

CONTRIBUTION TO THE GENERAL DISCUSSION ON LAND AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

These comments were elaborated by Centro de Estudios Legales y Sociales (CELS) as a contribution to the consultative process for drafting a General Comment.

This document presents some elements that we consider should be included on the general comment on land. Access to land is a key prerequisite for the enjoyment of most human rights and states have a clear responsibility to regulate the access to land in a way that is fair and not a subject of speculation. For this, it is of paramount importance that the Committee on Economic, Social and Cultural Rights moves forward in the approval of a general comments that contains the points described below.

1. A definition of Land

Land is being increasingly recognized as a non-renewable limited natural resource that needs to be used efficiently to be able to ensure that it can provide all of its functions in the future. At the same time, every human being needs access to a portion of land where to settle, live, and in some cases, also to produce. We believe that this tension between the finiteness of land and its universal necessity must be reflected in the General Comment in order to highlight the importance of having a Treaty Body confirm land as a human right.

Admitting the difficulty of attaining a comprehensive definition of “land”, we would like to propose this consideration to be included:

“Land is characterized by its finite availability and its indispensability to satisfy human rights. Every human being requires a portion of land, either urban or rural, to reside, exert their rights and, in some cases, to produce. The tensions between its finiteness and universal necessity implies that land is a particularly disputed commodity in urban and rural markets. In this sense, it is imperative that States exert a particularly active role in guaranteeing access to land.”

2. The Rights of Peasants and other people working in rural areas

On November 2018, the General Assembly adopted the Declaration on the rights of peasants and other people working in rural areas, through the Resolution no. A/C.3/73/L.30.¹

The Declaration develops a set of rights that should be included in the General Comment in order to ensure its correspondence with the development of international human rights law.

Accordingly, it would be imperative that the General Comment refers to the “rights to seeds” and “right to biological diversity” insofar as they relate to the right to land. The enjoyment of the right to land should also include the protection of peasant’s traditional knowledge relevant to plant genetic resources for food and agriculture and their right to maintain their traditional agrarian, pastoral and agro ecological systems, upon which their subsistence and the renewal of agricultural biodiversity depend.

Similarly, it would be important to consider the special ways in which the principle of “free, prior and informed consent” – typically applied to indigenous peoples – operates with regard to peasants and rural populations regarding the regulations on land. Also, the GC should consider the linkages between land, peasants and culture. Land is a necessary mean for indigenous peoples and peasant communities to enjoy culture. In cases related to

¹ United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas. Resolution adopted by the General Assembly on 17 December 2018

indigenous peoples, the relation between land, territories and cultural survival has been widely recognized by the international law on human rights. This recognition is more recent regarding peasant communities. In line with the Universal Declaration on Peasants Rights, it is important that the General Comments emphasizes the unbreakable relationship between land and the preservation of peasant culture, as the former is an inexcusable requirement for peasant's cultural rights.

3. Access to land as a fundamental precondition to enjoy the right to adequate housing in urban settings

The right to land and the factors conditioning its access have been more explored in rural settings. However, they also constitute a structural aspect of the violation of the right to adequate housing in urban settings. Within cities, land frequently operates as a commodity subject to financial speculation, with negative impact over its social value and utility. This situation exacerbates the problems caused by a decrease in the supply side of the real-estate market, namely, the rising of prices and deepening of exclusion. In turn, it provokes an increase in the informality of land use, as many people living in poverty are pushed into occupying land as their only option for having a place to live. This way, the practices of speculation, when applied to land, reproduce and deepen habitational precariousness.

In her contribution to the New Urban Agenda (NUA), which was adopted at the United Nations Conference on Housing and Sustainable Urban Development "Habitat III", the Special Rapporteur on Adequate Housing, Leilani Farha, issued a report that considers land to be one of five dimensions the NAU should prioritize and a key element to explain growing inequality in urban areas.² The Rapporteur underscores that "ensuring more equitable access to land and property and the prevention of land grabbing is central to many struggles for housing rights in cities".³

We consider imperative to expand that recognition to urban settings so that the General Comment also acknowledges the State's obligation to promote and implement policies to regulate land and real-estate market in urban areas. This regulation should focus on the social function of land over individual interests and financial speculation and ensure that sufficient and adequate land is available to low and middle-income people. According to the Special Rapporteur on Adequate Housing, the planning of land use constitutes a fundamental tool for guaranteeing the production of urban spaces that are respectful of human rights, and particularly the right to adequate housing.⁴

² Those who are affluent and own land, homes or other property in cities have dramatically increased their wealth because of speculation and inflation of values. Those who cannot afford ownership face increasing housing costs and are driven to the outskirts of cities or to informal settlements, dislocated from their sources of livelihood and lacking security of tenure. Inequality in access to land and property, affecting marginalized groups including women, migrants and all those living in poverty, has become embedded in housing inequality and spatial segregation, dividing cities between those who own land and property and have access to basic services and infrastructure and those who do not (UN-GA, *Adequate housing as a component of the right to an adequate standard of living*, A/70/270, 4 August 2015, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/70/270, para 54).

³ "Other urban patterns linked to land and property have increased inequality and social exclusion; these include privatization of social housing, public land and infrastructure; predatory lending practices; increased use of urban land and housing as investment assets within a globalized financial market; heightened control of urban land by wealthy individuals and corporate interests; environmental degradation of land and water in areas occupied by marginalized groups; unregulated real estate markets; conversion of land used for housing to commercial uses; land grabbing; and the disproportionate influence of private interests in land use planning. / In response to these systemic patterns of inequality and social exclusion with respect to land, human rights movements have emerged in cities with proposals for a reorientation of land and property rights that prioritizes the social function of land 35 and its central role in the realization of the right to adequate housing. Ensuring more equitable access to land and property and the prevention of land grabbing is central to many struggles for housing rights in cities. The human rights agenda of Habitat III must be informed by these creative approaches to urban land and property. Unless the primacy of human rights over market forces and private profit is entrenched, a new urban agenda that reduces inequalities and is based on inclusion and sustainability will be unachievable" (UN-GA, *Adequate housing as a component of the right to an adequate standard of living*, op cit. para 55 – 56).

⁴ The Special Rapporteur calls for a paradigm shift from housing policies based on the financialization of housing to a human rights-based approach to housing policies. In this context, she makes the following recommendations: (a) The promotion of access to adequate housing cannot be based solely on financial mechanisms. Broader State policies and interventions should be adopted, including, inter alia, public

4. Comments pertaining the Obligations of States with regard to Business Activities

In line with the Committee General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, the General Comment on Land should take into account the existence of power inequalities between communities and business entities which endanger the adequate protection of the right to land of these communities. Consequently, it is important that States provide access to justice under equal and free conditions to protect the right to land of these communities. A General Comment on land should consider that economic social and cultural rights are violated when States parties prioritize the interests of business entities that negatively affect the rights protected by the Covenant. States should not allow, for example, for forced evictions to be automatically ordered and executed in the context of investment projects, without considering the rights at stake, including the right to land.

5. Free, prior and informed consent

In some cases, there is not only an obligation to conduct substantial consultation or guarantee indigenous participation according to consolidated international standards but, given the rights at stake and the magnitude of the possible impact, there is an obligation to obtain the express consent of the indigenous peoples. This right to a prior, free and informed consent for indigenous people is been recognized by the United Nations Declaration on the Rights of Indigenous Peoples expressly for relocation measures and for storage or disposal of hazardous materials on indigenous peoples' territories (articles 10 and 29.2)⁵ The Inter-American Court of Human Rights has ruled that "when it comes to large-scale development or investment plans that would have a greater impact within the [indigenous peoples'] territory, the State has the obligation, not only to consult [them], but also must obtain their free, informed and prior consent, according to their customs and traditions."⁶

The Committee on Elimination of Racial Discrimination (CERD) has also stressed: "As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's General recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured."⁷

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples has warned that "the character of the consultation procedure and its object are also shaped by the nature of the right or interest at stake for the indigenous peoples concerned and the anticipated impact of the proposed measure".⁸ He has stressed that "the strength of the objective of achieving consent varies according to the circumstances, the indigenous peoples' rights and the interests involved. A significant, direct impact on indigenous peoples' lives establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the

investments in infrastructure and basic services, human settlements upgrading and rehabilitation, urban planning and land policies, public financing, land and housing provision, rent regulation and related legal and institutional frameworks. See, UN-GA, *The Right to Adequate Housing*, A/67/286, 10 August 2012, p. 71.

⁵ Article 10: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." Article 29 (2): "States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent"

⁶ ICourtHR, Case of the Saramaka People v. Suriname Judgment of November 28, 2007, p. 134

⁷ CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination, Ecuador. 2 June 2003, CERD/C/62/CO/2, p. 16.

⁸ Report of the Special Rapporteur on the rights of indigenous peoples, A/66/288, 10 August 2011, p. 83

absence of indigenous consent”.⁹ In addition, “in situations where an investment activity or project has substantial impacts that would endanger the physical or cultural well-being of an indigenous community, the State should not authorize continuing the activity without the consent of the affected community”.¹⁰ Accordingly, to the circumstances stressed in the UN Declaration on the Rights of Indigenous Peoples the Special Rapporteur added “situations involving the establishment of natural resource extraction projects within indigenous peoples’ lands and other situations in which projects stand to have a significant social or cultural impact on the lives of the indigenous peoples concerned”.¹¹

6. Land tenure security

Land security is closely related to the provision of individual and communal land titles that grant legal protection against unlawful action by the State and third parties. Thus, we would like to underline the importance that the General Comment emphasizes throughout its sections the obligation of States to put in place mechanisms for land tenure security as a way of protecting human rights that depend on a person’s or community’s access to land. Considering its connection to cultural rights, especially the rights of peasants and indigenous peoples, the General Comment should encourage States Parties to actively protect and promote the recognition of communal ownership system, rather than focusing solely on individual beneficiaries.¹²

7. Land and environment

The sustainable use of land is a key factor to ensure the right to a clean and healthy environment. In the 2012 UN Conference on Sustainable Development in Rio de Janeiro (Rio+20) soil degradation was recognized as a global and pressing issue. The Inter-American Court of Human rights in the Advisory Opinion 23 recognizes the existence of “an irrefutable relationship between the protection of the environment and the realization of other human rights, due to the fact that environmental degradation affects the effective enjoyment of other human rights.”¹³

The Court has also recognized the right to a healthy environment as an autonomous one, stressing that “as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently, rights to nature”.¹⁴

8. Land rights and right to food

Land rights are crucial to ensuring access to productive resources that are necessary for the realization of the right to food. According to a report of the Special rapporteur on the right to food¹⁵, access to land and security of tenure

⁹ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, A/HRC/12/34 15 July 2009, p. 47; and Report of the Special Rapporteur on the rights of indigenous peoples, A/66/288, 10 August 2011, p. 83

¹⁰ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur. A/HRC/12/34/Add.6, 5 October 2009, p. 39

¹¹ Report of the Special Rapporteur on the rights of indigenous peoples, A/66/288, 10 August 2011, p. 84

¹² Access to Land and the Right to Food" (parr. 42,a), Report of the Special Rapporteur on the right to food presented at the 65th General Assembly of the United Nations [A/65/281], 21 October 2010

¹³ Advisory Opinion OC-23/17, Inter American Court of Human Rights, November 15, 2017

¹⁴ Advisory Opinion OC-23/17, Inter American Court of Human Rights, November 15, 2017, para 62.

¹⁵ "Access to Land and the Right to Food", Report of the Special Rapporteur on the right to food presented at the 65th General Assembly of the United Nations [A/65/281], 21 October 2010.

are essential for the enjoyment of the right to food. Strengthening customary land tenure systems and tenancy laws could significantly improve the protection of land users, particularly of indigenous peoples and peasants, who are those who produce the food and, at the same time, are threatened by the increasing pressures on land.

9. The relevance of taxation

Despite increasing recognition of the links between fiscal policy and human rights, human rights obligations are systematically ignored by states in the design of tax systems and distribution of public resources. Part of the reason for this lack of accountability is that the implications of human rights standards for fiscal policy have not been fully examined, developed or systematized by the oversight bodies of the UN. As a consequence, corporate lobbying and elite capture tend to define fiscal policies, resulting in regressive taxation and tax privileges for corporations while successive waves of austerity-related budget cuts affect mostly low-income and rural populations in which women, afro-descendants and indigenous groups are disproportionately represented.

Taxes on property and land can be a mechanism to advance human rights. As such, the General Comment should take the impacts and benefits of a rights-oriented taxation system into consideration. Pursuant to the NUA, it is important that the General Comment recognizes the obligation of States to implement fiscal policy that discourages speculation on urban land. As a result of the deliberations carried out in the framework of “Habitat III”, States committed to promote the “best practices to capture and share the increase in land and property value generated as a result of urban development processes, infrastructure projects and public investments”.¹⁶

¹⁶ “We will promote best practices to capture and share the increase in land and property value generated as a result of urban development processes, infrastructure projects and public investments. Measures such as gains-related fiscal policies could be put in place, as appropriate, to prevent its solely private capture, as well as land and real estate speculation. We will reinforce the link between fiscal systems and urban planning, as well as urban management tools, including land market regulations. We will work to ensure that efforts to generate land-based finance do not result in unsustainable land use and consumption” (UN-GA, *Draft Outcome document of the United Nations Conference on Housing and Sustainable Urban Development (Habitat III)*, A/CONF.226/4, 29 september 2016, available at: http://nua.unhabitat.org/uploads/DraftOutcomeDocumentofHabitatIII_en.pdf, para 137)