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INFORMATION AND HUMAN RIGHTS

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Aaron Swartz and the Battles for Freedom of Knowledge

● **Alberto J. Cerda Silva**

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PRESENTATION



SUR 18 was produced in collaboration with the organizations **Article 19** (Brazil and United Kingdom) and **Fundar** (Mexico). In this issue's thematic dossier, we have published articles that analyze the many relationships between information and human rights, with the ultimate goal of answering the questions: What is the relationship between human rights and information and how can information be used to guarantee human rights? This issue also carries articles on other topics related to today's human rights agenda.

Thematic dossier: Information and Human Rights

Until recently, many human rights organizations from the Global South concentrated their activities on the defense of freedoms threatened by dictatorial regimes. In this context, their main strategy was whistleblowing, closely linked to the constant search for access to information on violations and the production of a counter narrative capable of including human rights concerns in political debates. Since they found no resonance in their own governments, the organizations very often directed their whistleblowing reports to foreign governments and international organizations, in an attempt to persuade them to exert external pressure on their own countries.*

Following the democratization of many societies in the Global South, human rights organizations began to reinvent their relationship with the State and with the system's other actors, as well as how they engaged with the population of the countries where they were operating. But the persistence of violations even after the fall of the dictatorships and the lack of transparency of many governments from the South meant that the production of counter narratives continued to be the main working tool of these organizations. Information, therefore, was still their primary raw material, since combating human rights violations necessarily requires knowledge of them (locations where they occur, the main agents involved, the nature of the victims and the frequency of occurrences etc.). Their reports, however, previously submitted to foreign governments and international organizations, were now directed at local actors, with the expectation that, armed with information about the violations and endowed with voting power and other channels of participation, they themselves would exert pressure on their governments. Furthermore, after democratization, in addition to combating abuses, many human rights organizations from the Global South aspired to become legitimate actors in the formulation of public policies to guarantee human rights, particularly the rights of minorities that are very often not represented by the majority voting system.

In this context, the information produced by the public authorities, in the form of internal reports, became fundamental for the work of civil society. These days, organizations want data not only on rights violations committed by the State, such as statistics on torture and po-

lice violence, but also activities related to public management and administration. Sometimes, they want to know about decision-making processes (how and when decisions are made to build new infrastructure in the country, for example, or the process for determining how the country will vote in the UN Human Rights Council), while at other times they are more interested in the results (how many prisoners there are in given city or region, or the size of the budget to be allocated to public health). Therefore, access to information was transformed into one of the main claims of social organizations working in a wide range of fields, and the issue of publicity and transparency of the State became a key one. This movement has scored some significant victories in recent years, and a growing number of governments have committed to the principles of Open Government** or approved different versions of freedom of information laws.***

This legislation has played an important role in the field of transitional justice, by permitting that human rights violations committed by dictatorial governments finally come to light and, in some cases, that those responsible for the violations are brought to justice. In their article **Access to Information, Access to Justice: The Challenges to Accountability in Peru**, Jo-Marie Burt and Casey Cagley examine, with a focus on Peru, the obstacles faced by citizens pursuing justice for atrocities committed in the past.

As the case of Peru examined by Burt and Cagley demonstrates, the approval of new freedom of information laws no doubt represents important progress, but the implementation of this legislation has also shown that it is not enough to make governments truly transparent. Very often, the laws only require governments to release data in response to a freedom of information request. They do not, therefore, require the State to produce reports that

**The Open Government Partnership is an initiative created by eight countries (South Africa, Brazil, South Korea, United States, Philippines, Indonesia, Mexico, Norway and United Kingdom) to promote government transparency. The Declaration of Open Government was signed by the initial eight members in 2011, and by the end of 2012 the network had been joined by 57 nations (Available at: <http://www.state.gov/r/pa/prs/ps/2012/09/198255.htm>). The initiative takes into account the different stages of public transparency in each of the member countries, which is why each country has its own plan of action for implementing the principles of open government. More information on the initiative is available at: <http://www.opengovpartnership.org>.

***In 1990, only 13 countries had some form of Freedom of Information legislation (Cf. Toby Mendel. 2007. Access to information: the existing State of affairs around the world. In VILLANUEVA, Ernesto. *Derecho de la información, culturas y sistemas jurídicos comparados*. México: Universidad Nacional Autónoma de México). By 2010, however, approximately 70 countries had adopted such a law. (Cf. Roberts, Alasdair S. 2010. A Great and Revolutionary Law? The First Four Years of India's Right to Information Act. *Public Administration Review*, vol.70, n. 6, p. 25–933.). Among them, South Africa (2000), Brazil (2012), Colombia (2012), South Korea (1998), India (2005), Indonesia (2010), Mexico (2002) and Peru (2003).

*K. Sikkink coined the term "boomerang effect" to describe this type of work by civil society organizations from countries living under non-democratic regimes.

make the existing data intelligible, nor to release the information on their own accord. The problem is exacerbated when the State does not even produce the data that is essential for the social control of its activities. Another area in which transparency is deficient is information on private actors that are subsidized by public funding, such as mining companies, or that operate public concessions, such as telecommunications providers.

Many organizations from the South have spent time producing reports that translate government data into comprehensible information that can inform the working strategies of organized civil society or the political decisions of citizens. Human rights organizations have also pressured their governments to measure their performance against indicators that can help identify and combat inequalities in access to rights. This is the topic of the article by Laura Pautassi, entitled **Monitoring Access to Information from the Perspective of Human Rights Indicators**, in which the author discusses the mechanism adopted recently by the Inter-American System of Human Rights concerning the obligation of States-Parties to provide information under article 19 of the Protocol of San Salvador.

The relationship between information and human rights, however, is not limited to the field of government transparency. The lack of free access to information produced in the private sphere can also intensify power imbalances or even restrict access to rights for particularly vulnerable groups. The clearest example of this last risk is the pharmaceutical industry, which charges astronomical prices for medicines protected by patent laws, effectively preventing access to health for entire populations. The privatization of scientific production by publishers of academic journals is another example. The issue gained notoriety recently with the death of Aaron Swartz, an American activist who allegedly committed suicide while he was the defendant in a prolonged case of copyright violation. Sérgio Amadeu da Silveira opens this issue of SUR with a profile of Swartz (**Aaron Swartz and the Battles for Freedom of Knowledge**), linking his life to the current struggles for freedom of knowledge given the toughening of intellectual property laws and the efforts of the copyright industry to subordinate human rights to the control of the sources of creation.

Since the internet has taken on a crucial role in the production and dissemination of information, it is natural for it to have become a battleground between the public interest and private interests, as illustrated by the Swartz case. On this point, civil society and governments have sought to adopt regulations intended to balance these two sides of the scale, such as so-called Internet Freedom, the subject of another article in this issue. In **Internet Freedom is not Enough: Towards an Internet Based on Human Rights**, Alberto J. Cerda Silva argues that the measures proposed by this set of public and private initiatives are not sufficient to achieve their proposed goal, which is to contribute to the progressive realization of human rights and the functioning of democratic societies.

The importance of the internet as a vehicle of communication and information also means that internet access is now a key aspect of economic and social inclusion. To correct inequalities in this area, civil society organizations and governments have created programs aimed at the so-called "digital inclusion" of groups that face difficulty accessing the web. Fernanda Ribeiro Rosa, in another article from this issue's dossier on Information and Human Rights, **Digital Inclusion as Public Policy: Disputes in the Human Rights Field**, defends the importance of address-

ing digital inclusion as a social right, which, based on the dialogue in the field of education and the concept of digital literacy, goes beyond simple access to ICT and incorporates other social skills and practices that are necessary in the current informational stage of society.

Non-thematic articles

This issue also carries five additional articles on other relevant topics for today's human rights agenda.

In **Development at the Cost of Violations: The Impact of Mega-Projects on Human Rights in Brazil**, Pétalla Brandão Timo examines a particularly relevant contemporary issue: the human rights violations that have occurred in Brazil as a result of the implementation of mega development projects, such as the Belo Monte hydroelectric complex, and preparations for mega-events like the 2014 World Cup.

Two articles address economic and social rights. In **Land Rights as Human Rights: The Case for a Specific Right to Land**, Jérémie Gilbert offers arguments for the incorporation of the right to land as a human right in international treaties, since to date it still only appears associated with other rights. In **Reaching Out to the Needy? Access to Justice and Public Attorneys' Role in Right to Health Litigation in the City of São Paulo**, Daniel W. Liang Wang and Octavio Luiz Motta Ferraz analyze legal cases related to the right to health in São Paulo in which the litigants are represented by public defenders and prosecutors, in order to determine whether the cases have benefited the most disadvantaged citizens and contributed to the expansion of access to health.

Another article looks at the principal UN mechanism for the international monitoring of human rights. In **The United Nations Human Rights Council: Six Years on**, Marisa Viegas e Silva critically examines the changes introduced to this UN body in the first six years of its work.

In **Human Rights, Extradition and the Death Penalty: Reflections on the Stand-Off between Botswana and South Africa**, Obonye Jonas examines the deadlock between the two African nations concerning the extradition of Botswana citizens who are imprisoned in South Africa and accused in their country of origin of crimes that carry the death penalty.

Finally, Antonio Moreira Maués, in **Supra-Legality of International Human Rights Treaties and Constitutional Interpretation**, analyzes the impacts of a decision in 2008 by the Supreme Court on the hierarchy of international human rights treaties in Brazilian law, when the court adopted the thesis of supra-legality.



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ABSTRACT

Land rights have received some attention as an issue concerning property rights and have been considered a specifically important right for indigenous peoples and women, but a right to land is absent from all international human rights instruments. This article reviews how land rights have been approached from five different angles under international human rights law: as an issue of property right, as a specifically important right for indigenous peoples; as an ingredient for gender equality; and as a rallying slogan against unequal access to food and housing. By examining these different approaches, the article proposes to identify the place of land rights within the international human rights instruments and jurisprudence as well as to examine why they have not been – and whether they should be – included in such documents as a stand-alone and specific right to land.

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KEYWORDS

Land Rights – Women – Indigenous peoples – Right to food – Right to housing



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LAND RIGHTS AS HUMAN RIGHTS: THE CASE FOR A SPECIFIC RIGHT TO LAND

Jérémie Gilbert

1 Introduction: Why land rights?

Land rights are not typically perceived to be a human rights issue. These rights broadly refer to rights to use, control, and transfer a parcel of land. They include rights to: occupy, enjoy and use land and resources; restrict or exclude others from land; transfer, sell, purchase, grant or loan; inherit and bequeath; develop or improve; rent or sublet; and benefit from improved land values or rental income (FOOD AND AGRICULTURAL ORGANISATION OF THE UNITED NATIONS, 2002). Legally, land rights usually fall within the categories of land laws, land tenure agreements, or planning regulations; but they are rarely associated with human rights law. Internationally, no treaty or declaration specifically refers to a human right to land. In fact, strictly speaking there is no human right to land under international law.

However, behind this *façade*, land rights are a key human rights issue. Land rights constitute the basis for access to food, housing and development, and without access to land many peoples find themselves in a situation of great economical insecurity.

In many countries, access and rights over lands are often stratified and based on hierarchical and segregated systems where the poorest and less educated do not hold security of land tenure. Control of rights to land has historically been an instrument of oppression and colonisation. One of the strongest illustrations of this is apartheid South Africa, where land rights were used as a central piece of the apartheid regime. Although less extreme, the extensive social movements of landless peasants throughout Latin and Central America are also a reaction to the control of lands by wealthy and dominant elites.

In the worst situations, stratification in land access has been an ingredient

Notes to this text start on page 134.

in violent conflicts. The situation in the Occupied Palestinian Territories and Israel is a vivid illustration on the use of land rights as a means of oppression (HUSSEIN; MCKAY, 2003). This is not particular to the Middle East, as in most conflict situations control of the land is a critical element of the conflict (DAUDELIN, 2003).

Access, redistribution, and guarantees of land rights are also crucial issues in post-conflict situations (LECKIE, 2008). Redistribution of land remains a critical issue in countries that have recently been through serious conflicts, such as Colombia, Bangladesh, or East Timor. In these post-conflict situations, the issue of land restitution is a factor that, if not properly addressed, could retrigger violence.

Outside violent and conflict situations, regulations and policies governing land rights are often at the heart of any major economic and social reform. Land rights play a catalytic role in economic growth, social development, and poverty alleviation (INTERNATIONAL LAND COALITION, 2003). Recent figures are pointing out that almost fifty per cent of the world's rural population do not enjoy secure property rights in land and up to one quarter of the world's population is estimated to be landless, making insecurity of land title and lack of access to land clear ingredients of poverty (UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME, 2008).

In the past few decades, several countries have adopted drastic land reforms to deal with such issues as poverty, equity, restitution for past expropriation, investment, and innovation in agriculture or sustainability. Arable lands are becoming extremely valuable due to greater investors' interest, changes in agricultural production systems, population growth, migration, and environmental change. This includes large-scale foreign agricultural investments in developing countries that have been labeled *land-grabs*. This has raised new issues regarding the respect of the right to land of local populations by depriving them of essential lands to sustain their access to food. The recent focus on climate change-offsetting measures, which has generated the acquisition of large tracts of lands to plant palm oil or other sources of bio-fuels, is likewise creating a pattern of acquisition of land for economic gains to the detriment of the local populations who are losing their lands to international investors.

In turn, this has created several *land rights* movements claiming the recognition and affirmation of the fundamental right to lands. The claim that land rights are human rights has been a common denominator to movements based in India, South Africa, Brazil, Mexico, Malaysia, Indonesia, the Philippines, and many other countries throughout the world. For these land rights movements, the articulation of a right to land is perceived as a way to push for the protection and the promotion of a key social issue: the recognition that local people do have a right to use, own and control the developments undertaken on their own lands. Land rights are not only directly impacting individual property rights, but are also at the heart of social justice.

Despite being such a central issue for social justice and equality, land rights are largely absent from the human rights lexicon. There have been several calls for the recognition of a right to land under international human rights law

(PLANT, 1993). Despite these initiatives, however, no human rights treaty has recognised land rights as being a core human rights issue. Out of the nine core international human rights treaties, land rights are only marginally mentioned once, in the context of women's rights in rural areas.¹ Nonetheless, despite the absence of a clear reference to land rights within the main international human rights instruments, there has been an increased focus within international jurisprudence on land rights as a human rights issue.

This article reviews how land rights have been addressed despite not being formally proclaimed in the main human rights instruments. To undertake such a journey, the article argues that land rights have been approached from five different angles under international human rights law. As will be examined, claims for land rights have emerged either as an issue of property right (Section 1), as a specifically important right for indigenous peoples (Section 2); as an ingredient for gender equality (Section 3); and as a rallying slogan against unequal access to food and housing (Sections 4 & 5). By examining these three different approaches to land rights, the article proposes not only to identify the place of land rights within the international human rights framework but also to examine why they have not been and whether they should be included in such instruments as a stand-alone and specific right to land (conclusion).

2 Land rights as property rights: Protecting the 'landed'?

Property generally refers to the *ownership over a thing or things*, but the word is also often associated with the idea of property in land. The right to property is a common denominator throughout most of the legal systems of the world, which usually frame it as one of the fundamental liberties of the individual. Most constitutions have a strong entrenched guarantee of this right (ALLEN, 2007), which has played a tremendous role in the development of human norms and values.

Historically, the guarantee of property rights in land was one of the central issues that triggered the development of an emergent human rights system. Property rights have commonly been a central feature of the affirmation of individual liberties against State authority in many Western liberal democracies (WALDRON, 1988). Both the 18th century US Bill of Rights and the French Declaration of the Rights of Man and of the Citizen put the protection of property rights at the same level as the right to life. In this context, private property meant the protection, guarantee, and security of tenures of the *landed*, as only the people who have official title to such land would be protected. Historically, only the wealthy and powerful landlords had such official title.

From such a historical perspective, therefore, the right to property in land could be perceived as a very conservative right; it protects the right of the *landed*. In other words, the right to property applies only to existing possessions and does not address the right to acquire possessions in land. The pre-eminence of property rights in some of the first human rights declarations of the eighteenth century, or even earlier documents, is explained by the will of the *landed* to get protection of their property rights against the power of the monarchs. Property

in land was seen as one of the key elements of freedom to be enjoyed against the governments' will.

The Western origins of the right to property have largely influenced the way property rights have been framed under international human rights law. Its importance is reflected in the international contemporary system of human rights protection, where the right to property is, at the same time, one of the system's quintessential principles and a very controversial issue. Article 17 of the Universal Declaration of Human Rights (UDHR) states:

1. *Everyone has the right to own property alone as well as in association with others.*
2. *No one shall be arbitrarily deprived of his property.*

(UNITED NATIONS, 1948, art. 17)

The inclusion of such a right in the UDHR was controversial and its drafting process gave rise to some serious debates and negotiations. The controversy notably concerned whether there was a need to include such a right and the extent to which the right to property should be limited by national laws (CASSIN, 1972). While the particular issue of land property was not itself a particular focus of the discussion, the divide between individual and more social and collective approaches to property was also going to mark later debates on land rights. The reference to the right to property was dropped in the two Covenants adopted in 1966, making property rights one of the only human rights affirmed in the UDHR which was not integrated into one of the legally binding Covenants. Several arguments have been advanced to explain the absence of the right to property from the two Covenants, notably the divide between the West and Eastern blocs, which made the drafting of a right to property a too complex and ideologically controversial a task (SCHABAS, 1991).

Parallel to these debates, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1965, stipulates a general undertaking of State Parties to eliminate racial discrimination and to guarantee "the right to own property alone as well as in association with others" (UNITED NATIONS, 1965, art. 5, v)

The right to property was also perceived to be an important issue in the fight to eliminate discrimination against women. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) affirms in its article 16 that States should ensure "[T]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration" (UNITED NATIONS, 1979, art. 16).

Despite these mentions of the right to property, the main international human rights treaties do not integrate a specific mention of land property rights. And when property rights have been integrated, it is mainly in the context of non-discrimination (ICERD and CEDAW). Ultimately, property rights are only strongly affirmed in the UDHR, and the connection to land rights in this context remains tenuous since it was not originally envisaged.

3 Land rights as cultural rights: Indigenous peoples

From the most diverse and often remote places of the globe, from the frozen Arctic to the tropical rainforests, indigenous peoples have argued that their culture will disappear without a strong protection of their right to land. While indigenous communities are most diverse, most of them share a similar deep-rooted relationship between cultural identity and land. Many indigenous communities, as we shall see below, have stressed that territories and lands are the basis not only of economic livelihood but are also the source of spiritual, cultural and social identity.

The connection between cultural rights and land rights has been acknowledged by the Human Rights Committee (HRC) in its interpretation of article 27 of the ICCPR, which concerns cultural rights for minorities. Article 27 does not allude to land rights per se, but puts an emphasis on the connection between cultural rights and land rights. The HRC has thus developed a specific protection for indigenous peoples' land rights by acknowledging the evidence that, for indigenous communities, a particular way of life is associated with the use of their lands. In an often-quoted general comment on article 27 the HRC stated:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.

(HUMAN RIGHTS COMMITTEE, 1994)

The connection between cultural protection and land rights for indigenous peoples has been reiterated in several concluding observations on States' reports and in individual communications (SCHEININ, 2000). The approach is that, where land is of central significance to the sustenance of a culture, the right to enjoy one's culture requires the protection of land.

This approach linking land rights and cultural rights for indigenous peoples has also been at the core of the recent jurisprudence of the Inter-American Court of Human Rights (IACtHR). In the 2001 case of the Awas Tingni community against Nicaragua, the court stated:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

(INTER-AMERICAN COURT OF HUMAN RIGHTS,
2001, para. 149)

Since then, the IACtHR has developed a larger jurisprudence on land rights by integrating them as part of the right to property, the right to life, and right to health (ANAYA; WILLIAMS, 2001). This approach to land rights is often referred to as a *right to cultural integrity*. While the *right to cultural integrity* does not appear in any of the international human rights treaties, it refers to a bundle of different human rights such as rights to culture, subsistence, livelihood, religion and heritage which all support the protection of land rights.

This reference to cultural integrity found some echoes in the recent decision from the African Commission on Human and Peoples' Rights (ACHPR) in the case concerning the Endorois community in Kenya. This case concerned the forced displacement of the Endorois community from their ancestral land in the heart of the Great Rift Valley to create a wildlife reserve, plunging a community of traditional cattle-herders into poverty and pushing them to the brink of cultural extinction. In this case, the indigenous community claimed that access to their ancestral territory "in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life" (AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS, 2010, para. 16). In its decision, the African Commission received the claim to cultural integrity by acknowledging that the removal of the indigenous community from its ancestral land was a violation of their right to cultural integrity based on freedom of religion (article 8), right to culture (article 17), and access to natural resources (article 21) of the African Charter.

The emergence of an indigenous peoples' right to *cultural integrity* marks the establishment of a connection between access to ancestral territories and freedom of religion, cultural rights, and right to access natural resources. Whilst land rights are not as such affirmed in either the American Convention or the African Charter, the regional human rights bodies have acknowledged the protection of land rights as a crucial human rights issue for indigenous peoples as part of a larger bundle of rights which include property rights, cultural rights, and social rights. This approach is one of the most developed recognitions of land rights as human rights.

A parallel law-making effort that culminated with the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007 has amplified this jurisprudential evolution. The declaration dedicates several of its articles to land rights, making land rights an essential human rights issue for indigenous peoples (GILBERT; DOYLE, 2011). Article 25 of the Declaration affirms that:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

(UNITED NATIONS, 2007, art. 25).

While the Declaration is not a treaty, the rights articulated in it are reflective of contemporary international law as it pertains to indigenous peoples, and

indicates a clear international recognition of the importance of a human rights-based approach to land rights for indigenous peoples.

The International Labour Convention No. 169 on the Rights of Indigenous and Tribal Peoples also integrates a human rights-based approach to land rights. It notably affirms that, in applying the Convention,

governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship

(INTERNATIONAL LABOUR ORGANIZATION, 1989, art. 13).

While arguably only a relatively small number of States are party to the Convention, these States are nonetheless representative of States with the largest indigenous populations. Further, because more and more States are ratifying it, the Convention has become an important legal instrument when it comes to land rights for indigenous peoples.

Overall, within the larger perspective of a human rights approach to land rights, the affirmation of land rights as a key human rights issue for indigenous peoples shows that the traditionally individualistic approach to property rights can be challenged and that individualistic approaches to property rights are not sufficient for indigenous peoples as they do not integrate their specific cultural attachment to their traditional territories.

4 Land rights as an issue of gender equality

Land rights have been recognised as a central point within the issue of gender equality. Women's land rights are often dependent on marital status, which makes their security of tenure dependent on relations with their husband. Under national legislations regulating property rights within the family, land rights are often restricted to men as the household head who holds exclusive administration rights over family property. As highlighted in a report from the former UN Special Rapporteur on Adequate Housing:

In almost all countries, whether 'developed' or 'developing', legal security of tenure for women is almost entirely dependent on the men they are associated with. Women headed households and women in general are far less secure than men. Very few women own land. A separated or divorced woman with no land and a family to care for often ends up in an urban slum, where her security of tenure is at best questionable.

(UNITED NATIONS, 2003, p. 9)

Under its focus on *rural women*, CEDAW makes specific mention of land rights in its article 14. In inviting States Parties to take all appropriate measures to eliminate discrimination against women in rural areas, article 14 calls on States to ensure

that women “have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes” (FOOD AND AGRICULTURAL ORGANISATION OF THE UNITED NATIONS. 1979). As highlighted earlier, this article contains the only specific mention of land rights in the nine core international human rights treaties. However, the reference to land rights remains marginal, as the main objective of the article is to ensure that women are not discriminated in land reforms; it does not call for a general reform of unequal land laws.

Article 16 of CEDAW, focusing on elimination of discrimination within the family, invites State Parties to take all necessary measures to ensure that both spouses have equal rights in the “ownership, acquisition, management, administration, enjoyment and disposition of property” (FOOD AND AGRICULTURAL ORGANISATION OF THE UNITED NATIONS. 1979). While not directly mentioning land rights, the reference to ownership and property could be seen as implicitly relevant to property in lands. The Committee on the Elimination of Discrimination against Women (hereinafter the “CEDAW Committee”) has specifically highlighted such a connection in its General Recommendation No. 21 on “Equality in marriage and family relations”, which largely focuses on article 16. The General Recommendation states:

In countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed.

(UNITED NATIONS, 1994, par. 27).

Despite the reference to land rights in both articles 14 (explicit) and 16 (implicit), it is apparent that land rights nonetheless remain marginal within the Convention. The CEDAW Committee, however, has adopted an active approach to the issue of land rights for women. In particular, in its concluding observations, the Committee has demonstrated the centrality of land rights to the fulfilment of women’s human rights by citing land rights as an issue in nearly all of the Committee’s observations. By analysing recent concluding observations of the Committee, one can identify several key issues relating to land rights for women. One of them is the guarantee of non-discrimination in access to land in customary legal systems as well as in formal ones. In its recent concluding observations on Zimbabwe, for instance, the Committee has expressed concern “at the prevalence of discriminatory customs and traditional practices, which particularly prevent rural women from inheriting or acquiring ownership of land and other property” (UNITED NATIONS, 2012, para. 35).

This is not particular to the situation of Zimbabwe; the Committee has made similar comments to the recent reports on Jordan, Chad, and the Republic of the Congo. In all instances, the Committee has highlighted that governments have a positive obligation to ensure that informal legal systems and family practices do not discriminate against women in their access to land

rights. The Committee has also identified de facto inequality in formal systems of land registration that provide some form of recognition to customary systems and either directly or indirectly support practices which favour males and put women in a disadvantaged position by perpetuating tenure regimes based on the assumption of household and community unity.

Another recurring theme in the concluding observations of the CEDAW Committee is thus the close relationship between access to land rights and means of livelihoods such as food and water. In the case of Nepal, for example, the Committee has invited the government to “ensure equal access by women to resources and nutritious food by eliminating discriminatory practices, guaranteeing land ownership rights for women and facilitating women’s access to safe drinking water and fuel” (UNITED NATIONS, 2011, para. 38). Women, especially in rural communities, have often highlighted how land rights have to be seen as central to their access to water, food, and health, and how as such land rights are a central element to support not only their livelihoods but also their children and families. The Committee’s works illustrates how land rights and security of land tenure for women is an essential element to women’s living conditions and economic empowerment.

The connection between access to livelihoods and land rights is also echoed in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa adopted in 2003. The Protocol to the African Charter twice references land rights as a women’s rights issue twice.. The first concerns access to adequate food. Article 15 declares that:

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food.

(AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2003, para. a a).

The second reference comes in the context of the right to sustainable development. Article 19, which is dedicated to the rights of women to fully enjoy their right to sustainable development, invites States to “promote women’s access to and control over productive resources such as land and guarantee their right to property” (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2003, para. c). The women’s rights approach to land rights links access to land not only to non-discrimination but also to poverty alleviation and economic empowerment. As captured by a recent report produced for the National Human Rights Commission of India:

Land, apart from being a productive resource also provides a great degree of socio-economic security and stability. The control and ownership of land by women also serves as an empowering resource and helps to balance gender dynamics, especially in historically patriarchal societies

(KOTHARI; KARMALI; CHAUDHRY, 2006, p. 28).

This is reflected in the work of several international institutions and non-governmental organisations that have increasingly focused their work on land rights as part of their strategies on poverty reduction and women's empowerment (BUDLENDER; ALMA, 2011).

5 Land rights as housing

The right to housing is inscribed in several key international human rights instruments. These include the ICESCR (article 11, para. 1), the Convention on the Rights of the Child (article 27, para. 3), and the non-discrimination provisions found in article 14, paragraph 2 (h) of CEDAW, and article 5 (e) of ICERD. Article 25 of the UDHR includes the right to housing as part of the larger right to an adequate standard of living. Hence, the right to housing is often qualified as a right to *adequate* housing.

The Committee on Economic, Social and Cultural Rights (hereinafter CESCR Committee) has dedicated a large part of its work to the right to adequate housing. In its General Comment No. 4 on the right to adequate housing, the CESCR Committee highlighted that while adequacy is “determined in part by social, economic, cultural, climatic, ecological and other factors” (UNITED NATIONS, 1991, par. 8), there are nonetheless some key universal factors to determine the content of such right. The Committee has identified seven common factors, the first one being the legal security of tenure.² While security of tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, it also refers to security of rights over lands.

The Committee has notably focused on the situation of landless persons highlighting how the lack of access to land fundamentally impinges on the realisation of their right to adequate housing. The CESCR Committee noted that “discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement” (UNITED NATIONS, 1991, para. 8 (e)). The Committee added that “[W]ithin many States Parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal.” (UNITED NATIONS, 1991, para. 8 (e)) This approach highlights how the realisation of the right to adequate housing necessarily implicates the guarantee by governments of both access to land and security of land tenure for the landless.

The focus on security of tenure and access to land as essential elements of the right to adequate housing is also a central feature in the work of the UN Special Rapporteur on Adequate Housing. Miloon Kothari, the former UN Special Rapporteur, has put particular emphasis on the importance of recognizing that land rights do constitute a central aspect of the right to housing. He identified a normative gap regarding land rights within international human rights instruments dealing with the protection of the right to adequate housing. As noted in the 2007 report: “Throughout his work, the Special Rapporteur has tried to identify elements that positively or negatively affect the realization of the right to adequate housing.

Land as an entitlement is often an essential element necessary to understand the degree of violation and the extent of realization of the right to adequate housing” (UNITED NATIONS, 2007b, para. 25). The Special Rapporteur has called upon the Human Rights Council to recognise the right to land as a human right and strengthen its protection in international human rights law.

The connection between housing and land rights has been particularly central to the work of the Special Rapporteur in the area of women’s rights to housing. Following a resolution adopted by the former Commission on Human Rights, the Special Rapporteur undertook a larger study on women’s rights to own property and to adequate housing. highlights One of the central conclusions of the report was that the lack of recognition of land rights of women directly affects their right to adequate housing. The Special Rapporteur has also highlighted the close link between violence against women and the right to adequate housing, and how the recognition of land rights for women could potentially play a positive role against domestic violence.

Housing and land rights are also connected in the human rights approach to forced eviction. The General Comment No. 7 of the Committee on ESCR defines forced eviction as the, “permanent or temporary removal against the will of individuals, families or communities from their homes or land, which they occupy, without the provision of, and access to, appropriate forms of legal or other protection” (UNITED NATIONS, 1997, para. 3).

Forced evictions are often linked to the absence of legally secure tenure, which, as we said above, constitutes an essential element of the right to adequate housing. Forced evictions are, therefore, *prima facie* violations of the human right to adequate housing. Both the UN Comprehensive Human Rights Guidelines on Development-based Displacement and the Basic Principles and Guidelines on Development-based Evictions and Displacement adopt a similar definition of forced eviction, which includes loss of lands.

The connection between forced eviction and violation of land rights played an important role in the decision of the ACHPR in the case of the Endorois community against Kenya. The Commission highlighted how the non-recognition and respect of the land rights of the indigenous community in their displacement led to their forced eviction in violation to article 14 of the African Charter (AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS, 2010, para. 200). In reaching such a decision, the Commission made direct reference to standards outlined by the UN CESC in its General Comment 4 on the right to housing and to General Comment 7, on evictions and the right to housing, highlighting how land rights are directly related to both the right to housing and the prohibition of forced evictions. Civil society has also put emphasis on the connection between housing and land rights with the establishment of the Housing and Land Rights Network.³

Overall, the connection between housing and land rights seems to be a strong feature of human rights law, and it involves both a positive and a negative aspect. It has a positive aspect in the sense that land rights are considered to be an essential element for the achievement of the right to housing; and a negative

aspect as land dispossession could qualify as forced eviction in direct violation of the right to housing. While such an approach is clearly logical it remains nonetheless limited to one particular aspect of land rights, which is to support housing; but the other crucial aspects of land rights, notably the cultural, social, and spiritual ones, are not captured here.

6 Land rights as access to adequate food

Unlike land rights, the right to food is strongly affirmed under international human rights law. Article 25 of the UDHR reads that everyone has the right to an adequate standard of living, “including food”. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) makes special reference to the right to food by expressly affirming the right of everyone to an adequate standard of living “including adequate food”. Article 11(2) proclaims the “fundamental right of everyone to be free from hunger”, with article 11(2)(a) requiring States “to improve methods of production, conservation and distribution of food”, in particular reforming agrarian systems to achieve the most efficient use of natural resources; and Article 11(2)(b) requiring the implementation of “an equitable distribution of world food supplies”.

Probably the most direct connection with land rights in the Covenant comes from the reference to the need to “improve methods of production, conservation and distribution of food . . . by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources” (UNITED NATIONS, 1966, art. 11).

Several references to land rights can be found in the General Comment 12 of the UN CESCR on the right to food. In its General Comment, the Committee stated: “the right to adequate food is realized when every man, woman and child, alone and in community with others, has physical and economic access at all times to adequate food or means for its procurement” (UNITED NATIONS, 1999, art. 11, para. 6).

In considering that the “roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food” (UNITED NATIONS, 1999, art. 11, para. 5), General Comment 12 on the right to adequate food states that availability “refers to the possibilities either for feeding oneself directly from productive land or other natural resources” (UNITED NATIONS, 1999, art. 11, para. 12), or from functioning market systems making food available. The General Comment further states that ensuring access to “food or resources for food” requires States to implement full and equal access to economic resources, including the right to inheritance and ownership of land for all people, and particularly for women.

The connection between the right to food and land rights is also an important part of the mandate of the UN Special Rapporteur on the Right to Food (both current and former). The former Special Rapporteur, Jean Ziegler, highlighted that “access to land is one of the key elements necessary for eradicating hunger in the world”, and noted that “many rural people suffer

from hunger because either they are landless, they do not hold secure tenure or their properties are so small that they cannot grow enough food to feed themselves” (UNITED NATIONS, 2002, para. 22). Several of his reports have shown how discrimination in the access to land rights can have a direct impact on the realization of the right to food. In his report on the situation in India, Ziegler noted that:

Widespread discrimination prevents Dalits from owning land, as they are seen as the ‘worker class’, and even if they receive land (as a result of redistribution and agrarian reform programmes in some states), such land is frequently taken by force by higher caste people in the area.

(UNITED NATIONS, 2006c, para. 11).

Landlessness among the Dalits is a common feature in the rural economy, as higher caste and rich landlords control lands, and this directly affects the realization of their right to food.

More recently, the connection between land rights and the right to food has been made even more clear in the context of large-scale land-acquisitions, also known as *land-grabs* (TAYLOR, 2009). Following the 2008 global food crisis, several major food-importing and capital-exporting states, having lost confidence in the global market as a stable and reliable source of food, accelerated the process of large-scale acquisition of suitable agricultural lands (COTULA et al., 2009). In other words, these “food insecure” governments that rely on imports of agricultural produces have started a policy of acquisition of vast areas of agricultural lands abroad for their own offshore food production and also for augmenting their investments in increasingly valuable agricultural foreign lands. In this context, land rights came to be perceived by some as a key tool to ensure local people’s right to food. The current UN Special Rapporteur on the Right to Food, Olivier de Schutter, for example, has directly connected the right to food to the question of large-scale land acquisitions through a recent report:

The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply-priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor.

(UNITED NATIONS, 2009, para. 4)

Moreover, the Special Rapporteur urges all stakeholders (governments, investors and local communities) to adopt a more structured approach placing human rights standards at the centre of negotiations. The Special Rapporteur has proposed eleven minimum principles addressed to investors, home States, host States, local peoples, indigenous peoples and civil society. Two of the proposed principles are directly concerned with land rights:

Principle 2 Transfer of land-use or ownership can only take place with the free, prior and informed consent of the local communities. This is particularly relevant to indigenous communities given their historical experience of dispossession.

Principle 3 States should adopt legislation protecting land rights including individual titles or collective registration of land use in order to ensure full judicial protection.

(UNITED NATIONS, 2009)

Hence, the Special Rapporteur has argued that, in the name of the protection of the right to food of the most destitute, States should ensure the security of the land tenure of their farmers and local communities as well as put in place policies aimed at ensuring more equitable access to land (DE SCHUTTER, 2011). While such an interaction between access to land and the right to food is particularly acute within the current *land-grab* phenomenon, this movement of large-scale investment in agricultural lands is only highlighting how the realization of the right to food necessarily implies the protection of land rights.

Recently, more direct references to land rights have started to appear in the work of other international organisations concerned with food security. For example, in 2004, the Food and Agricultural Organisation (FAO) issued its Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (FOOD AND AGRICULTURAL ORGANISATION OF THE UNITED NATIONS, 2004). The guidelines are based on all the relevant international instruments relating to the right to food, and propose 19 guiding principles to help States ensure the progressive realization of the right to food. Guideline 8 (B) specifically focuses on land rights of women and indigenous peoples as an important element to ensure the realization of the right to food. More generally, several organisations working on issues relating to food security have started to acknowledge the need to focus their work and campaigns on the protection of land rights as part of the realization of the right to food (MIGGIANO; TAYLOR; MAURO, 2010).

7 Conclusion

A human rights-based approach to land rights is essential to address pre-conflict, conflict, and post-conflict situations. As illustrated by the situations in South Africa, Uganda, Guatemala, and Zimbabwe, land issues and agrarian reform are often at the centre of violent conflicts and, as such, are key elements in the transition from conflict to peace. Land conflicts have recently erupted also in Indonesia, and recent large-scale land acquisitions are threatening the stability of Cambodia.

In many ways, these tensions around land rights are not new: the history of mankind has evolved around such conflicts, as arguably wars have always involved some form of territorial dispute. There is also a strong link between use, access to, and ownership of land on the one hand, and development and poverty reduction on the other. The growing agrarian crises, fuelled by the failure of land reform measures, corporate takeover of lands, privatisation of basic services, increase in development-induced displacement, and the usurpation of agricultural land of

small farmers, are all contributing to land rights gradually becoming a central social justice and human rights issue.

While land is increasingly commodified as an exclusively commercial good, a human rights-based approach to land rights brings another perspective to the value of land, as a social and cultural asset and, more importantly, a fundamental right. As traditional access and ownership rights for women, minorities, migrants and pastoralists are ignored or reduced within the current context, these populations are increasingly claiming that their land rights are part of their fundamental human rights. Under the banner *land rights are human rights*, they are claiming that land represent not only a very valuable economic asset but is also a source of identity and culture.

With the notable exceptions of women's rights and indigenous peoples' rights, however, land rights are not to be found under human rights treaties. As explored in the article, land rights are seen to be essential elements for the realisation of other human rights. The connection between land rights and the right to food seems to be gaining some prominence, based on a view of land rights as an essential element for the realization of the right to food. A very similar approach to land rights has developed under the banner of housing rights. In both situations, land rights have been identified as a portal for the realization of other fundamental rights.

The examples above certainly represent an important development within international human rights law. It is paradoxical, however, that notwithstanding the increasingly accepted perception that the realization of two fundamental human rights (food and housing) rely on the protection of the right to land, this right is not considered fundamental, as it is not to be found anywhere in international treaties, despite calls from activists, however, international non-governmental organisations and other civil society actors⁴. One might wonder if human rights law is not putting the cart before the horse with the affirmation that land rights are essential without first clearly embedding it and entrenching it within the legal framework.

Arguably, land rights are inherently contentious, as land is such an important source of wealth, culture, and social life. The distribution and access to land is not politically neutral, and land rights affect the overall economic and social basis of societies. Additionally, the different economical, social and cultural facets of land rights create tensions between different interests, notably between the need to protect the *landed* while also providing rights to the *landless*. Finally, land rights are an essential element of economic growth and, as such, involve a range of stakeholders that includes powerful foreign investors.

Ultimately, land registration and land management will remain within the remit of the national legislation of each country, but an international instrument on the human right to land would influence land legislation and land reforms at the national level. A human rights approach might be an important tool to ensure that both the cultural and economic value of land are recognized, and that thus the right of people over their lands are respected as a fundamental right. Indigenous peoples have succeeded in claiming their fundamental land rights and managed to include land rights within the human rights lexicon. This extremely positive development might be an indication that it is time for the human rights community to claim back land rights has a fundamental human rights for all, landed and landless.

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NOTES

1. Article 14 of CEDAW dedicated to the rights of rural women states that women should "have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement scheme." The nine core human rights treaties are: the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Convention for the Protection

of All Persons from Enforced Disappearance; the Convention on the Rights of Persons with Disabilities.

2. The other ones are: availability of services, materials, facilities and infrastructure; Affordability; Habitability; Accessibility for disadvantaged groups; Location and Cultural Adequacy.

3. See: <<http://www.hlrn.org/>>. Last accessed on: May 2013.

4. See for examples: Kathmandu Declaration: Securing Rights to Land for Peace and Food Security (2009); Bali Declaration on Human Rights and Agribusiness in Southeast Asia (2011) and also: Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/4/18 (Feb. 5, 2007), at para, 31-33.

RESUMO

O direito à terra tem atraído certa atenção como uma questão relacionada ao direito à propriedade e tem sido considerado um direito especificamente importante dos povos indígenas e das mulheres, mas o direito à terra está ausente dos instrumentos internacionais de direitos humanos. Este artigo analisa como o direito à terra tem sido abordado desde cinco ângulos diferentes na legislação internacional dos direitos humanos: como uma questão de direito à propriedade, como um direito especificamente importante para os povos indígenas; como um aspecto da igualdade de gênero, como um slogan na campanha contra o acesso desigual à alimentos e moradia. Ao analisar estas diferentes abordagens, o artigo propõe identificar o lugar do direito à terra nos instrumentos e jurisprudência internacional de direitos humanos assim como analisar por que não tem sido – e se deveria ser – incluído como direito específico e independente.

PALAVRAS-CHAVE

Direito à terra – Mulheres – Povos indígenas – Direito à alimentação – Direito à moradia

RESUMEN

El derecho a la tierra ha recibido una cierta atención en cuanto problema de derechos de propiedad y como un derecho particularmente importante para los pueblos indígenas y las mujeres, pero este derecho se encuentra ausente de todos los instrumentos internacionales de derechos humanos. Este artículo analiza como el derecho a la tierra ha sido abordado desde cinco ángulos diferentes en la legislación internacional de derechos humanos: como una cuestión de derecho de propiedad, como un derecho específicamente importante para los pueblos indígenas; como un ingrediente para la igualdad de género; y como una llamada para unirse contra la desigualdad en el acceso a la alimentación y a la vivienda. Al analizar estos diferentes enfoques, este artículo propone identificar el lugar del derecho a la tierra en los instrumentos y jurisprudencia internacional de derechos humanos así como analizar por qué ese derecho no ha sido incluido -y si debería ser incluido- como derecho específico e independiente.

PALABRAS CLAVE

Derechos sobre la tierra – Mujeres – Pueblos indígenas – Derecho a la alimentación – Derecho a la vivienda

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