**CONTRIBUTION TO THE DRAFT GENERAL COMMENT NO. 26 (2021) ON LAND AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

15 August 2021, Chiang Mai, Thailand

The Asia Pacific Forum on Women, Law, and Development (APWLD) welcomes the opportunity to submit a written contribution to the Draft General Comment N.26 on Land and Economic, Social and Cultural Rights. We thank the Committee for the call for contributions for a comprehensive Draft recognising many peoples' and women’s issues in relation to land and the fulfilment of their rights guaranteed in the Covenant. From the perspective of grassroots women in Asia and the Pacific, we submit the following inputs and comments on the Draft, particularly relating to the recognition of women’s land rights and the accountability of States and corporations for the infringement of such rights.

APWLD is the leading network of feminist organisations and individual activists in Asia and the Pacific. Our 252 members represent groups of diverse women from 29 countries in Asia and the Pacific. Over the past 34 years, APWLD has actively worked towards advancing women’s human rights and Development Justice[[1]](#footnote-1). We are an independent, non-governmental, non-profit organisation and hold consultative status with the United Nations Economic and Social Council since 1998.

We have been working on women’s access to and control over land and resources, particularly though our Feminist Participatory Action Research (FPAR) that aims to develop capacity, tools and resources that support rural, indigenous, migrant and urban poor women (RIMUP) to demand their rights on land, water, soils, biodiversity and other natural resources.

**On non-discrimination and equality**

We note and appreciate the recognition of women as among the groups often discriminated against in the governance of land tenure in paras. 16 and 17. It is true that women still represent a significant minority in the total number of holders of titles: in Nepal, for instance, nearly 98 percent of economically active women work in the agriculture sector but only 8.1 percent women are agricultural landholders; while in Bangladesh, 78 percent of women participate in agricultural activities but only 4.6 percent women own agricultural land.[[2]](#footnote-2)

With reference to the concept of “legitimate tenure rights holders” introduced in para. 19, we submit for consideration in enhancing this narrative that it should focus more broadly on women’s legitimate tenure rights rather than predominantly on women’s property rights, in the context of non-discrimination and equality. Relative to this, APWLD notes the following working definition of “women’s land rights” as proposed by UN Women and OHCHR: [[3]](#footnote-3)

*“Women’s rights to land and other productive resources” or “women’s land rights” mean the ability of women to own, use, access, control, transfer, inherit and otherwise take decisions about land and related resources, as well as women’s rights to land tenure security (including community, customary, collective, joint and individual tenure). They also encompass rights to meaningfully participate in discussions and decision-making on land law, policy and programming throughout the cycles of assessment and analysis, planning and design, budgeting and financing, implementation and monitoring and evaluation.”*

Broadening the discussion to women’s legitimate tenure rights shall further reveal how discrimination and inequality in the enjoyment of rights that women experience arises not only from discriminatory laws, policies and customs relating to land ownership, but perhaps more so from deliberate acts by States and corporations of land- and resource-grabbing as well as larger neoliberal globalisation policies.[[4]](#footnote-4)

For example, In Lao PDR, there has been the trend of the transfer of land from private households to companies, and the government passed laws to accommodate the transfer.[[5]](#footnote-5) The resettlement law passed by the Laos government in 2019 was heavily criticised by the CSOs given the formalisation of extremely broad powers to relocate people to accommodate private commercial projects while the current legal framework and ongoing draft land law have failed to sufficiently protect the land tenure of people who live in forests, of women, of those who practice shifting cultivation, and of those who rely on collective land.[[6]](#footnote-6)

Moreover, it should be emphasised that eviction from traditional agricultural lands affects women more gravely than men. Women have tended to assume and try to maintain their roles in agricultural work after eviction through the process that has been known as the ‘feminisation’ of agriculture[[7]](#footnote-7) while the men have had more opportunities to work elsewhere. As such, equal enjoyment of Covenant rights by women requires that women’s land rights beyond property ownership are recognised.

*Recommendations*

* That the narratives on States’ obligations to respect and protect legitimate tenure rights in paras. 19-20 and 29, respectively, including the need to recognise customary, collective, and traditional tenure rights, be woven more closely with paras. 16 and 17 to fully clarify States’ obligations on non-discrimination and equality with regard to land for women; and
* That the Committee consider, if not explicitly refer to, the working definition of “women’s land rights” as proposed by UN Women and OHCHR in enhancing the narrative on women’s legitimate tenure rights in paras. 16 and 17.

**On State and corporate accountability for the infringement of land rights**

Relative to States’ obligations under the Covenant as relates to land (Section III-C, particularly the obligations to respect and protect) as well as in armed conflicts and post-conflict situations (Section IV-A), we note the need for stronger language on prohibitions for when States themselves perpetrate military aggression against peoples, for instance in cases of forced displacement of ethnic minorities and militarisation of communities. Such aggressions lead not only to violations of land rights but also of fundamental human rights, and they invariably affect women and children more severely.

In one case well-documented by APWLD and the UN Special Rapporteurs on the rights of indigenous peoples and the human rights of internally displaced persons, hundreds of Lumad (indigenous peoples in the island of Mindanao in the Philippines) families had been forced to seek sanctuary in evacuation centers since 2014 due to the intense militarisation of their ancestral homeland, the Pantaron Mountain Range. The Lumad have been the target of sustained persecution by the Philippine government due to their opposition to large-scale mining on their ancestral lands and accused of ties to the armed revolutionary movement in the country.[[8]](#footnote-8) The military occupation of their lands and their forced eviction are in violation of provisions in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Yet the Lumad have had no recourse as they were forced to remain in the evacuation centers even during the COVID-19 pandemic.[[9]](#footnote-9) As one Lumad woman notes, through APWLD’s FPAR journey, in the Pantaron Mountain Range “[we had] so many fruits, vegetables, and herbal medicines. [In the evacuation center,] our food became even more sparse because of the government’s neglect for us.”[[10]](#footnote-10)

In many such cases, military force or the threat thereof is deployed against communities resisting state development projects or corporate takeover of lands, threatening their traditional food sources and livelihoods.[[11]](#footnote-11) We note that the Draft accounts for such circumstances where business entities and private investments in the context of large-scale land acquisitions risk violating Covenant rights, and that States should, among others, adopt a legal framework requiring business entities to exercise human rights due diligence (paras 31-32). However, similarly to when States themselves perpetrate military aggression against peoples, we note that stronger and more explicit prohibitions against corporate land-grabbing, in the context of State enforcement and accountability, may be required.[[12]](#footnote-12) For instance, similar in form to the final sentence of para. 32, States must refrain from passing the legislation or promulgating policies that enable corporate land-grabs and impair the State’s capacity to exercise regulation over corporate activities and provide for stronger penalties for corporate misconduct in this regard.

As the Draft also notes, land conflicts can be one of the root causes or a trigger of armed conflict—in some cases to which States themselves are party, and thereby are also perpetrators of land rights violations. Such circumstances inevitably impede the fulfilment of Covenant rights particularly for rural and indigenous women.

To address the issues of accountability of the state as primary duty bearers in upholding human rights, the Draft should recognise the states’ obligations and accountability for certain forms of forced displacement in the armed conflict under the international humanitarian law and criminal law. The forced displacement of the civilian population is prohibited under the Geneva Conventions of 1949 and their Additional Protocols of 1977. The extensive destruction and appropriation of property that are not justified by military necessity in the contexts of both international and non-international armed conflict are also the breach of Geneva Conventions. Furthermore, it can constitute as war crime under the Article 8 of the Rome Statute of the International Criminal Court[[13]](#footnote-13) and up for further international investigation, tribunal and prosecution of individuals.

*Recommendations*

* That the Draft pronounces more strongly for States’ accountability in such situations where States themselves are perpetrators of land rights violations or when they abet or fail to act against corporate land grabs, resulting in gross human rights violations and impairment of Covenant rights of women and their communities. States’ accountability under international humanitarian and criminal law should be also intensified in the Draft.
* That, relative to the final sentence of para. 32, the Draft may additionally refer to the Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, in particular on the duty of lenders and/or borrower states to conduct a credible ex-ante and ex-post Human Rights Impact Assessment (HRIA) of loans and economic policies.[[14]](#footnote-14) Such a HRIA, understood for the purposes of said report, shall constitute a de facto Free, Prior and Informed Consent (FPIC) mechanism not only applicable for indigenous peoples but for women and their communities in general, to protect them from investments and other such activities that endanger Covenant rights;[[15]](#footnote-15)
* That the Draft should also put the emphasis on the state’s responsibility to conduct the human impact assessment which covers the ex-ante, regular, and ex-post impacts of trade and investment agreements and refer to the Guiding principles on human rights impact assessments of trade and investment agreements developed by the Special Rapporteur on the right to food in 2011. The Guiding Principles states that the State has a duty to prepare human rights impact assessment of trade and investment agreements prior to the conclusion of the agreements and in time to influence the outcomes of the negotiations and, if necessary, should be completed by ex post impact[[16]](#footnote-16)
* That the Draft to consider, in Section V. Remedies, referring to the UN Guiding Principle of Business and Human Rights[[17]](#footnote-17)and highlight the States’ extraterritorial obligation for any human rights violations conducted by the States of their business enterprises; and
* That the Draft may also explore the inclusion of remedies (Section V) for cases where States are responsible for land rights violations as well as for attacks on human rights defenders (para 53), which may also cover corporations for when States fail to hold them accountable for violations on land rights. Particularly regarding the latter, the authors may consider taking note of the process that has been undertaken by the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, established by virtue of Human Rights Council Resolution 26/9 (2014), on developing a legally binding instrument for holding corporations to account for human rights abuses.[[18]](#footnote-18) The second revised draft of said instrument recognises the distinctive and disproportionate impact of business-related human rights abuses on women and girls, among other groups, and emphasises the need for States and business enterprises to integrate a gender perspective in all their measures. [[19]](#footnote-19)

**On the recognition of women’s right to land**

We welcome the authors’ appreciation that, while the Covenant does not affirm a self-standing “right to land,” “for certain groups, such as peasants, the treatment of their access to land and other productive resources is so important for the realization of several Covenant rights that it functionally equates with a right to land” (para. 52). We also acknowledge the Draft’s unequivocal statements in favour of agrarian reform and its recognition that women are often discriminated against in agrarian reform and other land distribution schemes, referencing in particular the ESCR Committee’s General Comment No. 16 (2005), which states that “women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so.”

In this regard, we propose that para. 52 on “Peasants’ Rights” include an explicit recognition of women’s right to land, as well as an affirmation of the essential nature of agrarian reform in the fulfilment of peasants’ land rights. This shall recognise the distinct needs and roles of peasant women and women working in rural areas in relation to land as compared to men, such that, as noted earlier in relation to the ‘feminisation’ of agriculture and in consideration of the multiple burdens borne by women including unpaid care and domestic work, access to land and other productive resources may be even *more* important for the realisation of their Covenant rights.[[20]](#footnote-20) Further, based on the statements that the Draft has made throughout the document on the importance of agrarian reform, reaffirming it in this paragraph links it more strongly with the notion of peasants’, and women’s, right to land, and reinforces the guidance for States to ensure equal, if not preferential (with reference to para. 48), guarantees on secure land tenure for women. An instrument that explicitly recognises women’s right to land in relation to fulfilling their Covenant rights shall also serve as a powerful tool for women’s movements to hold States accountable and push for structural changes for the benefit of women and their communities.

*Recommendations*

* That para. 52 on “Peasant Rights” include an explicit recognition of women’s rights to land, for which the working definition proposed by UN Women and OHCHR as noted above may be considered; and
* Further, that para. 52 reaffirm the essential nature of agrarian reform in the fulfilment of peasants’ and women’s right to land, in relation to the Draft’s statements in favour of agrarian reform in paras. 10 and 35-36, among others, with particular emphasis on equal fulfilment of women’s rights to land in relation to men.

1. Development Justice offers an alternative to the dominant, extractive model of development. It was framed by APWLD and adopted as the unifying position of civil society in the Asia Pacific region engaging with the Post-2015 sustainable development agenda. It is framed by five foundational shifts: (1) redistributive justice; (2) gender and social justice; (3) economic justice; (4) environmental justice; and (5) accountability to peoples. For more information on Development Justice, see more, Asia Pacific Forum on Women, Law, and Development (APWLD) (2019). *Breif on Development Justice*. https://apwld.org/wp-content/uploads/2019/07/2019\_Development\_Justice\_Brief\_update.pdf [↑](#footnote-ref-1)
2. United Nations, Economic and Social Commission for Asia and the Pacific, *Gender, the Environment and Sustainable Development in Asia and the Pacific*’ (Bangkok: United Nation, 2017) [↑](#footnote-ref-2)
3. The United Nations Entity for Gender Equality and the Empowerment of Women (UNWOMEN), the Office of the United Nations High Commissioner for Human Rights (OHCHR), *Realizing Women’s Rights to Land and Other Productive Resources (second edition)* (New York Geneva, UNWOMEN, OHCHR, 2020), available from <https://www.unwomen.org/en/digital-library/publications/2020/10/realizing-womens-rights-to-land-and-other-productive-resources-2nd-edition> [↑](#footnote-ref-3)
4. Through its Feminist Participatory Action Research (FPAR) on Women’s Rights to Land and Resources, APWLD has compiled case studies from partner organisations across the region on how such acts and policies threaten and violate women’s land rights. [↑](#footnote-ref-4)
5. United Nation, Human Rights Council, *Statement by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights on his visit to Lao PDR, 18-28 March 2019.* 28 March 2019, <https://www.ohchr.org/Documents/Issues/EPoverty/EOSVisitToLao28Mar2019_EN.pdf> [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. Olivier De Schutter, the former special rapporteur on the right to food, describes the ‘Feminization of Agriculture in his thematic report on Women’s rights and the right to food that ‘Due to prevalent societal norms and gender roles, their higher average levels of education, and the fact that they are less constrained, men are often better placed to seize opportunities arising from employment creation in the industry and services sectors. The result is that, with some exceptions (e.g. women migration for household work), men tend to migrate first from rural areas, for longer periods and to further destinations. Women stay behind in the village – especially relatively older women, beyond 35 years of age, who are poorly educated and less independent – to take care of the children and the elderly, and increasingly, also to tend the family plot of land.’ See more, United Nationd, Human Rights Council, *Report submitted by the Special Rapporteur on the right to food, Olivier De Schutter, Women’s rights and the right to food*’ A/HRC/22/50 (24 December 2012), available from <https://undocs.org/A/HRC/22/50> . [↑](#footnote-ref-7)
8. Asia Pacific Forum on Women, Law, and Development (APWLD) (2021). *Forthcoming Land FPAR regional report*. See also, A/HRC/30/41, and A/HRC/32/35/Add.3. [↑](#footnote-ref-8)
9. The UNDRIP prohibits the forceful displacement of indigenous peoples (Article 10) as well as military activities on indigenous territories (Article 30). See General Assembly Resolution*, United Nations Declaration on the Rights of Indigenous Peoples,* A/RES/61/295 (13 September 2007), available from https://undocs.org/A/RES/61/295 [↑](#footnote-ref-9)
10. Sabokahan Tomo Kamalitan (Unity of Lumad Women),Asia Pacific Forum on Women Law and Development (APWLD), *FPAR report, Amplifying the Voice and Unified Action of Lumad Women in Defense of their Ancestral Land, Food and Resources within the Pantaron Mountain Range and experiences during the COVID-19 pandemic.*  [↑](#footnote-ref-10)
11. In Pakistan, for instance, “many people have been sent to jail and other have been persecuted through different means” for resisting corporate land-grabbing of community lands. In another case, women farmers in Ban Sapwai, Thailand face imprisonment for alleged encroachment on reserved forest lands, which they have tilled for their livelihood long before the lands were declared as such. APWLD had previously joined other organisations in submitting an amicus curiae brief to the Supreme Court of Thailand in defense of women farmers’ rights. See more, Roots for Equity, Asia Pacific on Women Law and Development (APWLD), *FPAR report: Investigating the Impact of Corporate Control and Land Grabbing on Lives of Rural Women in Hattar and Kamilpur*. and, Asia Pacific on Women, Law, and Development (APWLD). (12 June 2019). *Press Release: Drop All Charges Against Land and Human Rights Defenders from Ban Sapwai, Thailand*. <https://apwld.org/press-release-drop-all-charges-against-land-and-human-rights-defenders-from-ban-sapwai-thailand/> [↑](#footnote-ref-11)
12. In one recent pronouncement, the Special Rapporteur on the Rights of Indigenous Peoples notes how “large-scale development projects including dams, mining, monocrop plantations and logging are increasing in [Asia] and causing serious human rights violations as indigenous peoples lose their traditional lands and resources... States must take measures to prevent violence and the criminalisation of indigenous peoples arising from the exercise of their rights and the defence of their lands and territories. Strengthening the regulation of private companies is essential …” See The Office of the United Nations High Commissioner for Human Rights (OHCHR*), Land-grabbing in Asia displaces indigenous peoples and destroys environment, says UN rights expert*. 8 September 2020 , <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26213&LangID=E> [↑](#footnote-ref-12)
13. The Office of the United Nations High Commissioner for Human Rights, *Forced Evictions: Fact Sheet No. 25/Rev.1* (New York and Geneva: United Nations, 2014), available from <https://www.refworld.org/docid/5566d6744.html> [↑](#footnote-ref-13)
14. United Nations, Human Right Council*, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, Guiding principles on foreign debt and human rights*, A/HRC/20/23 (10 April 2021) Para 40. [↑](#footnote-ref-14)
15. ibid. Para. 41 of said report states: “For the purposes of these principles, a HRIA is understood as a systematic process, undertaken by an independent body with the full and informed participation of affected communities, based on the normative framework for international human rights law, which aims to measure the impact of an activity or project on the realization of human rights.” Moreover, in the Guiding principles on human rights impact assessments of trade and investment agreements developed by the Special Rapporteur on the right to food emphasize throughout the guideline the state’s responsibility to involve in the human rights impact assessment process the effective, free, active, and meaningful participation of all stakeholders affected by the agreement. For example, in the section 6.3, it is indicated that the process of setting priorities must involve such participation of all stakeholders, including the poorest and most vulnerable segments of the population and women, [↑](#footnote-ref-15)
16. United Nations, Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier De Schutter, Guiding principles on human rights impact assessments of trade and investment agreements,* A/HRC/19/59/Add.5. (19 December 2011). [↑](#footnote-ref-16)
17. United Nations, *Guiding principles on business and human rights : implementing the United Nations "Protect, Respect and Remedy" framework* (New York and Geneva: United Nations, 2011), available from <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> [↑](#footnote-ref-17)
18. United Nations Human Rights Council. (2020, September 8). *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*. United Nation Human Rights Council. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26213&LangID=E> [↑](#footnote-ref-18)
19. Human Rights Council, Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, *OEIGWG Chairmanship second revised draft, LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES*. (6 August 2020), available from <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx> [↑](#footnote-ref-19)
20. As noted by UNWOMEN and OHCHR, “a positive correlation exists between ensuring women’s land rights and their enhanced enjoyment of a broad range of rights… Women acquire more power and autonomy in their families and communities as well as in their economic and political relationships. By diminishing the threat of forced eviction or poverty, direct and secure land rights boost women’s bargaining power in the home and improve their level of public participation.” See above 3. [↑](#footnote-ref-20)