



The Global Initiative
for Economic, Social and Cultural Rights



SID

Society for International Development



Submission to the U.N. Committee on Economic, Social and Cultural Rights on its draft General Comment on Land and Economic, Social and Cultural Rights:

Privatisation, commercialisation, commodification and financialisation of land

13 August 2021

I. Introduction

1. This is a collective submission on behalf of FIAN Germany, the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), Lokichar Action Networks, the Society for International Development, the World Organization for Early Childhood Education, and former U.N. Special Rapporteur on the right to adequate housing, Mr. Miloon Kothari. The submission builds on a roundtable discussion on the draft General Comment that was hosted by FIAN International and GI-ESCR on 28 July 2021.¹
2. The signing organisations welcome the decision of the U.N. Committee on Economic, Social and Cultural Rights (hereinafter “the Committee”) to develop a General Comment on land and economic, social and cultural rights (hereinafter “ESCR”) and the open consultation on the draft.
3. Privatisation, commercialisation and commodification are increasing in many areas, from the provision of services such as education and health, to the governance of land and natural resources. This raises a number of human rights concerns, including increased inequalities and segregation, restrictions in access, the loss of democratic control, and the reinforcement of unbalanced power relations. Dynamics of financialisation are further exacerbating the dispossession of communities and people, while creating new levels of concentration of power and wealth in the hands of a few actors.
4. We welcome the decision to address these issues in relation to land as part of the General Comment. This submission expands on the points made in the draft relating to the privatisation, commercialisation, commodification and financialisation of land and the impacts of these phenomena on ESCR, making several recommendations as to how the draft General Comment can be strengthened in this regard.

II. Definitions

5. The draft General Comment refers to three intertwined concepts: privatisation, commodification and financialisation. This section proposes a definition for each and for the closely related phenomena of commercialisation and digitalisation.
6. **Privatisation** can broadly be understood as the growth of private actors’ involvement (in ownership or management) or the adoption of private practices in a particular sector, leading to private interests (as opposed to public or collective interests) occupying an increasing amount of space. This can occur in a number of ways, reflecting the different roles

¹ The Global Initiative for Economic, Social and Cultural Rights (“GI-ESCR”), “GI-ESCR co-hosts series of roundtables on the new draft General Comment on land and ESC rights” (GI-ESCR, July 2021) < GI-ESCR co-hosts series of roundtables on the new Draft General Comment on Land and ESC Rights — GI-ESCR> accessed 11 August 2021.

the private actors can play in different sectors. While privatisation commonly occurs in land through the sale of public land to private developers, it does not always involve the transfer of property or management from the State to a private actor. Privatisation may also occur when the governance of a piece of land is transferred from a group that is organised with a view to promote the collective interest (such as a community) to a person or organisation whose mandate or interests are more exclusively private (such as a corporation).

7. **Commercialisation** may be defined as the act of using market mechanisms to gain a private benefit. Privatisation often, though not always, leads to commercialisation. The *Appeal by Francophone Civil Society against the Commercialisation of Education* defines commercialisation of education as “the transformation of education into a profit-making commodity.”² Commercialisation in land occurs, for instance, when commercial actors such as investors or corporations acquire land in order to pursue a commercial interest, such as establishing a large-scale agriculture, biofuel production or mining operation.³ **Commodification** is closely related to, and is often a consequence of, commercialisation. Commodification has been defined as “a process within which economic value is assigned to something not previously considered in pure economic terms”⁴ and as referring to the extent to which an individual’s access to a service is dependent on their market position.⁵
8. **Financialisation** is a form of privatisation through the introduction of private finance mechanisms. The former U.N. Special Rapporteur on the right to housing described financialisation in relation to housing as referring to “structural changes in [...] financial and global markets whereby housing is treated as a commodity, a means of accumulating wealth and often as security that are traded and sold on global markets.”⁶ Based on this understanding, the financialisation of land almost always involves the commercialisation and commodification of land. Financialisation of land commonly occurs when financial actors - which include banks, insurance and pension funds, hedge funds and private equity firms – purchase land as an investment. The total value of property owned by the world’s largest real estate private equity firm, the Blackstone Group, was last year estimated to be around US\$325 billion.⁷
9. **Digitalisation**, which can be understood as the increasing use of digital tools in the organisation and management of land, is an emerging phenomenon that can further drive privatisation and commercialisation. In countries such as Brazil and Indonesia, for instance, digital land registries have helped to facilitate land grabbing by private corporations and wealthy individuals, resulting in the dispossession of local people and communities.⁸

Recommendations

10. **We welcome the references to privatisation, financialisation and commodification in the draft General Comment, and recommend that the Committee retain this language. In addition, we propose that the General Comment should also refer to commercialisation, which, as outlined above, is closely related to the other three concepts and has similar implications for ESCR in the context of land.**
11. **We recommend that the Committee provide a few words of definition for these concepts, along with a brief explanation of their key drivers and how they impact on ESCR.**
12. **We welcome the reference to the increasing use of “digital techniques” in the process of titling (at [33]). We recommend that the Committee note in this regard that, despite having important consequences for tenure governance, land-related digitalisation processes are frequently implemented without any prior assessment of human rights impacts and without monitoring provisions to ensure accountability.⁹**

III. Public nature of land

13. As the draft General Comment acknowledges, the commodification of property rights through the creation of a market for land rights “can be a source of exclusion and increase insecurity of tenure” (at [33]). The report of the former U.N. Special Rapporteur on the right to housing on financialisation provides a detailed discussion of the human rights impacts of financialisation, commercialisation and commodification.¹⁰

² Various, “Appeal by Francophone Civil Society Against the Commercialisation of Education” (2016) <http://nevendezpasleducation.org/wp-content/uploads/2017/07/Appeal-eng.-against-commercialisation.pdf> accessed 10 April 2021.

³ See, for example, Chrispin R. Matenga and Munguzwe Hichaambwa, ‘Impacts of land and agricultural commercialisation on local livelihoods in Zambia: evidence from three models’ (2017) 44 J Peasant Stud 574.

⁴ Manuel Couret Branco, “The Case Against the Commodification of Social Protection” (U.N. Research Institute for Social Development, 2014) <https://www.unrisd.org/80256B3C005BE6B5/search/6A8E91A3625AA61AC1257D4F003869B2> accessed 7 April 2021.

⁵ Clare Bamba, ‘Cash Versus Services: “Words of Welfare” and the Decommodification of Cash Benefits and Health Care Services’ (2005) 2 J. Soc. Policy 195.

⁶ U.N. Human Rights Commission (“HRC”) ‘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 Leilani Farha’ (18 January 2017) UN Doc A/HRC/34/51.

⁷ Shawn Tully, “How Blackstone became the world’s biggest corporate landlord” (Fortune, February 2020) <How Blackstone became the world’s biggest corporate landlord | Fortune> accessed 2 August 2021.

⁸ Mathias Pfeifer, Philip Seufert, Astrud Lea Beringer and Roman Herre, “Disruption or Déjà Vu? Digitalization, Land and Human Rights. Case Studies from Brazil, Indonesia, Georgina, India and Rwanda” (FIAN International, 2020) <FIAN_Research_Paper_Digitalization_and_Land_Governance_final.pdf> accessed 2 August 2021.

⁹ Ibid.

¹⁰ HRC, above n 6.

14. **Taking this point to its logical conclusion, we consider that the General Comment should explicitly recognise that land is not a marketable good (that can be traded between individuals and subject to speculation) but is public in nature.**
15. While the term “public” is often associated with the State (for example, public land being owned by the State) we propose that it be understood as not necessarily meaning State-owned and State-governed. Accordingly, the term “public”, from a human rights perspective, could refer to a service or a resource that is controlled by the people, in the interests of the people, and that is not driven by or subject to any commercial pursuit or purpose. This broader understanding of “public” is drawn from Principle 2 of the *Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education* adopted in 2019 (the Abidjan Principles).¹¹
16. There is a diverse range of models of land ownership and governance that could fall within this understanding of “public”. These include “commons”-based models in which land is owned and governed collectively by a community, for the interests of the community, of which there are numerous examples in different regions of the world. In some instances, national legislation may provide for and protect collective ownership and governance. In India, for example, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 provides for the “right to hold and live in the forest land under...common occupation” and for “rights including community tenures of habitat and habitation.”¹²
17. Recognising land as public is aligned with the understanding that **land and property have a social function**. The “social function” of property is a concept that was developed in the early 1900s, according to which “tenure rights do not serve private interests alone, but a public interest, too” and therefore “their protection and configuration are both legitimised and limited by fulfilment of that public interest.”¹³ This concept has been adopted in the national constitutions and/or legislation of a variety of countries. Article 5(XXIII) of Brazil’s Constitution, for instance, states that “property shall comply with its social function,”¹⁴ and Article 42 of the Constitution of the Italian Republic provides that “[p]rivate property is recognized and guaranteed by law, which determines the ways it is acquired, enjoyed and its limits in order to ensure its social function and to make it accessible to all.”¹⁵ In 2016, Colombia’s Constitutional Court invoked the Constitution’s reference to the “social function” of property to strike down a provision exempting mining projects from environmental regulation in wetland ecosystems.¹⁶
18. In the context of the right to housing, the *Guiding Principles on Security of Tenure for the Urban Poor* emphasise that “property has a vital social function” and that “States should balance property rights with the social function of property” when designing and implementing policies.¹⁷ The Principles provide examples of ways in which States may inherently recognise the social function of land, including “the collection of property taxes, the exercise of expropriation powers for the public good, adverse possession laws, and urban planning that designates space for public use and environmental protection.”¹⁸

Recommendations

19. **We welcome the recognition of States’ obligation to respect and protect collective and customary tenure of land (at [20], [24], [27], [35] and [36]). We also welcome the references to “the commons”, and the acknowledgement that “the privatisation of the commons that results from the generalisation of individual property rights over land...may exclude people from access to resources on which they depend” (at [15]). We recommend that this language be maintained.**
20. **While we also welcome the recommendation (at [46]) that “States should consider the possibility of freezing the land market in regions in which the risks of internal displacement and land dispossession are high,” we consider that the General Comment should further explicitly recognise that land is public in nature and must be kept outside of the market logic, and call on States to take measures to prevent speculation in land. Language can be drawn from paragraph 30 of the *Basic Principles and Guidelines on Development-based Evictions and Displacement* contained in the report of the former U.N. Special Rapporteur on the right to housing, Miloon Kothari.**¹⁹

¹¹ Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education (13 February 2019) <https://static1.squarespace.com/static/5c2d081daf2096648cc801da/t/5dc414bb9f409d285dc9abf2/1573131454068/Online+version_A4_WEB_COUV%2BTEXT_THE-ABIDJAN-PRINCIPLES_Nov_2019.pdf> accessed 2 August 2021.

¹² Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (India), ch II, s 3.

¹³ Lorenzo Cotula, “Towards a more holistic approach to land governance” (Food and Agriculture Organization of the United Nations, 2021), 15 <Tenure rights and obligations (fao.org)> accessed 6 August 2021.

¹⁴ Constituição da República Federativa do Brasil 1988 (Brazil).

¹⁵ The Constitution of the Italian Republic 1948 (Italy), art 42.

¹⁶ Corte Constitucional de Colombia, Sentencia C-035/2016 (2016).

¹⁷ HRC ‘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’ (30 December 2013) UN Doc A/HRC/25/54, para 4.

¹⁸ *ibid*, para 42.

¹⁹ HRC ‘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, Miloon Kothari’ (5 February 2007) UN Doc A/HRC/4/18, annex 1, para 30.

21. **We further recommend that the Committee recognise that an obligation on States to protect and promote the social function of land in the design and implementation of policies relating to land.**

IV. Connections with commercialisation in other areas

22. What is on the land – a natural resource, a school or a community, for instance - is intimately connected to the land itself, and the dynamic in one directly impacts the other. It may work in two ways: the commercialisation of a resource (the commercial pressure to exploit a mineral, for example), may lead to the commercialisation of land; and, conversely, the commercialisation of land may impact on public land that is used for social or cultural purposes.

23. The growing demand for what is in or on the land should thus be addressed, taking into account the wide range of commercial activities putting pressure on land (such as mining, logging, agriculture and energy production) as well as the impact of growing demand for land on the services and resources it hosts. Of particular note is the commercialisation and/or commodification of natural resources, which in many cases drive privatisation, commercialisation, commodification and financialisation in land. The drive for renewable energy has, for instance, resulted in large-scale land acquisitions by transnational agribusiness companies in Madagascar for commercial production,²⁰ leading to the dispossession of Malagasy peasants.²¹

24. Among the dynamics of land use that encourage the commercialisation of land is the scramble for clean water, which has increased and is likely to explode in the coming years. The increasing demand for – and relative scarcity of - access to fresh water drives competition for access to, ownership and management of land. In this respect, the increasing commercialisation of water and its negative impacts on ESCR, as was recently analysed by the former UN Special Rapporteur on the human rights to water and sanitation,²² should be considered equally as a land issue. The recent establishment of the first market in water futures is a worrying move towards the commodification of scarce water resources that could have major implications for land. Launched by the CME Group in California, the futures market intends to provide buyers with an indication of expected water prices in the future and to allow them to hedge against exposure by locking in prices and managing the “risk associated with the scarcity of water”.²³ As the UN Special Rapporteur on the rights to water and sanitation has highlighted, the futures market invites speculation from investors, which may lead to speculative bubbles, volatility and higher prices, all of which would make it more difficult for less wealthy actors to secure access to water resources.²⁴ The likely speculation from investors with no need for water further means that this market is unlikely to ascribe water a price that accurately reflects its availability, thus undermining its capacity to act as a tool to manage climate-related risks.²⁵

25. Public service provision is a typical social function of land that is being put a risk by the privatisation, commercialisation, commodification and/or financialisation of land. This has occurred, for instance, in education: in countries such as Kenya, Mauritania, and Morocco, public schools are being closed down or encroached upon due to the high value of the land on which they are situated, which is often prime land in city centres and therefore subject to pressure from commercial investors.²⁶

Recommendations

26. **We recommend that the Committee address the connections between privatisation, commercialisation, commodification and financialisation in relation to land and in relation to natural resources and public services, and deepen the discussion as to how these phenomena impact on ESCR. We suggest the following addition to paragraph 6:**

[...] States parties should take the governance of such resources into account in the implementation of their obligations related to land. States parties should further address the privatisation, financialisation, commercialisation and commodification of natural resources and public services, which are having significant and irreversible impacts on land and on economic, social and cultural rights.

²⁰ Lorenzo Cotula, Sonja Vermeulen, Rebeca Leonard and James Keeley, “Land grab or development opportunity? Agricultural investment and international land deals in Africa” (Food and Agriculture Organization of the United Nations, the International Fund for Agricultural Development and the International Institute for Environment and Development, 2009) at 4.

²¹ Giulia Franchi, Mamy Rakotondrainibe, Eric Hermann Raparison and Philippe Randrianarimanana, “Land grabbing in Madagascar: echoes and testimonies from the field” (ReCommon, 2013) at 28.

²² HRC, ‘Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller: Human rights and the privatization of water and sanitation services’ (21 July 2021) UN Doc A/75/208.

²³ CME Group ‘Nasdaq Veles California Water Index (NQH2O) Futures’ (CME Group, 2020) <<https://www.cmegroup.com/trading/equity-index/us-index/nasdaq-veles-california-water-futures.html>> accessed 12 April 2021.

²⁴ UN Officer of the High Commissioner for Human Rights (OHCHR) ‘Water: Futures Market Invites Speculators, Challenges Basic Human Rights - UN Expert’ (OHCHR, 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26595&LangID=E>> accessed 12 April 2021.

²⁵ Susan Lea Smith ‘Water on Wall Streets: Understanding the Evils of Water Futures Markets’ (World Council of Churches, 2021) <<https://www.oikoumene.org/blog/water-on-wall-streets-understanding-the-evils-of-water-futures-markets>> accessed 12 April 2021.

²⁶ See Association of Women Heads of Households, Coalition of Mauritanian Educational Organisations and GI-ESCR, “Privatisation and sale of public school lands in Mauritania” (GI-ESCR, November 2018) <Privatisation and the sale of public school lands in Mauritania — GI-ESCR> accessed 11 August 2021.

27. We encourage the Committee to address how privatisation, commercialisation, commodification and financialisation may affect collective access to land and how this in turn may impact on ESCR. We recommend that, as part of section II of the General Comment, the Committee recognise that the realisation of ESCR, including specifically the rights to education and health, requires public or collective land to ensure the provision of public services. On this point, we further recommend that the Committee:

- a) Add “public services” to the statement (at [15]) that “[i]ll-conceived attempts to “formalize” property rights through titling schemes, as well as the enclosure of communal lands....may exclude such people from access to resources **and public services** on which they depend.”
- b) Recognise, as part of the discussion on the obligation to protect (at [29] to [33]), that “States should ensure that public land, particularly public land used for public services, is not encroached upon and commercialised.”
- c) Add education and health to the list of ESCR in the first sentence of [34], as follows: “States parties must facilitate secure, equitable and sustainable access to, use of and control over land for those... who depend on them to realise their economic, social and cultural rights, such as the rights to food, housing, adequate standard of living, **education and health.**”
- d) Recognise, as part of the discussion on the obligation to fulfil (at [34] to [38]), that “States should ensure that sufficient land is available and allocated for public services.”

28. We recommend adding a reference to the issue of booming microfinance and its impact on access to land for marginalised groups. This could be integrated as part of the discussion of the process of titling at [33], as follows: “since commodification of property rights can be a source of exclusion and increase security of tenure, **as observed in cases of indebtedness and mortgages on land resulting from increased microfinancing lending to marginalised groups.**”

V. Extraterritorial obligations

29. As part of their extraterritorial obligations, States are required to “take collective action, including through international cooperation, in order to help fulfil the economic, social and cultural rights of persons outside of their national territories.”²⁷ This means that States must “take the necessary steps in their legislation and policies, including diplomatic and foreign relations, to promote and help create” an “international environment that enables the fulfilment of the Covenant rights”.²⁸ This obligation applies in relation to States parties’ conduct as members of international financial institutions.

30. The Committee has also confirmed that, as subjects of international law, international financial institutions are also required to comply with international human rights law.²⁹

31. Over the past few decades, international financial institutions (hereinafter “IFIs”) such as the World Bank and the International Monetary Fund have actively promoted policies and programmes that have driven the privatisation and commercialisation of land, as well as the privatisation of natural resources and public services, which as mentioned above may have significant impacts on land.³⁰ A World Bank-financed programme in the Brazilian state of Piauí, for instance, has resulted in approximately four million hectares of land being privatised and acquired by international companies,³¹ with severe consequences for local communities (including loss of land and food insecurity).³²

Recommendations

32. We welcome the discussion (at [38] to [44]) of States’ extraterritorial obligations in the current draft, and the acknowledgement that “[e]xtraterritorial obligations are of particular significance to the implementation of Covenant obligations related to land” (at [38]). We recommend that this section be maintained.

33. We propose that this section could be strengthened by explicitly recognising that, as part of their extraterritorial obligations under international human rights law, States must take steps to address and prevent the privatisation, commercialisation, commodification and financialisation of land, public services and natural resources beyond their

²⁷ UN Committee on Economic, Social and Cultural Rights (“CESCR”) ‘General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ (10 August 2017) UN Doc E/C.12/GC/24, para 36.

²⁸ CESCR ‘General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ (10 August 2017) UN Doc E/C.12/GC/24, para 36.

²⁹ CESCR ‘Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights’ (22 July 2016) E/C.12/2016/1, para 7.

³⁰ HRC ‘Report of the Special Rapporteur on extreme poverty and human rights’ (26 September 2018) A/73/396.

³¹ Frédéric Mousseau, “The Highest Bidder Takes It All: The World Bank’s Scheme to Privatize the Commons” (The Oakland Institute, 2019) at 8 < highest-bidder-eng-high-res.pdf (oaklandinstitute.org)> accessed 12 August 2021.

³² ActionAid, “Background note: The World Bank’s support for land titling or “regularization in the state of Piauí” (ActionAid, 2018) <Background-note.pdf (actionaidusa.org)> accessed 11 August 2021.

borders. States should, for instance, be required to monitor and regulate cross-border financial flows relating to land.

34. We recommend the General Comment refer to the existing work of the Committee regarding investment funds and their typically strong extraterritorial nature. We suggest that the Committee draw from language used in its Concluding Observations on the sixth periodic report of Sweden regarding overseas investment activities and explicitly call on States to ensure that the decisions and activities of investors acting abroad do not result in the privatisation, commercialisation, commodification and/or financialisation of land and impact on the ESCR of local populations. In light of the diverse nature of the actors involved, this point should be integrated as part of both the discussion on the extraterritorial obligation to respect (at [39] to [41]) and the discussion on the extraterritorial obligation to protect (at [42]).
35. We welcome the statement (at [44]) that national policies supported in the context of international cooperation and assistance “should avoid leading to...a commodification of land.” This paragraph could be strengthened by noting the key role played by IFIs in this regard, and by explicitly recognising that, as part of their obligations under international human rights law, IFIs should ensure that any policy recommendations and/or loan conditionalities do not have the effect of driving the privatisation, commercialisation, commodification and financialisation of land, public services and natural resources.

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