of common-pool resources, Elinor Ostrom identified a set of "design principles" for long-enduring common-pool resources institutions (Ostrom (1990), pp. 88-102). Some of these principles (including clearly defined boundaries both of the community members and of the resource itself, and congruence or adequate 'fit' between the local conditions and the rules concerning the appropriation of the resource and the support given to its maintenance) can be said to be more or less independent from any recognition by the State. Other principles relate to the substance of the (primary, or operational) rules that govern the use of the resource (these conditions relate to the monitoring of the rules, to the adoption of a system of graduated sanctions, and to the accessibility of low-cost conflict-resolution mechanisms). Yet other principles may be said to relate to the 'secondary' rules relating to how the primary rules are adopted ('Most individuals affected by the operational rules can participate in modifying the operational rules'), and to the recognition by the official governmental authorities of 'rights to organize' ('The rights of appropriators to devise their own institutions are not challenged by external governmental authorities').

Thus, some form of intervention of the governmental authorities is not only inevitable, but to a large extent desirable. The framework enabling the emergence and endurance of common-pool resource management systems (with its institutional, regulatory and policy components) is not simply about allowing such systems to emerge or to exist. It is not just about not obstructing them. It can be conceived as an active form of intervention, required both in order to ensure that the management by the local community of the common-pool resource shall be perceived as legitimate and in order to ensure that the primary rules shall maximize the chances of the system that is established will last. For instance, the system could benefit from a requirement that decision-making procedures within the community are fully inclusive; that the operational rules take into account certain requirements linked to sustainable

use[23]; that monitoring of the rules by the community members and the system of sanctions comply with certain conditions related, for instance, to legal security and to proportionality, ensuring that the rules shall not be enforced in ways that shall be perceived as arbitrary, at the risk of creating divisions within the community (Nielsen et al. (2004)); or even, that the community members be recognized certain basic rights related to the guarantee of an adequate standard of living, since more secure, less vulnerable community members, are better equipped to take part in participatory management systems, and may feel greater freedom to experiment as a result of their improved material security (for an argument along these lines in the context of fisheries, see Allison et al. (2012)). The establishment of this 'constitutional framework' should not be seen as a violation of the principle of self-governance, by the community itself, of the common-pool resource; instead, it should be seen as an *enabling* framework -- as facilitating self-governance, and as increasing the resilience of the system.

Internationally recognized human rights could provide a source of inspiration for the establishment of such a 'constitutional framework' in support of the establishment and maintenance of common-property regimes. There is no tradeoff between the autonomy of the community that sets its own rules as regards the use of resources and the allocation of duties across the community members, and such a framework set by the governmental authorities. Provided the role of government is appropriately conceived -- to enable and to support, rather than to obstruct and to micro-manage --, the two can in fact be mutually supportive. Own-governance by the community shall ensure that the rules that shall be set shall be perceived as highly legitimate by the community members, since they shall have been involved in setting the rules[24], and shall be fully congruent with the local conditions and motivations. This allows the central governmental authorities to rely on such mechanisms for the effective management of the resource. Conversely however, the establishment by these authorities of an appropriate 'constitutional framework', in addition to ensuring that the common-property regime shall be perceived as legitimate[25], may ensure the appropriate functioning of the regime, in particular by ensuring that it shall be fully participatory (not excluding any part of the community), that the operational rules comply with certain requirements of non-discrimination and proportionality, and by protecting the resource from depletion.

Though the principle of a complementarity between the human rights-based constitutional framework on the one hand, and the self-governance by the community on the other hand, may be easy enough to accept, a number of further questions shall be more controversial. A first question is whether the framework should prohibit the selling off, by the community, in accordance with its internal decision-making rules, of the resource which its members are co-managing and sharing. In the case of the *Ogieks*, citing Article 26(2) of the UN Declaration on the Rights of Indigenous Peoples (which speaks of the right of indigenous peoples 'to own, use, develop and control the lands, territories and resources that they possess'), the African Court of Human and Peoples' Rights remarked that 'the rights that can be recognised for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land'.[26] In other terms, while

[23] For instance, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, provides that 'All tenure rights are limited by the rights of others
and by the measures taken by States necessary for public purposes' insofar as such measure aim to promote, for instance, 'general welfare including environmental protection' and are 'consistent with States' human rights obligations' (guideline 4.4). They continue: 'Tenure rights are also balanced by duties. All should respect the long-term protection and sustainable use of land, fisheries and forests'. For an illustration, though the VGGT are not referred to, see African Court of Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Kenya (in the case of the Ogiek Community of the Mau Forest)*, cited above, paras. 129-130 (noting that the Ogiek could not be expelled from the Mau Forest even in the name of the 'preservation of the natural ecosystem', since there has been no evidence provided 'to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in the area').

[24] Conversely, the top-down imposition of operational rules would result in a 'crowding-out' effect, undermining the legitimacy of the rules in the eyes of the community members (Cardenas, Stranlund and Willis (2000); Ostrom (2005)).

[25] It is noteworthy that, in countries as different as Norway and Japan, fisheries co-management systems that have been the most enduring were provided a legal foundation (Jentoft and Kristofferson (1998); Ruddle (1989)).

[26] African Court of Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Kenya (in the case of the Ogiek Community of the Mau Forest)*, cited above, para. 127.

recognizing the rights of the Ogieks to use and occupy the Mau Forest, the Court was agnostic (and perhas skeptic) as to whether they also should be allowed to cede it, for instance against a monetary compensation or promises of relocation, in the absence of a strong public purpose that might justify eviction. Indeed, it may be argued that the recognition of the right of local communities to set the rules concerning the definition appropriation / use rights and allocating responsibilities or duties to contribute should not extend to the right to liquidate the resource held in common, whether by tolerating an unsustainable use or whether by auctioning it to the highest bidder.

Another question concerns the role that should be recognized to the traditional authorities. Involving traditional authorities (such as customary chiefs, in indigenous communities) may strengthen the legitimacy of the common-property regime and thus favor its resilience. However, it has been found that the legitimacy of leaders elected by the members, and thus more directly accountable to them, could be as strong, and perhaps even stronger (Hara et al. (2002)). Moreover, recognizing traditional authorities a leading role shall perpetuate received hierarchies, and may lead to elite capture (see, for instance, Sandford (1983); Baland and Platteau (1999); Bardhan (2002)). Indeed, in situations where the traditional authorities are perceived to profit from their privileged position, and to act against the interest of the community, the trust on which the common management of resources relies may collapse entirely. It has been argued therefore that the traditional authorities 'should support, but not control the co-management enforcement activities' (Wilson et al. (2010), p. 660), and that a potential role for governmental authorities could be to 'ensure transparency of punishments' and that enforcement of the rules by the community leaders does not lead to personal gain.

VI. Conclusion

International law has its origins in the colonial project and in the attempt, by the founders of the discipline, to legitimize it. Its very project has been to 'civilize', which for the most part of its four-centuries long history meant: to look more like the 'advanced' Western nations. Not anymore. A counter-movement has emerged from the human rights regime, one of international law's most rebellious and untame departments. Whether the counter-movement shall be sufficient to resist the trend towards privatization and commodification, against the background of the increased competition towards the appropriation of natural resources, remains an open question. Provided however the challenges facing the counter-movement are well understood, and provided the task of enabling the commons to survive the assault they have been subjected to is taken seriously, international law could provide the space needed to write a new chapter of this script. The endless confrontation of the State and the market, of the public and the private, could soon end; a new character, the community, may emerge; and it shall then become clear that, to a large extent, the State and the market have been complicit in their attempt to keep it out of sight, condemning it to oblivion.

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