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SUBMISSION TO THE DRAFT GENERAL COMMENT ON LAND AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AUGUST 2021

The Danish Institute for Human Rights (the Institute) welcomes the opportunity to comment on the draft General Comment of the Committee on Economic, Social and Cultural Rights’ draft General Comment (No. 26) on land. The General Comment is a timely effort to elaborate on the Covenant rights as they relate to land.

The Institute is the national human rights institution of Denmark and Greenland. By request of the Greenlandic Parliament, Inatsisartut, and Government, Naalakkersuisut, the Institute promotes and monitors the implementation of human rights in Greenland, including by giving advice to public authorities on new legislation. In cooperation with the Human Rights Council of Greenland, the Institute monitors the situation in Greenland and drafts parallel reporting to international bodies and compiles status reports on various human rights topics. In this written contribution, the Institute provides comments on the content of the draft General Comment based on its expertise on international frameworks concerning land rights. For more information on the situation in Greenland, we refer to the submission by the Danish Institute for Human Rights to the United Nations Office of the High Commissioner for Human Rights (OHCHR) concerning the study on the right to land under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) being carried out by the Expert Mechanism on the Rights of Indigenous Peoples (31 March 2020). The Institute also encourages the inclusion of the Human Rights Council of Greenland[[1]](#footnote-1) in the further process.

## General comments

Overall, and most particularly in section C (Obligations of states), a diverse range of rights-holders is addressed in individual paragraphs. This sometimes results in the expression of rights that pertain to specific groups being conflated or expressed in an imprecise manner. Whereas the objective of this draft General Comment is to clarify the application of Covenant rights and related state obligations to land, the application of those rights can differ according to different factors and where there are different applicable international standards. For example:

Paragraph 15 (Section II, Obligations of states, non-discrimination and equality) addresses issues of use of the Commons by indigenous peoples, but also other groups such as landless rural people who may or may not be indigenous peoples in accordance with the international understanding of the term. Whereas these groups face similar issues, the frameworks pertaining to their situation may differ in a broader context. Even if Covenant rights are universal and apply to all of them, the expression of those rights may differ in different instruments and frameworks. Indigenous peoples, for example, have a specific set of rights recognised that are linked to the right to self-determination which would require addressing in a different manner. Conflating these groups also leads to gaps in the reflection of international human rights guidance pertaining to the group concerned on the issue in hand. Also addressed in this paragraph, discussion of the use of the Commons varies greatly according to different groups.

* The Institute recommends that, where possible, expressions of Covenant rights as they pertain to different groups be more clearly nuanced and explained through, where necessary, restructuring some of the paragraphs and the use of sub-paragraphs and clear references to relevant legal frameworks.

Overall the draft General Comment lacks a clear overview of different forms of land rights and is inconsistent in its referral to different forms of access to and ownership of land, thus making some of its guidance unclear. Throughout, the draft General Comment refers to ‘access to land’ or ‘access to and control over’ land as its overarching frame of reference, but the application of these terms appears inconsistent. It is also important to highlight the different means through which this can be secured (i.e., through ownership, possession, use, or access rights, participation in the benefits of exploitation, etc.) as these vary greatly, are expressed differently in different instruments, for different population groups, impact greatly on security of tenure and require different means and strategies to secure land. For example, ILO Convention No. 169 refers to rights of ownership and possession, the UN Declaration on the rights of Indigenous Peoples (UNDRIP) refers to the rights to own, use develop and control. Other instruments such as the UN Declaration on the Rights of Peasants (UNDROP) contain different nuances. ‘*Access*’ (referred to repeatedly in background and reasoning in the draft Comment, notably in the introductory section and Section C (obligations of states parties under the Covenant) at paragraphs 19, 29 and 30), is a generic term which does not adequately capture different forms of land rights for such a document.

* While we are not suggesting that the draft Comment propose a definitive typology of land rights, the Institute recommends that the draft General Comment provide more clarity on different forms of land rights from a human rights perspective and as expressed in different instruments, focussing on security of tenure as a central element.

## 2 Specific comments

The right to work (Articles 6 and 7 of ICESCR) is recognised as a specific right that can be impacted by a lack of access to or control over land and resources.

* The Institute suggests the inclusion of the right to work in the two sections which outline the different Covenant rights which are impacted by the level of access to or control over land: Section I (Introduction) and Section II (Provisions in the Covenant relating to land). Examples of international supervisory bodies who have made this link include the International Labour Organization’s (ILO) Committee of Experts on the Application of Conventions and Recommendations (CEACR) which has referred specifically to lack of access to land as undermining the ability of indigenous peoples to practise their livelihoods and traditional occupations in its Observations on a number of states’ reports under its Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

We also suggest adding the following considerations to Section I (Background) as well as in the analytical sections of the draft Comment:

* More focussed background and consideration of the implications around land rights and conservation. Whereas the draft Comment does refer in different places to the importance of land for ecosystems, potential impact on access to land due to climate change, and the importance of human rights-based approaches to conservation, it does not mention the critical role of local and indigenous knowledge in this context, the impact that lack of security of tenure can have on these communities’ ability to preserve and conserve their environment, or the frequent violations of human rights (violations of civil and political rights, dispossession, forced evictions, cutting off livelihoods, and right to be consulted) that are committed in the name of conservation and how the provisions of the Covenant apply in these contexts.
* Introducing a clearer understanding of the land needs of non-agricultural communities (pastoralists and hunter-gatherers, some nomadic groups) and the application of Covenant rights and state obligations in these contexts.
* Linked to the previous comment, we suggest also introducing the concept of territories, as it pertains to some of the aforementioned groups, and the nuances of different rights within this context.

Paragraph 4 refers to relevant international instruments that are not legally binding. Footnote 5 refers to a sentence which addresses “Other relevant soft law instruments” yet references ILO Convention No. 169 which is not a soft law instrument, and therefore requires correcting. We also suggest the inclusion of an additional paragraph on binding instruments and guidance based on those including relevant ILO Conventions, UN human rights treaties and any General Comments/Recommendations of relevance.

### Section III (Obligations of state parties under the Covenant), Part A (non-discrimination and equality)

* This section would benefit from referring to CERD General Recommendation No. 23.
* Paragraph 15 conflates a number of rights and issues. A clearer exploration of the role and recognition of customary law, or a possible separate paragraph on the topic, would help to clarify elements of this paragraph.

### Section III (Obligations of state parties under the Covenant), Part B (Participation, consultation and transparency)

This section seems to lack detail given the fundamental importance of, and significant challenges surrounding, consultation, participation and free, prior and informed consent (FPIC).

* We suggest that the document outline more clearly the components of meaningful participation, and consultation as they are expressed in different instruments as they pertain to land, including, among other things, recognition of representative institutions, good faith, timing (prior), appropriate procedures and addressing power imbalances. We also recommend highlighting the specific applicability of FPIC and its sources in international law. References to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), UNDROP and other instruments with relevant provisions are also missing from this section.

### Section III (Obligations of state parties under the Covenant), Part C (Obligations of States parties under the Covenant as relating to land)

Paragraph 19 states that “The term “legitimate tenure rights holder” was developed during the negotiations of the Voluntary Guidelinesin 2012 in order to clarify the fact that legitimate tenure rights holders include not only those with formal land titles, but also those with customary, collective or traditional tenure rights that might not be recognized by law.” This paragraph would benefit from acknowledging that this idea is also recognised in other instruments, including binding ones such as ILO Convention No. 169, and other instruments such as UNDRIP and UNDROP which both recognise that respective groups have rights to land which may not be currently protected by law. Paragraph 20 also makes the same point, but without referring to the provisions of international instruments.

Paragraph 23 states that “International law recognizes the right of indigenous peoples over the lands and territories that they have traditionally occupied”.

* We recommend to add “or otherwise used” to the end of this sentence to avoid that this is misinterpreted as indigenous peoples only retaining or having rights to actively inhabited land and not to their broader lands or territories. This additional wording is based on ILO Convention No. 169.

The same paragraph also states; “Therefore, indigenous peoples have the right to have their lands demarcated, and relocation is allowed only under narrowly defined circumstances and, *in principle*, with the prior, free and informed consent of the groups concerned.”

* The Institute recommends changing the use of the term “in principle” as it appears to diminish the significance of the use of FPIC in the relevant provisions of the UNDRIP.

The paragraph also indicates that “Both the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights have taken the view that members of indigenous communities who have unwillingly lost possession of their lands after a lawful transfer to innocent third parties “are entitled to restitution thereof or to obtain other lands of equal extension and quality”. Provisions relating to ensuring lands of equal quality and legal status are provided are also enshrined in ILO Convention No. 169.

Section on the Obligation to protect – we recommend that this section considers consultation, participation and FPIC within this context, as these are fundamental to the protection of the right to land and enshrined in numerous international legal instruments of relevance.

### Section III (Obligations of state parties under the Covenant), Part D (Extraterritorial obligations).

Paragraph 39 refers to the impact of large-scale land acquisitions and states that “In order to mitigate or prevent such situations, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security were developed and the International Finance Corporation (IFC) performance standards were updated in 2012, as were the respective World Bank safeguards, thereafter.”

* The Institute recommends nuancing the reference to IFC and World Bank safeguards as in some areas, the content of these document falls below the standard required by international human rights law.

### Section IV (Specific topics of relevance to the implementation of Covenant rights in land-related contexts), Part B (Assessment and monitoring measures)

We recommend that this section refer to rights to consultation and participation, and FPIC as fundamental components of a human rights-based approach to assessment and monitoring as an ongoing process.

### Section IV (Specific topics of relevance to the implementation of Covenant rights in land-related contexts), Part D (Peasants’ rights)

It is unclear why there is a separate section on peasants’ rights when issues and analysis pertaining to other rights-holders (indigenous peoples, women, etc) are incorporated in the body of text. This relates back to point 1 of our general comments relating to the conflation of issues and rights as they pertain to different groups through the document.

* As stated earlier, even if Covenant rights are universal and apply to all, the expression of those rights may differ in different instruments and frameworks. We recommend that throughout the document, care is taken to ensure that the specificities of specific groups of rights-holders are addressed systematically, rather than singling one group out for a specific paragraph whilst others are conflated in other sections of the document. This reflects our previous recommendation on paragraph 15.

### Section IV (Specific topics of relevance to the implementation of Covenant rights in land-related contexts), Part F (Climate change)

As with the background section at the beginning of the draft Comment, this section, it would strengthen this analysis to consider the potential human rights impact of actions to combat climate change. For example, one could refer to how carbon capture projects may impose conditions on local communities that are incompatible with their rights, or challenges relating to consultation and participation of rights-holders in actions and projects to combat climate change.

1. The webpage of the Human Rights Council of Greenland: https://humanrights.gl/ [↑](#footnote-ref-1)