**Comments on the Draft General Comment on Land, Economic, Social and Cultural Rights No. 26 (2021) by the Committee on Economic, Social and Cultural Rights**

Submitted by the Foreign Office of the German Federal Government

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The suggested changes in red and the comments in blue below follow the structure of the draft general comment by the Committee for legibility reasons.

1. **Introduction**

3. The lack of protection of tenure rights increases vulnerability, hunger, poverty and socioeconomic inequalities and can lead to conflict and environmental degradation. (…)

4. (…) Other relevant soft law instruments have been developed to describe the obligations and responsibilities of States and other actors relating to land use of specific groups.5 (…)

Comment: Substantive error in footnote 5 (appears as footnote 7 in the Draft General Comment document): ILO Convention 169 is legally binding and not a soft law document.

1. **Provisions in the Covenant relating to land**

9. Secure access to land is a precondition for the enjoyment of several rights under the Covenant. The right to housing, that is, the availability, accessibility and affordability of housing, may be violated where people are evicted from land where they had built housing, whether informally or not. Such evictions can be conducted without respecting the requirements established in the Covenant, which the Committee has clarified in its general comments No. 4 (1991) and No. 7 (1997). Those standards were further developed in the basic principles and guidelines on development-based evictions and displacement presented in 2007 by the Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living. Access to land in urban areas not only provides space for a shelter; household-related areas, including gardens, can also be places for domestic work in the informal and formal economy, as well as non-domestic work performed in the home. Houses in rural areas are normally built on the plot of land that is also used for production purposes. The loss of such land therefore often affects the right to housing, the right to food or access to employment

Comment: In Germany, the right to housing is not guaranteed by the Basic Law, the German constitution. At the federal level, however, there is a general consensus that the principle of the social state in Article 20 (1) of the Basic Law includes the state’s obligation to ensure the provision of adequate housing for the population. In Germany, this provision is ensured through government subsidies for housing construction to increase the supply of affordable housing, and through social benefits and legal protection for tenants, among other measures.

In case of eviction, legal recourse is open.

Access to justice in Germany is guaranteed by the constitution. Legal aid, including access to free legal consultation for indigent persons, is provided for by law.

12. (…) Furthermore, indigenous peoples and other traditional communities rely on the natural resources on their lands for subsistence and the conduct of traditional cultural practices (see para. 24 below).

1. **Obligations of States parties under the Covenant**

 **A. Non-discrimination and equality**

Comment: Especially with regard to the groups listed as being particularly affected, it would be desirable to address intersectionality and multiple discrimination more explicitly, especially in order to link it to the 2030 Agenda and its overarching principle of " Leaving no one Behind", for example by using wording such as "women in all their diversity".

17. For women, land is a pivotal resource for meeting subsistence needs and for accessing other goods and services, such as credit. Land is also important to enhance women’s engagement in household decision-making and for their participation in rural institutions that could strengthen their decision-making power and leverage over individual and collective rights and resources (…)

 **B. Participation, consultation and transparency**

18. Participation, consultation and transparency are key principles for the implementation of Covenant obligations relating to land. Individuals and communities must be informed and meaningfully participate on the local, national and international level in decision-making processes that may affect their enjoyment of Covenant rights in land-related contexts,[[1]](#footnote-1) otherwise their legitimate rights as land users might be overseen. (…)

 **C. Obligations of States parties under the Covenant as relating to land**

*Obligation to respect*

23. (…) International human rights law provides for the respect and protection of the relationship of indigenous communities with their lands, territories and resources, requiring States to demarcate their lands, protect them from encroachment and respect the collective right of indigenous peoples of self-determination, including the right to manage the lands according to their internal modes of organization. The requirements applicable to indigenous peoples have now been extended to at least certain traditional communities that maintain a similar relationship to their ancestral lands centred on the community rather than the individual.[[2]](#footnote-2) 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. Laws and policies should protect indigenous peoples from the risk of State and business encroachment on their land, for instance for the development of industrial projects or for large-scale investments in agricultural production.[[3]](#footnote-3) Regional human rights courts have contributed to strengthening the rights of indigenous peoples to their lands and territories.29 (…)

Footnote 29: Inter-American Court of Human Rights*, Mayagna (Sumo) Awas Tingni* *Community v. Nicaragua*, Judgment of 31 August 2001, paras. 151 and 164. For a discussion of the case law of the Inter-American bodies in that area, see Fergus MacKay, “From ‘sacred commitment’ to justiciable norms: indigenous peoples’ rights in the Inter-American system”, in *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Margot E. Salomon, Arne Tostensen and Wouter Vandenhole, eds. (Antwerp, Intersentia, 2007); and *African Court on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights v. Republic of Kenya*. Judgement of 26 May 2017 (Ogiek)

24. States parties should also recognize the social, cultural, spiritual, economic, environmental and political value of land for communities with customary tenure systems and should respect existing forms of self-governance of land. It is important that traditional institutions for collective tenure systems ensure the meaningful participation of all members, including women in all their diversity and young people, in decisions regarding the distribution of user rights.

 **D. Extraterritorial obligations**

*Extraterritorial obligation to fulfil*

44. (…) Policies should avoid leading to land concentration or a commodification of land, and should be aimed at improving the access of particular disadvantaged and vulnerable persons and groups and increasing their security of tenure.(…)

Comment: Purpose of this change is to also draw attention to individuals and the specific challenges that women face.

1. **Specific topics of relevance to the implementation of Covenant rights in land-related contexts**

 **A. Armed conflicts and post-conflict situations**

47. (…) Due process should be guaranteed to secondary occupants; if their eviction is necessary, it should be implemented with genuine consultation and States should, if necessary, provide them with alternative and sustainable accommodation and social services to guarantee them an adequate standard of living.“

Comment: Compare wording [OHCHR Fact Sheet No. 25 on Forced Evictions](https://eur01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2FFS25.Rev.1.pdf&data=04%7C01%7Cmaren.kraushaar%40giz.de%7C473e02fb26544f08b78608d9408f157b%7C5bbab28cdef3460488225e707da8dba8%7C0%7C0%7C637611805551620065%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C1000&sdata=gnia53qgUYfP8lyx%2FphjOLJ4PSwSBv%2Bf2RVsK3%2FjyhY%3D&reserved=0): [FS25.Rev.1.pdf (ohchr.org)](https://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf)

 **D. Peasants’ rights**

52. Access to land has particular importance for peasants worldwide, in order to realize their livelihood rights. 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 (…)“

Comment: We recommend a legal assessment of the wording “functionally equates with a right to land”. The question whether or not any form of “land as a human right” (for all, not for specific groups) would be created is controversial, see debate around UN-DROP.

 **E. Human rights defenders**

53. The situation of human rights defenders is particularly difficult in conflicts over land.[[4]](#footnote-4) The Committee has regularly received reports of threats and attacks aimed at those seeking to protect their Covenant rights or those of others, often in the form of harassment, criminalization, defamation and killings, particularly in the context of extractive and development projects.[[5]](#footnote-5) In accordance with the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, States must take all necessary measures to respect and protect human rights defenders and their work, including in relation to land issues, and to refrain from imposing criminal penalties on them or enacting new criminal offences with the aim of hindering their work.

Comment: Compare UN Human Rights defenders Declaration, Art. 12 [OHCHR | Declaration on the Right and Responsibility](https://www.ohchr.org/en/professionalinterest/pages/rightandresponsibility.aspx)

General Comment on 53.: A reference to the Escazú Convention, which entered into force in April 2021, would be desirable as it specifies the protection of human rights defenders and the right to information in environmental matters (an area in which the issue of land plays an important role). The agreement could be seen as a model for other states and regions. Also, with regard to threats to indigenous peoples through the violation of collective (land) rights, the need for collective preventive measures and collective response strategies could be emphasised.

1. 5 Committee on Economic, Social and Cultural Rights, general comments No. 16 (2005), para. 37, and No. 21 (2009), para. 16 (c). See also African Commission on Human and Peoples’ Rights, “State reporting guidelines and principles on articles 21 and 24 of the African Charter relating to extractive industries, human rights and the environment” (2017), pp. 26–27. [↑](#footnote-ref-1)
2. Inter-American Court of Human Rights, *Moiwana Community v. Suriname*,Judgment of 15 June 2005, paras. 132–133, and *Saramaka People v. Suriname*,Judgment of 28 November 2007, para. 86. [↑](#footnote-ref-2)
3. 29 Inter-American Court of Human Rights*, Mayagna (Sumo) Awas Tingni* *Community v. Nicaragua*, Judgment of 31 August 2001, paras. 151 and 164. For a discussion of the case law of the Inter-American bodies in that area, see Fergus MacKay, “From ‘sacred commitment’ to justiciable norms: indigenous peoples’ rights in the Inter-American system”, in *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Margot E. Salomon, Arne Tostensen and Wouter Vandenhole, eds. (Antwerp, Intersentia, 2007); and *African Court on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights v. Republic of Kenya*. Judgement of 26 May 2017 (Ogiek) United Nations Declaration on the Rights of Indigenous Peoples, arts. 28 and 32. [↑](#footnote-ref-3)
4. 4 Protecting human rights defenders addressing economic, social and cultural rights (A/HRC/31/L.28); and Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. [↑](#footnote-ref-4)
5. See, e.g., E/C.12/VNM/CO/2-4, para. 11, E/C.12/1/Add.44, para. 19, E/C.12/IND/CO/5, paras. 12 and 50, E/C.12/PHIL/CO/4, para 15, E/C.12/COD/CO/4, para. 12, E/C.12/LKA/CO/2-4, para. 10, and E/C.12/IDN/CO/1, para. 28. [↑](#footnote-ref-5)