

The Human Right to Land

Position Paper



Imprint:



November 2017

Published by FIAN International Secretariat
Willy-Brandt-Platz 5
69115 Heidelberg, Germany
www.fian.org
contact@fian.org

Photos: FIAN

Cover photo: Dawn at the peasant university Unicam Suri, Santiago del Estero, Argentina (photo by Philip Seufert/FIAN)



Hands on the Land for Food Sovereignty (HotL4FS) is a collective campaign by 16 partners, including peasants and social movements, development and environmental NGOs, human rights organizations and research activists aiming to raise awareness on the use and governance of land, water and other natural resources and its effects on the realization of the human right to food and food sovereignty. www.handsontheland.net



Produced with financial support from the European Commission.
The views expressed herein are those of the publisher and not of the EC.

This document is the result of a collective process of reflection and discussion over several years, both within FIAN International as well as with social movements of small-scale food producers and other organisations.

TABLE OF CONTENT

I. Introduction: It is time for the Human Right to Land	4
<hr/>	
II. Why a Human Right to Land?	
1. Current dynamics of land dispossession and privatization of nature	5
2. The current dominant framing of land and land governance	12
3. The existing normative gap in international human rights law	16
4. Peoples' struggles for land and natural resources	18
<hr/>	
III. Land in the current normative human rights framework	
1. General	20
2. Recent developments	23
<hr/>	
IV. Content and elements of the Human Right to Land	
1. Definition and elements	25
2. State obligations under the Human Right to Land	27
<hr/>	
V. Conclusion and the way forward	33
<hr/>	



I. Introduction: It is time for the Human Right to Land

Since its inception in 1986, FIAN has investigated and documented land conflicts and supported rural communities in the defence and struggle for their lands and other natural resources. FIAN was one of the first human rights organisations that began systematically applying a human rights-based approach to land issues and to conceptualise redistributive land reform as a human rights obligation. In particular, FIAN contributed to the understanding that the secure access to land is a key component of the right to food, understood as the 'right to feed oneself'. This concept was eventually adopted in 1999 by the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment no. 12 on the right to adequate food.¹

Later on, FIAN contributed to expanding this understanding through its involvement in the drafting of the FAO Guidelines to Support the Progressive Realization of the Right to Adequate Food², which dedicate the entire guideline no. 8 to the issue of access to resources to resources. More recently, FIAN

actively participated in the process of developing the Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests³ at the UN Committee on World Food Security (CFS). These Guidelines are the first international soft law instrument to focus on how economic, social and cultural rights should be applied to the governance of land, fisheries and forests. Together with the Global Network for the Right to Food and Nutrition (GNRtFN), FIAN has also coordinated the participation of civil society and social movements in the development of General Recommendation No. 34 on the rights of rural women at the Committee on the Elimination of Discrimination against Women (CEDAW).⁴ Furthermore, FIAN is currently involved in drafting a UN Declaration on the Rights of Peasants and Other People Working in Rural Areas at the UN Human Rights Council – a process that was initiated by the transnational peasant movement La Via Campesina. The advanced version of the draft declaration includes an article on the rights of peasants to land and other natural resources.

Based on FIAN's long-standing work on land issues, we strongly believe that it is time to assert the right to land as a human right and to further strengthen the recognition, respect, protection and fulfilment of this right.

¹ United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment 12: The right to adequate food (art. 11), 12 May 1999, UN Doc E/C.12/1999/5.

² Food and Agriculture Organisation of the United Nations (FAO), Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, 2005.

³ Food and Agriculture Organisation of the United Nations (FAO), Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 2012.

⁴ United Nations Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 34 on the rights of rural women, 7 March 2016, UN Doc CEDAW/C/GC/34.

II. Why a Human Right to Land?

1. Current dynamics of land dispossession and privatization of nature

The scale, depth and pace of the current wave of land and resource grabbing pose major threats to the current and future enjoyment of human rights worldwide. The increased interest in land as an economic and financial asset by corporations, funds, local elites and governments can be explained by an interplay of several factors, which include:

- the recent convergence of food, fuel, energy, climate, environmental, and financial crises;
- the rise of newer hubs of economic production, investment, trade and consumption (such as the BRICS countries: Brazil, Russia, India, China, and South Africa);
- the changing supply and demand patterns of, for instance, agricultural commodities, in the context of the growing world population;
- the industry-driven 'bioeconomy' that aims at replacing fossil raw materials with biological resources⁵ (among others, agrofuels and biomass produced through tree plantations⁶);
- the new paradigm of the so-called 'green economy', which, under the premise of pursuing economic growth, production and consumption within the ecological limits of the planet, transforms natural resources into investment capital;
- the increasing demand for raw materials for industrial use;
- the rise of 'flex crops and commodities'⁷;
- the financialization of natural resources, agriculture and food systems, one expression of which is the fact that financial actors (such as banks, brokerage companies, insurances, pension funds, hedge funds, investment firms and venture capital funds) increasingly consider land as an attractive investment option, in addition to agribusiness and energy companies that are involved in direct production. These financial actors channel capital into land purchases and land-based activities in order to diversify their investments, increase returns and lower the risks for their portfolios. Such 'investments' are not necessarily geared towards production, but rather towards speculation, the parking of money as well as gaining control over land in order to exert structural power, to mention but a few examples;
- the appropriation of land and other resources for alleged environmental ends such as those described in the establishment of natural reserves, conservation projects, and carbon and emission trade schemes, as well as the commercialization and monetization of environmental functions of ecosystems as so-called 'environmental services', which lead to the financialization and privatization of nature; and
- the sharp rise in extractive mining, tourism and urbanization.

These dynamics do not only affect land (agricultural lands, forests, rangelands, and coastal lands) but also natural resources in general. Land grabbing is also water grabbing, as only those lands with a water supply are acquired, often leading to the unsustainable extraction of ground water from water bodies, water pollution and diversion of rivers. In addition, mining, fracking and carbon sequestration projects seek to appropriate underground resources.

⁵ Please see: Transnational Institute (TNI) and Hands on the Land for Food Sovereignty, *The Bioeconomy – a Primer*, November 2015. Available at: handsontheland.net/new-hands-on-the-land-publication-on-bioeconomy.

⁶ Please see: FIAN, *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique*, 2012. Available at: www.fian.org/fileadmin/media/publications_2015/PR_-_2012.10.16_-_Tree_plantations_Niassa_Mozambique.pdf.

⁷ This refers to crops and commodities with multiple and flexible commercial uses. Please see: Borras, S., Franco, J., Isakson, R., Levidow, L. and Vervest, P., 'The rise of flex crops and commodities: implications for research', *The Journal of Peasant Studies*, 43:1, 2016, pp. 93-115.

Similarly, the negative impacts of all forms of resource grabbing on small-scale fisheries (‘ocean grabbing’⁸) are huge. Beyond the issues related to access to and control over land, changes in the utilization of these resources are a key issue. Namely, the global land and resource grab goes hand in hand with a commercial-industrial production model that depends on high external inputs (especially chemical fertilisers and pesticides). This type of production is based on the usage of industrial (and GMO) seeds, which is imposed through seed grabbing and the destruction of agricultural biodiversity. This model further inflicts minimum quality jobs, the economic displacement of small-scale food producers, anti-democratic oligopolies and a production system that is oriented towards the preferences of wealthy (urban) classes⁹. The current land (and water) grab is not limited to rural areas, but also concerns peri-urban and urban areas, and thus particularly affects popular neighbourhoods, informal urban settlements and slums.

In the context of global warming and eco-destruction, the pressure on land and natural resources has intensified in at least three ways. Firstly, the effects of eco-destruction pose great threats for the access to, control over and use of these resources by people and communities who depend on them. Their livelihoods are negatively impacted, as resources become depleted, soils are rendered infertile and

climatic variations and extreme weather events unfold. Secondly, peoples’ and communities’ access to, control over and use of land and related resources are further undermined by conservation and climate change mitigation schemes, such as the Clean Development Mechanism (CDM), REDD+ and Blue Carbon, as well as hydropower mega-dams – which supposedly produce ‘clean’ energy – as well as large scale irrigation schemes. Several of these result in ‘green grabbing’, affecting vast swathes of people in ways that are reminiscent of regular agricultural land concessions¹⁰. What’s more, even more people and communities run the risk of being expelled from their land as a result of technological fixes to climate change, such as carbon sequestration/capture and storage (in the soil, underground or in ocean waters¹¹). Thirdly, the dominant climate change discourse and respective policies justify the dispossession of rural people from their resources and territories by taking a double argument. It is claimed that, firstly, peasant economies, their institutions and their way of using natural resources are inefficient, and secondly, that some community production systems are ecologically destructive. This narrative depicts traditional and peasant farming and their use of resources as important drivers of climate change, and implies (implicitly and/or explicitly) that land and related resources need to be taken away from peasants, fishers, pastoralists and indigenous peoples and transferred to ‘more efficient’ and/or

⁸ The term ‘ocean grabbing’ aims to cast a new light on important processes and dynamics that are negatively affecting the people and communities whose way of life, cultural identity and livelihoods depend on their involvement in small-scale fishing and closely related activities’. Transnational Institute (TNI), Masifundise Development Trust, Afrika Kontakt and World Forum of Fisher Peoples (WFFP), *The Global Ocean Grab: A Primer*, September 2014. Available at: www.tni.org/en/publication/the-global-ocean-grab-a-primer - Q1.

⁹ In fact, as the implementation of projects linked to land deals that were made since 2008 is advancing, FIAN is increasingly confronted with cases where the actual land grab/dispossession has already occurred, and where communities and people now face the longer-term impacts of those deals. These include lack of jobs and/or bad working conditions, pollution of land and water, higher living costs, transformation of the local economy, disintegration of the social fabric of communities and resulting conflicts, emigration (especially of young people), etc. While some of these cases may not look like ‘land cases’ at first sight, they actually are. For examples of such cases, please see: www.fian.org/library/publication/a_life_without_dignity_the_price_of_your_cup_of_tea; www.fian.org/what-we-do/case-work/uganda-mubende; www.fian.de/fallarbeitskawiuganda/; fian.at/de/artikel/sierra-leone-vorzeigejekt-gescheitert.

¹⁰ Please see: Fairhead, J., Leach, M., and Scoones, I., *Green Grabbing: a new appropriation of nature?*, *The Journal of Peasant Studies*, 39:2, 2012, pp. 237-261.

¹¹ Please see: Ribeiro, S., *Cambio climático: armando la trampa*, ETC Group, 3 June 2015. Available at: www.etcgroup.org/es/content/cambio-climatico-armando-la-trampa.

‘more productive’ land uses and users¹², i.e. towards corporations and their commercial production, which has now been rebranded as ‘climate smart.’ At times, this vision is underpinned by a discourse that professes to ascribe value to family agriculture, but in fact promotes a corporate version of it.

The current wave of land dispossession and privatization of nature as well as the mechanisms, immediate outcomes, and broader, long-term implications are multi-faceted. It goes beyond what is most commonly understood as ‘land grabbing’ – if understood primarily in terms of size, features and procedures of large-scale land deals – thus neglecting the economic and political drivers of land dispossession¹³. A narrow framing of land grabbing potentially leaves by the wayside important mechanisms and processes and their impacts – such as trade investment agreements and development cooperation policies¹⁴ – which equally lead to the dispossession of people and communities from their lands. It also ignores the historic dispossession of communities, social and ethnic groups, indigenous peoples etc. – e.g. in the context of colonialism¹⁵ – as well as dispossession and land-related human rights violations in situations of conflict, occupation,

war¹⁶ and natural disasters. Similarly, a narrow framing of land grabbing fails to highlight silent processes of land concentration, their link to the systematic economic displacement of small-scale food producers, and the consequent radical transformations in agriculture and food production. A case in point is the ongoing land concentration in Europe, which over the last sixty years has similarly led to a profound reshaping of society and to the redistribution of wealth. This has had important consequences for the realization of human rights not only of peasants and other small-scale food producers, but also of society as a whole¹⁷.

The dynamics mentioned above deny local communities access to their land and land-related resources, destroy livelihoods, and disrupt communities. Furthermore, they reduce the political space for peasant-oriented agricultural policies and self-determined development, and distort markets towards increasingly concentrated agribusiness interests and global trade rather than towards sustainable peasant, smallholder production that prioritises local and national markets. These forces are at work even when no evictions are recorded, and independently of whether (legal or illegal) large-scale land deals

¹² Borras, S., Land politics, agrarian movements and scholar-activism, Inaugural Lecture, 14 April 2016. Available at: www.tni.org/en/publication/land-politics-agrarian-movements-and-scholar-activism.

¹³ For instance, please see the definition of land grabbing of the International Land Coalition (ILC), which neglects economic and political drivers. Available at: www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf. Please also see a critique of this definition: The International Land Coalition (ILC): a critical appraisal, Working paper – draft, May 2015.

¹⁴ For examples of cases documented by FIAN where communities’ land rights have been weakened through Official Development Aid (ODA) and how the international regime for investment protection has impeded land restitution and redistribution, please see Künnemann, R. and Monsalve Suárez, S., International Human Rights and Governing Land Grabbing: A View from Global Civil Society, *Globalizations*, 10:1, 2014, pp. 123-40.

¹⁵ For instance, please see: www.fian.org/what-we-do/case-work/brazil-guarani-kaiowa; www.fian.org/what-we-do/case-work/paraguay-sawhoyamaxa; www.fian.org/library/publication/a_life_without_dignity_the_price_of_your_cup_of_tea. It should be noted that historical processes of dispossession of peasants, fishers, pastoralists etc. have also occurred in Europe. Examples are, among others, the enclosures of (common) land, which played a key role in the development of capitalism in England in the 16th and 17th centuries, or the peasants’ wars in Germany in the 16th and 17th centuries.

¹⁶ For instance, please see: Habitat International Coalition-Housing and Land Right Network (HIC-HLRN), *The Land and Its People. Civil Society Voices Address the Crisis over Natural Resources in the Middle East/North Africa*, 2015. Available at: www.hlrn.org/img/publications/BigMasterFinal.pdf.

¹⁷ Please see: European Coordination Via Campesina (ECVC) and Hands off the Land, *Land concentration, land grabbing and people’s struggles in Europe*, 2013. Available at: www.tni.org/en/publication/land-concentration-land-grabbing-and-peoples-struggles-in-europe-0; and Transnational Institute (TNI) and Hands on the Land for Food Sovereignty, *Land grabbing and land concentration in Europe – A research brief*, 2016. Available at: www.tni.org/en/publication/land-grabbing-and-land-concentration-in-europe. Please also see the very illustrative infographics on the state of land concentration in Europe. Available at: handsontheland.net/infographics-the-state-of-land-concentration-in-europe.

have occurred or not. If these extractivist practices – such as industrial agricultural production (largely based on monocultures) and large-scale mining – go on unabated, they will accelerate ecosystem destruction and the climate crisis. If not reversed, the current developments will deprive a significant part of today's rural population of their access to and control over natural resources and destroy the peasantry, fishing communities, pastoralists and forest-dwellers that are still the backbone of local food production systems. As such, they affect society as a whole by fundamentally reshaping the entire food system in terms of production, distribution and consumption. They will also deepen existing patterns of discrimination and structural violence against women. Clearly, the very social fabric, stability and peace of many societies are at severe risk.

Important threats and challenges lie in the financialization¹⁸ of land, agriculture and the food system – a key element of the contemporary global resource rush – especially when it comes to protecting peoples' and communities' land and their

human rights in land deals. In the context of land and other natural resources, financialization sheds light on the multiple and interconnected actors, relations and processes that are involved in the design, financing and implementation of agribusiness and other land-related investments (including speculative 'investments'). This indicates that land grabbing is not only about the direct control over land and other natural resources, but also about the finance mobilised for control, acquisition and exploitation. The example of the complex structure of one of the biggest palm oil players in Africa, Feronia, illustrates the multi-layered nature of many land grabs: what looks like a corporate entity at first sight, is, in reality, a complex investment web. Attributing responsibility for human rights violations and abuses to each of the actors involved therefore becomes a substantive challenge for those in charge of determining accountability, and thereby providing remedies¹⁹. This is obviously not a coincidence, but a deliberate strategy of 'distancing of accountability'²⁰, used by those who promote and facilitate land grabbing.



¹⁸ The term financialization describes the growing power and influence of the finance industry, materially and discursively, and its way of operating in all sectors of the economy as well as society. This includes the fact that the finance industry's interests are evermore dominant in public institutions and discussions. It also entails a larger role played by the finance industry's geographic hubs (financial places like Delaware, London, Luxembourg or Mauritius, among others).

¹⁹ Borras, S., Seufert, P., Backes, S., Fyfe, D., Herre, R., Michèle, L. and Mills, E., Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing outside the European Union. Study commissioned by the Subcommittee on Human Rights of the European Parliament, May 2016. Available at: [www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU\(2016\)578007](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2016)578007).

²⁰ Clapp, J., 'Financialization, distance and global food politics', *Journal of Peasant Studies*, 41(5), 2014, pp. 797-814.

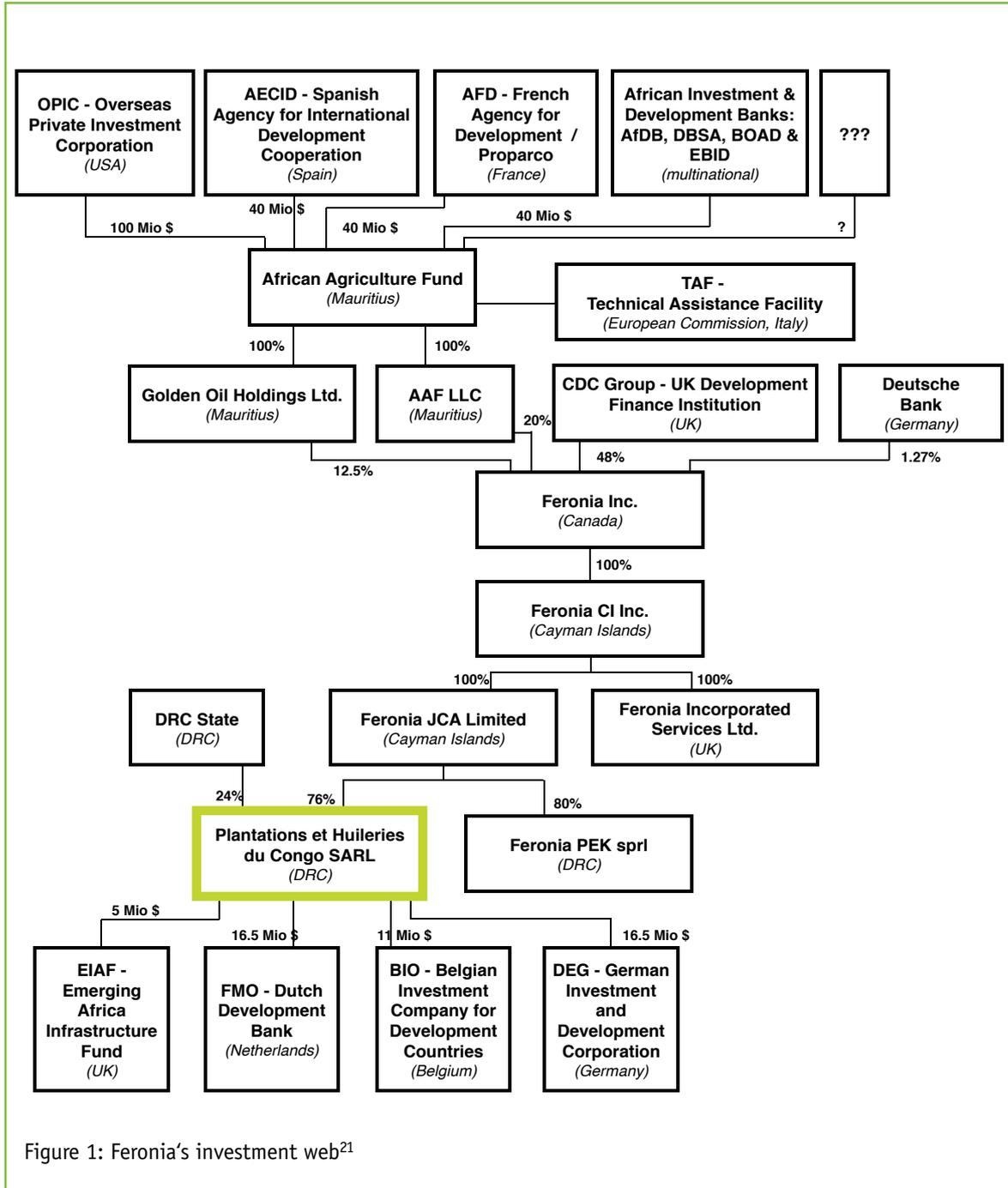


Figure 1: Feronia's investment web²¹

²¹ The following aspects must be taken into account: (1) The data are retrieved from different sources from different years. The figure does thus not necessarily reflect the exact situation as of today. However, this does not impede the purpose of the figure, which is to exemplify the complex investment webs surrounding land grabs. (2) CDC shares are summarised from shares and 'benders', an instrument that can convert loans to shares. (3) Due to negative perceptions, the Feronia entity in the Cayman Islands entered into voluntary liquidation. Feronia is now registered in Belgium.

The case of Feronia also exemplifies the fact that public and private actors are evermore intertwined, including in the financing of land grabs. Development finance institutions (DFIs) have become particularly important financiers of land deals and all sorts of land-related ‘investment’ projects – sometimes (as in the case of Feronia), the majority of a company’s shares are eventually in the hands of DFIs. While the scale of private sector financing from DFIs (as well as from International Finance Institutions – IFIs) has dramatically expanded over the last years, DFIs also increasingly put their capital in financial institutions, as part of an approach that sees the private financial sector as a development actor and bolsters it with public resources. Some DFIs invest around half of their total portfolios in financial intermediaries, making it extremely difficult to know where and how this money is then used, thus raising huge problems of accountability.²²

The current dynamics of land dispossession and privatization of nature go hand in hand with the mounting violence against communities, and especially against all those who oppose the grabbing of resources and/or struggle for people’s access to and control over land, social and environmental justice. Human rights defenders working on land, natural resources and environmental issues are often harassed, persecuted, arbitrarily imprisoned and even killed because of their work.²³ According to the

Special Rapporteur on the situation of human rights defenders, they are the second most vulnerable group of human rights defenders.²⁴

The state plays a key role in the processes described above. A significant part of the current wave of land and natural resources grabbing occurs on lands that are formally owned by the state. Communities that occupy and use the land and related resources have different degrees of recognition and protection of their land rights, which are often customary, ancestral, communal or informal rights. State authorities, relying on certain legal doctrines that in many cases were introduced to justify land dispossession by colonial powers, often believe that they are vested with the power to dispose at will of these lands.²⁵ In other cases, states use the doctrine of eminent domain and the argument of supposed public interest/purpose to justify dispossession.²⁶

Academics have identified three distinct but interrelated dimensions of state action that can be seen to configure land grabbing: a) simplification of land-based social relations to render complex social relations ‘legible’ to state administration and control, i.e. only what it is in the state land records exists and individual property rights are seen as the only land rights that enjoy full respect and protection by the state; (b) the assertion of sovereignty and authority over territory (right of discovery, ‘terra nullius’

²² Borras et al., 2016, *supra* note 19, pp. 27-28. Another example for the creation of constructs, which facilitate the entry of financial actors into land deals and create a mix between public, private and public-private actors and money is the Africa Agriculture and Trade Investment Fund (AATIF), a public-private financing tool based in Luxembourg, which was set up by the German Ministry for Economic Cooperation and Development (BMZ), The German Development Bank (KfW) and Deutsche Bank AG, and which involves several public investors. Please see: FIAN/Hands off the Land Alliance, Fast track agribusiness expansion, land grabs and the role of European private and public financing in Zambia. A Right to Food Perspective, December 2013. Available at: www.fian.org/en/news/article/latest_study_questions_the_role_of_european_investments as well as FIAN, Land and Human Rights. The Role of EU Actors Abroad, April 2017. Available at: www.fian.org/en/news/article/the_eu_must_act_to_stop_and_prevent_land_grabbing.

²³ Over the last years, FIAN has intervened with letters and actions in cases of violence against human rights defenders working on natural resources, among others, in Argentina, Brazil, Colombia, Ecuador, Ethiopia, Guatemala, Honduras, Laos, Mali, Nigeria, Pakistan, Paraguay, Sierra Leone and Spain.

²⁴ Please see: Report of the UN Special Representative on human rights defenders, Ms Hina Jilani. UN Document A/HRC/4/37, para 38-47 and the report of the former Special Rapporteur on the situation of human rights defenders, Ms Margaret Sekaggya, UN Document A/HRC/19/55.

²⁵ For instance, please see: FIAN, *Accaparement des terres et droits humains au Mali. Les cas de Sanamadougou-Saou, Sansanding et San*, March 2014. Available at: www.fian.org/fileadmin/media/publications_2015/Rapport_Mali_Final.pdf.

²⁶ Eminent domain refers to the power of the state to take over privately held land on the grounds of public interest, subject to payment of compensation. This principle ‘signifies the authority vested in the state to exercise its role as a guardian of larger public interest’ and provides a legal foundation, for instance, for expropriation of lands in the context of redistributive reforms. However, it has been used in several countries to justify dispossession of people and communities in the name of ‘public purpose/interest’, by abuse of the authority to determine what constitutes such public purpose or interest, and interpreting it to the disadvantage of marginalised populations. Please see: Gelbspan, T., Nagaraj, V.K., *Seeding Hope? Land in the International Human Rights Agenda. Challenges and Prospects*. Working Paper, ESCR-Net, 2012. Available at: www.escr-net.org/resources/seeding-hope-land-international-human-rights-agenda.



doctrine, 'wasteland'/'vacant lands' thesis); and c) the use of state-sanctioned armed force to ensure compliance, extend territorialization of the nation state, and broker for private capital accumulation.²⁷ This state behaviour and the legal land regimes, in many cases inherited from colonialism, are deep-seated in the structure of many contemporary states. Instead of applying policies of restitution and redress of historic land dispossession, of full recognition and protection of customary and ancestral land rights, and of redistribution of private and public lands in cases of widespread landlessness and highly unequal patterns of land ownership, states are today facilitating further privatization, commoditization and (re-)concentration of land due to the economic drivers mentioned above. They do this by generating a narrative – following significant lobbying by corporate interests – about why land deals that benefit all kinds of 'investors' (including those acquiring land for speculative purposes) are necessary. Hence, they embark on defining 'marginal' and 'available' land; reclassifying, rezoning, and quantifying such lands; expropriating land; and through (re)allocation

or dispossession processes. At the same time, states (including the home states of investors and corporations) fail to adequately regulate corporations and investors in order to guarantee the human rights of people and communities, as well as to hold these actors accountable for abuses and crimes.

The human right to land provides a framing and solid human rights basis to address the complex and interrelated dynamics around land and natural resources, putting the rights, livelihoods, needs and aspirations of people and communities on centre stage. It contributes to challenging the increasing tendency to consider land and related natural resources as mere commodities and/or financial assets ruled by market laws, and to concentrate the control of vital resources in the hands of a few. It also contributes to challenging legal doctrines and legal frameworks governing natural resources, which are interpreted in such a way so as to give unlimited power to the state to dispose of land and other natural resources; which do not adequately recognize and protect customary/ancestral/informal land rights; and which do not guarantee equitable access to and control over natural resources.

²⁷ Scott, J., *Seeing like a State: How Certain Schemes to Improve the Human Condition have Failed*, New Haven, CT: Yale University Press, 1998; and Borras, S. and Franco, J., *A 'Land Sovereignty' Alternative? Towards a People's Counter-enclosure*, TNI Agrarian Justice Programme Discussion Paper, July 2012. Available at: https://www.tni.org/files/a_land_sovereignty_alternative_.pdf.



2. The current dominant framing of land and land governance

Closely related to the dynamics described above is the current dominant discourse around land and land governance, which considers land and related natural resources primarily as a globalised economic and financial asset. Technical tools such as statistics, calculations on land use and productivity based on satellite images etc. are used to underpin this discourse, which fundamentally redefines land. Land is thereby considered a globalised, 'investible' resource, rather than a natural good with a strong local component, given that its control and use is primarily a social relation.²⁸ What is more, such an approach creates a narrative in which commercial land and agribusiness investment in the form of land acquisitions become not only beneficial, but also necessary.

In such a framing, 'secure land/tenure rights' or 'security of tenure' means providing, promoting and/or protecting property rights of exclusive owners and/or uses of land.²⁹ Usually it means Western-style individual and private property rights, including the right to alienate land, for the purpose of its commodification or transformation into something marketable.³⁰ This so-called security takes the shape of individual land titles, which – often justified with the need to 'clarify' tenure rights – give exclusive and easily transferrable land rights.³¹ Behind this approach

is the idea that lands should be transferred to the most 'productive' and 'efficient' user through the market. As such, it is much more centred on promoting 'investments' (in the form of land acquisition) and economic growth, rather than human rights. Adverse impacts on the human rights of affected – and in many cases already marginalised – populations are not understood as human rights violations and abuses, but rather as 'risks' (for investors), which need to be weighed against the potential/supposed benefits for affected people and groups as well as society as a whole. The vague promise made to affected and marginalized groups is that land acquisitions and land deals will provide economic growth and jobs for people, who in reality risk being incorporated into the bottom of increasingly global value chains.³²

In certain contexts, land titles can indeed be an option to provide protection, and land titling is what some marginalized groups aspire to, just as private ownership is one form through which people and communities access and use land. However, in many other cases, land titles increase the insecurity of these groups and the risk to lose their lands, as they expose them to market pressures.³³ In fact, the 'exit from agriculture' of what are considered to be non-viable farms is sometimes explicitly brought forward as one of the objectives of creating land markets.³⁴ In addition, people and communities access, manage and use lands in multiple ways, which are shaped over time within specific social and cultural contexts.

²⁸ Li, T., What is land? Assembling a resource for global investment, Plenary Lecture for the Transactions of the Institute of British Geographers, 39, 2014, pp. 589–602.

²⁹ As described further on, this does not mean that the concept of 'security of tenure' does not provide a useful framing.

³⁰ Borras, S., Franco, J. and Monsalve Suárez, S., 'Land and Food Sovereignty', *Third World Quarterly*, 36(3), 2015, pp. 600–617.

³¹ As a response to critical voices and negative experiences (from the point of view of marginalised groups), this discourse has to some extent accepted and integrated community titling. This practice, however, remains the exception rather than the rule and does not solve the above-mentioned problems with titles.

³² In fact, as the announced benefits of many land deals have not materialised, outgrower schemes such as contract farming are being promoted by governments and international institutions as the new and better way of agribusiness investments, which formally leave the concerned lands with the affected people and communities. In reality, however, communities still often lose control over their land under such schemes. For an example, please see: Land Grabbing Via Contract Farming. A Case Study from Limpopo (South Africa), September 2016 (unpublished).

³³ For an example, please see: Borras, S., Carranza, D. and Franco, J., 'Anti-poverty or Anti-poor? The World Bank's market-led agrarian reform experiment in the Philippines', *Third World Quarterly*, 28:8, 2007, pp. 1557 – 1576.

³⁴ The 2008 World Development Report explicitly states that 'land markets [...] can facilitate exit from agriculture'. Please see: The World Bank, *World Development Report 2008. Agriculture for Development*, 2007, p. 9. Available at: siteresources.worldbank.org/INTWDR2008/Resources/WDR_00_book.pdf.

Western-style private property rights are, as such, one form among many others. In several contexts, access to, management of and use of land are based on customary and communal tenure systems and practices, which are embedded in social relations and the value system of any given group. While it is true that some of these customary systems are not equitable and discriminate against certain groups, such as women or ethnic groups, their strengthening and democratization needs to be achieved through processes, which engage with the respective communities within the broader context of society, instead of imposing a transformation to individual ownership rights.

The approach to land governance and management described above is promoted by powerful actors, such as the World Bank, development cooperation donor countries and the corporate sector. They increasingly push for this model in the form of joint ,multi-stakeholder' initiatives,³⁵ to be translated into national legislation and policies that remove barriers for investments to the benefit of corporate actors and the detriment of people and communities, whose rights are side-lined and undermined.³⁶ At the same time, international investment law in the form of investment treaties and investor-state arbitrations has become a key tool for the protection of investments and property for investors. Indeed, the vast majority of land deals are protected by investment treaties³⁷ and investors skilfully use national legal and policy frameworks that facilitate and promote transfer of land to investors in order to acquire land, on the one hand, and the international investment protection regime on the other, in order to then protect these lands against claims of communities and people who



³⁵ See McKeon, N., 'Are equity and sustainability a likely outcome when foxes and chickens share the same coop?', *Globalizations*, 14:3, 2017, pp. 379-398.

³⁶ One example for such a public-private 'development' initiative is the New Alliance for Food Security and Nutrition in Africa, see FIAN, *G8 New Alliance for Food Security and Nutrition in Africa: A Critical Analysis From a Human Rights Perspective*, February 2014, available at: http://www.fian.org/fileadmin/media/publications_2015/2014_G8NewAlliance_screen.pdf.

³⁷ Cotula, L. and Berger, T., *Land Deals and Investment Treaties: Visualizing the Interface*, International Institute for Environment and Development, 2015. Available at: pubs.iied.org/pdfs/12586IIED.pdf.

have been dispossessed.³⁸ In addition, investors use international investment law to limit the ability of states to regulate in the public interest.³⁹ All this needs to be seen as part of a push to establish a global right to property, along with a global land market. This project ties in with the mounting misuse of human rights language – in particular related to the right to property⁴⁰ – by business and other actors, in order to make their property rights (in whatever way they have been acquired) prevail over the human rights of affected people.

In the same context, corporate actors and all types of ‘investors’ are increasingly considered and treated as key actors in land governance and management, including in decision-making processes, which affect land and other natural resources. One example is the surge of ‘multi-stakeholderism’, e.g. in the context of the implementation of the Guidelines on the Responsible Governance of Land, Fisheries and Forests.⁴¹

The concepts of ‘tenure’ and ‘security of tenure’ can provide a useful framing to challenge such approaches. According to FAO’s definition, ‘tenure’ is the relationship, whether defined legally or customarily, among people with respect to land and

other natural resources.⁴² This definition of tenure as social relations is multifaceted and captures, at least to some extent, the complex relationship of communities and people with land and other natural resources, as well as with nature itself. It should be underlined that the concept of ‘tenure’ has been developed in order to capture access and usage rights of all those who do not have formally recognised property rights. If understood along the lines of CESCR General Comment No. 4 on the right to adequate housing, ‘security of tenure’ provides an important basis for people and communities to protect the lands they are occupying and using and fight against forced eviction, regardless of whether or not they hold any formal titles. However, more recently, ‘tenure’ has become a term that is sometimes being used indistinctively to refer to all kinds of rights by all kind of actors, including ownership rights by commercial investors.

The human right to land challenges the dominant understanding of land as a globalised economic and financial asset as well as the promotion of private property rights and land markets to facilitate land acquisitions. It also contributes to challenging the national and international investment protection regime and provides a tool to oppose the project of establishing a global right to property. The human right to land clarifies that land is, first and foremost, a common good which communities and people access, control, manage and use in many different forms, in order to live a dignified life, according to their social and cultural context. As such, it recognizes, protects and guarantees a variety of tenure systems and tenure rights, seeking to democratise them wherever they are discriminatory.

³⁸ See, for instance, the case of the bilateral investment agreement between Germany and Paraguay: *Brot für die Welt/FIAN Deutschland et al., Extraterritorial State Obligations – Parallel report in response to the 5th Periodic Report of the Federal Republic of Germany on the implementation of the International Covenant on Economic, Social and Cultural Rights*, March 2011, p. 14. Available at: www.fian.org/fileadmin/media/publications_2015/2011-3-Germany_ETO-Report.pdf.

³⁹ See Cotula, L., ‘Land Grabbing’ and international investment law: toward a global reconfiguration of property?, in Bjorklund, A.K. (ed.), *Yearbook on International Investment Law & Policy 2014-2015*, Oxford University Press, pp. 177-214. Available at: pubs.iied.org/pdfs/G04091.pdf.

⁴⁰ While the right to property is recognised by international human rights law, this does not mean that all property rights are human rights.

⁴¹ See ‘The Guidelines on the Responsible Governance of Tenure at a Crossroads’, International Statement, December 2015. Available at: viacampesina.org/en/the-guidelines-on-the-responsible-governance-of-tenure-at-a-crossroads.

⁴² Based on FAO’s definition of land tenure. Please see: Food and Agriculture Organisation of the United Nations (FAO), *Land Tenure and Rural Development*. FAO Land Tenure Studies, 2002. Available at: www.fao.org/docrep/005/y4307e/y4307e00.htm. This definition can be applied, by extension, to natural resources more generally.

3. The existing normative gap in international human rights law

Despite increasing awareness and recognition about the inextricable connection between land and several human rights (land is indispensable for the realisation of various human rights, such as the right to food, the right to housing, the right to water, the right to an adequate standard of living, the right to take part in cultural life, the right to work, the right to self-determination and the rights of women), international human rights law guarantees, to date, only limited land rights. States cannot arbitrarily deprive people of their property, nor can they evict settled communities that rely on a piece of land but lack legal title to it, without meeting certain conditions.⁴³ The right to property, however, applies to land owners, thus leaving landless people and those with other forms of land and tenure rights – often the majority of the rural population – without protection. Moreover, the bar against evictions can easily be circumvented – and is – as states have broad discretion to determine whether the conditions justifying evictions have been met. Ultimately, these protections are largely procedural in nature and do not offer substantive guarantees.⁴⁴

Land as a substantive human right (i.e. going beyond procedural protection and safeguards, and recognising that humans need land to live a life in dignity) has largely been developed with regard to the rights of indigenous peoples who are guaranteed the right to land and territories, which they have traditionally occupied.⁴⁵ There exists, therefore, a normative gap in international human rights law that leaves non-indigenous rural communities who lack substantive guarantees – but for whom access to land is central

to their identity and essential to their survival – in a vulnerable position.

Although non-indigenous communities cannot directly claim the right to land, they can seek recourse through a multitude of other human rights such as the rights to food, housing, water, health, and an adequate standard of living. The protection provided by these corollary rights is, however, limited. The legal interpretation of the right to food, for example, leaves open whether people feed themselves through direct cultivation of lands or through an income and food distribution system. This room for interpretation has been misused to justify removing people from their lands – particularly when they do not have formalised land rights or property rights – with the reasoning that they are not using land ‘sufficiently, efficiently and sustainably’. It is claimed that their right to food would be ‘better realised’ through income gained from promised jobs – which, in reality, rarely materialise – or through corporate social responsibility or safety net schemes – which amount to nothing more than charity, as opposed to the human rights concepts of self-determination and dignity.

A similar challenge exists with regard to the right to housing. This right goes beyond the mere buildings that shelter people. It is a right to live in a place in peace, security and dignity. This implies that the right to housing also covers the lands and natural resources upon which peoples’ livelihoods depend.⁴⁶ Nevertheless, rural communities are vulnerable to losing their (communal) lands, forests, fisheries and their grazing and seasonally used lands, particularly when they do not have formalised, but rather customary or informal rights over them. As a consequence of the loss of their livelihoods, they will then be forced to also leave their homes. Additionally,

⁴³ General Comment No.7, Forced evictions, and the right to adequate housing, 1997, UN Doc. E/1998/22.

⁴⁴ Narula, S., ‘The Global Land Rush: Markets, Rights, and the Politics of Food’, *Stanford Journal of International Law*, 49:1, p. 101, 2013; NYU School of Law, Public Law Research Paper No. 13-42.

⁴⁵ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Convention 169 (Indigenous and Tribal Peoples Convention) of the International Labour Organization (ILO).

⁴⁶ United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.7, Forced evictions, and The Right to Adequate Housing, 1997, UN Doc. E/1998/22. Para. 10. United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.4, The Right to Adequate Housing, 1991, UN Doc. E/1992/23. Paras. 8 (a) and (e).



in processes of resettlement they are usually not compensated for the loss of these resources.⁴⁷

This situation leaves non-indigenous communities who depend on land for their survival in a vulnerable position, legally and otherwise, and weakens their possibilities to assert their rights.

The human right to land closes the existing normative gap and allows international human rights law to evolve from an instrumentalist approach to land – which considers land as a gateway to the realization of other rights – to the recognition that land sustains life and forms identity and culture, and is, therefore, in itself a substantial human right.⁴⁸ In addition, the recognition, description and implementation of the human right to land would make clear that human rights are also about controlling resources, and that this is essential for conducting a self-determined life in dignity and in community with others. As such, it supports communities and people who claim access to and control over land, and those who defend themselves against dispossession, assert their rights and challenge states that undermine people's access and control by claiming that there are other means to satisfy corollary human rights.

⁴⁷ Please see: Künnemann and Monsalve Suárez, 2014, *supra* note 14, p. 130.

⁴⁸ Please also see: Narula, *supra* note 44.

4. Peoples' struggles for land and natural resources

In their struggles to have their rights to land and natural resources recognised and protected, social movements and grassroots organisations around the world have de facto been claiming the human right to land for a long time. The concept and vision of food sovereignty has been crucial in this regard. It is defined as 'the right of peoples to healthy and culturally appropriate food produced through socially just and ecologically sensitive methods. It entails peoples' right to participate in decision-making, and to define their own food and agriculture systems.'⁴⁹ Food sovereignty has allowed for the developing of a strong conceptual framing of land, which aims at guaranteeing peoples' effective access to and control over the natural and productive resources needed to truly realise their human rights.⁵⁰ The concept of 'territory', which is used by many ethnic nationalities – especially indigenous peoples – as well as communities and social movements to express their relationship to land and nature, has been key in this context.⁵¹ 'Territory' refers to a holistic understanding of land, which recognizes that all natural resources and their uses are interconnected in the realities of the lives and livelihoods of many people, making it impossible to separate land, fisheries and forests from one another, or from other natural resources.⁵² It also underlines that for indigenous peoples, some communities, and small-scale food producers around

the world,⁵³ land, oceans, rivers, forests, and all of nature are much more than a means of production. They are the very basis of life, culture and identity, and fulfil crucial social, cultural, spiritual and environmental functions. Food sovereignty further highlights the self-determination of people, which is a fundamental human rights principle, at the heart of food issues, addressing the interlinked issues of control over natural resources, the way food is produced, marketed and consumed.

From a more urban perspective, the Right to the City has been developed to provide an answer to partly similar and comparable challenges that food sovereignty seeks to address. For instance, the Right to the City includes a strong emphasis on inclusive and participatory land use and planning processes and on the social function of land as part of a broader struggle to access the commons. Even though both visions come from different contexts, they are increasingly in dialogue with each other, and building convergence, as more and more urban groups have taken up food sovereignty and as more attention is given to increasingly complex rural-urban linkages.

The human right to land is a powerful legal tool for peoples' and communities' struggles and to support their land claims, in rural, peri-urban and urban contexts. It underlines that land and land-related resources sustain life and form identity and culture. The human right to land aims at social and environmental justice, transforming power relations and addressing social and economic inequalities.

⁴⁹ Nyéléni Food Sovereignty Forum, 'Declaration of Nyéléni', February 27, 2007. Available at: <https://nyeleni.org/spip.php?article290>.

⁵⁰ The document 'CSOs' Proposals for the FAO guidelines on responsible governance of land and natural resources tenure', March 2011, is the most systematic elaboration on how to govern natural resources for food sovereignty. Available at: www.fian.org/en/library/publication/detail/civil-society-organizations-proposals-for-the-fao-guidelines-on-responsible-governance-of-land-and/.

⁵¹ The concept of territory is complex and subject to multiple interpretations, but is understood here as expressing holistic relationships between people and their living environment. In this context it is not used to define the geographical and economic ambits of states, and over which states assert sovereignty through the use of political, legal and military force.

⁵² For many indigenous and local fishing communities who live along the coast, for instance, the distinction between land and sea tenure is a false one, as they themselves do not distinguish between landscape and seascape.

⁵³ In this context, it is important to note that today, in absolute terms, more peasants than ever live on this planet. Please see Edelman, M. and Borras, S. Jr., Political Dynamics of Transnational Agrarian Movements, Practical Action Publishing, 2016, pp. 1-2, referring, among others, to FAOSTAT data.



III. Land in the current normative human rights framework

1. General

As mentioned before, to date the human rights system has not yet explicitly codified a human right to land. However, an ever-increasing body of soft law instruments and recommendations/observations by UN Human Rights treaty bodies recognises the inextricable connection between land and human rights.

Several of the human rights codified in the major human rights treaties contain provisions regarding land and natural resources as part of their normative content, including the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) (1965), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), the International Covenant on Civil and Political Rights (ICCPR) (1966), the Convention to Eliminate All Forms of Discrimination against Women (CEDAW) (1979), the Convention on the Rights of the Child (CRC) (1989), and the rights enshrined in some of the fundamental International Labour Organisation (ILO) Conventions: Freedom of Association and Protection of the Right to Organise No. 87 (1948); Right to Organise and Collective Bargaining No. 98 (1949); Discrimination (Employment and Occupation) Convention No. 111 (1958); Minimum Age Convention No. 138 (1973); and Worst Forms of Child Labour Convention No. 182 (1999). Other ILO Conventions addressing land and natural resources include the Rural Workers' Organisations Convention No. 141 (1975) and Indigenous and Tribal Peoples Convention No. 169 (1989).⁵⁴ In addition, different UN treaty bodies such

as the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Elimination of Discrimination against Women (CEDAW) have been addressing the issue of land and agrarian reform with increasing intensity in their concluding observations, underlining that land is indispensable for the realization of various human rights. In fact, all human beings rely in some way, directly or indirectly, on land and other natural resources for their survival, and these resources are, in particular, indispensable for the human dignity of peasants, fishers, pastoralists, indigenous peoples and rural workers whose identity is deeply intertwined with land.

The UN Committee on Economic, Social and Cultural Rights (CESCR)

The treaty interpretation and jurisprudence of the UN Committee on Economic, Social and Cultural Rights (CESCR), the body authorized to interpret and monitor implementation of the ICESCR, has widely contributed to clarify the relationships between land and other natural resources, on the one hand, and human rights entitlements and state obligations, on the other. Among the CESCR's interpretive instruments are the General Comments (GC) No. 4 on the right to adequate housing, No. 7 on forced evictions, No. 12 on the right to adequate food, No. 14 on the right to the highest attainable standard of health, No. 15 on the right to water, No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights and No. 21 on the right to take part in cultural life. Moreover, CESCR has issued concluding observations with relation to land to approximately 50 countries since 2001.⁵⁵ These contain recommendations to states on how to respect, protect and fulfil their human rights obligations specifically related to land.

⁵⁴ For a comprehensive interpretation of existing human rights standards backing the recognition of a right to land see Annex II to CSO's Proposals for the FAO guidelines on responsible governance of land and natural resources tenure, March 2011. Available at: www.fian.org/en/library/publication/detail/civil-society-organizations-proposals-for-the-fao-guidelines-on-responsible-governance-of-land-and/.

⁵⁵ Based on an analysis by FIAN based on the Human Rights Index of the Office of the High Commissioner for Human Rights. Available at: uhri.ohchr.org/en.

Regarding the obligation to respect, CESCR recommendations refer for instance to Free, Prior and Informed Consent (FPIC); women's rights to land; indigenous peoples' rights to participation and traditional knowledge in land management; and indigenous peoples' rights to their ancestral lands. Regarding the obligation to protect rural people's rights to land, the CESCR's recommendations concern measures such as:

- implementing reforms that prevent evictions, dispossessions and landlessness;
- enacting or enforcing legislation that prohibits discriminatory customary practices that go against ownership of land by women;
- combating discrimination in land laws and policies;
- protecting farmers' access to land ownership and security through agrarian reforms;
- protecting indigenous people's rights to their ancestral lands;
- safeguarding women's land rights via implementing land restitution and adequate compensation; and
- resolving land disputes and taking measures to prevent future disputes.

As for the obligation to fulfil human rights related to land, the CESCR recommends agrarian reforms and granting land titles.

The Special Procedures of the Human Rights Council and the Human Right to Land

The Special Procedures of the UN Human Rights Council have also contributed to the development of the human right to land. These are independent human rights experts with the mandate to report and advise on human rights from a thematic or country-specific perspective. Several Special Rapporteurs have contributed to developing the relationship between access to land, agrarian reform and the economic, social, cultural and environmental rights of the most marginalised groups, calling for the full recognition of land as a human right.

The former Special Rapporteur on Economic, Social and Cultural Rights, Danilo Türk, stated in 1990 that '[i]t is increasingly recognised that land rights and agrarian reform are often central to the realization of human rights. The fulfilment of various economic, social and cultural rights show a direct relationship to land, such as the right to food, the right to housing, the right to an adequate standard of living, the right to culture, the rights of indigenous peoples and others. The Special Rapporteur is fully aware of the delicate nature and controversy surrounding issues relating to land issues internationally, yet feels convinced that the time has come to give this fundamental issue the serious attention it deserves. No question is more central to power relations within society or to issues of equality and income distribution than land.'⁵⁶

In 2007 the then Special Rapporteur on the right to adequate housing, Miloon Kothari, recommended to the Human Rights Council to recognise the right to land as a human right,⁵⁷ reinforcing the 2005 report of the Special Rapporteur, Paulo Sérgio Pinheiro on housing and property restitution in the context of the return of refugees and internally displaced persons.⁵⁸ Additionally, the Special Rapporteurs on the right to food have underlined the importance of secure access to land and agrarian reform,⁵⁹ and in 2010 the then Special Rapporteur on the right to food, Olivier de Schutter, recommended to CESCR to issue a General Comment clarifying the issue of land as a human right.⁶⁰

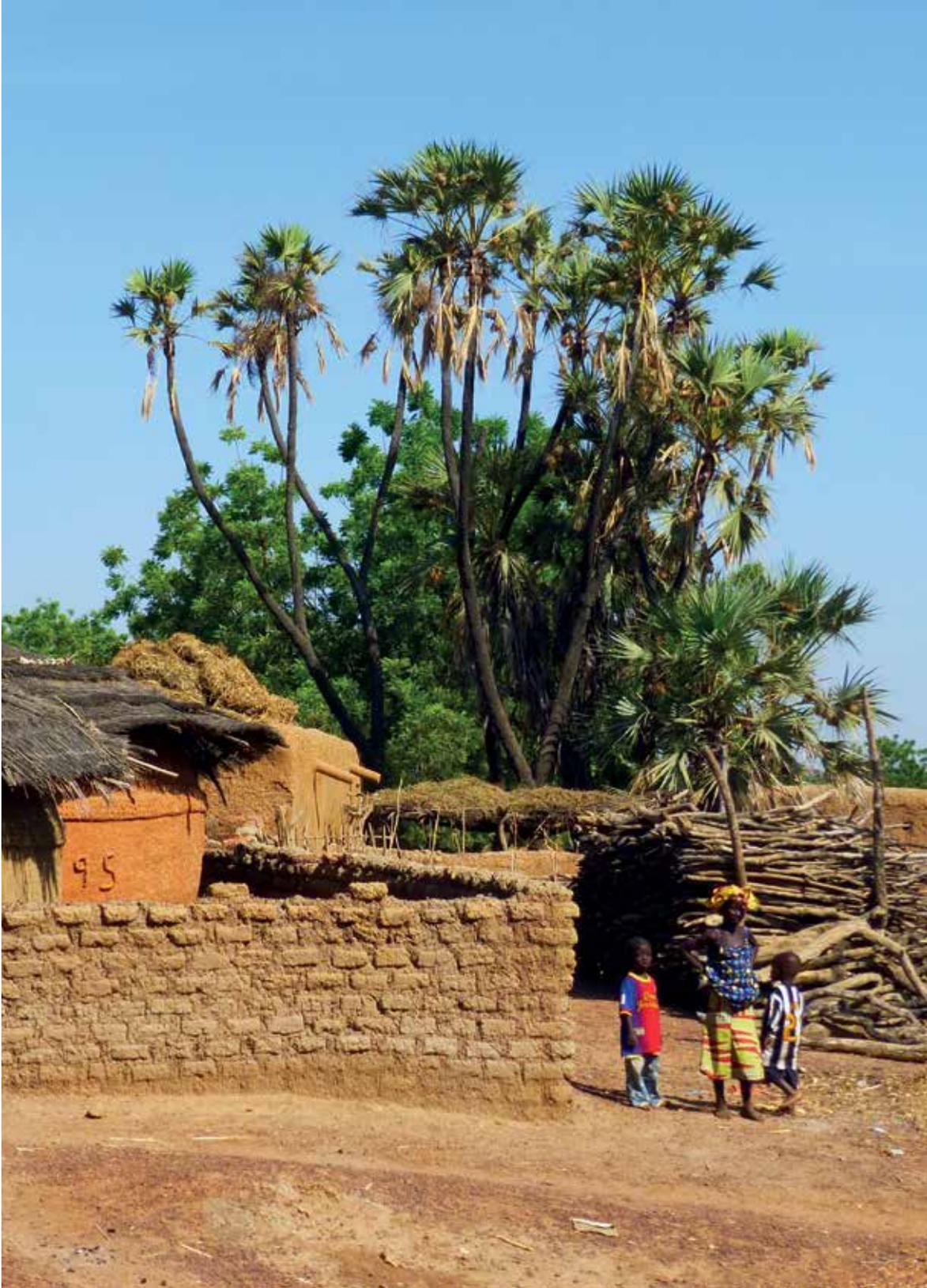
⁵⁶ Report of the Special Rapporteur on the realisation of economic, social and cultural rights, Danilo Türk, UN Document E/CN.4/Sub.2/1990/19, paragraph 121.

⁵⁷ Report of the Special Rapporteur on the right to adequate housing, Miloon Kothari, UN Document E/CN.4/2005/48, paragraphs 25-31. Please also see: Basic Principles and Guidelines on Development-Based Evictions and Displacement, UN Document A/HRC/4/18.

⁵⁸ Final report of the Special Rapporteur, Paulo Sérgio Pinheiro. Principles on housing and property restitution for refugees and displaced persons, UN Document E/CN.4/Sub.2/2005/17.

⁵⁹ Report of the Special Rapporteur on the right to adequate food, Jean Ziegler, UN Document A/57/356.

⁶⁰ Report of the Special Rapporteur on the right to adequate food, Olivier de Schutter, UN Document A/65/281.



2. Recent developments

The Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

As already mentioned, the Tenure Guidelines are the first international soft law instrument on tenure to focus on economic, social and cultural rights (ESCR) in relation to land, fisheries and forests. The guidelines provide guidance to states on how to apply their human rights obligations to the governance of natural resources. Although the guidelines are a soft law instrument, they are anchored in binding human rights obligations.⁶¹ As such, they can be used as a springboard to claims for the right to land. The legal principle of *Pro hominem*, which calls for the application of the norm or standard most favourable for protecting vulnerable social groups, enables state and non-state actors alike to interpret the Tenure Guidelines in line with the highest standards developed by the UN and regional human rights systems, as well as with case law. The guidelines are therefore an important step towards establishing the human right to land in international customary law and, hopefully soon, in positive international human rights law.

CEDAW General Recommendation No. 34 on the rights of rural women

During its 63rd session, held from February 15 to March 4, 2016, the Committee on the Elimination of Discrimination against Women adopted its General Recommendation (GR) No. 34 on the rights of rural women. This was the outcome of over three years of work by the committee with support from civil society. This General Recommendation is the committee's authoritative interpretation of Article 14

of the Convention on the Elimination of All Forms of Discrimination against Women and provides guidance to state parties on the measures to be adopted to ensure full compliance with their obligations to respect, protect and fulfil the rights of rural women.

The adoption of GR 34 is particularly significant because it is the first international instrument that specifically addresses the rights of rural women and furthermore, it is the first that explicitly recognises the human right to adequate food and nutrition of rural women within the framework of food sovereignty. It explicitly recognises 'rural women's rights to land, natural resources, including water, seeds, forestry, as well as fisheries, as fundamental human rights' (para. 56). It further underlines the right to participate in decision-making at all levels of rural women whose lives and livelihood depend on their effective access to natural resources (para. 53) and calls for state parties to protect rural women's rights to natural resources under customary institutions and more explicitly, to ensure indigenous women's equal access (para. 59). It also calls for the explicit recognition of the natural commons, and thus implicitly for the recognition of collective rights over land and natural resources as the use, access and management of the commons are socially defined and organised in a collective way (para. 62).

The process towards a UN Declaration on the Rights of Peasants and other People Working in Rural Areas

The process at the United Nations Human Rights Council initiated by the global peasant movement La Via Campesina towards the adoption of a UN Declaration on the Rights of Peasants and Other People Working in Rural Areas constitutes yet another significant step towards the recognition of land as a human right. Indeed, the advanced draft of the declaration includes an article on peasants' right to

⁶¹ A soft law is a law that sets standards and guidance on a particular subject but which is not mandatory; however, a soft law may become a precursor to a binding law ('hard law') at national or international level.

land and other natural resources. This article builds to a large extent on the interpretative developments and the concluding observations on states' reporting issued by the CESCR and the Special Procedures of the Human Rights Council mentioned above.⁶²



⁶² Please see: www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx. For a detailed discussion, please see: Monsalve Suárez, S., The right to land and other natural resources in the United Nations Declaration on the rights of peasants and other people working in rural areas, FIAN International Briefing, December 2015. Available at: www.fian.org/library/publication/publication_of_a_series_of_briefings_on_peasants_rights.

IV. Content and elements of the Human Right to Land

1. Definition and elements

The human right to land is the right of every human being to effectively access, use and control – individually or in community – land and related natural resources in order to feed and house themselves, and to live and develop their cultures.

The right to land is NOT:

- **A right to private property**
As stated before, private ownership is only one among many forms through which individuals and communities access, use and control land and land-related resources. The human right to land recognises, protects and guarantees this existing variety, ensuring secure access and use. As such, it does not primarily refer to a right to buy or sell land.
- **A right to make profit with land:**
The right to land is limited to its use for individuals and communities for reproduction and commercial purposes, especially in order to feed themselves and nurture their cultures. While individuals' and communities' relation to land includes an economic dimension (land as a means to produce in order to make a living, land as a safety net etc.), to live off the land in dignity is fundamentally different from the notion of making a profit from or with land.
- **A right to far away land:**
The human right to land entails a geographic dimension that privileges the local, and does not condone control of far-away lands by absentee owners.⁶³

Defined in this way, the human right to land contains several elements that need to be highlighted:

An individual and a collective right

The human right to land is as much a collective right as it is an individual right. Indeed, in many parts of the world, land and natural resources are commons: their use, access and management are socially defined and organised in a collective way. The natural commons comprise lands and water bodies, including for example, farm/crop lands, wetlands, forests, wood-lots, open pasture, grazing and range-lands, hill and mountain slopes, streams and rivers, ponds, lakes and other fresh water bodies, fishing grounds, seas and oceans, coastlines, minerals, terrestrial and aquatic biodiversity. In many rural communities, farm/crop lands are communally owned, although the tenure rights of families that farm specific parcels of land are recognised and respected. In every part of the world, agricultural, forest, fishing, coastal, pastoral, nomadic and indigenous communities have developed sophisticated systems of using, sharing, governing and regenerating their natural commons. These systems are essential elements of their respective cultural-political identities and are crucial to their very survival. Thus, the collective dimension is crucial in order to effectively secure the individual enjoyment of this right.

Holistic view

The right to land must be understood in a holistic way. Natural resources and their uses are interconnected just as the access to and control over these resources are intrinsically linked to the way that they are used by people and communities, according to their cultures, (customary) practices – which are usually adapted to local agro-ecological conditions – and values, as well as their conceptions of social and environmental

⁶³ Situations of forced absence, e.g. in the context of conflict, occupation and war require specific attention under the human right to land.

justice. Both access and use are further closely related to the ability of people to take part in decision-making over natural resources. Similarly, land and natural resources fulfil multiple functions, which are closely related to the realisation of multiple human rights. Particularly rural people need land and natural resources in order to make from them an adequate standard of living, to have a place to live in security, peace and dignity, to attain the highest standard of health and to develop their cultures including their spiritual relationship with nature.

Freedoms and entitlements

The right to land and natural resources contains both freedoms and entitlements. The freedoms include the right to maintain existing access to, use and management of land and natural resources necessary for the realization of the rights to an adequate standard of living, to health and to participate in cultural life. The freedoms also include the right to be free from interference, such as the right to be free from forced evictions or from contamination and destruction of land and water resources.

The entitlements include:

- the right to tenure, use and management systems which ensure non-discriminatory, equitable and sustainable access to, and use and management of land and natural resources for all rural people;
- the right to restitution and return to the lands and natural resources of which rural people were arbitrarily or unlawfully deprived;
- the right to redistribution of land and natural resources in order to facilitate broad and equitable access, including equal access of men and women;
- the right to preferential access (i.e. small-scale fishers have preferential access to fish in waters under many national jurisdictions); and
- the right to be given priority, as landless peasants and other rural workers, in the allocation of public lands, fisheries and forests.



2. State obligations under the Human Right to Land

Under the human right to land, states have an immediate obligation to ensure that the right to land and other natural resources is exercised without discrimination. Therefore, states have to remove and prohibit all forms of discrimination related to the tenure, use and management systems of land and natural resources. States must also give special attention to groups, which have been traditionally discriminated against, such as women, indigenous peoples, Dalits, nomadic pastoralists, landless peasants and workers, people using and managing natural resources in customary systems, and to marginalised groups within rural communities, amongst others. States must also refrain from taking measures that would cause the enjoyment of the right to land and natural resources to regress.

States have the obligation to respect, protect and fulfil the human right to land. Regarding their **obligation to respect**, states must refrain from interfering directly or indirectly with the enjoyment

of this right. This obligation includes, inter alia:

- refraining from forced evictions or any practice or activity that destroys or arbitrarily impairs existing access to, use of and control of land and natural resources by people and communities (including in the context of land deals, climate change mitigation schemes, land and agrarian policies and laws, infrastructure projects, mining etc.);
- clearly defining the concept of public purpose in law; and
- recognizing and respecting customary rights and tenure systems, and the natural commons – which might require a revision of civil codes and domestic property law (including those relating to international investment and investor protection), in order to overcome legal doctrines that justify dispossession of people.

Moreover, states have the **obligation to protect** people's access, use and control over land by preventing third parties from interfering in any way with the enjoyment of this right. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation to protect includes, inter alia:



- adopting the necessary and effective legislative and other measures to regulate third parties;
- restraining and sanctioning third parties that are promoting or participating in forced evictions, dispossessing women of their rights, encroaching on customary rights (including grazing, gathering and usage rights), or polluting and destroying natural resources.
- ensuring that the rules and mechanisms governing access to natural resources do not operate in discriminatory ways or lead to the concentration of control over natural resources.

In order to comply with their **obligation to fulfil** the human right to land, states are required to provide and facilitate secure and sustainable access to, use of and control over land and other natural resources for individuals and groups who have no or insufficient access to these resources but depend on them to realise their human rights.

This includes:

- implementing agrarian reform if individuals or groups live in poverty due to a lack of or insufficient access to land and natural resources;
- prioritising the allocation of public lands and other natural resources to marginalized groups;
- recognising and support customary and collective tenure of land by communities; and
- restitution of lands and natural resources to marginalised people whose lands and natural resources were unlawfully or arbitrarily taken from them.

States are further required to put in place policy and legal frameworks regarding land and other natural resources, which ensure the full realization of the right to land and other natural resources, ensuring that they are developed and implemented in transparent, participatory and inclusive processes. The obligation to fulfil also requires states to structure and review the land tenure system wherever necessary, in such a way so as to ensure broad and equitable distribution of land and other natural resources and to take measures to promote and protect the security of tenure, especially with respect to women – irrespective of

their civil and marital status or presence of a male guardian or guarantor – as well as other marginalised and disadvantaged segments of society. States are required to take all measures necessary to achieve the substantive equality of women in relation to land and natural resources, and design and implement a comprehensive strategy to address discriminatory stereotypes, attitudes and practices that impede their rights to land and natural resources. States are further required to ensure effective administrative and judicial systems to implement policy and legal frameworks related to land and natural resources and that administrative and judicial authorities act in accordance with states' obligations. Finally, states have to facilitate the sustainable use of natural resources by, inter alia:

- adopting policies and measures to strengthen the natural resources-based livelihoods of people;
- recognising and protecting traditional uses of land and natural resources, especially where these use little external inputs and are well adapted to local agro-ecological and climatic conditions; and
- adopting policies and measures that strengthen the long-term conservation of land and other natural resources including through agroecology. This includes specific measures to support communities and people to adapt to the consequences of global warming.

Further to the above, states have the obligation to ensure the conditions for the regeneration of biological and other natural capacities and cycles and should engage with people and communities in order to improve the ecological sustainability of their natural resource use, based on their rights, needs, own distinct customary practices as well as their conceptions of social and environmental justice.

The human right to land also includes **extraterritorial obligations**, which refer to states' obligations to respect, protect and fulfil the enjoyment of the right to land in other countries. These require states to refrain from actions that interfere, directly or indirectly (including through policies such as trade, investment, energy, agricultural, development





and climate change mitigation policies), with the enjoyment of human rights. Human rights impact assessments (HRIAs), which regularly assess and revise agreements, laws, policies and practices in order to ensure that they do not negatively affect human rights are an important measure in this regard. States parties are also required to establish the necessary regulatory mechanisms to ensure that private corporations, including transnational corporations, and other non-state actors that they are in a position to regulate,⁶⁴ do not impair

the enjoyment of the right to land in other countries, and to hold them accountable. States must further ensure that all international agreements (including in the area of trade, investment, finance, development cooperation, and climate change) do not adversely impact upon the right to land in other countries. Their extraterritorial obligations also require states to ensure that their actions as members of international organisations (including international financial institutions such as the World Bank and regional development banks) do not impair the enjoyment of the right to land and land-resources.

Some common arguments against a human right to land

- **‘Not everyone needs land for the realization of her/his human rights. It is not possible therefore to recognize the right to land as a human right because it is not a universal right. Everyone needs food and water for her/his survival but not everyone needs land. Thus the right to land is a right for specific groups only, such as peasants and indigenous peoples.’**

Reply 1: It is not true that not everybody needs access to land. Humans are land-living creatures, they are neither fish, birds nor extra-terrestrials. There is no access to food or housing without – at least some indirect form of – access to land. It is true that this access may not be direct (as it is for indigenous people or peasants, fisherfolk, pastoralists etc. who need direct access to land for daily survival), but mediated via markets. Nevertheless, these links exist, and if markets break down or if market access is not possible due to price surges and/or low income, direct access to land is essential to access food or housing.

Reply 2: There are many human rights that do not apply to everybody at all times: The right to form trade unions, for example, is a right of workers and not applicable to employers, or indigenous people. Nevertheless they are part of the ICESCR and human rights. The slogan ‘Women’s rights are human rights’ would not make sense if being a human right meant universality in the sense of being applicable to everybody at all times (like the right to food, or to water). Universality of the right to education for example does not mean that seniors have a right to free primary schooling, but that everybody whose life situation shows such needs, has these rights. The human right to land provides a framework, which – according to any given context – allows to prioritize people and groups whose situation entitles them to specific measures, such as being given access to land or having their access to land protected and/or restored.

⁶⁴ This refers to those states where a corporation has its centre of activity, is registered or domiciled, or has its main place of business and/or substantial business activities.

Human rights are generally defined as inalienable rights, or as the rights without which humans would lose their character as humans. The fact that without land and other natural resources rural people would lose their specific identity as pastoralists, peasants, and indigenous peoples means that land and other natural resources are inalienable to those rights-holders. Land and natural resources are indispensable for the human dignity of peasants, small-scale fishers, pastoralists and indigenous peoples. When they do not have access to and control over these resources, they are vulnerable to oppression, discrimination and exploitation, thus putting at risk their human dignity.⁶⁵

- **‘The recognition of a universal human right to land might be abused by landed classes who could use it as further protection of their property rights.’**

Reply 1: It is true that rich and powerful people and groups have misused the right to property. Nevertheless, the potential misuse of a right must not question its existence. Otherwise we would have to reject the right to property altogether. This counter-argument, however, reminds us that the right must be formulated carefully.

Reply 2: The right to property must be seen in the context of the indivisibility of human rights and the role of property for the fulfilment of other human rights, including the social function of property. By properly integrating the debates on the right to property, the human right to land can contribute to a much better and differentiated understanding of the right to property in relation to other human rights.

- **‘The existing standard setting related to the human rights dimensions of land is sufficient. What it is lacking is implementation. Social movements and CSOs should concentrate on demanding the implementation of the Right to Food Guidelines and the Tenure Guidelines instead of pushing for a further process of standard setting.’**

Reply: The implementation of the two mentioned guidelines according to the highest human right standards is and will indeed remain key. However, in principle the human right to land provides much more protection (for example in terms of state obligations and remedy) than the mentioned guidelines. Advocating for the full recognition of land as a human right does not imply giving less importance to the implementation of existing standards. Rather, both aspects (norm setting and implementation) are complementary for the full realization of human rights in the context of land.

⁶⁵ The inherent dignity of all members of the human family is recognised in the Preamble and Article 1 of the 1948 Universal Declaration of Human Rights. Article 22 adds that every person is entitled to the realization of economic, social and cultural rights that are indispensable for her/his dignity.

- **‘Does the right to land mean that everyone is entitled to receive a given amount of land?’**

Reply: As already stated, while all human beings need land in some way to survive, the need to directly access land in order to realize her/his human rights is not the same for everybody at all times. For many urban people in countries in the Global North, access to land to feed themselves is mediated via markets, i.e. they buy food. In a situation where they have a decent income and the market works in a way that allows them to get sufficient, nutritious and healthy food, these people will not necessarily be entitled – nor aspire – to a plot of land. Human rights provide a framework, which allows to prioritise certain people or groups whose situation entitles them to specific measures. Particularly in the context of the right to land, this entails prioritising the right of people who need access, or protecting the right of people who already have access to a plot of land for (food) production for their own consumption and/or for exchange. This argument, however, points to two important issues: 1) that equitable distribution of resources and social justice are closely tied to the realization of human rights, and that land concentration needs to be addressed in many regions of the world;⁶⁶ and 2) that, since the right to land has a strong geographic dimension that privileges the local, the application of this right would primarily occur in local contexts.

- **‘The right to land gives more power to the state to dispose of land and other natural resources.’**

Reply: While it is true that states have played an important role in the most recent wave of land grabbing by facilitating land deals and other forms of dispossession (see chapter II.), the state is necessarily part of the solution. Only the state has the authority to mobilise state resources to protect peoples’ access to land and to overcome resistance to redistributing large private landholdings. And only the state has the authoritative power to enforce rules and coerce compliance by competing social forces, including through the regulation of market forces. More importantly, the human rights framework limits state power in as much as it considers people as rights holders and not as subjects, and the state as a guarantor of rights (duty bearer) and not as absolute sovereign. This does not mean that only the state is relied upon to advance and protect the land rights of people (taking into account the contested and contradictory nature of state power); instead, an interactive state-society framework is pursued.

⁶⁶ For example, in the European Union 27, 69% of all farms work less than 5 ha of agricultural land. ‘In 2010, the top 3% of farms controlled half of the total used agricultural area (UAA) in the EU-27, while 80% of farms, all below 10 ha, controlled only 12% of the total UAA (EU 2012). According to EUROSTAT (2011)...large farms make up only 0.6% of all European Farms yet they control one-fifth of the total UAA in Europe’. Please see: European Parliament (EP), Study ‘Extent of farmland grabbing in the EU’ (IP/B/AGRI/IC/2014-069), May 2015. Available at: [www.europarl.europa.eu/RegData/etudes/STUD/2015/540369/IPOL_STU\(2015\)540369_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/540369/IPOL_STU(2015)540369_EN.pdf); and European Economic and Social Committee, Opinion of the European Economic and Social Committee on Land grabbing – a warning for Europe and a threat to family farming (NAT/632), 21 January 2015, par.3.3. Available at: www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/land-grabbing-europefamily-farming.



V. Conclusion and the way forward

As laid out in this paper, FIAN strongly believes that now is the time to assert the right to land as a human right, in order to counter ongoing trends of peoples' dispossession of their resources, to further develop the international human rights framework and to provide a powerful tool to peoples' struggles for control over land and other natural resources. In order to advance towards establishing the human right to land, FIAN will undertake the following steps:

- Consistently use the human right to land in our case documentation and analysis, advocacy and policy work;
- Further discuss with social movements and civil society organisations about entry points and strategies to advance the human right to land in the UN system, as well as regional human rights systems; and promote the human right to land in civil society;
- Continue advocating for the recognition of the human right to land in the process at the United Nations Human Rights Council towards the adoption of a UN Declaration on the Rights of Peasants and Other People Working in Rural Areas; and advocate for the right to land in the context of the current discussions about a General Comment on land in the UN Committee on Economic, Social and Cultural Rights (CESCR).

This position paper explains why FIAN advocates the full recognition of land as a human right. It provides an overview of the content and elements of the human right to land and how FIAN aims to promote this right amongst civil society, and in the UN and regional human rights systems.



FIAN INTERNATIONAL

Willy-Brandt-Platz 5
69115 Heidelberg, Germany

fon: +49-62 21-6 53 00 30

fax: +49-62 21-6 53 00 33

contact@fian.org

www.fian.org