

Land and Economic, Social and Cultural Rights: General Comment No. 26 (2022) of the UN Committee on Economic, Social and Cultural Rights

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Land and Economic, Social and Cultural Rights

General Comment No. 26 (2022) of the UN Committee on Economic, Social and Cultural Rights

Information

Land is of fundamental importance for the realization of several rights under the International Covenant on Economic, Social and Cultural Rights (ESC-rights). For instance, ensuring that individuals and communities have secure and equitable access to, use of and control over land can be essential to guarantee the right to an adequate standard of living. In its General Comment No. 26, the UN Committee on Economic, Social and Cultural Rights specifies the State obligations to respect, protect and fulfil the Covenant rights in relation to land. This paper summarizes this General Comment.

Land is essential for the realization of many of the rights under the International Covenant on Economic, Social and Cultural Rights (hereinafter: the Covenant), particularly those enshrined in articles 1–3, 11 and 12. Secure and equitable access to land for all helps to eradicate hunger and poverty and to guarantee an adequate standard of living. In many parts of the world, land serves as the basis for social, cultural and religious practices and the enjoyment of the right to take part in cultural life, in addition to being a resource for producing food, generating income and developing housing (1).¹

However, current land use management and practises have endangered the realization of several Covenant rights: The increased competition for access to and control over land in urban and rural areas has adverse impacts on the rights of many marginalized and disadvantaged groups. Land

degradation, due to overuse, poor management and unsustainable agricultural practices, has perpetuated food insecurity and water degradation and is directly linked to climate change and its consequences, i.e., massive desertification. This has resulted in an increase in internal and cross-border migration, which, in turn, is causing tensions over the access and use of land (2). A growing awareness of this dynamic has led to the adoption of several international instruments linked to land, land governance and land use, which have shaped national policies and legislation.²

Land is essential for the realization of several Covenant rights: Firstly, the right to adequate food (art. 11), as rural lands are used for food production. Depriving people of land that they have been using for this purpose can have adverse effects on their right to adequate food (6). Secondly, the right to adequate housing (art. 11), as the

General Comments

The UN committees that monitor the implementation of international human rights treaties regularly issue documents called General Comments. In these documents, the respective committees clarify the meaning and scope of the treaty whose implementation they are charged with monitoring, setting out their interpretation of individual rights and provisions under international law. Thus, General Comments provide States parties with guidance and recommendations for implementing the treaty.

realisation of this right is contingent on secure access to land since it is land that opens up the space for housing. People who do not have secure access to land and security of tenure can easily be evicted, including forcibly, and forced evictions violate the right to adequate housing (7, 23).³

This linkage between ESC-rights and access to land and the growing awareness of the need to secure land rights prompted the Committee monitoring the Covenant to draft its General Comment No. 26, which is intended to clarify State obligations relating to the impact of access to, use of and control over land on the enjoyment of the rights enshrined in the Covenant.

State Obligations

Under articles 2 (2) and 3 of the Covenant, States parties are required to eliminate all forms of discrimination in the exercise of Covenant rights and to ensure substantive equality.⁴ States are obliged to respect, to protect and to fulfil human rights. Article 2 (1) provides that States parties should use the maximum available resources to progressively realize the rights for everyone. Participation, consultation, and transparency are key principles to achieve this, particularly in connection with marginalised and vulnerable groups.⁵

Obligation to respect

States have an obligation to refrain from interfering with legitimate tenure rights held by land users. Holders of legitimate tenure rights include individuals or groups with customary, collective or traditional tenure rights that might not be recognized by domestic law.⁶ Examples of violations of this obligation include eviction by force and the demolition of property as a punitive measure;⁷ acts of corruption in tenure administration and tenure transfers and discrimination in land registration and administration processes, including that based on marital status, legal capacity or access to economic resources (22). The obligation to respect also includes respecting decisions of

concerned communities, for example indigenous communities, to manage their lands according to their own internal modes of organization (22, 16).

States should provide all persons with a reasonable degree of tenure security sufficient to guarantee legal protection against forced evictions and should establish a framework ensuring that eviction and resettlement processes are carried out in line with international human rights law and standards (23).

Article 4 of the Covenant sets out the conditions under which, in exceptional cases, limitations on the enjoyment of Covenant rights are permissible. For limitations (involving resettlement or eviction) to be permissible, they must:

- 1 be based on domestic law and in line with international human rights law,
- 2 promote the general welfare or „public purpose“, and
- 3 be reasonable and proportionate (23).⁸

State limitation of Covenant rights may be reasonable and proportional when, for instance, alternative accommodation is provided upon resettlement in a safe environment where the affected rights holders will have security of tenure, access to public services as well as livelihood opportunities. Moreover, all feasible alternatives should be explored in consultation with those who would be affected (24). States must also take action to ensure the protection of legitimate tenure rights, including customary tenure rights, to State land held by individuals and communities, by guaranteeing that they are recognised and respected (25).

Obligation to protect

The State obligation to protect means that States need to protect rights holders from interference with their human rights by third parties, be these armed non-State actors or business enterprises. Due to the complexities of land governance, States need to engage on numerous fronts. For example, they should protect access to land by ensuring that no one is forcibly evicted and

should protect rights holders against involuntary transactions resulting from investments, land consolidation measures, or other land-related readjustment and redistribution measures (26).

States must take steps to ensure an adequate level of security for everyone with respect to their relationship to land and to protect rights holders from displacement, illegal expropriation of land, appropriation, or harassment (27). They need to enact laws and develop policies that ensure that land-based investments are made in a responsible manner; put safeguards and policies in place to protect legitimate tenure rights from risks that could derive from large-scale transactions in tenure rights. States should take legislative and other measures to provide clear standards for non-State entities, especially in the context of large-scale land acquisitions (28–30). Land titling programs should support the rights of those most at risk of marginalization and discrimination and address historical injustices rather than promote the commodification of land tenure (31).

Obligation to fulfil

The obligation to fulfil requires States to take action to guarantee the enjoyment of Covenant rights in relation to land. This includes the adoption of legislative, administrative and budgetary measures, in the context of which States parties should ensure that no one is left behind and that the enjoyment of rights is guaranteed for all in relation to land. This requires that States parties take into account the needs and situation of members of vulnerable and marginalized groups when adopting measures aimed at fulfilling the Covenant rights in relation to land (32).

Maximum available resources

Article 2 (1) imposes a specific obligation on States parties to use the maximum of their available resources to progressively realize the Covenant rights in full for all.⁹ Among the indicators that the Committee analyses in order to determine whether a State is complying with this obligation are the proportion of its popula-

tion living below the nationally defined poverty line, the proportion of public revenue that is generated through taxes and the proportion of the public budget allocated to social spending. However, this obligation is not limited in scope to a State's own jurisdiction: States parties should also use their maximum available resources collectively through international cooperation where necessary.¹⁰

Land administration and land registration are of particular relevance for the obligation to fulfil. Land registration and administration procedures must be free of discrimination of any kind. In many of its Concluding Observations, the Committee has drawn special attention to discrimination against women in relation to security of land tenure, access to, use of and control over land, marital property, inheritance and exclusion from decision-making processes, including in the context of communal forms of land tenure (12). Under the Covenant and other international instruments, women and men should have the same rights to economic resources. States should ensure that women enjoy the rights enshrined in the Covenant on an equal basis with men. This requires the removal of traditional land regulations and structures that discriminate against women. This equality could be achieved by a combination of traditional and modern land governance regimes (14–15). In addition, being free of discrimination, land administration must be implemented by accountable agencies whose actions are reviewed by judicial bodies (34).

States should enact a legal framework that recognizes the manifold value (i.e., social, cultural, spiritual, economic and environmental value) of land to communities that have customary tenure systems and should respect existing forms of land self-governance. Ensuring access is of particular concern with respect to natural resources: Fishermen need access to fishing grounds; many peasants and rural households depend on user rights for gathering firewood for cooking and heating (35). Agrarian reform that establishes a more equitable land distribution and fair access to land can significantly reduce poverty, mainly by improving food security (36).

Extraterritorial obligations

State obligations apply both within the territory of a State party and extraterritorially, to the extent that the State party can influence the situation in another country. The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights establish the extraterritorial human rights obligations of States with respect to economic, social and cultural rights and provide a normative framework for them.¹¹

The framework of respect, protect, and fulfil also applies to extraterritorial State obligations, which are of particular relevance for the implementation of Covenant rights in relation to access to, use of, and control over land. International entities are often involved in land transfers of productive land, whether by financing them or promoting investment in them, as is the case when large productive areas in one State are supported or financed by another State to be operated by private actors such a transnational cooperation. Such transfers can increase food insecurity and thus adversely affect the rights of individuals and groups (40).

The extraterritorial duty to respect requires States to take measures to prevent their policies – e. g. trade, investment, energy, agriculture, and climate change mitigation policies – from adversely affecting the enjoyment of human rights in other countries (41, 45). First and foremost, States parties must carry out human rights impact assessments before making or promoting land-relating investments, for instance, through development banks or other means of investment. States parties are required to make these assessment processes transparent and to ensure that civil society can be meaningfully involved in them, as well as to provide remedy in cases where human rights are harmed (44). Moreover, States should adopt measures to prevent private entities under their jurisdiction from acquiring or leasing land in a manner that violates international norms; imposing a human rights due diligence obligation on investors can be among these measures (42–43). The extraterritorial obligation to fulfil requires States to take measures within the framework of international assistance and cooperation (art. 2

(1) of the Covenant). International cooperation and assistance should support national policies aimed at securing access to land tenure on the part of rights holders whose legitimate rights of use have not been recognised. This support should include technical cooperation, financial assistance, knowledge-sharing and institutional capacity building for, inter alia, land administration (46–47).

Issues of specific concern

Land conflicts are identified as one issue of specific concern in connection with the implementation of the ESC-rights in relation to land in General Comment No. 26. Conflicts are often rooted in a structurally unequal distribution of land ownership. Violent conflicts can often lead to land dispossession and forced displacement, with vulnerable groups being particularly affected. Settling land disputes can be key to building resilience and peace. Hence States should make every effort to prevent land dispossession during internal armed conflict (48). When dispossessions have occurred, States should address these with measures that guarantee the rights of refugees and internally displaced persons to return voluntarily, in safety and dignity, to their former place of habitual residence. If such a return is not possible, States should at least develop adequate compensation mechanisms (48, 50).¹² Transformative reparation measures may be necessary when land restitution or compensation alone will not be sufficient to guarantee the rights under the Covenant for the victims of internal displacement or violence (51).¹³

Therefore, referring to the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, the Committee notes that corruption must be prevented through State land policy measures and that appropriate accountability mechanisms must be established for this purpose.¹⁴ Authorities should establish transparent processes and work with civil society organisations and the general public towards improving services and preventing corruption (52–53).¹⁵ At the same time, the Committee emphasises the necessity of administrative and judicial systems

that can effectively implement policy and legal frameworks relating to land, also noting that administrative and judicial authorities should act in accordance with the State's obligations under the Covenant (60).

Many human rights defenders are also defenders of the environmental functions of land. There have been numerous reports of harassment, criminalization, and intimidation of such human rights defenders, often in the context of extractive or infrastructure projects (54–55). States should create an enabling environment for human rights defenders and should not permit violations of their rights to go unpunished (54–55).

Climate change has had severe impacts on access to land and land use. The Committee emphasizes that the duty to mitigate emissions and other commitments arising from the Paris Agreement are also duties under human rights law (56).¹⁶ Climate change adaptation policies need to take into account all changes in land use that are induced by climate change and all affected population groups (57).

Marginalized and vulnerable groups

States parties are required to ensure that groups particularly affected by discrimination – women, Indigenous Peoples and peasants and other people working in rural areas – can fully exercise their ESC-rights. Discrimination against women is often based on their poor access to, use of and control over land. Since Indigenous Peoples and peasants and other people working in rural areas are often depend-

ent on land as their livelihoods, they are particularly vulnerable to any measure denying them access to land (13). For these groups, access to land is of particular importance for the realization of a host of other rights. States parties must make active efforts to gain an understanding of the situation of vulnerable groups living under their jurisdiction, i.e., by collecting and analysing disaggregated data, so that they can adopt specific measures and policies to ensure the progressive realisation of the rights of these groups.

States' obligation to use their maximum available resources (art. 2 of the Covenant) also applies with respect to the State obligation to address the impacts of climate change, particularly in connection with disadvantaged groups (57). Mitigation policies that lead to forms of land grabbing, such as carbon sequestration through massive reforestation, should be avoided; rather, mitigation should lead to absolute emissions reductions through the phasing out of fossil fuel production and use (56). International climate policies can include the support of and financing for land-related adaptation measures, but States parties have to make sure that measures of climate mitigation or adaptation such as carbon offsetting do not lead to land use change with negative impacts on communities having legitimate user rights. Cooperation mechanisms aimed at mitigating climate change and adapting to its consequences require solid environmental and social safeguards (58).

- 1 Here and in the following, numbers in round brackets refer to the corresponding passages in the General Comment.
- 2 The most important of these are the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security adopted in 2004 by the Council of the Food and Agriculture Organization of the United Nations (FAO); the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), adopted in 2012 by United Nations Member States in the Committee on World Food Security (CFS). The VGGT primarily support efforts to eradicate hunger and poverty, but are also intended to help achieve sustainable livelihoods, social stability, housing security, rural development, environmental protection, and sustainable social and economic development. (UN, Food and Agriculture Organization (2012): Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. <https://www.fao.org/tenure/voluntary-guidelines/en/> (accessed 14 Aug. 2023)). The Principles for Responsible Investment in Agriculture and Food Systems, adopted in 2014, address, inter alia, the human rights implications of agricultural investments. Other pertinent instruments are the United Nations Declaration on the Right of Indigenous Peoples and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas. The latter recognized a right to land for these populations. The WHO Housing and Health Guidelines (HHGL) seek to improve the quality of housing for all: World Health Organization (2018): WHO Housing and Health Guidelines. <http://apps.who.int/iris/bitstream/handle/10665/276001/9789241550376-eng.pdf> (accessed 31 Aug. 2023)
- 3 The Committee defines the term „forced evictions“ as used therein as „the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.“ See UN, Committee on Economic, Social, and Cultural Rights (1997), General Comment No. 7 on the right to adequate housing, UN Doc. E/1998/22, para 3.
- 4 UN, Committee on Economic, Social, and Cultural Rights (2009), General Comment No. 20 on Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, para 7–8.
- 5 Cf. UN, Committee on Economic, Social and Cultural Rights (1990): General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para 1, of the Covenant), UN Doc. E/1991/23.
- 6 UN, Food and Agriculture Organization (2012): VGGT, op. cit., para 3.1.
- 7 Cf. source in endnote 3, for the committee’s definition of “forced eviction” and the distinction to “eviction by force”.
- 8 Cf. UN, Committee on Economic, Social and Cultural Rights (1997): General comment No. 7 on the right to adequate housing (Art. 11.1): forced evictions, UN Doc. E/1998/22.
- 9 UN, Committee on Economic, Social, and Cultural Rights (2007): An evaluation of the obligation to take steps to the “maximum of available resources” under an optional protocol to the covenant, UN Doc. E/C.12/2007/1, para 2.
- 10 Ibid., para 5, 10–11.
- 11 ETO Consortium (2013): Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. <https://www.etoconsortium.org/en/the-maastricht-principles/> (accessed 29 Aug. 2023).
- 12 UN, Sub-Commission on the Promotion and Protection of Human Rights (2005): Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles), UN Doc. E/CN.4/Sub.2/2005/17, para 13.
- 13 UN, General Assembly (2006): Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, Annex.
- 14 UN, Food and Agriculture Organization (2012): VGGT, op. cit., para. 3.1 (5).
- 15 Ibid., para 5.8.
- 16 Cf. UN, Treaty Bodies Joint Statement (2020): Statement on human rights and climate change, UN Doc. HRI/2019/1.

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