

BACKGROUND NOTE FOR THE JULY 9 CONSULTATION – INPUT TO CESCR GENERAL COMMENT ON LAND

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INTRODUCTION

This brief note is meant to initiate discussion at the consultation on July 9 on the draft General Comment on Land, Economic, Social and Cultural Rights (henceforth draft G.C.).¹ The session titles indicated in this note follow the agenda for the July 9 Consultation.

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SESSION 1: NATIONAL AND EXTRATERRITORIAL OBLIGATIONS OF STATES PARTIES UNDER THE COVENANT AS RELATING TO LAND (RELATED TO PARAGRAPHS 14 TO 17 OF DRAFT G.C.)

WOMEN'S RIGHTS TO LAND

The section of the draft G.C. on non-discrimination and equality, in the context of human rights contained in the Covenant, includes provisions on women's rights as related to land (paragraphs 14-17). Several important aspects of women's rights to land, however, are missing in the text. One key dimension that has not been developed is the critical issue on *inheritance of land* denied to women due to their status in society. The G.C. needs to reference key documents from the UN that recognize the crucial importance of inheritance rights to land for women:

1 E/C.12/69/R.2, 3 May 2021 available at: <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCR-draft-GC-land.aspx>.

- (A) This issue was repeatedly highlighted by the UN Commission on Human Rights (UNCHR) in resolutions on 'Women's Equal Ownership, Access to and Control over Land and the Equal Rights to Own Property and to Adequate Housing'.²
- (B) In concert with the resolutions from the UNCHR, the former UN Special Rapporteur on Adequate Housing undertook a four-year study on Women's rights to housing, land and inheritance. One of the central conclusions of these reports was that the lack of recognition of land rights of women directly affects their RAH.³ The Special Rapporteur also highlighted the close link between violence against women and the RAH, and how the recognition of land rights for women could potentially play a positive role against domestic violence. The resolutions from the UN Commission on Human Rights that followed these reports recognize women's land rights. On several occasions the Special Rapporteur expressed concern regarding the prevalence of cultural norms and traditions that deprive women of their rights to land, inheritance and property, which in turn prevents them from accessing their RAH. Of particular concern is the reflection of discriminatory cultural and social norms in family or personal law, including uncodified laws.
- (C) The work of the UN CEDAW Committee has been referenced in the draft G.C. The CEDAW Committee, in full recognition of the limited rights women have over land and natural resources of and the discrimination they face in relation to land rights, articulates women's human right to land using several articles of the CEDAW Convention. Several important points in the Committee's General Recommendation No. 34⁴ can, however, be added to the draft G.C.:
- i. In this General Recommendation, in the section on 'Land and Natural Resources' the CEDAW Committee calls on states parties to CEDAW to 'strengthen customary and statutory institutions and mechanisms for defending or women's rights to land, water and other natural resources' (para. 58).
 - ii. In the section on 'Land and agrarian reform, land acquisition and resettlement', the CEDAW Committee urges states parties to 'give priority to rural women's rights to land when undertaking land and agrarian reforms and consider it a specific and central objective of land reform'. In this section the Committee urges the states parties to 'Recognize and include rural women's equal rights to land in any land distribution, registration and titling or certification schemes' (para. 78(b)). The

² See, for example, CHR, Resolution 2004/ 21 on Adequate Housing as a Component of the Right to an Adequate Standard of Living, 16 April 2004, UN Doc. E/ CN.4/ RES/ 2004/ 21 and CHR, Resolution 2005/ 25 on Women's Equal Ownership, Access to and Control over Land and the Equal Rights to Own Property and to Adequate Housing, 15 April 2005, UN Doc. E/ CN.4/ RES/ 2005/ 25.

³ See CHR, Study by the Special Rapporteur on Adequate Housing: Women and Adequate Housing, 26 March 2003, UN Doc. E/ CN.4/ 2003/ 55; CHR, Study by the Special Rapporteur on Adequate Housing: Women and Adequate Housing, 25 February 2005, UN Doc. E/ CN.4/ 2005/ 43; CHR, Report by the Special Rapporteur on Adequate Housing: Women and Adequate Housing, 27 February 2006, UN Doc. E/ CN.4/ 2006/ 118. For a summary of the main findings from these reports and the regional consultations that contributed to the reports, see OHCHR and UNHRC, Women and the Right to Adequate Housing at: https://www.ohchr.org/Documents/Publications/WomenHousing_HR.PUB.11.2.pdf.

⁴ See CEDAW Committee, General Recommendation No. 34 on the rights of rural women, 7 March 2016, UN Doc. CEDAW/ C/ GC/ 34.

Committee calls on states parties to give priority in allocation of public lands, fisheries and forests to landless rural women.

- iii. In the section on housing, the CEDAW Committee calls on states parties to protect women's rights to housing using measures requiring the protection of women's human right to land.

(D) This issue of women's rights to inheritance also finds reflection in SDG Goal 5, Target 5 that urges States to '[u]ndertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources..'

FORCED EVICTIONS, DISPLACEMENT, RESETTLEMENT, COMPENSATION (RELATED TO PARAGRAPHS 19-37 OF THE DRAFT G.C.)

The current global scenario is marked by a colossal scale of land grabbing for a range of reasons leading to an unprecedented number of people and communities being evicted from their homes and land. The draft G.C. recognizes the importance of guaranteeing access to land and land based resources such that people and communities are not threatened with evictions and displacement. *The draft G.C., however, does not take a 'land as a human right' approach and thus evades some critical issues facing communities across the world.* While recognizing the importance of international standards on this subject, such as the Basic Principles and Guidelines on Development based Displacement and Evictions⁵ (henceforth the Evictions Guidelines), a more comprehensive treatment of evictions and displacement, including key provisions of the Evictions Guidelines, would bring the draft G.C closer to the adverse land reality facing millions across the world.

The draft G.C needs to take advantage of the extensive recognition and substantiation, in the context of forced evictions and displacement, of the right to land in the Evictions Guidelines:

- (A) In the section on 'Implementation of State Obligations' (para. 16) the Guidelines stress the need for States to refrain from confiscating lands if this does not contribute to the enjoyment of the human right to land such as the implementation of land reform or redistribution for the benefit of vulnerable persons, groups or communities. In the same section (para. 25), the Guidelines urge States, in the context of providing legal protection against forced evictions, to take immediate measures in order to confer legal security of tenure on all those who do not have formal titles to home and land. The Guidelines (para. 26) stress, with the imperative of equal enjoyment of human rights, that such titles to housing and land are conferred on all women.
- (B) In the section on 'Preventative Strategies', the Guidelines States should take specific preventive measures to avoid and/or eliminate underlying causes of forced evictions, such as speculation in land and real estate. States should review the operation and regulation of the housing and tenancy markets and, when necessary, intervene to ensure that market forces do not increase the vulnerability of low-income and other marginalized groups to

5 Report of the UN Special Rapporteur on Adequate Housing, A/HRC/4/18, Annex 1. at: <https://www.undocs.org/A/HRC/4/18>.

forced eviction. In the event of an increase in housing or land prices, States should also ensure sufficient protection against physical or economic pressures on residents to leave or be deprived of adequate housing or land.

- (C) In the section on human rights safeguards required 'Prior to Evictions' (para. 43) the Guidelines urge States to ensure that evictions do not lead to individuals becoming homeless. The States, by adopting all appropriate measures, must ensure that alternative housing and access to productive land must be made available.
- (D) In the section of the Guidelines on human rights safeguards 'After an Eviction: Immediate Relief and Relocation' (para. 56) States are urged, in the context of compatibility of resettlement with international human rights law, to ensure timely information, and full participation in planning and implementation of affected communities in measures taken towards resettlement. The Guidelines call on States to pay particular attention to the representation in this process of indigenous peoples, minorities, the landless, women and children.
- (E) In the section on the provision of 'Compensation' (para. 60), the Guidelines stipulate that cash compensation should under no circumstances replace real compensation in the form of land and common property resources. The Guidelines state that in situations where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better. Para. 61 urges that compensation should accrue to all those evicted irrespective of whether they hold title to their property. Para. 63 urges States, in the context of estimation of economic damage to take into consideration losses of land plots and losses that would have accrued from lost wages and incomes. The Guidelines call for compensation to be based on impact and loss assessment to account for the value of business losses, equipment/inventory, livestock, land, trees/crops, and lost/decreased wages/income.
- (F) In the section on the 'Role of the International Community Including International Organizations' (para. 71) the Guidelines stress that the international community bears an obligation to promote, protect and fulfil the RAH, land and property. The international financial and other institutions must, therefore, take into account the prohibition of forced evictions under international human rights law.

In the context of the impact of evictions and displacement on particular groups, there is a key dimension missing in the draft G.C. The denial of rights to land, leads to the violation of a range of human rights of women, contained in the Covenant, including those impacted by land evictions and resulting displacement of women.⁶

⁶ As also recognised by the CEDAW Committee, in the context of the need for strong measures to protect rural women from forced evictions from their homes and lands. The Committee in op.cit. 4, General Recommendation no. 34, urges states parties to comply with international standards including the Basic Principles and Guidelines on Development-Based Evictions and Displacement.

SESSION II: SPECIFIC TOPICS OF RELEVANCE TO THE IMPLEMENTATION OF COVENANT RIGHTS IN LAND-RELATED CONTEXTS (RELATED TO PARAGRAPHS 9-37 OF THE DRAFT G.C.)

LAND RIGHTS IN URBAN AREAS

The draft G.C. makes only a passing reference to the salience of land rights in urban areas. A number of provisions in existing international ‘soft-law’ instruments can serve as a guide to ensuring the inclusion of this critical dimension in the draft G.C.

The attainment and retention of security of tenure over homes and lands is critical to the survival of millions of city dwellers across the world. In the urban context, legal recognition of land rights is often critical for protecting human rights recognised in the CESCR (such as the Right to Adequate Housing), including access to essential services and livelihoods, especially for the urban poor. Urban and peri-urban areas across the world today are scenes of violations of a range of human rights due to the inability or unwillingness of the authorities to adequately control land and housing speculation and to reverse the concentration of land ownership and hoarding of property. The privatisation of land often leads to land becoming less affordable, which has particularly affected households headed by women. Thus Security of tenure can take many forms and a very useful instrument with provisions and guidance for states, in this context, was issued by the former Special Rapporteur on Adequate Housing, Raquel Rolnick. The ‘*Guiding Principles on Security of Tenure*’ provide useful guidance for local authorities to establish a process to tackle tenure insecurity in their jurisdictions.

The Special Rapporteur outlined various forms and contexts which undermine tenure security.⁷ In these guidelines, the Special Rapporteur examined the wide range of existing tenure arrangements and existing guidance under international human rights law and asked the states to ensure security of tenure to all, irrespective of tenure type.⁸ The principles also underscored the

⁷ In section F on General remarks para 69, the report says, “Finally, while the full elaboration of the scope of —security of tenure— as recognized in the framework of international human rights law presents a range of challenges that have yet to be adequately met, the Special Rapporteur nonetheless underscores that security of tenure should be understood as encompassing, at a minimum: (a) legal protection from forced eviction, harassment or other threats; (b) recognition—legally, by authorities, but also by private actors—of the right to live in a secure place in peace and dignity; this recognition includes receiving support from authorities and equal access to and availability of all public services; (c) justiciability—in other words, security of tenure must be enforceable; to make this criterion truly effective may require the provision of legal aid to facilitate access to effective remedies; and (d) any other aspect required as a step towards the enjoyment of other components of the right to adequate housing, on an equal basis with others”. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, Human Rights Council, Twenty-second session, 24 December 2012, A/HRC/22/46, P 15.

⁸ Consistent with standing obligations of states, the Special Rapporteur urged that “All relevant laws, policies and programs should be developed on the basis of human rights impact assessments [that] identify and prioritize the tenure arrangements of the most vulnerable and marginalized,” promoting, strengthening and protecting, as appropriate, in the given context: *Possession rights: Use rights: Rental: Freehold tenure and Collective arrangements*.

need for more specific and comprehensive human rights and operational guidance on security of tenure that can be adopted in the draft G.C.

Recognition of land rights in urban areas in the draft G.C. would strengthen the global imperative for the recognition of land reform in not only rural but urban areas as well. Such a regularisation process should also include people and communities who have had no choice but to occupy land in urban areas due to migration induced by economic necessity, as a result of disasters or ethnic and armed conflict.⁹

The draft G.C. needs to also consider the recognition of land rights of urban dwellers worldwide to ensure that speculation of land is controlled and unaffordability of land that leads to gentrification, increase in homelessness and people and communities being forced to live in insecure conditions does not continue to be a reality. The draft G.C., therefore, can consider recognition, in the context of urban land rights, of the social function of land.¹⁰

SPATIAL JUSTICE AND LAND RIGHTS

The draft G.C. does not acknowledge the critical role that ‘spatial justice’ strategies can play in tackling land based deprivation and poverty. The global housing and land rights emergency is marked by multiple crisis points centred on segregation and discrimination, affordability and the severe lack of housing and land. Each of these phenomena can be tackled by adopting, as a distinct part of the human rights paradigm, the morphological approach. The draft G.C. needs to acknowledge the relevance of the ‘morphological’, ‘human geography’, ‘spatial justice’ approach, both to understand the gravity of housing and land poverty and to serve as a basis for seeking solutions.

A morphological approach to the study of poverty, e.g., why apartheid cities are being created across the world, would lend a different but critical dimension to studies on poverty. An area-based approach would also assist in knowing what policy support is necessary in what location. Tackling poverty would then also include the need for housing and land development strategies based on a human rights approach, a non-discriminatory approach to how urban and rural areas are developed that also derails the policies that lead to social exclusion and marginalisation of people and communities. The added dimension of the ‘morphology approach’ revolves around greater specificity and context that assists in better targeted interventions in the spaces and places where the marginalized live.¹¹

⁹ In this context see the provision in the Basic Principles and Guidelines on Development based Displacement and Evictions (paragraph 25) that. ‘In order to secure a maximum degree of effective legal protection against the practice of forced evictions for all persons under their jurisdiction, States should take immediate measures aimed at conferring legal security of tenure upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land’. A/HRC/4/18. Annex 1.

¹⁰ As also recognised in the New Urban Agenda, paragraphs 14b;111 a 137. See also

¹¹ For an overview of the numerous uses of the ‘spatial justice’ approach see: Kothari, M. “Addressing poverty at its base: The housing and land rights approach” in Research Handbook on Human Rights and Poverty, Martha F. Davis, Morten Kjaerum, Amanda Lyons (Eds.) Edward Elgar Publishing (2021).

As recently stated by the Executive Director of UN Habitat “Human activities generate wealth. The more concentrated wealth becomes, so particular areas of the city receive more investments than others. This phenomenon, often termed as spatial inequality, is a consequence of certain locations benefiting more than others in their access to economic opportunities and infrastructure investment.”¹²

SESSION III: REMEDIES (RELATED TO PARAGRAPHS 56-57 OF THE DRAFT G.C.)

THE ROLE OF NATIONAL LEGISLATIONS AND POLICIES

The credibility at national levels of the draft G.C. would benefit from reference to national legislations and policies that have adopted the land rights approach. Such an approach would also reinforce the link in the draft G.C. between Covenant recognised human rights, including the right to adequate housing and the right to land.¹³ Some examples of relevant national legislations are given below. These national legislations have adopted a land rights approach as well as a ‘spatial justice’ approach.¹⁴

In **Brazil** the **Brazil City Statute**¹⁵ is revolutionary in that it redefines the concept of land ownership and promotes the social dimension of land. The statute also promotes democratic participation in urban management, and provides for legal instruments to regularize informal settlements and to tax vacant under-used land. Particularly valuable from a human rights perspective is the provision in the statute that makes it mandatory for all municipalities in Brazil to designate ‘special zones of social interest’ and thereby protect the ‘right to the city’ for the cities’ marginalized people and areas.

Legislative advances in **India**, since 2013, reinforce this link between the human rights and the morphological approaches. The **Right to Homestead Act** is of critical importance as it recognizes entitlements to both the right to housing and to land. Several states in India have adopted ‘Homestead Acts’ that recognize the RAH and the right to land of landless and marginalized communities.¹⁶ This Act has been adopted in the Indian States of Madhya Pradesh and Bihar. In 2013, an attempt was also made to adopt a ‘National Right to Homestead Act’. Following a

12 See Maimunah Mohd Sharif, ‘Cities as Vanguard for Action’, 17 June, 2021 at: <https://sdg-action.org/cities-as-vanguards-for-action/>.

13 For an overview of the critical link between the right to housing and the emerging right to land see: Kothari, M. (2020). The Human Right to Adequate Housing and the New Human Right to Land: Congruent Entitlements. In A. Von Arnould, K. Von der Decken, & M. Susi (Eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (pp. 81-96). Cambridge: Cambridge University Press.

14 For more details on these legislations see op.cit. 9. Kothari M. “Addressing poverty at its base: The housing and land rights approach.

15 Instituto Pólis, ‘The Statute of the City: New Tools for Assuring the Right to the City in Brazil’ (WIEGO, 2001 39–75 (text of Brazil City Statute, Law No 10.257 of July 10, 2001) <<https://bit.ly/30f65OI>> accessed 2 June, 2021.

16 For regular updates on homestead acts see ‘Ekta Parishad’ <www.ektaparishadindia.org/> accessed 6 June, 2021. For the text of the draft National Homestead Act 2013 see: bit.ly/3jMxoLf.

campaign in 2018 by Ekta Parishad, the Indian National Movement for Land Rights, the Government of India has announced that it will reopen the issue of a national act.

In the state of Odisha, India, the Legislative Assembly enacted the **Odisha Land Rights to Slum Dwellers Act, 2017**.¹⁷ The landmark legislation aims at empowering slum dwellers in the state with security of land tenure and accessibility to a liveable habitat. The Act aims to assign land rights to eligible slum dwellers for redevelopment, rehabilitation and up-gradation of slums in the Notified Area Councils (NAC) and municipalities. The Act has two interlinked objectives: first, to improve the living conditions of slum dwellers, and second, to provide security against the threats of demolition and eviction. The Act provides for *in situ* rehabilitation in general, and offsite rehabilitation in case of land important for the public interest, land unfit for human habitation, ecologically sensitive land, or heritage land. The programme is likely to benefit one million people residing in 2,500 slums across the state over the next few years. Technical support was provided by numerous actors, including drone surveys and slum mapping, for around 100,000 households in ten districts of the state.

Another example from India, announced in April 2020, is a national programme, the **Swamitva Yojana (Survey of Villages and Mapping with Improvised Technology in Village Areas)**.¹⁸ The Yojana plans to map (through geo-spatial surveys for measuring the inhabited land in villages and rural areas) the location of landless families across India. Once the survey is complete the beneficiaries will be given rights to the land. If implemented, such a programme in concert with a national homestead act has the potential to bring about a remarkable change by securing land rights of lower income people across rural India.

17 'The Odisha Land Rights to Slum Dwellers Act' (2017) <<http://govtpress.odisha.gov.in/pdf/2017/1652.pdf>> accessed 1 June, 2021.

18 Swamitva Yojana (Survey of Villages and Mapping with Improvised Technology in Village Areas) at: <https://bit.ly/2DDyaa0>.