

## **Committee on Economic, Social and Cultural Rights**

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### **Day of General Discussion**

14 October 2019 – Palais des Nations, room XVII

### **Issues paper (rev. 4 October 2019)**

#### **State Obligations under the International Covenant on Economic, Social and Cultural Rights and governance of land tenure**

1. The day of general discussion on Covenant obligations related to land is organized in preparation of the discussion within the Committee of Economic, Social and Cultural Rights of a new general comment dedicated to land under the Covenant. The Committee and the co-rapporteurs for this general comment (Olivier De Schutter, Rodrigo Uprimny and Michael Windfuhr) are seeking recommendations from experts and stakeholders, including the States parties to the Covenant, as to what land-related issues should be discussed in the general comment, and how the Covenant can help address the challenges related to the governance of land tenure.
2. Experts and participants are invited to answer the questions raised below but might address also other points related to the different subjects.

#### **Panel 2: Pressures on land and speculation**

3. We have witnessed in recent years an increased competition for land and other natural resources. In cities, this competition is encouraged by the gentrification of certain areas and the financialization of housing markets, both of which encourage speculation and price 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 reservation of land for tourism and other purposes.
4. Land degradation due to unsustainable agronomic practices and climate change, together with a growing demand for agricultural commodities for food, bioenergy, fiber and feedstock, increase the tensions between industrial agriculture (conducted on a large scale and often for export commodities) and agriculture practiced on a smaller scale to meet the needs of local communities. All of this further encourages speculation over land. Against this background, concerns have been expressed about the impact of "land grabs", fuelled by fears about the volatility of agricultural prices and facilitated by weak governance of tenure and corruption in land administration.

5. These mounting concerns have led to the adoption of a number of instruments that, although not legally binding, have been highly influential and widely endorsed by governments. Already in 2004, the *Voluntary Guidelines in support of the progressive realization of the right to adequate food in the context of national food security* were adopted by all Member States of the FAO; a number of provisions therein relate to access to natural resources. This text strengthened the interpretation of the right to adequate food developed by the Committee on Economic, Social and Cultural Rights in its General Comment No. 12 (1999). In 2012, in reaction to the increased pressures on land referred to above, the Committee on World Food Security (CFS) adopted the *Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security* (VGGT).

6. Though the VGGT have acquired a high degree of legitimacy due to the inclusive nature of the CFS, and their endorsement by all member States of the FAO, they remain a non-binding instrument. The VGGT are written from a human rights perspective, applying obligations of States to the practice of land governance, including to their obligations as regards the rights of indigenous peoples. Nevertheless, the VGGT do not seek to identify systematically the sources of human rights obligations related to land. Similarly, the *Principles for Responsible Investments in Agriculture and Food Systems*, adopted by the CFS in 2014, remain implicit about the human rights implications of agricultural investments.

7. Most recently, in Resolution 73/165 of 17 December 2018, the General Assembly adopted the *Declaration on the rights of peasants and other people working in rural areas*, which recognizes, *inter alia*, the right of peasants and other people working in rural areas to "have access to and to use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions" (art. 5.1). This Resolution also establishes the right to land, defined as the right "individually and/or collectively [...] to have access to, sustainably use and manage land and the water bodies, coastal seas, fisheries, pastures and forests therein, to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures" (art. 17). The full text of this provision reads as follows:

*1. Peasants and other people living in rural areas have the right to land, individually and/or collectively, ..., including the right to have access to, sustainably use and manage land and the water bodies, coastal seas, fisheries, pastures and forests therein, to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures.*

*2. States shall take appropriate measures to remove and prohibit all forms of discrimination relating to the right to land, including those resulting from change of marital status, lack of legal capacity or lack of access to economic resources.*

*3. States shall take appropriate measures to provide legal recognition for land tenure rights, including customary land tenure rights not currently protected by law, recognizing the existence of different models and systems. States shall protect legitimate tenure and ensure that peasants and other people working in rural areas are not arbitrarily or unlawfully evicted and that their rights are not otherwise extinguished or infringed.*

*States shall recognize and protect the natural commons and their related systems of collective use and management.*

*4. Peasants and other people working in rural areas have the right to be protected against arbitrary and unlawful displacement from their land or place of habitual residence, or from other natural resources used in their activities and necessary for the enjoyment of adequate living conditions. States shall incorporate protections against displacement into domestic legislation that are consistent with international human rights and humanitarian law. States shall prohibit arbitrary and unlawful forced eviction, the destruction of agricultural areas and the confiscation or expropriation of land and other natural resources, including as a punitive measure or as a means or method of war.*

*5. Peasants and other people working in rural areas who have been arbitrarily or unlawfully deprived of their lands have the right, individually and/or collectively, in association with others or as a community, to return to their land of which they were arbitrarily or unlawfully deprived, including in cases of natural disasters and/or armed conflict, and to have restored their access to the natural resources used in their activities and necessary for the enjoyment of adequate living conditions, whenever possible, or to receive just, fair and lawful compensation when their return is not possible.*

*6. Where appropriate, States shall take appropriate measures to carry out agrarian reforms in order to facilitate the broad and equitable access to land and other natural resources necessary to ensure that peasants and other people working in rural areas enjoy adequate living conditions, and to limit excessive concentration and control of land, taking into account its social function. Landless peasants, young people, small-scale fishers and other rural workers should be given priority in the allocation of public lands, fisheries and forests.*

*7. States shall take measures aimed at the conservation and sustainable use of land and other natural resources used in their production, including through agroecology, and ensure the conditions for the regeneration of biological and other natural capacities and cycles.*

8. These voluntary commitments demonstrate the political will to address the challenges raised by the management of land tenure, against the background of increasing pressures on land. Against this background, it is important to clarify the obligations that can be derived from the International Covenant on Economic, Social and Cultural Rights as regards land tenure and the rights of landusers.

9. The following questions emerge:

- 1. What are the main lessons learned from titling programmes, as a means to protect the rights of land users whose ownership of land is not formally recognized? What**

**alternatives to titling could be explored, such as anti-eviction laws or the recognition of a status for tenants?**

- 2. What are the pros and cons of recognizing customary forms of tenure, and how can the challenges associated with such recognition be addressed, especially concerning the risks of women or minorities being excluded, or the complexity of managing the coexistence between customary forms of tenure and tenure rights that result from a formalization process? (see also, in this regard, the questions submitted to the next panel)**
- 3. How to ensure that investments in land shall not worsen inequalities and result in depriving local communities from access to natural resources on which they depend? What is the role, in this regard, of the requirement of free, prior and informed consent initially developed in order to protect indigenous communities? What is the role of the emerging human rights responsibilities of business enterprises, including investors, particularly regarding their due diligence obligations to ensure their investment does not negatively impact human rights?**

### **Panel 3: Protection of security of tenure, including gender dimension**

10. Security of tenure is key for describing Covenant obligations to land. What is needed in the general comment is a good description of State obligations in order to guide States' actions in that regard. The Voluntary Guidelines on the responsible governance of tenure land, fisheries and forests in the context of national food security (VGGT) differentiate the processes of land registration, land administration and the organisation of transfer. In order for such processes to result in an increase of security of tenure, they need to be transparent, participatory and should allow for complaint mechanisms when legitimate tenure rights are overseen. Such planning processes can only take into consideration all uses of land by different groups for different purposes if they are based on rural and spatial planning processes that are inclusive and set up to register the different forms of land use.

11. In recent years, titling has been encouraged as a means to protect land users from eviction by the State, as well as from encroachment by other private parties, in particular by large landowners or investors. However, the impact of titling in the past has been ambiguous. On the one hand, the clarification of property rights was intended to provide security of tenure: for example to allow slum dwellers to be recognised as owners of their home in the informal settlement where they are staying, or to allow those operating small farms to be protected from eviction from the land which they cultivate. On the other hand, however, the clarification of property rights was justified by the need to establish a market for land rights, allowing for a more fluid transfer of property rights, and a lowering of transaction costs increasing the liquidity of these markets. These may appear as two contradictory objectives, since the commodification of property rights can be a source of exclusion and increase insecurity of tenure.

12. A good starting point could be the results of the UN High-Level Commission on the

Legal Empowerment of the Poor, which offered a balanced view concerning the formalization of property rights on poverty reduction:

*Promoting a truly inclusive property-rights system that incorporates measures to strengthen tenure security requires learning from the mixed experience with past individual titling programmes. To ensure protection and inclusion of the poorest, a broad range of policy measures should be considered. These include formal recognition, adequate representation, and integration of a variety of forms of land tenure such as customary rights, indigenous peoples' rights, group rights, and certificates. Success depends greatly upon comprehensively reforming the governance system surrounding property rights [...] These systems need to be accessible, affordable, transparent, and free from unnecessary complexity. Above all, the poor must be protected from arbitrary eviction by due process and full compensation.*

Concerning the obligation to respect:

- 1. How do such processes need to be set up in order to achieve security of tenure in particular for individuals and groups in vulnerable situations? How to make sure that these processes of security of tenure are not manipulated or tainted by corruption? If lenders are willing to provide loans, how to avoid the risks that the debts will accumulate and that the land will be seized by the lender? How to avoid the commodification of land and that rural poor may be tempted to sell off land to overcome temporary economic hardship ("distress sales")?**
  - 2. What are the best practices concerning the process of land registration, land administration and land transfers? How should they be linked to rural and spatial planning? How to ensure that the interests of the legitimate land users and groups, such as women, shall not be overlooked? How can participation be organized in order to avoid that risk?**
13. Prior to the formalisation of property rights through titling, tenure generally is regulated by custom, which is often highly legitimate and can ensure a high level of security of tenure. Such customary forms of tenure can deliver the same services as formalised property rights; in many cases, traditional (or customary) systems of tenure allow for the individualisation of ownership. Even where communal ownership subsists, such systems allow for cultivation and possession to remain with individual households. On the other hand, traditional systems of tenure could result in various forms of discrimination or exclusion of certain individuals and groups, such as women and ethnic minorities.
- 3. What are the pros and cons of recognizing customary forms of tenure? How can the challenges associated with such recognition be addressed? How to ensure that**

**women and minorities are not excluded? How to manage the coexistence of customary forms of tenure and tenure rights that result from a formalization process? How can different systems of security of tenure contribute to ensuring access to productive resources without discrimination?**

Concerning the obligation to protect

14. States parties have a duty to protect land users from land grabbing by private investors/large landowners; and to regulate the activities of investors in land (regarding respect for labor rights, environmental rights, etc.). In this context, the question arises as to how States should ensure security of tenure in land transfer processes:

- 4. How to set up processes of land transfer and regulate land markets in a way that guarantees the rights of certain individuals and groups in vulnerable situations to access natural resources?**

Concerning the obligation to fulfil

15. Article 11, para. 2, (a), of the Covenant imposes on States parties to "improve methods of production, conservation and distribution of food by [...] developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources". This implies a duty of States parties to support agrarian reform schemes ensuring adequate access to land for small-scale farmers who depend on access to land for their livelihoods. Concerning the obligation to fulfil, Guideline 8 from the *Voluntary Guidelines in support of the progressive realization of the right to adequate food in the context of national food security* notes that access to productive resources (land, water, seeds etc.) is essential in order to implement the right to adequate food for those who live in rural areas and are securing their livelihood through self-employed work on fields. The international community has acknowledged the importance of agrarian reforms, for example in the terms of the conclusions adopted at the 2006 ICARRD conference (International Conference on Agrarian Reform and Rural Development), "mainly in areas with strong social disparities, poverty and food insecurity, as a means to broaden sustainable access to and control over land and related resources".

- 5. How to ensure that land redistribution schemes are set up in a way to support the intended beneficiaries, so as not to contribute to processes of land commodification?**

**Gender dimension on securing access to productive resources**

16. Land can be a critical resource for meeting subsistence needs, and for accessing other goods and services, such as credit, as land can be used as a collateral. Land is also important to enhance women's bargaining position in household decision-making, as well as for their participation in rural institutions. This could enhance their decision-making power and leverage more collective rights and resources. Moreover, property ownership reduces the exposure of women to violence and provides economic security.

17. Article 14, para. 2, (g), of the International Convention on the Elimination of All Forms of Discrimination against Women guarantees the right of women to equal treatment in land and agrarian reforms as well as in land resettlement schemes (see also: CEDAW General Recommendation No. 34 on the rights of rural women (CEDAW/C/GC/34) (2016)). The same requirement follows from Articles 3 and 2, para. 1 of the Covenant.

- 6. How to ensure that laws and social customs guarantee the realization of the rights of women to equal treatment in land and agrarian reforms? How to ensure that they are recognized in land policies? How to ensure that these rights are guaranteed also upon the death of the spouse? How to overcome the disparity of women still representing a significant minority in the total number of holders of titles?**

**Panel 4: Concerns related to land by indigenous peoples, other traditional groups and other particular individuals and groups in vulnerable situations**

18. There are specific individuals and groups that are particularly at risk of discrimination in the governance of land tenure, including in the organization of property rights over land, land titling processes and agrarian reform schemes with a land redistribution component.

19. Specific attention should be given in this regards to groups which depend on access to the "commons", such as fisherfolk and pastoralists, or landless rural people who may depend on access to communal lands or forests for gathering firewood, for access to water, or for occasional hunting or fishing. Customary forms of property may provide security for those depending on the commons for whom classic property rights are generally not an appropriate solution.

- 1. The Committee is interested in receiving input on how security of tenure for indigenous communities and the groups relying on the commons should be organised. How to guarantee that attempts to "formalize" property rights through titling schemes, as well as the enclosure of communal lands in order to encourage "development" of such land by investors, do not exclude these people from access to resources on which they depend for the exercise of their rights under the Covenant? How can these land use patterns best be recognized in spatial planning processes at the national level?**
- 2. In addition, worldwide, many rural households still depend on the gathering of firewood for their cooking energy, and on collectively owned wells or water sources for their access to water. How to ensure that processes of formalization of property rights and the establishment of land registries do not result in deprivation of use of those other resources on which they depend?**

20. International law recognizes the right of indigenous peoples over the lands and territories that they have traditionally occupied : indigenous peoples have the right to have their lands

demarcated, and relocation is only allowed under narrowly defined circumstances and, in principle, with the free and informed consent of the groups concerned, as described by the UN Declaration of the Right of Indigenous Peoples and ILO Convention (No. 169) (Indigenous and Tribal Peoples Convention), and various national constitutions. These instruments in principle should protect indigenous peoples from the risk of state encroachment on their land, for instance for the development of industrial projects or for large-scale investments in agricultural production. This has been strengthened by decisions of regional human rights courts.

**3. Under the Covenant, an extension to other groups who depend on natural resources is required under the right to self-determination of peoples, which includes the right of all peoples freely to dispose of their natural wealth and resources. How to ensure the protection of indigenous territories and access to natural resources for indigenous communities under the Covenant? Shall it be done by the reference to the specific protection granted to the lands and territories of indigenous peoples in international law instruments?**

21. In many countries, smallholder farmers are often not favoured in processes of land registration and land administration (see the guidance provided above for the discussion under Panel 2).

**4. The Covenant imposes on States a duty to abstain from interfering with land users' rights, in particular by evicting occupants from the land on which they depend for their livelihoods. How to ensure that in the dynamic processes around land markets and the use of land resources for different purposes, the legitimate interests and rights of land users such as small-scale farmers are guaranteed?**

22. Under international human rights law, expropriation of privately owned land is generally possible under four conditions:

- (1) it must be regulated by law and follow authorized legal procedures;
- (2) there must be a “public purpose” or “public interest” in expropriating the land, such as the building of a major infrastructure that serves the public welfare;
- (3) the eviction must be reasonable and proportionate to the public welfare objective pursued; and
- (4) the landowner is granted full, fair, and equitable compensation, which generally means that he or she should be allowed to resettle on land of at least commensurate quality, size, and value (for a more detailed set of prescriptions, please see the Basic Principles and Guidelines on Development-Based Evictions and Displacement, presented in the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Annex 1, UN doc. A/HRC/4/18 (2007), especially para. 21).

23. The notion of “public purpose,” in this regime, plays a central role. However, this notion

is frequently abused, since a clear and uncontested definition of the term is lacking. Whereas the public authorities should be required to prove that the expropriation serves the public interest, in practice, the burden of proving that the expropriation is not in the public interest most often falls on the victims of eviction, if and when they choose to challenge the eviction before the court system.

- 5. How to best assess what type of activity qualifies as being in the “public interest”? How to make sure that the notion is not manipulated by public authorities? How to guarantee effective access to remedies in cases evictions are carried out without proper recognition and protection of legitimate land users?**

#### **Panel 5: Land rights and conflicts: land in transitional justice and post conflict situations**

24. Both empirical and theoretical evidence demonstrate the strong links that exist between conflicts, including armed conflicts, land and the enjoyment of economic, social and cultural rights as protected under the Covenant. Sometimes, land problems, especially those related with deep unequal distribution of land tenure, can be one of the causes of the conflict; in other cases, the conflict leads to forced displacements, land grabbing and land dispossession, especially of populations in vulnerable situations, such as peasants, indigenous peoples, or ethnic minorities. Both situations undermine the enjoyment of Covenant rights (particularly the right to food and the right to housing) for these populations. For those reasons, peace studies also suggest that addressing these land issues might be crucial for achieving a stable peace. However, at the same time there are tensions and dilemmas in these contexts: should States prioritize restitution or redistribution? Or, on the contrary, should States prioritize other rural development strategies, for instance, based on the development of industrial agriculture, with the support of private investment from agribusiness?

25. In that context, several questions arise:

- 1. During conflicts: How to protect land tenure of peasants, indigenous peoples, and ethnic minorities in order to avoid or at least reduce their forced displacement and land dispossession? Are there comparative experiences that the Committee should take into account in this field, either because of their success or because of their failures?**
- 2. During transitions: Is it necessary that transitions from conflict to peace deal with the restitution of land and property to the populations that were dispossessed of their land? Should transitional mechanisms seek, at least in certain cases, to achieve land redistribution, as part of broader agrarian reform schemes? Are these objectives (restitution and redistribution) compatible? What are the relevant international human rights standards in this field, and which framework do they**

**impose to such processes? Which comparative experiences should the Committee take into account in this field, either because of their success or because of their failures?**

- 3. In post conflict situations: Is it necessary to establish specific mechanisms to ensure the sustainability of land tenancy of populations whose land has been restituted, or who have received land through a rural reform mechanism?**
- 4. Are there other relevant questions that should be addressed by the Committee in this field?**

#### **Panel 6: Land under changing environmental conditions and climate change**

26. The most recent Special Report of the Intergovernmental Panel of Experts on Climate Change (IPCC), presented on 8 August 2019, emphasizes that human use directly affects more than 70% of the global, ice-free land surface. Since land also plays an important role in the climate system, how we use land can have a decisive impact on our ability to mitigate climate change, in accordance with the requirements of the UN Framework Convention on Climate Change and the Paris Agreement adopted at the 21st Conference of Parties to the UNFCCC, which commit States to collectively limit warming to 1.5°C or well below 2°C.

27. According to the IPCC, agriculture, forestry and other land use (AFOLU) activities accounted for around 13% of CO<sub>2</sub>, 44% of methane (CH<sub>4</sub>), and 82% of nitrous oxide (N<sub>2</sub>O) emissions from human activities globally between 2007 and 2016, representing 23% of total net anthropogenic emissions of GHGs. At the same time, the natural response of land to human-induced environmental change caused a net sink equivalent to 29% of total CO<sub>2</sub> emissions during 2007-2016. However, the ability for land to help regulate the climate is now at risk as a result of climate change. Sustainable land management, on the other hand, can prevent and reduce land degradation, maintain land productivity, and sometimes reverse the adverse impacts of climate change on land degradation, and contribute to mitigation and adaptation.

28. In this regard, the IPCC notes that: "Appropriate design of policies, institutions and governance systems at all scales can contribute to land-related adaptation and mitigation while facilitating the pursuit of climate-adaptive development pathways. Mutually supportive climate and land policies have the potential to save resources, amplify social resilience, support ecological restoration, and foster engagement and collaboration between multiple stakeholders" (IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse gas fluxes in Terrestrial Ecosystems. Summary for Policymakers - Headline Statements (2019), para. C1). The approved Summary for Policymakers of the IPCC's Special Report notes the relationship between the governance of land tenure and the ability for land to better fulfil its role in climate regulation:

*C1.2. Insecure land tenure affects the ability of people, communities and organisations to make changes to land that can advance adaptation and mitigation (medium confi-*

*dence). Limited recognition of customary access to land and ownership of land can result in increased vulnerability and decreased adaptive capacity (medium confidence). Land policies (including recognition of customary tenure, community mapping, redistribution, decentralisation, co-management, regulation of rental markets) can provide both security and flexibility response to climate change (medium confidence).*

29. Similar conclusions were reached in 2018 by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), in its Thematic assessment of land degradation and restoration approved at its sixth session (Medellin, Colombia, 18-24 March 2018):

*Evidence shows that customary practices and indigenous and local knowledge are used within local, tribal or indigenous communities for sustainable land management. Formalizing customary practices requires the adaptation of policies based on multi-stakeholder participatory approaches towards restoration of degraded lands. The use and development of community protocols can play an important role in advancing the respect of customary norms in formal decision-making. Participatory and stakeholder engagement approaches can lead to co-development of restoration responses and jointly agreed prioritizations, making it easier to identify opportunities for collaborative responses that harness synergy.*

30. A section of chapter 8 of the IPBES report is dedicated to securing land rights. It notes the following:

*Secure rights to land of rural communities (indigenous and non-indigenous) and of their members are considered as an essential contribution to the realization of human rights such as the rights to adequate food, water, health and housing; even though a human right to land has not yet been recognized in international human rights law [...]. Secure land rights are also inextricably linked to land degradation and restoration issues [...]. At the same time, the human rights principle of participation in decision-making plays an essential role for securing land rights and in the responsible governance of land and natural resources [...]. Institutional competencies for the development of effective participatory processes are hence a core element of land tenure security and policy responses regarding land degradation. (para. 8.3.2.1 Securing land rights).*

31. Against this background, the following questions arise:

- 1. How can the potential of strengthening customary forms of tenure and participation of local communities in the governance of land and natural resources be maximized in order to reduce land degradation, accelerate land restoration, maintain land biodiversity and thus its ability to fulfil its function in the regulation of climate?**
- 2. What lessons can be learned in this regard from co-management schemes, community mapping, or other innovative community-based solutions?**
- 3. What does a rights-based approach to the governance of land and natural resources consist in, and what is the added value of such an approach?**

- 4. How can adaptation policies be designed to ensure that legitimate land rights are respected and not overseen?**
  
  - 5. How can regional and spatial planning be adjusted when climate impact influences land use patterns? How can respective processes of change be organized in a participative way?**
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