**Indigenous Peoples’ Submission to the draft General Comment on Land and Economic, Social and Cultural Rights[[1]](#footnote-2)**

Indigenous Peoples Rights International (IPRI) convened a working session with indigenous experts and representatives to get their perspectives regarding the Draft General Comment and provide inputs to the CESCR to ensure coherence and consistency of the Draft General Comment with international standards on the rights of indigenous peoples.

The outcomes of the process are synthesized in the following sections: i) Operationalization of Key Provisions Related to Indigenous Peoples Right to Self-Determination and rights on lands, territories and resources; ii) The need for coherence with UNDRIP and other relevant international human rights instruments and standards; iii) Other Observations; iv) Conclusions; and v) Recommendations.

### Operationalization of Key Provisions Related to Indigenous Peoples Right to Self-Determination and rights on lands, territories and resources

The obligations under Article 1 on the right to Self-Determination can be better articulated to reaffirm the rights enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and advancing on issues related to the right to Self-Determination and the rights of Indigenous Peoples to their lands, territories and resources.

In relation to the right to Self-Determination, the Draft General Comment should reference core obligations addressed in various of its Concluding Observations since 2013. It should also reference jurisprudence of indigenous peoples regarding Article 1. There is an opportunity to memorialize the Concluding Observations under Article 1.

Moreover, the Committee addresses land rights issues under Article 1, i.e. under the right to self-determination, and in particular Article 1(2).[[2]](#footnote-3) The Draft General Comment should reference relevant jurisprudence such as *Mahuika v. New Zealand*.[[3]](#footnote-4)

Article 1 can be further and properly elaborated because the Covenant cannot be interpreted as impairing the right to enjoy and fully utilize the resources.*[[4]](#footnote-5)* Securing indigenous peoples’ territorial rights should be clearly reflected in the Draft General Comment. This includes the profound and special cultural, economic and spiritual relationship that indigenous peoples have with the lands, territories and resources they have traditionally owned or otherwise occupied or used.[[5]](#footnote-6)

Although reference is made to self-governance, the nexus between self-government and control of the land should be made, as it is not yet addressed. Also, in the references made of “control over land and resources” it is important to clarify how the “control” will be exercised. The latter is paramount for indigenous peoples, since governance also relates to customary law, spiritual and cultural relations to the land which could be adequately mentioned.

There is a repeated promotion of Agrarian Reform. Concerns were expressed since there are numerous examples whereby Agrarian Reform served as means to dispossess indigenous peoples from their lands and territories, and distributing these among third parties. Redistribution of land through Agrarian Reforms may serve a good purpose and may be considered harmless; nonetheless, it may prejudice indigenous peoples and the General Comment provides no tools to address these conflicts.

Furthermore, reference should be made to treaties, agreements and other constructive arrangements. Treaties are hard law. In general, for indigenous peoples, treaties pertain to land rights.. Therefore, these should be referenced.

The General Comment should uphold and further develop standards to properly protect indigenous peoples’ rights to lands, territories and resources and their livelihoods. This is of great importance since the identity and survival of indigenous peoples relates directly these.

### The need for coherence with UNDRIP and other relevant international human rights instruments and standards

A strong emphasis was made on the need to uphold international standards enshrined in the UNDRIP and other relevant international human rights instruments and jurisprudence.

The Draft General Comment should properly use UNDRIP as a framework in the analysis, interpretation and clarification of the State obligations under the Covenant.[[6]](#footnote-7) In addition, it is important to emphasize that UNDRIP is a universally-recognized standard and it restates existing binding law.

Some issues were raised regarding the right to Free, Prior and Informed Consent (FPIC). The Draft General Comment recognizes FPIC as an appropriate standard of engagement with indigenous peoples; nonetheless, it is ambiguous with regards to FPIC and relocation, resulting in contradiction with UNDRIP.[[7]](#footnote-8) It is important to define what are “narrowly defined circumstances” and correct the reference that “in principle” it must be done with FPIC. UNDRIP[[8]](#footnote-9) and other jurisprudence explicitly state that under no circumstances will indigenous peoples be forcibly relocated without their consent. The right of Indigenous peoples redress, and when not possible, to just, fair and equitable compensation should be guaranteed, pursuant to UNDRIP Article 28.[[9]](#footnote-10)

The Draft Comment contains language could result in denying agency and indigenous peoples’ distinct rights-holder status. Statements such as “indigenous and other traditional communities rely on the natural resources on their lands for subsistence and the conduct of traditional cultural practices” limits the right to Self-Determination as it states that indigenous peoples use their resources for subsistence activities only. This is important since not all indigenous peoples practice only subsistence activities. This creates a standard that the use of resources has to be attached to traditional practices contravening UNDRIP.

It is important to note that certain rights and standards that are inherent to indigenous peoples that do not necessarily apply in the context of other groups. For example, in paragraph 23 related to the judgments of the Inter-American Court on Human Rights extend these rights to other “traditional communities”, which, in the referenced cases related to indigenous and tribal peoples only.[[10]](#footnote-11)

The Committee has the opportunity to properly address indigenous peoples issues, and further elaborate on the interconnected nature of human rights. For instance, referencing the General Comment on the Right to Health,*[[11]](#footnote-12)* and in the General Comment on the Right to Water.*[[12]](#footnote-13)*

On another issue, the Draft General Comment states that “[e]nsuring access to natural resources, as concerns the Covenant, cannot be limited to specific protections granted to the lands and territories of indigenous peoples”. It also provides that the “States therefore have an obligation to guarantee security of tenure for all legitimate land users, particularly those who depend on collective or communal land use schemes.”[[13]](#footnote-14) Legitimate land users
“include not only those with formal land titles, but also those with customary, collective or traditional tenure rights that might not be recognized by law.”[[14]](#footnote-15) The Draft General Comment sets up a system of competing rights which must be resolved through proper frameworks or tools, eliminating the risk of the interpretation by State parties.

### Other Observations

The UN Committee on the Elimination of Racial Discrimination (UNCERD) has held the position that any violation of the rights of indigenous peoples by acts or omission is an act of racial discrimination. In this regard, following UNCERD practice under Article 2, the lack of recognition of indigenous peoples’ rights is a discriminatory act *per se*. There is no need to compare indigenous peoples to others to identify discriminatory treatment.

Beyond the socio-economic needs, Indigenous peoples rely on their traditional lands, territories and resources for the preservation of their cultural identity as well as for their spiritual continuity and vitality. Considering the interconnected nature of rights, this could also include linguistic rights, for example, to name places in indigenous languages.

In the case of Economic, Social and Cultural Rights, General Comments usually explain what the core obligations are. Core obligations have two aspects: i) minimum levels that must be respected, e.g. non-discrimination; and ii) a baseline of the obligations that cannot be regressed. The Draft General Comment should explain the difference between core and other obligations.

### Conclusions

Indigenous experts and representatives acknowledge the effort made by the Committee in drafting this important General Comment. Through the thoughtful and deep analysis on the Draft General Comment, as well as the Covenant and the jurisprudence of the Committee, the following conclusions were made:

First, that a specific General Comment on Indigenous Peoples should be adopted by the Committee. Similar experiences at the UN and by other treaty bodies have enabled States, indigenous peoples and other stakeholders to properly understand and interpret the obligations of the covenants in relation to indigenous peoples. These includes the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women.

Second, that UNDRIP, after twenty-three years of deliberations, resulted in a universally-recognized standard related to Indigenous Peoples rights. In this regard, it should be properly used as framework and as a minimum standard that can be further developed through mechanisms such as the General Comment.

Lastly, Indigenous Peoples are committed to good-faith and constructive dialogues for the development of these standards. In that spirit, this submission is presented to the Committee. Also, in that spirit Indigenous Peoples will engage in future efforts with the Committee.

### Recommendations

1. For the Committee to include a specific section on Indigenous Peoples’ land rights that shall affirm the UNDRIP and the ILO Convention 169 as minimum standard and a framework for the respect, recognition, protection and exercise of indigenous peoples’ land rights in conjunction with their right to self-determination, self-government, to free, prior and informed consent and to their cultural integrity. This section should also include indigenous peoples land rights in relation related conventions of climate change, biodiversity and other relevant Guidelines such as the UN Guiding Principles on Business and Human Rights and the Voluntary Guidelines on the Responsible Governance of Tenure.
2. In line with recommendation above, the Committee should elaborate on Article 1 on the Right to Self-Determination of Indigenous Peoples and properly address the issues of the rights to lands, territories and resources. In addition, it should memorialize its jurisprudence on indigenous peoples rights and the right to self-determination and build on the inter-related nature of human rights to incorporate the Covenant rights, Committee’s standards as well as other frameworks and jurisprudence.
3. In accord with the Human Rights Committee, the Committee should also address indigenous and tribal peoples’ rights to their lands, territories and resources under article 1 of the Covenant,[[15]](#footnote-16) which guarantees the right to self-determination, both alone and when read together with other provisions of the Covenant.[[16]](#footnote-17)
4. For the Committee to commit to draft a General Comment within the next two years for the application of the Covenant in compliance with Indigenous peoples human rights standards particularly with UNDRIP.
1. Endorsed by: Vicky Tauli-Corpuz (UN Special Rapporteur on the Rights of Indigenous Peoples 2014-2020), Willie Littlechild (Former Expert - Expert Mechanism on the Rights of Indigenous Peoples), José Carlos Morales M. (Former Expert - Expert Mechanism on the Rights of Indigenous Peoples), Joan Carling (Former Expert UN Permanent Forum on Indigenous Issues), Shankar Limbu, Joseph Itongwa, Dalee Sambo Dorough, PhD, Councillor Laurie Buffalo (Samson Cree Nation), Anne Nuorgam, Ambassador Bobbi Herrera, Alancay Morales Garro. Including the following organizations: Almaciga, Grupo de Trabajo Intercultural, Spain in the NGO/civil society; ANAPAC RDC; Indigenous Peoples Rights International; International Organization of Indigenous Resource Development (IOIRD); Lawyer's Association for the Human Rights of Nepal's Indigenous Peoples (LAHURNIP); REPALEAC; Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education). [↑](#footnote-ref-2)
2. International Covenant on Economic, Social and Cultural Rights. Article 1. [↑](#footnote-ref-3)
3. Apirana *Mahuika et al. v. New Zealand*, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 [↑](#footnote-ref-4)
4. *See* International Covenant on Economic, Social and Cultural Rights. Article 25 states that “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources”. [↑](#footnote-ref-5)
5. Inter-American Court of Human Rights, *Maygna (sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, para. 149 which states that “[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must full enjoy, even to preserve their cultural legacy and transmit it to future generations”. “Hence, the traditional lands and natural resources of indigenous peoples are key to their physical and spiritual survival and an essential prerequisite for the enjoyment of their international recognized human rights. The relationship between indigenous peoples and their ancestral lands should therefore be safeguarded as a human rights imperative as well as under the goal of self-determination and respect for and promotion of global cultural diversity.” [↑](#footnote-ref-6)
6. *See* General Comment para. 5 stating ”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. 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.” And in particular, footnote 5 references UNDRIP. [↑](#footnote-ref-7)
7. *See* General Comment para. 23 “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.” [↑](#footnote-ref-8)
8. *See* United Declaration on the Rights of Indigenous Peoples Article 10 “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” [↑](#footnote-ref-9)
9. *See* United Declaration on the Rights of Indigenous Peoples Article 28(1) “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their fee, prior and informed consent” [↑](#footnote-ref-10)
10. *See* General Comment para. 23 stating “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.” [↑](#footnote-ref-11)
11. CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) *see* para. 27 which states “In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.” [↑](#footnote-ref-12)
12. CESCR General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) see para. 7 which states “Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.” [↑](#footnote-ref-13)
13. CESCR Draft General comment No. 26 (2021) on land and economic, social and cultural rights, para. 15. [↑](#footnote-ref-14)
14. Draft General Comment para. 19. [↑](#footnote-ref-15)
15. *Tiina Sanila-Aikio vs. Finland*, CCPR/C/124/D/2668/2015, 20 March 2019, para. 6.8-6.9; *Klemetti Käkkäläjärvi et al. v. Finland*, CCPR/C/124/D/2950/2017, 18 December 2019, para. 9.9 (explaining that “article 27 of the Covenant, interpreted in the light of the [UNDRIP] and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development. Article 1 of the Covenant and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law”); and *Apirana Mahuika et al. vs. New Zealand*, CCPR/C/70/D/547/1993 (2000), para. 9.2. [↑](#footnote-ref-16)
16. *See e.g.,* E/C.12/GC/25, para. 40 (on the relationship between traditional knowledge and land rights); E/C.12/2000/4, para. 27 (on the relationship between security of tenure and health); E/C.12/1999/5, para. 13 (on violations of the right to food in cases where “access to their ancestral lands may be threatened”); and E/C.12/2002/11, para. 7 (“[t]aking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not ‘be deprived of its means of subsistence’, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples) and para. 16(d) (“States parties should take steps to ensure that: … (d) Indigenous peoples’ access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water”). [↑](#footnote-ref-17)