**August 13, 2021**

**To: The United Nations Committee on Economic, Social and Cultural Rights (CESCR)**

**Re: Comments on the Draft General Comment on Land, Economic, Social and Cultural Rights submitted by the International Indian Treaty Council (IITC), Indigenous Peoples Organization in General Consultative Status to the United Nations Economic and Social Council (ECOSOC)**

**Via email:**  cescr-land@ohchr.org

Esteemed Committee members,

The International Indian Treaty Council has reviewed with interest the document titled General comment No. 26 (2021) on land and economic, social and cultural rights [E/C.12/69/R.2.] dated 3 May 2021. We note that it is designated as a draft submitted by the Rapporteurs and that the deadline for comments is August 15, 2021.

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Two Indigenous Peoples’ representatives from our organization, including current IITC Board President Ron Lameman (Beaver Lake Cree Nation, Canada) and representative of IITC Affiliate San Francisco Magu, Berenice Sanchez Lozada (Otomi/Nahuatl, Mexico) attended the CESCR Day of General Discussion on this matter in person in Geneva, Switzerland on October 14, 2019. IITC’s Executive Director Andrea Carmen (Yaqui Nation, USA) also submitted an invited video presentation. All three addressed the vital importance of land and territories to the exercise of Indigenous Peoples’ social, cultural and economic rights, and, in fact, to our very identity and survival. On that basis, we respectfully submit the following comments, proposed edits, additions, and in some cases deletions to the current draft. Our intention is to assist the Committee to most accurately and comprehensively reflect our input based on the unique legal status, rights and relationships of Indigenous Peoples in this regard.

**1. Indigenous Peoples’ status, their relationship to their traditional lands and territories, and the related rights affirmed in international standards are unique and distinct.**

Indigenous Peoples have been an organized, distinct constituency at the United Nations since 1977 when the first UN Conference on Indigenous Peoples focused on discrimination against Indigenous Peoples of the Americas took place. Our distinct status as a “Major Group” was confirmed at the 1992 UN Conference on Sustainable Development in Rio de Janeiro (the 1st “Earth Summit”) based on our recognized role as sustainable caretakers of our lands, territories and natural resources.

The United Nation Working Group on Indigenous Populations which operated from 1982-2006 carried out three key studies which are of direct relevance to the topics addressed in this General Comment. WGIP Chairwoman Erica-Irene A. Daes was Rapporteur for two of these studies, “Indigenous Peoples’ permanent sovereignty over natural resources” (E/CN.4/Sub.2/2004/30 and Add.1) and “Indigenous Peoples and their relationship to land” (E/CN.4/Sub.2/2001/21). In addition, the UN Study on Treaties, Agreements and Constructive Arrangements was concluded in 1999 by Special Rapporteur Miguel Alfonso Martinez [E/CN.4/Sub.2/1999/20].

These landmark studies and their conclusions and recommendations affirmed the unique, distinct relationships, legal status and rights pertaining to Indigenous Peoples and their traditional lands and resources and should be cited in this General Comment.

**We therefore request that Indigenous Peoples and their rights to land in relation to the CESCR be included in the General Comment as a separate stand-alone section.**  The references to Indigenous groups, communities etc. should be changed to “Indigenous Peoples.” Indigenous Peoples included in references which also contain “local communities, vulnerable groups, campesinos (aka peasants) etc. should be deleted from those lists. Cites already included in the draft to the rights of Indigenous Peoples affirmed in ILO 169 and the UN Declaration on the Rights of Indigenous Peoples should be moved to this new section.

2. Indigenous Peoples should also not be referred to as “stakeholders.” **Indigenous Peoples are properly referred to as “rights holders.”**

**3. Indigenous Peoples are Peoples with the rights accruing to all Peoples under International Law.** Their right to self-determination, which includes their rights to freely pursue their economic, social and cultural development, is affirmed in Article 1 in Common of the 2 International Covenants (including the ICESCR) as well as Article 3 of the UN Declaration. This designation has been in use since the beginning of the United Nations’ consideration of Indigenous Peoples, including in the 1999 UN Study on Treaties, Agreements and other Constructive Arrangements[[1]](#footnote-1) and the Martinez-Cobo Report completed in 1983[[2]](#footnote-2). It is notable that the Martinez-Cobo Report also tied its definition of “Indigenous Peoples” on their identification with pre-colonial lands and territories and their determination to transmit their ancestral territories to their future generations.

4. Although the **UN Declaration on the Rights of Indigenous Peoples, the internationally-recognized minimum standard for the rights of Indigenous Peoples,**  is minimally referenced in the draft General Comment, several of the most essential and pertinent articles and preambular paragraphs are not included. This includes the Declaration preamble’s essential recognition that the land rights of Indigenous peoples are “**inherent.”**[[3]](#footnote-3) Other key references that should be cited in the General Comment include:

**Article 25** which affirms the rights and responsibilities of Indigenous Peoples based on their distinctive **spiritual relationship** with their traditional lands and resources.[[4]](#footnote-4)

**Article 26** which affirms **Indigenous Peoples’ rights to the lands, territories and resources which they have traditionally owned, occupied, used or acquired** as well as the state obligation to legally demarcate and protect these lands, territories and resources.[[5]](#footnote-5)

**Article 29** which affirms Indigenous Peoples rights to the **productive capacity of their lands** and their conservation and environmental protection.[[6]](#footnote-6)

5. **The right of Indigenous Peoples to redress including the return of lands taken without their Free Prior and Informed Consent**.

This right is of essential importance and is unique to Indigenous Peoples as affirmed in International Standards. Notably, and of particular relevance for the process at the CESCR, the UN Committee on the Elimination of Racial Discrimination (CERD) General Recommendation XXIII adopted on August 8, 1997 states in paragraph 5 *that “The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to 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.”*

In addition, the UN Declaration on the Rights of Indigenous Peoples affirms the right to redress regarding their lands, territories and resources. For example, Article 27 affirms that *“States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.”*

Article 28 affirms, in addition, that: “*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 free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”*

6**. The Right of Indigenous Peoples to the recognition, observance and enforcement of Treaties and Agreements concluded with settler states and the predecessors.**

The intervention presented by IITC’s current Board President Ron Lameman at theCESCR Day of General Discussion on 14 October, 2019 specifically emphasized the vital importance of the Nation-to-Nation Treaties and Agreements concluded in many regions between Indigenous Peoples and settler governments to the theme of this General Comment. However, this reference is unfortunately not included in the current draft. The conclusions and recommendations of the UN Study on Treaties referenced and footnoted above are directly relevant. They are also underscored in Article 37 of the UN Declaration on the Rights of Indigenous Peoples. [[7]](#footnote-7) Most of these bi-lateral Treaties recognize the rights of Indigenous Peoples to their traditional lands, territories and resources, including rights to water and means of subsistence. However, these rights have been consistently violated by the settler governments.

In his study, Special Rapporteur Miguel Alfonso Martinez confirmed that the legal standing and validity of these Treaties, including their legally-binding recognition of the land and resources of the Indigenous Treaty partners, has neither been diminished nor eliminated.[[8]](#footnote-8) The rights and political status recognized in these Treaties and the ongoing challenges for Indigenous Peoples in ensuring that they are **recognized, observed and enforced** is of key importance to include in the new section we have proposed on Indigenous Peoples’ rights to land in the General Comment.

In closing, we thank you for the opportunity to present this information which we feel is essential to include in the General Comment under development. IITC could also support the proposal presented by other organizations for additional time to review thedraft General Comment at the upcoming meeting of the Committee in September for proposed adopted in 2022. This will allow time for additional consultations including with Indigenous Peoples. The comments contained in this submission should be considered as inputs into the Committee’s further work in this regard.

We would be pleased to discuss any of the issues and recommendations we have presented in order to further strengthen and clarify the General Comments’ references to the Rights of Indigenous Peoples consistent with relevant international standards and studies in this regard.

Respectfully submitted,



Ron Lameman, President

International Indian Treaty Council



Andrea Carmen, Executive Director

International Indian Treaty Council

cc: United Nations Special Rapporteur on the Rights of Indigenous Peoples Mr. Jose Francisco Cali Tzay via email to indigenous@ohchr.org

1. “In the case of indigenous peoples who concluded treaties or other legal instruments with the European settlers and/or their continuators in the colonization process, the Special Rapporteur has not found any sound legal argument to sustain the argument that they have lost their international juridical status as nations/peoples.” Final Conclusions, Special Rapporteur Miguel Alfonso Martinez, June 1999 [↑](#footnote-ref-1)
2. “Indigenous communities, peoples and nations are those which, having a **historical continuity with pre-invasion and pre-colonial societies that developed on their territories**, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.” Martinez-Cobo Report, “the Problem of Discrimination Against Indigenous Populations,” completed in 1983, Sub-commission on the Elimination of Discrimination and Protection of Minorities. [[E/CN.4/Sub.2/1983/21](http://www.un.org/esa/socdev/unpfii/documents/MCS_intro_1983_en.pdf)] [↑](#footnote-ref-2)
3. “Recognizing the urgent need to respect and promote **the inherent rights of indigenous peoples** which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, **especially their rights to their lands, territories and resources.**” Preamble, UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly September 13, 2007. [↑](#footnote-ref-3)
4. “Indigenous peoples have the right to maintain and strengthen their distinctive **spiritual relationship** with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard;” Ibid, Article 25. [↑](#footnote-ref-4)
5. “1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; 2. Indigenous peoples have the right to own, use, develop and

control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired; 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with

due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.” Ibid, Article 26 [↑](#footnote-ref-5)
6. “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement

assistance programmes for indigenous peoples for such conservation and protection, without discrimination.” Ibid, Article 29, paragraph 1. [↑](#footnote-ref-6)
7. 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements; 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements. Ibid, Article 37. [↑](#footnote-ref-7)
8. Miguel Alfonso Martinez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations* E/CN.4/Sub.2/1999/20, including paragraphs: *270. This leads to the issue of whether or not treaties and other legal instruments concluded by the European settlers and their successors with indigenous nations currently continue to be instruments with international status in light of international law. 271. The Special Rapporteur is of the opinion that said instruments indeed continue to maintain their original status, and to be fully in effect and consequently, are sources of rights and obligations for all the original parties to them (or their successors), who shall fulfill their provisions in good faith. 272. The legal reasoning supporting the above Conclusion is very simple and the Special Rapporteur is not breaking any new ground in this respect. Treaties without an expiration date are to be considered as continuing in effect until all the parties to it decide to terminate them, unless otherwise established in the text of the instrument itself, or unless, its invalidity is declared.* [↑](#footnote-ref-8)