**Minority Rights Group International’s Observations on the Draft General Comment on Land and Economic, Social and Cultural Rights**

1. Minority Rights Group International (‘MRG’) welcomes the work of the Committee on Economic, Social and Cultural Rights (‘CESCR’ or ‘the Committee’) in developing the draft General Comment on Land and Economic, Social and Cultural Rights (the ‘Draft General Comment’) and it appreciates the opportunity to submit the following written observations for its consideration. The observations outlined below are being provided with a view towards clarifying existing State human rights obligations with respect to land, particularly as they pertain to the rights of minorities and indigenous peoples.

# A RIght to Land

1. MRG respectfully urges the CESCR to acknowledge the right to land as a self-standing human right implied in Articles 11(1), 12(1) and 15(1) of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’ or ‘the Covenant’).[[1]](#footnote-1) MRG submits that land falls within the category of guarantees essential for securing an adequate standard of living, the highest attainable standard of physical and mental health, and the ability to take part in the cultural life of the community, particularly for indigenous peoples and other communities that do not identify as indigenous, but have long-standing relationships to land expressed primarily through customary tenure systems that are often collective in nature (hereafter, ‘land-dependent communities’).[[2]](#footnote-2) Many of these land-dependent communities also happen to be minority groups. Failure to recognize the right to land as a self-standing human right under the Convention risks overlooking important developments in international human rights law, back-tracking on gains made through years of activism, consensus-building and advocacy by some of the world’s most marginalized communities.
2. International human rights law has long recognized the land rights of indigenous peoples.[[3]](#footnote-3) The recognition of the land rights of land-dependent communities, while less established, is also gaining traction. In the African context in particular, groups that do not identify as indigenous are vested with land rights based on customary and collective tenure.[[4]](#footnote-4) In the Americas, the Inter-American Court of Human Rights has recognized that certain land-dependent, Afro-descendant communities have a host of rights akin to the rights of indigenous peoples, including to land, which vest in the group by virtue of the central role their lands play in their livelihoods and cultural survival.[[5]](#footnote-5)
3. Three years ago, the Human Rights Council adopted the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (‘UN Peasants Declaration’), relying on international instruments, including the ICESCR. The text builds on the self-standing right to land of indigenous peoples, recognizing that peasants have individual and collective rights to land and that States have obligations to recognize customary tenure arrangements (Article 17). At the heart of these protections is a recognition of “the special relationship and interaction between peasants and other people working in rural areas and the land, water and nature to which they are attached and on which they depend for their livelihood”.[[6]](#footnote-6)
4. The Committee’s recognition that the Covenant protects the right to land as a self-standing human right is critical because collective and customary tenure rights are often not recognized or adequately protected by States despite being under a legal obligation to do so. This issue requires urgent attention by the international human rights community given the prevalence of land-grabbing, resource theft and the environmental damage and human rights violations that are linked to these phenomena.[[7]](#footnote-7) The economic, social and cultural rights framework must be capable of protecting the land tenure of indigenous peoples and land-dependent communities, which is the tangible and necessary element on which other related human rights can be realized. Protecting lands held in customary tenure indirectly through other economic, social and cultural rights has often proved ineffective in practice. It is for this reason that we strongly urge the Committee to recognize the right to land as a self-standing right in its General Comment.
5. MRG is also concerned that the Draft General Comment frames the right to land as a right to access land (see e.g., paragraphs 1, 9 and 10). We urge the Committee to broaden the language beyond mere access to include governance, control, use, development and, critically, ownership.[[8]](#footnote-8)

# Indigenous Peoples AND Minorities

1. MRG welcomes the specific attention afforded by the Committee to indigenous peoples through the Draft General Comment. Notwithstanding, we urge the Committee to expand on and clarify State obligations under the ICESCR as they relate to indigenous peoples’ land rights, as well as those of minorities and other land-dependent communities.

## Indigenous Peoples

1. States have specific obligations arising from the special relationship indigenous peoples have with their lands, territories and resources. The Draft General Comment should seek to reaffirm and build on hard-fought indigenous rights protections relating to land, including those contained in the UN Declaration on the Rights of Indigenous Peoples (‘UNDRIP’), which are grounded in preexisting international human rights instruments, such as the ICESCR. Of particular concern is the failure of the Draft General Comment to explicitly reference indigenous peoples’ right to self-determination in the context of their lands, territories and resources. The right to self-determination is firmly enshrined in Article 1 of the ICESCR, and its realization is necessary for indigenous peoples to secure all of their fundamental rights, including their right to land.[[9]](#footnote-9) By the same token, indigenous self-determination can only be ensured with due recognition of indigenous peoples’ rights to collectively own, use, control, govern and develop their lands, territories and resources.[[10]](#footnote-10) The Draft General Comment should explicitly link indigenous peoples’ inherent right to self-determination through Article 1 of the ICESCR with their right to land under international law.[[11]](#footnote-11)
2. Indigenous peoples’ right of free, prior and informed consent (‘FPIC’) is grounded in the right to self-determination and has been enshrined in UNDRIP.[[12]](#footnote-12) Worryingly, the language in paragraph 23 of the Draft General Comment purports to weaken FPIC protections outlined in UNDRIP by stating: ‘…*indigenous peoples have the right to have their lands demarcated, and relocation is allowed only under narrowly defined circumstances and,* ***in principle****, with the free, prior and informed consent of the groups concerned*.’ (emphasis added). Indigenous peoples’ FPIC rights should not be qualified by the inclusion of *‘in principle’* or any other manner inconsistent with UNDRIP.
3. The Draft General Comment further recites its intent to clarify State obligations concerning land, particularly with respect to Articles 1, 2, 11 and 12 the ICESCR (paragraph 8), but not the right to take part in cultural life under Article 15(1)(a). Indigenous lands and cultural identities are inextricably intertwined with indigenous cultures, which are inseparable from the territories in which they are practiced. Indeed, indigenous lands are still most commonly protected through enforcing the right to culture and they serve as the necessary vehicles for many indigenous groups to maintain their cultural identities and engage in their cultural practices. The Draft General Comment should expressly reaffirm indigenous peoples’ right to land as indispensable to the realization of their right to take part in cultural life under Article 15(1)(a) of the ICESCR. This is consistent with both well-established international jurisprudence,[[13]](#footnote-13) as well as the CESCR’s previous work.[[14]](#footnote-14)

## Minorities

1. The Draft General Comment rightly notes the importance of land and resources for other non-indigenous, marginalized groups, such as fisher folk, pastoralists, landless rural people and other land-dependent communities (paragraph 15). Yet, it only makes a cursory reference to ethnic minorities in the context of the armed-conflict and post-conflict situations (paragraph 45). Some ethnic, religious and linguistic minorities maintain special and sacred relationships with land akin to indigenous peoples.[[15]](#footnote-15) Minority communities are also disproportionately affected by unlawful evictions,[[16]](#footnote-16) discriminatory inheritance laws,[[17]](#footnote-17) and gentrification,[[18]](#footnote-18) among other adverse impacts relating to their lands. The relationship between minorities and their lands should be clarified in the Draft General Comment and the immense land-related challenges faced by these communities should be recognized.
2. The Committee should expand on State obligations relating to ethnic, religious and linguistic minorities, whose livelihoods and cultures are dependent on the access, use, control and ownership of land and who experience discrimination in seeking to exercise their land rights. It should clarify the extent to which land is a necessary precondition to realize the right to housing, water, food and culture for minority communities, denoting a right to land for them under the ICESCR. We further call for the Draft General Comment to make clear that minorities are entitled to effective participation and meaningful consultation in connection with any measure that impacts their lands or resources, as a key principle of the implementation of minority rights in the ICESCR.

# Non-Discrimination

1. We welcome the Committee’s recognition that indigenous peoples and land-dependent communities may face impermissible discrimination in relation to their Covenant rights in land-related contexts. We also welcome that the Committee underscored that State parties “are required to eliminate all forms of discrimination, formal, substantive, direct, indirect and multiple, and to take appropriate measures to ensure substantive equality” (paragraph 14). However, we remain concerned that by failing to recognize the right to land as a self-standing right under the Covenant, the legal analysis around non-discrimination stops short of being able to effectively address the discrimination indigenous peoples, minorities and land-dependent communities face in relation to their rights to access, use, enjoy, control, govern and own their lands.
2. At the heart of the non-recognition and non-implementation of the land and resource rights of indigenous peoples, minorities and land-dependent communities lies deep-seeded racial, ethnic and cultural discrimination. The bias against customary and collective forms of tenure in favor of individualized property regimes stems from colonial interventions that denied property rights to groups who were deemed inferior and whose use of land was not considered ‘productive’. The legacies of this colonial history continue to shape legal systems in many successor States in ways that continue to render land collectively held under customary tenure arrangements susceptible to dispossession. As such, we urge the Committee to address the issue of racial and ethnic discrimination vis-à-vis land rights directly, rather than through other related human rights.
3. We commend the Committee’s recognition that women are particularly susceptible to intersectional forms of discrimination in this context. We encourage the Committee to consider expanding its analysis to include other identities that render members of indigenous and minority groups more susceptible to intersectional discrimination, for example, indigenous and minority persons with disabilities.

# CLimate CHange, Biodiversity Loss and Conservation

1. MRG welcomes a dedicated section (paragraphs 54-55) on climate change in the Draft General Comment and encourages the CESCR to robustly address related challenges concerning the biodiversity crisis and the impact of conservation on indigenous peoples’ and land-dependent communities’ lands. Indigenous peoples and land-dependent communities are the least responsible for the climate and biodiversity crises, but often shoulder the largest burdens when it comes to adverse impacts and mitigation strategies, which can infringe on their fundamental human rights, including their economic, social and cultural rights. As such, the impacts of climate-change and biodiversity loss on indigenous peoples and land-dependent communities should be independently analyzed in the Draft General Comment.
2. The CESCR should emphasize the importance of securing and protecting the collective land rights of indigenous peoples and land-dependent communities as critical to stemming species loss and a key climate change mitigator, in line with a host of recent of empirical studies.[[19]](#footnote-19) Indigenous peoples and land-dependent communities are routinely recognized as the best custodians of their environments. Yet, all too often, these groups’ central role in protecting their environments is disregarded, leading to a host of interrelated human rights violations and environmental degradation. Indigenous peoples and land-dependent communities also suffer from State initiatives to mitigate climate change and biodiversity loss, which often infringe on their land rights. The Draft General Comment should thus draw attention to State obligations to respect the land and resource rights of indigenous peoples and land-dependent communities under the ICESCR when implementing various climate change mitigation strategies, such as the establishment of protected areas, carbon offsets and renewable energy projects.[[20]](#footnote-20)

# Remedies

1. In the section of the Draft General Comment on remedies, we urge the Committee to add a paragraph setting out the specific remedies that are due to indigenous peoples and land-dependent communities whose land rights have been curtailed, underscoring the right to restitution in particular. We would suggest that the CESCR draws inspiration from CERD General Recommendation XXIII, paragraph 5, which provides that where indigenous peoples “have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent” States must “take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.”[[21]](#footnote-21) This articulates the standard widely applied by international and regional human rights bodies,[[22]](#footnote-22) also extended to land-dependent minority communities.[[23]](#footnote-23)
1. It is not the first time the Committee has read an implied right into Article 11(1). In General Comment No. 15 on the Right to Water, the Committee noted that “Article 11, paragraph 1 of the Covenant specifies a number of rights emanating from and, indispensable for, the realization of the right to an adequate standard of living ‘including adequate food, clothing and housing.’” It concluded that “use of the word ‘including’ indicates that this catalogue of rights was not intended to be exhaustive”. UN Committee on Economic, Social and Cultural Rights, General Comment No. 15: Right to Water (2002) UN Doc E/C.12/2002/11, para 3. [↑](#footnote-ref-1)
2. This is in line with International Institute for Environment and Development’s observations on the draft general comment recently submitted for the co-rapporteur’s consideration as well as the recommendations of the former Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, who urged the international human rights community to recognize land as a human right. *See* UN Human Rights Council, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari (2007) UN Doc A/HRC/4/18, paras 29, 31, 33. [↑](#footnote-ref-2)
3. *See e.g.*,United Nations Declaration on the Rights of Indigenous Peoples, 2007 (‘UNDRIP’) Articles 10, 25, 26; ILO Convention 169 on the Rights of Indigenous and Tribal Peoples, 1989 (‘ILO Convention 169’), Article 14; Committee on the Elimination of Racial Discrimination (‘CERD’) General Recommendation XXIII on the Rights of Indigenous Peoples (1997) (‘CERD General Recommendation XXIII’), para 5; Inter-American Court of Human Rights, *Case of The Mayagna (Sumo) Awas Tingni v Nicaragua*, Judgment of 31 August 2001, para 149; Inter-American Court of Human Rights, *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August2010 (‘*Xákmok Kásek* case’), para 86; Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*,Judgment of 29 March 2006, para 118; African Commission on Human and Peoples’ Rights Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (2010) (‘*Endorois* case’), paras 204, 212, 252-268;African Court on Human and Peoples’ Rights, *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, Application No. 006/2012, Judgment of 26 May 2017, paras 195-201. [↑](#footnote-ref-3)
4. *See e.g.*,Land Rights Act (2018) of Liberia; Land Code (2017) of Mali; Customary Land Act (2016) of Malawi; Community Land Act (2016) of Kenya; Land Tenure Code (2013) of Benin; Land Code (2012) of Burkina Faso; Law on the Promotion and Protection of the Rights of Indigenous Peoples (2011) of the Republic of the Congo; Land Act (2009) of South Sudan; Federal Rural Land Law (2005) of Ethiopia; Land Act (2004) of Angola; Communal Lands Act (2002) of Namibia; Village Land Act (1999) of Tanzania; Land Act (1998) of Uganda; Rural Land Law (1998) of Ivory Coast; Land Act (1997) of Mozambique, Land Act (1995) of Zambia; Constitution of the Republic of South Africa (1967), Article 25. At the regional level, together with the right to property, the African Charter recognizes a host of ‘peoples’ collective rights, including the right to equality of peoples, the right to self-determination, the right to natural resources, the right to development and the right to an environment favorable to development. The African Commission on Human and Peoples’ Rights has applied these collective rights to groups that do not identify as indigenous. The Commission has clarified that “the notion of ‘people’ is closely related to collective rights. Collective rights enumerated under Articles 19 to 24 of the Charter can be exercised by a people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.” African Commission on Human and Peoples’ Rights Communication 266/03, *Kevin Mgwanga Gunme et al v Cameroon* (2009), para 171. [↑](#footnote-ref-4)
5. In these cases, the Inter-American Court reasoned that the Moiwana and Saramaka peoples respectively constituted distinct social, cultural and economic groups with special relationships to their ancestral territories. Inter-American Court of Human Rights, *Case of the Moiwana Community v. Suriname,* Judgment of 15 June 2005 (hereinafter, “*Moiwana* case”), paras 132-35 Inter-American Court of Human Rights, *Saramaka People v Suriname*, Judgment of 28 November 2007 (‘*Saramaka* case’), paras 80-86. [↑](#footnote-ref-5)
6. UN Peasant Declaration, Preamble, p. 2. [↑](#footnote-ref-6)
7. *See e.g.*, UN Human Rights Council, Report of the Special Rapporteur on the Right to Food, Addendum, Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge, Olivier De Schutter (2009) UN Doc A/HRC/13/33/Add.2; UNGA, Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz (2016) UN Doc. A/71/229. [↑](#footnote-ref-7)
8. The Committee on the Elimination of Discrimination Against Women (‘CEDAW’) has called on State Parties to eliminate all forms of discrimination on ownership, cosharing and inheritance of land, thus going beyond mandating mere non-discriminatory access to land. *See e.g.*,UN CEDAW,Concluding Observations, Zimbabwe(2012) UN Doc CEDAW/C/ZWE/CO/2-5. Similarly, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (‘ICERD’) expressly prohibits discrimination vis-à-vis the right to own property alone or in association with others, the right to inherit and the right to housing. [↑](#footnote-ref-8)
9. UNGA, Report of the Special Rapporteur on the Rights of Indigenous Peoples (2019) UN Doc A/74/149, para 15. [↑](#footnote-ref-9)
10. Expert Mechanism for the Rights of Indigenous Peoples, Right to Land Under the United Nations Declaration on the Rights of Indigenous Peoples: a Human Rights Focus (2020) UN Doc. A/HRC/45/38, para 7. [↑](#footnote-ref-10)
11. UNDRIP, Arts. 25-28. [↑](#footnote-ref-11)
12. UNDRIP, Arts. 19, 28. [↑](#footnote-ref-12)
13. Inter-American Court of Human Rights, *Case of Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005 (‘*Yakye* case’), para 147; Inter-American Court of Human Rights, Inter-American Court of Human Rights, *Kichwa of Sarayaku v Ecuador,* Judgment of 27 June 2012; *Endorois* case, para 244 [↑](#footnote-ref-13)
14. CESCR, General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights) (2009) UN Doc E/C.12/GC/21, paras 36-37. [↑](#footnote-ref-14)
15. *See e.g.*, *Moiwana* case, para 132-33; *Saramaka* case, paras 85-86. [↑](#footnote-ref-15)
16. *See e.g.*,Basic Principles and Guidelines on Development-based Evictions and Displacement, Annex 1 of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living (2007) UN Doc A/HRC/4/18, para 7; United Nations, Office of the High Commissioner on Human Rights, Forced Evictions, at ohchr.org/en/issues/housing/pages/forcedevictions.aspx; United Nations, Forced Evictions, Fact Sheet No. 25/Rev 1 (2014) 8, at <https://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf>; Deena Greenberg et al., ‘Discrimination in Evictions: Empirical Evidence and Legal Challenges’ (2016) 51 Harvard Civil Rights-Civil Liberties Review 115. [↑](#footnote-ref-16)
17. United Nations, Minority Rights: International Standards and Guidance for Implementation, 37 (2010) at <https://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf>. [↑](#footnote-ref-17)
18. *See e.g.*, Jackelyn Hwang and Lei Ding, ‘Unequal Displacement: Gentrification, Racial Stratification, and Residential Destinations in Philadelphia’ (2020) 126(2) American Journal of Sociology 354. [↑](#footnote-ref-18)
19. For a summary of some these studies see Rights and Resources Initiative, *Rights-Based Conservation: The path to preserving Earth’s biological and cultural diversity?* (November 2020), at https://rightsandresources.org/wp-content/uploads/2020/11/Final\_Rights\_Conservation\_RRI\_05-01-2021.pdf. [↑](#footnote-ref-19)
20. *See e.g*.*,* the recommendations of the former Special Rapporteur on the Rights of Indigenous Peoples and the recommendations of the Special Rapporteur in the Field of Cultural Rights in their respective reports on the impacts of climate change. UN Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples), Victoria Tauli-Corpuz (2017) U.N. Doc. A/HRC/36/46; UNGA, Report of the Special Rapporteur in the Field of Cultural Rights, Karima Bennoune (2020) U.N. Doc. A/75/298. [↑](#footnote-ref-20)
21. The standard for what makes restitution impracticable is very high. In a recent judgment, the Inter-American Court ordered Argentina to engage in a seven-year process to remove non-indigenous settlers who had encroached on indigenous lands since the colonial period as part of the restitution process. Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Nuestra Tierra) Association v Argentina*, Judgment of 6 February 2020. [↑](#footnote-ref-21)
22. Restitution of ancestral lands is generally delivered through a delimiting, demarcation and titling exercise. *See e.g.*, Inter-American Commission of Human Rights Case 12.053, *Case of Maya Indigenous Communities of the Toledo District v Belize*, Report No. 40/04 of 12 October 2004,para 197; *Yakye* case, para 233; *Xákmok Kásek* case, para 337; Inter-American Court of Human Rights, *Kaliña* *and* *Lokono* *Peoples v Suriname*, Judgment of 25 November 2015, para 305. [↑](#footnote-ref-22)
23. *Moiwana* case, para 209, operative paragraph 3; *Saramaka* case, para 198, operative paragraph 5. [↑](#footnote-ref-23)