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OPENING ADDRESS AT THE COLLOQUIUM 'GOOD GOVERNANCE IN LAND TENURE' HELD AT POTCHEFSTROOM ON 22 AND 23 APRIL 2010 LAND TENURE AND GOOD GOVERNANCE FROM THE PERSPECTIVE OF INTERNATIONAL LAW

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LAND TENURE AND GOOD GOVERNANCE FROM THE PERSPECTIVE OF INTERNATIONAL LAW

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1 Introduction

Addressing land tenure from the perspective of international law is challenging, not least because there are hardly any legally binding international instruments which explicitly address the issue.

This may be surprising when one thinks of the global importance of land as a natural resource, the scarcity of which is increasingly felt with the dramatic, ongoing increase in the human population. Such population expansion has already led to an increased usage of resources and is often linked to threats to the ecosystem. Since the Earth's land mass cannot reasonably be increased, and instead seems to be in decline (one needs only to take into account the effect of rising sea levels on small island states), disputes about the land needed for productive purposes of all kinds will by their nature become issues of international concern. In 2008, as corn and soybean prices hit record highs and the United Nations predicted that prices would continue to rise, the UN Food and Agriculture Organisation's food summit was hit by a controversy surrounding the use of food crops for biofuels. Even if non-edible crops are used for fuel, a controversy about land use may easily result, unless it can be shown that the production of non-food crops for conversion to biofuel is performed on low-grade soil and on otherwise non-croppable land, thus providing a renewable energy source without competing with food crops. Jatropha may be an example.

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The lack of legally binding international instruments on land tenure is less surprising if one takes into account that, as a matter of customary international law, states enjoy sovereignty over natural resources within their territory, which obviously includes the land within their borders. Disputes about (private) land ownership, access to land and land use, have thus often been considered to be matters of exclusively national concern, to be addressed by national law within the context of national policy considerations. Land reforms have rarely become the object of international legal disputes, with the exception of those which were related to trans-border expropriations. As this latter reference already makes clear, disputes over land have reached the level of international law only if property rights were at stake. And even then it must be noted that property rights have rarely been included as a human right in international law. Disputes related to expropriations, with the exception of those addressed on the basis of individual claims raised within the arbitral framework of the International Centre for the Settlement of Investment Disputes, and those handled by appropriate regional human rights institutions, have in the first place been addressed between states. Indeed, more recently it has primarily been international investment law that has provided the background for international rules on the protection of private property. However, this provides limited insights into the overall problems of land tenure, among others, because investment law always involves a trans-boundary element.

The lack of legally binding international instruments which explicitly address the issue of land tenure does not mean that international law is tacit on land tenure. Indeed, it is not! However, since international legal instruments only implicitly affect land tenure, the identification of applicable rules is difficult and will not be dealt with comprehensively in this opening address. The purpose of this opening address is to illustrate some of the indirect affects international law may have on land tenure and to briefly discuss to what extent international considerations of good governance have an impact on land tenure, even though it may be equally difficult to locate and identify the concept of good governance in public international law. Before addressing land tenure from the perspectives of international environmental law, internationally guaranteed indigenous rights, and international standards of good governance, it

may be helpful to briefly define the concept of land tenure as applied in this opening address.

Rather than simply relying upon a definition taken from one particular system of municipal law, it seems plausible to rely upon work done by the Land and Water Division of the Natural Resources Management and Environment Department established within the FAO as of January 2007 and its predecessors within the FAO. In its guide on *Land Tenure and Rural Development*, published in 2002 as the third paper in the *Land Tenure Studies* series, the Organisation submits that land tenure is "the relationship, whether legally or customarily defined between people, as individuals or groups, with respect to land". This definition includes formal legal rights as well as customary rights. It is also important to note that the expression "land tenure" was originally a legal term that means the right to hold land rather than the simple fact of holding it. "Tenure" is derived from the Latin term "tenere" which means "to hold", and the legal concept was introduced into common law after 1066, following the conquest of England by the Normans. With their Roman law-oriented tradition and their human rights approach, Europe and North America have continuously focused on private property rights. Another aspect is noteworthy, in particular, when discussing the international aspects of land tenure: ownership is not the only type of land tenure right. One of the other important rights is the right of a "tenant", in return for the payment of some type of "rent", to use the land. Typically, the underlying agreement will specify the use or uses to which the land will be put and will also specify the mutual obligations of the parties. Outside the (North-Western) hemisphere, there still are some jurisdictions which have rejected the notion of private land. In the African context land was sometimes nationalised in order to assert governmental power over traditional chiefs and to allow the developmental distribution and use of land. Nevertheless, even in such systems individuals have typically been granted long-term use rights. On the other hand, even in countries that permit private land ownership, large areas of land may remain in state ownership. Land reforms have often not looked into the medium term needs of the country, but have instead been motivated by short-term policy objectives. What is decisive, however, is that the use of land is for the general benefit, ie that it should respond to concerns relating to food security and poverty alleviation. Finally, it is important to

realise that land tenure is concerned with far more than ownership, lease and use rights. Due to its immovable nature, land is frequently subject to numerous simultaneous uses, claims and legal rights.

All of these relationships can, in principle, be looked into in the context of land tenure legislation - and all of them are, as a matter of principle, subject to international law and to the principles of good governance.

2 Land tenure and international environmental law

When addressing land tenure from the perspective of international environmental law, the focus is on soil much more than on land: At the national level, soil law means a body of law to promote soil conservation, enacted by a legislature; internationally, the legal framework for the conservation of soil can include conventions, protocols, agreements, and covenants, which are expressed as being legally binding.

While soil has always been considered important as the basis for agricultural production and for food supply and as the ground upon which human beings establish their dwellings, its specific environmental vulnerability has only recently become a matter of concern. As the top layer of the earth's crust, soil is formed by mineral particles, organic matter, water, air and living organisms. It is therefore an extremely complex, variable and living medium. It is a non-renewable resource with many vital functions apart from the production of food and other biomass. Soil allows for the storage, filtration and transformation of many substances including water, carbon and nitrogen, and it is a habitat and gene pool. Erosion, the loss of organic matter, salinisation, landslides, contamination, and sealing are only some kinds of soil degradation that can be mentioned, all of them having negative effects not only on human health but also on ecosystems, climate change and the economy.

Early efforts to protect soil can be found in the 1971 Ramsar Convention, which lays down obligations to preserve and maintain wetlands. The Convention, which was negotiated against the background of the increasing loss and degradation of wetland

habitat for migratory water-birds, protects particular sites but it also addresses their resources.

An important regional instrument which can serve to a certain extent as a model for the protection of soil in particularly vulnerable ecosystems is the Convention on the Protection of the Alps (the Alpine Convention) of 7 November 1991 with its Protocol on the Implementation of the Alpine Convention of 1991 in the Field of Soil Conservation (Soil Conservation Protocol) of 16 October 1998. The Convention itself is a framework agreement. It only sets out the basic principles of all of the activities under the Convention and lays down general measures for sustainable development in the Alpine region (article 2 of the Alpine Convention). More detailed obligations are laid down in a number of protocols (article 11 of the Alpine Convention) which have been adopted since its inception. As can be taken from article 2(1) of the Alpine Convention, parties:

> shall pursue a comprehensive policy for the preservation and protection of the Alps by applying the principles of prevention, payment by the polluter (the “polluter pays” principle) and cooperation, after careful consideration of the interests of all the Alpine States, their Alpine regions and the European Economic Community, and through the prudent and sustained use of resources.

The Convention envisages intensified trans-border cooperation to this end.

The object and purpose of the Soil Protocol is to preserve the Alpine soil in a sustainable manner in order to allow it to perform its natural function, its historic function ("as an archive of natural history and the history of civilisation") and a variety of socio-economic functions, including agricultural use, human settlement and tourism activities, other commercial usages, and its capacity as a source of raw materials (article 1 of the Soil Conservation Protocol). Article 1(2) of the Protocol underlines the "ecological functions of soil" which must be safeguarded and preserved. It also promotes the restoration of impaired soils. While the Protocol focuses on utilisation, article 2(2) thereof clarifies that protection shall be given priority over utilisation if "there is a risk of serious and sustained damage to the functionality of soils". The Protocol follows an integrated (article 3) and a participatory approach (article 4). Specific measures include the designation of protected areas

(article 6), the development of plans and programmes for the economic and prudent use of soils (article 7), an obligation requiring the economic use and prudent extraction of mineral resources (article 8), particular provisions for wetlands, for endangered areas, and for Alpine areas threatened by erosion (articles 9, 10 and 11). The economic uses of soil and the effects of economic activities on soil are also specifically addressed (articles 12-17). Provisions addressing the implementation of the Protocol ensure that its obligations do not remain dead letters. Even though the Soil Conservation Protocol can, in principle, serve as a model for other mountainous areas, it must be borne in mind that the Alps are densely populated and intensely used for a broad variety of purposes.

At the universal level, states have intensified their efforts to stem the negative effects of desertification. To this end the UN Convention to Combat Desertification was adopted on 17 June 1994 and entered into force on 26 December 1996. Participation in this Convention, which goes back to a recommendation in Agenda 21, and which is the first binding post-Rio instrument, has become close to universal. In the light of the particular problems experienced in Africa, a "Resolution on urgent action for Africa" was adopted on the same day as the Convention, in order to ensure that measures would already have been taken before the entry into force of the Convention. Based on the principles of participation, partnership and decentralisation, the Convention's activities build upon innovative local programmes and supportive international partnerships. The Convention acknowledges that the causes of desertification are many and complex and that the struggle to protect drylands is not an easy one. According to article 2(2) of the UNCCD, combating desertification and mitigating the effects of drought necessitates

> long-term integrated strategies that focus simultaneously [...] on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources [...] in particular at the community level.

In terms of instruments, the Convention focuses on the development and carrying out of national, subregional, and regional action programmes (articles 9-15 of the UNCCD). Criteria for preparing these programmes are detailed in the Convention's five regional implementation Annexes: Africa, Asia, Latin America and the Caribbean,

the Northern Mediterranean, and Central and Eastern Europe. These Annexes form an integral part of the Convention (article 29(1) of the UNCCD). Article 3 of the UNCCD establishes a so-called "bottom up" approach. This means that populations and local communities are to participate in the design and implementation of programmes to combat desertification and to mitigate its effects, and that higher levels facilitate these activities. This basically means that higher levels of government must structure their activities in accordance with the needs expressed at the lower levels. To this end, governments must take steps towards good governance, including the decentralisation of authority and improvements in land tenure systems, and are required to take measures empowering women, farmers and pastoralists. As may be taken from article 4 of the UNCCD, parties are under an obligation not only to pursue a "bottom up" approach but also to follow an integrated approach "addressing the physical, biological and socio-economic aspects of the processes of desertification and drought" and to bear in mind the need for international cooperation. Articles 5 and 6 of the UNCCD lay down obligations for developing and for developed countries respectively, whereby the first have to give "due priority" to combating desertifation and the second to undertake to "provide substantial financial resources and other forms of support" to developing countries. While article 7 of the UNCCD gives priority to Africa, Article 8 encourages parties to coordinate their activities under other multilateral environmental agreements according with those pursued under UNCCD.

Articles 16 to 21 of the UNCCD deal with scientific and technical cooperation, and they address supporting mechanisms, including financial mechanisms. As laid down in article 20 of the UNCCD all parties to the Convention "shall make every effort to ensure that adequate financial resources are available". Developed country parties are under a particular obligation to provide funding, including the mobilisation of resources to cover the "agreed incremental costs" of anti-desertification and drought mitigation programmes through the Global Environmental Facility (and its four focal areas). The need for additional resources notwithstanding, the Convention underlines the need for cost effectiveness and efficiency (articles 20(4) and (5) of the UNCCD). Article 21 establishes a Global Mechanism in order to "increase the effectiveness and efficiency of existing financial mechanisms". In essence, the Mechanism provides

advisory services to UNCCD parties in order to upscale finance for sustainable land management. To this end, the Mechanism has developed the concept of "integrated financing strategies (IFS)" to achieve integrated investment frameworks for sustainable land management covering a broad range of dimensions.

With the Conference of Parties (article 22 of the UNCCD), the Permanent Secretariat (article 23) and a Committee on Science and Technology (article 24), the Convention establishes three permanent organs. The Conference of Parties "shall make, within its mandate, the decisions necessary to promote [the] effective implementation" of the Convention. In order to ensure proper decision-making and effective implementation, articles 26-32 of the UNCCD establish further detailed procedures, including the communication of information (article 26), measures to resolve questions on implementation (article 27) and a provision on the settlement of disputes (article 28).

Outlining a strategy for action, the Regional Implementation Annex for Africa is the most detailed of the regional annexes to the Convention, benefiting from the early attention of signatories as documented by the above-mentioned "Resolution on urgent action for Africa". Based on this Annex, most African countries have formulated National Action Programmes, typically emphasising the raising of awareness. Several Subregional Action Programmes have also been adopted, coordinated by the Arab Maghreb Union (AMU), the Permanent Inter-State Committee for Drought Control in the Sahel (CILSS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC). Finally, a Regional Action Programme (RAP) is under development. As can be taken from article 6 of Annex I of the UNCCD, action programmes have to be developed through a "consultative and participatory process". The socio-economic dimension is included in article 8 of Annex I.

Overall, it may be argued that the Convention at least attempts to support changes in local and international behaviour in order to achieve sustainable land use and food security. Its approach is pragmatic at least, and promising with a view to those involved who are actually concerned most by desertification and drought.

Apart from the Soil Conservation Protocol adopted under the (sub-regional) Alpine Convention, which may serve as a model, and the UNCCD, at least one other important regional instrument may be referred to. In its article VI the 2003 Maputo Convention takes up land and soil protection, including an obligation of parties to develop "long-term integrated strategies for the conservation and sustainable management of land resources, including soil, vegetation and related hydrological processes". The provision establishes a link with land tenure policies, taking into account the rights of local communities.

In addition, soft law instruments have addressed issues of land degradation and soil protection, in particular through the Food and Agriculture Organisation of the United Nations (FAO) and UNEP. UNEP elaborated the 1982 World Soils Policy and the FAO developed the so-called World Soil Charter. However, they seem to have been limited to influencing Agenda 21 and the resulting soil policies. An IUCN-sponsored Draft Protocol for the Conservation and Sustainable Use of Soil is worth mentioning.

3 Land tenure and indigenous rights under international law

Increasingly, there are also rules addressing the rights of indigenous peoples, which have to be considered in designing land tenure regimes.

While ILO (International Labour Organisation) Convention No. 107 sets forth several provisions relating to land rights, they are contextualised within a more or less assimilationist framework, as far as indigenous groups are concerned.

ILO Convention No. 169 moves away from this assimilationist philosophy. Articles 13-19 are entirely dedicated to land, although there are other articles that may be of significance for indigenous peoples' land claims. Article 13(1) recognises the importance of the link between indigenous groups and land in general, and particular pieces of land in particular, the collective basis of this relationship and the implications of this relationship to indigenous culture and spirituality. Article 14(1) states that "[t]he rights of ownership and possession of the peoples concerned over

the lands which they traditionally occupy shall be recognised". Some commentators have taken this to mean that continuous occupation of traditional lands is required for ownership of those lands to be recognised. However, it has also been argued that the ILO Guide

> makes clear that the phrase 'traditionally occupy' does not imply that there must be continued occupation but rather that 'there should be some connection with the present, such as relatively recent expulsion from these lands, for example, or a recent loss of title'.

Indigenous norms relating to the transmission of lands are protected in article 17(1), while 15(1) makes provisions for indigenous land and resource management. Sub-surface mineral excavation requires advance consultation with indigenous peoples, as per article 15(2), and a consultation process is to occur where relocation of indigenous peoples is necessary. Relocation can occur only as an exceptional measure and states are encouraged to obtain the "free and informed consent" of affected peoples.

Article 16(2) also stipulates a right to return to traditional lands, "as soon as the grounds for relocation cease to exist". If return is impossible, compensation should be in the form of "lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development". However, if a preference for monetary compensation is expressed by the affected group, "they shall be so compensated under appropriate guarantees".

States have a responsibility to demarcate indigenous lands and create tribunals or other bodies to resolve indigenous land claims and disputes. Indigenous ideas of property are incorporated into a binding convention that builds on human rights precepts of non-discrimination, cultural integrity and self-determination. In monitoring the implementation of the treaty, the ILO Committee of Experts has significantly fleshed out and clarified several of the provisions contained therein, particularly in relation to land rights; however, the poor rate of ratification somewhat limits its character as a source of customary law regarding indigenous peoples' land rights. Nevertheless, subsequent developments in "international instruments and national

laws" were inspired by the shift in ILO Convention No. 169 towards a *sui generis* appreciation of indigenous peoples' relationship to land.

It is important to note again that article 14 of the 1989 International Labour Convention no. 169 provides that the collective "rights of ownership and possession [of indigenous peoples] over the lands which they traditionally occupy shall be recognized". To this end, governments are required to "take steps as necessary to identify" these lands and to "guarantee effective protection of the recognised rights".

4 Land tenure and international good governance standards

Good governance is a multi-dimensional, multi-faceted, complex and sometimes even amorphous concept: states, international organisations, non-governmental organisations, and other actors largely agree that it is worthwhile to be promoted, but there is still little clarity as far as its substance and its standing in public international law is concerned. One might argue that the agreement on its promotion is somehow related to its openness in substance. If the concept as such were more precise, it might be difficult to establish as broad an agreement as there seems to be. Such exaggerated scepticism, however, would be unfounded, even though some measure of scepticism is helpful.

In the following it will be demonstrated that the concept of good governance has developed beyond a pure statement of policy. The principle is located at the intersection of international and municipal law. It applies equally to certain aspects of international relations and to the format and design of municipal governance structures. Furthermore, the principle is neither exclusively procedural nor comprehensively substantive. More precisely, it might be described as an emerging principle of international administrative law, anchored in public international law.

Good governance was first developed as a policy concept for practical purposes of development co-operation. It was, however, not designed by high-ranking state representatives. Neither was it the subject of negotiations leading to the adoption of a treaty text to be submitted for signature and ratification. From the perspective of

public international law the question thus arises whether and in how far the concept has been integrated into the normative framework established by public international law, whether it can be attributed to any particular source of public international law, whether it must hence be respected by subjects of international law, and whether there are any specifications as to its substance.

Research into this matter is still fairly recent. This is partly due to the fact that at least two tracks can be identified along which the concept has developed since its first inception in the World Bank context: there is a specific meaning attached to the concept by international financial institutions on the one hand, and there is a broad range of new developments and distinctive meanings promoted by national and international human rights organs. These two routes must be distinguished for reasons of intellectual clarity but we will also realise that their distinctiveness, the differences between them, have begun to overlap and to interact. It may even be argued that they have started to cross-pollinate. In a way we are faced with a politics of concepts. These must be reviewed and their ramifications for international institutions must be assessed.

When placing the concept into the framework of public international law, the two different tracks of its development can be brought together from a more procedural background as well as from a substantive background.

Beginning with international institutional law, it is quite clear that international organisations can develop policy concepts which may - depending on the extent to which the statutes of the respective organisations provide for such a possibility - emerge as (secondary) rules within such organisations. This does not even require formal law-making powers to be laid down in the international organisation's statutes. There is agreement that at least for the purposes of pursuing its mandate each international organisation can fine-tune its policies by developing internal standards. These standards may even affect its member states in as far their adoption, implementation and even enforcement is part of the implied powers of each international organisation. Thus, if international financial institutions in the performance of their task interpret and apply their constituent documents internally as

well as in their relations with their member states, then this leads to the development of legal rules and principles. However, their scope of application is limited to the organisation in question and to its lawful activities. *Ultra vires* acts will not normally develop into rules and principles. If good governance from a World Bank perspective thus primarily includes accountability, effectiveness and coherence, and also openness and participation, then these elements may provide normative guidance - but only within the ambit of World Bank activities. To take this a step further, we will have to assess if and in how far the policy concept of good governance was adopted by international organisations, in our case primarily international financial institutions. If this can be proven on a relatively broad scale with a sufficient degree of similarities, it may be argued that the individual policy concepts have begun to (re-) emerge as a principle of international institutional law beyond each of the particular international organisations. It is obvious that any detailed analysis to this end would go beyond what is permissible in this short opening address. However, it is possible to refer to existing and broader analyses in this field and to draw upon their findings. Indeed, there is an impressive number of similarities and parallels between the policies developed by international financial institutions in this field. And the elements of

- accountability,
- effectiveness,
- coherence,
- openness and
- participation

can be found in nearly all pertinent policy documents. Interestingly enough, those policies are applied internally (within those organisations and thus - it may be argued - they have become part of international administrative law) but also with regard to member states. This finding does not, however, clarify the status of the concept in international law as far as the sources are concerned. We will have to come back to this issue.

Turning to a broader concept of good governance and the identification of (general) standards for governance in international law, including the human rights perspective,

it is first of all doubtful that any standards can be derived from the Charter of the United Nations as such. Much more can be found in the international human rights context. At least three paths are available: the participatory rights in the International Covenant on Civil and Political Rights (ICCPR); the economic, social and cultural rights as included in the Covenant on Economic, Social and Cultural Rights (ICESCR) and elsewhere; and the anti-discrimination standards of international human rights law. These elements are rooted in positive international law, and are thus easy to identify. Beyond those clear-cut obligations it is difficult to name the elements of a broader concept of good governance precisely. Whether or not rights to development and democracy, or a principle of participation does indeed exist, as well as what the meaning of each of these terms is, is an open question. There are valid arguments in favour of their existence, and also to the contrary, and again it would go beyond the scope of this paper to address each of them separately. In sum, however, recent writings suggest that the human rights path of good governance is indeed expanding from the existing positive standards of international law into a broader contextual framework, including standards of democratic governance.

What remains to be addressed here is the difficult question of how these two tracks, how these politics of concepts, can be linked to the sources of public international law - in order to provide for a more solid foundation of good governance in international law. While traditional international law looks at treaties, customary law, and general principles of law (as taken up by Article 38 of the Statute of the International Court of Justice), there is a growing debate on principles in international law from a much broader perspective than the general principles referred to in the ICJ Statute. This debate on principles seeks to distinguish between rules and principles as discussed by Ronald Dworkin. While it is a debate that does indeed enrich public international apart from discussions on sources, it nevertheless has implications for our perception of sources - and in the long run for the law to be applied. This is particularly true of the divergence between HLA Hart's positivism and Dworkin's theory.

It may then be argued that the principle of good governance, if it does exist as part of international law, cannot be traced back to treaty law - at least not in its totality. This is so, despite the fact that individual elements of the principle are rooted in treaties. A

similar conclusion may be drawn as far as customary international law is concerned. There is no coherent state practice and no *opinio iuris* available on the basis of which to argue that good governance has become a legally binding norm of international customary law. In the light of this relatively weak outcome, would it be legitimate to refer to general principles of law within the meaning of article 38 of the ICJ Statute? I must admit that I am sceptical in this regard. I don't think that we can establish such a principle on the basis of a traditional reading of article 38 of the Statute. Existing elements of the concept of good governance are too divergent to allow for such a conclusion, even though within the narrower context of international financial institutions, a more limited notion of good governance may be considered to meet the requirements of becoming a general principle of international (administrative and/or institutional) law. But this does not allow for the more general conclusion that good governance is a legally binding general principle of public international law.

Does this, then, weaken our debates from the perspective of international law? Does it mean that international law is too rigid, not sufficiently responsive, eventually lacking flexibility? I do not think so. I would agree that we can talk about an emerging principle according to Dworkin's theory, which is, however, based on a heterogeneous and incomplete foundation in positive international law. Strictly speaking, good governance is not a legally binding norm in international law - but some of its elements are.

This necessitates the taking of care when referring to the concept in a legal context. As an emerging principle it does not have sufficient strength to be narrowly implemented and strictly enforced. However, some of its elements enjoy such potential. This is particularly true for a number of human rights standards (as far as civil and political rights are concerned), and it is true for the notion of accountability in the context of international financial institutions. As far as the other elements are concerned, we are still in the area of policy concepts, the effectiveness of which depends on convincing reasoning.

So far, the rule of law as such has not been addressed within this opening address. Since the rule of law, however, is often referred to as an inherent element of good

governance the question arises if and in how far it has become part of public international law. There are various levels that have to be distinguished:

- first, the rule of law may form part of relations between the subjects of public international law;
- second, there may be an obligation imposed upon subjects of public international law to organise themselves (their internal structure) along the lines of the rule of law; and
- third, we may distinguish a basic concept of the rule of law from more refined concepts with a higher degree of complexity.

As to the first level, there is little doubt that inter-state relations as well as relations between states and international organisations are today perceived as being governed by rules of international law. Addressing the third level, a number of constitutional democracies apply refined concepts with a high degree of complexity, such as the notions of *"Rechtsstaat"* or *"état de droit".* What might be particularly interesting in the context of international law and development is the second level, addressing the question of if and in how far states are under a general obligation or may be put under a more specific obligation to apply the rule of law in domestic law. This gives rise to the question of if and in how far the rule of law can be made part of conditionality in the context of development co-operation. It is noteworthy that this is the kind of policy that has been increasingly pursued, among others, by the European Union and its member states. It may at least be considered to be permissible in international law.

Summing up the status of good governance in public international law, the principle in its full scope is an emerging principle of public international law only. However, certain elements of the principle, including respect for human rights, the rule of law, and governmental accountability have gained legal status as obligations imposed upon states more generally, at least when participating in or benefiting from development co-operation.

5 Conclusions

To conclude, let me stress, first of all, that this opening address cannot provide final answers as to the impact of international law on land tenure. However, it has shown that international law is not tacit on land tenure; rather, the challenge is and will be to identify those parts of international law which (may) have an impact on land tenure at the national level. For myself, I must admit, the challenge to draft this opening address has opened a totally new research agenda which I will hopefully be able to pursue for some time in co-operation with our African partners within the APEDIA network, among others. The Academic Partnership for Environment and Development Innovations in Africa (APEDIA) is an international network established to stimulate academic collaboration and research in the field of environmental development and sustainable land use in Africa, and both NWU (Potchefstroom) and Justus Liebig University, Giessen, Germany, are involved. Another path within which to pursue research in this field is our collaboration with the Konrad Adenauer Foundation, with regard to development cooperation. Recently, my research has been able to contribute to constitution building and governance in West Africa, in Benin and in Mali in particular. I thank all those who are involved in this most sincerely.

In summarising what I have said about the status of good governance in international law, I should like to say the following: from a human rights point of view, transparency and accountability can be considered as essential principles of good governance, in general, and of land tenure regimes, in particular. Even though the specifications of good governance are normally designed in the light of the particular problem addressed, the rule of law, public participation, transparency, accountability, the control of corruption and government effectiveness have also been identified as common elements (Edith Brown Weiss and Ahila Sornarajah) which can indeed be considered as elementary standards to be respected by land tenure regimes at the national level.

With regard to indigenous rights, let me refer to the situation in South Africa, where the issue of the lands lost during apartheid came to the fore during the drafting of

your new *Constitution*. One of the purposes of such a land-related reform process was to "bring about equitable access to all South Africa's natural resources". The notion of indigenous peoples was interpreted more broadly than required by international law since it was considered to be all non-white peoples that had been dispossessed as the traditional owners of the lands. Section 25(7) of the South African *Constitution* affirms:

> A person or community dispossessed of property after June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Subsequent legislation, the *Restitution of Land Rights Act* 22 of 1994, established the Commission on Restitution of Land Rights which, among others, has the power to investigate claims and make settlements, as well as to refer claims to the Land Claims Court, which could ratify agreements reached by the Commission, and intervene in cases where no agreement was reached. It is noteworthy that the otherwise narrow interpretation of dispossession as occurring after 1913 adversely affected indigenous peoples dispossessed of their lands during the original colonial enterprise. You know much better than I do the details of the *Richtersveld Community* case, which is highly interesting because - under the Act - the claim for restitution fell outside the remit of the Act. Interestingly, the Supreme Court of Appeal found that the appropriation of the land was in fact based on racially discriminatory practices "because it was based upon the false, albeit unexpressed premise that, because of the Richtersveld community's race and lack of civilisation, they had lost all rights in the land upon annexation". When the mining company with interests in the land appealed the decision, the Constitutional Court upheld the ruling, finding that any practices "which did not recognise indigenous customary interest in their lands and gave priority to other registered owners were discriminatory". Indeed, South African jurisprudence with regard to land tenure in this field is highly interesting and may have an impact on developments in other jurisdictions.

Turning finally to the impact of international environmental law, this is an area of the law which has only recently begun to move to the fore with regard to land use. As I

hope to have illustrated, it is, however, a growing area of concern. It is necessary to note only that the international legal framework on climate change requires states to develop adaptation strategies in the light of the challenges which arise from the fact that climate change can no longer actually be prevented, but that it can be limited to a minimal rise in temperature. The development of adaptation strategies is closely linked to land tenure, and they must be developed in a way which is fully based on the principles of good governance as identified in this opening address. Otherwise such adaptation strategies will lack the legitimacy which they will need in order to provide long-term solutions in combating poverty and in ensuring nutrition security. I am sure that the research done in South Africa, and at NWU in particular, will contribute to the development of an appropriate legal framework for the development of such adaptation strategies. Later this year our APEDIA network will address these issues in a conference to be held at Windhoek in Namibia.

To conclude:

- I want to thank the organisers, in particular Gerrit Pienaar, for inviting me to Potchefstroom,
- I want to express my gratitude to my dear colleague Francois Venter for reading out my opening address,
- I want to express my gratitude to all of you who had hoped to see me here, and who have been disappointed now due to the volcanic ash covering Europe,
- I want to reiterate how sad I am not to be with you; and I must admit that, among my travel plans during our German spring semester, the visit to Potch was my favourite; and I therefore deplore all the more the fact that the flight ban in Europe was lifted one day too late for me to be able to come to South Africa.

Most importantly, I wish you a truly successful conference, and I hope that my opening address has met at least some of your expectations.

Thank you very much for your kind attention.