



# **Towards a Human Right to Land: An evolutive interpretation of the International Covenant of Economic, Social and Cultural Rights.**

**Submission in response to the Call for written contributions to the draft general comment (No. 26) on Land and Economic, Social and Cultural Rights**

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\* This contribution is based on Dr. Torres-Marenco's PhD dissertation '*A Human Right to Land for Local Communities: A Proposal in the Context of Transnational Corporations' Control of Land Use* (University of Greenwich, United Kingdom, 2019), to be published in 2023.

In 2021, the Committee on Economic, Social and Cultural Rights, through its Co-Rapporteurs, prepared the draft general comment (no. 26) on Land and Economic, Social and Cultural Rights and invited interested individuals and organizations, including States, national human rights institutions, civil society organizations, academics, international and regional organizations and experts, to submit written contributions. This Research Brief responds to this call, providing an evolutive interpretation of the International Covenant on Economic, Social and Cultural Rights which grounds the recognition of a right to land.

The BHRE Research Group welcomes the initiative of the Committees' General Comment on land. It strongly believes that it is necessary to strengthen, particularly, the adequate standard of living of local communities in the world whilst being threatened by global issues such as environmental contamination, the different dynamics of land investments, the power of transnational corporations and the trends of the privatisation of global governance.

The draft General Comment rightfully recognises the dependence of local communities on land. Furthermore, it affirms that access to land is a precondition for the realisation of several rights in the Covenant which also concern these communities<sup>1</sup>, particularly the rights to food, housing, water, health, and cultural life, as well as the provision for non-discrimination.<sup>2</sup> Indeed, such a precondition has been largely affirmed by the Committee in its practice, such as through general comments concerning the rights to adequate food, housing, and water,

as well as through its concluding observations. In addition, special rapporteurs have continuously recognised such a precondition, as well as local communities' dependence.

At the same time, the right to land has been recognised as a self-standing right in relation to indigenous peoples, and more recently to peasants. The newly adopted Declaration of Peasants gave momentum to the affirmation of a human right to land for local communities as a group apart from indigenous peoples. Indigenous peoples' right to land is largely affirmed in international human rights law; however, peasants' right to land, is only recognised in a non-legally binding Declaration. Therefore, for such a right to reach a path of mandatory recognition and be binding to States it must be endorsed by human rights treaty bodies, which can legally undertake such a task.

Relying on the very work of the Committee, it can be argued that a right to access to land already exists. Basing its argumentation on the typology of states' obligations,<sup>3</sup> the analytical triple A&Q framework<sup>4</sup>, and the core content of the right to food, housing and water, the Committee has consistently established such a prerogative. Therefore, a State which does not guarantee access to land is in violation of the core content of the rights to food, housing and/or water comprised in Article 11 ICESCR on the right to an adequate standard of living. The central argument is that access to land, as such, is both a prerogative and a component of these rights, therefore making it a right itself. Based on this assumption, the present contribution from the BHRE Research Group aims to

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<sup>1</sup> Paras. 1 and 9.

<sup>2</sup> Paras. 9-13.

<sup>3</sup> The typology of States' obligations includes the obligation to respect, protect and fulfil.

<sup>4</sup> This is comprised of the following aspects: 'availability, accessibility, acceptability and quality of facilities, goods, services and programmes that are provided to individuals as

part of States' core and non-core obligations flowing from different ESC rights.' Amrei Müller, Economic, Social And Cultural Rights And The Notion Of Progressive Realisation in Michal O'Flaherty and David Harris *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law* vol 2 (Martinus Nijhoff Publishers 2013) 103.

provide the foundations for making a case for an evolutive interpretation of such a scope of land protection within Article 11 ICESCR, into a self-standing **right to use, access and control land**. This contribution is motivated by the current context of transnational corporations' (TNCs) control of land from which local communities are left unprotected, which is fundamentally different to that when the Covenant was negotiated and drafted.

**a) The existence of a right to access to land within Article 11 ICESCR.**

The minimum core content of the rights to food, housing and water prescribes access to land as a precondition for their realisation. As established in their respective general comments, the guarantee of the minimum essential level

required to be free from hunger;<sup>5</sup> the prohibition of forced evictions,<sup>6</sup> and the minimum essential amount of water for personal and domestic use to prevent disease,<sup>7</sup> presuppose the access to land when this is necessary to fulfil such core protection.<sup>8</sup>

Therefore, there are grounds to argue the existence of a right to access to land as a means to protecting local communities' right to food, housing and/or water. This right to access to land falls within the obligations to respect, protect and fulfil, and more importantly, within the minimum core content obligations of States. Nonetheless, **the right to access to land denotes a subordinate character**, because its main object of protection is the specific right i.e. food, water and/or housing. Consequently, if a State

complies with that minimum core obligation through other means, and a lack of access to land persists, the State is not in violation of Article 11 ICESCR.

**b) The State has lost the control of land.**

Current land investment trends adversely impact local communities' relationship with land. TNCs participate in the use of land through global value chains as they lead international trade. The participation of TNCs in the value chain of businesses such as food crops, biofuels, timber and the extractive industries demonstrates a more prominent form of participation in the use of land. This is the ability to control land through their power over key technologies and/or the market in the value chain. In light of this, it is important to note that TNCs in control of land are not necessarily located in the host State as they are present through direct foreign investment. Consequently, they escape host State jurisdiction.<sup>9</sup> Such a dynamic is especially evident in the Global South, however is spreading all over the world.

This trend takes place in a context of policies which prioritise agribusiness and the timber industry by favouring the importation of food crops, whilst promoting the substantial reduction in states' support of rural agriculture, and their contribution to land concentration. The combination of these policies and the control of land by TNCs negatively impacts local communities. Such an impact is generally directly undertaken by other foreign or domestic companies present in the host State as producers, and therefore engaged in land investments controlled

<sup>5</sup> CESCR 'General Comment No. 12 (Article 11 of the Covenant): The Right to Adequate Food' (1999) UN doc. E/C.12/1999/5. para. 17.

<sup>6</sup> CESCR 'General Comment No. 7 The right to adequate housing (art. 11.1 of the Covenant): forced evictions' (1997) E/1998/22. para. 8.

<sup>7</sup> CESCR General Comment No. 15 Right to Water (2003) E/C.12/2002/11 para. 37.

<sup>8</sup> CESCR General Comment No. 12 para. 17; See also 'Report of the Special Rapporteur on the right to food' (2009) A/HRC/13/33 Add2. para. 4.

<sup>9</sup> Chapter 3, Torres-Marenco PhD thesis addresses this analysis with a special focus on Latin America.

ultimately by the TNC in control of the value chain. Additionally, the implementation of these policies heightens by this negative impact, placing local communities in an extreme power asymmetry in relation to both TNCs and the State. As a result of these situations, local communities have faced poverty due to their lack of capacity to integrate into the international market due to investment costs; obstacles to cultivate their land; proletarianisation; forced labour; lack of prior consultation or free, prior and informed consent; land dispossession and displacement; loss of access to land; and homicides and forced disappearances, among other factors.<sup>10</sup> The circumstances resulting from local communities' vulnerability constitute several human rights violations. These include abuses regarding environmental contamination and loss of lands, as well as obstacles to access to land which prevent them from peacefully and safely enjoying the lands they depend on and equally, concern the violation of the right to an adequate standard of living under Article 11 ICESCR, which encompasses the right to food, water and housing, and other related rights such as health and culture.

### **c) Human rights treaty interpretation rules.**

Human rights treaty interpretation rules follow the teleological approach method, which encompasses the analysis of a number of legal (normative content) and political (object and purpose) aspects of the norm. The interpretation of Article 11 ICESCR also

observes the teleological method of interpretation, and the effectiveness and evolutive principles. There is a general agreement that all human rights bodies are bound in their interpretation exercises by the Vienna Convention on the Law of Treaties (VCLT) and that these methods are enshrined within Articles 31 and 32 of the VCLT. Indeed, the method of interpretation of the ICESCR comprises the rules established for such a purpose in Articles 5; 24 and 25 ICESCR.

The rules of interpretation of the VCLT have been consistently applied by the Committee. Yet, the practice of interpretation of the Committee is subject to strong criticism for reasons such as a failure to rightfully abide by these rules – in text, context, and object and purpose – on a number of issues.<sup>11</sup> This has led to the creation of obligations that cannot be extracted from the Covenant, thus compromising its legitimacy and coherence, as well as there being a danger of it exceeding its mandate.<sup>12</sup> This ambiguity is reflected in criticisms surrounding issues such as constant changes in the interpretation of minimum core obligations' standards,<sup>13</sup> and the 'creation' of a right to water, which 'arguably do not reflect the will of states' parties.<sup>14</sup> Therefore, the Committee needs to work on generating legitimacy in the interpretive community, which Moeckli believes should mean working towards generating adherence 'to a set of principles agreed upon by the interpretive community', and transparency and coherence in its interpretative task.<sup>15</sup> These criticisms have their place, yet the BHRE Research Group

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<sup>10</sup> *ibid.*

<sup>11</sup> See Mechlem on the issue of 'obligations' of International Organisations 931; on States' Extraterritorial Obligations 935 and; on the expansion of the concept of 'Core Obligations' 940. Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905 at 941-942.

<sup>12</sup> *ibid.* 945-946.

<sup>13</sup> Daniel Moeckli 'Interpretation of the ICESCR: Between Morality and State Consent' in Daniel Moeckli, Helen Keller

and Corina Heri (eds) *The Human Rights Covenants at 50: Their Past, Present, and Future* (OUP 2018) 19.

<sup>14</sup> *ibid.* For strong criticism on CESCR's approach to the ICESCR see Michael J. Dennis and David P. Stewart 'Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98(3) *A.J.I.L.* 462; Stephen Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15' (2005) 23(1) *NQHR*.

<sup>15</sup> *ibid* Moeckli 20-21.

does not agree that affirmation by the Committee of concepts such as the right to water and minimum core obligations exceed the Covenant's protection. This contribution nevertheless concedes that the CESCR has failed to provide a solid legal interpretation to certain provisions of the Covenant. **Therefore it aims to guide the Committee on how to overcome these kinds of omissions when addressing the need for a solid reinterpretation of Article 11 ICESCR.**

**d) Making a case for a reinterpretation of Article 11 ICESCR: an effectiveness assessment.**

As stated in section b) of this contribution TNCs' control of land, in combination with policies adopted by the State, has put local communities in a situation of vulnerability. This reality should be sufficient to provide the grounds for the Committee to evaluate whether provision concerning the right to access to land, derived from Article 11, is effective to protect these communities, and further consider an evolutive interpretation if such a condition is not met.

In light of this, the Committee should assess the subordinate character of the right to access to land, which would lead it to conclude that it does, in fact, not provide effective protection. The main argument of this failure is that by acknowledging such a subordinate character local communities might be protected while the State was in actual control of land. Nonetheless, in the current reality, a subordinate protection of access to land is not enough. **This is because control, once exercised by the State, is now in the hands of TNCs** and, as a result, the former can no longer guarantee access to land. Thus, the right to access to land is subordinate to the rights to food, water and housing, which means a right to land as such cannot provide a straight protection to local communities against land deprivation.

Consequently, the Committee may consider that in the context described above the right once decreed as access to land, and guaranteed by the State, has now become the exception. The original purpose of protection, which considers local communities' dependency on, and access to, land is currently overlooked. In other words, in the current state of affairs, it is very unlikely that the general protection of local communities' adequate standard of living is fulfilled through the access to land.

In addition, the reality for local communities is that they cannot rely on the State to even provide concrete solutions to address the impact resulting from TNCs' control of land. This is because the control TNCs wield escapes a State's jurisdiction, and/or may take place in the context of neoliberal State policies that promote this situation rather than offering protection from it. Thus, local communities remain in a situation of vulnerability, leading to violations of their minimum subsistence levels, which constitute the very object and purpose of Article 11 ICESCR. This situation exposes the unsuitability of the subordinate character of the right to access to land, as its current scope of protection cannot guarantee the purpose for which it was conceived. This leads to a mandatory evolutive interpretation of such scope of land protection (access to land) of Article 11 ICESCR.

**e) The basis for an evolutive interpretation of Article 11 ICESCR: A human right to access, use and control land.**

If the right to access to land recognised within Article 11 ICESCR on the right to an adequate standard of living is acknowledged as ineffective to guarantee its purpose, it is the duty of the interpreter to examine the causes of that failure, so as to deliver an

interpretation capable of guaranteeing effective protection. Based on the conclusion of the effectiveness analysis above, this contribution argues that the reason why the right to access to land is not effective, lies in the fact that the State is not in control of land use as it is instead in the hands of TNCs in control of the value chain in the form of several businesses meant for international trade.

**Such change is framed by a shift in the political economic model of a State from a socio-liberal to a neoliberal one.** Therefore, Article 11 should be interpreted according to the evolutive principle with the aim of taking into account the effects of such a shift on the protection of local communities' adequate standard of living, and provide them with effective protection.<sup>16</sup> The evolutive principle is of mandatory application in the interpretation of human rights treaties. It has in fact been applied by the Committee in a number of general comments, recognising that context and time impact on the interpretation of the Covenant provisions.<sup>17</sup>

In order to justify such an evolutive interpretation the Committee can be supported by the following premises: 1) The political-economic context at the time of negotiations and the adoption of the Covenant (1950-1966) was within a climate of social welfare. The independent States generally had control over their economic policies, population, and jurisdiction over territory. Consequently, in terms of land use and transnational corporations, the State had control of its land and TNCs involved in land-

use were essentially under the State's jurisdiction; 2) Between the 1970s and 80s, the socio-liberal state was replaced by a neoliberal state model, seen in with the Washington consensus in 1989. The State drastically reduced its control of economic policies as part of the implementation of neoliberalism and this new model brought with it the bestowal of major decision power to entities other than States – i.e. TNCs. Consequently, this model encouraged TNCs' power internationally by advancing economic globalisation, and this, together with technology, led to a shift in the use of land compared to previous decades; and 3) Despite this shift being unforeseen, the drafters did discuss and include the moral values and rights that should not be jeopardised regardless of any future changes in social, economic and political context, unless explicit consensus to the contrary was achieved (in the form of subsequent agreements or treaties).

For more than 30 years, the Committee has continuously addressed issues related to local communities, land, TNCs and land investments. Yet this approach has not been sufficient. Ironically, the Committee, in the course of its practice, has recognised the central issues relating to the motivations of an evolutive interpretation of Article 11: (i) local communities' dependency on land; (ii) States' obligations to undertake measures to address the impact of TNCs and land investments in the framework of ESCR, including Article 11; and (iii) the negative effects of neoliberal policies and economic globalisation.<sup>18</sup> Nevertheless, it has failed to analyse local

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<sup>16</sup> Chapter 4, Torres-Marengo PhD thesis addresses an expanded analysis on an evolutive interpretation of Article 11 ICESCR.

<sup>17</sup> See particularly, CESCR 'General Comment No. 14 The right to the highest attainable standard of health (article 12 of the Covenant)' (11 August 2000) E/C.12/2000/4 para.10; CESCR 'General Comment No. 4 The Right to Adequate Housing (Art. 11 (1) of the Covenant)' (13 December 1991) E/1992/23 para. 6; CESCR 'General Comment No. 20 Non-discrimination in economic, social and cultural rights (art. 2,

para. 2, of the Covenant)' (2 July 2009) E/C.12/GC/20 para. 27; CESCR General Comment No. 24 on States' obligations to the Covenant in the context of business activities para. 25.

<sup>18</sup> See for instance, CESCR General Comment No. 24; CESCR, 'Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights' E/C.12/2016/1 (22 July 2016); CESCR 'Globalization and its impact on the enjoyment of economic, social and cultural rights' (11 May 1998) E/1999/22 E/C.12/1998/26 Supp.2.

communities' adequate standard of living in full context. A proper examination of this right requires its evaluation in order to overcome the obstacles that jeopardise the enjoyment of the land they depend on in today's context. The expanded analysis of the relation of local communities, land, and the right to an adequate standard of living in the draft General Comment substantiates, in itself, a need for a right to land. Neglecting to recognise this as a self-standing right provokes the contradictory effect of framing land as an orphan right: whilst the Committee agrees on the crucial importance of a right to land, it fails to recognise it as a right within itself despite possessing the prerogative to do so, as well as sufficient legal grounds.

Instead, the Committee should consider that given the new reality of the control of land by TNCs, the nature of dependency on the land eventually becomes fragmented. If the community seeks land access, they must demonstrate that the violation is not preventable or subject to remediation through other alternatives, for instance, the relocation of homes or jobs, or through the purchase of food from supermarkets. Those alternatives differ from guaranteeing the permanent use of land and blur the very purpose of the adequate standard of living of local communities which depend on land for their survival and livelihood. Küneman and Monsalve have criticised this approach to land protection. They contend that local communities having to argue a multitude of other rights in order to defend their lands fragments the argument i.e. protection from being deprived of their lands.<sup>19</sup> Therefore, when a number of violations occur (against

the right to food, water and/or housing) as the result of one single phenomenon (in this case, that of land deprivation) and these unfold in the context of environmental contamination, loss of lands or obstacles to access to land, having to argue each violation in isolation is a burden that unbalances the effective protection of human rights.

For this reason, the right to access to land should be separated from the currently established approach, which covers the rights to food, housing and water. This reinterpretation should move in a direction similar to the one described by Bulto in the approach to the right to water – it is 'thus not dependent upon the finding of violations of other related rights, but is an autonomous right that can be violated when its constituent elements are infringed'.<sup>20</sup> Scholars whose work focuses on the protection of local communities in the context of the negative impacts of business activities and land investments, have consistently agreed that there exists a need for an autonomous right to land. Their insights contribute to the construction of this new interpretation and the concept of a right to access to land. All these approaches concur that the right to land consists of access, use and control.<sup>21</sup> Indeed, it should not be ignored that initial proposals for a right to land in the Declaration of Peasants enunciated these elements as falling under the right to land. This is an approach we agree with: **access and use are fundamental for the factual utilisation of land and its related resources, and control is the key to bridging the protection gap of present concern: in the current reality of TNCs in control of land use, as opposed to**

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<sup>19</sup> Rolf Küneman and Sofía Monsalve Suárez, 'International Human Rights and Governing Land Grabbing: a view from Global Society' (2013) 10:1 Globalizations 123-130.

<sup>20</sup> Takele Soboka Bulto, 'The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery' 12 Melb. J. Int'l L. 290, 314 (2011). 303.

<sup>21</sup> See for instance, Saturnino M. Borrás Jr., Jennifer C. Franco, Cristóbal Kay and Max Spoor Land grabbing in Latin America and the Caribbean viewed from broader

international perspectives'. (FAO 2011) 8; Olivier De Schutter, 'The Emerging Human Right to Land' (2010) 12(3) International Community Law Review 334-310; Human Rights Committee: Report on Thailand 2005 para. 24; Küneman and Monsalve (n 19) 130; Jérémie Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) 20(18) International Journal on Human Rights 125-126.

**the State, which does not provide protection to prevent those situations, a right to land that presupposes the control of such a resource creates a safety net against such negative impact.**

While in the current draft General Comment the Committee calls States to implement several prerogatives concerning the rights to

use, access and control of land domestically, it could instead embrace this as a unique opportunity to recognise a human right to land as such internationally, enshrining this within the Covenant and drawing on Article 11 on the right to an adequate as its legal basis.

## **About BHRE**

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## **About the Author**

Dr Verónica Torres-Marengo is an associate member of the BHRE. She obtained her PhD at the University of Greenwich. Her dissertation entitled 'A Human Right to Land for Local Communities: A Proposal in the Context of Transnational Corporations' Control of Land Use' explored the protection of local communities' rights to land with a particular focus on Article 11 ICESCR on the right to an adequate standard of living. She has a law degree from Universidad del Norte (Colombia) and an LL.M degree in International Legal Studies from American University Washington College of Law (USA). Her work focuses on socio-economic rights, transnational corporations and global value chains. She has served as a consultant and taught several courses on Business and Human Rights. Before her studies at Greenwich, she was a lecturer at the law faculty of the Universidad del Norte (Colombia).