

The Human Rights Approach to Land: Promoting the Sustainable Use of Land Through the Affirmation of the Rights of Local Communities

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Abstract

The issues emerging from land grabbing and the recognition of interlinkages between land use and climate change have highlighted the difficulty of balancing economic development and sustainability. In this context, scholars, international organisations and NGOs have called for the adoption of a human rights (HR)-based approach to the governance of land and natural resources. The article aims to provide an overview of the human rights-based approach to land governance in the International Human Rights Law framework. The first part is aimed at framing the state of the art on the human rights-based approach to land. The analysis focusses on the principles of sovereignty over natural resources and self-determination, the protection of indigenous people's collective property rights and a core of HR associated to the use of land. The second section attempts to review recent developments and future perspectives on the topic through the reference to three soft and hard law acts: the United Nations Declaration on the rights of peasants and other people working on the rural area; the General Comment on Land and the European Directive on Corporation Due Diligence. The work will be an exploration of the impact that recent developments have on the current use of the HR-based approach to land, to understand whether its evolution fosters the sustainable use of land through the affirmation of the rights of local communities, to the point of provoking a paradigm shift in land governance.

Keywords: land, natural resources, human rights, sustainability, local communities.

1 Introduction

The human rights (HR)-based approach explores the role of International Human Rights Law (IHRL) as a legal basis for the efficient management of natural resources. In *Human Rights and Natural Resources: An Appraisal*, Gilbert provides a broad overview of its content

and application to the natural resources sector.¹ The result of this extensive work is the reconstruction of an approach to natural resources management, founded on the research in the substantive and jurisprudential sources of IHRL. However, according to the author, the application of this approach to natural resources is made possible by references to their issues in several principles, freedoms and substantive and procedural rights.²

Why is land relevant in developing a human rights-based approach to natural resources? Indeed, land as a resource is essential for people's livelihoods and subsistence, and it has economic as well as social and cultural value on its own. However, the way land is used also impacts other natural resources, such as water, forests and biodiversity, and, therefore, the rights associated with it.

On the other hand, land as a right has a dual value: it is instrumental to the realisation of other land-related HR, especially the right to food, the right to housing and the right to non-discrimination, but it is also a self-standing human right attributed to indigenous peoples.³ Moreover, land governance has a multi-level character, calling for States, corporations, NGOs, individuals and communities.

For these reasons, land is an important use paradigm for the application of an HR-based approach to natural re-

- 1 The concept of human rights-based approach was born in the development framework, and it has been described by the High Commissioner for Human Rights as 'a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights'. Office of the High Commissioner for Human Rights, *Frequently Asked Questions about Human Rights-Based Approach to Development Cooperation* (2006), at 15 in J. Gilbert, *Human Rights and Natural Resources: An Appraisal* (2018), at 4. Referring to the specific use of this approach to natural resource management, the African Commission on Human and Peoples' Rights affirmed that this approach require to consider the realisation of human rights as 'a prerequisite of sustainability' and asks the States '[to ensure] natural resources stewardship with, and for the interest of, the population and must fulfil its mission in conformity with international human rights law and standards'. ACHPR Res. 224(LI), March 2012.
- 2 Gilbert categorises them in: 'Overarching principles; Fundamental rights; Essential freedoms; Participatory Rights; Cultural Rights; Environmental Rights', Gilbert (2018), above n. 1, at 180-90.
- 3 O. De Shutter, 'The Emerging Human Right to Land', 12 (3) *International Community Law Review* 303-34, at 306 (2010).

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sources. Indeed, the application of IHRL has already found its way into land issues that have highlighted the difficulty of balancing economic development and the protection of the HR of local communities that depend on land and resources to survive. This is the case of large-scale land acquisitions, also known as 'land grabs',⁴ where the asymmetry in the protection offered

4 The term 'land grabbing' was first used in a study by the Spanish non-governmental organisation GRAIN to define foreign direct investment (FDI) in large-scale land acquisitions that, due to their characteristics, are likely to have a negative impact on human rights and the environment. GRAIN, 'Sized! The 2008 Land Grab for Food and Financial Security', 2008, <https://grain.org/e/93> (last visited 27 February 2024). The contracts or agreements founding this type of FDI, mainly in the agricultural and energy sectors, involve the concession of large amounts of land for very extended periods of time. The elements that make it possible to isolate a grabbing hypothesis, within the roster of large-scale investments on land, were summarised by the Tirana Declaration, issued by the non-governmental organization Land Coalition in 2010, in: '(i) in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing and; (v) not based on effective democratic planning, independent oversight and meaningful participation'. International Land Coalition, 'Tirana Declaration. Securing Land Access for the Poor in Times of Intensified Natural Resource Competition', 2011, landcoalition.org (last visited 27 February 2024) Since 2008-2010, the phenomenon has been studied by a wide range of academics, NGOs and journalists. As the report of the Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD) and the International Institute for Environment and Development (IIED) highlight, such investments move between the opportunity for socioeconomic development for the investing countries and the risk to the human and environmental rights of the local communities and territories involved. L. Cotula, S. Vermeulen, R. Leonard & J. Keeley, *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa*, 2009, <https://www.iied.org/12561iied> (last visited 27 February 2024). Indeed, according to the studies an excessive concentration of land in the hand of a foreign investor is likely to impact on food security and cultural integrity of local communities and to cause environmental harms. The most impactful implications of certain land deals on land-related rights insist on: right to property; right to food; right to water; right to self-determination of peoples; right to adequate compensation for dispossession suffered and participation in decisions concerning territories traditionally inhabited by indigenous peoples and worked by rural communities. Sources dealing with the issues include: S.M. Jr. Borras, S.J.C. Franco & S.M. Suárez, 'Land and Food Sovereignty', 36(3) *Third World Quarterly* 600-17 (2015), <https://doi.org/10.1080/01436597.2015.1029225> (last visited 27 February 2024). F. Romanin Jacur, A. Bonfanti & F. Seatzu, *Natural Resources Grabbing: An International Law Perspective* (2019); L. Montilla Fernández, *Large-Scale Land Investments in Least Developed Countries: Legal Conflict between Investment and Human Rights Protection* (2017). Moreover, according to De Shutter, UN special rapporteur on the right to food in 2010, the 'rush for land' makes it difficult to envisage a coexistence between small local farmers and the development of a larger economy. O. De Schutter, 'How Not to Think of Land-grabbing: Three Critiques of Large-Scale Investments in Farmland', 38(2) *Journal of Peasant Studies* 249-79 (2011). Finally, incompatibilities between such investments and the principle of territorial sovereignty and permanent sovereignty over natural resources were also examined. On the point, see: M. Nino, *Land grabbing e sovranità territoriale* (2019); F. Violi, 'The Practice of Land Grabbing and Its Compatibility with the Exercise of Territorial Sovereignty', in F. Romanin Jacur, A. Bonfanti & F. Seatzu (eds.), *Natural Resources Grabbing: An International Law Perspective* (2015) 15-37; J. Von Bernstorff, 'Who Is Entitled to Cultivate the Land? Sovereignty Land Resources and Foreign Investments in Agriculture', in F. Romanin Jacur, A. Bonfanti & F. Seatzu (eds.), *Natural Resources Grabbing: An International Law Perspective* (2015), 55-75.

to actors engaged by International Investment Law has led to land issues being approached through the lens of the HR involved.⁵

Sustainability is a key component of the HR-based approach to land and natural resources. The interdependence between the implementation of local communities' land rights and the effort towards sustainable development is expressed in the three-pillar model by the 2030 agenda and implemented by the Sustainable Development Goals. On this point, Principle 22 clearly provides that 'local communities have a vital role in environmental management and development and, as a result, their identity, culture and interests must be protected'.⁶ Indeed, International Environmental Law treaties already recognise a human dimension to ecological protection through the relevance of traditional practices of local

5 Extensive literature exists on the use of the HR-based approach in soft law documents directly addressing land governance, acting as guidelines for governments in addressing land-related issues. Among the most impactful documents, despite their non-binding nature, a relevant contribution comes from the special rapporteur on the right to food to the UN Human Rights Council, Olivier De Shutter, who in 2009 published: *Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*. According to the author's report, first and foremost, negotiations must be conducted in full transparency, with the participation of local populations, and only after assessing the balance between the costs and benefits of the project. Any investment must obtain the consent of the local populations, and any dispossession should only take place in exceptional cases and always in compliance with international law and local legislation. In this regard, states must provide the appropriate regulatory framework for more sustainable investments, possibly including forms of collective registration of land used by local populations. O. De Shutter, 'Large-scale Land Acquisition and Leases: A Set of Core Principles and Measures to Address the Human Rights Challenge', 11 July 2009, SRRT/Flarge-scalelandacquisitions9.6.09 (last visited 27 February 2024).

Furthermore, the Voluntary Guidelines for the Responsible Governance of Tenure Regimes Applicable to Land, Fisheries and Forests in the Context of National Food Security, issued in 2012 by the FAO Committee on World Food Security, refers to the phenomenon of land grabbing arguing that responsible investments are indispensable to improve food security but also recommending that 'safeguard mechanisms be put in place that preserve the property rights of local people from the risks arising from large-scale acquisitions, and that defend human rights, livelihoods, food security, and the environment'. FAO, Committee on World Food Security, 'Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security', 2012, <https://openknowledge.fao.org/handle/20.500.14283/i2801e> (last visited 11 October 2023).

Finally, the Principles for Responsible Agricultural Investment that Respects Rights, livelihoods and Resources (PRAI) included the guarantee of access rights to land among the parameters for the legitimacy of large-scale investments. FAO, IFAD, UNCTAD SECRETARIAT, WORLD BANK GROUP, 'Principles for Responsible Agricultural Investment that Respect Rights, Livelihoods and Resources', 2010, Principles for responsible agricultural investment that respects rights, livelihoods, and resources : extended version (last visited 11 March 2025). As remarked by Brunori, these documents share the use of the human rights-based approach to structure state obligations in land and resource governance. Indeed, state action is categorised in terms of obligations to respect, protect and fulfil; indigenous peoples' consent and access to land and resources essential to the livelihoods of all local people are taken into account as parameters of the legitimacy of state action. Finally, a link is established between the sustainable use of land and resources and the implementation of policies that respect human rights. M. Brunori, 'The Emerging Human Right to Land in Soft Law Legal Instruments', in L. Westra, J. Gray & V. Karageorgou (eds.), *Ecological Systems Integrity* (2015) 55-58.

6 Principle 22, GA Res. 70/1, 25 September 2015.

communities.⁷ Simultaneously, some HR related to land may have an intrinsic ecological value: a relevant example is that of indigenous peoples' collective property rights over ancestral lands.⁸ Authoritative doctrine holds that an ecological function of this human right is inherent in the norm itself.⁹

Furthermore, the social and environmental sustainability of land governance is functional to the enforcement of substantive (right to water, food, housing, the right of self-determination, the right to benefit sharing and the right to a clean, healthy and sustainable environment) and procedural rights (right to participation, the FPIC – i.e. free, prior and informed consent – and transparency), that may also contribute to the realisation of a broader right to development. As stated by Gilbert, the right to development constitutes a foundation of the HR approach to natural resources.¹⁰ In this regard, the introduction of the *General Comment No. 26 on land and economic, social, and cultural rights*, a soft law act designed to provide a thorough interpretation of the land rights enshrined in the respective Covenant (ICESCR, i.e. International Covenant on Economic, Social and Cultural Rights),¹¹ affirms that 'the sustainable use of land is essential to ensure the right to a clean, healthy, and sustainable environment and to promote the right to development, among other rights'.¹²

For those reasons, an inquiry into the structure and the development in the use of a human rights-based approach to the management of land, through the role of local communities in a sustainable governance, seems appropriate. Indeed, as argued by Hope, a rights-based approach 'fosters an analysis of the different components that promote or impede secure land access and draws attention to those whose rights are most closely connected to secure access to arable land' and thus 'pri-

oritises the interests of those most dependent on land for survival'.¹³

The article uses a normative approach and is structured as follows: the first section provides a general overview of the HR-based approach to the governance of land, considering its foundations. For this purpose, the analysis briefly mentions the role of the principle of permanent sovereignty over natural resources, the collective property rights of indigenous peoples and participation. From the analysis will emerge a State-centric approach to the governance of land and its representation as functional to the realisation of other HR, and, finally, a lack of protection of non-indigenous communities.

On the other hand, the second section attempts to review some developments in the use of this approach and future perspectives, whose choice responds to a chronological criterion of a recent time frame (2018-2024) and the potential impact on the traditional approach to land governance. An analysis of the highlights of these recent legal instruments reveals the growing involvement of non-State actors in the 'sustainable' land governance and the awareness of the role of their land rights in facing global challenges.

2 Overview of the HR-Based Approach to the Governance of Land: From Foundations to Indirect Protection

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This paragraph will attempt to frame the HR-based approach applied to the sustainable governance of land, considering the state of the art.

Given the lack of a universal human right to land, which has not been codified in the international normative framework of HR,¹⁴ land-related issues enjoy indirect protection through other principles and HR that are associated to the use of land.¹⁵

In this regard, it is possible to identify three pillars on which the HR-based approach to land is based: permanent sovereignty over natural resources and self-determination; the collective right to property of indigenous peoples; and a core of land-related HR.

The HR approach to natural resources reveals its foundation in the internal dimension of the principle of permanent sovereignty over natural resources, regarding the relationship between the State and the people in managing land and the resources located therein.¹⁶ The reference here is to the concept of permanent sovereignty over natural resources, which is rooted in Resolu-

7 Articles 8j and 10c of the Convention on Biological Diversity (CBD) foster the role of practices of indigenous and local communities embodying traditional lifestyles as functional to the conservation and sustainable use of biological diversity. Convention on Biological Diversity, 5 June 1992, 31 ILM 818, at 9. Also see: Forest Peoples Programme, Local Biodiversity Outlooks 2: The contributions of indigenous peoples and local communities to the implementation of the Strategic Plan for Biodiversity 2011-2020 and to renewing nature and cultures. A complement to the fifth edition of the Global Biodiversity Outlook, 2020, www.localbiodiversityoutlooks.net (last visited 11 October 2023).

8 See S. Di Benedetto, 'La Funzione Ecologica Della Proprietà Collettiva Sulle Terre Ancestrali: Un Nuovo Modello Di Rapporto Tra Diritti Umani e Tutela Dell'ambiente?', 10(3) *Veredas do direito* 11-37 (2017).

9 In the author's opinion, the collective dimension of the proprietary rights attributed to indigenous peoples, arising from the symbiotic relationship between the object (ancestral land) and the subjects (indigenous peoples), provides direct protection. Indeed, any conduct detrimental to the ecological balance of such lands by the State would automatically legitimise any claims by the indigenous communities concerned. Di Benedetto (2017), above at. 8, at 28-29.

10 Gilbert (2018), above n. 1, at 63.

11 GA Res. 12200 (XXI), 6 December 1966.

12 UN Committee on Economic, Social and Cultural Rights, General Comment No. 26 on Land and Economic, Social and Cultural Rights, 22 December 2022, E/C.12/GC/26 E/C.12/GC/26: General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights | OHCHR (last visited 27 February 2024).

13 H. Johnson, *International Agricultural Law and Policy: A Rights-based Approach to Food Security* (2018), at 72.

14 This point will be addressed in Section 2.

15 Brunori (2015), above n. 5; L. Cotula, 'The Right to Land', in M. Alabrese et al. (eds.), *United Nations' Declaration on Peasants' Rights* (2022) 91-105; Johnson, above n. 13, at 90-100.

16 Gilbert (2018), above n. 1, at 14.

tion 1803¹⁷ and later elaborated by the International Human Rights Law (IHRL) regime. Indeed, Article 1(2) common to both Covenants¹⁸ recognises sovereignty over natural resources as a right of peoples, within the framework of the broader customary right of self-determination of peoples, in its economic dimension.¹⁹ The same approach is found at the regional level in the African Charter on Human Rights.²⁰ Indeed, the document limits State sovereignty in Article 21, speaking of the ‘exclusive interest’ of peoples in the exploitation of resources.²¹ Moreover, the Arab Charter on Human Rights recognises the right of all peoples to self-determination and control over their own wealth and natural resources.²²

This approach fits into the open question about the entitlement to manage natural resources, which is typically State based, as it is brought right back into the concept of territorial sovereignty,²³ proposing an intermediate position. As a result of the normative elaboration of sovereignty over natural resource made by IHRL, this entitlement is expressed through the exerciser-beneficiary dynamic, in which the State assumes the position of the one exercising the prerogative and the people of the beneficiary of the exercise thereof.²⁴ As a result, what emerges from the international and regional HR framework, with respect to the question of who holds the right to the exploitation of natural resources is that the State remains the holder of this right, under its sovereign powers. Nevertheless, the State also becomes the holder of duties, by the involvement of peoples in the exercise of this prerogative.²⁵

This State-people relationship to resource management is effectively defined by authoritative scholarship as a ‘top-down’ approach, in which centralised control and exploitation leave a non-active role for local communi-

ties at the decision-making stage.²⁶ The second pillar of the HR-based approach to land is the right to collective property of indigenous peoples on their ancestral lands. Indeed, the normative evolution of this collective human right has specifically addressed issues concerning the land, as a natural resource, with its own specific characteristics. The right to ancestral lands is attributed to indigenous peoples, on account of the spiritual relationship that they have with the territories on which they are located.²⁷ The status of collective property rights on ancestral lands has been the result of the synergy between its recognition and the creation of obligations for States at the international level and the work of regional inter-American and African Human Rights Courts, which have defined its content and enforceability.

The first international act to establish a sphere of obligations on governments to protect indigenous and tribal peoples is Convention No. 169 on Indigenous and Tribal Peoples, adopted by the International Labour Organisation (ILO) in 1989.²⁸ Among the most relevant obligations, States shall protect the right of ownership and possession of lands traditionally inhabited by indigenous peoples, and to which they owe their subsistence, as well as to guarantee their use and exploitation of natural resources (Arts. 14 and 15). Regarding the eventuality that populations are displaced from the lands they occupy, Article 16 provides that the general prohibition can only be violated with free and informed consent and that the relocation must in any case take place as soon as possible. Finally, in the only case where this is not possible, the State is obliged to find land that allows them the same level of livelihood and development, as well as a form of compensation. As far as procedural rights are concerned, indigenous peoples’ exercise of control over their own economic, social and cultural development cannot disregard the promotion of participation in decision-making concerning agreements that could affect the well-being of indigenous peoples. As stated in Article 6, participation of indigenous communities needs to be achieved by ensuring their rights to consultation and representation at the institutional level.

Another relevant tool is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).²⁹ Adopted by the UN General Assembly in 2007, the resolution

17 Para. 1: ‘The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned’. GA Res. 1803 (XVII), 14 December 1962.

18 Art. 1, para. 2: ‘All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence’. GA Res. 2200, 16 December 1966.

19 In this sense, the right of internal self-determination would limit State sovereignty in the management of natural resources. Di Benedetto (2017), above n. 8, at 65.

20 Art. 21, Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights (‘Banjul Charter’), 27 June 1981.

21 *Ibid.*, Art. 21.

22 Art. 2, Arab Charter on Human Rights, 22 May 2004.

23 Gilbert (2018), above n. 1, at 32; S. Di Benedetto, *Sovranità dello Stato sulle risorse naturali e tutela degli equilibri ecologici nel diritto internazionale generale* (2018), at 65.

24 See Di Benedetto (2018), above n. 23, at 64.

25 N. Shriver, ‘Self-determination of Peoples and Sovereignty over Natural Wealth and Resources’, in United Nations Office of the High Commissioner for Human Rights, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013) 95-102, at 96, https://www.ohchr.org/sites/default/files/Documents/Publications/RightDevelopmentInteractive_EN.pdf (last visited 11 March 2025); N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, (1997), at 373.

26 Gilbert (2018), above n. 1, at 189.

27 *Ibid.*, at 26. The ancestral lands over which indigenous peoples claim collective property rights are those traditionally used and occupied by them. As stated in the *Saramaka* judgment, such lands are not only necessary for the material sustenance of indigenous peoples but also ‘for the continuation of the life and cultural identity’. In fact, in addition to being the source of food, medicine and logistical support for these peoples, they contain sacred sites and are themselves considered sacred, as well as representation of their fight against slavery. ‘The lands and resources of the *Saramaka* people are part of their social, ancestral, and spiritual essence.’ Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgment (Merits), 28 November 2007, para. 96.

28 ILO, Convention No. 169 concerning indigenous and tribal people in independent countries, 27 June 1989.

29 GA Res. 61/295, 13 September 2007.

addresses the relationship between indigenous peoples and the exercise of permanent sovereignty over natural resources, re-affirming the spiritual relationship between indigenous peoples and ‘their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources’ (Art. 25). In virtue of this relationship, indigenous peoples have a right to land, territory and natural resources. The core content of the norm are prerogatives that express the affirmation of a right to self-determination: the right to use, own, develop and control land and resources that they possess ‘by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired’ (Art. 26). Therefore, the State is burdened with obligations of protection, legal recognition of the land and restitution or, fair compensation for the land they have been deprived of in possession without having offered their free prior and informed consent. The Convention addresses not only the exploitation of resources but also the equitable allocation of the benefits obtained. Finally, the nexus between the sustainable use of land and the rights of indigenous peoples is effectively expressed in Article 32, which provides that ‘States shall take effective measures to ensure that no storage or disposal of hazardous substances takes place on the lands or territories of indigenous peoples without their free and informed prior consent’.

According to the General Comments No. 23 of the UN Committee on Human Rights, interpreting the Covenant on Civil and Political Rights, States also have positive obligations. States should therefore put in place measures that can concretely guarantee the effective participation of community members, first and foremost that of consultation before the exploitation or expropriation of the territories on which they are settled, considering that ‘the 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’.³⁰

At the regional level, the American declaration on the rights of indigenous peoples³¹ explicitly recognises the right to land to indigenous communities. Article 25 of the Declaration includes the prerogative for indigenous peoples to own, control and use the land and the resources, in virtue of the material and spiritual relationship between the communities and the territory, also to the benefit of their future generations.³²

Nonetheless, the Inter-American Court of Human Rights (IACHR) and the African Commission on Human and Peoples’ Rights (ACHPR) have contributed significantly to defining the substantive content of collective property rights over indigenous peoples’ ancestral lands, as well as the mechanisms for protecting them.

Indigenous peoples’ property rights were first recognised in their collective dimension by the IACHR in

2001, in the *Mayagna* case.³³ In the present case, the Court recognised the collective nature of the right to property over the lands traditionally owned by the Awas Tingni community through the evolutionary interpretation of Article 21 of the Inter-American Convention, which protects the individual right to property.³⁴ In 2001, also the ACHPR recognised for the first time the collective nature of the right to ancestral land of Ogoni indigenous communities in Nigeria,³⁵ reaffirmed in 2009 in the *Endorois* case.³⁶

33 As a result of the concession of the territory on which the indigenous community was settled by the government of Nicaragua to a third party, the plaintiffs had invoked Nicaragua’s violation of Arts. 21 and 24 of the convention protecting the right to property and the right to judicial protection. Inter-American Court of Human Rights, *Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, Judgment (Merits), 31 August 2001.

34 The Court clarified the concept of property adopted in the judgment, stating that ‘Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community...’ *Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, para. 149; Subsequent judgments have crystallised the Court’s practice by following the same approach: Inter-American Court of Human Rights, *Indigenous Community Sawhoyamaxa v. Paraguay*, Judgment (Merits, Reparations and Costs), 29 March 2006, Series C No. 146, para. 120. Inter-American Court of Human Rights, *Moiwana Community v. Suriname*, Judgment, Preliminary Objections, Merits, Reparations and Costs, June 15, 2005. Series C No. 124, paras. 135-136.

35 *The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v. Nigeria Commission*, communication no 155/96/2001, para. 55. The case concerned the complaint against the government of Nigeria lodged by two NGOs dealing with economic and social rights, for the violation of Arts. 2, 4, 14, 16, 18, 21, 24 of the ACHR. According to the claimants, the government of Nigeria failed to protect the human rights guaranteed by the ACHR to the detriment of the Ogoni indigenous community. Indeed, the oil extraction activity granted by the government to the company Nigerian National Petroleum Company (a state oil company, formed a joint venture with Shell Petroleum Development Corporation) had caused environmental contamination and consequent health problems on Ogoni territory. In 2001 the African Court of Human Rights found these violations and ruled that the Nigerian government should have stopped all attacks to Ogoni community; investigate on human rights abuses and prosecute the responsible parties involved; ensuring compensation to victims and the cleanup of contaminated areas; ensuring the environmental impact assessment for future oil operations; provide means of information and participation of the communities in decision-making processes. Among the most interesting findings of the ruling are the recognition of four categories of States obligations for each human right protected by the charter: obligations to respect, protect, promote and fulfil. In addition, the Court interpreted the charter stating that it ensures not only a protection of the rights explicitly affirmed by the document but also those implicitly derived from the combination of articles of the charter, with reference, in the present case, to the right to housing (para. 63) and the right to food (para. 64). For an in-depth analysis of the case see F. Coomans, ‘The Ogoni Case Before The African Commission on Human and Peoples’ Rights’, 52(3) *International and Comparative Law Quarterly*, 749-60 (2003).

36 African Court of Human Rights, *Centre for Minority Rights Development & Minority Rights Group International on behalf of the Endorois Community v. The Republic of Kenya*, Communication 276/2003, para. 162. The case concerned the forced removing and displacement of the indigenous Endorois community from their ancestral land by the government of Kenya, without paying fair compensation. The communication of the ACHPR found the government of Kenya responsible for all alleged violations of the African Charter of Human Rights (Art. 7(2)-(3), Art. 8, Art. 14, Art. 21, Art. 24). For an in-depth analysis of the case see E. Ashamu, ‘Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: A Landmark Decision from the African Commission’, 55(2) *Journal of African Law* 300-13 (2011).

30 UN Human Rights Committee, CCPR General Comment No. 23, 8 April 1994, Art. 27, para. 7.

31 GA Res. 2888 (XLVI-O/16), 15 June 2016.

32 *Ibid.*, Art. 25.

Regarding the content of the collective property right both Courts refer to the use, possession, control and exploitation of land. The African Court later specified in the *Ogoni* case decision that this right also extends to the resources on the land.³⁷

On the issue of dispossession of land, both the African and Inter-American Courts have, likewise, affirmed the equivalence of the effects of traditional land tenure to a State-granted full property title.³⁸ Therefore, the State must guarantee not only the means of effective demarcation and recognition of land ownership but also the eventual return or receipt of an alternative territory of equal extension and quality in case of dispossession.³⁹ Finally, particularly relevant to this analysis is the ruling in the *Endorois* case, which, in accordance with principles previously affirmed by the African and Inter-American Courts themselves, affirmed the unprecedented link between the violation of the right to land (14) and resources (21) and that of the right to development. In this sense, the Court enshrined the participatory rights of consultation,⁴⁰ consent and benefit sharing, as well as the right to compensation, as guarantors of respect for the right to development.⁴¹ Moreover, in the same decision, the Court emphasised that the State must not only ensure the permanent use of the land for the benefit of the indigenous communities settled there but must also ensure that they ‘can engage with the state and third parties as active stakeholders rather than as passive beneficiaries’.⁴²

As Nino argues, this has led to a shift from the purely State-based management of land and natural resources in favour of a ‘shared sovereignty’ between the State and indigenous communities on ancestral territories.⁴³

Finally, regarding the connection between respect for the land-related rights of indigenous communities and sustainable land management, it is interesting to cite the interpretation of Art. 24 of the American Convention on Human Rights (ACHR) by the Commission in the *Ogoni* case. According to the Court, Art. 24, which protect the right for all people ‘to a general satisfactory environment favourable to their development’, compels the States ‘to secure an ecologically sustainable development and use of natural resources’.⁴⁴ On the same

point, the IACHR highlighted the interrelationship between the respect of the rights of indigenous and tribal peoples and the protection of natural resources in their territories. According to the Court, the guarantee of the rights, especially procedural rights, of indigenous peoples, such as information, consultation, environmental impact assessment and benefit sharing, would allow the communities to contribute to the conservation of biodiversity and the protection of the environment, thanks to the interrelationship between ‘the nature and their way of life’. Thus, these guarantees provided by the States would ensure a sustainable use of the resources.⁴⁵

The assertion of this right has two merits that are relevant to the topic at hand: first, it has shaped a different vision of the land: it is no longer exclusively associated with rights of exploitation but also with cultural rights. In the second instance, a right to land is affirmed for the first time. This right, though not universal, undoubtedly has the merit of opening a window on the need for collective rights over land – other than individual property rights – especially in the context of developing countries with a strong drive towards economic development, whatever the conditions.

The third pillar of the HR-based approach to land is a core of human rights associated to the use of land.

In reason of the lack of a universal human right to land,⁴⁶ other HR like the rights to non-discrimination, adequate housing, food, water, health, sanitation, work, freedom of opinion and expression, as well as the right to participate in public affairs and cultural life intervene in offering protection in the context of land issues.⁴⁷

Leaving aside the rights of self-determination and the collective property over ancestral lands of indigenous peoples, the first reference to the connection between land rights and other HR is Article 11 of the International Covenant on Economic, Social, and Cultural Rights.⁴⁸ Nonetheless, other legal instruments refer to the link between access to land and the enjoyment of other HR: Article 14, paragraph 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* addresses the right to non-discrimination against women, and specifically rural women, calling for States to ensure

found violation of Art. 24 the Commission appeals to the Nigerian government to ‘provide meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities’.

37 *Ibid.*

38 *Sawhoyamaya Indigenous Community v. Paraguay*, para. 128; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 209.

39 O. De Shutter, ‘The Emerging Human Right to Land’, 12 *International Community Law Review* 303-4 (2010).

40 The obligation to consult was later defined as a general principle of international law by the Inter-American Jurisprudence in the *Kichwa* case in 2012, which framed it as a state obligation, specifying that consent must be sought by the state in advance, in good faith and in compliance with procedures for adequate consultation. *Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits), 27 June 2012, paras. 177-220.

41 *Ibid.*, paras. 289-298.

42 *Centre for Minority Rights Development & Minority Rights Group International on behalf of the Endorois Community v. The Republic of Kenya*, para. 204.

43 M. Nino, *Land grabbing e sovranità territoriale* (2019), at 227.

44 *The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v Nigeria Commission*, para. 52; as a result of the

45 *Inter-American Court of Human Rights, Kaliña and Lokono peoples v. Suriname*, Judgment (merits, reparation and costs) 25 November 2015, para. 181.

46 On the historical causes of the missed provision of a universal human right to land see: J. Gilbert, ‘The Human Right to Land “New Right” or “Old Wine in a New Bottle”?’ in A. von Arnould et al. (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020) 97-103.

47 M. Kothari, ‘The Human Right to Adequate Housing and the New Human Right to Land: Congruent Entitlements’, in A. von Arnould et al. (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020) 81-96, at 95; Gilbert (2020), above n. 46, at 101.

48 Art. 11: ‘1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent’. CESCR; above n. 12.

that ‘Women have access to agricultural credit and loan, marketing facilities, appropriate technology and equal treatment in land and agrarian reforms as well as in land resettlement schemes’.⁴⁹ At the regional level, the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2023)* strictly connects women’s equal enjoyment of sustainable development to the guarantee of the right to property and control over land and natural resources.⁵⁰

Furthermore, land rights are considered as a component of the right to food.⁵¹ The human right to food is considered as an official universal human right under Article 25 of the Universal Declaration of Human Rights (UNDHR)⁵² and 11.1 of ICESCR, that impose to States to ensure that all individuals under its jurisdiction have an adequate amount of safe food, as an essential condition to reach a general adequate standard of living.⁵³

The UN Committee on Economic, Social and Cultural Rights highlighted the link between access to land and food in General Comment No. 12 on the Right to Adequate Food, interpreting Article 11 of the ICESCR. The document reports that land is an indispensable right for the fulfilment of other human rights (para. 4).⁵⁴

Among the relevant land-related HR it is worth mentioning the right to housing. The right to housing is recognised in Article 25 of the UNDHR and in Article 11 of the ICESCR, as a key component of the broader right to an adequate standard of living. The same has been then fully recognised by the Committee on Economic, Social and Cultural Rights (CESCR) as a self-standing human right by General Comment No. 4 (1991) and General Comment No. 7, concerning forced evictions.⁵⁵ According to the special rapporteur Miloon Kothari international soft law instrument on the topic show an ‘inseparable connection’ between the right to housing and land rights.⁵⁶ It is, therefore, for this reason that the special rapporteur promote the recognition of a human right to

land to face landless and homelessness conditions and forces evictions, deriving from tenure insecurity.⁵⁷ From all the above, it emerges that the traditional HR approach to land is structurally based on the principle of permanent sovereignty over natural resources and the principle of self-determination. In this context, land has taken on a dual value: the land, as a resource, has an economic but also cultural and spiritual value, since connected to the very identity of the indigenous peoples who inhabit it; on the other hand, the land, as a right, is functional to the realisation of other HR connected to it, such as the right to food, the right to non-discrimination and the right to housing. Conversely, the same rights intervene to protect the rights of local communities and indigenous peoples, filling the void of the absence of a self-standing universal human right to land. Finally, as far as the participation of indigenous peoples in development processes is concerned, free and informed prior consent has crystallised as a parameter of legitimacy in the governance of land and natural resources.

3 Developments and Future Perspectives: From a Top-Down to a Bottom-Up Approach?

Once the general framework for the application of the HR approach to land governance has been defined, it is worth considering some developments in this area. To do so, three relevant juridical instruments dated from 2018 to 2024 are taken under consideration, for their impact on the topic: The United Nations Declaration on Peasants Rights (2018)⁵⁸; The General Comment No. 26 on land and economic, social and cultural rights (2022)⁵⁹; the European directive on corporate sustainability due diligence (2024).⁶⁰

A critical reading of these recent legal instruments addressing the issue shows that developments can be identified with respect to three elements: the affirmation of a human right to land; the expansion of right-holders; and the role of corporations.

The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UN-DROP) is a soft law act born on the input of a proposal from the association *La Via Campesina* and elaborated through a participatory process, which incorporated in-

49 UN Committee on the Elimination of Discrimination against Women (CEDAW). General Recommendation No. 34 on the Rights of Rural Women. UN Doc. CEDAW/C/GC/34, 4 March 2016, <https://documents.un.org/doc/undoc/gen/n16/061/90/pdf/n1606190.pdf> (last visited 27 February 2024), Art. 14, para. 2.

50 African Commission on Human and Peoples’ Rights, *Protocol to the African Charter on Human and Peoples’ Rights (2003)*, 37077-treaty-charter_on_rights_of_women_in_africa.pdf (au.int) (last visited 27 February 2024), Art. 18.

51 P. Claeyns, L. Cotula, J. Gilbert, C. Golay, M. Kothari & V. Torres-Marenco, ‘Land Is a Human Right’, in S. M. Borras, Jr., J. C. Franco (eds.), *Oxford Handbook of Land Politics*, (2022), at 4.

52 GA Res. 61/295, 13 September 2007, Art. 25.

53 GA Res. 2200A (XXI), 16 December 1966, Art. 11, para. 1.

54 Committee on Economic, Social and Cultural Rights, General Comment No. 12, E/C.12/1999/5 (1999), E/C.12/1999/5: General Comment No. 12 on the right to adequate food | OHCHR (last visited 27 February 2024).

55 Committee on Economic, Social and Cultural Rights, General Comment No. 4, CESCR (1991), Committee on Economic, Social and Cultural Rights, General Comment No. 4 | OHCHR (last visited 7 February 2024). Committee on Economic, Social and Cultural Rights, General Comment No. 7, CESCR (1997), General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions | Refworld (last visited 27 February 2024).

56 M. Kothari, above n. 47, at 94.

57 *Ibid.*, at 84.

58 GA Res. 39/12, 28 September 2018, United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas : (last visited 27 February 2024).

59 UN Committee on Economic, Social and Cultural Rights, above n. 12.

60 European Parliament and Council Directive 2024/1760 and Regulation 2023/2859, OJ L, 2024/1760, 5 July 2024.

ternational organisations, scholars and members of the civil society, at the global level.⁶¹

In the footsteps of UNDRIP, the Working group has included three innovative elements compared to previous HR-based tools that addressed land issues: the unprecedented affirmation of a human right to land,⁶² and the recognition of the collective dimension of land-related rights (land; natural resources; seeds; biodiversity⁶³); the recognition of peasants and other rural workers as right-holders.⁶⁴

The human right to land is affirmed in Article 17, paragraph 1 of the Declaration both in its individual and collective dimensions: 'Peasants and other people living in rural areas have the right to land...'.⁶⁵

As a result of such recognition, the State is assumed to ensure freedoms and entitlements without discrimination based on gender, marital status or economic conditions (2), to guarantee the access and sustainable individual and collective use of the land by rural communities (1) but also to take positive appropriate measures in the form of agrarian reform to recognise land tenure rights, given the existence of the different systems and models, arising also from customs (3). Indeed, States are responsible for unlawful forced evictions, displacement, confiscation, and destruction of agricultural areas (4).⁶⁶ Such provisions could be significant in bridging the mentioned gap between Global North and Global South, expanding the protection in contexts where land tenure rights are non-existent or based on customs. Finally, paragraph 8 also takes into consideration the concern about the potential of land concentration in a few hands in integrating cases of 'land grabbing',⁶⁷ affirming that States shall 'limit excessive concentration and control of land, taking into account its social function'.⁶⁸ In such

cases, an HR-based approach to land founded exclusively on individual property rights had proven insufficient in the context of agribusiness investments, later classified as land grabs. In this regard, Cotula notes that protection based exclusively on the right to property encounters limits in the concept of property itself, which may not be a coincidence in the indigenous conception and the role played by the local elites.⁶⁹ On the same point, Gilbert argues that property rights, while constituting the ground on which most HR are based, are structurally designed to protect 'the landed' (those who already possess the land).⁷⁰

Here, instead, land takes on a double value: the one traditionally accorded as instrumental to the realisation of other HR related to it (right to food, housing, property, adequate living conditions). However, the land also takes on an autonomous value, as the object of an individual and collective 'self-standing' human right that imposes on the State specific obligations to respect, protect and fulfil, in favour of peasants.⁷¹

The Declaration expositis the link between an HR-based approach to land through the affirmation of peasants' rights and the dimension of sustainability. This relationship is developed on a double track: the unsustainable use of land and resources significantly affects the identity and survival of farmers. This makes them 'vulnerable subjects' to the negative effects of production processes that affect the environment.⁷² Likewise, the protection of the link between peasants and the land they work contributes significantly to the realisation of rights connected to the right to development.⁷³ The same concept emerges through the combination of Articles 5 and 18, which entitle peasants and other rural workers to the right of access and use of natural resources 'in a sustainable manner'. Connected to this right is the positive obligation for States to conserve and use land 'sustainably' (Art. 17, para. 8).

According to the Declaration, sustainable use cannot disregard the guarantee of procedural rights such as the participation in decision-making processes on the management of natural resources and climate policies; the social and environmental impact assessment; the consent; and the right to benefit sharing.

61 Via Campesina, Declaration of Rights of Peasants - Women and Men. Peasants of the World need an International Convention on the Rights of Peasants, 2008, viacampesina.org/en/wp-content/uploads/sites/2/2011/03/Declaration-of-rights-of-peasants-2009.pdf (last visited 27 February 2024).

62 UNDROP (2018), Art. 17, paras. 1-7.

63 *Ibid.*, Arts. 17, 18, 19 and 20.

64 All categories of recipients are listed in Art. 1, paras. 1-4 of the Declaration: '1. For the purposes of the present Declaration, a peasant is any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land. 2. The present Declaration applies to any person engaged in artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering, and handicrafts related to agriculture or a related occupation in a rural area. It also applies to dependent family members of peasants. 3. The present Declaration also applies to indigenous peoples and local communities working on the land, transhumant, nomadic and semi-nomadic communities, and the landless, engaged in the above-mentioned activities. 4. The present Declaration further applies to hired workers, including all migrant workers regardless of their migration status, and seasonal workers, on plantations, agricultural farms, forests and farms in aquaculture and in agro-industrial enterprises.' UN Committee on Economic, Social and Cultural Rights, above n. 12.

65 UNDROP (2018), Art. 17, para. 1.

66 *Ibid.*, paras. 2-4.

67 On land grabbing see above, n. 4.

68 UNDROP (2018), Art. 17, para. 8.

69 L. Cotula, 'Between Hope and Critique: Human Rights, Social Justice and (Re)Imagining International Law from the Bottom Up', 48(2) *Georgia Journal of International and Comparative Law* 473-521 (2020).

70 J. Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land', 10(18) *SUR - International Journal on Human Rights* 115-36, at 117 (2013).

71 L. Cotula, 'The Right to Land', in Alabrese et al. (eds.), *United Nations' Declaration on Peasants' Rights* (2022) 95.

72 The Preamble recognises 'the past, present and future contributions of peasants and other people working in rural areas in all regions of the world to development and to conserving and improving biodiversity, which constitute the basis of food and agricultural production throughout the world, and their contribution in ensuring the right to adequate food and food security which are fundamental to attaining the internationally agreed development goals, including the 2030 Agenda for Sustainable Development'. *Ibid.*, at 2.

73 M. Alabrese, 'Introduction in The United Nations' Declaration on Peasants Rights', in M. Alabrese, A. Bessa, M. Brunori & P.F. Giuglioli (eds.), *United Nations' Declaration on Peasants' Rights* (2022) 2.

The same focus is also reflected in the language which separates land, territory and natural resources, demonstrating an approach to land that includes but is not limited to its consideration as a commodity but also as a resource with an ecological and identity function.⁷⁴

The *General Comment No. 26 on land and economic, social, and cultural rights* was issued by the CESCR in 2022,⁷⁵ to clarify the State's obligations related to the use or control of land, in the proper exercise of its sovereignty over natural resources, for the benefit of peoples. The soft law act considers the HR-based approach as the desirable approach to implement the obligations to fulfil ensuring the full enjoyment of land-related rights affirmed in the Covenant. This is made explicit in paragraph 38 of the document, which compels States to maintain the environmental function of the land through the use of an HR-based approach to conservation, biodiversity and the sustainable use of land and other natural resources.⁷⁶

While limiting itself to clarifying the interpretation of rules already present within the Covenant (specifically, in Arts. 1-3,11,12,15) this document seems to offer a broader reading of its content. Indeed, clear focus is given to land-related issues such as sustainable development, land grabbing, climate change and the effective control of land.

Concerning subjects, States still are the exclusive duty-bearers. However, special attention, compared to the original wording of the '66 Covenant,⁷⁷ is found right in providing for multiple categories of people in vulnerable situations: peasants, indigenous peoples, ethnic minorities and women. Particularly significant is what is stated in paragraph 27 of the document, concerning State obligations to protect. Indeed, the text states that 'States parties should also recognise and protect communal dimensions of tenure, particularly in relation to indigenous peoples, peasants and other traditional communities who have a material and spiritual relationship with their traditional lands that is indispensable to their existence, well-being and full development. That includes the collective rights of access to, use of and control over lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired'.⁷⁸ The content of the article would seem to in-

corporate the doctrinal orientation that non-indigenous communities, like peasants communities, would still represent communal interests deserving protection. What has been said is found in the placement of the material bond alongside the spiritual one, referring to the land as an essential and irreplaceable resource for survival, well-being and development.⁷⁹

Further relevant note to the General Comment is the interpretation of existing State land-related obligations in terms of sustainability. Whereas in the original text of the '66 Covenant,⁸⁰ no reference is made to state obligations to sustainably manage and redistribute land, the soft law instrument interprets the binding norms through the lens of the concept of sustainability.⁸¹

Nonetheless, a reading of the norms of the General Comment and inputs offered by States and international organisations, at the request of Office of the High Commissioner for Human Rights (OHCHR), suggests that this interpretive tool might constitute a missed opportunity for the affirmation of an official universal human right to land.⁸²

Indeed, the recognition of this right is likely to lead to a change in the structure of the HR approach to land management, from 'top-down' to 'bottom-up'.⁸³ The first reason lies in the origin of the claim for recognition of the right to land, which came from non-governmental organisations and members of the civil society, i.e. from

74 A. Bessa and J. Gilbert, 'Indigenous Peoples' Rights and the Declaration on the Rights of Peasants: Synergies and Challenges', in M. Alabrese et al. (2020) above n. 73, 32-46, at 39; A. Mensi, 'Indigenous Peoples, Natural Resources and Permanent Sovereignty', 49 *Queen Mary Studies in International Law* 1877-4822, at 151 (2023).

75 UN Committee on Economic, Social and Cultural Rights (2022), above n. 12.

76 *Ibid.*, para. 38: '...States parties should engage in long-term regional planning to maintain the environmental functions of land. They should prioritize and support land uses with a human rights-based approach to conservation, biodiversity and the sustainable use of land and other natural resources. They should also, inter alia, facilitate the sustainable use of natural resources by recognizing, protecting and promoting traditional uses of land, adopting policies and measures to strengthen people's livelihoods based on natural resources and the long-term conservation of land'.

77 GA Res. 12200 (XXI), 6 December 1966, Art. 11.

78 UN Committee on Economic, Social and Cultural Rights (2022), above n. 12, para. 27.

79 On the point, see M. Nino, *Land Grabbing e sovranità territoriale in diritto internazionale* (2019), at 247-51. In the theory developed by the author, analogical extension would allow land-related rights attributed to indigenous peoples affected by 'land grabs', to be extended to rural communities in the same situation. This would occur through the commonality of the injured legal interest's collective dimension: the indigenous people's spiritual link and the material one for rural communities with the land and its use to guarantee survival.

80 GA Res. 12200 (XXI), 6 December 1966, at 16.

81 Several references to sustainable use of land can be found in the document: 'States should take measures to support peasants to use the land in a sustainable manner' (para. 3, n. 18); 'Responsible investments shall respect legitimate tenure rights and shall not harm human rights and legitimate policy objectives such as food security and the sustainable use of natural resources' (para. 3, n. 28); among obligations to fulfil 'States parties shall facilitate secure, equitable and sustainable access to, use of and control over land for those who depend on land to realize their economic, social and cultural rights' (para. 3, n. 32); 'land redistribution schemes should ensure that the beneficiaries receive proper support to enhance their capacity to use land productively and to engage in sustainable agricultural practices in order to maintain the productivity of the land' (para. 3, n. 36); 'Policies and laws should be accompanied by adequate, gender-sensitive support measures, developed through participatory processes, and should aim to make agrarian reforms sustainable' (para. 3, n. 37).

82 During the drafting of this document, many scholars and international organisations promoted the affirmation of a universal human right to land through the interpretive activity of the General Comment, following the model of the right to water. See: L. Cotula and L. Jacobs (IIED), *Written Contribution to the Draft General Comment on Land and Economic, Social and Cultural Rights Submitted to the Committee on Economic, Social and Cultural Rights* (2021); International Land coalition, *Response to the General Comment on land developed by the Committee of the International Covenant on Economic, Social and Cultural Rights*, (2021); P. Claeys, L. Cotula, J. Gilbert, C. Golay, M. Kothari & V. Torres-Marenco, (2022), above n.51.

83 The bottom-up approach is understood here both in terms of decentralisation in the material management of resources and in terms of the contribution of local communities, including through NGOs, in the proposal and elaboration of norms and policies related to land management.

'below', for then to be institutionalised in the UNDROP.⁸⁴ The second set of reason lies at the legal level: as already mentioned, various scholars have argued the structural inadequacy of property rights to ensure land tenure and redistribution.⁸⁵ This right, although closely related to land, does not consider the social reasons related to the occupation, use, or work of land. Indeed, according to the special rapporteur on the right to housing Miloon Kothari the land is an indispensable resource for the survival of some local communities, as the only source of food and housing security⁸⁶: For that purpose, he fosters the affirmation of a self-standing human right to land, as functional to the effective implementation of a human right to housing.⁸⁷ Furthermore, Kothari highlights that the human right to land has already found its way into other soft law international acts, such as the Sustainable Development Goals (SDGs) and the work of the CEDAW (Committee on the Elimination of Discrimination Against Women).⁸⁸ For this reason he encourages the UN Human Rights Council to adopt a resolution to be endorsed by the UN General Assembly, with the scope of recognising a self-standing human right to land.⁸⁹ Nevertheless, some scholars are sceptical about the realism and effectiveness of creating a new human right to land. Among them, Hope believes that States have no interest in granting land rights to certain categories of food-insecure populations.⁹⁰ Moreover, the author questions the effectiveness of such a right in addressing food insecurity, as it is difficult to reconcile with circumstances such as disputes over claiming the right to the same portion of land, its application to non-agricultural land and the difficulty of implementing land redistribution.⁹¹ More generally, such a right would lack the character of universality, as the needs of urban and rural populations may not coincide.⁹² Finally, it is feared that the right could hinder government land redistribution projects.⁹³ These doubts are compounded by scepticism about the need to expand the range of HR and effectiveness in addressing land-related issues through the HR system.⁹⁴

84 See P. Claeys, 'The Right to Land and Territory: New Human Right and Collective Action Frame', 73 *Revue interdisciplinaire d'études juridiques* 115-33 (2016).

85 Cotula (2020), above n. 69; Gilbert (2013), above n. 70.

86 Kothari (2020), above n. 47.

87 To this end, he calls for a self-standing human right to land, as guarantor against land confiscations that are an obstacle to enjoyment of land rights, if not driven by purposes of reforms and protection of vulnerable communities. Guidelines United Nations High Commissioner for Refugees (UNHRC), Report by the Special Rapporteur on Adequate Housing, M. Kothari, Annex 1: Basic Principles and Guidelines on Development-Based Evictions and Displacement, 5 February 2007, UN Doc. A/HRC/4/18.V, para. 16.

88 Kothari (2020), above n. 47, at 94.

89 *Ibid.*, at 96.

90 Jhonson (2018), above n.13, at 72.

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*, at 72.

94 See: V. Granet, 'The Human Right to Land: A Peasant Struggle in the Human Rights System', 24(3) *Human Rights Law Review* (2024), 12-23. Taking the case of the right to land affirmed in UNDROP as a specific example, the author digresses from the criticisms of effectiveness related to the

For what future perspectives are concerned, *General Comment No. 26* addresses the issue of climate change among the 'Specific issues of relevance to the implementation of rights enshrined in the Covenant in land-related contexts'.⁹⁵ The issue had already been addressed by soft law instruments, such as UNDROP, which in Article 18 had recognised the key role of traditional knowledge and local communities in designing climate adaptation and mitigation policies, enhancing public participation.⁹⁶

The General Comment recalls the IPCC Report of 2019 issued by the Intergovernmental Panel on Climate Change and Land⁹⁷ and recognises the underrated relationship between climate change and the land: climate change impacts on access to land, land user rights, housing, agriculture and fisheries, by provoking land degradation and desertification. Inadvertently, climate change mitigation and adaptation policies have the potential to affect the rights of local communities. Indeed, the Intergovernmental Panel on Climate Change and Land argued 'that insecure land tenure negatively affects the ability of people, communities and organizations to make changes to the land that can advance adaptation and mitigation'. Moreover, 'limited recognition of customary access to land and ownership of land can result in increased vulnerability and decreased adaptive capacity'.⁹⁸ In this context, land policies aimed at recognising customary tenure, community mapping, redistribution, decentralisation, co-management and regulation of rental markets have an active role in response to climate change.

Therefore, according to the recent interpretation of the Covenant provided by the General Comment No. 26, States are subject to a double obligation: the negative one, to avoid mitigation climate change policies, such as carbon sequestration through massive reforestation and protection of existing forests leading to forms of land grabbing (46); the positive one, to take account of land use changes caused by climate change, in the planning of adaptation policies (47).⁹⁹

A separate discussion deserves the role of corporations in the evolution of the HR-based approach to land. Both the UNDROP and the General Comment No. 26 do bring companies into the discourse on sustainable land management and the impact of business activities on the rights of locally settled communities. However, as

extension of human rights and, more generally, to the use of the human rights system to address land-related problems.

95 UN Committee on Economic, Social and Cultural Rights (2022), above n. 12, at 16-17

96 On UNDROP and climate change see: M. Alabrese and A. Savaresi, 'The UNDROP and Climate Change: Squaring the Circle?', in M. Alabrese et al. (eds.), *United Nations' Declaration on Peasants' Rights* (2022), at 165-76.

97 IPCC, 'Summary for Policymakers', in Shukla et al. (eds.), *Climate Change and Land: An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (2019), <https://doi.org/10.1017/9781009157988.001> (last visited 27 February 2024).

98 *Ibid.*, at 31.

99 UN Committee on Economic, Social and Cultural Rights (2022), above n. 12, paras. 46, 47.

noted above, States remain the only duty-bearers. On the matter, a brief reference is made to corporations in Article 2(5) of UNDROP, affirming that it integrates a positive obligation of States to ensure that transnational corporations respect the rights of peasants and people working in rural areas. On the same line, General Comment No. 26, dedicates a specific section to the extraterritorial obligation of States, recognising the fundamental role in enforcing the HR enshrined in the Covenant. In light of this, paragraphs. 30 and 42 of the document define the State's obligation to protect, establishing standards and a regulatory environment, which will bring private investors and corporations into compliance with HR due diligence in the context of large-scale investments affecting land tenure.¹⁰⁰ Furthermore, States are required to avoid interference between business activities outside their territory and the enjoyment of HR, considering soft law standards elaborated in the context of international large-scale investments on land, such as the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (para. 41).¹⁰¹ Moreover, obligations to fulfil require international cooperation, for the benefit of peoples in and outside the national territory (paras. 46–47).¹⁰² Finally, paragraph 43 also indirectly refers to 'land grabs', recognising the State's duty to impose HR due diligence obligations on investors to avoid leases and concessions that violate international norms.¹⁰³

However, a broad practice of large-scale land investments showed that the interest of the State does not always align with that of all local communities. Among the main reasons discouraging States from acting in defence of the public interest are the interest of governments in attracting the flow of capital to the host country and the attachment of national elites, to the 'extractivist' model of economic development, especially in countries of the Global South, that have undergone processes of decolonisation.¹⁰⁴ In addition, the prospect of abundant compensation for breaches of contracts or agreements often acts as a significant disincentive for States to act.¹⁰⁵ For this reason, it would be desirable to

combine corporate social responsibility tools with legally binding obligations directly addressed to corporations, for activities having the potential to affect the identity and survival of communities.

The *European corporate sustainability due diligence directive* (CSDDD) seems to be heading in this direction, promoting the role of Business and Human Rights in the HR-based approach to the land.¹⁰⁶ The proposal issued by the European Commission in February 2022, then modified and approved by the Council of the European Union in May 2024 aligns with international standards on corporate responsibility in the conduct of business activities set by the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights (UNGPs). Pillar II of UNGPs laid the groundwork for corporate responsibility for HR violations, including those contained in the ICESCR, noting that situations of conflict over control of territory and its resources are among the most likely to be fertile ground for HR abuses related to business.¹⁰⁷

With specific reference to land, the CSDDD notes that European corporations have been responsible for activities that have caused environmental degradation and HR abuses and specifically cites unlawful land acquisition as one of the reasons for the proposal. In this regard, the Annex, containing violations of due diligence, involving eventual corporate civil liability, include the

[v]iolation of the prohibition to unlawfully evict or take land, forests and waters when acquiring, developing or otherwise use land, forests and waters, including by deforestation, the use of which secures the livelihood of a person, interpreted in line with Article 1 and 27 of the International Covenant on Civil and Political Rights and Article 1, 2 and 11 of the International Covenant on Economic, Social and Cultural Rights. (Item 16)¹⁰⁸

100 *Ibid.*, paras. 30, 42.

101 *Ibid.*, para. 41.

102 *Ibid.*, paras. 46, 47.

103 *Ibid.*, para. 43.

104 L. Cotula and N. Perrone, 'Investors' International Law and Its Asymmetries: The Case of Local Communities', in J. Ho and M. Sattorova (eds.) *Investors' International Law* (2023) 71–88, at 74.

105 Indeed, state actions to block the activities of the companies do not always fall within the scope of application of the regulatory action framework, exposing the State to allegations of indirect expropriation, violations of fair and equitable treatment and not providing compensation. A well-known example is provided by the decision in the *Bear Creek v. Peru* case, which concerned the Canadian company's revocations of mining concessions following protests against the investment project by the Aymara indigenous community. In the award, the arbitrators recognised that the Peruvian government's action did indeed constitute an indirect expropriation of foreign investment in violation of the FTA between Canada and Peru. On this point see S. Di Benedetto, 'Valori non commerciali e sovranità dello Stato nella prassi arbitrale sugli investimenti', XIII *Trattato di diritto dell'arbitrato* 892–933 (2020); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017.

106 European Parliament and Council Directive 2024/1760 and Regulation 2023/2859, OJ L, 2024/1760, 5 July 2024.

107 United Nations (2011), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, p. 9, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* | OHCHR (last visited 23 July 2024).

108 The annex adopted together with the directive in 2024 changed the previous wording from the 2022 proposal, which had only cited Art. 11 of the Covenant on Economic, Social and Cultural Rights. In the final wording, the rights related to land are also to be interpreted under Arts. 1 and 2 of the same Covenant (respectively, the protection of the right of peoples to self-determination and the right to control their own natural resources and not to be deprived of the means of subsistence) and Arts. 1 and 27 of the International Covenant on Civil and Political Rights (respectively, the protection of the right of peoples to self-determination and the right of minorities to enjoy their culture, religion and language). Item 20, which included among the rights protected by the due diligence the specific 'violation of the rights of indigenous peoples to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, in accordance with Arts. 25, 26 (1) and (2), 27 and 29 (2) of the United Nations Declaration on the Rights of Indigenous Peoples', was also deleted from the final text. European Commission, Proposal for a Directive on corporate sustainability due diligence and Annex, 23 February 2022, Proposal for a Directive on corporate sustainability due diligence and annex – European Commission (europa.eu) (last visited 20 January 2025).

A critical reading of this point reveals that the respect of land-related rights of local communities is essential in reaching sustainability goals. On the matter, it is interesting to note that the right-holders are ‘individuals, groups and communities’. This formulation attributes the rights mentioned in item 16 by reason of the material relationship between individuals and communities and the land, understood as the means that guarantees their subsistence. Considering this, it can be assumed that land is conceived by the Directive in its social function, as an indispensable means for the subsistence of individuals and all communities, regardless of whether they are recognised as indigenous. However, it is noteworthy that while the Directive also recognises the rights listed in item 16 as collective in nature, it does not recognise an autonomous right to land but adopts the traditional approach of indirectly protecting land rights through the protection of other HR associated to the enjoyment of the land. Indeed, the Annex refers to the violations of Article 1, 2 and 11 of the CESC, namely the right to self-determination, to freely dispose of their natural resources and the right to food, housing and to an adequate standard of living, and Article 1, 27 of the International Covenant on Civil and Political Rights (ICCPR) on self-determination and minorities’ right, as grounds for civil liability for activities that affect the land.

Nevertheless, considering the growing weight of corporations in the material management of land, the extra-territorial subjective scope of the Directive, and its binding effect, the CSDDD promises an interesting potential for the use of an HR-based approach to land governance in the context of Business and Human Rights Law, for both an analysis of the effectiveness of any preventive measures and for judicial implications in domestic Courts.

4 Conclusion

Following the analysis above, it is possible to draw the lines of the application of the HR-based approach to land and its development over time. Therefore, it is appropriate to wonder whether its evolution fosters the sustainable governance of land through the affirmation of the rights of local communities, to the point of provoking a paradigm shift in land governance from ‘top-down’ to ‘bottom-up’.

Considering the normative development of the HR-based approach to land, from Section 1 emerges that its foundations are rooted back at the origins of the IHRL and are essential to be found in the principle of permanent sovereignty over natural resources and the right of self-determination. At the same time, the absence of an official universal right to land has created a system of indirect protection of land-related issues through the invocation of other rights, such as the right to collective property of indigenous communities, the right to food, the right to non-discrimination, the right to housing.

This approach, which is defined by Gilbert as ‘top-down’, sees the management of resources as essentially State-centric, leaving some open questions, such as the absence of a human right to land and, consequently, the lack of protection of land-related rights by communities who can not avail themselves of collective property rights over ancestral lands.

What emerges from the critical reading of the normative developments and future perspectives offered by the three legal instruments under consideration (the UNDROP, the General Comment and the CSDDD) in Section 2 is that the use of an HR-based approach to the governance of land is a growing trend. All the three acts explicitly mention or implicitly include the use of this approach respectively in the formulation of soft law land-related norms, the interpretation of hard law norms concerning the governance of land and the creation of binding obligations directed to companies, also for land-based investments.

Subsequently, it emerges that recent developments recognise an even stronger link, compared to the traditional approach, between the use of an HR-based approach and the land-related rights of local communities. Accordingly, the use of this approach cannot disregard the respect, protection and fulfilment of substantial and procedural land-related rights of local communities by the States.

In fact, from the point of view of entitlement, great strides have been made, starting from the UNDROP, which is characterised, in its formation process, by a generally recognised inclusive participation of various stakeholders. Moreover, on the substantive level, as Francioni acknowledged, the recognition of peasants and other rural workers as holders of a universal human right to land and other collective rights, paved the way for the recognition of legal status for this ‘vulnerable’ or ‘marginalised’ category.¹⁰⁹ Furthermore, the General Comment interpreted extensively the CESC, recognising that in the concept of ‘everyone’ as right-holders of land-related rights according to the CESC, peasants, along with women, indigenous peoples and other vulnerable groups, are the most impacted subjects in the context of land governance. Finally, also the CSDDD considers a broad category of right-holders in item 16, mentioning individuals groups and communities, sharing the material relationship with the land in terms of means that guarantees their subsistence, regardless of whether communities are recognised as indigenous.

Moreover, it emerges from the recognition of the close link between the affirmation of the rights of local communities and a more sustainable land governance. The correlation between the involvement of local communities in the decision-making process and in the material management of natural resources and a more sustainable use of land, already fully affirmed in the context of International Environmental Law, also seems to be

109 F. Francioni, ‘The Peasant’s Declaration, State Obligations and Justiciability’, in M. Alabrese, A. Bessa, M. Brunori & P.F. Giuggioli (eds.), *The United Nations’ Declaration on Peasants Rights*, (2020), at 14.

present in the IHRL's regulatory context. This circumstance is made explicit in the *General Comment*, which in its preamble recognises the fundamental contribution of sustainable land use to the promotion of the right to development and other rights. This occurs through the recognition of the value of traditional practices of local communities and the role of women in shaping land management policies, and through the enhancement of the concept of control, which is not limited to protecting the mere use or access but also recognises the involvement of multiple stakeholders, including private entities, in land governance. As noted in Section 2, the meaning 'sustainable' is present in several sections of the *General Comment*, including State obligations. This consistent presence marks a particular focus of the Commission in considering sustainable use of land and the land rights of the most vulnerable groups as interdependent. In this sense, the HR-based approach to land can be said to have evolved into the affirmation of sustainability as a key requirement for its effective implementation.

The question, therefore, arises as to whether recent normative developments are likely to provoke a structural change of direction towards a 'bottom-up' HR-based approach to land.

The answer appears to be partial. The factor that impacts significantly on the mentioned paradigm shift is the inclusion of non-State actors as both right-holders (as in the case of peasants and other people working in rural areas in UNDROP) and duty-bearers (concerning certain corporations in CSDDD). The involvement of all actors impacting or being impacted in the enjoyment of land-related HR substantially mitigates the State-centric character of land governance. All these elements demonstrate a commitment of the IHRL system to consider the complexities of relationships within land governance, which involve other relevant stakeholders, namely local communities and corporations; other perspectives, such as indigenous, gender- and youth-sensitive perspectives; and different challenges between the Global North and Global South. If in the first phase, the international debate was focussed on whether and who could 'exploit' the land and natural resources, the focus would then shift to how to 'use' land and natural resources, in a way that balances economic interests with the needs of environmental and social sustainability.

On the other hand, the affirmation of a human right to land remains an open issue. Indeed, the three acts consider both the relevance of the land as a resource and as a right, functional to the pursuit of other rights. However, the formalisation of an autonomous right to land through the interpretative action of the General Comment would have added a social justice function to the already established economic and cultural one.¹¹⁰ Moreover, the assertion of an autonomous human right to land would have allowed for the inclusion of a sustainability dimension that property rights lack, in virtue of the needs that this new right is supposed to protect. To

that effect, the affirmation of this right in favour of peasants and other vulnerable people fostered by the UNDROP, would indirectly contribute to the implementation of State commitments to SDGs, while promoting the same approach among land users themselves, where their practices are deemed to be unsustainable. Finally, if, on the one hand, the CSDDD is innovative in imposing binding effects to violations of land rights, on the other, it adopts, as well, the traditional indirect approach of land rights protection, through the recall to HR associated to the use of land.

For what future perspectives are concerned, it is noteworthy to mention the growing interest of the international community for the intersection between Human Rights and Climate Change Law, and its progressive recognition by Courts, in the context of climate change litigation. In particular, the latter one is likely to offer an interesting contribution to the bottom-up paradigm shift in land governance over time, considering the impact of climate change on the enjoyment of land-related rights.

¹¹⁰ Gilbert (2013), above n. 70, at 129.