**Submission to the UN Committee on Economic, Social, and Cultural Rights**

**Draft General Comment on Land**

August 2021

As organizations that support communities to defend their rights in the face of threats from extractive development projects and policies, we welcome the Committee’s important work to develop the state obligations under the Covenant relating to land.

We have studied the draft through the lens of two particular situations that we accompany closely, in which peasant communities are currently facing enormous challenges in terms of their economic, social, and cultural rights in the context of large-scale extractive projects in their territories: the prospective *La Colosa* gold mine (Tolima, Colombia) and the operating *El Quimbo* hydroelectric dam (Huila, Colombia).

Especially relevant in the General Comment is the emphasis placed on the social function of property rights in terms of human rights guarantees[[1]](#footnote-1) and the acknowledgement of the need for profound structural changes related to rights to land in order for states to fulfill their obligations under the Covenant.[[2]](#footnote-2)

Yet reading the draft General Comment in light of the concrete obstacles encountered by the peasant communities in Colombia offers insights into critical points where the Committee could strengthen the guidance to states and further support the efforts of communities and advocates defending their rights under the Covenant.

In this submission we offer recommendations focused on the following points:

1. Link more explicitly to the rights of peasants and UNDROP
2. Acknowledge traditional approach to right to property must be reformed with legislative changes favoring the social function of land
3. Specifically acknowledge the threats from medium- to large-scale development projects
4. Expand on the connection and limitation of participation to land and ESC rights
5. **Link more explicitly to the UN Declaration on the Rights of Peasants**

The UN Declaration on the rights of peasants and other people working in rural areas (UNDROP) is a new but crucial piece of existing human rights guidance for states as to their obligations toward these groups, defined by their unique, socio-cultural relationship to and dependence on land.[[3]](#footnote-3) The General Comment ought to link up with UNDROP throughout the text and not only at the end. This would be a significant stride toward communicating coherently to states the importance of acknowledging peasants as a particular group, with a distinctive relationship to the land, and for which special protections are needed to guarantee their rights under the Covenant.

**Suggested amendments:**

UNDROP should be cited throughout the text to increase the coherence of interpretation across instruments. For example, this could be in the text or footnotes to paragraphs 10 and 18:

10. “…as echoed in paragraph 8.1 of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security *and in Articles 4.h and 19 of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*.”

18. “…decision-making and management processes relating to land as described in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security *and in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (arts.10, 11).*”

In paragraph 12, peasants should be explicitly included: “Furthermore, indigenous, *peasant,* and other traditional communities rely on the natural resources on their lands for subsistence and the conduct of traditional cultural practices.” This would be consistent with paragraph 20, which recognizes peasants distinct relationship to land, together with indigenous peoples and other traditional communities.

An additional reference that would allow the General Comment to contribute to consolidating clear guidance for states would include in paragraph 16 a link to the CEDAW General Comment 34 on the rights of rural women (esp. paras. 55-78).

States should be encouraged to acknowledge that peasant communities are groups requiring special protection because of the systemic vulnerability they face – ranging from multidimensional poverty, climate change, land-grabbing, predatory extractive development models, and forced displacements from armed conflict, and other violence. This could be done with a specific paragraph in between what is now para. 23 on indigenous peoples and before para. 24 on communities with customary tenure systems.

1. **Acknowledge that traditional approach to right to property must be reformed with legislative changes favoring the social function of land**

The General Comment makes the powerful point that land is more than an economic asset and calls for a more robust consideration of the links to human rights. Paragraphs 5-7 recognize the relation of land to other elements, including water resources, biodiversity, ecosystems, and cultural aspects. The Comment asserts that states must ensure that “land is not treated as a mere commodity, but that its role as a social and cultural good is recognized” (para. 5).

However, for states to comply with this, legislative reforms are needed to supplant all the norms supporting the traditional and predominant “right to property” approach to land with more human rights-compliant approaches focused on the social function of land. Concretely this requires legislative reforms, inter alia, to counteract the vulnerability faced by peasant communities, whose rights are not adequately captured under the law and who generally enjoy no measures of special protection. This is the only way to overcome unfavorable judicial decisions regarding land use and access that rely on the predominant approach to right to property. Without these structural reforms, any commitments to human rights protection and realization remain illusory in practice.

The rights that communities have in relation to their land are rendered meaningless through the declaration of other strategic objectives of the state, such as infrastructure works or extractive projects that are executed in the name of development and the national interest; and it is in this confrontation in which rights are undermined. To counteract these strong trends which undermine the realization of rights under the Covenenant, the frame of “right to territory”[[4]](#footnote-4) must be strengthened together in consideration of land and human rights.

**Suggested amendments:**

There are elements signaling to these required reforms in paragraphs 31 and 32 on the obligation to protect. These should be a cornerstone of the Comment and emphasized throughout Section III on state obligations.

Paragraph 14 should include an additional acknowledgement that ensuring equality and non-discrimination requires including a socio-cultural approach in the different areas of law touching on land – including civil, agrarian, environmental, and commercial law.

Paragraph 52 should acknowledge the particular vulnerability and gap in terms of the protections of the economic, social, and cultural rights of peasants and other rural communities, who despite the special relationship and dependence on land and distinctive identity on that basis, do not enjoy effective legal mechanisms or norms designed to protect their rights.

Paragraph 56 should acknowledge the importance of explicit legislative reforms to recognize and protect rights of affected communities as a precondition for effective administrative and judicial mechanisms.

1. **Specifically acknowledge the threats from medium- to large-scale development projects; and the legal strategies of how these are advanced, in violation of the rights of communities**

There is a welcome recognition of the power imbalances that endanger Covenant rights (e.g. paragraph 31) and this should be reflected in other key paragraphs, including paragraph 2, which could emphasize how the weak legal and institutional frameworks reproduce and compound the risks from these asymmetries of power.

In the same vein, the General Comment would be greatly strengthened by naming more specifically the systemic threats to economic, social, and cultural rights that stem from the imposition of medium- to large-scale land- and resource-intensive development project. Paragraph 2 could be strengthened by including an explicit mention of mining and dams in the mention of the “pressures” resulting from large-scale development projects; the extractive development model ought to be denounced as a systemic threat. The same acknowledgement could be included in paragraphs 26 and 27.

Equally important is to name the particular legal gaps and strategies that enable these systemic violations and undermining of ESC rights. For example, the confrontation between sub-national, territorial governance and national policies often results in violation of rural communities’ rights. The section on the obligation to respect ought to acknowledge the disadvantage of rural communities vis-à-vis centralized development policies.

The Comment should acknowledge that in practice the centralized declarations of “general welfare,” “public purpose,” and “legitimate objective” provide cover and justification for human rights violations. There are systemic deficiencies in these calculations, especially for non-indigenous rural communities. Paragraph 25 should acknowledge that although the four-prong test is the prevailing standard, given the insufficient legal protections for the rights of communities and systemic failings in terms of participation and access to justice, this may in fact be a vehicle to enable decision-making around land that excludes the recognized rights of communities related to their territories, including the land and other natural resources. This acknowledgement could also be made for example in paragraphs 31 and 50.

1. **Expand on the connection and limitation of participation to land and ESC rights**

It would be especially important for the General Comment to expand the focus beyond access to information and emphasize further the necessary mechanisms and measures to ensure effective participation with the aim of exercising and protecting rights under the Covenant. Namely, more is need to ensure that there are sufficient regulations and legislation dedicated to guaranteeing meaningful participation. These measures are especially important for peasant communities, which are (1) disproportionately threatened by land grabs and (2) historically and systematically marginalized and disempowered.

The General Comment ought to acknowledge the shortcomings of prior consultation with communities, which is often ineffective to actually intervene in the determination of the use of land, and in the end just legitimizes and formalizes the imposed use and displacement.

Paragraph 18 should reference the UNDROP specifically and the numerous provisions related to the specific protections and empowerment required by states to guarantee the rights of peasants to meaningfully participate in decision-making affecting their territories, including in articles 2(3), 4, 5, 10, 11, and 15. Paragraph 18 could additionally note that “States parties should guarantee the participation in every stage of planning and implementation of medium- and large-scale project that could affect the rights of communities, through democratic mechanisms that guarantee the rights of residents to decide on the use of the land in their territories.” Moreover, “States parties should establish clearly the criteria, scope, and mechanisms related to participation in order to avoid the situation where arbitrary and faulty participation processes serve only to legitimize and enable decisions and processes that otherwise violate Covenant rights.”

**Conclusion**

We welcome this important contribution to the international jurisprudence related to human rights defense and promotion in the context of land and territory and look forward to further engagement with the Committee additional drafting and the eventual implementation.

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1. Corina Heri, The Human Right to Land, for Peasants and for All: Tracing the Social Function of Property to 1948, *Human Rights Law Review*, Volume 20, Issue 3, September 2020, Pages 433–452. [↑](#footnote-ref-1)
2. Especially paragraphs 31 & 32, calling for the prioritization of local land users and acknowledging the severe power asymmetries that endanger the realization of Covenant rights in practice. [↑](#footnote-ref-2)
3. United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas : resolution / adopted by the Human Rights Council on 28 September 2018, UN Doc. A/HRC/RES/39/12. [↑](#footnote-ref-3)
4. Priscilla Claeys. The Right to Land and Territory: New Human Right and Collective Action Frame. 2016. [↑](#footnote-ref-4)