

Land and the Climate Emergency

Written contribution to the draft general comment on Land and ESC Rights, August 15th 2021.

On the 22 July, the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) and Landesa co-convened a Roundtable on Land and the Climate Emergency. Participants were invited to reflect on a series of key questions concerning the relationship between land and the climate emergency and offer suggestions as to how the guidance provided by the draft General Comment on Land and Economic, Social and Cultural Rights (hereafter “GC”) may be rendered more effective. The following submission contains a summary of these discussions, organised according to six key themes: i) foregrounding the climate emergency; ii) net-zero and carbon sequestration; iii) FPIC and impact assessments; iv) moving beyond safeguards; v) biodiversity and an ecosystems approach; and vi) inclusion and non-discrimination. The final submission is co-sponsored by GI-ESCR, Landesa, Earthjustice, and the International Women's Rights Action Watch Asia Pacific (IWRAW Asia Pacific), together with independent expert Mayra Gomez and former Special Rapporteur on the right to adequate housing Miloon Kothari.

Foregrounding the climate emergency

Participants in the roundtable broadly agreed that climate change is one of the most important matters addressed in the draft GC, as well as one of areas in which there is real scope for the Committee to be forward looking and progressively advance the human rights framework.

It was emphasised that the climate breakdown is having a profound impact on all land-issues and is the context in which land related crises or pressures (such as displacement and resettlement, urbanization, agricultural commodities, unsustainable land use, and land speculation/concentration) are not only taking place, *but also getting worse* and are likely to become worse still in the future. Many participants shared the view that the current draft of the GC fails to convey the urgency of this problem and make clear that we are entering a new context which will have implications for our understanding of all land related matters.

Climate concerns should be made more prominent throughout the draft and the Committee should set the tone at the beginning of the GC by identifying climate change upfront as the “critical context” in which land issues are unfolding.

Climate change will exacerbate historic inequalities experienced by developing countries and marginalised groups including indigenous and tribal groups, women, and others facing multiple discrimination. At the same time, climate change is also a global problem that will create new vulnerabilities and have impacts on those that have historically not been so vulnerable, including urban populations and developed countries.

The Committee should address the link between climate change and urban areas and recognise that, whilst solutions will look different in different contexts, the climate emergency affects humanity as a whole.

One participant suggested that the Committee should also look beyond those that have a specific attachment to land and consider how the ubiquitous nature of climate impacts relates to the case for recognizing land as a universal human right. Even those without a direct relationship to the land ultimately depend on its sustainable use for the realization of human rights such as rights to food, water, and a healthy environment.

Net-zero and carbon sequestration

Multiple participants stressed the importance of clearly distinguishing between net- and real-zero emissions. Land-intensive carbon sequestration projects have taken off in recent years and will only become

increasingly relevant with time, with both governments and corporations committing to nature-based solutions and carbon capture and storage as a means of achieving net-zero targets. Many were sceptical of these mechanisms, pointing out that they effectively allow large polluters to continue emitting whilst finding other means of offsetting their carbon footprint, with the result that they often do not lead to emissions reductions and can even have the paradoxical effect of allowing them to increase. They also require enormous amounts of land. For example, Shell has made a commitment to achieve net-zero by 2050 by tree-planting, for which it is estimated that 12 million hectares of land will be required – an area three times the size of the Netherlands.¹ A number of participants raised the question of *where* the land used for mitigation purposes will come from, *who* will be affected by the acquisitions, and *who* will be in control of that land.

It was also pointed out that nature-based solutions such as REDD+ can have the same impact as forms of land marketization. Indeed, carbon titling through carbon credit schemes is not only similar to land titling, but often occurs on a larger scale, with communities and ecosystems broken up into titles of carbon in a way that is fundamentally incompatible with land rights and inaccessible to smallholders.

The GC should do more to address the potentially discriminatory or detrimental impacts of nature-based solutions such as afforestation.

Moving beyond safeguards

The question of how we may move beyond simply adding safeguards to projects was one of the main issues discussed during the roundtable. Multiple suggestions were advanced:

The GC could include a clear caution against States blindly using land-based carbon or biodiversity offsets and market schemes or land-based sequestration schemes and encourage them to recognize the risks of violating land rights when pursuing these projects.

Instead of States taking a protected areas approach and adding safeguards afterwards, the GC could recommend that they achieve the climate targets contained in the Paris Agreement in a way that also proactively realises UNDROP, UNDRIP and the Voluntary Guidelines.

The GC should guide States away from net-zero technologies and towards an approach that would reduce emissions at source and secure real-zero emissions.

Given that States are using carbon offsets as a means of meeting their human rights obligations to mitigate climate change and this is not reducing emissions and leading to human rights violations, the Committee could return to its fundamental jurisprudence– such as General Comment 3 on the nature of State obligations – as a means of guiding State action. It could also do more to explicate what "obligations of conduct", "obligations of result", "immediate obligations" and "progressive obligations" mean in this context.

The Committee could address climate change in relation to 'fulfil' obligations. Here, references to climate change could enhance the urgency of agrarian reform and advance it beyond its classic framing in terms of social equity. The Committee could link equal distribution, sustainable use of land resources and climate change mitigation, and make the case that more equal land distribution can be a means of tackling climate change and the ecological crisis.

The GC could reinforce fundamental human rights principles such as indigenous peoples' self-determination and article 1 of the Covenant, which it does not refer to. Article 1 (2) states that in no case may a people be deprived of their means of subsistence, which is critical in relation to environmental degradation and climate change.

¹ 'Shell's Net Zero Climate Plans Need Land up to Three Times the Size of the Netherlands for Carbon Offsets', ActionAid International, accessed 6 August 2021, <https://actionaid.org/news/2021/shells-net-zero-climate-plans-need-land-three-times-size-netherlands-carbon-offsets>.

The UN Office of the High Commissioner for Human Rights has been advocating for directing funding toward projects which will support both climate action and the fulfilment of human rights. This could include toward, for example, indigenous and community conservation areas and efforts to recognize customary tenure. There is value in addressing the potential for land policy reform and the strengthening of land rights to have a positive effect on climate mitigation and adaptation. Participants drew attention to the UN Convention to Combat Desertification – one of the three Rio conventions and the only convention that deals directly with land – and pointed out that during the fourteenth Conference of the Parties (COP14) in 2019, the 197 parties of the Convention adopted a decision that acknowledges the importance of addressing land tenure in the context of desertification/land degradation and drought.² Secure land tenure is particularly important from the perspective of women’s human rights, as they often work land without property rights.

The GC should address the positive impact secure tenure of land and natural resources has on climate, biodiversity and land restoration, and highlight that land tenure is an enabler of land degradation neutrality which will help climate action and foster sustainable development.³

The Committee should do more to link to standards under the UNFCCC and Agenda 2030, in particular SDGs 1-5 and 11-15, which contain many land-related targets and could help render the GC more relatable to parties.

The GC could be used as an opportunity to develop more explicit standards in relation to secure tenure, similar to those that exist in relation to the right to health or housing (for example, along the lines affordable, accessible, available, etc). The paragraphs on land tenure security (19-20, 27-28) could include such guidance, with a strong intersectional and gender dimension and the recognition that both law and social recognition form part of secure tenure.

FPIC and Impact Assessments

One of the key discussion points in the roundtable concerned the draft GC’s treatment of participation, consultation and transparency, as well as the standard of Free Prior and Informed Consent (FPIC). Several participants drew attention to the fact that many major projects that contribute significantly to climate change are also highly land intensive, such as agrobusinesses and extractive projects. The displacement, food and water insecurity, and cultural rights violations faced by communities affected by climate change will often occur in addition to existing degradation and insecurity caused by extraction or agribusiness’s local impacts on the environment, such as land grabbing and oil contamination. Structurally, human rights discussions could benefit from recognising that the causes of land rights violations and climate change tend to be similar, in that both are grounded in an extraction based economic system that is also highly unequal.

Issues of participation, consultation and transparency are particularly fraught in the context of climate change and several participants agreed that there is a real danger that powerful interests will use their power to conduct consultations in a superficial way or implement their desires against the will of communities. As climate change mitigation becomes increasingly urgent the pressure on countries to implement measures will be so high that it is important that there is also an explicit reference to power imbalances in this context.

Whilst power balances are implicit in FPIC, there is wording in participation standards in the Voluntary Guidelines on the Responsible Governance of Tenure which speaks specifically of power asymmetries.⁴ The GC could address these issues by drawing on such language.

² ‘COP 14, New Delhi, India, 2019’, UNCCF, accessed 6 August 2021, <https://www.unccd.int/official-documentscop-14-new-delhi-india-2019/26cop14>.

³ See ‘Solution Brief: Restored Land, Healthy People, Green Recovery’, UNCCD, accessed 6 August 2021, <https://www.unccd.int/convention/solution-brief-restored-land-healthy-people-green-recovery>.

⁴ Committee on World Food Security (CFS) (2012): Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security <http://www.fao.org/tenure/voluntary-guidelines/en/>.

The African and the Inter-American regional systems call for assessments of projects to be *cumulative*. In the context of FPIC, this means that the relevant stakeholders – in this case the indigenous communities that are affected – should be fully informed not only of the local environmental degradation posed by a land use activity, but also about how the project will contribute to climate change and exacerbate rights violations in relation to, *inter alia*, water and food security. Affected communities will not be fully informed per the requirements of FPIC of the cumulative impact of new climate change-driving activities unless they are fully aware of how these activities will exacerbate already existing insecurity at the local level.

The GC should also articulate a cumulative standard of FPIC

The Committee was also encouraged to not limit their reference to FPIC to indigenous peoples, but to say that it should be the standard, or at least good practice, in dealing with similarly situated communities such as peasants and fisherfolk, pastoralists and rural women. This would be consistent with the Committee's own Concluding Observations,⁵ the practice of other Treaty Bodies,⁶ and recent international legal standards.⁷ Whilst FPIC is a higher level of obligation when it comes to the rights of Indigenous Peoples, it results in better practical outcomes for other similarly situated groups, and, as such, is more consistent with State party obligations under the Covenant. The inclusion of such language in the GC would have a significant impact and the broader application of FPIC could pre-empt negative scenarios and human rights violations across a wide range of issues and affected groups.

The GC should state that FPIC should be the standard in dealing with communities that are similarly situated to indigenous peoples.

The need to assess projects in the context of the climate emergency should also have implications for the stages of human rights and environmental impact assessments (EIAs) conducted by States and companies.

The Committee should consider the jurisprudence of the Aarhus Convention Compliance Committee and the standards contained in the Escazú Agreement, where they may find strong guidance how to conduct EIAs and ensure real public participation that occurs at a stage when it is possible to cancel a project.

EIAs are however not sufficient on their own and the Committee should refer to the importance of social impact assessments in relation to adaptation and mitigation measures.

Biodiversity and an ecosystems approach

The UN Environment Programme talk of three fundamental environmental crises – pollution, biodiversity and climate change – and it may be useful for the Committee to do likewise. Issues such as biodiversity, forest degradation, pollution, and desertification, land degradation and drought predate what we think of as climate change, and it is important not to lose sight of this. Nature-based solutions and the expansion of conservation areas as a means of contributing to climate change mitigation and adaptation represent one key point of interrelation between climate and biodiversity concerns. If nature-based solutions are not grounded in an ecosystems approach they risk being used instrumentally as a resource in an industrial style process.

Whilst climate change should be treated as a specific topic in the GC, it should also be linked to biodiversity and ecological crises. Biodiversity is itself but one component of an ecosystem and the Committee could take a broader ecosystems approach within the GC.

⁵ For example, on [Uganda in 2015](#) (para 14).

⁶ For example, [CEDAW's General Recommendation 34 on Rural Women](#) at para 54 (e). See also paras 62(d) and 52(e)).

⁷ Other recent international law has expanded and applied the norm of FPIC – or of prior informed consent -- to both indigenous peoples and local communities as good practice (see, e.g., [the Nagoya Protocol, a supplementary agreement to the Convention on Biological Diversity](#)).

The link between conservation and climate change could be made more explicit in the GC. The GC should address the adverse impacts that conservation can have on land rights and recognise that groups such as indigenous peoples, rural women, tribal peoples and fisher peoples play a central role in conserving biodiversity and preventing climate change.

The GC should encourage policy coherence at the national level, such that States are encouraged to harmonise laws and policies that relate to land use, biodiversity, ecosystems, climate change, food, water, energy. These are not really separate policy areas but ought to be seen as comprising a ‘nexus’ where policy on any one of these areas affects the others.

Inclusion and non-discrimination

Several participants considered that it was important for the GC to improve the gender analysis in the draft and adopt stronger language on intersectional discrimination, in line with the reference to substantive equality in paragraph 14. Participants advanced the following recommendations:

The Committee should recognise the disproportionate impact of land related violations across the text, including in relating to climate impacts.

Small scale female farmers produce 20 - 30% less than male farmers as they face compounding layers of exclusion, as smallholder farmers and as women.⁸ The GC should include greater recognition of the fact that women are the majority of small farmers in many countries and the majority of the poor worldwide.

Rural women and other vulnerable groups play a vital role in land conservation and sustainable land use practices and the GC should emphasize that they should be seen as key partners within the context of land, climate change and biodiversity. These communities – those that live closest to the land – have incredibly important knowledge on how to care for the land and ecosystems and that should be seen as a valuable asset.

Whilst the draft currently mentions CEDAW General Recommendation 21,⁹ the Committee could place greater emphasis on CEDAW General Recommendation 34, which contains much more specific and strong language around land.¹⁰ This General Recommendation is included in footnotes but should be referenced more visibly in the GC.

The GC uses the term ‘gender-sensitive’, which means that both men and women’s concerns, aspirations and capacities are considered. It could be improved by using the term ‘gender responsive’, which conveys a higher level of aspiration, namely that women and girls will not only be considered, but that the outcomes of the policies and programmes will reflect on gender roles and inequalities and that an active effort will be made to encourage co-participation and fair distribution of benefits in line with the principle of substantive equality.

The GC should recognize that women human rights defenders are targeted disproportionately and acknowledge the disproportionate impact of extractive projects on women. The narrow gender-based violence focus in the current draft could be improved through stronger references to sexual and gender-based violence against women in the extractive industries.

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⁸ See ‘Empowering Women Farmers to End Hunger and Poverty’, Oxfam International, 16 March 2018, <https://www.oxfam.org/en/empowering-women-farmers-end-hunger-and-poverty>.

⁹ CEDAW general recommendation No. 21 (1994) on Equality in Marriage and Family Relations.

¹⁰ Para 56 states that the CEDAW “considers rural women’s rights to land, natural resources, including water, seeds and forests, and fisheries as fundamental human rights.” On climate change, see para 12.