**Contribution to the UN Draft General Comment No. 26 (2021) on Land and Economic, Social and Cultural rights**

These comments were prepared by the Center for Legal and Social Studies (CELS) as a contribution to the consultation on the first draft of General Comment No. 26 (2021) on land and economic, social and cultural rights. CELS stresses the importance of this General Comment which, once approved, will become a crucial tool for the defense and protection of rights.

Access to land is a necessary condition for guaranteeing fundamental human rights such as the right to housing, work, and food, among others. For this reason, States have the obligation to guarantee that all people have access to this asset. Land is essentially a real-estate asset and, therefore, tied to the logic of the real estate market, both urban and rural. This market is increasingly affected by speculative and financial logics at a global level, which makes access to land more and more difficult for middle and low-income sectors. For this reason, we consider that the obligation of States to guarantee access to land necessarily implies implementing measures that intervene in this market to prevent land from being subjected to logic of expulsion.

This General Comment responds to the historical need for better standards for the protection of groups and communities living in rural and peri-urban areas, such as peasants, indigenous peoples, quilombola communities, groups dedicated to family agriculture, small-scale fishing and livestock farming, and alternative modes of production and subsistence to the logic of the extractive and agro-export market. It is also a fundamental instrument for the protection of the urban population struggling for access to land against expelling dynamics associated with urban land valorization, which often results in forced evictions. In addition to being more exposed to violence, these groups have fewer resources to access justice and claim their right to land. Protecting broad access to land and alternative modes of production brings, in turn, benefits to society as a whole by promoting more sustainable uses, healthier food production, and less environmental degradation.

Based on these considerations, we present in this paper some elements that we believe should be included in this interpretation of the obligations arising from the International Covenant on Economic, Social and Cultural Rights (ICESCR), which impact the possibilities of access to an essential asset such as land.

1. **Right to work**

In addition to Articles 1, 2, 11, and 12 of the ICESCR, this General Comment should expressly include the right to work among the rights dependent on access to land (Articles 6 and 7 of the Covenant). That nexus[[1]](#footnote-1) brings into play the right of families and communities to work in rural areas and peri-urban territories, on their land or unused land on which they depend for their subsistence,[[2]](#footnote-2) obtaining agricultural products, raising livestock, and/or gathering and fishing in those territories.

According to the UN Declaration on the Rights of Peasants, they have a specific relationship with land and nature that includes working the land on their own, as families or through other forms of small-scale work organization, producing food or other agricultural products traditionally integrated into their local communities, and caring for the local natural environment and agro-ecological systems. Indigenous communities that work the land can also be considered to be covered by the concept of peasant-indigenous communities. These forms of work are often not recognized and protected by the State and are threatened by the expansion of the industrial agricultural model.

Suggested language:

Parr. 1: “Access to land is an important precondition for the realization of several Covenant rights, particularly the rights to adequate food, water and housing as part of the right to an adequate standard of living, as well as the right to health and the protection against non-discrimination contained in several of the Covenant rights”. **It is also linked to the right to work in rural areas and in peri-urban territories where mainly food is produced. (...).**

Parr 8: “The aim of the present general comment is to clarify the specific obligations contained in the Covenant in relation to land, particularly with regard to articles 1, 2, **6, 7** 11 and 12, especially the protection of land tenure and the rights of land users (...)”

New paragraph 11 bis: **The insecurity of land tenure and the lack of measures to recognize and protect small-scale agriculture, livestock and fishing production methods are also a threat to the right to work and to decent working conditions. “**When the loss of access to productive resources reduces income and sufficient social security benefits are not available, several Covenant rights may be imperilled, such as rights to food, access to health care or social services that require payments.”

Parr 19. “States parties should recognize and respect existing access to land of all legitimate tenure right holders, given that secure access to productive resources such as land is crucial to realize their right to food and their the right to housing **and work**. That requires safe access to a place for shelter and carry out **productive** economic activities **including** domestic work.”

Parr 31. “States parties should have safeguards and policies in place to protect legitimate tenure rights, particularly those relevant to the protection of the right to **work and** an adequate standard of living, under article**s** **6, 7, and** 11 of the Covenant, from risks that could derive from large-scale transactions in tenure rights.”

1. **Right to Land**

The text should clearly state the problems generated by a system based on large-scale monoculture since it is not only a factor that contributes to competition for arable land but also generates its deterioration. Most countries do not have sufficient legislation or control mechanisms to prevent the environmental damage caused by land degradation as a result of these practices. Today, where there used to be peasant communities, there are now large deserts of monocultures or unproductive land because their properties have been depleted.

It is important that this General Comment reinforces the importance of recognizing customary land tenure arrangements and emphasizes the legal security of this tenure beyond the written law. It is also necessary to reinforce the idea that the protection of land tenure cannot focus solely on titling without considering customary practices.

We welcome the fact that this General Comment considers the ways in which land rights play a role in cities. However, we believe it is necessary for the document to take into account that the division between urban and rural areas is not sudden; it occurs on a continuum. For this reason, we also believe that it is necessary for this document to recognize the particularities of peri-urban areas. In these territories, where a large part of the food consumed in cities is produced, the right to land is affected not only by the pressures of a concentrated agribusiness model but also by the expansion of cities. In developing countries, cities are expanding spatially at 3.5 times the rate of population growth.[[3]](#footnote-3) The transformation of land around cities especially affects those who live in informal settlements or have other precarious forms of tenure as their land becomes desirable for real estate development, leading in many cases to their eviction.

Although the Comment mentions in some instances, like in paragraph 30, the problems generated by land accumulation and speculation, we believe it is necessary to reinforce the importance that States regulate these practices. Fiscal policy is one of the main elements that States have to regulate this type of negative externalities, so we suggest taking into account the Principles for Human Rights in Fiscal Policy. These Principles and Guidelines are the product of a three-year process of joint construction and validation of normative standards and policy guidelines for the case of Latin America and the Caribbean, but which can be scaled globally. They are the result of the work of seven civil society organizations and exhaustive research of normative sources and other complementary sources such as research by international institutions. They were also nourished by the invaluable contributions received through various channels, especially through national, thematic, and regional dialogues aimed at public and open discussion of the text of the document.[[4]](#footnote-4)

In addition to the language below, we suggest adding the case of Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) vs. Argentina as relevant jurisprudence of the Inter-American Court of Human Rights.[[5]](#footnote-5) This case provides more detail on the necessary characteristics of the land demarcation process, especially when this process includes third parties.[[6]](#footnote-6)

Suggested language:

Parr. 2: “In cities, the competition between different groups for access to and control over land is exacerbated by gentrification of certain urban areas and by the financialization of housing markets, which encourage speculation and inflation. In rural areas, competition for arable land is the combined result of demographic growth, urbanization, and the sprawl of urban areas, pressures resulting from large-scale development projects, **and the production model based on large-scale single-crop farming** and the use of land for tourism and other purposes.” **In the peri-urban areas of cities, the competition between urban and rural groups is intertwined, so it is necessary that the States also generate specific policies for these areas** (...)

Parr 9: “(...) Houses in rural **and some peri-urban** areasare normally built on the plot of land that is also used for production purposes. The loss of such land therefore often affects the right to housing, the right to food or access to employment.”

Parr 10: “The Committee is of the view that effective agrarian reforms aiming at equitable access to land **suitable for the development** will ensure the realization of the right to adequate food (...)”

Parr 15: “First, specific attention should be given to those groups such as indigenous peoples, fisher folk and pastoralists, or landless rural people **and rural communities with land but without legal protection**, who depend on access to communal lands or the commons for gathering firewood, collecting water or medicinal plants, or occasional hunting or fishing. (...) States therefore have an obligation to guarantee security of tenure for all legitimate land users, particularly those who depend on collective or communal land use schemes” **and legitimate land users who do not have titles or written documents and whose tenure is based on usage.**

Parr 23: “(...) Laws and policies should protect indigenous peoples from the risk of encroachment on their land **by the State** **or third parties acting with their acquiescence or tolerance**, for instance for the development of industrial projects or for large-scale investments in agricultural production.”

New paragraph 30 bis: **States should use the full collection, redistributive and regulatory potential of real estate property taxes, taxation of capital gains, and other fiscal instruments for territorial management like the adoption of a multipurpose cadastre and the strengthening of differential taxation on unproductive land ownership in order to discourage speculative real estate practices and thus facilitate access to land in rural and urban areas, and promote the development of more compact and more sustainable spaces.[[7]](#footnote-7)**

Parr 31: “(...) The Committee recommends that States consider the promotion of **~~a range of~~** production and investment models that do not result in large-scale land displacements.” **In this regard, priority should be given to policies aimed at strengthening local producers and supplying nearby towns, in order to avoid displacement and forced evictions. Large-scale production that affects or modifies the territory must be subject to free and informed prior consultation with the affected communities.**

Parr 33: “Therefore, States should adopt laws and policies to guarantee that titling programmes are not implemented solely to support the sale of land and the commodification of land tenure. If such laws or regulations are missing, titling of pre-existing, customary forms of tenure may result in more conflict rather than more clarity, and in less security rather than improved security.” **The protection of land tenure cannot be subject to and aimed solely at titling pursuant to Western laws without considering customary practices. In judicial and administrative instances in which the protection of land rights is claimed, these forms of tenure of legitimate users who do not have titles or written documents must be considered and protected to the same extent as those who do.**

1. **Access to Justice**

Although this draft contains references to the standards of access to justice for rural, peasant, and indigenous sectors, we believe that they can be strengthened. States must allocate specific material resources to guarantee access to justice for these sectors. In judicial and administrative processes, special consideration and attention must be given to the rights of the least favored sectors, taking into account the prior information they have, the distance they live from judicial or administrative centers, and the rights they are claiming.

In our work, we have seen how many peasants lose judicial processes and do not have access to appeals and review instances because the deadlines for requesting such reviews are very short and they do not have sufficient information and economic resources to do so. As a result, a sentence that does not admit review outside the narrow margins imposed by the procedural legislation becomes final. This could be added in section V on reparations.

Suggested language:

Parr. 56: “Access to justice is key; States parties must guarantee that even in remote areas, it is accessible and affordable, particularly for disadvantaged and marginalized groups.” **The States Parties must guarantee that the most remote populations receive complete information about their rights, about spaces for monitoring/assistance and specific technical advice, about available legal remedies, and about judicial and administrative procedures. Communication between the organs of the Judiciary and the communities should use clear, understandable, and accessible language that guarantees respect for linguistic diversity, both through the hiring of linguistic and cultural interpreters, as well as through training policies within the Judiciary. Communities must be assured an adequate time period to defend their rights.**

**New paragraph 56 bis: Those who must decide on judicial or administrative processes involving land rights should visit the territory whose tenure is in dispute or under discussion. It is recommended to have teams of professionals working in itinerant work in the most remote communities to facilitate access to justice. Judicial operators should have a comprehensive perspective in all cases in which other rights are at stake, such as the right to food, decent housing and habitat, work, health, and a decent life.**

**New paragraph 56 ter: States must adopt an interdisciplinary approach to conflicts over land rights, which will make it possible to understand and translate into legal language the different ways of inhabiting the territory according to the culture of each people. This includes understanding their productive model, which has a direct impact on the link with the environment and the extension of the territory that a community needs to live. States must ensure that in judicial and administrative processes there are diverse evidentiary means capable of reflecting cultural diversity in the link with the land. In those jurisdictions where indigenous peoples exist, the judicial and administrative bodies that must protect their rights must have teams specialized in the matter, both legally and culturally.**

1. **Pesticides**

As expressed by the UN Special Rapporteurs on the right to food and on toxic products, there is a gap in the human rights protection framework with regard to pesticides, as there is no global treaty that regulates the vast majority of them throughout their life cycle.[[8]](#footnote-8) We believe that this General Comment can help to close this gap.

Suggested language:

Parr 29: “(...) States parties should also ensure that legitimate tenure rights are protected in all processes relating to transfer of existing tenure rights, including voluntary or involuntary transactions as a result of investments, land consolidation policies or other land-related readjustment and redistribution measures.” **States must also protect the populations living in these territories from the use of pesticides and regulate their use. Public regulatory agencies should provide the entire population with up-to-date and transparent information on pesticide use. Legislation on permitted pesticide use levels should be constantly updated based on research on health and environmental impacts.**

Parr 42: “(...) States parties should ensure that the investors domiciled in other countries and investing in farmland overseas do not deprive individuals or communities of access to land or associated resources on which they depend for their livelihood” **or affect them through the use or commercialization of pesticides.**

1. **Human Rights Defenders**

We suggest introducing language similar to that available in Article 9 of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean or the Ezcazú Agreement.[[9]](#footnote-9)

Suggested language:

Parr 53: “(...) In accordance with the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, States must take all necessary measures to respect human rights defenders and their work, including in relation to land issues, and to refrain from imposing criminal penalties on them or enacting new criminal offences with the aim of hindering their work.” **In addition, in order to comply with their obligation to protect, States parties to the Covenant must take the necessary measures to prevent third parties from interfering with the enjoyment of the rights of human rights defenders and take appropriate, effective, and timely measures to prevent, investigate and punish attacks, threats or intimidation that human rights defenders may suffer.**

1. Recognized in the last sentence of paragraph 9 of the draft. [↑](#footnote-ref-1)
2. United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas Art. 4.2 and 4.3. [↑](#footnote-ref-2)
3. UN Habitat 2020. Available at: https://unhabitat.org/sites/default/files/2020/10/wcr\_2020\_report.pdf [↑](#footnote-ref-3)
4. Principles for Human Rights in Fiscal Policy. Available at: https://derechosypoliticafiscal.org/images/ASSETS/Principles\_for\_Human\_Rights\_in\_Fiscal\_Policy-ENG-VF-1.pdf [↑](#footnote-ref-4)
5. Case available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec\_400\_esp.pdf [↑](#footnote-ref-5)
6. In paragraph 98, the ruling says that “the State must ensure the effective ownership of the indigenous peoples and, therefore, it must: (a) delimit indigenous lands from others and grant collective title to the lands of the communities; (b) “refrain from carrying out actions that may result in agents of the State or third parties acting with its acquiescence or tolerance, adversely affecting the existence, value, use and enjoyment of their territory,” and (c) guarantee the right of the indigenous peoples to truly control and use their territory and natural resources, and to own their territory without any type of external interference from third parties”. [↑](#footnote-ref-6)
7. Principles for Human Rights in Fiscal Policy. Available at: https://derechosypoliticafiscal.org/images/ASSETS/Principles\_for\_Human\_Rights\_in\_Fiscal\_Policy-ENG-VF-1.pdf [↑](#footnote-ref-7)
8. Available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21306 [↑](#footnote-ref-8)
9. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428\_en.pdf [↑](#footnote-ref-9)