



Universiteit
Leiden
The Netherlands

Addressing land inequality, rehabilitation and competing uses

Dam-de Jong, D.A.; Sjöstedt, B.

Citation

Dam-de Jong, D. A. (2023). Addressing land inequality, rehabilitation and competing uses. In B. Sjöstedt (Ed.), *Research Handbooks in Environmental Law series* (pp. 304-327). Cheltenham: Edward Elgar.
doi:10.4337/9781789906929.00023

Version: Publisher's Version

License: [Creative Commons CC BY-NC-ND 4.0 license](https://creativecommons.org/licenses/by-nc-nd/4.0/)

Downloaded from: <https://hdl.handle.net/1887/3674597>

Note: To cite this publication please use the final published version (if applicable).

14. Addressing land inequality, rehabilitation and competing uses

Daniëlla Dam-de Jong¹

1. INTRODUCTION

Land is a vital resource, which performs key economic, social, cultural and ecological functions for a variety of stakeholders. Large-scale economic projects, such as agriculture, extractive industry, forestry and infrastructure projects, which can secure long-term economic development that benefits the state as a whole, depend on the availability of land. Yet, land also provides livelihood and food security for local communities; it shapes human culture (e.g., for its spiritual importance) and national identity (e.g., the Dutch polder landscape); it is essential for the preservation of indigenous peoples' traditional lifestyles and cultures and it plays an important role in the conservation of biological diversity and the storage of greenhouse gases for the benefit of humankind. In light of these myriad functions that land performs in and across societies, disputes over the use and distribution of land are unfortunately also among the root causes of armed conflict. According to a major study, 'land issues played a major role in all but three of the more than thirty intrastate conflicts that occurred between 1990 and 2009'.² In post-conflict societies, these disputes may be exacerbated by the legacies of armed conflict. Land may have become inaccessible due to the presence of explosive or toxic remnants of war and soil degradation may have occurred as a consequence of the conduct of hostilities or due to illegal exploitation of natural resources during the conflict. Land may also have been taken as the spoils of war or extra-judicially as punishment for perceived community support of one side or another. Addressing land issues in peace processes is therefore essential for the resolution of these conflicts and for maintaining the peace that has been so hard won.

The purpose of this chapter is twofold. First, it aims to examine how international law impacts on decisions with respect to land uses, distribution and rehabilitation in peace processes. Although the governance of land is still very much a matter for domestic law, the past decades have shown an increase in recourse to international legal bodies to address disputes over land distribution, uses and rehabilitation.³ This raises the question as to whether and to

¹ This chapter has benefitted from discussions with Alexandra Harrington and Cymie Payne in an early stage of the drafting process.

² See United Nations Interagency Framework Team for Preventive Action, *Land and conflict: Toolkit and guidance for preventing and managing land and natural resources conflict* (2012), https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Land%20and%20Conflict.pdf accessed 9 April 2023.

³ See Lorenzo Cotula, 'Land, Property and Sovereignty in International Law' (2017) 25 *Cardozo Journal of International & Comparative Law*, 219, 223–24. See also, specifically in relation to post-conflict situations, Tara Van Ho, 'Is it Already Too Late for Colombia's Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives' (2016) 5 *International Human Rights Law Review* 60; and Andrei Gomez-Suarez et al 'Foreign Investors and the Colombian

what extent international law offers a coherent framework for addressing land as part of environmental peacebuilding. Second, this chapter aims to explore whether and how the notion of environmental peacebuilding can be instrumental in mainstreaming international legal responses for the purpose of achieving a sustainable peace. Environmental peacebuilding has been defined in this book as ‘the integration of natural resource management and environmental protection in conflict resolution and recovery strategies to prevent conflict relapse and to lay the foundations for sustainable peace and development’.⁴ This definition positions natural resources management and environmental protection within the realm of peace and security and thereby provides a specific lens for policy decisions.

For these purposes, Section 2 first addresses two questions of terminology that are relevant for understanding the focus of the chapter. Section 3 introduces the principal peacebuilding priorities that pertain to land uses and allocation. Section 4 subsequently explores the contribution of international law to addressing these priorities. It demonstrates that international law is highly relevant for post-conflict land governance, but that it does not offer a fully coherent and complete framework. Section 5 provides overarching reflections on whether and to what extent the notion of environmental peacebuilding provides an appropriate lens for mainstreaming international law to achieve a much needed integrative approach to addressing land issues as part of peacebuilding.

2. TERMINOLOGY AND SCOPE OF THE CHAPTER

In order to understand the scope and focus of this chapter, this section addresses two questions of terminology. These concern the distinction between ‘land’ and ‘soil’ on the one hand and between ‘land’ and ‘territory’ on the other. Questions related to soil are addressed in this chapter, but territorial disputes fall outside of its scope.

2.1 Distinguishing Between Land and Soil

This chapter has so far referred to land in a generic sense. It is nevertheless important to refine this notion and to distinguish between ‘land’ proper and ‘soil’ more specifically, as different connotations are attached to these terms. An authoritative legal definition is lacking for either of these terms, but resort can be made to more common definitions. ‘Land’ has been defined as ‘the planet’s surface not covered by seas, lakes or rivers’.⁵ It therefore encompasses all land mass, whether natural or artificial. Furthermore, it ‘can be covered by different types of vegetation (e.g., natural or managed grassland, cropland and wetlands) and artificial surfaces (e.g., roads and buildings)’.⁶ ‘Soil’ on the other hand is material in the top layer of land. As such, it is ‘one of the essential components of land. It consists of particles of rock, sand and clay as

Peace Process’, (2016) 18 *International Community Law Review*, 223. See further Chapter 12 in this volume, which discusses the judgment of the International Court of Justice regarding compensation for the environmental damage to Costa Rica’s wetlands caused by Nicaragua’s military incursion.

⁴ See Chapter 1 in this volume.

⁵ European Environment Agency, ‘Land and soil: Towards the Sustainable Use and Management of These Vital Resources’, <https://www.eea.europa.eu/signals/signals-2019-content-list/articles/land-and-soil-towards-the> accessed 22 March 2023, (2019) (last modified 6 August 2020).

⁶ Ibid.

well as organic material such as plant residues, soil-dwelling animals and organisms such as bacteria and fungi, along with the air and water in soil pores'.⁷ This definition underscores the ecological functions that soil performs as well as the importance of water and air for the ability of soil to perform these functions.

The distinction between land and soil is relevant for the environmental peacebuilding priorities discussed in this chapter, as it highlights that the potential usages of land are informed by the condition of its soil. For instance, the variation in life contained in soil may determine its relevance for the conservation of biological diversity or its suitability for agriculture. Soil that is contaminated as a consequence of armed conflict (for instance, due to explosive and toxic remnants of war) needs to be rehabilitated before it can contribute to food production, which may put additional strain on the peace process. Conversely, land usages may impact on the quality of the soil. Mineral extraction, for instance, can play an important role in economic recovery of post-conflict countries, but also has a serious impact on the quality of the soil and nearby water sources,⁸ thereby informing policies for land distribution in post-conflict settings. These issues are discussed in more detail in the following sections.

2.2 Distinguishing Between Land and Territory

A second terminology issue relates to the distinction between 'land' and 'territory'. While this chapter focuses on land proper, it is important to note that land issues are closely connected to questions of territorial sovereignty. As noted by Kohen and Hébié, '[t]he expression "acquisition of territory" is usually employed as meaning the establishment of sovereignty over a given piece of land'.⁹ After all, a state's territory consists largely of land. Disputes over land may therefore also involve disputes between states with respect to territorial sovereignty over a given piece of land. Several of these disputes have been brought to international courts. A pertinent example concerns the dispute between Thailand and Cambodia regarding sovereignty over Preah Vihear that was brought to the International Court of Justice.¹⁰ This dispute involved questions of territorial title and the recognition of (colonial) boundaries.

Territorial disputes may furthermore arise in intra-state contexts, especially in relation to secessionist claims. Such disputes are often settled through autonomy or power-sharing arrangements.¹¹ In some instances, autonomy is not a suitable option or has proved unsuccessful. In those instances, the parties may agree that the state relinquishes title over territory to the secessionist group. This implies that a new state is established on part of the territory

⁷ Ibid.

⁸ See Claudine Sigam and Leonardo Garcia, 'Extractive Industries: Optimizing Value Retention in Host Countries', United Nations Conference on Trade and Development (UNCTAD) (2012), 14.

⁹ Marcelo G. Kohen and Mamadou Hébié, 'Territory, Acquisition', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP, 2011). The authors also note that this definition is too narrow, as the notion 'territory' also refers to a state's territorial sea and internal waters as well as the airspace above the land and territorial sea.

¹⁰ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1962] ICJ Rep 6

¹¹ Autonomy arrangements consist of the establishment of an autonomous region within the existing boundaries of the state, while power-sharing concerns arrangements regarding the exercise of public authority over land and other natural resources. See e.g., Marcelo G. Kohen and Mamadou Hébié, 'Peace Agreements and Territorial Change', in Marc Weller, Mark Retter and Andrea Varga (eds), *International Law and Peace Settlements* (CUP 2021) 432; and Marie-Joelle Zahar, 'Power-Sharing and Peace Settlements', in *ibid.*, 356.

of the former state. The 2005 Comprehensive Agreement between Sudan and the Sudan People's Liberation Movement (SPLM) provides a relevant example encompassing several of these arrangements. First, it encompasses governance arrangements with respect to natural resources, including land. Second, it formulates a right for the people of South Sudan to hold a binding referendum to decide on their political status after the completion of a transitional phase, which was based on a combination of autonomy and power-sharing arrangements.¹² The people of South Sudan exercised their right to hold a referendum and opted for the independence of South Sudan, after which Sudan relinquished its title over the territory.

Territorial and land disputes may overlap to some extent, especially in post-conflict situations. However, they revolve around inherently different matters. Territorial disputes relate to the establishment of public authority over land and are closely related to questions of sovereignty and territorial acquisition. Land disputes on the other hand concern the questions of title to land and permitted uses, as determined by the public authorities based on the domestic law of the state concerned. In other words, land rights are derivative of title to territory. The remainder of this chapter will focus on land disputes proper, as these are often at the root of internal armed conflicts and form obstacles for achieving peace in post-conflict settings.

3. PRINCIPAL PEACEBUILDING PRIORITIES RELATED TO LAND

The resolution of land disputes is essential for securing a sustainable peace, as these disputes are often linked to the root causes of the armed conflict itself. Inequities relating to land distribution and restitution are among these root causes. Furthermore, soil degradation as a consequence of armed conflict seriously reduces soil fertility, which in turn affects agricultural production, the conservation of biological diversity and the capacity of soil to play a role in carbon sequestration for the purpose of combating climate change. The current section presents the principal priorities pertaining to land and soil for environmental peacebuilding in more detail. It assesses the various roles that land and soil play in peace processes, starting with land distribution and return of land to dispossessed individuals and communities as an overriding concern for conflict resolution. It subsequently discusses the restoration of degraded land as an essential prerequisite for land restitution programmes and for safeguarding nature's capacity to provide ecoservices. Lastly, it looks at the contribution of land to economic reconstruction, with a focus on the role that foreign investment in land and soil performs in peacebuilding processes.

3.1 Land (Re)distribution and Return of (Dispossessed) Land

The majority of post-conflict states are developing countries that are highly dependent on agricultural commodities, not only as export commodities but first and foremost to support the livelihood of their population.¹³ Addressing disputes over access to (arable) land and over the

¹² The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (9 January 2005).

¹³ See Carl Bruch et al., 'Post-Conflict Peace Building and Natural Resources' (2008) 19 *Yearbook of International Environmental Law*, 60.

dispossession of land (either by past political regimes or as a direct consequence of an armed conflict) is therefore a vital aspect of the peacebuilding process. This is reflected in peace agreements and other political settlements that aim at rebuilding society after an armed conflict. Questions regarding land tenure are often central to these agreements, many of which aim to address past injustices with respect to inequalities in land tenure and dispossession of land.

These questions are often addressed by establishing institutions responsible for developing policies with respect to land distribution and settling disputes regarding property rights, such as land trust funds or land banks. Examples of agreements establishing such institutions include the 1996 Guatemalan Agreement on Social and Economic Aspects of the Agrarian Situation and the 2016 Final Agreement for Colombia.¹⁴ Such institutions often have wide-ranging mandates, consisting of promoting access to land ownership for vulnerable groups as a means to reduce inequalities, to return land to dispossessed persons and to allocate land to former combatants as a means to reintegrate them into society.¹⁵

These objectives are however not necessarily mutually supportive and must be carefully balanced to avoid tensions, for instance between displaced persons reclaiming their land and other communities and individuals who have settled there in the meantime. Unruh and Williams, in their book on land and post-conflict peacebuilding, identified problems with respect to land restitution and broader land disputes as key factors undermining land tenure security – and thereby the peace process – in post-conflict situations.¹⁶ Factors causing and exacerbating such disputes include legal ambiguity with respect to individual ownership and the institutions responsible for land governance as well as uncertainty caused by legal pluralism, i.e., the existence of competing claims under different types of laws that co-apply.¹⁷ The establishment of mechanisms for the settlement of disputes over land restitution and land tenure more broadly is therefore essential to resolve this issue. Land institutions, such as established in the Guatemalan and Colombian peace agreements, have an important role to play in settling these disputes.

¹⁴ See Guatemalan Agreement on Social and Economic Aspects of the Agrarian Situation of 6 May 1996, Chapter III on the agrarian situation and rural development; and the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace of 24 November 2016 for Colombia, Part 1.

¹⁵ For examples of arrangements addressing land restitution only, see e.g., Art. 1 of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement) of 21 November 1995, containing an agreement on refugees and displaced persons, which determines that: 'All refugees and displaced persons [...] shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.' As noted by Buyse, this is one of few agreements explicitly stipulating a right for displaced persons to return of property (or compensation for loss) instead of formulating an obligation for the state to return property. See Antoine Buyse, *Post-Conflict Housing Restitution: The European Human Rights Perspective with a Case Study on Bosnia and Herzegovina* (Intersentia 2008) 150. A similar provision can be found in Art. 8 of Protocol IV to the Arusha Peace and Reconciliation Agreement for Burundi of 28 August 2000, which formulates as a principle for the settlement of issues related to land that: 'All refugees and/or sinistrés must be able to recover their property, especially their land.' A difference with the Dayton Agreement is that the agreement for Burundi does not formulate a right per se, but rather a principle which is to guide the land restitution process undertaken in Burundi.

¹⁶ Jon Unruh and Rhodri C. Williams, 'Lessons Learned in Land Tenure and Natural Resource Management in Post-conflict Societies', in Jon Unruh and Rhodri C. Williams (eds.), *Land and Post-conflict Peacebuilding* (Earthscan 2013) 545–62.

¹⁷ *Ibid.*, at 537–45.

Special mention must furthermore be made of the land rights of indigenous peoples. It is generally recognized that the traditional lands of indigenous peoples play an essential role in the preservation of indigenous peoples' identity, as these peoples have deep spiritual, cultural, social and economic ties with their ancestral lands.¹⁸ Indigenous peoples' title to their ancestral lands is not always recognized in domestic systems, as their collective rights to land do not properly fit in Western conceptions of ownership. Their claims to land are nevertheless recognized in several peace agreements. The Guatemalan Agreement on Identity and Rights of Indigenous Peoples provides a good example, as it encompasses both recognition of indigenous peoples' rights to their ancestral lands and the preservation of their holy places.¹⁹ Likewise, the 2016 final agreement for Colombia contains a 'chapter on ethnic perspectives', which recognizes title for indigenous communities over their ancestral lands and stipulates that the interpretation and implementation of the agreement must take into account the principles of 'free determination, autonomy and self-government, participation, consultation and prior free and informed consent'.²⁰

However, in practice, these peoples are not always adequately involved in the peace process, even if their special position has been recognized in the peace settlement. Colombia provides a good example. The provisions in the 2016 Agreement stand in contrast with practice, as observed by the OHCHR. A 2018 report concludes that indigenous authorities 'are recognized in the Colombian Constitution, but not yet in practice'.²¹ The report furthermore states that 'high-level State officials have made public statements against the principle of prior, free and informed consultation as many still see self-government as an obstacle for the implementation of agro-industrial and mining projects and not as a means to improve the human rights situation'.²² Furthermore, Colombia currently records the highest number of murders of land and environmental defenders, who are often representatives of indigenous communities.²³ In Guatemala, the number of murders is lower, but the position of indigenous peoples is equally precarious, even though 25 years have elapsed since the peace agreement was signed.²⁴ This clearly demonstrates the need for external mechanisms, such as international human rights bodies, to help safeguard the land rights of indigenous peoples.

¹⁸ See on indigenous peoples' rights within the context of environmental peacebuilding also Bas Rombouts' Chapter 18 in this volume.

¹⁹ Agreement on identity and rights of indigenous peoples, Annex to UN Docs. A/49/882 and S/1995/256 of 10 April 1995.

²⁰ See the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace of 24 November 2016 for Colombia, 6.2.2. Art. 6.2.3 furthermore explicitly states that 'as far as ethnic peoples are concerned, [the implementation of the agreement] should be carried out in guaranteeing the right to prior free and informed consultation respecting constitutional and international standards'.

²¹ See Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Situation of human rights in Colombia (2 March 2018) UN Doc. A/HRC/37/3/Add.3, para. 49.

²² Ibid.

²³ Global Witness, 'Defending Tomorrow: The climate crisis and threats against land and environmental defenders', July 2020, available at <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/> accessed 22 March 2023.

²⁴ Ibid.

3.2 Restoring Degraded Land

Armed conflicts can have serious impacts on the environment and thereby also affect the productivity of land and related ecosystems. It has been reported that '[o]ver 90% of the major armed conflicts between 1950 and 2000 occurred within countries containing biodiversity hotspots, and more than 80% took place directly within hotspot areas'.²⁵ These figures are indicative of the potential for damage to parts of the environment that are of prime importance for nature conservation.²⁶

Land degradation as a result of armed conflict is caused mainly through three pathways. First and foremost, land degradation may be the result of hostilities conducted during the armed conflict. Examples include the release of toxic chemicals into the soil as a result of bombardments; the presence of landmines, unexploded ordnance, and depleted uranium munitions; and scorched-earth military tactics more generally.²⁷ It goes without saying that the large-scale presence of explosive or toxic remnants of war makes land unsuitable for agriculture or other civilian purposes. The presence of such ordnances may have a lasting impact well beyond the end of the armed conflict. To provide an example: after the armed conflict ended in Cambodia in 1991, refugees and internally displaced persons returning to their home provinces found 80 per cent of arable land to be unworkable due to the presence of landmines.²⁸

A second pathway for land degradation as a result of armed conflict is through illegal exploitation of natural resources by parties to the armed conflict. Land degradation resulting from such practices is caused by the release of chemicals in the soil, by soil erosion and by deforestation related to clearing sites for mining or crop cultivation.²⁹ Illegal exploitation of natural resources constitutes a prevalent means for parties to an armed conflict to finance their armed struggle. According to the UN Environment Programme (UNEP), around 40 per

²⁵ See Thor Hanson et al., 'Warfare in Biodiversity Hotspots' (2009) 23(3) *Conservation Biology* 578–87.

²⁶ For positive examples of environmental protection of important sites during armed conflict, see Britta Sjöstedt, *The Role of Multilateral Environmental Agreements: A Reconciliatory Approach to Environmental Protection in Armed Conflict* (Hart 2020).

²⁷ David Jensen and Steve Lonergan, 'Natural Resources and Post-conflict Assessment, Remediation, Restoration and Reconstruction: Lessons and Emerging Issues' in David Jensen and Steve Lonergan (eds), *Assessing and Restoring Natural Resources in Post-conflict Peacebuilding* (Earthscan 2012) 414. Examples of land degradation as a result of hostilities include the deforestation that occurred as a consequence of the use of herbicides in Vietnam in the 1970s and in Colombia in the 1990s and 2000s and the soil degradation, pollution, erosion and compaction caused by Iraq when it invaded Kuwait in 1990. See e.g., Arthur Westing, *Ecological Consequences of the Second Indochina War* (Almqvist & Wiksell International 1976); Samira A.S. Omar and others, 'The Gulf War Impact on the Terrestrial Environment of Kuwait: an Overview' in Jay E. Austin and Carl E. Bruch (eds), *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives* (Cambridge University Press 2000) 316–37.

²⁸ Paul Davies and Nic Dunlop, *War of the Mines: Cambodia, Landmines and the Impoverishment of a Nation* (1994). Reported in Nao Shimoyachi Yuzawa, 'Linking Demining to Post-conflict Peacebuilding: A Case Study of Cambodia', in David Jensen and Steve Lonergan (n 27) 185.

²⁹ For an example of land degradation caused by illegal natural resources exploitation, see UN Environment (UNEP), 'Sierra Leone: Environment, Conflict and Peacebuilding Assessment, Technical Report', February 2010, 45. This report concluded that 'mining sites that were expanded were not rehabilitated in any way, leaving effluent, degraded sites and lost arable land'.

cent of internal armed conflicts over the past 60 years have been linked to natural resources.³⁰ These practices do not automatically end when the peace process is underway, as these are often connected to transnational crime. Post-conflict Colombia provides a relevant example. With the signing of the 2016 peace agreement, the Fuerzas Armadas Revolucionarias de Colombia (FARC) agreed on a robust programme for the eradication of coca production that had financed its armed struggle. Yet, criminal syndicates stepped in and took over coca production in areas previously controlled by the FARC, thus increasing insecurity in the region and hampering efforts to restore the land as agreed upon by the Colombian government and the FARC.³¹ The demobilization of the FARC has further increased threats to the Amazon Forest. Deforestation has soared ever since the FARC abandoned its camps in the Amazon, with criminal syndicates mobilizing local populations to engage in slash and burn practices to free land for cattle ranching and palm oil plantations. This example shows that peace can also bring new challenges, which pose obstacles to the conservation of land.³²

A third pathway for land degradation ensues from (internal) displacement as a result of armed conflict. According to the UN High Commissioner for Refugees (UNHCR), ‘refugee activities such as uncontrolled fuelwood collection, poaching, and over-use of limited water supplies, add pressure to ecosystems in many regions, including some unique areas set aside by local governments as parks, reserves or even World Heritage Sites’.³³ Examples provided by the UNHCR include contamination of surface and ground water e.g., due to inadequate sanitary facilities and land degradation resulting from poor land-use practices.³⁴ According to an empirical study on the protection of the environment in armed conflict, the environmental degradation that ensues from massive displacement as a result of armed conflict may even exceed environmental destruction caused by the conduct of hostilities.³⁵

The post-conflict phase offers novel opportunities to reinstate previous protection regimes over existing conservation areas and to designate new conservation areas. The 2016 Colombian Agreement offers a good example of this, as it seeks to establish protected areas of ‘special environmental interest’, such as ‘forest reserve areas, areas of high biodi-

³⁰ See UNSC, ‘Maintenance of international peace and security: Root causes of conflict — the role of natural resources’ (16 October 2018) UN Doc. S/PV.8372, 2.

³¹ Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Situation of human rights in Colombia, UN (8 May 2020) Doc. A/HRC/43/3/Add.3, para. 39. Previous reports noted the risks for local communities and specifically human rights defenders ensuing from this situation. See Human Rights Council, Visit to Colombia: Report of the Special Rapporteur on the situation of human rights defenders (26 December 2019) UN Doc. A/HRC/43/51/Add.1, para. 71; and Human Rights Council (n 20) paras 38–43.

³² See Katie Jones et al., ‘GameChangers 2021: How Organized Crime Devoured the Amazon Rainforest’, *InSightCrime*, 28 December 2021; Lorenzo Morales, ‘Peace and Environmental Protection in Colombia: Proposals for Sustainable Rural Development’ (*Interamerican Dialogue*, January 2017); Gena Steffens, ‘In the Colombian Amazon, Peace has Environmental Consequences’ (*Global Post*, 3 May 2018).

³³ UNHCR, UNHCR Environmental Guidelines, August 2005, available at: <https://www.refworld.org/docid/4a54bbd10.html> (accessed 16 November 2020), at 5.

³⁴ *Ibid.*, at 7.

³⁵ International Law and Policy Institute, Protection of the Natural Environment in Armed Conflict: An Empirical Study, Report 12/2014 (2014), p. 5 in relation to the armed conflict in the DR Congo.

versity, fragile and strategic ecosystems, watersheds, moorland (*páramos*) and wetlands'.³⁶ Implementation of such provisions is not without risk, as the designation of protected areas can bring new tensions if it is done without involving local populations. These risks and the need to adopt a right-based approach to conservation were acknowledged in a (non-binding) 2016 Resolution adopted by the International Union for the Conservation of Nature (IUCN) on Prevention, management and resolution of social conflict as a key requirement for conservation and management of ecosystems.³⁷ Usually however, peace agreements are silent on the types of measures needed for nature conservation and refer more generally to environmental conservation. The 2012 Provisional Constitution of the Federal Republic of Somalia, for instance, determines that measures will be taken to 'reverse desertification, deforestation and environmental degradation, and to conserve the environment and prevent activities that damage the natural resources and the environment of the nation'.³⁸ The establishment of transboundary conservation areas, also called 'Parks for Peace', is furthermore a feature of several inter-state peace processes. The Cordillera del Condor Peace Transborder Reserve bordering Peru and Ecuador is an example of a transboundary conservation area that serves to promote peaceful relations between the two states.³⁹

The effects of armed conflict on land may also affect peacebuilding processes in other ways, as degraded land is not suitable for agriculture or other livelihood purposes. Environmental conservation measures may be essential to safeguard or restore the quality of the land, for instance for the purpose of preventing soil erosion and desertification. This is exemplified by the Arusha Peace and Reconciliation Agreement for Burundi, which determines that '[t]he policy of distribution or allocation of new lands shall take account of the need for environmental protection and management of the country's water system through protection of forests'.⁴⁰ A revolutionary example of nature restoration for the purpose of recovering degraded land is the Great Green Wall project, which aims to grow a belt of 8.000 km of trees across Africa, including in the conflict-ridden Sahel region.⁴¹ These examples clearly show how environmental conservation measures may contribute to land distribution programmes for the purpose of supporting local livelihoods.

3.3 Kick-starting the Economy Through Foreign Investment in Agriculture and the Extractive Industry

Natural resources, such as minerals, oil, gas and timber, but also land itself, provide huge potential to generate the funds necessary for post-conflict reconstruction and institution-building.

³⁶ See the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace of 24 November 2016 for Colombia, 1.1.10.

³⁷ IUCN, Prevention, management and resolution of social conflict as a key requirement for conservation and management of ecosystems, WCC-2016-Res-068-EN. See also IUCN, Conflict and conservation, Nature in a Globalised World Report No.1 (2021).

³⁸ Provisional Constitution of the Federal Republic of Somalia of 1 August 2012, Art. 45(3)(d).

³⁹ For a critical perspective on peace parks, see Elaine Hsiao, *Protecting Places for Nature, People and Peace: A Critical Socio-Legal Review of Transboundary Conservation Areas* (Doctoral dissertation, University of British Columbia, 2018).

⁴⁰ See Art. 8(h) of Protocol IV to the Arusha Peace and Reconciliation Agreement for Burundi of 28 August 2000.

⁴¹ See <https://www.greatgreenwall.org> accessed 22 March 2023.

Exploitation of such resources furthermore creates jobs, including for former combatants, helping them to reintegrate into society. For these reasons, natural resources are strongly associated with the delivery of 'peace dividends' – notably basic services and the creation of jobs – which help foster 'social cohesion and stability, build trust in the peace process and support the state to earn legitimacy under challenging conditions'.⁴² Attracting foreign direct investment (FDI) is considered one of the key means to help the state in delivering such peace dividends, since FDI can provide the advanced technical expertise and significant investments that are required for large-scale natural resources exploitation.

FDI in the natural resources sector can however also undermine peace processes. First, it can hamper the implementation of land rehabilitation, restitution and redistribution programmes. Liberia provides a relevant example, where timber concessions that were granted during the armed conflict had to be cancelled because these exceeded 2.5 times the total forest surface of this state.⁴³ Post-conflict Colombia provides another relevant example. The government currently experiences difficulties in implementing its ambitious land restitution programme for persons displaced during the armed conflict due to the transfer of the titles to these lands to foreign investors.⁴⁴ Furthermore, its ambitious environmental agenda has led to claims by investors who see the value of their investment diminished as a result of the strengthening of environmental regulation.⁴⁵

Second, FDI can further exacerbate tensions when the negative externalities are not offset by its positive effects. Most importantly, natural resources exploitation – if left unchecked – may cause serious pollution of the environment (e.g., by the release of chemicals in the soil and groundwater) and may compete with local demands for resources, most importantly arable land and water.⁴⁶ Colombia provides a relevant example. Improved access to regions that were previously controlled by the FARC has proven an incentive for the government to grant concessions for the exploitation of gold without adequately taking into consideration the broader implications for the peace process. This has led to a rapid decline of the forest cover in that region and increased levels of (mercury) pollution affecting the health and livelihood of local communities.⁴⁷ Post-conflict Cambodia provides another relevant example. State-sanctioned land grabbing, fed by endemic corruption, has resulted in the (forcible) removal of communities from their lands without adequate compensation or consideration of cultural ties of communities with their lands.⁴⁸ This example raises obvious questions about the role of

⁴² Erin McCandless, 'Peace Dividends and Beyond: Contributions of Administrative and Social Services to Peacebuilding', United Nations Peacebuilding Support Office (2012) 16.

⁴³ See Report of the Panel of Experts, submitted pursuant to paragraph 14 (e) of Security Council resolution 1607 (2005) concerning Liberia (7 December 2005) UN Doc. S/2005/745, para. 72.

⁴⁴ See Van Ho (n 3).

⁴⁵ See e.g., *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41 (2016). See further under section 4.

⁴⁶ Mining companies and agribusinesses use significant amounts of water and other raw materials (sand, rocks) for their production process. See C. Sigam and L. Garcia, 'Extractive Industries: Optimizing Value Retention in Host Countries', United Nations Conference on Trade and Development (UNCTAD 2012) 115.

⁴⁷ See e.g., Human Rights Council (n 21) para. 55, concluding that the 'rights to water, health and food are also negatively impacted by legal and illegal mining polluting rivers in various parts of the country, especially in areas affected by the armed conflict'.

⁴⁸ Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi, Addendum: A human rights analysis of economic and other land concessions in Cambodia (24 September 2012) UN Doc. A/HRC/21/63/Add.1, paras 138–145.

accountability mechanisms in holding governments and investors responsible and in providing remedies to the victims.⁴⁹ It furthermore demonstrates the tensions between (greed-driven) government policies promoting large-scale agriculture on the one hand and access to land for local communities on the other.

3.4 Appraisal

This section sets out the principal roles and functions that land performs as part of environmental peacebuilding, namely land (re)distribution and return of (dispossessed) land as an overriding concern for conflict resolution; the restoration of degraded land as an essential prerequisite for land restitution programmes and for safeguarding nature's capacity to provide ecoservices; and the contribution of land to economic reconstruction, with a focus on the role that foreign investment in land and soil performs in peacebuilding processes. This overview demonstrated that tensions exist both between and within these objectives.

The principal tensions that exist between the peacebuilding priorities discussed in this section relate to promoting large-scale economic development as a means to obtain peace dividends on the one hand and protecting the various functions that land performs for local communities on the other. Environmental conservation measures aimed at establishing protected areas may furthermore limit opportunities to use land for economic and social purposes and thereby contribute to tensions over land use. Tensions can also be found within peacebuilding priorities, notably in relation to land distribution. Competing claims between groups over access to land sometimes require difficult choices to be made, especially if the availability of land is limited. The following section zooms in on the role that international law plays in addressing these peacebuilding priorities and the tensions between them.

4. THE ROLE OF INTERNATIONAL LAW IN ADDRESSING PEACEBUILDING PRIORITIES CONCERNING LAND

International law plays an important role in regulating the peacebuilding priorities concerning land identified in the previous section, both as a normative and as an institutional framework. The current section assesses the functions that international law performs with respect to regulating land uses, assessing the obligations that it imposes on states in relation to each of the peacebuilding priorities and the mechanisms that it has created to assist states in fulfilling their obligations pertaining to land.

4.1 Regulating Access to Land for Communities and Individuals

As highlighted in Section 3.1, addressing disputes over access to (arable) land and over the dispossession of land (either by past political regimes or as a direct consequence of an armed conflict) is a vital aspect of the peacebuilding process. It is important to note that questions

⁴⁹ It is relevant to note that several NGOs have sent an open letter to the Office of the Prosecutor of the ICC in March 2021, urging the Prosecutor to start investigations on land grabbing in Cambodia. See https://www.fidh.org/IMG/pdf/cambodia_open_letter_to_icc_pros_16_march_2021.pdf accessed 22 March 2023.

relating to land and land rights in post-conflict situations are intertwined with questions of transitional justice and ‘undoing the past’.⁵⁰ An important objective of land policies in post-conflict situations after all is to undo harm that has been done to individuals and communities by the armed conflict, while many also address land inequality as a root cause of the armed conflict. At the same time, environmental peacebuilding is more forward-looking and geared towards creating opportunities for peace. In this sense, land policies can play an important role in bringing individuals and communities together, for instance as a means to reintegrate former combatants into society and by fostering inclusion of marginalized groups. This section will explore international legal norms and standards relating to property and subsistence rights and examine how these contribute to reconciling the various objectives of post-conflict land policies.

International human rights law is the primary framework of reference when it comes to identifying relevant obligations and standards for states relating to land ownership and use. Such obligations and standards also have relevance for the operations of corporations. It is for states to ensure that corporations operating within their jurisdiction do not infringe on the rights of others over land. This section discusses how such obligations have been given shape in international human rights law. Highly relevant in this respect is the new General Comment (GC) No. 26 of the Committee on Economic, Social and Cultural Rights (CESCR) on Land and Economic, Social and Cultural Rights. Even though the GC is not legally binding in itself, it nevertheless provides a good starting-point for a discussion of states’ human rights obligations with respect to land. This is so for two reasons. First, the GC synthesises several recent developments with respect to the human rights aspects of land governance.⁵¹ Second, it consolidates and builds on earlier work of the CESCR and other human rights bodies and courts on the relations between human rights and land governance.⁵² For these reasons, this section discusses the GC as the most up-to-date guidance on the relationship between human rights and land, while placing its findings in a broader perspective.

The GC clarifies that access to land is a precondition for the realization of several other rights included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), most notably the right to an adequate standard of living in Article 11 (including the right to adequate food, water and housing) and the right to health in Article 12.⁵³ Conversely, it also recognizes that ‘[t]he sustainable use of land is essential to ensure the right to a clean, healthy and sustainable environment and to promote the right to development’,⁵⁴ thereby

⁵⁰ Christine Bell, *Peace Agreements and Human Rights* (OUP 2003) 233.

⁵¹ See CESCR, General comment No. 26 (2022) on land and economic, social and cultural rights, UN Doc. E/C.12/GC/26, 23 January 2023. Relevant developments include the adoption by the Food and Agriculture Organization of the 2004 Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security; the adoption by the Committee of World Food Security of the 2012 Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security and of the 2014 Principles for Responsible Investments in Agriculture and Food Systems; and the adoption by the UN Human Rights Council of the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, A/HRC/RES/39/12.

⁵² See for a comprehensive discussion, Lorenzo Cotula, ‘Land’, in Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar 2016) 137.

⁵³ CESCR, General Comment No. 26 (n51), paras. 5–11.

⁵⁴ CESCR, General Comment No. 26 on Land and Economic, Social and Cultural Rights, Draft prepared by the Rapporteurs, Rodrigo Uprimny and Michael Windfuhr, available at <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCR-draft-GC-land.aspx>, para. 1.

emphasizing the importance of environmental conservation for the protection of human rights. This is crucial, as it implicitly recognizes that environmental conservation is a precondition for the realization of human rights.

Most relevant in relation to land distribution, the GC recognizes that '[p]articipation, consultation and transparency are key principles for the implementation of obligations arising from the Covenant, including in relation to land',⁵⁵ thereby emphasizing that individuals and communities (including indigenous peoples) must be actively involved in decision-making with respect to land related policies, including land transfers. This is significant, as participatory rights in relation to land governance have received little attention outside the context of indigenous peoples' rights and environmental matters.⁵⁶ The GC clarifies in this respect that states have obligations in this regard, more specifically that they 'should develop relevant laws, policies and procedures to ensure transparency, participation and consultation in relation to decision-making affecting land, including in relation to land registration, land administration and land transfers, as well as prior to evictions from land'.⁵⁷

The GC further sets out what states' obligations to respect, protect and fulfil Covenant rights entail with respect to land. Pursuant to their duty to respect relevant human rights, the GC identifies an obligation for states to recognize and respect existing access to land of all legitimate tenure right holders, without discrimination. The legal basis that is provided for this obligation can be found in the right to an adequate standard of living, which includes the rights to food and housing.⁵⁸ This underlines the close connections between access to land and basic subsistence needs and provides a *rationale* for prioritizing these needs over other land uses. The GC further points to an obligation for states to respect the rights of indigenous peoples over their lands, recognizing the special connections that these peoples have with their lands.⁵⁹ This obligation is partly grounded in the right to take part in cultural life, as included in Article 15 of the ICESCR.⁶⁰ Furthermore, it is important to note that regional human rights systems and the International Covenant on Civil and Political Rights (ICCPR) provide additional legal bases for the protection of indigenous peoples' land rights.⁶¹ These rights have further found recognition in the non-binding yet authoritative UN Declaration on the Rights of Indigenous Peoples.⁶² It can therefore be argued that international law provides a distinct normative

⁵⁵ Ibid., para. 20.

⁵⁶ There is a rich body of case law by regional human rights bodies with respect to indigenous peoples' right to free, prior and informed consent. See Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law* (Brill 2016). Participatory rights with respect to environmental matters have been included in the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 UNTS 447 and in the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, <https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf>, accessed 9 April 2023.

⁵⁷ General Comment No. 26 on Land and Economic, Social and Cultural Rights, para. 20.

⁵⁸ Ibid., para. 23.

⁵⁹ Ibid., para. 16.

⁶⁰ Ibid., para. 10.

⁶¹ For a discussion of the land rights of indigenous peoples under international law, including under regional human rights systems, see Jérémie Gilbert (n 56). It should further be noted that Art. 1 of the ICESCR includes the right to self-determination, including rights over natural resources. This provision arguably provides an additional legal basis for indigenous peoples' land rights.

⁶² UN Declaration on the Rights of Indigenous Peoples, (2 October 2007) UN Doc. A/RES/61/295.

framework for indigenous peoples' rights over land that can be enforced through recourse to human rights bodies, including regional human rights courts.⁶³ This is important in view of the marginalization of indigenous peoples in peace processes, as identified in Section 3.1.

While these obligations apply primarily in the relationship between a state and its population, the GC also clarifies that third states must:

refrain from actions that interfere, directly or indirectly, with the enjoyment of the rights under the Covenant in land related contexts outside their territories [and] to take specific measures to prevent their domestic and international policies and actions [...] from interfering, directly or indirectly, with the enjoyment of human rights.⁶⁴

This is a powerful message to third states to ensure that their policies with respect to areas such as investment, public finance and development cooperation do not infringe on subsistence rights of local communities in other countries. Furthermore, it again underlines the need to prioritize protection of individuals and communities that depend on land for their livelihood.

The duty to protect relevant rights under the ICESCR within the context of land governance requires states to protect individuals and communities against infringements of their tenure rights and access to land by third parties, notably investors.⁶⁵ In this respect, states are to take 'legislative and other measures to provide for clear standards for non-state actors such as business entities and private investors in the context of large-scale land acquisitions/leases at home and abroad'.⁶⁶ Crucially, this requires states to adopt a legal framework requiring mandatory due diligence.⁶⁷ Likewise, in the context of extra-territorial obligations for states, the GC points to an obligation for states to establish regulatory mechanisms and to prevent investors in the agri-business from depriving individuals or communities of access to land or subsistence resources.⁶⁸

The GC hereby breaks with the approach adopted by the 2011 UN Guiding Principles on Business and Human Rights as the principal normative framework for business and human rights, which concluded in the commentary that 'States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.'⁶⁹ The GC thereby takes a bold position, considerably strengthening states' obligations under international human rights law to respect the land rights of legitimate tenure holders, including through their investment policies.

⁶³ See Chapter 18 in this volume for a discussion of relevant judgments by regional courts.

⁶⁴ General Comment No. 26 on Land and Economic, Social and Cultural Rights, para. 41.

⁶⁵ See General Comment No. 26 on Land and Economic, Social and Cultural Rights, paras 26–31.

⁶⁶ *Ibid.*, para. 30.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, para. 43.

⁶⁹ Human Rights Council, Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011) UN Doc A/HRC/17/31, p. 2. The CESCR hereby also strengthens its own position set out in its GC on state obligations in the context of business activities, adopted in 2017. See CESCR, General comment No. 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (10 August 2017) UN Doc. E/C.12/GC/24.

The duty to fulfil rights under the ICESCR within the context of land governance, finally, focuses on ameliorating the position of the landless and the poor. The GC identifies an obligation for states to ‘facilitate secure, equitable and sustainable access to, use of and control over land for those who depend on land to realize their economic, social and cultural rights’, in particular those who are landless or live in poverty.⁷⁰ This obligation is intrinsically connected to subsistence needs and therefore the rights to food, housing and an adequate standard of living. This obligation is crucial in relation to land reform programmes as part of peacebuilding, as an objective of many of these programmes is precisely to address structural inequalities with respect to land tenure and ownership as root causes of or triggers for armed conflict. It however also flags the difficulties that post-conflict countries face, as the obligation to fulfil within the context of land governance must be realized while observing the obligation to respect. In other words, redistribution of land, for instance to address structural inequalities, must not infringe on existing land rights.

This epitomizes a problem which is inherent in international human rights law, namely that it does not propose solutions for balancing claims between individuals and groups as beneficiaries of land policies.⁷¹ While international human rights law is helpful in prioritizing the needs of vulnerable and marginalized groups over other land users, it is not useful in deciding to whom priority should be given when the availability of land is limited. The GC attempts to provide some guidance in this respect. In a separate section on armed conflicts and post-conflict situations, it posits that post-conflict states have an obligation to ‘establish restitution programs to guarantee to all internally displaced persons (IDPs) the right to have restored to them any land of which they were arbitrarily or unlawfully deprived’ when land dispossession occurred during the armed conflict.⁷² It however also leaves open the possibility to compensate IDPs for the loss of property as a fall-back solution, provided restoration is not an option.⁷³ This may be helpful in relation to addressing conflicts between persons who have fled as a consequence of the armed conflict and those who have occupied the deserted plots of lands since (secondary occupants).

⁷⁰ General Comment No. 26 on Land and Economic, Social and Cultural Rights, para. 32.

⁷¹ See Bell (n 50) at 234.

⁷² See General Comment No. 26 on Land and Economic, Social and Cultural Rights, para. 48. It should be noted that there is no corresponding obligation under international law for persons displaced as a consequence of non-international armed conflicts. Whereas the 1949 Geneva Conventions contain some provisions that are relevant to relocation of displaced persons (including Art. 63 of Geneva Convention I, Art. 62 of Geneva Convention II, and Arts 36, 127, 132 and 134 of Geneva Convention IV), these provisions are very limited in scope and apply only in relation to international armed conflicts. Relevant provisions for persons displaced as a consequence of non-international armed conflict are missing in the Geneva Conventions and their Protocols. The only international legal instruments that could provide a basis for the obligation identified in the GC in the context of internal armed conflicts concern the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), which applies only to the African region, and the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, which is not legally binding.

⁷³ See General Comment No. 26 on Land and Economic, Social and Cultural Rights, para. 50. The GC thereby builds on the Advisory Opinion by the International Court of Justice on the Israeli Wall, which held that Israel was under an obligation to return the land seized for the construction of the wall and, if restitution was not possible, to compensate land owners from the damage suffered. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para. 153.

4.2 Regulating the Rehabilitation and Conservation of Soil

Section 3.2 identified three pathways to land degradation as a result of armed conflict, namely hostilities, illegal exploitation of natural resources and human displacement. It also noted that the majority of armed conflicts take place in and around biodiversity hotspots, demonstrating the impact of armed conflict on nature conservation. The current section examines the international legal framework that applies to the rehabilitation and conservation of soil. While this analysis is primarily based on a study of the applicable rules, including their shortcomings, it is also relevant to draw attention to ongoing work to develop the international legal framework. Highly relevant in this regard is a recently concluded study on protection of the environment in relation to armed conflict, conducted by the International Law Commission and resulting in the adoption of a set of draft principles in 2019.⁷⁴ These draft principles represent an effort to codify existing obligations and best practices for states, international organizations and armed groups with respect to the prevention and remediation of conflict-related environmental harm and are based on in-depth research of the applicable international legal framework. Some of the principles are directly relevant for post-conflict land rehabilitation and are therefore referenced in the analysis.

Any attempt to rehabilitate degraded land should start with an assessment of the harm that has been inflicted during the armed conflict. Such assessments are important for defining and prioritizing needs, to determine the impact of environmental harm on human health and the environment and to decide on the most adequate approach to remediate the harm caused.⁷⁵ Environmental assessments should be distinguished from the environmental impact assessments that have been recognized by the International Court of Justice as an important precondition for and inherent part of the customary duty to prevent transboundary environmental harm.⁷⁶ An important difference between the two mechanisms is related to their purpose. While the purpose of environmental impact assessments is to assess risks for the environment (of other states) stemming from (economic) projects that a state plans to undertake, environmental assessments primarily serve to ‘ensure that natural resource management and environmental governance needs are reflected in post-conflict relief, recovery, and development plans’.⁷⁷

A rich practice in relation to post-conflict environmental assessments has developed over the years, notably under the auspices of UNEP.⁷⁸ According to a study by Conca and Wallace, land degradation was part of the assessment in Afghanistan, the DR Congo and Rwanda, while land conflicts and land tenure were included in the environmental assessments in the

⁷⁴ Report of the International Law Commission to the Seventy-First Session (20 August 2019) UN Doc A/74/10.

⁷⁵ See David Jensen, Evaluating the Impact of UNEP’s Post-Conflict Environmental Assessments, in David Jensen and Steve Lonergan (n 27) 19–20.

⁷⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, para. 204; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, para. 104.

⁷⁷ David Jensen, ‘Evaluating the Impact of UNEP’s Post-Conflict Environmental Assessments’, in David Jensen and Steve Lonergan (n 27) 17.

⁷⁸ Ibid.; and Ken Conca and Jennifer Wallace, ‘Environment and Peacebuilding in War-Torn Societies: Lessons from the UN Environment Programme’s Experience with Post-Conflict Assessment’, in David Jensen and Steve Lonergan, *ibid.*, 63.

Central African Republic, the DR Congo and Sierra Leone.⁷⁹ These assessments are usually conducted on the initiative of the respective states themselves and are voluntary in nature. The voluntary nature of such assessments is also reflected in the wording of Principle 25 of the ILC draft principles on protection of the environment in relation to armed conflict, addressing post-armed conflict environmental assessments and remedial measures. Instead of formulating an obligation or best practice with respect to such assessments, the Principle focuses on cooperation between relevant actors, which may encompass armed groups, civil society and international organizations, in addition to states.⁸⁰

Specifically in relation to remediating environmental harm caused by hostilities, for instance the removal of landmines or other explosive remnants of war, relevant obligations derive first and foremost from weapons conventions. Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices to the Convention on Certain Conventional Weapons, for instance, contains several relevant obligations for parties to an armed conflict in relation to minefields, mined areas, mines, booby-traps and other devices, including record keeping, sharing information and clearing such devices after hostilities have ended.⁸¹ Similar obligations exist for conventional munitions containing explosives other than those covered under Protocol II (explosive remnants of war), anti-personnel mines and cluster munitions.⁸² It is important to note that these obligations also apply to armed groups.⁸³

While the legal regime for explosive remnants of war is well developed, this is less so for toxic remnants of war. These can be defined as ‘any toxic or radiological substance resulting from military activities that forms a hazard to humans or ecosystems’.⁸⁴ As a minimum, the Chemical Weapons Convention, which has achieved near universal ratification, prohibits the development, use, stockpiling and transfer of chemical weapons, such as herbicides.⁸⁵ States have an obligation to destroy all chemical weapons located in their jurisdiction or left behind

⁷⁹ Ibid., Table 1, 66. Indirectly, land degradation was also part of the assessment in other states, e.g., in Liberia, where the assessment included deforestation.

⁸⁰ Principle 25 states as follows: ‘Cooperation among relevant actors, including international organizations, is *encouraged* with respect to post-armed conflict environmental assessments and remedial measures.’ ILC Report 2019, 288, emphasis added.

⁸¹ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 2048 UNTS 93, Arts 9 and 10.

⁸² Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V), 2399 UNTS 100, Arts 3–5; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 211, Art. 5; and Convention on Cluster Munitions, 2688 UNTS 39, Art. 4.

⁸³ The scope of the Conventional Weapons Convention and its Protocols was extended to non-international armed conflicts following an amendment of Art. 1 in 2001. See <https://www.un.org/disarmament/the-convention-on-certain-conventional-weapons/> accessed 22 March 2023.

⁸⁴ Doug Weir, ‘Reframing the Remnants of War: The Role of the International Law Commission, Governments, and Civil Society’, in Carsten Stahn, Jens Iverson, and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (OUP 2017), 443.

⁸⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1975 UNTS 45. The Convention has 193 parties.

by them on the territory of other states.⁸⁶ This obligation extends also to production facilities. However, several state parties still possess such weapons. Furthermore, the relevant obligations do not bind countries such as North Korea, which has never joined the Convention and is believed to possess a vast arsenal of chemical weapons.⁸⁷ There are therefore ample opportunities for these weapons to be used, either by states themselves or by armed opposition or terrorist groups. In fact, a Fact-Finding Mission of the Organization for the Prohibition of Chemical Weapons has found evidence that such weapons were used in the armed conflict in Syria.⁸⁸ Furthermore, chemical weapons are not the sole cause of pollution caused by hostilities. As highlighted in the definition of toxic remnants of war, pollution can also be a result of the use of conventional weapons, such as chemicals released by the bombardment of an industrial complex or oil fires caused by the bombing of refineries. It is evident that the leaking of chemical substances in the soil has serious adverse effects on the quality of the soil and groundwater and, consequently, harms the ecosystems of which these are part. Nevertheless, there are no conventional obligations in place to address such pollution.⁸⁹

Cognizant of the environmental harm caused by toxic remnants of war, Principle 27 of the ILC draft principles on protection of the environment in relation to armed conflict states in general terms that parties to an armed conflict 'shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment'.⁹⁰ The commentary however does not provide information on the legal basis for such an obligation. A potential legal basis can be found in international environmental law, namely in the polluter pays principle. While this principle is geared towards establishing a system of liability ensuring that remedial costs are borne by the polluter (often non-state actors), it also serves to underline a more general obligation for states and non-state actors to remediate pollution caused by them.⁹¹ The polluter pays principle is also pertinent with respect to other forms of conflict-related pollution, including in relation to conflict-sustaining activities such as natural resources exploitation.

However, in practice it is not always possible or useful to approach conflict-related pollution exclusively from the perspective of liability or in terms of obligations. This is especially so when the causal nexus is unclear and/or when parties to the armed conflict have limited capacity to remedy the harm. Arguably, international environmental agreements can play a useful role here by offering an institutional framework for cooperation that supports parties to an armed conflict in fulfilling their obligations with respect to remediating conflict-related pollution. Relevant agreements include the UN Convention on Biological Diversity for the conservation of soil biodiversity, the UN Framework Convention on Climate Change in relation to soil's capacity to sequester carbon, the UN Convention to Combat Desertification for the prevention of land degradation, the Ramsar Convention on Wetlands of International Importance in relation to the conservation and wise use of wetlands and the UNESCO

⁸⁶ Ibid., Art. I.

⁸⁷ See <https://www.nti.org/analysis/articles/north-korea-chemical/> accessed 22 March 2023.

⁸⁸ See <https://www.opcw.org/fact-finding-mission> accessed 22 March 2023, for an overview of the reports issued by the mission.

⁸⁹ See on this Weir (n 84), 438.

⁹⁰ ILC, Report of the International Law Commission to the Seventy-First Session (20 August 2019) UN Doc A/74/10, 214.

⁹¹ See Priscilla Schwartz, 'Principle 16', in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015) 429.

World Heritage Convention with respect to the conservation of natural heritage and cultural landscapes.⁹² However, while some of the obligations formulated by these agreements are directly relevant for soil rehabilitation, they leave much discretion to states. Article 8 of the Convention on Biological Diversity, for instance, contains an obligation for states to rehabilitate and restore degraded ecosystems, but only ‘as far as possible and as appropriate’.⁹³ Furthermore, while many international environmental agreements contain mechanisms for technical and financial assistance and capacity-building frameworks to help states to achieve the agreements’ objectives,⁹⁴ their effectiveness depends on the capacity of treaty bodies and other state parties to these agreements to provide the necessary support. As such, these mechanisms and frameworks can play an important role in supporting states to rehabilitate and conserve soil, but mostly in a facilitative role. International environmental agreements are incentives-based and rarely contain enforcement mechanisms.⁹⁵

4.3 Regulating Foreign Investment

Based on the understanding that attracting foreign investment is key to post-conflict economic recovery and is therefore first and foremost beneficial to the peace process, section 3.3 identified several ways in which land-intensive foreign investment, such as in the agri-business and extractive sectors, risks to undermine the peace process. A first problem that was identified relates to the way in which existing land concessions hamper the implementation of land restitution and redistribution programmes. This raises questions as to the implications of international investment law for decisions to annul concessions as part of peace processes. A second problem presents itself when the negative externalities of foreign investment (such as its impact on the environment and on access to land and water for local communities) are not offset by its advantages (economic and social development), thereby decreasing popular support for the peace process. This raises the question of whether and under what circumstances international investment law permits a host state to modify the conditions under a land concession agreement to address social and environmental concerns when no relevant clauses have been included in the agreement.

This section explores these questions in turn. Yet, it is important to observe from the outset that the primary aim of international investment law is to ensure a stable investment climate and therefore to protect investors from decisions by or conditions in the host state that could negatively affect their position and/or diminish the value of their investment. Its focus is there-

⁹² See also International Law Association, *The Role Of International Law In Sustainable Natural Resources Management For Development*, Final Report, Kyoto Conference (2020) 25–27.

⁹³ Convention on Biological Diversity, 1760 UNTS 79, Art. 8(f).

⁹⁴ See for instance under the Convention on Biological Diversity, International Initiative for the Conservation and Sustainable Use of Soil Biodiversity: Framework for Action, Annex to COP 8 Decision VIII/23 on Agricultural Biodiversity, UNEP/CBD/COP/DEC/VIII/23, 15 June 2006; and Review of the International Initiative for the Conservation and Sustainable Use of Soil Biodiversity and Updated Plan of Action, Subsidiary Body on Scientific, Technical and Technological Advice, CBD/SBSTTA/24/CRP.5, 26 May 2021. See on the role of multilateral environmental agreements in environmental peacebuilding also Chapter 10 in this volume.

⁹⁵ Exceptions include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 UNTS 243 and 1987 Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3.

fore on establishing standards of protection for investors, to be guaranteed by the host state. Investment agreements furthermore create the possibility for investors to make this protection effective through recourse to international arbitration.⁹⁶

For land-related issues in post-conflict situations, two standards are of particular relevance. The first relates to the modalities for expropriation. International investment law prescribes that investments may only be expropriated for public purposes, in respect of due process, in a non-discriminatory manner and against adequate compensation.⁹⁷ These standards are highly relevant for situations in which a post-conflict state seeks to expropriate land or annul concessions thereon which were awarded prior to or during the armed conflict. While it will be relatively easy to justify the public purposes served with the annulment of concessions situated on land destined for land redistribution and restitution programmes or for the protection of a biodiversity rich area, the requirement of non-discrimination can be more problematic in relation to land reform programmes.⁹⁸ Furthermore, the compensation that is due to the investor may impose too high a burden on a country recovering from armed conflict. This problem is however of a practical nature and does not signal a normative clash between land redistribution or restitution programmes on the one hand and investment protection on the other. After all, investment law does not oppose expropriation for public purposes such as land redistribution or restitution. The problem instead seems to relate to competing conceptions of justice and fairness when it comes to the financial implications of expropriation. Where international investment law adheres to market value as an appropriate standard for compensation, international human rights bodies have pleaded for more flexibility, based on a balancing exercise between the rights of investors and the public interest at stake.⁹⁹

The question can further be raised whether compensation for expropriation is required in all circumstances. A distinction should be made in this respect between land redistribution and land restitution. Whereas land redistribution seeks to address inequities with respect to land tenure, favouring marginalized groups that historically did not possess land, land restitution programmes seek to return land to landowners that have historical claims. It can be argued that investors acquiring land in conflict-affected states assume risks if they do not conduct proper due diligence when making the investment, even if they acquired the land from the appropriate authorities. This argument is intrinsically connected with the second standard that is relevant for land-related issues in post-conflict settings, namely the fair and equitable treatment (FET) standard that is included in most investment agreements. This standard requires *inter alia* that host states respect the legitimate expectations of investors. As a consequence, the arbitral tribunal in *Parkerings v. Lithuania* determined that investors have a 'right to a certain stability and predictability of the legal environment of the investment'.¹⁰⁰

⁹⁶ See Chapters 13 and 16 in this volume.

⁹⁷ These conditions are included in the majority of bilateral investment treaties. See for instance Art. 12(1) of the Netherlands Model BIT of 22 March 2019.

⁹⁸ See Dunia P. Zongwe, 'The Contribution of Campbell v. Zimbabwe to the Foreign Investment Law on Expropriations', Comparative Research in Law & Political Economy, Research Paper No. 50/2009.

⁹⁹ See Cotula (n 52) at 147–48.

¹⁰⁰ See *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) para. 333, as reported in Eric De Brabandere, 'Jus Post Bellum and Foreign Direct Investment: Mapping the Debate' (2015) 16 *The Journal of World Investment and Trade* 590, 599.

The FET standard is highly relevant for situations in which a post-conflict state wishes to review the conditions relating to a land concession for the purpose of offsetting (some of) the negative externalities of an investment. A key example would be a decision to limit an investor's access to scarce water resources in favour of local communities. Another example would be for a host state to demand additional safeguards from an investor or impose limitations on the rights of an investor for the purpose of preventing damage to a nearby cultural heritage or a nature reserve. Several cases against Colombia are currently pending in relation to the Constitutional Court's decision to ban mining in high-altitude wetlands that are the country's main water source.¹⁰¹ Another example would be to impose upon investors an obligation to demonstrate that the land that they acquired was not dispossessed as a consequence of the armed conflict, such as is required under the Colombian land restitution programme as a condition for compensation.¹⁰² These examples raise important questions regarding the circumstances in which investors would be able to claim that their legitimate expectations with respect to land usage rights have been violated in post-conflict settings. What may be considered to fall under the investor's legitimate expectations is context specific and premised on the investor conducting adequate due diligence.¹⁰³ Factors such as the political situation in a country at the time the concession was negotiated, good faith on the part of the investor, the legal status of the authorities granting the concession and the conditions set out in the contract between the authorities and the investor (most importantly whether stabilization or freezing clauses have been included) may be relevant for determining whether a particular investor's legitimate expectations have been breached. The fact that a state is in transition from an armed conflict to peace raises the bar for claiming a breach of legitimate expectations.¹⁰⁴ Nevertheless, this leaves ample situations in which investors' rights will compete with the rights of local commu-

¹⁰¹ These claims are based on a breach of the fair and equitable treatment standard and on indirect expropriation. See *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41 (2016); *Galway Gold Inc. v. Republic of Colombia*, ICSID Case No. ARB/18/13 (2018); *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23 (2018).

¹⁰² Satisfaction of this requirement is a condition for receiving compensation under Colombian domestic law. The restitution program raises issues both in relation to expropriation and the FET standard. See Rafael Tamayo-Alvarez, 'Colombia's Land Restitution Programme and International Investment Law: Normative Tensions and Possible Convergences concerning Investor Diligence' (2018) 15 *Manchester Journal of International Economic Law* 114.

¹⁰³ See de Brabandere (n 100) at 599–600.

¹⁰⁴ This is exemplified by the facts underlying *Parkerings v. Lithuania*. The arbitral tribunal in this case considered that 'legislative changes, far from being unpredictable, were in fact to be regarded as likely' because Lithuania was transitioning from being part of the Soviet Union to becoming a member of the European Union and therefore 'no expectation that the laws would remain unchanged was legitimate'. See *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 335. It is however important to note that the relevant agreement did not include stabilization clauses. For a discussion of the relativity of the legitimate expectations standard and of the due diligence obligations for developing host states with respect to the related full protection and security standard, see also Eric de Brabandere, 'Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity' (2017) 18 *Journal of World Investment and Trade* 530, at 550–54. See more generally on due diligence obligations of investors, Aniruddha Rajput, 'Due Diligence in International Investment Law: From the Law of Aliens to Responsible Investment', in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020).

nities or are incompatible with environmental conservation. International law does not offer a coherent framework to address these tensions.

4.4 Appraisal

This section examined the international legal framework that applies to the three peacebuilding priorities discussed in section 3. The purpose of this section was to determine whether and to what extent international law offers a coherent framework for addressing land as part of environmental peacebuilding.

International human rights law and, to a lesser extent, the law of armed conflict are the most relevant international legal regimes in relation to land (re)distribution and return of (dispossessed) land as a first peacebuilding priority. International human rights law plays an important role in ensuring that vulnerable groups have access to land for livelihood purposes. It also provides protection to the land rights of indigenous peoples and advocates participation of local communities in decision-making. However, international human rights law also contains important gaps, including most importantly a lack of guidance with respect to deciding between various claims by holders of land rights (whether statutory or customary). International human rights law does not have an adequate formula for addressing these competing claims. Furthermore, the rights of individuals and communities may also conflict with the rights of international investors, raising questions about the interplay between international human rights law and international investment law. Likewise, access to arable land may be impaired as a consequence of the presence of explosive or toxic remnants of war or by other types of conflict-related pollution.

International weapons law and international environmental law are the primary international legal frameworks in relation to restoring degraded land as a second peacebuilding priority. It is important to note that there are relatively few hard obligations with respect to the rehabilitation and conservation of soil. Whereas weapons conventions impose specific obligations on parties to an armed conflict to remove explosive remnants of war, there are no rules in place that address toxic remnants of war or other types of conflict-related pollution. International environmental agreements can play an important role in filling these gaps, primarily by offering a facilitative framework for action. This facilitative framework is also useful for realizing broader environmental ambitions included in peace agreements, such as the establishment of protected areas. However, the facilitative nature of international environmental agreements makes them vulnerable in the face of opposition, for instance when states are not motivated to address environmental harm or when environmental conservation measures clash with the rights of individuals, communities or investors.

Finally, international investment law is of prime importance in relation to economic recovery as the third peacebuilding priority. This body of law provides strong protection to investors, notably because it offers them legal avenues to bring claims against the host state when its policies impact on (the value of) the investment. In practice, investment protection can constitute a practical hurdle for post-conflict states with respect to addressing the other two peacebuilding priorities. This is because the amount of financial compensation that is due for the loss or devaluation of an investor's property can be substantial. This problem is difficult to resolve without corroding the foundation of international investment protection. Nonetheless, the obligation for investors to conduct due diligence when making an investment is an important counterweight for bad faith claims.

All-in all, it could be argued that international law does not provide a coherent framework for addressing land governance in the aftermath of armed conflict. While the legal regimes governing international human rights protection, environmental conservation and investment protection are mutually supportive in some respects, there are also tensions between these sets of rules and their objectives. Measures taken for the restoration and rehabilitation of degraded land, for instance, contribute to making land suitable for productive purposes, such as agriculture and mining. In this sense, the objectives are mutually supportive. At the same time, environmental conservation measures, such as those taken for the protection of biological diversity, reduce the availability of land for productive purposes, thereby conflicting with the objectives of international human rights and investment law. Likewise, tensions can exist between the rights of individuals, local communities and investors with respect to land rights. The following section explores the notion of environmental peacebuilding as a means to mainstream international legal responses for the purpose of reducing tensions between peacebuilding priorities and the normative frameworks governing them.

5. TOWARDS AN INTEGRATIVE APPROACH: FOSTERING INTERACTIONS AND ADDRESSING TENSIONS

This chapter has discussed the principal peacebuilding priorities related to land and the normative frameworks that apply to them. It concluded that tensions exist between and within peacebuilding priorities and that international law does not offer a coherent framework for addressing these tensions. This section zooms in on the contribution of environmental peacebuilding to mainstreaming international legal responses for the purpose of achieving a sustainable peace. Environmental peacebuilding seeks to ensure that natural resources management and environmental protection contribute to sustainable peace and development instead of armed conflict. Its two main objectives are addressing the connections between environmental factors and the root causes of an armed conflict on the one hand and reconciling communities through cooperation in natural resources management and environmental protection on the other. The question can be raised whether and to what extent such an approach fosters an integrative approach to land governance in the aftermath of an armed conflict.

Using an environmental peacebuilding approach implies that natural resources management and environmental protection are viewed through a peace and security lens. Using this lens has two important implications. The first is that it mobilizes particular actors, most importantly the UN Security Council and regional security arrangements. The second is that it places emphasis on the peace and security aspects of natural resources management and environmental protection. The implications of an environmental peacebuilding approach to land become clear when examining the resolutions of the UN Security Council relating to land. A major empirical study by Aldinger, Bruch and Yazykova reveals that the 32 resolutions mentioning land that were adopted between 1946 and 2016 focus on resolving disputes over title to land.¹⁰⁵ More recent resolutions also address land degradation and desertification within the context of

¹⁰⁵ Peter Aldinger, Carl Bruch and Sofia Yazykova, 'Revisiting Securitization: An Empirical Analysis of Environment and Natural Resource Provisions in United Nations Security Council Resolutions, 1946–2016', in Ashok Swain and Joakim Öjendal (eds), *Routledge Handbook of Environmental Conflict and Peacebuilding* (2018) 143, at 152–53.

ecological factors that act as drivers of armed conflict and emphasize the need for the adoption of risk management strategies relating to these factors.¹⁰⁶

In conclusion, the principal contributions of an environmental peacebuilding approach to land are threefold, namely to channel the attention of policy-makers to risk factors stemming from land, to facilitate solutions to addressing these risk factors and to foster cooperation over land issues as a means to reconcile communities and build trust. In this sense, environmental peacebuilding provides a distinct lens for mainstreaming international legal responses to peacebuilding priorities related to land governance. As such, it provides important building-blocks for a truly integrative approach, which offers a more comprehensive perspective on the myriad functions that land performs in society.

¹⁰⁶ See e.g., UNSC, UN Security Council Resolution No. 2349 (31 March 2017) on Peace and security in Africa (31 March 2017) UN Doc. No. S/RES/2349 (2017) para. 26.