**Comments to the draft general comment on Land and Economic, Social and Cultural Rights of the Committee on Economic, Social and Cultural Rights**

**June 2021**

**Submitted by the Indigenous Peoples and Development Branch – Secretariat of the UN Permanent Forum on Indigenous Issues/Division for Inclusive Development/UN Department of Economic Affairs**

The Indigenous Peoples and Development Branch/DISD/DESA offers some comments to the draft general comment on Land and Economic, Social and Cultural Rights of the Committee on Economic, Social and Cultural Rights.  This draws on the recommendations of the Permanent Forum on Indigenous Issues, an ECOSOC advisory body mandated to provide expert advice and recommendations on indigenous issues to the Council, and through the Council to the UN system agencies, funds and programmes.

The suggestions and comments in bold and red below follow the structure of the draft general comment for ease of reference:

1. **Introduction**
2. In addition to long-term trends in the high demand for land, the rapid urbanization in most parts of the world often takes place on land that is being used by peasants, rural communities, pastoralists and indigenous **peoples ~~communities~~** or as natural reserves and forests.[[1]](#footnote-1)

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.[[2]](#footnote-2) Such soft law instruments provide help in the interpretation of the legally binding obligations of States parties under the Covenant and address a broad range of Covenant rights.

**Comment: ILO Convention 169 cannot be considered soft law as it is an international treaty signed and ratified by Member States.**

1. Provisions in the Covenant relating to land

11. …. The right to water is infringed where communal grounds are enclosed, depriving people from access to water sources necessary to meet their daily needs. The right to health may be affected where land is cultivated by industrial means, particularly with the use of pesticides, **or** **affected by mining activities or other extractive industries**.

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).

III. Obligations of States parties under the Covenant

A. Non-discrimination and equality

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 collective rights and resources.

B. Participation, consultation and transparency

18. … States parties must ensure, inter alia, the regular and effective production and dissemination of relevant information relating to all those processes. Such processes should be transparent, organized in the relevant languages, **including indigenous languages**, widely publicized and grant access to all relevant documents. Affected persons **or peoples** need to be contacted prior to any decision that might affect their livelihood rights.

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

 Obligation to respect

23. International law recognizes the right of indigenous peoples over the lands and territories that they have traditionally occupied.[[3]](#footnote-3) International human rights law provides for the respect and protection of the relationship of indigenous **peoples ~~communities~~** with their lands, territories and resources, requiring States to demarcate their lands, protect them from encroachment and respect the right of the communities concerned 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.[[4]](#footnote-4) 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 **and after agreement on just and fair compensation and, where possible, with the option of return (Art. 10 UNDRIP).** Laws and policies should protect indigenous peoples from the risk of State encroachment on their land, for instance for the development of industrial projects or for large-scale investments in agricultural production.[[5]](#footnote-5) Regional human rights courts have contributed to strengthening the rights of indigenous peoples to their lands and territories.[[6]](#footnote-6) Both the Inter-American Court of Human Rights and the African Commission on Human and Peoples’ Rights have taken the view that members of indigenous communities who have unwillingly lost possession of their lands after a lawful transfer to innocent third parties “are entitled to restitution thereof or to obtain other lands of equal extension and quality”.[[7]](#footnote-7) **Other issues to be considered are: military activities on indigenous lands (Article 30 of UNDRIP); indigenous peoples right to conservation and protection of the environment and the productive capacity of their lands (Article 29.1) no storage of disposal of hazardous materials without their free, prior and informed consent (Article 29.2).**

32. The obligation to protect entails a positive duty to take legislative and other measures to provide clear standards for non-State actors such as business entities and private investors in the context of large-scale land acquisitions and leases at home and abroad, among others.[[8]](#footnote-8) States parties should adopt a legal framework requiring business entities to exercise human rights due diligence[[9]](#footnote-9)

**Suggestion for footnote making reference to the UN Guiding Principles on business and human rights.**

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

**Suggested para. on Indigenous peoples’ rights**

**52. Land is the foundation of the lives and cultures of indigenous peoples all over the world. Land rights, access to land and control over it and its resources are central for indigenous peoples’ wellbeing throughout the world. To survive as distinct peoples, indigenous peoples and their communities need to be able to own, preserve and manage their lands, territories and resources but the intensification of natural resource exploitation is adversely affecting their lands and territories. Since indigenous peoples came to the United Nations, they have emphasized the fundamental importance of their relationship with their lands, territories and resources. The United Nations Declaration on the Rights of Peoples adopted by the General Assembly in 2007 recognizes the right of indigenous peoples to self-determination (articles 3 and 4), the collective right to own and control their lands and resources (articles 25-27), their right to free, prior and informed consent in relation to legislation, measures and projects that may have an impact on their rights (articles 10, 11, 19, 28, 29 and 32) and their right to participate in decision-making processes (articles 5, 18 and 27). Ensuring the collective rights of indigenous peoples to lands, territories and resources is important not only for their well-being, but also for addressing some of the most pressing global challenges, including climate change and environmental degradation. Strengthening and safeguarding such rights constitute an effective way to protect critical ecosystems, waterways and biological diversity.[[10]](#footnote-10)**

E. Human rights defenders

53. The situation of human rights defenders **and indigenous rights defenders** is particularly difficult in conflicts over land.[[11]](#footnote-11)…

1. See <https://ourworldindata.org/urbanization>. The Department on Economic and Social Affairs has estimated that in 2050, more than two thirds of the world (more than 7 billion people) will live in urban areas. See https://population.un.org/wup. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)
3. ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), United Nations Declaration on the Rights of Indigenous Peoples, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, guideline 9, and A/HRC/9/9, para. 41. [↑](#footnote-ref-3)
4. 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-4)
5. United Nations Declaration on the Rights of Indigenous Peoples, arts. 28 and 32. [↑](#footnote-ref-5)
6. 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*. [↑](#footnote-ref-6)
7. Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, para. 128; and African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 209. [↑](#footnote-ref-7)
8. African Commission on Human and Peoples’ Rights, *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria*, decision, thirtieth ordinary session,
13–27 October 2001. [↑](#footnote-ref-8)
9. African Union, African Development Bank and Economic Commission for Africa, “Guiding principles on large scale land based investments in Africa”. The Committee has also observed that such regulations should also cover the issue that certain credit/microfinancing practices might also deprive people from their land, including by leading to overindebtedness. [↑](#footnote-ref-9)
10. State of the World’s Indigenous Peoples, Rights to Lands, territories and resources, 5th Volume, available at <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2021/03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final.pdf> [↑](#footnote-ref-10)
11. 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-11)