

ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY: SYMPOSIUM ON LAND-GRABBING

Grabbing land legally: A Marxist analysis

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Abstract

This article lays the groundwork for a Marxist theory of the international law of land-grabbing. It argues that any comprehensive politico-economic analysis of land-grabbing must also be a politico-economic analysis of the law of land-grabbing. It argues further that Marx's account of 'primitive accumulation' in *Capital* – an account it presents as an historical explanation of the transition to capitalism as well as a general theory of 'extra-economic' force deployed through state power, including, crucially, the power of law – is helpful for developing an analytical framework for understanding the legal facets of land-grabbing. Political economists, rural sociologists, and social and political theorists have argued for and against the applicability of Marx's theory of 'primitive accumulation' to the contemporary wave of global land grabbing. Intriguingly, though, no international lawyers have grappled with the question of whether a specifically Marxist approach to the phenomenon can or should be developed. This article does so, contending that contemporary land-grabbing is unintelligible absent a theory of capitalism, and that the processes whereby capitalism transforms land and labour are unintelligible absent a theory of the periodic waves of legally mediated 'primitive accumulation' that propel it forward. The article pays particular attention to the work produced by Olivier De Schutter during his tenure as United Nations Special Rapporteur on the Right to Food.

Keywords: capitalism; international law; land-grabbing; Marxism; primitive accumulation

1. Introduction

'Land-grabbing', it seems, remains all the rage. Typically understood today as the acquisition or lease of large tracts of land in developing countries by wealthy states and corporate investors, usually for engaging in agribusiness and securing reliable sources of food and biofuel, 'land-grabbing' has established itself as a staple in the lexicon of countless advocacy networks, social movements, and international organizations, turning into something of a slogan for those troubled by a variety of distinct but structurally related modes of dispossession and displacement. The interest is justified. In late 2008, amidst the spike in food and oil prices that accompanied the onset of the 'Great Recession', GRAIN – a Barcelona-based non-profit dedicated to studying issues of biodiversity and access to food – published a report detailing the rapid growth of land-grabbing as a means of outsourcing production and finding a home for profitable investment.¹ In a 2016 follow-up, it pointed to recent numbers to demonstrate that the global land-grab continued, though the pace

*Assistant Professor of Law and Legal Studies, Carleton University. I thank Nate Holdren, Eva Nanopoulos, Paul O'Connell, Surabhi Ranganathan, Akbar Rasulov, William Clare Roberts, Ntina Tzouvala, and two anonymous reviewers for detailed comments. I also thank participants in the 'International Law and Technologies of Land Grabbing' workshop, held at King's College, University of Cambridge on 18 July 2017, for observations. The usual caveats apply.

¹GRAIN, 'Seized: The 2008 Landgrab for Food and Financial Security', 24 October 2008, available at www.grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security.

had slowed and some of the most egregious deals had been shelved or modified due to public pressure: 491 large-scale land-grabs had been initiated by foreign investors over the preceding decade, over 30 million hectares (in no less than 78 countries) had been acquired as part of completed land deals, and nearly 13 million hectares had been primed for acquisition in deals that were ultimately discarded.² GRAIN's researchers acknowledged that many civil society and non-governmental organizations had begun to mobilize against land-grabs, but they felt compelled to draw a harsh conclusion: '[W]hile some deals have fallen by the wayside, the global farmland grab is far from over. Rather, it is in many ways deepening, expanding to new frontiers and intensifying conflict around the world.'³

A range of concerns have been voiced over the years about the large-scale purchase or leasing of land. Some have pointed to the fact that agricultural practices prioritizing industrial cultivation of single crops threaten to undermine biodiversity and disrupt existing food systems. Others have argued that land-grabbing erodes state sovereignty in the name of outsourced food production or speculative investment in land and water, attenuating the capacity of under-resourced governments to formulate and implement broad-based redistributive policies. Still others have accused 'land grabbers' of engaging in a kind of neocolonialism, one that further reduces the heterogeneity of land held and used in common by direct producers in the 'global South' to the homogeneity of a commercial monoculture reinforced by the social property relations of export-oriented capitalism. Large-scale land-appropriation is not, of course, new. Nor is it confined to the 'global South', having also occurred in Australia, New Zealand, Romania, Russia, Slovakia, Spain, Ukraine, and elsewhere.⁴ Nor, for that matter, are those responsible for contemporary land-grabbing confined to the 'global North', however precisely we may define that expression. Relevant actors include China, Egypt, India, Saudi Arabia, and other Gulf states, not to mention the private investors with which they are associated. Less often noticed but no less important, those living and working on the land in question – the 'local communities' of standard policy and activist jargon – have frequently felt compelled to participate in and seek benefit from resulting 'investment opportunities' rather than attempting to mount a frontal challenge.⁵ Nevertheless, the processes of large-scale land-appropriation engendered by the current wave of land-grabbing, with all that this entails for 'land reform' and 'labour management', have been far-reaching. In mid-2009, the *Economist* was led to suggest that we had entered a 'third wave' of outsourcing, after those of manufacturing during the 1980s and information technology during the 1990s.⁶ The claim may have been somewhat exaggerated but it is certainly not without basis.

A number of calls have been made in recent years to rethink relations between different forms of socio-economic expulsion and expropriation. One particularly influential example is Saskia Sassen's *Expulsions*, which attempts to analyze forced migration, especially the kind that stems

²GRAIN, 'The Global Farmland Grab in 2016: How Big? How Bad?', 14 June 2016, available at www.grain.org/article/entries/5492-the-global-farmland-grab-in-2016-how-big-how-bad. The statistical information is provided in full in two annexes to this report, both of which are available online. For larger (and regularly updated) estimates see Land Matrix, available at www.landmatrix.org/en/. Needless to say, all such estimates should be treated with great caution, as reliable numbers are difficult to ascertain. For the problems that beset data collection in this context see C. Oya, 'Methodological Reflections on "Land Grab" Databases and the "Land Grab" Literature "Rush"', (2013) 40 *Journal of Peasant Studies* 503; L. Cotula, *Land Deals in Africa: What Is in the Contracts?* (2011), 12–15; L. Cotula, "'Land Grabbing' and International Investment Law: Toward a Global Reconfiguration of Property?', in A.K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy 2014–2015* (2016), 177, at 181–2.

³GRAIN, *supra* note 2, at 2.

⁴For a survey of some of the European cases see European Coordination Via Campesina and Hands Off the Land Alliance, 'Land Concentration, Land Grabbing and People's Struggles in Europe', 24 June 2013, available at www.tni.org/en/publication/land-concentration-land-grabbing-and-peoples-struggles-in-europe-0. See further GRAIN, *supra* note 2, at annex 1.

⁵For a useful attempt to parse some of the available data see S.M. Borras Jr. and J.C. Franco, 'Global Land Grabbing and Political Reactions "From Below"', (2013) 34 *Third World Quarterly* 1723.

⁶'Buying Farmland Abroad: Outsourcing's Third Wave', *The Economist*, 21 May 2009.

from land-grabs, in tandem with the socio-economic inequality spawned by the neoliberal financial capitalism of the past half century.⁷ Interestingly, though, the legal dimensions of land-grabbing remain under-theorized. When the phenomenon is broached explicitly by legal scholars, it is often absorbed into broader discussions of ‘food security’ and ‘food sovereignty’. Less common are efforts to examine the specific modalities of power and authority informing the contracts, concessions, and other instruments that underwrite the seizure and systematic exploitation of large tracts of land. Indeed, with the notable exception of the body of work that Olivier De Schutter produced during his tenure as United Nations Special Rapporteur on the Right to Food,⁸ land grabbing has attracted comparatively limited attention from international legal scholars, though a small and growing cohort of researchers have begun to analyze the way in which international law sanctions, formalizes, and legitimates this new drive to acquire, utilize, and transform land (while also providing certain avenues for countering it).⁹

This article considers land-grabbing from the standpoint of international law. Rather than presenting land-grabbing as a strictly politico-economic phenomenon – so that law, to the extent that it is brought into the picture at all, is confined to a weak, if vaguely ‘progressive’, role – I foreground the constitutive power of legal instruments, focusing upon the way in which they have fostered a new mode of land-appropriation. I argue that any politico-economic analysis of land grabbing must, of necessity, also be a politico-economic analysis of the law of land-grabbing. I argue further that Marx’s account of ‘primitive accumulation’ in *Capital* – an account I present as both an historical examination of the transition to capitalism and a general theory of ‘extra-economic’ force deployed through state power, including, crucially, the power of law – is helpful for developing an analytical framework for understanding the legal facets of land-grabbing. Political economists, rural sociologists, and social and political theorists have for some time argued for and against the applicability of Marx’s theory of ‘primitive accumulation’ to the contemporary wave of global land-grabbing. However, no international lawyers have grappled with the question of whether a specifically Marxist approach to the phenomenon can or should be developed. I do so here, arguing that contemporary land-grabbing is unintelligible absent a theory of capitalism, and that the processes whereby capitalism transforms land and labour are unintelligible absent a theory of the periodic waves of legally mediated ‘primitive accumulation’ that propel it forward. I demonstrate that international law plays a facilitative role in regard to land-grabbing, and that this role finds powerful, if counter-intuitive, expression in De Schutter’s work during his tenure as special rapporteur. Though critical of many facets of land-grabbing, De Schutter’s influential interventions in the debate about land-grabbing revealed more about international law’s role in facilitating the phenomenon (and the usefulness of certain legal concepts and arguments for softening its edges or papering over its violence) than it did about international law’s opposition to it.

⁷S. Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (2014).

⁸For sustained scholarly statements of his thinking see especially O. De Schutter, ‘The Green Rush: The Global Race for Farmland and the Rights of Land Users’, (2011) 52 *HILJ* 503; 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.

⁹See especially Cotula, ‘“Land Grabbing” and International Investment Law’, in Bjorklund (ed.), *supra* note 2; L. Cotula, *The Great African Land Grab? Agricultural Investments and the Global Food System* (2013), Ch. 4; C. Golay and I. Biglino, ‘Human Rights Responses to Land Grabbing: A Right to Food Perspective’, (2013) 34 *Third World Quarterly* 1630; R. Künneemann and S.M. Suárez, ‘International Human Rights and Governing Land Grabbing: A View from Global Civil Society’, in M.E. Margulis, N. McKeon and S.M. Borras Jr. (eds.), *Land Grabbing and Global Governance* (2014), 123; C. Carter and A. Harding (eds.), *Land Grabs in Asia: What Role for the Law?* (2015); F.R. Jacur, A. Bonfanti and F. Seatzu (eds.), *Natural Resources Grabbing: An International Law Perspective* (2016); N.C.S. Lambek and C. Debuquois, ‘The Right to Food Beyond Borders: The Extraterritorial Reach of the Right to Food in Africa’, in L. Chenwi and T.S. Bulto (eds.), *Extraterritorial Human Rights Obligations from an African Perspective* (2018), 133; H. Zeffert, ‘The Lake Home: International Law and the Global Land Grab’, (2018) 8 *Asian Journal of International Law* 432; J.L. Vivero-Pol et al. (eds.), *Routledge Handbook of Food as a Commons* (forthcoming). See also J. von Bernstorff, ‘The Global “Land-Grab”, Sovereignty and Human Rights’, (2013) 2 *ESIL Reflections* 1, available at www.esil-sedi.eu/node/426.

2. Marx's 'primitive accumulation'

Mark Neocleous, the political theorist of state and security power, once observed that the recent outpouring of critical international law scholarship, while highly impressive in scope and ambition, has been marked by a certain peculiarity – the near-total absence of Marxism, in any genuinely recognizable sense. As Neocleous observed, despite the growth of interest in the history and theory of international law over the past two decades, only a comparatively small group of legal scholars have sought to examine international law's complicity with imperialism, colonialism, and neocolonialism from a Marxist perspective.¹⁰ Fewer still, he noted, have attempted to develop a theory of international law's historical and conceptual development on the basis of the account of 'primitive accumulation' provided in the final chapters of the first volume of Marx's *Capital* – or even, for that matter, of the various reconstructions that it has inspired in recent years, the most widely known being David Harvey's 'accumulation by dispossession'.¹¹ This lacuna, Neocleous argues, is not simply unfortunate. It points, rather, to a systemic blindness, a broader unwillingness to admit that 'the ways in which the international order and its legal regime were violently constituted through the 16th and 17th centuries can be understood as part and parcel of the process Marx calls "primitive accumulation"'.¹²

Neocleous is justified in pointing to the absence of engagement with 'primitive accumulation' and related Marxist models of dispossession in international legal scholarship. In order to see why this is the case, and what precisely such engagement might illuminate about contemporary land grabbing, it is necessary to revisit Marx's original exposition. Marx developed his theory of 'primitive accumulation' – or, more accurately, 'so-called primitive accumulation', this being an allusion to Adam Smith – in an effort to explain the violence enacted by capitalism.¹³ In chapters 26 through 33 of the first volume of *Capital*, the *locus classicus* of his discussion of 'primitive accumulation', Marx is concerned centrally with the way in which capitalism – a specific mode of production driven by the competitive exploitation of human labour-power for the creation, appropriation, and accumulation of surplus value – presupposes exclusion and expropriation through 'extra-economic' means. How, he asks himself, does the process of accumulating capital – the subject of the immediately preceding chapters – get off the ground? What is its root, its first cause – the force that is generative of the process that sustains, reproduces, and amplifies the capital-relation, the worker's separation from ownership of the means of production? Marx's answer is 'primitive accumulation', an expression he derives from Smith's 'previously necessary' form of 'accumulation of stock' and invests with newfound significance (and which, it should be noted, is rendered more accurately as 'original accumulation', the German original being *ursprüngliche*

¹⁰Note, though, that the literature is growing rapidly. Especially notable contributions include C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005) and B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2017). See also S. Marks, 'Exploitation as an International Legal Concept', in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008), 281; A. Rasulov, "'The Nameless Rapture of the Struggle": Towards a Marxist Class-Theoretic Approach to International Law', (2008) 19 *Finnish Yearbook of International Law* 243; R. Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism', (2016) 4 *London Review of International Law* 81; G. Baars, "'It's not me, it's the corporation": The Value of Corporate Accountability in the Global Political Economy', (2016) 4 *London Review of International Law* 127; P. O'Connell, 'On the Human Rights Question', (2018) 40 *Human Rights Quarterly* 962; U. Özsu, 'Neoliberalism and Human Rights: The Brandt Commission and the Struggle to Make a New World', (2018) 81 *Law and Contemporary Problems* 139.

¹¹See D. Harvey, *The New Imperialism* (2003), Ch. 4; D. Harvey, 'The "New" Imperialism: Accumulation by Dispossession', (2004) 40 *Socialist Register* 63; D. Harvey, *A Brief History of Neoliberalism* (2005), Chs. 6–7; D. Harvey, *The Enigma of Capital* (2010), Chs. 2, 8.

¹²M. Neocleous, 'International Law as Primitive Accumulation; Or, the Secret of Systematic Colonization', (2012) 23 *EJIL* 941, at 957. For an application of this argument to early modern conceptions of the laws of war see further M. Neocleous, 'War on Waste: Law, Original Accumulation and the Violence of Capital', (2011) 75 *Science and Society* 506.

¹³Part 8 of the first volume of *Capital* bears the title 'So-Called Primitive Accumulation': K. Marx, *Capital: A Critique of Political Economy*, vol. I (1990), 871.

Akkumulation).¹⁴ The capital-relation, and the process of capital accumulation generally, is ultimately grounded in the ‘previous’ forced conversion of independent peasant proprietors, living directly on and off the land, into wage-labourers, henceforth ‘free’ – that is, forced – to sell their labour-power on the market. This conversion – what Marx refers to as ‘[t]he process of forcible expropriation of the people’¹⁵ – is realized not through the internal dynamics and mechanisms of capitalist exchange relations, for these dynamics and mechanisms are precisely those which ‘primitive accumulation’ makes possible. Instead, it is realized through the direct application of the coercive power of the state, including, again, the coercive power of the law. This, for Marx, is what distinguishes the ‘economic’ force of routine capital accumulation – marked by a ‘silent compulsion’ expressed in patterns of ‘education, tradition and habit’ for which the demands of such accumulation are ‘self-evident natural laws’ – from the ‘extra-economic’ force of ‘primitive accumulation’.¹⁶ Violence may be omnipresent in capitalism but it is most crass and visible, Marx insists, at its point of origin, written as these are ‘in the annals of mankind in letters of blood and fire’.¹⁷

Marx unfolds this account of ‘primitive accumulation’ ambitiously. He argues that the transition from a pre-capitalist mode of production premised upon small-scale farming and artisanship under conditions of parcelized sovereignty to a capitalist mode of production driven by the constant creation of (‘absolute’ and ‘relative’) surplus value required the availability of a significant amount of ‘original’ capital. This ‘original’ capital did not emerge through some sort of idealistic Lockean application of human labour to the soil. Rather, Marx maintains, it was generated through the eviction of free, predominantly self-supporting peasants as part of the violent birth of an entirely new mode of production. Large numbers of peasants were forced off the land on which they sustained themselves, channelled toward nascent centres of industry prepared for their exploitation, transformed into a surplus population of ‘free and rightless proletarians’, and often ‘turned in massive quantities into beggars, robbers and vagabonds’ in the process.¹⁸ According to Marx, this process, which culminates in the famous ‘clearing of estates’,¹⁹ also had the effect of bolstering the growth of a domestic home market while furthering the liberation of industrial capitalists from the prerogatives of corporate guilds (in the towns) and feudal territorial arrangements (in the countryside).²⁰ Hence the importance of the concept of ‘primitive accumulation’, which captures the specificity of this expulsion and expropriation, marking it off from the specifically ‘economic’ coercion with which established processes of capital accumulation are shot through. Social relations in an environment in which the capitalist mode of production has established itself are structured by a set of market constraints that find expression in the ideology of ‘free labour’, ‘contractual freedom’, and ‘individual liberty’. By contrast, social relations in an environment that is only just beginning to undergo integration into the capitalist mode of production are characterized by a significant measure of what Marx terms ‘extra-economic’ coercion – the use of direct, unconcealed violence to compel dispossession and subjugate labour-power.

Marx trains his lens on England and Scotland, maintaining that the process of enclosing and privatizing the commons that took hold during the fifteenth and sixteenth centuries was central to the development of capitalism. One of his most striking examples concerns the way in which successive waves of enclosure throughout the Scottish Highlands by the chiefs or ‘great men’ left many peasants with no choice but to seek employment in Glasgow and other cities, which

¹⁴A. Smith, *The Wealth of Nations, Books I-III* (1997), 372. Marx makes express reference to Smith’s ‘previous accumulation’; see Marx, *supra* note 13, at 873.

¹⁵*Ibid.*, at 881.

¹⁶*Ibid.*, at 899.

¹⁷*Ibid.*, at 875.

¹⁸*Ibid.*, at 896. Marx employs the expression ‘free and rightless [*vogelfrei*]’ several times; see also *ibid.*, at 885, 905. He also employs the expression “‘free” and unattached”; see *ibid.*, at 878.

¹⁹*Ibid.*, at 889.

²⁰*Ibid.*, at 910–13, 915.

consequently grew in manufacturing power and also in legal and economic autonomy.²¹ However, he also recognizes that ‘primitive accumulation’ has unfolded through different means in different contexts, including, of course, territories that have been administered under formal or informal colonialism.²² Indeed, chapters 31 through 33 of the first volume of *Capital* are devoted to colonial capitalism, particular attention being paid to the slave trade, the history of chartered companies, the role of public debt and credit systems in inter-imperial competition, and the theory of ‘systematic colonization’ proposed by British imperialist Edward Gibbon Wakefield (and partly implemented through legislative action in South Australia and elsewhere during the early nineteenth century).²³ Crucially, Marx views the colonial context not as a supplement to his analysis of Britain but as its logically necessary completion. It is in late seventeenth-century England, he claims, that the coercive powers of the state were brought to bear most fully in the service of ‘primitive accumulation’ in the extra-European world, thereby accelerating ‘the process of transformation of the feudal mode of production into the capitalist mode’.²⁴ And ‘[i]t is the great merit of E. G. Wakefield to have discovered’, he writes, ‘not something new *about* the colonies, but, *in* the colonies, the truth about capitalist relations in the mother country’ – namely that a functional capitalist system presupposes the formation of a sizeable class of wage-labourers divorced from the means of production.²⁵

Unsurprisingly, this account of ‘primitive accumulation’ has engendered a variety of interpretations. The debate concerning its analytical merits and historical plausibility ranges widely, and has been a mainstay of Marxist theory for nearly a century and a half. Here I wish to focus upon two points. First, many debates about Marx’s theory of ‘primitive accumulation’ have circled around the question of whether it is intended as an historical account of a phase that reached its completion at a particular point in the past, an analytical framework designed to explain the complex and ongoing process whereby capitalist social relations gradually absorb pre- or non-capitalist social relations, some combination of the two, or something else entirely.²⁶ Marx repeatedly locates ‘primitive accumulation’ in the past. He frames ‘primitive accumulation’ partly as an answer to the question ‘where did the capitalists originally spring from?’²⁷ Characterizing it as capital’s ‘historical genesis’, and also as the ‘pre-history of capital’, he argues that it ‘plays approximately the same role in political economy as original sin does in theology’,

²¹*Ibid.*, at 890–3.

²²The history of this expropriation assumes different aspects in different countries, and runs through its various phases in different orders of succession, and at different historical epochs.’ *Ibid.*, at 876. See also *ibid.*, at 915: ‘The different moments of primitive accumulation can be assigned in particular to Spain, Portugal, Holland, France and England, in more or less chronological order. These different moments are systematically combined together at the end of the seventeenth century in England; the combination embraces the colonies, the national debt, the modern tax system, and the system of protection.’

²³In order to catalyze capitalist production in the colonies, Wakefield suggested setting a high price for land, so that each settler would need to work for a long period of time in return for a wage before earning enough money to purchase the land outright and retire to a life of independent production. The fund generated through the sale of such land would then be used to import new settlers from the metropolis, which in turn would replenish the wage labour market. *Ibid.*, at Ch. 33. For recent reconstruction and analysis see O.U. Ince, *Colonial Capitalism and the Dilemmas of Liberalism* (2018), Ch. 4.

²⁴Marx, *supra* note 13, at 915–16.

²⁵*Ibid.*, at 932 (original emphases).

²⁶See especially M. Perelman, *The Invention of Capitalism: Classical Political Economy and the Secret History of Primitive Accumulation* (2000), Ch. 2; S. Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation* (2004), 12–13; M. De Angelis, ‘Separating the Doing and the Deed: Capital and the Continuous Character of Enclosures’, (2004) 12 *Historical Materialism* 57, at 59–61, 68–71; J. Glassman, ‘Primitive Accumulation, Accumulation by Dispossession, Accumulation by “Extra-Economic” Means’, (2006) 30 *Progress in Human Geography* 608, at 611–12, 622; W. Bonefeld, ‘Primitive Accumulation and Capitalist Accumulation: Notes on Social Constitution and Expropriation’, (2011) 75 *Science and Society* 379, at 380–1; O.U. Ince, ‘Primitive Accumulation, New Enclosures, and Global Land Grabs: A Theoretical Intervention’, (2014) 79 *Rural Sociology* 104, at 107ff; R. Nichols, ‘Disaggregating Primitive Accumulation’, (2015) 194 *Radical Philosophy* 18, at 18–21.

²⁷Marx, *supra* note 13, at 905.

presenting it as ‘the historical process of divorcing the producer from the means of production’.²⁸ And while he relates his analysis to ‘[t]he discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the indigenous population of that continent, the beginnings of the conquest and plunder of India, and the conversion of Africa into a preserve for the commercial hunting of blackskins’, all ‘things which characterize the dawn of the era of capitalist production’ and the ‘chief moments of primitive accumulation’,²⁹ he claims – infamously – that ‘[i]n Western Europe, the homeland of political economy, the process of primitive accumulation has more or less been accomplished’.³⁰ This has encouraged the view that early modern British experience with enclosures, which Marx expressly positions as the ‘classic form’ of ‘primitive accumulation’,³¹ should also be understood as archetypal in the sense of providing a standard with which all other experiences must be compared, regardless of their obvious and often enormous contextual differences.³² Critics have objected to this as a form of Eurocentrism.³³

Importantly, though, Marx is also given to employing ‘primitive accumulation’ in an analytical rather than historical sense. On this account, the key to ‘primitive accumulation’ is the worker’s separation from the means of production. And since ‘[t]he expropriation of the agricultural producer, of the peasant, from the soil is the basis of the whole process’,³⁴ it is conceivable that there is in principle no temporal limit to this process, at least not an easily identifiable one. The most influential variant of this interpretation anchors itself in the work of Rosa Luxemburg, who understood ‘primitive accumulation’ as a theory not simply of the origins of capitalism, but also of the permanent and continuous unfolding of its assimilationist dynamic. On this rendering, ‘primitive accumulation’ is constitutive of capitalism through and through, not merely an explanatory tool useful for decoding its initial emergence. If the colonial context is significant for Marx, it is central for Luxemburg: it is in capitalism’s continued expansion into and transformation of the non-capitalist world that the ongoing need for ‘extra-economic’ violence is made manifest most forcefully. This is because capitalism always requires a constitutive ‘outside’, a region whose labour it may incorporate and whose social relations it may marketize, and this process cannot help but rely upon organized, ‘extra-economic’ violence.³⁵ Marx himself made a point of undertaking extensive research into land tenure and communal property practices in Russia and among a variety of extra-European peoples after the publication of the first volume of *Capital* in 1867. One result

²⁸*Ibid.*, at 873, 875, 927, 928.

²⁹*Ibid.*, at 915.

³⁰*Ibid.*, at 931.

³¹*Ibid.*, at 876.

³²Additional support for this interpretation comes from the *Grundrisse*, where Marx claims that ‘[t]he condition that the capitalist, in order to posit himself as capital, must bring values into circulation which he created with his own labour – or by some other means, excepting only already available, previous wage labour – belongs among the antediluvian conditions of capital, belongs to its *historic presuppositions*, which, precisely as such *historic presuppositions*, are past and gone, and hence belong to the *history of its formation*, but in no way to its *contemporary history*, i.e., not to the real system of the mode of production ruled by it’. K. Marx, *Grundrisse: Foundations of the Critique of Political Economy* (1993), 459 (original emphases).

³³Consider, as illustrative, A. Chakrabarti and A. Dhar, *Dislocation and Resettlement in Development: From Third World to the World of the Third* (2010), 151: ‘Put bluntly, the theory of primitive accumulation remains starkly underdeveloped and Eurocentric. Notwithstanding the desperate attempts to resituate it in a non-teleological domain, primitive accumulation remains turned to the perspective of capital and the West; in that sense, the theorization of primitive accumulation remains orientalist.’

³⁴Marx, *supra* note 13, at 876.

³⁵During original accumulation, i.e., during the historical emergence of capitalism in Europe at the end of the Middle Ages, the dispossession of the peasants in the U.K. and on the continent represented the most tremendous means for transforming the means of production and labor-power into capital on a massive scale. Since then, however, and to the present day, this same task has been accomplished under the rule of capital through an equally tremendous, although completely different, means: modern colonial policy . . . From the standpoint of capitalism . . . the violent appropriation of the colonial countries’ most important means of production is a question of life or death for it.’ R. Luxemburg, ‘The Accumulation of Capital: A Contribution to the Economic Theory of Imperialism’, in P. Hudis and P. Le Blanc (eds.), *The Complete Works of Rosa Luxemburg*, vol. II: *Economic Writings 2* (2015), 1, at 266–7.

of these further investigations was a desire to avoid a teleological interpretation of ‘primitive accumulation’, as expressed in an 1877 letter in which he cautioned that the relevant chapters of *Capital*, containing a ‘historical sketch of the genesis of capitalism in Western Europe’, should not be read as an attempt to provide an ‘historico-philosophical theory of general development, imposed by fate on all peoples, whatever the historical circumstances in which they are placed’, as though he were in possession of an ‘all-purpose formula’ for the transition to capitalism.³⁶ Indeed, Marx observed a few years later, the implication of ‘historical inevitability’ (he himself put the expression in scare quotes) in his claim in *Capital* that ‘primitive accumulation’ converted the worker’s ‘private property’ in land into ‘capitalist private property’ was ‘*expressly* limited to the *countries of Western Europe*’; it was by no means applicable directly to Russia or elsewhere, where pathways of socio-economic development could well differ significantly.³⁷

While the tension between these two interpretations of ‘primitive accumulation’ is undeniable, the extent to which both find real and sustained expression in Marx’s text is often overlooked. For Marx ‘primitive accumulation’ is intended both historically and analytically, as a means of explaining how capitalism comes to arise, entering the world ‘dripping from head to toe, from every pore, with blood and dirt’, as well as a means of explaining its ongoing capacity to institute, consolidate, and augment the separation of the labouring classes from the conditions of their labour.³⁸ Expansive models of ‘primitive accumulation’ are not necessarily without problems of their own. Harvey is an especially illuminating case here, having applied the notion to a range of disparate phenomena, including but not limited to gentrification and ‘urban renewal’ projects, the corporatization of universities, the privatization of basic resources like water, the patenting and commercial licensing of seeds and genes, and financial crises orchestrated or managed with a view to devaluing existing capital assets and thereby facilitating their predatory appropriation at fire sale prices.³⁹ Understandably, this has given rise to charges of conceptual inflation and imprecision.⁴⁰ Nevertheless, it is my contention that ‘primitive accumulation’ is particularly suitable for understanding the legal implications of land-grabbing. Highlighting the violence immanent not only in the emergence of the capitalist mode of production but in its subsequent spatial expansion, quantitative amplification, and modular transformation, the concept of ‘primitive accumulation’ invites us to analyze land-grabbing as an especially powerful manifestation of contemporary capitalism’s ongoing drive to divorce direct producers from their means of subsistence and consolidate land’s status as a fully fungible commodity, to be sold, purchased, and exploited

³⁶K. Marx to *Otechestvenniye Zapiski* [November 1877], in *Collected Works of Karl Marx and Frederick Engels*, vol. XXIV (1989), 196, at 200–1. For recent discussion see Perelman, *supra* note 26, at 26–7; Nichols, *supra* note 26, at 20; G.S. Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (2014), 186.

³⁷K. Marx to V. Zasulich [8 March 1881], in *Collected Works of Karl Marx and Frederick Engels*, vol. XXIV (1989), 370, at 370–1 (original emphases); Marx, *supra* note 13, at 928. See further T. Shanin (ed.), *Late Marx and the Russian Road: Marx and ‘the Peripheries of Capitalism’* (1983); K.B. Anderson, *Marx at the Margins: On Nationalism, Ethnicity, and Non-Western Societies* (2010), 224–36, 243. It is partly on the basis of passages of this kind that many Marxists explicitly repudiate the idea of a universal model for transitions to capitalism, as well as the related notion of a stark distinction between capitalist and pre-capitalist modes of production. For a nuanced argument to the effect that ‘the accumulation of capital, that is, *capitalist* relations of production, can be based on forms of exploitation that are typically *precapitalist*’, and that there is therefore ‘not one ostensibly unique configuration of capital but a series of *distinct configurations*’, see J. Banaji, *Theory as History: Essays on Modes of Production and Exploitation* (2010), Chs. 1–2 (quotations at 9, original emphases).

³⁸Marx, *supra* note 13, at 925–6.

³⁹See especially Harvey, *New Imperialism*, *supra* note 11, at 145–52; Harvey, ‘The “New” Imperialism’, *supra* note 11, at 75–6. To be fair, Marx himself is at times quite expansive; see, e.g., Marx, *supra* note 13, at 895 (‘The spoliation of the Church’s property, the fraudulent alienation of the state domains, the theft of the common lands, the usurpation of feudal and clan property and its transformation into modern private property under circumstances of ruthless terrorism, all these things were just so many idyllic methods of primitive accumulation’).

⁴⁰See Ince, *supra* note 26, at 106; Nichols, *supra* note 26, at 20; R. Das, ‘David Harvey’s Theory of Accumulation by Dispossession: A Marxist Critique’, (2017) 8 *World Review of Political Economy* 590.

according to technocratic concerns of ‘food security’.⁴¹ There is no need to privilege the British case so as to ‘derive’ from it all subsequent forms of dispossession and proletarianization through ‘extra-economic’ land-appropriation. Nor is there any requirement that one subscribe to or accept in full Marx’s account of the relevant history, whether in Britain or in the colonies.⁴² What remains valuable in ‘primitive accumulation’ is the recognition that the routine operation of the capitalist mode of production, a system of generating and accumulating surplus value through largely ‘economic’ forms of exploitation, is structurally dependent upon periodic waves of expropriation and displacement that are made possible by strong infusions of legally formalized violence and that forcibly alienate producers from the means of production.⁴³ There is much in Marx that supports this view, among others his statement in the *Grundrisse* that once the ‘original’ separation between producer and means of production ‘is given, the production process can only produce it anew, reproduce it, and reproduce it on an expanded scale’, his suggestion in the third volume of *Capital* that ‘primitive accumulation’ is capitalist accumulation ‘raised to a higher power’, and his claim in the same volume that the logic of separation that lies at the heart of the capital-relation ‘arises with primitive accumulation . . . subsequently appearing as a constant process in the accumulation and concentration of capital, before it is finally expressed here in the centralization of capitals already existing in few hands’.⁴⁴ The transformation in social relations effected by ‘primitive accumulation’ is characterized not by the incremental aggregation or enlargement of wealth but by the producer’s alienation from the means of production, a rift that transforms her into a wage-labourer subordinated to the dynamics of competition and surplus-reinvestment.⁴⁵

This leads to a second point. Marx argues forcefully that ‘primitive accumulation’ was enabled by legal no less than extra-legal means. In Britain, argues Marx, the *en masse* displacement of free peasants that followed the usurpation of arable land held in common and its conversion into pasture land subject to private ownership throughout the course of the fifteenth, sixteenth, and seventeenth centuries expressed itself in episodic, largely unco-ordinated acts of expropriation. These were ‘individual acts of violence’, writes Marx, and they were also acts ‘against which legislation, for a hundred and fifty years, fought in vain’.⁴⁶ Time and again laws were promulgated to forestall or at least minimize the destruction of peasant establishments and the concomitant conversion of (relatively unprofitable) arable to (relatively profitable) pasture land. However, by the eighteenth century, the law itself had become ‘the instrument by which the people’s land is stolen’ – the

⁴¹For the argument that contemporary ‘food insecurity’ is best understood as a by-product of imperialism, a central feature of which is income deflation, deindustrialization, and the creation of large reserve armies of labour in the predominantly ‘tropical’ and ‘subtropical’ periphery with a view to ensuring the supply of raw materials and foodstuffs to advanced capitalist countries, see U. Patnaik and P. Patnaik, *A Theory of Imperialism* (2017), 33–9, 45–6, 50–1, 142–5, 175–8, 184–94. For empirical analysis of India and elsewhere, see *ibid.*, Ch. 7.

⁴²Among early and influential criticisms see especially J.D. Chambers, ‘Enclosure and Labour Supply in the Industrial Revolution’, (1953) 5 *Economic History Review* 319; J.D. Chambers and G.E. Mingay, *The Agricultural Revolution, 1750–1880* (1966); K. Collins, ‘Marx on the English Agricultural Revolution: Theory and Evidence’, (1967) 6 *History and Theory* 351. For a subtle empirical response see J. Saville, ‘Primitive Accumulation and Early Industrialization in Britain’, (1969) 6 *Socialist Register* 247. For an intriguing methodological reaction see H. Magdoff, ‘Primitive Accumulation and Imperialism’, (2013) 65 *Monthly Review* 13, at 17–20.

⁴³For similar arguments see, e.g., De Angelis, *supra* note 26; Glassman, *supra* note 26, at 615–17, 621–2; W. Bonefeld, *supra* note 26; sources cited in note 11; essays in (2001) 2 *The Commoner*, available at www.commoner.org.uk/?p=5; J. Batou, ‘Accumulation by Dispossession and Anti-Capitalist Struggles: A Long Historical Perspective’, (2015) 79 *Science and Society* 11, at 12, 18–20, 31–2. For a related attempt to demonstrate that commodity exchange is shot through with extra-economic coercion, notably in the production of racial categories and the appropriation of women’s unpaid work see N.P. Singh, ‘On Race, Violence, and So-Called Primitive Accumulation’, (2016) 128 *Social Text* 27, at 40–1. In this vein see also A. Goldstein, ‘On the Reproduction of Race, Capitalism, and Settler Colonialism’, in A. Roy (ed.), *Race and Capitalism: Global Territories, Transnational Histories* (2017), 42, at 44–5.

⁴⁴Marx, *supra* note 32, at 462; Marx, *supra* note 13, vol. III (1991), 354–5.

⁴⁵Cf. E.M. Wood, *The Origin of Capitalism: A Longer View* (2002), 36–7.

⁴⁶Marx, *supra* note 13, at 885.

instrument, that is, through which the ‘clearing’ of the commons was enabled and consolidated, particularly in the form of parliamentary acts adopted for the purpose of lending legal credence to enclosures.⁴⁷ Since the sixteenth century, ‘vagabondage’ had engendered ‘bloody legislation’ designed to discipline those who had been forced from the land and had proven unable to secure stable employment; they were thereby characterized as ‘voluntary criminals’ who chose not to work, and funnelled into the new regime of wage labour.⁴⁸ Worker associations had been outlawed since the fourteenth century, and wages had been subject to strict regulation so as to punish employers who paid above levels stipulated by statute.⁴⁹ The eighteenth century added fuel to this fire with more sweeping and ambitious acts to enclose the commons. For its part, the nineteenth century brought with it the added innovation of identifying ‘the wealth of the nation’ with ‘the poverty of the people’, the standard rationale marshalling the economic and even moral necessity of ‘improving’ land that supposedly lay in a state of ‘waste’.⁵⁰ While labour made certain legal gains during the course of the nineteenth century, such as the incremental contraction of the working day, the partial regulation of child labour, and the legal recognition of trade unions (first in 1824),⁵¹ nothing stood in the way of the ongoing ‘expropriation of the great mass of the people from the soil, from the means of subsistence and from the instruments of labour’.⁵² Marx insists upon the centrality of law, and the state power it presupposes and crystallizes, to capitalism, at its point of inception as well as during its ongoing expansion. Under conditions of settled capitalism, the ‘silent compulsion of economic relations’ may be powerful enough to render ‘[d]irect extra-economic force’ necessary ‘only in exceptional cases’.⁵³ But this is the case only because such economic relations are structured and legitimated through law and ‘the power of the state’ – the same force that makes the ‘historical genesis of capitalist production’ possible in the first place.⁵⁴

3. International laws of land-grabbing

In itself, there is little new in the application of Marx’s theory of ‘primitive accumulation’ to the general topic of land-grabbing. A sizeable and rapidly growing body of scholarship grapples with the question of whether and how it may be so applied.⁵⁵ Given that Marx goes out of his way to situate ‘primitive accumulation’ at the heart of the process whereby ‘the dwarf-like property of

⁴⁷*Ibid.*

⁴⁸*Ibid.*, at 896. Marx argues that such unemployment was integral to the logic of ‘primitive accumulation’, as the availability of a large surplus population of desperate wage-labourers had the effect of suppressing wages, which, in turn, strengthened the hand of industrial capitalists. *Ibid.*, at 899–904.

⁴⁹*Ibid.*, at 900–4.

⁵⁰*Ibid.*, at 886.

⁵¹Marx deals extensively with the first two of these three developments in Ch. 10 of the first volume of *Capital*, famous for its extensive discussion of the Factory Acts but under-appreciated as an analysis of law as a key site of class struggle. *Ibid.*, at 340–416. Trade unions make an appearance in the appendix; see *ibid.*, at 1066–71.

⁵²*Ibid.*, at 928.

⁵³*Ibid.*, at 899.

⁵⁴*Ibid.*

⁵⁵See, e.g., I.G. Baird, ‘Turning Land into Capital, Turning People into Labour: Primitive Accumulation and the Arrival of Large-Scale Economic Land Concessions in the Lao People’s Democratic Republic’, (2011) 5 *New Proposals: Journal of Marxism and Interdisciplinary Inquiry* 10; S. Moyo, ‘Primitive Accumulation and the Destruction of African Peasantries’, in U. Patnaik and S. Moyo (eds.), *The Agrarian Question in the Neoliberal Era: Primitive Accumulation and the Peasantry* (2011), 61; D. Hall, ‘Primitive Accumulation, Accumulation by Dispossession and the Global Land Grab’, (2013) 34 *Third World Quarterly* 1582; S. Adnan, ‘Land Grabs and Primitive Accumulation in Deltaic Bangladesh: Interactions Between Neoliberal Globalization, State Interventions, Power Relations and Peasant Resistance’, (2013) 40 *Journal of Peasant Studies* 87; M. Levien, ‘From Primitive Accumulation to Regimes of Dispossession: Six Theses on India’s Land Question’, (2015) 50 *Economic and Political Weekly* 146; S. Adnan, ‘Land Grabs, Primitive Accumulation, and Resistance in Neoliberal India: Persistence of the Self-Employed and Divergence from the “Transition to Capitalism”?’’, in A.P. D’Costa and A. Chakraborty (eds.), *The Land Question in India: State, Dispossession, and Capitalist Transition* (2017), 76.

the many' becomes 'the giant property of the few',⁵⁶ it should come as no surprise that the concept has figured prominently in recent efforts to conceptualize the dispossession and exploitation of peasants and indigenous peoples. What is new about the approach I propose here is the explicit application of Marx's theory of 'primitive accumulation' – understood as the alienation of the producer from the means of production through juridico-political power – to the international legal dimensions of land-grabbing. While Marx was alive both to the legal dimensions of 'primitive accumulation' and to the colonial context in which it operated, he did not, of course, bring these elements together in an analysis of international law. The same can be said for contemporary critics of land-grabbing, who tend to disregard the specifically legal facets of Marx's original discussion. Thus, in one of the most searching theoretical analyses of land-grabbing currently available, Onur Ulas Ince argues that 'primitive accumulation' ought to be understood as 'a frontier phenomenon that arises at the interface of accumulative and non-accumulative logics of social reproduction and consists in the assimilation or subordinate articulation of the latter to the former through the deployment of extra-economic and extra-legal force'.⁵⁷ Interestingly, Ince conjoins 'extra-economic' and 'extra-legal' consistently while developing his argument in defence of this proposition,⁵⁸ implicitly removing law from the sphere of state-driven expropriation that distinguishes 'primitive accumulation'. Similarly, William Clare Roberts has argued powerfully that 'primitive accumulation is an ongoing necessity internal to *capitalism*, but always anterior to the specific operations of *capital*': since the process of generating and accumulating surplus value cannot itself create the systemic conditions for generalized capitalist accumulation, this task must be performed by the state, 'which undertakes capital's dirty work because it has become dependent upon capital accumulation for its own existence'.⁵⁹ Like Ince, however, Roberts makes no mention of law, electing instead to couch 'primitive accumulation' as 'plunder, fraud and theft' – all terms that suggest outright illegality.⁶⁰ It is this neglect of the legal aspects of 'primitive accumulation', particularly on the international plane, that must be rectified.

The international law of land-grabbing – the drive to formalize and legitimate large-scale land-appropriation through law – engages a range of different ideas and entitlements. In addition to the right to food, some of the more 'progressive' of these ideas and entitlements include the right to development, the principle of permanent sovereignty over natural resources, the concept of the 'common heritage of mankind', the land rights of indigenous peoples under international law, and various legal formulations of sustainable development and collective self-determination (understood in an 'economic' no less than a 'political' register). Yet undergirding much of the legal architecture of land-grabbing are the more humdrum elements of the law: property rights that are protected, contractual instruments that are enforced, and trade and investment rules that constrain the policymaking authority of capital-importing states while encouraging liberalization, facilitating the operation of food commodity markets, and reducing barriers of entry to real estate markets in the global South. Legal rules and principles are not merely applied as part of an after-the-fact response to land-grab. They are also – and more significantly – employed in a facilitative capacity, making land-grabs possible in the first place. This is particularly visible in the case of the contracts, concessions, and other agreements providing much of the legal framework for the

⁵⁶Marx, *supra* note 13, at 928.

⁵⁷Ince, *supra* note 26, at 106.

⁵⁸*Ibid.*, at 110, 122, 127.

⁵⁹W.C. Roberts, 'What Was Primitive Accumulation? Reconstructing the Origin of a Critical Concept', (2018) 17 *European Journal of Political Theory* 1, at 5, 15 (original emphases), available at journals.sagepub.com/doi/10.1177/1474885117735961. Elsewhere Roberts has argued that Marx's account of 'primitive accumulation' in *Capital* presupposes a model of the state as the 'dependent agent of capital', 'bound to the fortunes of capital' but distinguished by 'relative independence from the actually existing class of capitalists'. See W.C. Roberts, *Marx's Inferno: The Political Theory of Capital* (2017), 214, 216 (emphasis removed). The strongest articulation of such a model of the state remains the one articulated by Nicos Poulantzas in *State, Power, Socialism* (1980).

⁶⁰Roberts, 'What Was Primitive Accumulation?', *supra* note 59, at 5.

purchase or lease of large swathes of land. Although many instruments directly governing large land deals are marked by vague or incomplete provisions, concealed from public scrutiny, and drafted with little or no consultation with those whom they affect most directly, their legality is accepted by investors and governments alike, they are prepared against the background of a corpus of structurally similar instruments, and use can be made of courts and in certain cases investor-state arbitration, or the law of investment protection more generally, to uphold and enforce them.⁶¹

Consider, for instance, a 2010 land lease agreement between the Ethiopian Ministry of Agriculture and Rural Development and Saudi Star Agricultural Development, a company incorporated under Ethiopian law and possessed of a registered office in Addis Ababa but owned by Ethiopian-born Saudi multi-billionaire Mohammed Hussein al Amoudi and operating as an offshoot of the MIDROC group, his larger, tricontinental business empire.⁶² Pursuant to the terms of the agreement, designed to serve Saudi Arabia's 'food security program',⁶³ Saudi Star was granted a half-century lease of 10,000 hectares of rural land in Ethiopia's western Gambella region for the purpose of cultivating and processing rice (and also for the production of biofuels). Interestingly, Ethiopian law was to govern the agreement, and recourse was to be had to the Ethiopian federal court in the case of a dispute.⁶⁴ However, Ethiopian authorities were obligated to 'provide special investment privileges such as exemptions from taxation and import duties of capital goods and repatriation of capital and profits'.⁶⁵ Further, in addition to being required to hand over vacant possession of the land free of all legal and other impediments to its 'clearing', they were required to ensure that Saudi Star would:

enjoy peaceful and trouble free possession of the premises and ... be provided adequate security, free of cost, for carrying out its entire activities in the said premises, against any riot, disturbance or any other turbulent time other than force majeure.⁶⁶

In the years since, al Amoudi's Saudi Star has developed the farm as part of the Ethiopian government's broader push to conclude large-scale land deals in order to increase agricultural exports. Roughly 4,000 hectares have been added to the original 10,000, and the land's transformation into a fully irrigated commercial farm has been made possible through forced relocation of pastoralists and subsistence farmers, a process accompanied by sporadic outbreaks of violence despite significant numbers of Ethiopian soldiers being on hand.⁶⁷ That all this has been achieved with a contract – one which was drafted without public consultation, which resulted in significant

⁶¹See especially Cotula's work: *Land Deals in Africa*, *supra* note 2, at 43–5; "'Land Grabbing" and International Investment Law', in Bjorklund (ed.), *supra* note 2; *Great African Land Grab?*, *supra* note 9; *Land Rights and Investment Treaties: Exploring the Interface* (2015).

⁶²Land Rent Contractual Agreement Made Between Ministry of Agriculture and Saudi Star Agricultural Development Plc', 25 October 2010. A copy of this agreement, and detailed information regarding the deal, is available at landmatrix.org/en/get-the-detail/by-target-region/eastern-africa/1244/.

⁶³See 'Saudi Star' at www.sheikhmohammedalamoudi.info/index.php?option=com_content&view=article&id=66:saudi-star-agribusiness&catid=9:general-pages&Itemid=128.

⁶⁴Land Rent Contractual Agreement', *supra* note 62, at 7–8, arts. 12, 17.

⁶⁵*Ibid.*, at 5, art. 6.

⁶⁶*Ibid.*

⁶⁷For various assessments, see Human Rights Watch, 'Waiting Here for Death': Forced Displacement and 'Villagization' in Ethiopia's Gambella Region, 16 January 2012, available at www.hrw.org/report/2012/01/16/waiting-here-death/forced-displacement-and-villagization-ethiopia-gambella-region; Oakland Institute, *We Say the Land is Not Yours: Breaking the Silence Against Forced Displacement in Ethiopia*, 2015, available at www.oaklandinstitute.org/we-say-land-not-yours-breaking-silence-against-forced-displacement-ethiopia. See further W. Davison, 'Saudi Billionaire To Invest \$100 Million in Ethiopian Farm', *Bloomberg*, 2 December 2014, available at www.bloomberg.com/news/articles/2014-12-02/saudi-billionaire-to-invest-100-million-in-ethiopian-rice-farm; W. Davison, 'Local Ethiopians Miss Out as Big Agriculture Firms Struggle in Gambella', *The Guardian*, 1 January 2015; T. Burgis, 'The Great Land Rush—Ethiopia: The Billionaire's Farm', *Financial Times*, 1 March 2016.

dispossession and displacement, and which continues to involve the wholesale material transformation of the land – sheds light upon the degree to which law is constitutive of land-grabbing.

Or take, as another example, a 2009 concession agreement between Liberia and Sime Darby Plantation (Liberia), a company incorporated under Liberian law as a subsidiary of Sime Darby, a mammoth Malaysian conglomerate known chiefly as the world's largest oil palm plantation company.⁶⁸ Kumpulan Guthrie Berhad, one of the companies out of which Sime Darby grew, had been active in Liberia for decades prior to its second civil war, and Sime Darby was keen to maintain its presence in the resource-rich and investment-dependent country.⁶⁹ The resulting agreement formalized a 63-year concession of 220,000 hectares of land for the cultivation of palm oil and rubber trees and the production of related goods, mainly for export purposes. Sime Darby was accorded the power to establish and maintain its own security services on the conceded land,⁷⁰ and it was also afforded the right to 'request that certain settlements be relocated' if 'such existing settlement and its inhabitants would impede Investor's development of the Concession Area and would interfere with Investor Activities'.⁷¹ In the event of a serious dispute, the parties were required to submit themselves to binding arbitration in accordance with the rules of the International Centre for Settlement of Investment Disputes, this being the 'exclusive remedy'.⁷² In the years since 2009, Sime Darby has proceeded with its development plans.⁷³ But it has had to do so slowly and haltingly, given staunch opposition from villagers incensed that they were not consulted, that their lands were taken from them, and that the few jobs that have been created pay too little (when they actually pay at all). Resistance groups have formed, riots have broken out, and incidents of arson have been reported.⁷⁴

In a sense, international law's constitutive role in land-grabbing follows to some degree from the very concept of sovereignty. During the height of the post-Second World War wave of decolonization, a great many socialist and non-aligned jurists and policymakers sought to reconceptualize sovereignty in explicitly 'economic' terms, with the notion of permanent sovereignty over natural resources, already boasting roots in customary international law, gaining significant traction as a result.⁷⁵ While this and related doctrines lend weight to arguments against contemporary

⁶⁸An Act to Ratify the Amended and Restated Concession Agreement Between the Republic of Liberia and Sime Darby Plantation (Liberia) Inc., 23 July 2009. A copy of this agreement, and detailed information regarding the deal, is available at landmatrix.org/en/get-the-detail/by-target-region/western-africa/1388/.

⁶⁹*Ibid.*, at 1–2, preamble.

⁷⁰*Ibid.*, at 24–5, art. 9.

⁷¹*Ibid.*, at 11–12, art. 4.

⁷²*Ibid.*, at 47, art. 28.

⁷³See 'Liberia' at www.simedarbyplantation.com/our-businesses/upstream/liberia.

⁷⁴For details and evaluations, see Basta! and Les amis de la terre, *Live or Drive, A Choice Has To Be Made: A Case Study of Sime Darby Operations in Liberia*, 2012, available at www.sdiliberia.org/node/224; G. York, 'Land Rush Leaves Liberia's Farmers in the Dust', *The Globe and Mail*, 26 September 2012; 'Fire Destroys 200 Hectares of Sime Darby's Liberia Plantation', *Reuters*, 19 March 2014, available at www.reuters.com/article/liberia-simedarby-fire/fire-destroys-200-hectares-of-sime-darby-liberia-plantation-idUSL6N0MG3O020140319; S. Siakor, 'Palm Oil, Poverty and "Imperialism": A Reality Check from Liberia', *farmlandgrab.org*, 10 September 2014, available at www.farmlandgrab.org/post/view/23929-palm-oil-poverty-and-imperialism-a-reality-check-from-liberia; 'Sime Darby in Unfair Labor Practice Saga—Lawyers Buy Time', *Front Page Africa*, 6 February 2018, available at frontpageafricaonline.com/business/sime-darby-in-unfair-labor-practice-saga-lawyers-buy-time/.

⁷⁵See especially 1952 Integrated Economic Development and Commercial Agreements, GA Res. 523 (VI), UN Doc. A/2119; 1952 Right to Exploit Freely Natural Wealth and Resources, GA Res. 626 (VII), UN Doc. A/2361; 1962 Declaration on Permanent Sovereignty over Natural Resources, GA Res. 1803 (XVII), UN Doc. A/5217; 1966 International Covenant on Economic, Social, and Cultural Rights, Art. 1, 993 UNTS 3; 1966 International Covenant on Civil and Political Rights, Art. 1, 999 UNTS 171; 1974 Declaration on the Establishment of a New International Economic Order, para. 4, GA Res. 3201 (S-VI), UN Doc. A/Res/S-6/3201; 1974 Programme of Action on the Establishment of a New International Economic Order, GA Res. 3202 (S-VI), UN Doc. A/Res/S-6/3202; 1974 Charter of Economic Rights and Duties of States, Arts. 2–3, GA Res. 3281 (XXIX), UN Doc. A/Res/29/3281. For discussion see especially N.J. Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (1997); A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005), 211–20; S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011), Ch. 4. On some of the implications for the law of state succession to treaties see M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007), 195ff.

forms of land-grabbing, particularly when packaged in the language of ‘food sovereignty’,⁷⁶ it is also the case that sovereignty has conventionally been understood to afford states sufficient authority to conclude agreements with foreign investors and other states with respect to the sale or lease of territory.⁷⁷ After all, Saudi Star’s move into Gambella was actively encouraged by the Ethiopian government, which understood it to be part and parcel of its (sovereign) decision to make land available in large quantities to foreign investors. The same may be said of Liberia’s decision to continue its long-standing involvement with Sime Darby. International law does not merely sift through or take stock of the legal implications of land-grabs, bringing this or that norm, doctrine, or instrument to bear upon a given situation with a view to addressing a particular injustice. More significantly, international law formalizes and provides legitimacy for such grabs. Crucially, it may do so even when international legal scholars happen to be critical of this or that land-grabbing technique.

De Schutter’s work provides a particularly revealing illustration of the complex and constitutive role that international law plays in land-grabbing. Special Rapporteur on the Right to Food from mid-2008 to mid-2014, during which time he conducted more than a dozen country visits, De Schutter sought to foster a ‘developmental’ approach to the purchase or lease of land on a large scale. Land-grabbing – and the ideological and institutional structures of international law that make it possible – is a complex, multifaceted, and internally fractured phenomenon, one that cannot be reduced to a single interpretation or captured with a single exemplary model. Yet De Schutter’s interventions are especially illustrative of broader trends in ‘progressive’ legal responses to large-scale land-grabbing. Entrusted with his mandate by the UN Human Rights Council and dependent upon UN member states for much of his data, not to mention his ability to undertake information-gathering visits, De Schutter’s capacity to articulate a radical critique of land-grabbing – one that would, say, analyze the phenomenon as a manifestation of neocolonial capitalism and clearly denounce the states and corporations that benefit from it – was limited.⁷⁸ Yet it is precisely for this reason, precisely because De Schutter’s options were few so long as he wished to keep his position, retain the trust of fellow jurists, and wield a modicum of influence over UN member states, that his preponderantly accommodationist views on land-grabbing are as revealing and noteworthy as they are. For they reflect the similarly cautious appraisals of many other international lawyers who are concerned with land-grabbing. Like De Schutter, such lawyers tend to level a variety of important and wide-ranging criticisms against certain aspects of the phenomenon, often on the basis of international human rights law. But they neither repudiate the phenomenon directly and unequivocally nor seek to ground it firmly in a cogent and genuinely compelling theory of capitalism.⁷⁹

⁷⁶But see M.G. Desta, ‘Competition for Natural Resources and International Investment Law: Analysis from the Perspective of Africa’, (2016) 1 *Ethiopian Yearbook of International Law* 117, at 127–8, 134–5.

⁷⁷J. von Bernstorff, ‘Who Is Entitled to Cultivate the Land? Sovereignty, Land Resources and Foreign Investments in Agriculture in International Law’, in F.R. Jacur, A. Bonfanti and F. Seatzu (eds.), *Natural Resources Grabbing: An International Law Perspective* (2016), 55, at 61–71, 73.

⁷⁸As Anna Chadwick has noted, ‘the blameworthy international is notably absent’ in De Schutter’s UN reports: ‘Mistakes of the past are acknowledged, but it is uncommon to find mention of who made them. When such mention is made, the governments of food insecure states are more typically put in the spotlight than the governments of wealthier states in the North.’ A. Chadwick, ‘World Hunger, the “Global” Food Crisis and (International) Law’, (2017) 14 *Manchester Journal of International Economic Law* 92, at 110.

⁷⁹Cotula comes closest when he leverages Polanyi’s account of the ‘double movement’ between market fundamentalism, marked by the ‘fictitious’ commodification of land, labour, and money, and its dialectical ‘counter-movement’, the move to marshal non-market mechanisms of social regulation in order to counter such ‘disembeddedness’ of ‘the economy’. Tellingly, though, even Cotula – one of the very few legal scholars concerned with land-grabbing to hazard a theory of capitalism – does so in support of an argument to the effect that international investment law may ‘hold promise for reflecting the continued social embeddedness of land’ even as it is ‘an enabler of land commodification and a protector of accrued transitions towards commodification’. See L. Cotula, ‘The New Enclosures? Polanyi, International Investment Law and the Global Land Rush’, (2013) 34 *Third World Quarterly* 1605, at 1607. For Polanyi’s own account of this ‘double movement’ see K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944).

De Schutter's most widely read article during his tenure as a rapporteur sought to demonstrate that the large-scale appropriation of land by states and agrifood companies demanded not simply increased commitment to 'transparency' and 'accountability', but the recognition of non-Eurocentric modes of tenure that would provide peasants and other land users with enhanced legal protection. Ultimately, De Schutter contended, the agreements that formalize investment by transnational corporations and food-importing, capital-exporting states raise fundamental questions of agricultural development:

if the current challenge of large-scale land acquisitions leads to the globalization of Western-style property rights, the ultimate result will be a more capitalized form of agriculture and more land concentration, when what we need instead is to democratize access to land and to support reforms that will benefit small-scale farmers and thus favor broad-based rural development.⁸⁰

De Schutter's principal target here was the kind of individual titling popularized by Hernando de Soto.⁸¹ Rejecting the idea that the basic aim of security of tenure is to facilitate market integration, so that land may be alienated or mortgaged as an economic 'asset' and thereby drive the accumulation of capital,⁸² De Schutter levelled a number of charges against titling schemes. Among other things, he argued that it often strengthens those who are already privileged in the relevant community, particularly men and members of dominant ethno-linguistic groups⁸³; that it works against those of limited means when it requires payment of a fee; that it tends to lead to the concentration of land in the hands of wealthy landowners; and that it often assumes that legally formalized property will be used as collateral to access credit, an assumption belied by the understandable unwillingness of many peasants, artisans, and others to enter into mortgage agreements.⁸⁴ By contrast, he pointed out, most forms of registering customary use of communal land and resources – a practice that can also promote long-term investment and access to credit – afford protection from eviction without individuating the rights in question.⁸⁵ Of particular interest to De Schutter was the fact that this approach has garnered support through association with the international law of self-determination as well as the right to property, understood in collective rather than exclusively individual terms and enshrined in treaties like the International Convention on the Elimination of All Forms of Racial Discrimination.⁸⁶ While

⁸⁰De Schutter, 'The Green Rush', *supra* note 8, at 506.

⁸¹*Ibid.*, at 529, 531. See also De Schutter, 'How Not To Think of Land-Grabbing', *supra* note 8, at 269–70. For de Soto's argument about formalization of individual property rights, and the legal 'inclusion' they were supposed to bring about see H. de Soto, *The Other Path: The Invisible Revolution in the Third World* (1989) and H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000). As De Schutter notes, the World Bank and other international financial institutions have supported this approach.

⁸²This process is propelled in no small part by increased financialization of land. See O. Visser, 'Finance and the Global Land Rush: Understanding the Growing Role of Investment Funds in Land Deals and Large-Scale Farming', (2015) 2 *Canadian Food Studies* 278; T. Ferrando, 'The Financialization of Land and Agriculture: Mechanisms, Implications, and Responses', draft available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2916112. For a related argument about food prices see A. Chadwick, 'Regulating Excessive Speculation: Commodity Derivatives and the Global Food Crisis', (2017) 66 *International and Comparative Law Quarterly* 625.

⁸³This is a point of some importance to scholars who underscore corruption, 'democratic deficits', and related issues in the context of large land deals. See, e.g., L. Brilmayer and W.J. Moon, 'Regulating Land Grabs: Third Party States, Social Activism and International Law', in N.C.S. Lambek et al. (eds.), *Rethinking Food Systems: Structural Challenges, New Strategies and the Law* (2014), 123, at 125, 130–4.

⁸⁴De Schutter, 'The Green Rush', *supra* note 8, at 527–31. See also De Schutter, 'How Not To Think of Land-Grabbing', *supra* note 8, at 271.

⁸⁵De Schutter, 'The Green Rush', *supra* note 8, at 533.

⁸⁶*Ibid.*, at 535–6. See 1966 International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5, 660 UNTS 195.

careful not to idealize customary use rights, not least since they too may exclude or subordinate women and those designated as members of minority groups, he clearly positioned them as favourable to ‘Western’ conceptions of individual property.⁸⁷

De Schutter’s argument is curious – and illuminatingly so. Unlike de Soto and others, he expressly distances himself from ‘Western capitalist legal systems’ and maintains a somewhat critical stance with respect to the concept of enclosure, which he defines (via his critique of Eurocentrism) as ‘the privatization of the commons that results from the generalization of a Western notion of individual property rights over land’.⁸⁸ He does so mainly in order to reframe the debate about land-grabbing around questions of sustainable rural development and systemic poverty-reduction. However, the argument he advances cannot justifiably be characterized as anti-capitalist, as it ultimately offers little aside from encouragement to consider ‘more transparent and participatory processes of negotiation’ and entertain ‘other business models that could support an increase in the productivity of farmers and improve their access to markets’.⁸⁹ What one is thereby afforded is not so much direct confrontation with the legal and institutional mechanisms of contemporary land-grabbing as a set of palliative measures designed to socialize some of its less ‘humane’ features, notably with the assistance of human rights, and reframe it in broadly ‘developmental’ terms. De Schutter underestimates the degree to which capitalism’s day-to-day operation is rooted in and dependent upon legally formalized dispossession and displacement. Rather than advancing a frontal and comprehensive critique of the accumulative logic that sustains commercial agro-investment, he chooses to underscore the need for greater regulatory oversight, enhanced respect for human rights, formal recognition of customary user rights, and renewed commitment to sustainable agricultural development. As it turns out, this stance also finds expression in the reports that De Schutter submitted to the Human Rights Council and General Assembly. In the final report he submitted to the Human Rights Council in January 2014, for instance, he anchors his multi-pronged approach to democratic and decentralized food systems – an approach that has strong implications for national policy-making and the broader environment of transnational ‘governance’ – in a concerted push to ensure security of tenure through anti-eviction legislation, customary user rights, enhanced regulations concerning expropriation and speculation, and, more generally, new models of socio-economic development.⁹⁰ In an earlier report, he had already explained that increased recognition of the right to food – enshrined in a large number of human rights instruments⁹¹ – constituted a central pillar in this strategy, calling for stronger institutional support for its implementation from all branches of government, as well as national human rights institutions, civil society organizations, and social movements.⁹² In stark contrast to those who would argue that this right, like human rights generally, offers little aside from a bald assurance to the effect that a certain ‘basic nutritional floor’ or ‘subsistence minimum’ will be respected (without

⁸⁷De Schutter, ‘The Green Rush’, *supra* note 8, at 538.

⁸⁸*Ibid.*, at 536–7.

⁸⁹*Ibid.*, at 557.

⁹⁰Special Rapporteur on the Right to Food Olivier De Schutter, Final Report: The Transformative Potential of the Right to Food, UN Doc. A/HRC/25/57 (2014), at 14–15 and 21, para. 35 and annex.

⁹¹See, e.g., 1948 Universal Declaration of Human Rights, Art. 25, GA Res. 217A (III), UN Doc. A/810; 1966 International Covenant on Economic, Social, and Cultural Rights, Art. 11, 993 UNTS 3; 1979 Convention on the Elimination of All Forms of Discrimination Against Women, Art. 12, 1249 UNTS 13; 1989 Convention on the Rights of the Child, Arts. 24, 27, 1577 UNTS 3; 2006 Convention on the Rights of Persons with Disabilities, Arts. 25, 28, 2515 UNTS 3. See also CESCR, General Comment No. 12: The Right to Adequate Food, UN Doc. E/C.12/1999/5 (1999); FAO, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, 2004, available at www.fao.org/docrep/009/y7937e/y7937e00.htm.

⁹²Special Rapporteur on the Right to Food Olivier De Schutter, Interim Report of the Special Rapporteur on the Right to Food, UN Doc. A/68/288 (2013), at 5 and 18–20, paras. 8 and 47–56.

offering means of rectifying the massive inequalities that exist in most states in regard to access to food),⁹³ he views it as fundamental to the regulation of large-scale land deals.⁹⁴

Crucially, De Schutter distinguishes his position from the one articulated in the (voluntary and legally non-binding) 2010 Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods, and Resources. A joint product of the World Bank, the UN Food and Agriculture Organization, the UN International Fund for Agricultural Development, and the UN Conference on Trade and Development, the principles encourage investors to respect existing land rights; ensure ‘food security’; commit to ‘transparency, good governance, and a proper enabling environment’; consult with and provide avenues for participation for affected groups; display ‘responsibility’ by adhering to the ‘rule of law’ and employing industry ‘best practices’ that prioritize ‘economic viability’; attend to broader social and distributional questions; and recognize the value of environmental sustainability.⁹⁵ Broadly related, if somewhat more visibly ‘progressive’, is the Committee on World Food Security’s (similarly voluntary and non-binding) 2014 Principles for Responsible Investment in Agriculture and Food Systems, which underscore the importance of ‘food security’, gender equality, youth empowerment, security of tenure, cultural heritage and ‘traditional’ knowledge, safe and healthy agriculture and food systems, assessing ‘impacts’ and promoting ‘accountability’, conserving and managing natural resources, ‘transparent’ and participatory ‘governance’ mechanisms, and inclusive and sustainable forms of economic development and poverty-reduction.⁹⁶ In some respects, legally toothless codes of conduct of this sort, of which there are several others,⁹⁷ echo regional documents such as the African Union’s Declaration on Land Issues and Challenges in Africa, which deploys vague language about providing ‘equitable access to land and related resources’ and cultivating ‘adequate human, financial, technical capacities to support land policy development and implementation’.⁹⁸

De Schutter notes that the 2010 principles – initially requested by the Group of Eight and subsequently supported by a larger group of states and international organizations, as well as a private bank and a multinational agribusiness concern⁹⁹ – have been criticized by peasant groups and civil society organizations for extending ‘soft law’ legitimacy to questionable deals.¹⁰⁰ He also stresses, with some justification, that he lays greater stress upon questions of agricultural development.¹⁰¹ Yet, when all is said and done, he does not depart substantively from the principles’ central and overriding commitment to fostering investment, so long, of course, as it is undertaken with the

⁹³*Ibid.*, at 6 and 10, paras. 9 and 23.

⁹⁴Special Rapporteur on the Right to Food Olivier De Schutter, *Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, UN Doc. A/HRC/13/33/Add.2 (2009), at 3, para. 4. For the argument that most forms of human rights advocacy have proven unwilling to address socio-economic inequality see especially S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

⁹⁵FAO, IFAD, UNCTAD, and World Bank, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods, and Resources*, 2010, available at documents.worldbank.org/curated/en/748861468194955010/Principles-for-responsible-agricultural-investment-that-respects-rights-livelihoods-and-resources-extended-version.

⁹⁶CFS, *Principles for Responsible Investment in Agriculture and Food Systems*, 2014, available at www.fao.org/cfs/home/activities/rai/en/.

⁹⁷See especially Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food, *supra* note 91; FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, 2012, available at www.fao.org/tenure/voluntary-guidelines/en/.

⁹⁸Declaration on Land Issues and Challenges in Africa, Assembly/AU/Decl.1(XIII) Rev.1 (2009), available at www.uneca.org/publications/declaration-land-issues-and-challenges-africa.

⁹⁹P. Stephens, ‘The Principles of Responsible Agricultural Investment’, (2013) 10 *Globalizations* 187, at 188.

¹⁰⁰De Schutter, ‘The Green Rush’, *supra* note 8, at 505–6. See, e.g., La Via Campesina, FIAN, Land Research Action Network, and GRAIN, ‘Stop Land Grabbing Now! Say No to the Principles of “Responsible” Agro-Enterprise Investment Promoted by the World Bank’, 2010, available at focusweb.org/content/stop-land-grabbing-now/; Global Campaign for Agrarian Reform, ‘Why We Oppose the Principles for Responsible Agricultural Investment (RAI)’, 2010, available at www.fian.org/library/publication/why_we_oppose_the_principles_for_responsible_agricultural_investment/. See further the International Land Coalition’s 2011 Tirana Declaration, available at www.landcoalition.org/en/resources/tirana-declaration.

¹⁰¹De Schutter, ‘The Green Rush’, *supra* note 8, at 506.

requisite degree of contractual clarity, regulatory oversight, adherence to the ‘rule of law’, dedication to ‘food security’ and environmental sustainability, and willingness to consult with and integrate the views of those affected. He may argue that the principles ‘ignore human rights’,¹⁰² or even that they furnish ‘policymakers with a checklist of how to destroy the global peasantry responsibly’.¹⁰³ He shies away, however, from repudiating the drive to accumulate capital that underlies appropriation of land and land resources. And his own list of ‘minimum human rights principles applicable to large-scale land acquisitions or leases’ encourages ‘host States and investors [to] establish and promote farming systems that are sufficiently labour-intensive to contribute to employment creation’ while making room for forced evictions provided that they conform to relevant domestic laws, are ‘justified as necessary for the general welfare’, and accompanied by resettlement and satisfactory monetary compensation.¹⁰⁴ The result is a preponderantly moralistic analysis of the global race for farmland, one that is incontrovertibly distinguished by considerable concern for those affected by the push to ‘improve’ ostensibly ‘unproductive’ land but that does not yield a sustained critique of the politico-economic system (and, crucially, the international legal system) that undergirds it. If the World Bank has sought to win support for the 2010 principles on the grounds that ‘[r]esponsible investors interested in the long-term viability of their investments realize that adherence to a set of basic principles is in their best interest’,¹⁰⁵ De Schutter has hesitated before calls to impose a moratorium on large-scale land deals and proven reluctant to endow affected peasants and indigenous communities with robust veto rights over the agreements that formalize them.¹⁰⁶ His approach may well be ‘developmental’, but that does not make it any less firmly anchored in capitalism. Nearly a decade ago, at the outset of the current round of ‘standards’, ‘guidelines’, and ‘codes of conduct’ on large land deals, Saturnino Borrás and Jennifer Franco argued that such efforts accepted the basic co-ordinates of the ‘TNC-controlled global system of food-feed-fuel production, distribution, and consumption’, reframing their social and environmental consequences as ‘side effects of an essentially beneficial cure’ rather than ‘direct impacts that are so severe and unjust that they call into question the very validity of the cure’.¹⁰⁷ It is difficult to avoid the conclusion that De Schutter’s analysis is vulnerable to much the same criticism.

Ultimately, the approach adopted by De Schutter during the course of his work for the United Nations sheds light upon the degree to which international legal frameworks and arguments enable and legitimate land-grabbing. Far from functioning merely as a means of responding to violations of one or another set of human rights, international law provides much of the normative and institutional architecture for land deals: sovereign states exercise their power to conclude contracts, investment treaties, and other bilateral instruments with corporations or other states, and these instruments are capable of being upheld and enforced by courts and arbitrators after entering into effect and reconfiguring the legal structures that govern social relations within the relevant territory. To his credit, De Schutter is critical of many facets of the international law of land grabbing. But he does not repudiate it outright. Doing so would require acknowledging that the legally formalized acquisition or lease of land wrenches direct producers from the means of production, maintains and amplifies this rift over time, and transforms them into wage-labourers

¹⁰²De Schutter, ‘How Not To Think of Land-Grabbing’, *supra* note 8, at 274.

¹⁰³*Ibid.*, at 275. See also O. De Schutter, ‘Responsibly Destroying the World’s Peasantry’, *Project Syndicate*, 4 June 2010, available at www.project-syndicate.org/commentary/responsibly-destroying-the-world-s-peasantry?barrier=accessreg.

¹⁰⁴Special Rapporteur, Large-Scale Land Acquisitions and Leases, *supra* note 94, at 16–17, annex.

¹⁰⁵World Bank, *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?*, 2011, xlv, available at documents.worldbank.org/curated/en/998581468184149953/Rising-global-interest-in-farmland-can-it-lead-to-sustainable-and-equitable-benefits. See also *ibid.*, at 133.

¹⁰⁶Such rights may, for instance, be inferred from the 2007 Declaration on the Rights of Indigenous Peoples, Arts. 8, 10, 25–30, 32, GA Res. 61/295, UN Doc. A/Res/61/295.

¹⁰⁷S. Borrás Jr. and J. Franco, ‘From Threat to Opportunity? Problems with the Idea of a “Code of Conduct” for Land-Grabbing’, (2010) 13 *Yale Human Rights and Development Journal* 507, at 510, 512–13.

subordinated to the dynamics of competition and surplus-reinvestment. In short, it would require that De Schutter recognize the not-so-'silent' compulsion of 'primitive accumulation' as foundational to land-grabbing.

4. Conclusion

In a groundbreaking study of the gendered dimensions of 'primitive accumulation', dimensions that Marx fails to integrate into his analysis of the phenomenon in *Capital*, Silvia Federici argues that a:

return of the most violent aspects of primitive accumulation has accompanied every phase of capitalist globalization, including the present one, demonstrating that the continuous expulsion of farmers from the land, war and plunder on a world scale, and the degradation of women are necessary conditions for the existence of capitalism in all times.¹⁰⁸

The global land-grab that continues today showcases the ongoing, continuous nature of 'primitive accumulation', its inherence in and centrality to the cycles of capital accumulation Marx associated with specifically 'economic' dynamics. It also showcases the legal dimensions of this process of transforming land and labour. Undeniable though it is that international law offers a variety of means to counter the far-reaching economic and political forces that drive land-grabbing, many of its constituent structures entrench the uneven distributions of wealth, power, and resources that permit states and corporations to engage in this new scramble. One cannot understand contemporary land-grabbing without understanding capitalism, and one cannot understand the way in which capitalism effects sweeping transformations of both land and labour-power without understanding the waves of legally mediated 'primitive accumulation' that drive it. The process of 'incorporat[ing] the soil into capital' is to a significant degree a legal process.¹⁰⁹

¹⁰⁸Federici, *supra* note 26, at 12–13.

¹⁰⁹Marx, *supra* note 13, at 895.