

# Women's Rights to Land and Land-Related Resources under the UN Convention on the Elimination of all Forms of Discrimination Against Women

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## Abstract

This article addresses the most recent developments in international human rights law in connection with land rights from a gender equality perspective. It focusses on the United Nations (UN) Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and places this in a broader, international legal context. Discriminatory laws, deficits in implementation and access to justice, and discriminatory attitudes and practices at the levels of both national institutions and society lead to the fact that until today, in many states, the access of women to land and other reproductive resources and the protection of existing property and usage rights are not guaranteed to the same degree as for men. This is shown namely in the weak protection of *de facto* usage rights, land reforms or in broader land policies, such as the management of large-scale land acquisitions (or land grabbing). Equal rights in relation to land use and other reproductive resources are important factors for the improvement of the economic independence and social equality of women in both the agrarian and urban context. The CEDAW contains no specific provision which addresses land rights comprehensively and coherently. Rather, the obligations of the States parties are derived from the mosaic of different rights associated with this topic, e.g. equality in marriage and family (Art. 16 CEDAW), economic rights (Art. 13 CEDAW), the recognition of legal capacity (Art. 15 CEDAW) or the rights of rural women (Art. 14 CEDAW). This implies that a holistic approach is required to define State obligations in relation to land rights. The three levels of obligation (to respect, to protect, and to fulfil/ensure) can be applied to land rights and linked to the principles of non-discrimination and equality. This demarcates the States' obligations clearly. Formal legal equality alone is not enough, though: many problems lie in the implementation and establishment of substantive and transformative equality. To balance *de facto* discriminations, temporary special measures as per Art. 4 CEDAW may also be necessary, such as to facilitate access to land and credit. Furthermore, the problem of indirect discrimination is underestimated. Women are more affected by indirect than direct discrimination, e.g. in land reforms, as formal, neutrally maintained programs set conditions which many women cannot fulfil. In this regard, it must be considered that women are often confronted with multiple and intersectional discrimination in connection with land rights, e.g. owing to a combination of factors such as gender and civil status or ethnicity. With regard to transformative equality, the States parties are required to consider discriminations between private parties and to combat and overcome gender stereotypes. In addition,

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measures in the field of land policy should be sustainably equality-related, i.e. take a longer-term perspective.

## I. Introduction

On 8.5.2017, the *New York Times* published an article on the political fight of Moroccan women for land and land usage rights. According to customary law, Moroccan women only possess rights to traditionally used land in exceptional cases. As a consequence, they have no opportunity to defend themselves against the *de facto* expropriation, privatisation and sale of land.<sup>1</sup> Morocco ratified the Convention on the Elimination of all Forms of Discrimination Against Women<sup>2</sup> in 1993 and withdrew all reservations in December 2008; the State is thus fully bound to the obligations. Morocco is only one example of many that shows how far apart the normative treaty provisions and the legal reality in contracting States still lie. The reasons for this are complex: historical discrimination in land distribution, persisting gender role stereotypes and current inequality in land property and land use entitlements, weak legal protection of traditionally or informally used land and problems concerning access to justice.

This paper starts by demonstrating the interconnections between land-related rights, the social situation and the economic advancement of women (section II). The article then addresses the general international and regional human rights framework concerning land and land-related resources (section III) and discusses gender equality aspects arising from different concepts of land ownership and land use (section IV). From this basis, the paper then focuses on non-discrimination and gender equality with respect to land rights according to the provisions of the CEDAW (sections V and VI), before exploring major challenges in securing the land rights of women, e.g. obstacles in access to justice, legal pluralism and gender role stereotypes (section VII). The paper concludes with a summary, linking the duties of States to respect, protect and ensure land-related human rights with their obligations regarding non-discrimination and gender equality (section VIII), before presenting a brief outlook (section IX).

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<sup>1</sup> A. Alami, In a Fight for Land, a Women's Movement Shakes Morocco, *The New York Times*, 8.5.2017, A6.

<sup>2</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18.12.1979, 1249 UNTS, 13.

## II. The Economic and Social Importance of Land Rights as a Starting Point

Land ownership, tenure and use are economically and socially important values. They are not only of importance for agrarian use, subsistence farming, secure housing and investment, but also as resources for culture and tradition.<sup>3</sup> Differences exist of course with regard to the specific relevance, such as between rural and urban areas or between rich industrial nations and poorer countries. Reliable figures for the distribution of assets between women and men in general, and of land ownership and associated resources in particular, are only partially available;<sup>4</sup> these generally concern specific sectors. Somewhat reliable data are available for some countries regarding plots of land used for agricultural purposes; however, these only describe the management and use of the land, not the actual (formal) ownership. Further, some data describe so-called *agricultural holders*, i.e. those persons who manage the land and who make decisions regarding its agricultural use. This may or may not imply formal ownership. Women form around 13 % of all landholders on average (from 0.8 % in Saudi Arabia to 51 % in Cabo Verde). The largest average *gender gap* is found in the Middle East and North Africa, while it is smallest in Europe.<sup>5</sup> In contrast, gender-segregated figures regarding *landowners* in the narrow sense are available for only a few countries; in addition, the indicators in the available statistics are highly heterogeneous.<sup>6</sup> Overall, this shows that we still know too little regarding

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<sup>3</sup> E.g. see United Nations High Commissioner for Human Rights (UNHCHR), Report on Land and Human Rights, E/2014/86 (2014), 3 et seq., 9; S. Wiessner, The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges, EJIL 22 (2011), 121 et seq., 136 et seq.

<sup>4</sup> A. P. de La O Campos/N. Warring/C. Brunelli, C. Doss/C. Kieran, Gender and Land Statistics. Recent Developments in FAO's Gender and Land Rights Database, 2015, <<http://www.fao.org>>, 1 et seq.; see also C. Doss/C. Kovarik/A. Peterman/A. R. Quisumbing/M. van den Bold, Gender Inequalities in Ownership and Control of Land in Africa: Myth and Reality, Agricultural Economics 46 (2015); UN-HABITAT, Policy Makers Guide to Women's Land, Property and Housing Rights Across the World, 2007, 8.

<sup>5</sup> A. P. de La O Campos/N. Warring/C. Brunelli, C. Doss/C. Kieran (note 4), 7; see Food and Agriculture Organization of the United Nations (FAO), Gender and Land Rights Database, <<http://www.fao.org>>. FAO keeps separate statistics for agricultural holders and landowners. According to the FAO land rights database information on indicators, the "agricultural holder is the civil or juridical person who makes the major decisions regarding resource use and exercises management control over the agricultural holding. The agricultural holder has technical and economic responsibility for the holding", while the agricultural landowner is defined as "the legal owner of the agricultural land".

<sup>6</sup> A. P. de La O Campos/N. Warring/C. Brunelli, C. Doss/C. Kieran (note 4), 8.

the *de facto* inequality, i.e. the *gender gap* in relation to the actual ownership, tenure and use of land and resources.

The current distribution of the formal ownership and tenure titles in the narrow sense is partly due to the *systematic legal discrimination* of women in the past, which – as in the example of Morocco – continues in part today. *Structural discrimination* of women also contributed to inequality, with the consequence that women were in a disadvantaged position to acquire land. This includes a lower standard of education and lower independent socio-economic status through *gender-specific work or role distribution*<sup>7</sup> (unpaid housework, care activities), dependence on subsistence economy and lower to non-existent political participation.<sup>8</sup> Until today, inequalities in relation to the actual distribution of and access to the land and the associated resources remain closely interwoven with various aspects of social and economic discrimination in many States.<sup>9</sup>

In some States, the land registry systems are still outdated and unsuitable. They are derived, for example, from colonial systems and do not take into account all forms of ownership and use, or are administered inconsistently.<sup>10</sup> Often, past land reforms – generally based on the construct of the “male head of the household” – also contributed little to the equalisation of the ownership ratios; on the contrary: in the initial land reforms in Africa, Asia and Latin America, 80 % of all individual land titles formally passed to men (over 90 % in some countries).<sup>11</sup> As the United Nations Human Settlements Programme (UN-HABITAT) illustrates in a comprehensive analysis, the transition to industrialised agriculture and from informal to formal ownership and tenure systems as well as urbanisation have actually led to the consolidation of the inequality in land rights to the benefit of men, for example in the Middle East (and elsewhere).<sup>12</sup>

<sup>7</sup> CEDAW, General Recommendation No. 21, A/49/38 (1994), para. 32.

<sup>8</sup> UN Department of Economic and Social Affairs, Division for the Advancement of Women (UN DAW), 2009 World Survey on the Role of Women in Development. Women's Control over Economic Resources and Access to Financial Resources, Including Micro-finance, 2009, VII et seq.; regarding discrimination, also I. Westendorp, Rural Women's Right to Land and Housing in Times of Urbanization, in: I. Westendorp (ed.), The Women's Convention Turned 30: Achievements, Setbacks, and Prospects, 2012, 325 et seq.

<sup>9</sup> Highly instructive regarding these connections, see UN DAW (note 8), 11 et seq., 27 et seq. and 41 et seq.

<sup>10</sup> UN-HABITAT (note 4), 10 et seq.

<sup>11</sup> R. Nielsen, “If he asks me to leave this place, I will go.” The Challenge to Secure Equitable Land Rights for Rural Women, in: H. de Soto/F. Chevenal (eds.), Realizing Property Rights, Swiss Human Rights Book I, 2006, 204 et seq., 212 et seq.; UN DAW (note 8), 44 with references to various studies.

<sup>12</sup> UN-HABITAT (note 4), 28.

Reduced access to land and land-related resources has a negative effect in turn on the economic security of women; they are significantly more dependent on men than *vice versa* in relation to land use and living, have fewer opportunities to participate when land tenure is a prerequisite for participation (e.g. in societies and communities) and are less credit-worthy.<sup>13</sup> If women possess only derived usage rights, they find themselves in a precarious position in the event of divorce, separation, sale of the land or the death of the formal owner. The unequal access to land further limits the economic productivity of women, particularly in non-industrialised or economically weaker States (Least Developed Countries – LDC)<sup>14</sup>, reduces the food security of families and is associated with poverty, migration, urbanisation, insecurity of tenure and increased risk of violence.<sup>15</sup> The CEDAW Committee also states that access of women to land would be central in reducing poverty and guaranteeing supply security: although women contribute significantly to agriculture and thus to food security, their work is often unpaid, they are barely recognised in agricultural policy and reforms and only marginally supported or assisted.<sup>16</sup> Conversely, improvements in access to land and its associated resources lead to more rights and autonomy for women in the family and an improved status in the community and economy.<sup>17</sup> Thus in a report from 2012 on the right to adequate housing, the UN Special Rapporteur stressed the importance of (legal) certainty with regard to housing and land (*security of tenure*) for the economic and social development of women.<sup>18</sup> Other UN bodies also recognise gender equality in *land tenure* as a strategy for combating hunger and poverty.<sup>19</sup> These documents primarily, but not only, address LDCs with a dominant agrarian sector. Gender ine-

<sup>13</sup> See *I. Westendorp* (note 8), 325 et seq.

<sup>14</sup> Least Developed Countries (LDC), categorisation as per United Nations Economic and Social Council, and according to the Committee for Development Policy (CDP), based on *per capita income, human assets and economic vulnerability*, see <[www.unctad.org](http://www.unctad.org)>.

<sup>15</sup> UN DAW (note 8), VII et seq.

<sup>16</sup> CEDAW, General Recommendation No. 34, CEDAW/C/GC/34 (2016), paras. 63-66.

<sup>17</sup> Also of interest in this context is the study by *H. Swaminathan/R. Laboti/J. Y. Suchitra*, *Women's Property, Mobility and Decision Making: Evidence from Rural Karnataka, India*, International Food Policy Research Institute, Discussion Paper No. 01188, 2012, <<http://ebrary.ifpri.org>>, 22 et seq.; also, Office of the High Commissioner of Human Rights (OHCHR)/UN Women, *Realizing Women's Rights to Land and Other Reproductive Resources*, 2013, 2 et seq.

<sup>18</sup> Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *R. Rolnik*, A/HRC/22/46 (2012), para. 16.

<sup>19</sup> See for example FAO, *Committee on World Food Security, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, 2012.

quality with respect to agriculture and land may also be found in European countries: in its 2016 recommendations regarding Switzerland's State Party Report, the CEDAW Committee criticised that women farmers can find themselves in a precarious financial position after divorce or separation. It also complained that women are under-represented in agricultural associations, societies and similar bodies.<sup>20</sup>

### III. The Human Rights Framework: Land Rights and Other Resource-Related Rights in International and Regional Conventions

#### 1. Various Instruments Are Interwoven

Art. 17 of the Universal Declaration of Human Rights<sup>21</sup> states that each person has the right to own property and that no one may be arbitrarily deprived of their possessions; however, the nine core international human rights conventions contain no specific guarantees which secure the respect, protection and ensuring of land ownership or land tenure and its associated resources in a comprehensive and coherent fashion *per se*.<sup>22</sup> The individual and collective protection of human rights arises rather through the *interaction of individual guarantees in various instruments*, whereby the literature in this area also assigns some aspects of customary international law to classic expropriation.<sup>23</sup>

<sup>20</sup> CEDAW, CO Switzerland, CEDAW/C/CHE/CO/4-5 (2016), paras. 44 et seq.; regarding the legal situation in Switzerland, see also *M. Caroni/F. DeWeck/N. Scheiber*, Umsetzung von Art. 14 in der Schweiz, in: E. Schläppi/S. Ulrich/J. Wyttenbach (eds.), CEDAW. Kommentar zum Übereinkommen der Vereinten Nationen zur Beseitigung jeder Form von Diskriminierung der Frau. Allgemeine Kommentierung – Umsetzung in der Schweiz – Umsetzung in Österreich, 2015, 1057 et seq., 1064 et seq. Problems in divorces arise for example as the women farmers are usually not property owners, see *F. A. Wolf*, Rechtliche Stellung der Partner und deren Kinder im landwirtschaftlichen Unternehmen. Landesbericht Schweiz, Europäischer Agrarrechtskongress – 11.-14.9.2013, <<https://www.studer-law.com>>, 24 et seq.

<sup>21</sup> Universal Declaration of Human Rights, 10.12.1948, Res. 217 A (III).

<sup>22</sup> See also OHCHR, Land and Human Rights. Standards and Applications, 2015, 3.

<sup>23</sup> See also *S. Dischler*, Landvertreibung zu Zwecken der wirtschaftlichen Entwicklung in Postkonfliktstaaten. Eine Analyse der menschenrechtlich garantierten Land-, Eigentums- und Wohnrechte und der daraus abzuleitenden staatlichen Schutzpflichten. Dargestellt am Beispiel Kambodschas, Schweizer Studien zum Internationalen Recht 144 (2017), 96 et seq.; *C. Golay/I. Cismas*, Legal Opinion: The Right to Property from a Human Rights Perspective, Rights & Democracy, 2010, 10 with further references; *C. Golay/A. Bessa*, The Right to Land

For land rights, the general prohibitions on gender discrimination in Arts. 3 and 26 of the Covenant on Civil and Political Rights (CCPR),<sup>24</sup> Art. 3 of the Covenant on Economic, Social and Cultural Rights (CESCR)<sup>25</sup> and Art. 2 of the Convention on the Rights of the Child (CRC)<sup>26</sup> are of initial note. Also relevant is the obligation for equality in marriage and family (in Art. 23, para. 4 CCPR), access to justice (in Art. 14, para. 1 CCPR) and the equal right of women and men to an adequate standard of living pursuant to Art. 11 CESCR in conjunction with Art. 3 CESCR, whereby the focus here is on aspects of food security and accommodation (*housing and security of tenure*).<sup>27</sup> There are provisions in other conventions for the protection of ownership and tenure for *certain groups of persons* or in *certain situations*: Art. 15 of the International Convention on the Rights of Migrant Workers (ICMW)<sup>28</sup> protects these from arbitrary dispossession and provides for claims on fair and appropriate compensation in the event of expropriation. Art. 5, clause d (v and vi) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>29</sup> obliges the States parties to guarantee the right to own or acquire property, without “differentiation on the basis of race, skin colour, national origin or ethnicity”. Furthermore, assets and possessions are protected by provisions in international humanitarian law;<sup>30</sup> further instruments specifically address the protection from evictions and resettling (see below, Section VII. 3).

At the international level, Art. 27 CCPR should be mentioned with regard to the rights of *indigenous women*. In conjunction with Art. 3 CCPR, it addresses the right of women to manage their own cultural life without discrimination; this can include use of land. The 2007 UN Declaration on

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and Other Natural Resources, Geneva Academy, Research Brief, 2017, <<https://www.geneva-academy.ch>>, 2 et seq.

<sup>24</sup> International Covenant on Civil and Political Rights (CCPR), 16.12.1966, 999 UNTS, 171.

<sup>25</sup> International Covenant on Economic, Social and Cultural Rights (CESCR), 16.12.1966, 993 UNTS, 3.

<sup>26</sup> Convention on the Rights of the Child (CRC), 20.11.1989, 1577 UNTS, 3.

<sup>27</sup> See CESCR, General Comment No. 16, E/C.12/2005/4 (2005), para. 28; CESCR, General Comment No. 7, E/1998/22 (1997); Council of Europe Commissioner for Human Rights, Recommendation on the Implementation of the Right to Housing, CommDH(2009)5; Special Rapporteur on Adequate Housing, Basic Principles and Guidelines on Development-based Evictions and Displacement, A/HRC/4/18 (2007); Special Rapporteur on the Right to Food, Women’s Rights and Right to Food, A/HRC/22/50 (2012).

<sup>28</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), 18.12.1990, 2220 UNTS, 3.

<sup>29</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 21.12.1965, 660 UNTS, 195.

<sup>30</sup> An overview is provided in OHCHR (note 22), 85 et seq.

the Rights of Indigenous Peoples<sup>31</sup> comments on the protection from dispossession of land and other property and from eviction (Art. 8, para. 2, clause b and Art. 10). The special relationship between indigenous peoples and their land and its traditional use are to be protected and recognised in law (Arts. 25 et seq.). The Declaration contains no specific non-discrimination clauses; rather it urges States to pay particular respect to the interests and rights of women (Arts. 21 and 22). Likewise, the International Labour Organization (ILO) Convention 169 from 1989 on indigenous and tribal peoples<sup>32</sup> contains provisions regarding the protection of land rights (Arts. 13 et seq.). The basic principles in Art. 3, para. 1 state that the provisions of the convention “are to be applied to male and female members of these peoples without discrimination”.

The non-discrimination clauses in these treaties contain various status and identity factors (including sex and gender, civil or social status, religion, ethnic origin, age or disability). Therefore, States have an additional obligation to combat multiple and intersectional discrimination due to a combination or interaction<sup>33</sup> of several discrimination grounds, e.g. gender and economic status (see wording of Art. 2, para. 2 CDESCR and Art. 2, para. 1 CCPR)<sup>34</sup>.

## 2. Regional Protection of Human Rights

Property-related guarantees are generally found in the regional human rights instruments. These also apply to land. Common to these provisions is that they guarantee the individual property rights on the one hand, and recognise the social function of property with restriction clauses on the other. Art. 1 of the first additional protocol to the European Convention on Human Rights (ECHR)<sup>35</sup> guarantees the peaceful enjoyment of possessions. According to this provision, confiscations, expropriation or other restrictions on property are only permissible if they are “in the public interest and subject to the conditions provided for by law and by the general principles of international law”. Art. 21, para. 2 of the American Convention on

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<sup>31</sup> UN Declaration on the Rights of Indigenous Peoples, 13.9.2007, GA Res. 61/295.

<sup>32</sup> ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27.6.1989, C169. The convention has so far been ratified by only 22 states.

<sup>33</sup> See Section V. 2.

<sup>34</sup> See also CDESCR, General Comment No. 20, E/C.12/GC/20 (2009), para. 25.

<sup>35</sup> Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20.3.1952, ETS 5.

Human Rights<sup>36</sup> gives each person the right to enjoy property and protects from illegal, uncompensated expropriation. The guarantee of property rights is also contained in Art. 31 of the Arab Charter on Human Rights<sup>37</sup> and Art. 14 of the African Charter on Human and Peoples' Rights.<sup>38</sup> All of these instruments contain general prohibitions on gender discrimination.<sup>39</sup> The first additional protocol to the African Charter is explicit: Art. 19 obliges the contracting States to ensure the access of women to land and other resources and to guarantee their property rights.<sup>40</sup>

The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have adjudicated on land-related claims. While those judgements do not focus on gender discrimination, they are still relevant to women's rights as they contributed to the interpretation of *land rights* and granted protection not only for formal property titles, but also for informal or traditional possessions or use of land. For example, in *Doğan and others v. Turkey*, the ECtHR held that the protection enshrined in Art. 1 of the 1<sup>st</sup> Protocol to the ECHR was not only afforded to persons holding formal property titles. Rather, the protection extends to other forms of land possession, e.g. cultivating ancestral land and traditional use of common land.<sup>41</sup> The ECtHR has also heard land-related claims based on the right to respect for private life (Art. 8 ECHR); however, these cases do not focus on gender discrimination.<sup>42</sup> The judgements of the IACtHR, based on the Inter-American Convention on Human Rights, contributed substantially to the protection of land rights of indigenous peoples; these judgements also addressed the protection of informal possession and traditional use.<sup>43</sup>

<sup>36</sup> American Convention on Human Rights, 22.11.1969, 1144 UNTS, 123.

<sup>37</sup> League of Arab States, Arab Charter on Human Rights, 15.9.1994, reprinted in International Human Rights Report 12 (2005), 893.

<sup>38</sup> African [Banjul] Charter on Human and Peoples' Rights, 27.6.1981, 1520 UNTS, 217.

<sup>39</sup> Art. 14 ECHR; Art. 1 ACHR; Art. 2 African Charter on Human and Peoples' Rights; Art. 3 Arab Charter on Human Rights.

<sup>40</sup> [Maputo] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 7.11.2003, CAB/LEG/66.6.

<sup>41</sup> Appl. Nos. 8803-8811/02, 8813/02 and 8815-8819/02 (2004), ECHR 2004-VI.

<sup>42</sup> Lack of procedural safeguards against the evictions of Roma travelers as a violation of Art. 8 ECHR, ECtHR, *Connors v. UK*, Appl. No. 66746/01 (2004).

<sup>43</sup> E.g. Inter-American Court of Human Rights (IACtHR), *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Series C, No. 79; *Moiwana Community v. Suriname* (2005), Series C, No. 124; *Yakey Axa Community v. Paraguay* (2005), Series C, No. 125; *Sawhoyamaya Community v. Paraguay* (2006), Series C, No. 146; *Saramaka People v. Suriname* (2007), Series C, No. 172; *Xákmok Kásek Community v. Paraguay* (2010), Series C, No. 214; *Kichwa People of Sarayaku v. Ecuador* (2012), Series C, No. 245.

## IV. Gender Equality and Concepts of Land Ownership and Land Use

The right to property, as enshrined in the regional human rights instruments, is ambivalent from the perspective of substantive equality. On the one hand, property rights have to be guaranteed for men and women equally. On the other hand, the protection of individual property titles can, under certain circumstances, perpetuate *de facto* inequalities which have arisen through discriminatory regulations in the past. There is also a certain ambivalence shown in the promotion of formal registration of individual property titles for women (e.g. in the course of land reforms) as individual registration may decrease the amount of collectively usable land and increase the commercialisation of parcels. The liberal concept of land or soil assumes that land and all its associated resources can, in principle, be objects of formal ownership and tenure titles, have an investment value and can be sold, traded, gifted, inherited, leased, privatised and expropriated (this last by the state). This contrasts with other forms of tenure and use, for example traditional-collective forms (such as seasonal pasturage or wood collection rights), which see the land as a shared resource that should not be divided and privatised.<sup>44</sup> It is difficult to allocate the property individually in such cases and it often makes little sense to do so.<sup>45</sup>

In contrast to property rights in the narrow sense, the human rights protection of *de facto* or *informal forms of land use* is less clear,<sup>46</sup> even though the aforementioned jurisprudence of the regional human rights courts has improved protection, especially for indigenous peoples (see section III. 2). As women often use or possess land without holding a formal ownership title,<sup>47</sup> they are particularly affected by so-called *de facto expropriations*.<sup>48</sup> This may concern: sales or leases of land traditionally used in a collective way (but not registered by the State or by *communities*) to national or international companies/investors; or land reforms, in which traditionally used land is newly redistributed and allocated individually.<sup>49</sup> If the State

<sup>44</sup> See OHCHR/UN Women (note 17), 3.

<sup>45</sup> O. de Schutter, The Role of Property Rights in the Debate on Large-Scale Land Acquisitions, in: Large-Scale Land Acquisitions: Focus on South-East Asia, International Development Policy Series 6 (2015), 53 et seq., margin No. 30 et seq.

<sup>46</sup> See T. Xu/W. Gong, Communal Property Rights in International Human Rights Instruments: Implications for De Facto Expropriation, in: T. Xu/J. Allain (eds.), Property and Human Rights in a Global Context, 2015, 225 et seq., 235 et seq.

<sup>47</sup> UN-HABITAT (note 4), 4 and 13.

<sup>48</sup> For terminology, see T. Xu/W. Gong (note 46), 225 et seq.

<sup>49</sup> T. Xu/W. Gong (note 46), 226 et seq., with examples (Africa, Asia).

qualifies land as “formally unregistered”, it raises the question of how traditional or collective uses are to be managed. As the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights have stated, the obligations to respect and protect can extend beyond formal land ownership and tenure titles to the traditional forms of use by indigenous peoples and other local communities who must be protected from and, where required, compensated for *de facto* expropriations.<sup>50</sup> The respect and protection of these traditional usage rights are to be guaranteed in equal manner for female and male members of these communities.

In addition, pre-existing property and tenure title relationships in the narrow sense and other forms of use can overlap and even collide (e.g. for informal settlements or for renting and leasing). As women are particularly affected by land-related conflicts, it is important to consider the individual functions of land ownership (i.e. the protection of individual property titles) and the social/collective components (e.g. the protection of long-term and/or traditional and informal forms of use) *holistically* from a gender equality perspective. In some rural regions especially, women are less often the formal title holders but, at the same time, form the majority of land users (see above, section II).

Consequently, the forms of tenure and use can be highly varied: individual or collective, formal or informal, legal or customary, unlimited or limited in time, commercial or non-commercial.<sup>51</sup> Furthermore, a consideration cannot be limited to areas put to agricultural use: urbanisation – and with it the number of people who live in urban environments and informal settlements – is steadily increasing.<sup>52</sup> In the following, the term “land rights” is to be broadly understood using a definition from UN-HABITAT: these include all “socially or legally recognised entitlements to access, use and control areas of land and related natural resources”.<sup>53</sup> This terminology is interwoven with the protection of tenure, i.e. the granting of security in relation to possession, which can – but need not – include formal ownership rights. According to the Special Rapporteur, security of tenure denotes a

<sup>50</sup> IACtHR, judgments quoted in note 43; African Commission on Human and Peoples’ Rights (ACHPR), *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya*, No. 276/2003, 25.11.2009 and further references in *T. Xu/W. Gong* (note 46), 241 et seq.

<sup>51</sup> OHCHR (note 22), 6; see also UN-HABITAT (note 4), 9, with an overview. UN-HABITAT, 25, further references new, flexible forms of possession, which combine formal and informal elements, for example. See also CESCR, General Comment No. 4 on the Right to Adequate Housing, E/1992/23 (1991).

<sup>52</sup> UN-HABITAT (note 4), 4 and 13; see also UNHCHR (note 3), para. 6.

<sup>53</sup> UN-HABITAT, *Secure Land Rights for All*, 2008, <<http://www.gltm.net>>, 5.

“set of relationships with respect to housing and land, established through statutory or customary law or informal or hybrid arrangements, that enables one to live in one’s home in security, peace and dignity”.<sup>54</sup> In conclusion, a comprehensive perspective has to take into account *non-discrimination and gender equality with regard to ownership, tenure and use of land as well as land-related resources (such as springs or forests)*<sup>55</sup> in a broad sense, i.e. from formal property and tenure rights up to informal forms of tenure and use, such as the customary or subsidiary use of land or the *de facto* recognition of tenure in informal settlements.

## V. Land Rights and the CEDAW

### 1. Overview

The CEDAW contains no coherent and independent provision with respect to land or land-related rights. However, some of its guarantees protect central aspects of land and resource rights. This is reflected in the latest general recommendation of the CEDAW Committee which focused on Art. 14 CEDAW and thus on land ownership and land use in the *rural context*.<sup>56</sup> Under the heading “*Land and natural resources*”, the Committee stated that the right of women to equal access to land, natural resources, water, seeds, forests and fisheries is a *fundamental human right*.<sup>57</sup> The Committee refers in this respect to Art. 14, para. 2, clause g in conjunction with Art. 13 CEDAW, i.e. to those provisions of the Convention which concern the rights of women in rural areas on the one hand, and economic and social rights on the other. Other CEDAW provisions also play a role, namely Art. 2 (policy of eliminating discrimination), Art. 3 (general duty to implement), Art. 4 (temporary special measures for the establishment of *de facto* equality), Art. 5 (gender role stereotypes), Art. 15 (equality in relation to legal capacity and ability to contract) and Art. 16 (equality in marriage and family).

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<sup>54</sup> Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, including the Guiding Principles on Security of Tenure for the Urban Poor, *R. Rolnik*, A/HRC/25/54 (2013), 3, para. 5.

<sup>55</sup> The interpretative documents of the CEDAW Committee include the right to possess and use land related resources, for example CEDAW, General Recommendation No. 34, (note 16).

<sup>56</sup> CEDAW, General Recommendation No. 34 (note 16), paras. 55 et seq.

<sup>57</sup> CEDAW, General Recommendation No. 34 (note 16), para. 56; see section title.

Only France had, upon ratification, deposited a reservation on the rights of women in rural areas (Art. 14 CEDAW); this was withdrawn in 2013. However, several States parties have deposited reservations regarding other articles (especially Arts. 2, 15 and 16 CEDAW) which may have massive effects on the property and land rights of women; these include Bangladesh, Egypt and Iraq with a general reference to Islamic law; or Jordan and Algeria with reference to personal or family law.<sup>58</sup> Reservations of this kind may have a negative impact on legal capacity or the opportunities of (married) women to exercise that capacity, and impede their ability to conclude contracts over land and administer their property. In its General Recommendation No. 28 on access of women to justice, the Committee has criticised in particular the various reservations regarding legal capacity in family and other civil matters.<sup>59</sup>

## 2. Arts. 2, 3, 4 and 5 CEDAW: Policies to Eliminate Discrimination

The introductory provisions of the Convention contain the general implementation obligations of the States parties. As a standard norm, Art. 2 CEDAW obliges the adoption of constitutional or legal measures and a coherent policy for the elimination of all forms of discrimination (letters a, b and d) and to guarantee access to justice (clause c). Furthermore, all appropriate measures are to be taken for the elimination of the discrimination by persons, organisations and companies (clause e) and for the amendment or abolishment of discriminatory traditions and practices (clause f). According to the Committee's General Recommendation No. 28, the States have a duty to eliminate discriminatory laws and practices and to harmonise the national legal system.<sup>60</sup> This means, for one, that the CEDAW requires the revision of incompatible statutory laws, administrative practices and court practice regarding access to or use of land. It is also incompatible with Art. 2 for the State to recognise discriminatory customary or religious rules related to land ownership, land transmission and land use (such as through

<sup>58</sup> See the analysis in *R. Nielsen* (note 11), 207 et seq. The scope of the reservations and declarations and their current status may be found at United Nations Treaty Collection Database, <<https://treaties.un.org>>.

<sup>59</sup> CEDAW, General Recommendation No. 28, CEDAW/C/GC/28 (2010), para. 65.

<sup>60</sup> CEDAW, General Recommendation No. 28 (note 59), para. 31; regarding Art. 2, clause f CEDAW see *A. Byrnes*, Article 2, in: M. A. Freeman/C. Chinkin/B. Rudolf (eds.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary*, 2012, 71 et seq., 90 et seq.

corresponding references or *exemption clauses* in the legal system) or to protect claims based on such rules administratively or judicially. Lastly, women are often affected by *multiple* or *intersectional discrimination*, such as from a combination of disadvantages based on gender, their economic situation or their civil status (single, divorced, widowed). Multiple or intersectional discrimination in connection with land rights can, for example, affect indigenous women, Roma women, national minorities or single mothers,<sup>61</sup> refugee women or older women.<sup>62</sup> In its General Recommendation No. 28, the Committee has stressed States parties' obligations to combat multiple and intersectional discrimination.<sup>63</sup>

According to Art. 3, all necessary measures especially in the political, social, economic and cultural areas are to be taken so that women can equally exercise and enjoy their "human rights and fundamental freedoms". As stated in section II, there are close connections between land rights and the general economic and social status of women. Using the categories developed by *Fredman* for economic and social rights, substantive equality in the area of land rights depends on several aspects: the balancing of substantial and social inequalities through support and temporary special measures (*redistribution*), the dismantling of gender-specific stereotypes and the elimination of vilification and violence which prevent women from obtaining equal access to land and its use (*recognition*), the adaptation of structures to the needs and realities of women (*transformation*) and the inclusion or participation of women (*agency and voice*).<sup>64</sup> The CEDAW Committee suggests the States draft an overall policy for the achievement of substantive equality with regard to land rights in order to combat discriminatory attitudes and practices.<sup>65</sup> Thus, for example, Ethiopia has been urged to develop a strategy to address its various challenges in the area of property rights and the

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<sup>61</sup> See also Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination, *M. Kothari*, Women and Adequate Housing, E/CN.4/2006/118 (2006), paras. 47 et seq.; as well as the Report of the Special Rapporteur *R. Rolnik* (note 54), paras. 50 and 60 et seq.

<sup>62</sup> UN-HABITAT (note 4), 8; on the Rights to Land and Property of Older Women see CEDAW, General Recommendation No. 27, CEDAW/C/2010/47/GC.1 (2010), paras. 47 et seq.

<sup>63</sup> CEDAW, General Recommendation No. 28 (note 59), para. 18.

<sup>64</sup> *S. Fredman*, Engendering Socio-Economic Rights, in: A. Hellum/H. Sinding Aasen (eds.), Women's Human Rights. CEDAW in International, Regional and National Law, 2013, 217 et seq.

<sup>65</sup> CEDAW, General Recommendation No. 34 (note 16), para. 57.

access of women to land.<sup>66</sup> The Committee considers it important to promote a broader understanding of equality in society and to involve civil society.<sup>67</sup> According to Art. 4, para. 1 CEDAW, adopting *temporary special measures* for the rapid establishment of *de facto* or substantive equality with regard to land rights is permissible and does not represent discrimination against men. Such measures include quotas and targets or specific supportive measures.<sup>68</sup>

Art. 5, clause a CEDAW, in close connection with Art. 2, clause f, obliges the States parties to combat stereotypes and all other practices “which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. This primarily concerns measures for the establishment of *transformative equality*. Social discrimination and stereotypical perceptions often present obstacles to land rights of women; these affect the status of women in the family and their right to inherit, as well as of ownership and tenure.<sup>69</sup> For example, this is the case when ownership is formally linked to the male “head of the household” or property is *de facto* inherited patrilineally. Such practices, even if no longer rooted in national regulations but in private, social concepts, are to be overcome and women protected from the associated disadvantages. Thus the Committee has criticised Bangladesh because the access of women to land ownership is impeded on the basis of traditional gender roles and a lack of awareness by public officials and institutions.<sup>70</sup> Furthermore, discriminatory stereotypical concepts are widespread among authorities, hence the States parties are encouraged to provide education, training and sensibilisation. Thus, for example, the Committee asked Cameroon to ensure that the customary authorities and courts hold the requisite knowledge regarding the rights of women.<sup>71</sup>

<sup>66</sup> See the Committee’s Concluding Observations in response to Ethiopia’s sixth and seventh periodic reports in 2011, CEDAW, CO Ethiopia, CEDAW/C/ETH/CO/6-7 (2011), paras. 19(a) and 19(b).

<sup>67</sup> CEDAW, General Recommendation No. 34 (note 16), para. 23.

<sup>68</sup> CEDAW, General Recommendation No. 25, CEDAW/C/GC/25 (2004), para. 25.

<sup>69</sup> See J. Wytttenbach, Allgemeine Kommentierung von Art. 5 CEDAW, in: E. Schläppi/S. Ulrich/J. Wytttenbach (note 20), 385 et seq., 402 et seq.

<sup>70</sup> CEDAW, CO Bangladesh, CEDAW/C/BGD/CO/7 (2011), paras. 33 et seq.

<sup>71</sup> CEDAW, CO Cameroon, CEDAW/C/CMR/CO/4-5 (2014), para. 11(c).

### 3. Art. 13 CEDAW: Equality in Social and Economic Life

According to Art. 13 CEDAW, the States parties must combat discrimination against women in economic and social life using appropriate methods and specifically guarantee the equal right of women to receive bank loans, mortgages and other financial credit instruments. Art. 13 CEDAW is closely connected with Art. 14 (rural women), and Art. 3, which obliges the States parties to adopt measures in the social and economic areas (among others). The formal status as owners on the one hand, and access to the use of (collective) land on the other, such as to pastures, firewood, springs or forestry products, clearly advances the economic development of women.<sup>72</sup> Art. 13 CEDAW extends to all economic and social rights which are not included in other, specific CEDAW guarantees, i.e. the right to food and the right to housing.<sup>73</sup> Ownership, tenure and use of land can be important for both rights. Finally, supporting the access of women to land is seen by the Committee as a means of strengthening the economic power of women and, in this way, of combating the roots of human trafficking (as stated in the recommendations to Ethiopia).<sup>74</sup>

There are further connections to Art. 15 CEDAW (legal capacity): in General Recommendation No. 34, the Committee criticised that women in some States cannot independently apply for mortgage credit, hold a bank account or close contracts.<sup>75</sup> For access to credit, women are often discriminated against on the basis of their economic and social status and owing to prevailing gender stereotypes, for example because they are primarily active in the informal sector, cannot contribute the requisite financial securities, are less experienced professionally or are not considered to be independent and are thus categorised as not creditworthy. There is a highly negative correlation in this regard between land/real estate ownership as security for access to financial services and – *vice versa* – the financial services as a prerequisite for the acquisition of secure legal positions on land. This usually concerns services from private credit institutes and, as a consequence, the obligations of the State to address *de facto* discrimination, as based on Art. 13 and – in the rural context – Art. 14, para. 2, clause g CEDAW.<sup>76</sup> In informal credit systems, the situation is often made more difficult owing to

<sup>72</sup> CEDAW, General Recommendation No. 34 (note 16), para. 59.

<sup>73</sup> B. Rudolf, Article 13, in: M. A. Freeman/C. Chinkin/B. Rudolf (note 60), 335 et seq., 339 et seq. and 344 et seq.

<sup>74</sup> CEDAW, CO Ethiopia (note 66), para. 25(c).

<sup>75</sup> CEDAW, General Recommendation No. 34 (note 16), para. 67.

<sup>76</sup> See also F. Banda, Article 14, in: M. A. Freeman/C. Chinkin/B. Rudolf (note 60), 357 et seq., 374.

negative gender role stereotypes, hence the CEDAW Committee recommends the change to more formal services. In addition, the Committee raises awareness of the fact that credit systems should also take into account the needs of women and that appropriately prepared information material should be made available.<sup>77</sup>

#### 4. Art. 14 CEDAW: Rural Women

According to Art. 14, para. 1 CEDAW the States have to take into account the “particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy” and to ensure the implementation of the (other) Convention rights of these women. Art. 14 therefore obliges States parties to consider those discriminations which are connected to the geographic and socio-economic situation or the rural context.<sup>78</sup> Urbanisation has indeed led to a decrease in the rural population; however, numerous women continue to live largely from agricultural work or subsistence farming, especially in poorer countries.<sup>79</sup>

Various aspects of Art. 14 CEDAW relate to land rights: para. 2 urges the States parties to adopt all appropriate measures so that women can participate equally in agricultural development. For this they must be able to participate in the elaboration and implementation of development planning at all levels (clause a). They must be able to use all educational facilities, especially for the improvement of their technical knowledge, and they should benefit from all community and other services (clause d). Access to technology and infrastructure is central for the exploitation of the land’s potential and thus for economic development:<sup>80</sup> owing to their under-representation in cooperatives, women may have less access to irrigation systems and other collectively used facilities (such as electricity and transport possibilities; ag-

<sup>77</sup> CEDAW, General Recommendation No. 34 (note 16), para. 68.

<sup>78</sup> With regard to the criticism of Art. 14 which highlights rural women as a special group and the question of how this group of women is to be defined, see *L. R. Pruitt*, Deconstructing CEDAW’s Article 14: Naming and Explaining Rural Differences, *William and Mary Journal of Women and the Law* 17 (2011), 347, 389 et seq. with further references to the literature, also *M. Caroni/N. Scheiber*, Allgemeine Kommentierung von Art. 14 CEDAW, in: E. Schläppi/S. Ulrich/J. Wytenbach (note 20), 1027 et seq., 1031 et seq., and *F. Banda* (note 76), 359 et seq.

<sup>79</sup> UN DAW (note 8), 41 et seq.

<sup>80</sup> CEDAW, General Recommendation No. 34 (note 16), para. 73.

ricultural machinery).<sup>81</sup> Access to information technology can also improve the (agricultural) economic development of women.<sup>82</sup> Furthermore, the appropriate representation of women in agricultural cooperatives and similar facilities is important for the economic advancement of women.<sup>83</sup> Clause e states in this regard that the States parties must grant women the possibility for self-organisation and cooperative organisation. Finally, women should have equal access to agricultural credits and loans, marketing institutions and suitable technologies, and be treated equally in the context of land and agrarian reforms and rural resettlement actions (clause g). On a number of occasions the Committee has addressed the rights of indigenous women in the context of Art. 14 CEDAW: the States parties must ensure that these women receive equal access to property and the use of land-related resources and are protected from dispossessions.<sup>84</sup> Thus, for example, the Mexican government is urged to adopt temporary special measures to eliminate inequalities which impede indigenous women's access to land and property.<sup>85</sup>

## 5. Art. 15, Para. 2 CEDAW: Legal Capacity

According to Art. 15, para. 2 CEDAW, women must be granted equal legal capacity; this also refers to the *concluding of contracts* regarding ownership and tenure of land and its use, the *recognition of the legal status* as owner, proprietor or user and *the right to manage* ownership and tenure of land. However, land rights are not explicitly mentioned in Art. 15. In order for women to acquire and possess land and exercise land-related claims, their *legal capacity* – independent of civil status – must be recognised in law and also needs to be guaranteed or protected *de facto*. While the situation is particularly difficult in countries not granting equal legal capacity to women,<sup>86</sup> it may *de facto* be difficult for women to claim their rights even in States where women are granted equal legal capacity as men. In addition,

<sup>81</sup> UN DAW (note 8), VII et seq.

<sup>82</sup> UN DAW (note 8), VII et seq.

<sup>83</sup> CEDAW, General Recommendation No. 34 (note 16), para. 59.

<sup>84</sup> CEDAW, General Recommendation No. 34 (note 16), para. 59; see also General Assembly (GA), Resolution and Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007); International Labour Organization (ILO), Convention No. 169, Indigenous and Tribal Peoples, C169 (1989).

<sup>85</sup> CEDAW, CO Mexico, CEDAW/C/MEX/CO/7-8 (2014), paras. 34 et seq.

<sup>86</sup> CEDAW, General Recommendation No. 28 (note 59), paras. 24-25, 43-44; W. E. Goosenekere Savitri, Article 15, in: M. A. Freeman/C. Chinkin/B. Rudolf (note 60), 392 et seq.

tribal, customary or religious law can oppose the independent management of land.<sup>87</sup> The State is obliged to eliminate such obstacles, to confer on women the independent capacity to take legal action and to guarantee access to justice.<sup>88</sup> In an assessment of an individual complaint in 1998, the UN Human Rights Committee determined that it was a violation of the CCPR when matrimonial property could only be represented in a court by the husband.<sup>89</sup> Equal legal capacity and capacity to act not only include the entitlement to acquire, own and dispose of property, but also the recognition of the equal inheritance status of women and men.<sup>90</sup> There are close connections in this regard to equality in marriage and family (see below).

## 6. Art. 16 CEDAW: Marriage and Family

According to Art. 16 CEDAW, States parties have to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. To be guaranteed are namely equal rights with regard to the acquisition, exploitation, management and use of assets (para. 1, clause h);<sup>91</sup> in many States this continues *de jure* or *de facto* not to be the case.<sup>92</sup> Even in States which recognise formal equality in marriage and other family matters, care models with traditional role distributions, unpaid care work and the economic and social discrimination of women still lead *de facto* to significant dependencies and power imbalances which cause further inequalities in the event of separation. This particularly affects the rights and interests of women in connection with land and housing. The obligation to eliminate discrimination extends not only to statutory law, but also to customary, tribal or religious laws, that are (indirectly) recognised by the State. Teleologically, the elimination of discrimination in “marriage and family” should extend to all forms of relationships resembling marriage, namely to *de facto* life partnerships with children. Whether this understand-

<sup>87</sup> *W. E. Goonesekere Savitri* (note 86), 387 et seq., 396 et seq., which draws a more differentiated picture.

<sup>88</sup> *R. Kägi-Diener*, Allgemeine Kommentierung von Art. 15 para. 1-3 CEDAW, in: E. Schläppi/S. Ulrich/J. Wytenbach (note 20), 1099 et seq., 1106; *W. E. Goonesekere Savitri* (note 86), 400 et seq.

<sup>89</sup> *Avellanal v. Peru*, Comm. No. 202/1986 (1988), CCPR/C/34/D/202/1986.

<sup>90</sup> *R. Kägi-Diener* (note 88), 1105; an overview of inheritance regulations with regard to land is found in UN-HABITAT (note 4), 18.

<sup>91</sup> Comprehensively covered in CEDAW, General Recommendation No. 29, CEDAW/C/GC/29 (2013), paras. 37 et seq.

<sup>92</sup> See also the above recommendation of the CEDAW Committee (note 91) and UN-HABITAT (note 4), 20 et seq.

ing derives from an extensive interpretation of the concept of marriage or not is in fact irrelevant, as the concept of family may be interpreted to cover such forms of relationship.<sup>93</sup>

With regard to land rights, the *formal equality* in all matters of family law and the *elimination of concepts such as the "head of the household"* are crucial factors. The obligation for equality relates to all (*marital*) *estate ownership and possession systems*, i.e. in particular to (customary) usage entitlements, for example to *community land*. The matrimonial property regime has a strong impact on the economic advancement and independence of women. For example, division of property is not ideal for women if they primarily provide unpaid care work or if they work on the marital farm; property partitioning or collective property also provide better security to women in these situations in relation to access to and use of land after separation or divorce. Furthermore, the right to equal participation in direct usage rights of property which provides a livelihood, or to compensations with which these livelihoods can be replaced, must be recognised.<sup>94</sup>

Customary law or traditions which exclude women from the acquisition and management of property during and after marriage must be revised.<sup>95</sup> This also applies to States with plural legal systems, where the applicability of regulations and practices is dependent on the ethnic or religious affiliation of those concerned. The Committee has urged Sri Lanka, for example, to enact a uniform family law and to guarantee equal rights with regard to land and inheritance.<sup>96</sup> In rural regions of various African, Asian and South American States, it is primarily women who work small parcels of land. Nonetheless, these women often hold *no secure land ownership or usage titles*. If access to the land depends on male relatives, women often exercise only secondary or subordinate rights; this makes them vulnerable in the event of divorce, separation or dispositions by the formal title holder, or

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<sup>93</sup> CEDAW, General Recommendation No. 21 (note 7), para. 18; regarding the economic rights of women in life partnerships see CEDAW, General Recommendation No. 29 (note 91), paras. 15, 16 et seq., 30-31; regarding the notion of family (in CEDAW and other treaties) in general and the division of property upon dissolution of *de facto* relationships in particular see *M. A. Freeman*, Article 16, in: *M. A. Freeman/C. Chinkin/B. Rudolf* (note 60), 409 et seq., 416 et seq., 433 et seq.

<sup>94</sup> CEDAW, General Recommendation No. 29 (note 91), para. 47.

<sup>95</sup> See CEDAW, General Recommendation No. 29 (note 91), paras. 2, 10, 12 et seq., 49 et seq.

<sup>96</sup> CEDAW, CO Sri Lanka, CEDAW/C/LKA/CO/7 (2011), paras. 44 et seq., see also para. 16.

highly vulnerable with regard to mortgaging or sales, for example.<sup>97</sup> The recognition of women as formal owners or beneficial owners through *individual land titles* can bring improvements in this regard: the CEDAW Committee thus recommended to Ethiopia to enforce the rights of women through systematic inclusion in land ownership certificates.<sup>98</sup> Security can be improved if *both spouses/partners* are recognised as entitled parties and are registered (*joint titling*) and if the *consent* of the other partner is required for sales and liabilities/borrowings. Ownership, tenure and usage rights (including residential rights) of women must also be secured in *de facto* relationships, in marriages/relationships concluded according to customary law or religious custom or in polygamous relationships.<sup>99</sup> The question of securing land rights of women in non-formal relationships is highly relevant, as the proportion of women living in customary-law or *de facto* relationships is above 40 % in many countries.<sup>100</sup> Special note must be made of such family forms if they include children and do not enjoy the formal legal protection of family law.<sup>101</sup> In particular, the States parties must ensure that women and men are treated equally during the *division* of real estate or usage rights acquired during the marriage or *de facto* relationship.<sup>102</sup> In some regions of China, the land returns to the original acquirer during a divorce; in the view of the Committee this has an indirectly discriminatory impact on women. In addition, in some cases land ownership titles are not issued to women, which increases the risk that they lose their (portion) of land in the event of a separation or divorce.<sup>103</sup>

Also important is *equality in inheritance law* (of husband and wife, of sons and daughters) and the *prohibition on disinheritance of widows*. In many countries, discriminatory legal regulations or customary practices and gender stereotypes which disadvantage women with respect to inheritance still persist. Thus the CEDAW Committee criticises Tuvalu that the laws and customs do not grant women equal opportunities to inherit real estate or other assets.<sup>104</sup> The Committee also urges Congo to combat practices

<sup>97</sup> J. Quan, Natural Resources Institute, University of Greenwich, Land Access in the 21st Century: Issues, Trends, Linkages and Policy Options (UN FAO), Livelihood Support Programme (LSP), LSP Working Paper 24, 2006, 25 et seq.; R. Nielsen (note 11), 204 et seq.

<sup>98</sup> CEDAW, CO Ethiopia (note 66), paras. 36 et seq.

<sup>99</sup> OHCHR/UN Women (note 17), 37 et seq.

<sup>100</sup> UN-HABITAT (note 4), 27.

<sup>101</sup> A. Varley, Gender and Property Formalization. Conventional and Alternative Approaches, World Development, 35 (2007), 1739 et seq., 1742; also UN DAW (note 8), 43 et seq.

<sup>102</sup> CEDAW, General Recommendation No. 29 (note 91), para. 46.

<sup>103</sup> CEDAW, CO China, CEDAW/C/CHN/CO/7-8 (2014), paras. 44 et seq.

<sup>104</sup> CEDAW, CO Tuvalu, CEDAW/C/TUV/CO/3-4 (2015), paras. 33 et seq.

which prevent women from inheriting or claiming an inheritance.<sup>105</sup> Sierra Leone is required to amend social and cultural practices to ensure that widows can indeed exercise their right to ownership and inheritance.<sup>106</sup> For inheritances according to customary law, the transition of the property or usage right must not depend on whether the widow enters a marriage with the brother of the deceased or whether or not there are children.<sup>107</sup> These situations often concern the State's obligation to protect: E.g. the Committee urges that the misappropriation of land by relatives of the deceased or in the event of separation or divorce (so-called *property grabbing*) which continues to be practised in many States is combated and punished.<sup>108</sup>

Regulations on the purchase of real estate, inheritance or property division in case of divorce which aim to prevent the subdivision of agriculturally used land and which provide, for example, for certain priorities and privileges to the advantage of the self-manager, may indeed follow legitimate aims. However, it must be carefully verified that these do not have indirect discriminatory effects.

## VI. Example of a Holistic Approach: *E.S. and S.C. versus Tanzania*

The CEDAW Committee addressed land rights in an individual complaint procedure. In 2015 it considered the complaints from two Tanzanian widows.<sup>109</sup> Both claimed that they had been disadvantaged by customary law in the inheritance process. After the death of her husband, E.S. lost the jointly acquired house to her brother-in-law. S.C. had to leave the house her deceased husband had built; the jointly purchased car was sold by the brother-in-law. Patrilineal customary law was applied in both cases. These customary rules determine that, for example, the ownership of the land and houses primarily passes to or is managed by the male relatives of the deceased. In return, the male inheritor must provide for the widow of the deceased. With regard to the inheritance of clan land, the oldest son is first in line to inherit, the remaining sons are second and the daughters third. Wid-

<sup>105</sup> CEDAW, CO Republic of Congo, CEDAW/C/COG/CO/6 (2012), para. 44 (b).

<sup>106</sup> CEDAW, CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), paras. 36 et seq.

<sup>107</sup> CEDAW, General Recommendation No. 29 (note 91), para. 53.

<sup>108</sup> CEDAW, CO Ethiopia (note 66), para. 41; see also the principles in *Cecilia Kell v. Canada*, Comm. No. 19/2008 (2012), CEDAW/C/51/D/19/2008.

<sup>109</sup> CEDAW, *E.S. and S.C. v. United Republic of Tanzania*, Comm. No. 048/2013 (2015), CEDAW/C/60/D/48/2013.

ows only inherit if there are no children or siblings of the deceased and if his father is also dead (para. 2). What followed in this case can be described as a classic example of denial of access to justice: the Tanzanian High Court recognised the discriminatory nature of these provisions in 2006. However, it refused to annul them: customary law “ought not to be revised by court decision” and the High Court did not want to “open Pandora’s box”.<sup>110</sup> The court was indeed of the opinion that it would be best to urge the local authorities to apply the customary law in a non-discriminatory way; however, a corresponding regulatory request has not been issued. Several petitions by the complainants to other bodies remained ignored or unanswered. Four years later, their complaint was rejected by the Court of Appeal as the deed of the contested High Court judgement showed two different dates. The complainants were urged to obtain a correct deed from the High Court, but several attempts to obtain such a document failed.

The CEDAW Committee stated a violation of Art. 2, clause f and Art. 5, clause a CEDAW: Tanzania had not fulfilled its obligation to revise or annul customary law which discriminated against women.<sup>111</sup> Furthermore, the Committee found a violation of Art. 16, para. 1 CEDAW which obliges that women be granted equal rights during and after dissolution of marriage (through divorce or death). The States parties have the duty to treat widows and widowers equally with regard to inheritance law and to forbid the disinheritance of female partners.<sup>112</sup> The Committee also found a violation of Art. 15, para. 2 CEDAW which grants women the same rights for the management of assets as the ones for men.<sup>113</sup> Of particular interest are the statements regarding Art. 13 CEDAW: the Committee determined that the eviction of the women from the houses placed them in an economically insecure and vulnerable position. The discriminatory practices had restricted their economic self-determination and advancement, which is incompatible with Art. 13 CEDAW.<sup>114</sup> The Committee thus stressed the importance of ownership as a starting point for economic equality. Tanzania has not yet implemented the recommendation of the Committee to amend customary

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<sup>110</sup> Details on the High Court procedure, see *N. J. Bourdon*, Opening Pandora’s Box: Human Rights, Customary Law and the “Communal Liberal Self” in Tanzania, in: R. Sieder/J.-A. McNeish (eds.), *Gender Justice and Legal Pluralities. Latin American and African Perspectives*, 2015, 180 et seq., 192 et seq.

<sup>111</sup> *E.S. and S.C. v. Tanzania* (note 109), para. 7.6.

<sup>112</sup> The Committee refers in this point to its comments in *E.S. and S.C. v. Tanzania* (note 109), para. 7.4 and para. 7.6.8.

<sup>113</sup> *E.S. and S.C. v. Tanzania* (note 109), para. 7.3.

<sup>114</sup> *E.S. and S.C. v. Tanzania* (note 109), para. 7.8.

law<sup>115</sup> as the documents regarding Tanzania's last State Reporting Procedure demonstrate. The Committee thus reminded Tanzania again to provide for compensation to the complainants and to amend the customary law.<sup>116</sup>

## VII. Gender Equality and Land-Related Rights in Context

### 1. Agrarian and Land (Use) Reforms

Land reforms with an initial or re-distribution of property and possessions, amendments of the form of land use or the change from a system of customary use rights to formal registration can serve various political purposes and come correspondingly in complex and heterogeneous forms. Early reforms in the 20<sup>th</sup> century primarily concerned redistribution or new allocations and registration of land; programs for rezoning or use in connection with advancing urbanisation have long been the focus as well.<sup>117</sup> As described above, in the first land reforms in Africa and Latin America, the governments distributed large land holdings to smallholders, whereby in Latin America, for example, men were registered as the title holders of between 87 % and 96 % of the distributed land.<sup>118</sup> In the 1990s and early 2000s there was a further, broader formalisation of tenure titles in the course of land reforms in East and Central Asian, Latin American and African States. This usually concerned individual property titles to agriculturally used land, partly, however, also the formalisation of tenure in urban areas; here also those who profited were primarily men.<sup>119</sup>

The lesson drawn from the initial waves of formalisation was that the formal linking of the land titles to male "heads of households" had highly direct and indirect discriminatory consequences for women. One possible remedy is seen in a system of *joint titling* for couples and the requirement for the consent of both entitled parties for liabilities and sales of land.<sup>120</sup> However, even formal legal titles or equality in family law do not guarantee security for women if they are denied the *de facto* control of land, for ex-

<sup>115</sup> *E.S. and S.C. v. Tanzania* (note 109), para. 9.

<sup>116</sup> CEDAW, CO Tanzania, CEDAW/C/TZA/CO/7-8 (2016), paras. 50 and 51.

<sup>117</sup> See UN-HABITAT (note 4), 28 et seq.

<sup>118</sup> *R. Nielsen* (note 11), 212 et seq.

<sup>119</sup> *A. Varley* (note 101), 278 et seq., with further references.

<sup>120</sup> *A. Varley* (note 101), 284 et seq.; for details on the systems practised regarding joint titling see UN-HABITAT (note 4), 22 et seq.

ample. It seems from previous experience that formalisation with individual land titles for women is only advantageous under certain conditions, namely if social integration is ensured at the same time.<sup>121</sup> As shown by *Varley*, the land titling concepts are also generally criticised and alternative approaches proposed which are supposed to be more sustainable, e.g. collective/group titles.<sup>122</sup> If the parcels are registered in the name of the collective (e.g. cooperatives) or village communities in the context of land reforms or when registering informal settlements (*group titling/community titling*), it must be ensured that women and men equally participate and benefit. For example, memberships in cooperatives and similar bodies should be transferred equally to female and male heirs.<sup>123</sup>

Although comprehensive land reforms offer the opportunity to improve women's access to land, this chance has until today rarely been used systematically.<sup>124</sup> The provisions of CEDAW require that during the distribution (privatisation) of national land reserves, be it in a rural or urban context, women receive the same possibilities as men *de jure* and *de facto*; substantive equality is to be targeted by applying temporary special measures pursuant to Art. 4 CEDAW. The corresponding programs must not be indirectly or directly discriminatory. Furthermore, reforms which replace the customary and/or collective use of land with parcelling and individual allocation must take the rights of women into account. Thus, attention must be paid so that pre-existing discriminations against women in the customary law system are not perpetuated. Indeed this danger also exists if the land reforms occur with the inclusion of, or under the responsibility of, the local authorities. It is therefore important to understand local decision-making processes and the position of women in these processes.<sup>125</sup> Further, the effects of privatisation of *community land* on women must be clarified, for example the loss of traditional forms of use (collecting wood, pastures, fisheries or the access to springs or wells).<sup>126</sup>

The type of property or land use rights most suitable to counter the disadvantages faced by women depends on the specific conditions: individual property and tenure titles can improve the economic and social status of women, for example in the event of separation or divorce, or for access to

<sup>121</sup> *A. Varley* (note 101), 278 et seq. and 282 with references to the literature.

<sup>122</sup> *A. Varley* (note 101), 278 et seq. and 282; *R. Nielsen* (note 11), 214 et seq.

<sup>123</sup> UN-HABITAT (note 4), 24 et seq.

<sup>124</sup> CEDAW, General Recommendation No. 34 (note 16), para. 78; the Committee indicates that there are also opportunities here to improve the access of indigenous women to land resources; see also UN DAW (note 8), VII et seq.

<sup>125</sup> *A. Varley* (note 101), 288 with references.

<sup>126</sup> *R. Nielsen* (note 11), 214 et seq.

credit and mortgages. Depending on the context, however, collectively held titles (*joint titling*) or the collective or jointly held property of several women to specifically agriculturally used land can indeed bring improvements by, for example, simplifying investments. The protection of usage rights to community land may also represent a good solution in other situations.<sup>127</sup>

The same applies for policies regarding so-called informal settlements which are used without legal title and authorisation, or the parcels and units which are rented informally.<sup>128</sup> In informal settlements a male household member is often considered to be the *de facto* owner (as the “head of the family”). However, many single mothers also live in informal settlements in urban areas. If such settlements are regularised, be it temporarily or long-term, attention must be paid so that the usage rights or land titles (in whatever form) are granted equally and that women can participate in the formation of such processes from the beginning. Temporary special measures (Art. 4 CEDAW) in the area of bank lending and mortgages can also contribute to improving the access of women to such parcels and residential units, as well as their security of tenure.

Finally, it is important that a gender perspective is included in agricultural and land policies. Firstly, it must be clarified which forms of ownership and use by women currently exist and the effects a reform could have on the basis of the social and economic status of women. Secondly, it requires that women are specifically educated and informed so that they can participate in such processes. Thirdly, it is important that the authorities regulating *land governance* are sensibilised and trained with regard to gender issues. Fourthly, it must be clarified which temporary measures pursuant to Art. 4 CEDAW would be suitable for improving the access of women to land in the context of land reforms (quota systems, special access to mortgages, etc.).

## 2. Investments in Land, Agricultural Industrialisation

Complex land rights issues may arise when States or private parties sell large amounts of land or grant broad usage rights to local, national or foreign investors. These large-scale land acquisitions, investments or deals or long-term leases can have positive effects on the local population; however, outcomes can also be ambivalent and the disadvantages often outweigh the

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<sup>127</sup> In comprehensive detail, see *B. Agarwal, Are We Not Peasants Too? Land Rights and Women's Claims in India*, 2002.

<sup>128</sup> UN-HABITAT (note 4), 32.

advantages. If the State sells or leases land which is not formally registered, traditional forms of use by the local population may be disregarded.<sup>129</sup> In other cases, traditionally used land is newly registered to local private entities and thus becomes an investment item.<sup>130</sup> Various authors indicate that the recognition, respect and implementation of individual land-related claims or of customary and traditional usage rights is generally underdeveloped with regard to more recent trends like large scale land acquisitions in poorer countries.<sup>131</sup> The population usually finds itself in an unfavourable negotiating position; exploitation and emergency sales owing to the economic situation can occur.<sup>132</sup> Approaches to responsible and sustainable *land governance* which anticipate, and not only react, to the consequences of a structural change or to land grabbing, are needed. The States can orient themselves, for example, to the 2012 Food and Agriculture Organization of the United Nations (FAO) guidelines on responsible governance of tenure of land, fisheries and forests. The guidelines summarise the human rights obligations and also consider the special situation of women.<sup>133</sup> Further efforts, such as the inclusion and (self-) obligation of private parties have until now been rather slow.<sup>134</sup>

<sup>129</sup> C. Gironde/C. Golay, Large-Scale Land Acquisitions, Livelihoods and Human Rights in South-East Asia, in: Large-Scale Land Acquisitions: Focus on South-East Asia, International Development Policy Series 6 (2015), 275 et seq.

<sup>130</sup> O. de Schutter (note 45), margin No. 39 et seq.; regarding economic and social rights and land as a capital investment see D. Cowan/S. Wheeler, The Reach of Human Rights, in: T. Xu/J. Allain (eds.), Property and Human Rights in a Global Context, 2015, 197 et seq., 212 et seq. (using the example of England).

<sup>131</sup> W. Anseeuw/L. Alden Wily/L. Cotula/M. Taylor, Land Rights and the Rush for Land, International Land Coalition, 2012, <<http://www.landcoalition.org>>, 47 et seq.; T. Cottier/K. Gebhe/M. Schultheiss, The Protection of Property in International Law: The Missing Pieces, in: H. P. Hestermeyer/D. König (eds.), Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum. Vol. I, 2012, 367 et seq., margin No. 7 et seq. (for South East Asia); T. Xu/W. Gong (note 46), 225 et seq.; O. de Schutter (note 45), margin No. 2 et seq. (in general).

<sup>132</sup> S. Dischler (note 23), 195 et seq. and 200 et seq., with further references; W. Anseeuw/L. Alden Wily/L. Cotula/M. Taylor (note 131), 4 and 30 et seq., with a comprehensive analysis of case studies.

<sup>133</sup> FAO (note 19), paras. 4, 4.6, 5.4, 5.5, 7.1, 7.4, 9.2, 9.6, 15.5, 15.6., 15.10, 17.3, 21.1, 23.2; see also J. von Bernstorff, "Land Grabbing" und Menschenrechte: Die FAO Voluntary Guidelines on the Responsible Governance of Tenure, Studie des Instituts für Entwicklung und Frieden (INEF) im Auftrag des Bundesministeriums für wirtschaftliche Zusammenarbeit und Entwicklung, Forschungsreihe Menschenrechte, Unternehmensverantwortung und nachhaltige Entwicklung 11/2012, 42 et seq.

<sup>134</sup> See regarding the voluntary commitment of companies and investors, the Principles of UN Global Compact, <<https://www.unglobalcompact.org>>, as well as the United Nations Principles of Responsible Investment dated 2006 (UNPRI), <<https://www.unpri.org>>. Further, see Guiding Principles on Business and Human Rights. Implementing the United Na-

Based on country studies from different regions, *Daley* has shown that pre-existing socio-economic, political and legal discriminations can lead to the increased vulnerability of women during land acquisitions or State-supported land development measures.<sup>135</sup> According to the CEDAW Committee they are often disadvantaged in such projects, specifically in areas in which women traditionally manage small parcels for their self-sufficiency and the local market, or collectively use community land.<sup>136</sup> Thus, for example, compensations (provided they occur at all) are paid much more frequently to men as the formal title holders, or the compensations are calculated on the basis of land-related economic activities of men, but not of those of women.<sup>137</sup> The Committee criticised Peru because women do not have equal rights to participate in agricultural policy, gender-sensitive land development measures are absent and the concerns of women in land acquisitions by multinational enterprises are often not taken into consideration.<sup>138</sup> Ethiopia was urged to prevent land-leasing contracts with foreign corporations leading to resettlements and evictions. In addition, the government of Ethiopia must ensure that the affected persons and communities receive compensation or are assigned other parcels of equal value.<sup>139</sup> In Sierra Leone, women were particularly negatively affected by land acquisitions (primarily for mining); the Committee stated that women were evicted and not compensated, and especially urged the government to improve the enforcement of the law.<sup>140</sup> The Committee recommended that Colombia respect the land rights of women in the context of large agricultural or mining projects and to protect and ensure that women receive appropriate compensation for expropriations.<sup>141</sup>

For large-scale land investments and comparable projects, the obligations from CEDAW require that the States parties must first clarify how a struc-

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tions "Protect, Respect and Remedy" Framework, UN Human Rights Council Resolution 17/4 of 16.6.2011 (A/HRC/17/31 Ruggie Principles). Critical in relation to the assurance of land rights *D. Cowan/S. Wheeler* (note 130), 199 et seq.

<sup>135</sup> *E. Daley*, Gendered Impacts of Commercial Pressures on Land, Study Commissioned by International Land Coalition/CIRAD/MOKORO, 2011, <<http://www.landcoalition.org>>, 4 et seq., and with further references.

<sup>136</sup> CEDAW, General Recommendation No. 34 (note 16), para. 60; *M. Manuchehri*, Large-Scale Land Acquisitions and Applying a Gender Lens to Supply Chain Reform, *Washington International Law Journal* 25 (2016), 365 et seq.; see also *W. Anseeuw/L. Alden Wily/L. Cotula/M. Taylor* (note 131), 44.

<sup>137</sup> CEDAW, General Recommendation No. 34 (note 16), para. 77.

<sup>138</sup> CEDAW, CO Peru, CEDAW/C/PER/CO/7-8 (2014), paras. 37 et seq.

<sup>139</sup> CEDAW, CO Ethiopia (note 66), paras. 36 et seq.

<sup>140</sup> CEDAW, CO Sierra Leone (note 106), paras. 34 et seq.

<sup>141</sup> CEDAW, CO Colombia, CEDAW/C/COL/CO/7-8 (2013), para. 32.

tural change from the perspective of existing ownership or land usage and the socio-economic situation could affect women. If women receive employment or work as an out-grower (contract farmer) as a consequence of investment projects, this can on the one hand include positive economic opportunities.<sup>142</sup> On the other hand, long-term disadvantages may arise as women lose their former livelihood basis and, for example, become dependent on the market trends. These and similar aspects are to be clarified from a gender perspective. Secondly, formal property titles and traditional forms of use by women are to be respected and protected in the same way as those of men. Thirdly, the authorities must ensure that women are in fact included in negotiations and that their negotiating power is strengthened. They have to provide their consent freely on an informed basis and they have to be protected from arbitrary *de jure* and *de facto* expropriations. Finally, compensations must be appropriate, also for compulsory purchases, and access to justice must be guaranteed in law and in fact.<sup>143</sup>

Confronted with increasing large-scale land acquisitions, the Food and Agriculture Organization of the United Nations (FAO) adopted voluntary guidelines for the responsible management of land (2012). The guidelines refer to international human rights conventions and contain minimum standards for land management for investments, expropriation processes and compensation, as well as agrarian reforms.<sup>144</sup> Further, to improve women's land rights at the national level, FAO published a legal assessment tool for gender-equitable legal frameworks for land tenure.<sup>145</sup> Offering clear legal indicators, these kinds of tools are useful for "translating" international human rights obligations into a national context.

### 3. Resettlement and Eviction

Forced evictions and displacement have the consequence that persons are forced to leave their homes and land against their will, be it temporarily or permanently.<sup>146</sup> The causes and forms are heterogeneous. The causes range

<sup>142</sup> J. Behrman/R. Meinzen-Dick/A. Quisumbing, The Gender Implications of Large-scale Land Deals, *Journal of Peasant Studies* 39 (2012), 49 et seq., 71 et seq.

<sup>143</sup> See also CEDAW, General Recommendation No. 34 (note 16), para. 62.

<sup>144</sup> FAO Voluntary Guidelines (note 19).

<sup>145</sup> N. Kenney/A. P. de la o Campos, Developing Gender-Equitable Legal Frameworks for Land Tenure. A Legal Assessment Tool, Food and Agriculture Organization of the United Nations, FAO Legal Papers No. 98, Rome 2016.

<sup>146</sup> CESCR, General Comment No. 7 (note 27), para. 4, defines forced evictions as follows: "the permanent or temporary removal against their will, of individuals, families and/or

from armed conflicts, to land development measures, settlement planning, investment and infrastructure projects to environmental dangers.

The 1998 UN guiding principles regarding internally displaced persons primarily concern individuals or groups who leave their homes because of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters.<sup>147</sup> Art. 4 contains a discrimination clause and urges the states to ensure special protection for “*female heads of households*”. According to Art. 9, particular attention must be paid to groups of persons with a special connection to or dependency on the land, namely members of indigenous peoples or farmers. Art. 21 enshrines the principle that no-one may be arbitrarily dispossessed of property and possessions and that the owners are to be protected from eviction. The authorities have the responsibility of assisting returned or resettled persons to recover, to the extent possible, their property and possessions, or, when this is not possible, assist these persons in obtaining appropriate compensation or another form of just reparation (Art. 29). Armed conflicts can lead to women losing access to land which either formally belongs to them or which they have traditionally used. For example, the CEDAW Committee states in its recommendations to Syria that women often have a heavy burden in conflict zones as their access to land is curtailed and thus their productivity and livelihood are endangered.<sup>148</sup> This can combine with the loss of male relatives (e.g. husbands or fathers), provided the women are not themselves the title holders. The literature also indicates that it is central to recognise the equal rights of women to restitution and to use the post-conflict situation for gender-equitable reforms so that women can be registered or regain access to traditional land use.<sup>149</sup> The 2005 UN Principles on housing and property restitution for refugees and displaced persons provide specific guidance with respect to women's rights. According to the principles, States have to ensure the equal right of men and women to housing, land and property restitution, legal security of tenure, property ownership and equal access to inheritance. In particular, States should ensure that restitution pro-

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communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”. See also UNHCHR (note 3), paras. 5, 7.

<sup>147</sup> OHCHR Representative on Internally Displaced Persons, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 (1998), Introduction, para. 2.

<sup>148</sup> CEDAW, CO Syria, CEDAW/C/SYR/C/2 (2014), para. 43.

<sup>149</sup> For example S. S. Mohan, *The Battle after the War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution*, Yale J. Int'l L. 36 (2011), 461 et seq., with further references.

grams are gender sensitive and that policies and practices recognise the joint ownership rights of both the male and female heads of household.<sup>150</sup>

Various other international human rights documents address the States' obligations in connection with evictions and forced resettlements due to investment and infrastructure projects.<sup>151</sup> Regarding the right to adequate housing, the UN Special Rapporteur subsumes the right of not being discriminated against with regard to resettlements under Art. 14, para. 2, clause h CEDAW and Art. 11, para. 1 in conjunction with Art. 3 CDESCR. In addition, the Special Rapporteur creates a strong connection between security of tenure and the prohibition on arbitrary or unlawful interference with the home in Art. 17 CCPR and further provisions of international human rights and international humanitarian law.<sup>152</sup> On several occasions, human rights bodies have addressed Art. 17 and the problem of forced evictions, even if not specifically in the context of the discrimination of women.<sup>153</sup>

CEDAW in particular brings with it the obligation to clarify and take into account the effects of evictions and resettlement measures on women, to respect and protect their land rights, to include them equally in consultations, to guarantee their access to justice and not to discriminate against them in either compensation issues or after any return. The CEDAW Committee has, for example, urged Cambodia to include women in resettlements and to take further actions to protect women and girls from evictions, as these affect women particularly severely.<sup>154</sup> These approaches have in the meantime – *inter alia* given the impression of increasing land deals – partially been included in the development cooperation policies of European donor states.<sup>155</sup>

<sup>150</sup> Sub-Commission on the Promotion and Protection of Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles), E/CN.4/Sub.2/2005/17, Annex (2005), para. 4; see also para. 14.2 (participation).

<sup>151</sup> Commission on Human Rights Res. 1993/77 on Forced Eviction; CDESCR, General Comment No. 7 (note 27); Special Rapporteur on Adequate Housing (note 27); UN Special Rapporteur on the Right to Food, Report “Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge” Presented to the Human Rights Council, A/HRC/13/33/Add.2 (2010).

<sup>152</sup> Special Rapporteur on Adequate Housing (note 27), paras. 1, 15, 26, 29, 33, 34, 38 et seq., 53 et seq. and 65; see also *T. Xu/W. Gong* (note 46), 232 et seq.

<sup>153</sup> See also the discussion of the jurisprudence in *S. Dischler* (note 23), 103 et seq.

<sup>154</sup> CEDAW, CO Cambodia, CEDAW/C/KHM/CO/4-5 (2013), para. 42.

<sup>155</sup> As example: Bundesministerium für wirtschaftliche Entwicklung und Zusammenarbeit, Investitionen in Land und das Phänomen des “land grabbing”. Herausforderungen für die Entwicklungspolitik, BMZ-Strategiepapier 2/2012, 15 et seq.; see also, for Switzerland, the activities mentioned in Botschaft des Bundesrates zur internationalen Zusammenarbeit 2017-2020 vom 17.2.2016, BBl 2016 2333, 2470 et seq., 2516 et seq.; or for Denmark: Ministry of

#### 4. Discriminatory Practices and Legal Pluralism

The case of *E.S. and S.C. versus Tanzania* (see section VI) is not a rare, isolated one, rather it is representative of a broader grievance. The CEDAW Committee stated in its new General Recommendation No. 34 that women in States or regions with plural legal structures are particularly discriminated against with regard to the tenure and use of land, water and other natural resources.<sup>156</sup> The problem is addressed clearly in several Concluding Observations in the context of the State Reporting Procedure: for example, the Committee expresses its concern regarding India, Bangladesh or Sierra Leone because in those countries customs and traditional practices lead to women's property and possessions not receiving equal protection. The Committee urges that the right to inherit and to own land be uniformly regulated in law (Bangladesh)<sup>157</sup> and that conflicting customary laws be revised (Sierra Leone).<sup>158</sup> Similar recommendations were given to Burkina Faso.<sup>159</sup> Even in States parties which have revised their constitutions and legislation, the implementation often faces difficulties for sociocultural reasons, namely if customary law or tribal law is strong at the local level; in addition, women often do not know their rights or cannot enforce them.<sup>160</sup> Benin recognised the equal right of women to inherit land from their parents or husbands in 2007. However, the customary practice that women cannot inherit land persists and women still have difficulties accessing land or credit. The Committee urged the government of Benin to raise awareness of the legislation of 2007, to ensure its enforcement and to support the participation of women in agricultural policy.<sup>161</sup> Despite a new property law, many women in rural China are denied equal land rights. The Committee recommends to abolish the *de facto* obstacles and to ensure that women are appropriately compensated during land disputes.<sup>162</sup> In the recommendations to Congo, the Committee suggests that discriminatory inheritance customs be overcome through information and through engaging the local popula-

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Foreign Affairs of Denmark, Strategic Framework for Gender Equality, Rights and Diversity in Danish Development Cooperation, 2014, 21 et seq.

<sup>156</sup> CEDAW, General Recommendation No. 34 (note 16), paras. 22, 23, 33.

<sup>157</sup> CEDAW, CO Bangladesh (note 70), para. 36; CEDAW, CO India, CEDAW/C/IND/CO/4-5 (2014), para. 35; CEDAW, CO Sierra Leone (note 106), paras. 34 et seq.

<sup>158</sup> CEDAW, CO Sierra Leone (note 106), para. 35.

<sup>159</sup> CEDAW, CO Burkina Faso, CEDAW/C/BFA/CO/6 (2010), para. 44.

<sup>160</sup> UN DAW (note 8), VII et seq.

<sup>161</sup> CEDAW, CO Benin, CEDAW/C/BEN/CO/4 (2013), paras. 34 et seq.

<sup>162</sup> CEDAW, CO China (note 103), paras. 42 et seq.

tion.<sup>163</sup> Problems also exist regarding the rights of women to *community land*: thus Cameroon is urged to ensure access of women to jointly held land, to overcome the remaining obstacles through (for example) continuing land reforms and – again – improving access to justice.<sup>164</sup>

However, the juxtaposition of plural legal traditions is highly varied in the States concerned.<sup>165</sup> Thus for example, statutory and customary regulations coexist in countries in Southern Africa, whereby these are often also influenced by colonial legal traditions.<sup>166</sup> The customary rules regarding land claims (for example governing family and inheritance law) also cannot always be clearly defined; they are primarily interpreted by customary councils or customary courts.<sup>167</sup> If the customary rules are patriarchal and land rights are linked to the status in the clan and family, women profit little from plural legal systems.<sup>168</sup>

Several perspectives are represented in the literature regarding the question of how the situation of women under the conditions of a plural legal system can best be improved. *Nyamu-Musembi* criticises the attitude of the CEDAW Committee as sometimes expressed in the Concluding Observations and General Recommendations: the Committee would appear to represent the opinion under Art. 2, clause f and Art. 5 CEDAW that parallel legal systems (e.g. in post-colonial Africa) which also permit customary, tribal or religious law are generally problematic (she refers here in particular to previous General Recommendation No. 21 from 1994). According to her, the Committee regularly demands that formal (statutory) law be employed and practices prohibited – immediately – instead of considering all factors in that process. The actual protection of women would be neglected thereby; in addition, the prohibitions on cultural practices would often be of no benefit if they came as isolated steps; rather, partial steps which are well embed-

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<sup>163</sup> CEDAW, CO Congo, CEDAW/C/COG/CO/6 (2012), paras. 37 et seq.

<sup>164</sup> CEDAW, CO Cameroon (note 71), para. 35.

<sup>165</sup> An overview of customary law practices in relation to access to land, land use, inheritance etc. is found in FAO, Gender and Land Statistics, <<http://www.fao.org>>; see also *R. Sieder/J.-A. McNeish*, Introduction, in: *R. Sieder/J.-A. McNeish* (note 110), 1 et seq., 3 et seq.

<sup>166</sup> See UN-HABITAT (note 4), 14 et seq.

<sup>167</sup> *T. Masengu*, Customary Law Inheritance: Lessons Learnt from *Ramantele v. Mmusi and Others*, *AJICL* 24 (2016), University of Cape Town, Working Paper No. 6, 2015, 23 et seq.

<sup>168</sup> *R. Nielsen* (note 11), 208 et seq.; the relevance of actual social power relationships is also referenced by *A. Hellum/R. Katsande*, Gender, Human Rights and Legal Pluralities in Southern Africa: A Matter of Context and Power, in: *G. Corradi/E. Brems/M. Goodale* (eds.), *Human Rights Encounter Legal Pluralism. Normative and Empirical Approaches*, 2017, 119 et seq., 125 et seq.

ded socially and culturally would be required depending on the situation.<sup>169</sup> Given the fact that discriminatory practices are often embedded in a complex network of economic dependencies and social relationships, rapid, formalistic solutions may provide little benefit or may even be counter-productive. *Ikdahl* indicated that short and long-term strategies should be developed depending on the context: as long as customary law obstructs, it may make sense initially to create *secure housing/tenure* (e.g. to demand the consent of wives for land sales); at a long-term level, the discriminatory stereotypes should be addressed and practices which oppose property rights in the narrow sense overcome.<sup>170</sup> However, the General Recommendation No. 34 on Art. 14 CEDAW offers a more differentiated argument compared to older recommendations. The Committee stresses that the sensibilisation of local authorities and the population is important and – if required – religious or tribal authorities must be consulted and involved.<sup>171</sup> This means specifically that the importance of customary law and local power structures must be considered and included. To avoid resistance at the local level, land development projects and land rights projects must be gender-sensitive on the one hand, but must include the economic, social and cultural context on the other.<sup>172</sup>

Even when women have equal entitlements according to statutory or customary law, they frequently remain dependent on patriarchal structures and submit themselves to the practices. Thus, for example, in many countries where the inheritance law has been comprehensively revised, land-related inheritance continues *de facto* to follow a patrilineal pattern, or the female inheritors transfer their titles to the brothers or uncles to receive security and shelter in return. Discriminatory traditional inheritance practices can primarily be traced back to the gender-stereotypical expectations of the social role and the life paths of daughters and sons; for example in parts of Central and South Asia, daughters live with the family of the husband after marriage (e.g. they receive a dowry) while the sons take over the land and thus also responsibility for the parents (*exogamy*). Such systems are discriminatory as the dowry can usually be spent while the land rarely loses value. To improve the situation of women under these conditions, funda-

<sup>169</sup> C. Nyamu-Musembi, Pulling Apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol, in: A. Hellum/H. Sinding Aasen (note 64), 183 et seq.

<sup>170</sup> I. Ikdahl, Property and Security: Articulating Women's Rights to their Homes, in: A. Hellum/H. Sinding Aasen (note 64), 268 et seq., 288 et seq.

<sup>171</sup> CEDAW, General Recommendation No. 34 (note 16), para. 58.

<sup>172</sup> A. Kapur, Catch-22: The Role of Development Institutions in Promoting Gender Equality in Land Law – Lessons Learned in Post-Conflict Pluralist Africa, Buffalo Human Rights Law Review 17 (2011), 75 et seq.

mental changes to the social and economic status of women are required; these are challenging and require an overall perspective.<sup>173</sup>

Complex issues may also arise with regard to the rights of indigenous peoples. The human rights instruments relating to indigenous peoples described above refer to the collective dimension of human rights of minorities in the area of land-related resources on the one hand, and promote the individual right to non-discrimination and gender equality on the other. These two aspects can run in parallel, but may also come into conflict.<sup>174</sup> When land traditionally belongs to or is used by a certain (e.g. indigenous) group or community (*customary communal tenure* in its various forms), it is not always certain that women have equal and independent access to use, i.e. independent of male relatives.<sup>175</sup> These circumstances can bring the danger that governments instrumentalise international obligations for the equality of women in order to play women's rights against local and group traditions and the associated self-determination rights of indigenous groups and other minorities. This does not serve the interest of a coherent protection of human rights; holistic and participative approaches are more desirable. *UN Women* suggests supporting a gender-sensitive debate in the *communities* regarding customary law and other plural legal systems which is not limited just to the critical points, but uses the positive sides of the different legal systems to strengthen women's tenure claims and especially to emphasise the changeability of rules and thus also of customary law.<sup>176</sup> It is essential to make gender equality with respect to land rights socially acceptable and to use plural structures appropriately; however, this requires, for example, that the participation of women is generally improved. The literature indicates that it may well be pragmatic and socially acceptable to include and use local structures, for example to implement women's funding programs. However, depending on the context, it may be necessary to transfer the power of definition of land rights in itself and the enforcement

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<sup>173</sup> R. Nielsen (note 11), 208 et seq.; see also I. Westendorp (note 8), 325 et seq.; UN-HABITAT (note 4), 20.

<sup>174</sup> With regard to the incoherence of the protection of international human rights in relation to a plural legal structure in general (in the context of rights of indigenous people, customary law and religious law), see E. Brems, *Legal Pluralism a Human Right and/or as a Human Rights Violation*, in: G. Corradi/E. Brems/M. Goodale (note 168), 23 et seq., 27 et seq.

<sup>175</sup> O. de Schutter (note 45), margin No. 32 et seq.

<sup>176</sup> OHCHR/UN Women (note 17), 30 et seq.; see also UN-HABITAT (note 4), 16. The changeability of laws in plural systems is also referenced in the context of case studies from South and East Asia or Mexico: A. Hellum, *Gender, Human Rights and Legal Pluralities: Experiences from Southern and Eastern Africa*, in: R. Sieder/J.-A. McNeish (note 110), 31 et seq., 49 et seq., and M. T. Sierra, *Indigenous Fight for Justice: Gender Rights and Legal Pluralism in Mexico*, in: R. Sieder/J.-A. McNeish (note 110), 56 et seq., 74.

of these rights from local elites to central institutions.<sup>177</sup> To this extent, access to justice is central. This is addressed further below.

## 5. Legal Certainty and Access to Justice

On the basis of Art. 2, clause c CEDAW, the States parties must ensure that the administrative authorities and courts know the Convention rights, interpret the national legislation appropriately and protect the rights of women effectively. Inconsistencies between the national legal order and the obligations arising from the Convention which cannot be eliminated immediately by a court decision are to be resolved by the legislative authorities.<sup>178</sup> The *E.S. and S.C. v. Tanzania* dispute is a good example of the importance of access to justice for combating discrimination in the area of land rights. The Committee indeed also urged Tanzania to invest in the continuing training of lawyers and judges, to improve the legal knowledge of women and to prevent excessive delays and formalism.<sup>179</sup>

The basic requirement for access to justice is the *recognition of entitlements in the national legal order*. Further, Convention rights must be known to the courts: the Committee thus urged Cameroon to ensure that the national and customary courts applied the Convention to land-related disputes.<sup>180</sup> Law enforcement can fail if courts delay the case, do not hear complaints of private parties against the state for formal reasons or, influenced by gender stereotypes, are not willing to protect the substantive rights of women. The lack of independence of the judiciary can also be a problem: the Committee thus criticised political interference in court procedures in China which concerned land ownership claims by women.<sup>181</sup> In African countries in particular, the constitutions contain *exemption clauses* which allocate certain areas of law to customary or religious law. This is specifically problematic when formal legal action is blocked in these cases and thus a (constitutional) court review is not possible. *Nyamu-Musembi* indicates that these exemption clauses can be more problematic than the existence of plural legal systems *per se*, as they deny constitutional review of land-related customary law.<sup>182</sup> Examples from various countries show that

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<sup>177</sup> A. Kapur (note 172), 75 et seq.

<sup>178</sup> CEDAW, General Recommendation No. 28 (note 59), para. 33; on the rule of law and access to justice see also OHCHR (note 22), 16 et seq. and 27 et seq.

<sup>179</sup> CEDAW, CO Tanzania (note 116), para. 50.

<sup>180</sup> CEDAW, CO Cameroon (note 71), para. 35.

<sup>181</sup> CEDAW, CO China (note 103), paras. 14 et seq.

<sup>182</sup> C. *Nyamu-Musembi* (note 169), 183 et seq., 199 et seq. (also with examples).

judicial review can contribute to eliminating discriminatory provisions and also to changing customary law over time:<sup>183</sup> in 2002, the Kenya Court of Appeal heard the complaint of a woman who claimed that the customary law was gender-discriminatory as daughters inherited fewer portions of land than sons. The lower court had supported the customary law with the argument that daughters would marry and leave the family. The Court of Appeal referred in its opinion (*inter alia*) to the CEDAW; it found that the constitutional and conventional guarantees of gender equality took precedence over customary law and that the land was to be shared (or balanced) among all sons and daughters.<sup>184</sup> In 2004, the Supreme Court of South Africa decided that it was unconstitutional if inheritances only passed to male relatives when the deceased had not left a will.<sup>185</sup> Of particular interest is a case from Botswana: in 2012 the High Court found that the application of the patrilineal customary inheritance rules was gender-discriminatory and thus unconstitutional.<sup>186</sup> In 2013, the Court of Appeal confirmed the claimants' equal inheritance rights, with, however, another rationale: it avoided recognising a direct conflict between customary law and constitutional law. Instead it ruled that customary law, correctly interpreted, did not exclude the claimants' entitlements to inherit the land. Further, it determined that customary law is not static, rather it develops and must modernise with the times.<sup>187</sup> The South African Constitutional Court also referred to the changeability of customary law.<sup>188</sup>

This all requires, firstly, that women are informed of their rights (legal literacy). Secondly, the legal recourse must be accessible, in particular through

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<sup>183</sup> See also the compilation OHCHR, Land and Human Rights. Annotated Compilation of Case Law, 2015; further examples and analysis in *M. Ssenyonjo*, The Protection of Women's Human Rights by Domestic Courts in Africa, in: M. Ssenyonjo (ed.), The African Regional Human Rights System, 2011, 355 et seq., 357 et seq.; *F. Banda* (note 76), 376 footnotes 162 and 163; *L. Felder*, A Tool for Reconciling Gender and Customary Law, in: L. Yarwood (ed.), Women and Transitional Justice. The Experience of Women as Participants, 2013, 137 et seq., 151 et seq.; *Y. Olomjobi*, Women's Right to Own Property, Babcock University. School of Law and Security Studies, 2015, <<https://dx.doi.org/10.2139/ssrn.2716902>>, 20 et seq. (especially Nigeria).

<sup>184</sup> Kenya Court of Appeal at Eldoret, *Mary Rono v. Jane Rono*, Civil Appeal No. 66, 2002.

<sup>185</sup> Constitutional Court of South Africa, *Bhe v. Magistrate Khayelitsha et al.*, 2005 (1) BCLR 1 (CC), 15.10.2004.

<sup>186</sup> High Court of Botswana, *Mmusi and Others v. Ramantele and Another* (MAHLB-000836-10) [2012] BWHC 1 (12.10.2012).

<sup>187</sup> Botswana Court of Appeal, *Ramantele v. Mmusi and Others* (CACGB-104-12) [2013] BWCA 1 (3.9.2013), paras. 77 and 105; also the analysis by *T. Masengu* (note 167), 30 et seq.

<sup>188</sup> Constitutional Court of South Africa, *Alexkor Ltd and Another v. Richtersveld Community and Others*, 2004 (5) SA 460 (CC), para. 52.

financial and professional support.<sup>189</sup> Thirdly, the courts must have enough resources to fulfil their duties competently and independently; corruption in the judicial system must be combated.<sup>190</sup> Fourthly, the judges and lawyers must be appropriately trained regarding the rights of women. Fifthly, the judgements and other legal titles have to be enforced, which in the context of the *duty to protect* can also mean proceeding against opposing private parties. Thus the CEDAW Committee encouraged Colombia to protect women who had received land in the course of restitutions from (armed) attacks.<sup>191</sup>

However, the traditional access to justice approach which is linked to intervention of state authorities, formal dispute settlement and court proceedings also has its limits. As *Nagarajan/Parashar* clearly illustrated with regard to the land rights of women in the Pacific region (Vanuatu), human rights conventions, constitutional principles and other formal laws often have no impact in the reality of women's daily life: "Most women's lives are lived outside the space of courts with disputes, if they arise at all, settled informally in spaces where CEDAW does not cast its shadow."<sup>192</sup> In its General Recommendation No. 34, the CEDAW Committee indicates that not only legal but also *customary institutions and mechanisms* with which the land rights of women are protected and defended must be strengthened.<sup>193</sup> Thus, as shown by *Banks* in sub-Saharan countries, for example, the inclusion of important social stakeholders, namely of customary authorities and tribunals, is central for the implementation of the CEDAW.<sup>194</sup> This in turn requires that these bodies are sensibilised with regard to all the country's legal sources,<sup>195</sup> with particular regard to women's rights, and that women *de jure* and *de facto*, i.e. also financially, have the possibility to take formal legal action instead of – or in addition to – customary proceedings (so-called *opting out*).

<sup>189</sup> CEDAW, CO China (note 103), paras. 14 et seq.

<sup>190</sup> *M. Boersma*, The Impact of Corruption Upon Women's Rights: A Neglected Area?, in: I. Westendorp, The Women's Convention (note 8), 2012, 467 et seq., 467 et seq.

<sup>191</sup> CEDAW, CO Colombia (note 141), para. 31.

<sup>192</sup> *V. Nagarajan/A. Parashar*, Space and Law, Gender and Land: Using CEDAW to Regulate for Women's Rights to Land in Vanuatu, *Law and Critique* 24 (2013), 87 et seq., 102 et seq.

<sup>193</sup> CEDAW, General Recommendation No. 34 (note 16), para. 59.

<sup>194</sup> *A. M. Banks*, CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa, *Fordham Int'l L. J.* 32 (2008), 781 et seq., 783 et seq., and 844 et seq.

<sup>195</sup> Also *T. Masengu* (note 167), 31.

## VIII. Summary Analysis of States' Obligations

### 1. Non-Discrimination and Equality

The States parties to the CEDAW are obliged to eliminate all forms of discrimination against women in all areas of life and to ensure formal, substantive (*de facto*) and transformative equality.

The convention forbids both *direct* and *indirect discrimination*. While direct discrimination formally links differences in treatment to the criterion of gender,<sup>196</sup> indirect discrimination occurs when the legislation, application of the law or other measures, although formulated or conceived neutrally or linked to gender-neutral differences, have a discriminatory effect on women owing to pre-existing or *de facto* inequality. Structural and historical discrimination and the power imbalance between men and women must be taken into consideration here.<sup>197</sup> Thus land development programs may disadvantage women by (for example) setting conditions which most women cannot fulfil. Further, States have to understand and address *multiple* and *intersectional* forms of direct and indirect discrimination of women. With respect to land and land-related resources, these may be due to disadvantages based on gender in combination with, or intersecting with, other grounds, such as economic or civil status or national minority.<sup>198</sup>

Beyond the classical prohibition on discrimination, the CEDAW further obliges the States parties to establish *formal* and *substantive or de-facto equality* (Arts. 2 and 3 CEDAW) in relation to access to land, the use and management of, and control over, land and its associated resources. Many States have revised their constitutions and legislation in the last 20 years, e.g. introduced equal rights in the family, for separation and divorce and for inheritance.<sup>199</sup> Formal equality is an indispensable and important factor for any improvement with regard to land rights for women, but it is clearly not enough, as various examples in South Asia, Southern Africa or Latin America show<sup>200</sup> (see also examples in sections V and VII). The States parties are not only obliged to revise their legislation and administrative practices, but also to take discriminations in society, i.e. between private parties, into consideration: the States parties must ensure that discriminatory practices and

<sup>196</sup> CEDAW, General Recommendation No. 28 (note 59), para. 4.

<sup>197</sup> CEDAW, General Recommendation No. 28 (note 59), para. 16; on the concept of discrimination see Art. 1 CEDAW.

<sup>198</sup> See above, Section V. 2.

<sup>199</sup> OHCHR/UN Women (note 17), 3.

<sup>200</sup> Convincingly also *J. Quan* (note 97), 25 et seq.

role stereotypes are overcome (*transformative equality*, Art. 2, clause f and 5 CEDAW).<sup>201</sup> It must be added that measures in the area of women's land rights should not only target short-term improvement, but should contribute to substantive equality in the longer-term (this can be described as *sustainable equality*). Thus an isolated measure in the area of formal (legal) equality can have *de facto* negative effects over the longer term if not taken from an overall perspective and important social and economic factors are not considered. To secure short-term and longer-term interests of women, it may be appropriate initially to establish security of tenure and housing, such as for informal settlements or *de facto* use of land, and then find longer-term and stable gender-sensitive solutions in relation to property and use.

## 2. Duty to Respect, Protect and Fulfil/Ensure

### a) Background

(1) First of all, States have to respect, protect and fulfil all *human rights* relating to land. According to the understanding of the treaty bodies, this triad can be applied not only with regard to the so-called first generation rights (e.g. the right to property under the regional human rights conventions), but also to Economic, Social and Cultural rights (so-called ESC rights, e.g. the right to adequate housing).<sup>202</sup> However, the UN core conventions do not contain a specific and coherent norm regarding the protection of ownership and tenure in general, nor one regarding land rights in particular. The protection of land rights arises rather from the interplay of various guarantees in the core conventions (see section III above, e.g. the right to privacy, the right to adequate housing, minority rights) on the one hand, and from the classic right to property, as enshrined in the regional human rights conventions on the other. ESC rights are to be ensured progressively according to the available resources of the State party (Art. 2 CESCR), while some obligations, e.g. the duty to respect or the guarantee of a minimum, are to be taken into account immediately.<sup>203</sup>

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<sup>201</sup> See also *F. Banda* (note 76), 381.

<sup>202</sup> UNHCHR/UN-HABITAT, *The Right to Adequate Housing*, Fact Sheet No. 21 Rev. 1, 2009/2014, 33 et seq.; CESCR, General Comment No. 14, E/C.12/2000/4 (2000), para. 33.

<sup>203</sup> On the duty to respect and protect in connection with the Right to Adequate Housing see CESCR, General Comment No. 4, (note 51), paras. 10-13 (on the Right to Housing in Art. 11 para. 1 CESCR); and General Comment No. 3, E/1991/23 (1990), para. 5.

(2) Furthermore, an (*accessory*) *prohibition on discrimination* applies in relation to these human rights which are connected to land and reproductive resources (e.g. Art. 2, paras. 1 and 3 CCPR; Art. 2, paras. 2 and 3 CESCR; Art. 14 ECHR; Art. 1, para. 1 ACHR). This means that these human rights are to be respected, protected against violations by third parties and fulfilled and ensured through appropriate measures *equally for women and men*.<sup>204</sup>

(3) Finally, we find *general and independent non-discrimination clauses* in several documents, e.g. in the CEDAW, in Art. 26 CCPR or in Art. 1 of Protocol No. 12 to the ECHR<sup>205</sup> which relate to *all areas of law and State practice*: the overall legal system and practice must be non-discriminatory.

The CEDAW Committee applies the triad of the obligations to respect, protect and fulfil also to the principles of non-discrimination and *de jure* and *de facto* equality.<sup>206</sup> What this means for ensuring equal land rights for women is presented in the final evaluation below.

## b) The Obligation to Respect the Land Rights of Women

The State must respect women's *property rights in the narrow sense*, contained, for example, in Art. 1 of the 1<sup>st</sup> Protocol to the ECHR and also implicitly guaranteed by Art. 15, para. 2 CEDAW, as well as their other land-related claims, in law, in administrative practice and in jurisprudence. Furthermore, it must not *discriminate* against women in relation to the respect of these land rights. This principle applies firstly to State activities which are directly connected to property rights and other land rights. Thus women may not be directly or indirectly discriminated against, for example, in the law governing land registry or land sales, in land-related contract law, in land reforms, regarding expropriation of formal titles or of *de facto* usage rights, for restitutions and compensations, in the recognition and registration of property and tenure rights or for the enforcement of land rights (for example) in court. Secondly, the principle also applies to legislation, institutional practice and jurisprudence which *indirectly* affect women's land rights, e.g. in personal, marriage, family and inheritance law or in relation to the management and use of assets. States with plural legal systems at a na-

<sup>204</sup> With respect to ESC-rights: CESCR, General Comment No. 16, E/C.12/2005/4 (2005), para. 17; UNHCHR (note 3), paras. 24-27.

<sup>205</sup> Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.2000, ETS 5.

<sup>206</sup> CEDAW, General Recommendation No. 28 (note 59), para. 9.

tional or regional level may also be obliged to revise their legal order and practice: it is incompatible with CEDAW to recognise or promote discriminatory customary or religious rules legally or judicially.

### c) The Obligation to Protect the Land Rights of Women

Authorities are obliged to prevent and combat violations of land rights by private parties, e.g. *property grabbing* by relatives or property and tenure violations by other persons. Again, *de jure* and *de facto* protective measures are to be provided without discrimination. In this context, combatting violence against women – considered as a form of discrimination<sup>207</sup> – may be an important factor, as violence can directly or indirectly lead to the violation of women's land rights. Women and girls are thus to be protected with appropriate measures against discriminatory social practices which affect the *de facto* access, management, use and control of or over land and its associated resources. Further, direct and indirect discriminations in the private economic sector are also to be approached, namely for access to services, either through legal regulation (e.g. with regard to the granting of mortgages<sup>208</sup>), such as by setting certain conditions for approvals (e.g. in connection with large-scale land acquisitions), or through other measures, e.g. the sensibilisation or training of involved parties. The obligations to protect and fulfil intertwine in this area.

### d) The Obligation to Fulfil/Ensure with Respect to Land Rights of Women

Overall there is a marked discrepancy between the human rights which women enjoy on the basis of international and regional conventions, and the enforcement or implementation of these rights at national and local levels. An important first step is the recognition of *land governance in a broad sense* as a highly human rights-sensitive area. Art. 2 CEDAW obliges a *policy* which is effective and coherent overall. Existing problems must be contextualised legally and socially, in particular if institutional difficulties and

<sup>207</sup> See e.g. CEDAW, General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35 (2017), para. 1 with further references.

<sup>208</sup> On the obligations of the States parties to regulate services from private parties, see also CEDAW, General Recommendation No. 28 (note 59), para. 13.

customary law or gender stereotypes oppose implementation. Local customary law and other practices and their effects on women's land rights must be understood and included in land policy.

*Direct and indirect land-related policy* must be oriented towards the social and economic situation and the communal or familial status of women. Therefore, e.g. in land reforms or agricultural development, it must be determined which forms of ownership and tenure have been practised in a certain region and how these are embedded in the overall economic and social status of women.<sup>209</sup> Socio-economic factors are usually decisive for the question of which solution is best in which context. For all measures which the State wishes to adopt in the area of land rights, tenure and use, the advantages and disadvantages are to be reviewed in a *gender impact assessment*, be it the registration of individual land titles, the granting of intermediate tenure titles, the formalisation or other recognition of land used according to customary law, the elimination or regularisation of informal settlements, the planning of urban settlements or similar. The same applies to other governmental programs such as the decentralisation of land management or the improvement of the participation of local communities.<sup>210</sup> Thereby, it has to be taken into account how current developments, as identified by UN-HABITAT for example,<sup>211</sup> impact women economically and socially: changes in land use (for example through land acquisitions), increasing urbanisation, migration (including internal displacement), environmental damage and climate change as well as violent conflicts.

This requires that it is *structurally and institutionally* ensured that women participate in land and agricultural (economic) policy as both concerned parties and as members of authorities and institutions, that gender aspects are systematically included in the development of policy and budgeting and that the accountability of the authorities is ensured.<sup>212</sup> A coherent policy must be based on reliable data. There is a striking lack of gender-segregated data on the ownership and use of land and land-related resources.<sup>213</sup> The collection of gender-segregated data, monitoring and evaluation are required to clarify where and why deficits regarding substantive equality exist and which measures must be adopted.<sup>214</sup>

<sup>209</sup> UN-HABITAT (note 53), 28 et seq.

<sup>210</sup> Regarding participation see OHCHR (note 22), 47 et seq.

<sup>211</sup> UN-HABITAT (note 53), 39.

<sup>212</sup> OHCHR/UN Women (note 17), 37.

<sup>213</sup> R. Nielsen (note 11), 207 et seq.; OHCHR/UN Women (note 17), 37 et seq.

<sup>214</sup> Thus the CEDAW Committee requested Macedonia (for example) to clarify why the portion of women owning land is so low, CEDAW, CO Macedonia, CEDAW/C/MKD/CO/4-5 (2013), paras. 35 et seq.

In its concluding observations, the Committee repeatedly mentions that *temporary special measures* pursuant to Art. 4, para. 1 CEDAW may be necessary to balance discriminations against women in access, tenure and use of land.<sup>215</sup> Such measures may include improved access to credit or loans, for example,<sup>216</sup> or the support of legal consultations and representations. Temporary special measures can also address the situation of particularly disadvantaged groups of women, such as in the event of multiple or intersectional discrimination,<sup>217</sup> and improve the participation of women in *land governance* structures, such as by using quotas. *Information campaigns* should be targeted to women and their *legal literacy* should be improved. Finally, the general *principles of the rule of law* such as legal security, transparency of State activities, accountability and access to justice are to be strengthened.

## IX. Outlook

This paper has examined how existing human rights in general and the provisions of CEDAW in particular may be used for a human rights-based approach to land and gender equality. As shown, the topic of women's land rights is extremely diverse, ranging from access to land and distribution of land to the protection of property, usage rights and security of tenure in a rural or urban context. Inequalities in relation to the actual distribution of and access to the land are often based on general social and economic discrimination. At the same time, equal land rights are important to promote economic independence and social equality of women. Land rights of women are not only affected by land-related economic and social developments such as agrarian reforms and industrialisation, registration and privatisation of land or resettlement programs, but they are also strongly influenced by the general *de jure* and *de facto* situation of women, e.g. in family, personal or heritage law or regarding their (political) participation.

So far, a comprehensive provision on land rights is missing in international human rights law and it might be difficult to design one at all, given the heterogeneity of aspects. As the obligations of the States parties are derived from various human rights standards associated with this topic, a holistic approach is required. The three levels of obligation (to respect, to pro-

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<sup>215</sup> CEDAW, CO Cameroon (note 71), paras. 15, 35; CEDAW, CO Mexico, CEDAW/C/MEX/C/7-8 (2014), paras. 34 et seq.; CEDAW, CO Sierra Leone (note 106), paras. 34 et seq.; CEDAW, CO Macedonia (note 214), paras. 35 et seq.

<sup>216</sup> *B. Rudolf* (note 73), 351 et seq.; *F. Banda* (note 76), 380.

<sup>217</sup> CEDAW, General Recommendation No. 25 (note 68), para. 38.

tect, and to fulfil/ensure) need to be linked to the principles of equality and non-discrimination. The documents by UN treaty bodies and Special Rapporteurs offer not only compilations of human rights standards with a connection to land and tenure but also more specific guidance focussing on certain groups (e.g. urban poor, indigenous peoples) or particular situations (e.g. evictions, informal settlements or agrarian reforms).<sup>218</sup> In 2017, a working group of the Human Rights Council discussed the latest draft of a UN Declaration on the rights of peasants and other people working in rural areas. The Human Rights Council thus reacted to the economic and social challenges currently existing for rural populations, such as environmental damage, climate change, resettlements and evictions or agrarian industrialisation by investors. The current version of the draft contains an article on land rights in general as well as a detailed provision on gender equality.<sup>219</sup> Art. 4 of the draft version is strongly inspired by Art. 14 CEDAW, highlighting, however, the obligations of the States in relation to land rights: States should ensure the rights to access to agricultural credit and loans, marketing facilities, appropriate technology, equal rights with regard to land and natural resources (clause g); to have equal access to, use of and control over land and natural resources, independently of their civil and marital status and of particular tenure systems, and equal or priority treatment in land and agrarian reform and in land resettlement schemes (clause h; see also Art. 17, para. 2 of the draft). Overall, human rights standards with respect to land have received increasing attention from international organisations and their scope has been further clarified in the last years.

Nevertheless, the real challenge arises at the level of implementation. Even in States where the legal system is currently gender-sensitive, the implementation and enforcement of land rights for women may continue *de facto* to be difficult. Sustainable changes indeed only arise in longer-term processes which take the economic and social conditions into account and in which participation of women is supported and their access to justice improved. Lastly, aspects of gender equality must be anticipated while dealing with (current and future) developments, such as large-scale land acquisitions, agricultural reforms, resettlement due to infrastructure projects and the regularisation of informal settlements; these must also be included in the design of policies.

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<sup>218</sup> See above, Section III.

<sup>219</sup> Human Rights Council, Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas, Presented by the Chair – Rapporteur of the Working Group, A/HRC/WG.15/4/2 (2017), Arts. 4 and 17.