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**Comments on Draft General Comment No. 26**

**The Center for Water Security and Cooperation[[1]](#footnote-1)**

**General Reflections**

The current draft General Comment does not adequately address water and its critical importance to land rights. Water has a vital role in land use, and land use can also have a profound impact on water supply and quality. By not addressing water management and its relation to productive land use, the General Comment does not strike the needed balance between land rights and overall water security, which may encourage problematic trade-offs. This balance is particularly important as states seek to meet the standards set in Sustainable Development Goal 6 on “clean water and sanitation for all.”[[2]](#footnote-2) Addressing water fully in the General Comment will also improve land security. Often, the value of land is determined by the presence of water because water is necessary for all productive land uses including agricultural,[[3]](#footnote-3) industrial,[[4]](#footnote-4) commercial, energy,[[5]](#footnote-5) and domestic. Without water, a land right may ultimately be an illusory right.[[6]](#footnote-6) Therefore, the availability of land, how productive it is, the advisability of granting tenure, and what it can be used for all reflect significant water issues, rather than primarily land rights issues.[[7]](#footnote-7) Clarifying water’s role in land rights will encourage States to sustainably manage their water through planning and collaboration, allowing the goal of increased land security to be met.[[8]](#footnote-8)

Clearer incorporation of water also requires a more nuanced balancing of the individual human rights and the legal property rights that are also implicated. Land and water rights must be carefully coordinated in a regulatory structure and in a human rights framework, because each set of rights affects the other’s availability and quality. Failing to consider the implications of land and water rights together will undermine the efforts of states who are trying to sustainably manage these two interconnected resource systems. There needs to be a clearer path for States hoping to avoid conflicting regimes. Conflicting human rights directives, or directives that undermine existing water rights, may undermine the stability of existing land and water regimes.

While the import of land rights is critical, and may even be key to protecting land resources, ending conflict, redressing historical inequities, preserving indigenous peoples and cultures, and other important development goals, these cannot be traded against preserving clean and sufficient water for all. Water is necessary for survival and life, and it must be preserved and protected. Land does allow for people to thrive, develop and grow, and the importance of land rights is great. But water is the key to useable, habitable land and to a broader sustainable society and state. Water is the foundation on which the right to land and land rights are built, and as such it must be the starting point in this General Comment.

**Specific Comments**

As noted above, the General Comment does not accurately reflect the complex relationship between land and water: “the right to land is an important precondition for the… rights to adequate food [and] water.”[[9]](#footnote-9) In actuality, water is a precondition for an exercisable right to land; water can be provided in various ways. We also have concerns with this phrasing because water management and land management have different legal systems and institutions; conflating water rights and land rights may actually be legally inaccurate and confusing. The General Comment could more accurately portray this relationship.[[10]](#footnote-10)

Although this section does admit there are separate management systems of “natural resources,” the management of water related to land should be more clearly addressed.[[11]](#footnote-11) The General Comment must include more context regarding the importance of water to “arable land,” “other productive resources” and “quality of land” so the reader understands the connection.[[12]](#footnote-12) To provide this background, the following language could be added:

*The productivity and quality of land is dependent on water supply. Without water, arable land becomes arid, forests and wetlands die, and the land becomes uninhabitable to humans. The continuing depletion and improper distribution of water leads to reduced land productivity and insecure land rights because a right to land without water is a right to land with little value or use.[[13]](#footnote-13) Sustainably managed water is a vital component to meaningful land use. In order to combat the depletion and degradation of productive land, it is imperative to plan land rights and use in accordance with the associated water burden, including the importance of those uses to human survival. Water rights management is driven by the goal of sustainable allocation. Both the right to land and the right to water requires a different level of flexibility, management, protection and monitoring to achieve its goal.[[14]](#footnote-14) The legal rules that manage land and water are necessarily different because of varying goals and needs and must be coordinated to ensure land productivity and water sustainability. States should implement robust planning, monitoring, accounting, and managing systems to preserve water and protect the land and its value.[[15]](#footnote-15) States should also include sustainable water management in their efforts to protect land rights by making water a prerequisite consideration in policy concerning land rights and use.*

Finally, the General Comment must address the need for water in its environmental protection recommendations. Despite the preservation of “forests, wetlands, and grasslands” being dependent on water, the General Comment does not mention water management as a necessary component to preserving these ecosystems. [[16]](#footnote-16) The following language should be added to address this issue: “In order to preserve the water necessary for biodiversity and protect ecological environments that are critical to land rights, States should implement river basin plans, priority setting, water resource assessments, sustainable water withdrawal policies, and efficient use and minimum flow requirements.[[17]](#footnote-17)

Provisions in the Covenant Relating to Land

Land use affects water quality from pollution and availability from increased consumption. The General Comment needs to better limit the scope of land use and rights by addressing these impacts. The broader impact of formalized land rights must be included by adopting the following language: “Land rights may also encourage higher water consumption and increased pollution from new or expanded land use. To maintain the availability and quality of water for all other users in that basin, States must consider the intended use of the land and its impact on water availability and quality when formalizing land rights.”

Obligations of States parties under the Covenant

The obligations of States parties under the General Comment must include a directive for States to respect, protect, and fulfill water obligations as well. Currently, the draft leaves out water from the State’s obligations which will leave the land vulnerable to degradation and lower yields.

The General Comment must create opportunities for public engagement and oversight to protect water security and the viability of land. The draft does not advise States to coordinate with other water users when distributing land rights, despite the effects land and water use have on all other users in the basin and the need to protect these rights as well. The same laws, policies, and procedures to promote participation and transparency in land rights, must also be applied to the water use associated with the land right. The draft should be changed to include this responsibility: “States are also obligated to ensure other water users are not disadvantaged by newly allocated land rights, including the obligation to act transparently, ensure meaningful public consultation and participation, particularly for marginalized communities. States must also regularly review and publish information on these uses to create opportunities for public participation and enhance accountability.”

The General Comment creates an obligation of State parties to protect land rights. For these land rights to be concrete, proper water management must be required. First, dispossession of land through force and eviction should be expanded to include displacement due to inadequate water.[[18]](#footnote-18) To fix this, include “or a threat to the human right to water” after “other threats to land” when discussing “measures to ensure that all persons possess a reasonable degree of security in relation to their relationship with land.”[[19]](#footnote-19) In the event of relocation, the “alternative accommodation” must include a “sufficient quantity and quality of water to meet basic needs now and in the future” under the list of public services that should be provided.[[20]](#footnote-20)

The General Comment should include sustainable water management as a necessary component to ensuring that land-based investments are responsible. The General Comment should include “availability of sufficient quantity and quality of water for present and future needs” as part of the “clear standards and protections” needed for large-scale land acquisitions. States should consider water availability and quality when approving large-scale transactions.[[21]](#footnote-21)

Within the State’s obligation to fulfill, States should be called upon to manage and educate rights holders about sustainable water practices alongside land preservation practices. In addition to support for small, family-owned farms through marketing opportunities and the pooling of machines, States should provide “support sustainable water practices through policies that educate small agricultural users and encourage water preservation through education and incentives."[[22]](#footnote-22) Additionally, the draft should ensure that “the State should engage in long term planning which includes water accounting, minimum flow levels, and reserves for environmental protection and sustainability” as part of their land practices.[[23]](#footnote-23) These changes will ensure that the General Comment more successfully protects the productivity of land.

The General Comment should require robust transnational collaboration for water management. There are many water basins that traverse international borders that impact land in multiple States. This requires extensive cross-boundary collaboration. The General Comment should reinforce the customary international law obligation to respect, protect, or fulfill any specific obligations surrounding water management in discussing international cooperation and assistance. States should be encouraged to “coordinate water use within a specific water basin across international boundaries, including data sharing, negotiating, planning, and sufficient power to ensure management of both land and water across boundaries.”

States should also be tasked with creating clear protections for water rights from third party overconsumption that will affect land rights holders. As it is, the draft directs states to ensure that a person’s “access rights to land are not otherwise extinguished or infringed by third parties... or other land-related readjustment and redistribution measures” but does not include overconsumption of water as a threat to land rights.[[24]](#footnote-24) In order for the General Comment to have an impact on water and therefore land security, the remedies section must provide an avenue to resolve conflicts over water disputes fairly and for the good of all. Shared water resources are especially susceptible to disputes and exploitation because each user’s consumption and discharge has a direct impact on the quality and quantity of water available for other users in the basin. Therefore, the following language must be added: “States parties should ensure that they have effective administrative and judicial systems in place to prevent and resolve conflicts relating to water use. States should create or support a robust water accounting system with water rights that are responsive to changing availability and priorities. These systems should have the capacity to timely and effectively address public complaints of overconsumption or pollution, including through an enforcement mechanism that monitors and ensures compliance.” This includes more dynamic regulation to address climate change, the inclusion of meaningful remedies that ensures access to water, and an overall requirement to regulate, including through the application of the “polluter pays” principle, where necessary.[[25]](#footnote-25)

**Conclusions**

The right to land and water are indelibly and inextricably linked, and the rights regimes that protect them must be linked as well. Without these links, there is a greater likelihood that the concomitant rights will overlap and conflict in ways that undermine both land and water resources. For the right to land to have its full power, water must be considered; the right to water is similarly also linked to land rights for many peoples, though this belies issues with the implementation of the right to water by governments. Land can be a significant vehicle for many to obtain a right to water for farming or basic consumption. In truth, this represents a breakdown of legal protections for the right to water. It is critical that the right to land or land tenure does not become a means of constructively ensuring the right to water. While the right to land and the right to water are forever linked, the right to water must be maintained as a separate and **primary** goal for all States. This General Comment must say this clearly and acknowledge the linkages between the goals of the two rights regimes.

While people can live without land, they cannot live without water. We must not lose sight of that reality. Every effort must be made to ensure that the development of a right to land does not negatively impact the availability of water or the ability of States to manage and provide water. If water is not protected properly, we risk the destruction of both land and water resources, and the resulting migration, suffering and starvation of too many to count.

We are grateful for the opportunity to provide these comments and look forward to engaging you on this topic moving forward.

1. The Center for Water Security and Cooperation (CWSC) is a non-partisan 501(c)(3) organization dedicated to improving water security through improved law and governance. Many thanks to Danielle Cossey of the George Washington University Law School for her assistance in preparing these comments. [↑](#footnote-ref-1)
2. UN High Commissioner for Refugees (UNHCR), *The Sustainable Development Goals and Addressing Statelessness*, March 2017, available at: https://www.refworld.org/docid/58b6e3364.html. Additionally, General Comment 15 indicates that States have a “constant and continuing duty to move as expeditiously and effectively as possible towards the full realization of the right to water... and there exists a strong presumption against retrogressive measures taken in relation to the right to water.” Committee on Economic, Social and Cultural Rights, *General Comment 15* (2021) at Para 8. [↑](#footnote-ref-2)
3. Water is necessary for agriculture and accounts for more than 70 percent of total freshwater withdrawals and more than 90 percent of its consumptive use. FAO, *Coping with Water Scarcity: An action framework for agriculture and food security*, ix (Rome, 2012). Available at: <http://www.fao.org/3/i3015e/i3015e.pdf>. [↑](#footnote-ref-3)
4. Water is used for fabricating, processing, washing, diluting, cooling, and transporting products. Centers for Disease Control and Prevention, Other Uses and Types of Water, Industrial <https://www.cdc.gov/healthywater/other/industrial/index.html> (last visited June 17, 2021). [↑](#footnote-ref-4)
5. All major sources of electricity rely on water for resource extraction, processing, lubrication, cooling, or waste disposal. Andrew Reimers, *Plugged In*, Scientific American (May 17, 2018), <https://blogs.scientificamerican.com/plugged-in/making-electricity-consumes-a-lot-of-water-whats-the-best-way-to-fix-that/>. [↑](#footnote-ref-5)
6. The United States federal government recognized that the right to reservation land necessitates the right to sufficient water to fulfill the purpose of the reservation. Without irrigation, the land was “practically valueless.” Winters v. United States, 207 U.S. 564 (1908). [↑](#footnote-ref-6)
7. Since the pre-industrial area, more than 80% of wetlands have been lost. IPBES, *UN Report: Nature’s Dangerous Decline ‘Unprecedented’; Species Extinction Rates ‘Accelerating’, Summary for Policymakers,* <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>. Additionally, the increase of temperature, changing patterns of precipitation, and the increase of extreme weather events such as droughts or floods will affect access to land, the productivity, and the value of that land. *See* IPCC, 2019: Summary for Policymakers. *In: Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* [P.R. Shukla, et. al. (eds.)]. [↑](#footnote-ref-7)
8. From 2012 to 2020, the water crisis was consistently ranked in the top five global risks. Incidents of water-linked violence have more than doubled in the past 10 years and over 700 million people could be displaced by intense water scarcity by 2030. Kitty Van Der Keijden and Callie Stinson, *Water is a growing source of global conflict. Here’s what we need to do*,World Economic Forum (2019). [↑](#footnote-ref-8)
9. Committee on Economic, Social and Cultural Rights, *General Comment 26 Draft* (2021) at para 1. [↑](#footnote-ref-9)
10. Paragraph 20 provides that individuals and collective land tenure holders should be provided “access to, use of and control over... resources which they have traditionally owned, occupied, or otherwise used or acquired” and should have a caveat “with the exception of water” added to ensure there is no expectation that water management should be directed solely by land tenure. [↑](#footnote-ref-10)
11. *Id*. at para 6. [↑](#footnote-ref-11)
12. *Id*. at para 1, 2, 10, 11, 19, 26, 36, 38, 41, 52. [↑](#footnote-ref-12)
13. The value of land is determined by the presence of water because water is necessary for all productive land uses including agricultural, industrial, commercial, energy, and domestic. [↑](#footnote-ref-13)
14. Land is immobile and more permanent in its division, while water is constantly moving irrespective of international borders which makes planning and coordination essential to proper allocation and preservation. Once the title or right is delivered and a mechanism for legal protection is established, land rights are fairly secure, while water rights need to be constantly monitored, measured, and reallocated based on changing availability and use, which necessitates a more flexible and direct management system. Land tenure protects rights through legal recognition and strong protections for the individual user, while water management and preservation must protect the collective interests through prioritization of use and flexibility with changing availability. [↑](#footnote-ref-14)
15. Priority must be given to water required for the realisation of the human right to water, and water resources must be protected from overuse or pollution to support this right. UNHCR, *The Sustainable Development Goals and Addressing Statelessness* (Sustainable Development Goal 6), March 2017, available at: <https://www.refworld.org/docid/58b6e3364.html> [↑](#footnote-ref-15)
16. Committee on Economic, Social and Cultural Rights, *General Comment 26 Draft* (2021) at para 7. [↑](#footnote-ref-16)
17. Resource assessments, sustainable water withdrawal, efficient use, and minimum flow requirements would all help preserve these natural environments. [↑](#footnote-ref-17)
18. *See* Miletto, M., Caretta, M. A., Burchi, F. M. and Zanlucchi, G. 2017. *Migration and its interdependencies with water scarcity, gender and youth employment*. WWAP. Paris, UNESCO. Paragraph 25, 29, 45, and 46 discuss the dangers of dispossession on a person’s rights and increased conflict, but neglect the role of water availability in preventing displacement. [↑](#footnote-ref-18)
19. Committee on Economic, Social and Cultural Rights, *General Comment 26 Draft* (2021) at para 20. [↑](#footnote-ref-19)
20. *Id*. at para 26. [↑](#footnote-ref-20)
21. For example, Frederick, Maryland, USA dictates what percentage of surplus water can be directed to different types of development, and some Colorado, USA towns require proof of available water for residential development over 500 units. By linking development to water availability, States can ensure the water resource is preserved and development projects will have adequate access to water. Matthew McKinney, *Linking Growth and Land Use to Water Supply*, Lincoln Institute of Land Policy (April 2003), <https://www.lincolninst.edu/publications/articles/linking-growth-land-use-water-supply>. [↑](#footnote-ref-21)
22. Committee on Economic, Social and Cultural Rights, *General Comment 26 Draft* (2021) at para 35. [↑](#footnote-ref-22)
23. *Id*. at para 37. [↑](#footnote-ref-23)
24. Committee on Economic, Social and Cultural Rights, *General Comment 26 Draft* (2021) at para 28. [↑](#footnote-ref-24)
25. *See e.g.*, paras. 54 (Climate change), 48 (transformative remedies), 37 (duty to regulate), 32 (mitigation). [↑](#footnote-ref-25)