**Comment by Emmaus Aurinkotehdas ry on draft CESCR General Comment 26:**

**Comment on peoples' equal right to self-determine the use of land so as to fulfil human rights**

**1.** **Land as basis of peoples' right of self-determination and self-determination as basis of land as territory**

As by their right of self-determination all peoples "freely pursue their economic, social and cultural development" and "may, for their own ends, freely dispose of their natural wealth and resources", land belongs to this peoples' "natural wealth and resources" of which they may "freely dispose" (1) and which are also in many ways based and used on land.

So far "all peoples may, for their own ends, freely dispose of" and use their land on which they live and other "natural wealth and resources" on it (2) and the realization of this peoples' equal right of self‑determination "is an essential condition for the effective guarantee and observance of individual human rights" and their advanced realisation. (3)

**2.** **Use of land is obliged to be primarily determined by how peoples' can fulfil human rights**

As "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law" (4), **this does not mean** obligations "based upon the principle of mutual benefit, and international law" coukd in some case allow **impairing peoples' right to freely use their land**/natural wealth - as this is set in the present Covenant under which:

**a)** "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" and "in no case may a people be deprived of its own means of subsistence."(5)

Each state party has to demonstrate in its activity's impacts in respect to all world's peoples "any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to" the above presented "economic content of the right of self-determination" "and to what extent that affects the enjoyment of other" human rights. (6)

On land, natural wealth and resources peoples can freely adopt and duly fulfil "any obligations arising out of international economic co-operation" as "based upon the [...] mutual benefit" under the international law only compliant to how it is ensured that they are not "impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth" and that "in no case may a people be deprived of its own means of subsistence." (7)

**b)** This imposes "obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination"(8):

- States "shall promote the realization of the right of self-determination, and shall respect that right, in conformity with" the UN charter obligations (9) that "shall prevail" also to secure "equal rights and self-determination of peoples" anywhere with "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction".(10)

-"The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not" and so also anywhere on lands on which peoples live and which any state affects, it has "to facilitate realization of and respect for the right of peoples to self-determination" "consistent with" the UN Charter obligations.(11)

**c)** Each State Party shall also "through international assistance and co-operation, especially economic" kinds, take steps "to the maximum of its available resources" - including also uses of land - for "achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means", also by the "legislative measures" (12) so that:

- "State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."(13)

- States have "to guarantee that the rights [...] will be exercised without discrimination of any kind as to [...] social origin, property, birth or other status" (14) both within each state and internationally to ensure that "Everyone is entitled to a social and international order in which" universal human rights "can be fully realized". (15)

**Thus each state shall ensure that the impacts of its laws, policies and activities in global economy shall everywhere respect peoples' right to self-determine the use of lands on which they live in ways which best realise economic, social and cultural rights and do not cause any regression to the realisation of these rights anywhere in the world.**

But to fully understand what does that require, states need to understand what constitutes a human collective to be a 'people' with a right to self-determine a use of some land area and what lives on it.

**3. 'A people' as a human collective with such ways to hold and use land which sustain its life as the people who it is**

Peoples have right to land and its use which sustain their life as peoples who they are so that they can self-determine that life in a way which fulfils their human rights, but what are peoples ? Who is 'a people'?

**a) Peoples determined by states or peoples' right of self-determination ?**

If the criteria for a group constituting 'a people' would be that only all citizens of a nation state would be undersood as 'a people', then their collective human rights as a people would disappear as soon as they would be violated by another state conquering the area ?

And if two peoples who both have had their own states decide to unite to a one common state where they both would continue to have their rights as peoples, would they by that stop themselves being two peoples ?

Such right which disappears as it becomes violated would be neither just nor logical. People's right of self-determination means right to determine its own life - not to determine life of others by taking into account only the impacts of one's decisions and actions to one's own life without addressing transparently how they affect life of others.

Peoples right of self-determination is valid as universal right only as far as all peoples can equally realise it without violating or impairing the realisation of equal rights of others.

People's human right to self-determine its own life can not thus be born from the power of state to govern the people but rather the state is only one mode of expression of people's right of self-determination.

As one can not assume there has not existed any peoples before or without states, 'peoples' can not be results of states. Their human right to self-determination can not thus come from state but rather sets the conditions for state's legitimacy.

World has not had any stable number of different peoples but throughout the history many peoples have disappeared by cultural disintegration, by being assimilated to other peoples, etc. and new peoples have continued to emerge. As a result also states and justifications of their existence have continued to change based on how they affect peoples' life.

As all peoples who have been in history able "for their own ends, freely dispose of their natural wealth and resources" and "freely pursue their economic, social and cultural development" (16) have not had states, state is not only form via which peoples may realise right of self-determination of land use for realising human rights. "States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth":

"The right of peoples [...] to permanent sovereignty over their natural wealth and resources must be exercised in the interest of [...] the well-being of the people" and "the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions whichthe peoples and nationsfreely consider to be necessary or desirable".(17)

**b) Who have rights on a land as 'a people' and how states are obliged to respect internationally people's rights on** **lands**

Peoples' right of self-determination sets also "obligations on States parties [...] vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination". (18) States have thus obligations on how they have internationally to treat lands on which peoples live also in case if such peoples are deprived of having their own state or deprived also of other types of self-determination.

Also peoples deprived of having own state in their control - or peoples who see state not as a way to express their identity or self-determination - have at least a right that "in no case may a people be deprived of its own means of subsistence".(19)

What makes a human collective on some land to be 'a people' whose rights as a people have to be respected consists of evolving processes, under which also "self-determination cannot be understood as a one -time choice" as its "process did not end with decolonization". It "continues today as many minorities, indigenous peoples and peoples living under occupation strive to achieve higher degrees of self-administration and self-government." (20)

In this process "the concept of “peoples” embraces ethnic, linguistic and religious minorities", "groups living under alien domination" and indigenous groups who are deprived of autonomy or sovereignty over their natural resources." (21)

What are the criteria of justice which have made and now make certain new peoples to start to deserve a right of self-determination as distinct peoples - and other peoples to lose that right ?

The International Court of Justice has noted that in determining when and how a group may constitute "a people", one has to consider the distictive unity the group has in respect to the traditions, culture, ethnicity, historical ties, heritage, language, religion, sense of identity or kinship, the will to constitute a people and common suffering. (22)

How do such criteria for the distictive unity of group's culture - or ethnicity, language, heritage, history, religion, identity/kinship or common suffering - relate to the land and ways to use land in terms of human rights ?

Status of 'a people' can belong also to "a group of persons with a common [...] territorial connection, or common economic life" sustaining their "consciousness of being a people" (23) and "there are many unrepresented peoples and nations, peoples living under occupation" who would need more sef-determination so as to fulfil their huuman rights. (24)

'A people' can be seen as such group of humans who identify themselves by their common life and by such life's heritage of sustaining itself in certain areas of land whose life such group is adapted to live collectively as people unified by such life which in some dignified way realises their human rights - and which need thus to be secured to fulfil human rights obligations.

Ways how lands are shaped and used by human life in different areas and times influence crucially the emergence, disappearance, continuous change and re-formation of different peoples and their right of self-determination throughout the history also as "an essential condition for the effective guarantee and observance of individual human rights" (25)

Peoples are thus such groups with distinctive common life and understanding who determine their life and identity collectively through their common heritages or decisions on their life and/or on lands where they live and whose such self-determination of their life and natural wealth by which they live helps to realise universally equal human rights.

'A people' is a wide human collective who collectively sustains its own life and life-heritage in lands or areas where it lives by its own means of using such areas' natural wealth and resources to live such common life which its members can sustain only collectively as their own, dignified life by which they can fulfil their human rights.

As such collective has its "own ends" on use of land's "natural wealth and resources" by which it lives by using them as its own, distinctive means of subsistence needed to sustain its life/life-heritage and to fulfil economic, social and cultural rights, it deserves right to self-determine such lands to be used as such its "own means of subsistence" by which it lives. (26)

As those who belong together as 'a people' need thus each other's life, work and some shared understanding on the area and its life to commonly sustain their own life by what are their own means subsistence to commonly live in the area, thus even if only some are taken away their rights of their subsistence uses of the lands on which they have lived, a people may become also more widely deprived of some crucial integral parts of its own means of subsistence violating human rights.

And to secure people's subsistence such means have to be treated in ways which secure the economic, social and cultural rights of any groups among the people with specific protection for the vulnerable and marginalised communities.

**4. How land is people's 'own means of subsistence' as its natural wealth ?**

How land belongs to peoples' right of self-determination depends also on that in which sense lands are some people's lands.

We need thus to address in which sense lands can be for peoples "their natural wealth and resources" which they may freely use "for their own ends" so that each land may belong to some people's "own means of subsistence" ? (27)

Land where one lives one's life is one's own land in a profound sense even if one would not commercially own it.

Some peoples may live on land or forest by using it as their 'own' in a sense how people belong to such land or forest to sustain their self-subsistent life as distinctive for that land or its life, for their identity, dignity and survival as people who they are - and thus more profoundly, inalienably and permanently people's own than any exchangeable commercial property.

Peoples' right of self-determination of the 'natural wealth and resources' of their life on a land as their 'own means of subsistence' to sustain their own life of such lands concerns also this how their life belongs to the land whose life they live.

Land by which a people lives can thus belong to people's own means of subsistence as its non-exchangeable, inalienable right to self-determination of its own life which is thus more fundamentally people's own than any commercial property.

Land on which a people lives and to which it belongs - and which is in this way people's own land as people's own means to subsist - shall be protected as people's land to an equal extent as commercial property gets protected, irrespective of the cultural form or status of property. "Property status, as a prohibited ground of discrimination" includes also "land ownership or tenure" whose status shall not condition human"rights, such as access to water" or "protection from forced eviction".(28)

**"In no case may a people be deprived of its own means of subsistence"** (29) with no discrimination of culture of economy.

So also in case of peoples who are deprived of having their own state in their control or peoples who determine their own means of subsistence (not via a state but) by their communities' life-practices - or who live in one state together with other peoples who have different means of subsistence - no laws or measures of state's territorial integrity or obligations of international economic cooperation shall deprive any people of its own, self-determined means of subsistence, because:

**a)** Also in case how a specific land or territory under state's jurisdiction belongs to certain people's own means of subsistence, "the States Parties [...] shall promote the realization of the right of self-determination, and shall respect" it to secure people's own means of subsistence on such land also for "all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self‑determination". State is to "take positive action" to secure this "irrespective of whether a people entitled to self‑determination depends on a State party [...] or not". (30)

**b)** Also in case of "conflict between those who depend on land for subsistence and other stakeholders who may want to use natural resources for other purposes, including for profit", if subsistence users need land to sustain their life, state has to secure that "no one should be deprived of his or her own means of subsistence, including those deriving from land".(31)

Also "human rights of populations that depend on land for their subsistence and survival" (32) have to be protected from being "violated when [...] marginalized peoples are not allowed to dispose freely of their natural resources, including land, particularly when such resources are their means of subsistence." (33) State shall provide "people working in rural areas with effective mechanisms for the prevention of [...] any action [...] depriving them of their means of subsistence and integrity" (34) and ensure "adequate access to water for subsistence farming" (35) "No one should be deprived of his or her own means of subsistence including those deriving from land" particularly as one's "inherent right to life" depends on that.(36)

**c)** Also in case of indigenous peoples who have their own means of subsistence but live (without their own state) in a state controlled by others, they also have the right "to be secure in the enjoyment of their own means of subsistence [...] and to engage freely in all their traditional [...] economic activities" on "lands, territories and resources which they have traditionally owned, occupied or otherwise used". They shall "not be forcibly removed" without their consent (37) from such lands of their traditional uses or occupations which are for them also a "shelter, a place of security and a source of a sense of belonging and identity" "the defining element of their [...] culture and their relationship to their ancestors and future generations" and to which lands "access [...] is obtained through community membership, not the free market".(38)

**d)** Also in case of "minority groups, indigenous peoples or [...] other communities" state needs "their free and informed prior consent when the preservation of their cultural resources [...] associated with their way of life and cultural expression, are at risk". (39) States have to be "preserving the distinctive character of minority cultures" (40) also when these may determine their land based subsistence by their right to their cultural life "which can only be expressed and enjoyed as a community". State has "to guarantee [...] the exercise of the right to take part in cultural life" in community and this "includes the right to the lands" (41), access to cultures of "rivers, mountains, forests and nature reserves, [...] the flora and fauna found there ." (42)"Traditional communities rely on the natural resources of their lands for subsistence and the conduct of traditional cultural practices". Often especially "for women, land is a pivotal resource for meeting subsistence needs". (43)

**e)** Also in case if state aims to protect its territorial integrity or may adopt "obligations arising out of international economic co-operation [...] based upon the principle of mutual benefit, and international law", nothing in these shall be "impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" in a way which secures people's own, self-determined means of subsistence (44) - also because:

**-** National territorial integrity shall be respected as "the territorial integrity [...] of sovereign and independent Statesconducting themselves in compliance with the principle of equal rights and self-determination of peoples" securing thus "a government representing the whole people belonging to the territory without distinction as to race, creed", etc

- By independent sovereignty "every State has the duty to refrain from any forcible action which deprives peoples [...] of their right to self-determination and freedom" and to support them "in their actions against [...] such forcible action”. (45)

- As "territorial integrity cannot be used as a pretext to undermine the State’s responsibility to protect the human rights of the peoples" (46) it has to secure "the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self -determination” also under "alien domination". (47)

- Also "through international [...] co-operation, especially economic" one, state has "to take steps to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (48)

- "The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights" like "when forced evictions are ordered in the context of investment projects. Indigenous peoples’ cultural values and rights associated with their ancestral lands are particularly at risk. States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally [...] used. (49)

- "Gross and reliably attested violations of human rights against a population negates the legitimacy of the exercise of governm ental power" (50) while states have to "treat all populations under their jurisdiction in accordance with internationally accepted human rights norms, enable their participation in decision-making". (51)

**f)** Also in case where land is used or treated in ways which undermine regenerational viability of such land and its life's diversity which belong to such people's own means of subsistence whose communities' life depends on that land, their rights get violated. A people has a right to self-determine its life and such use of land's natural wealth in an area by which it can sustain its life by itself in most self-subsistent and dignified way, which best secures human rights, identity and life-heritage of its vulnerable people and regeneration of that life's diversity of the land by which people sustain its life.

When land as natural wealth and resource belongs to people's 'own means of subsistence' its life's diversity is sustained in people's land use so that it does not become consumed away but regenerates, remains alive as natural wealth by which people can continue to live. In this way peoples can continue to hold lands as 'their natural wealth' and people can keep land alive/vital as its 'own means of subsistence'.

**Notes and references**

1. ICESCR article 1 and ICCPR article 1

2. ICESCR article 1 and ICCPR article 1

3. CCPR, General comment No. 12, paragraph 1

4. ICESCR article 1.2

5. ICESCR articles 1.2 and 25

6. CCPR, General comment No. 12, paragraph 5

7. ICESCR articles 1.2 and 25

8. CCPR, General comment No. 12, paragraph 6

9. ICESCR article 1.3

10. UN Charter articles 1.2-1.3, 55-56 and 103

11. CCPR, General comment No. 12, paragraph 6

12. ICESCR article 2.1

13. ICESCR article 4

14. ICESCR article 2.2

15. UDHR, article 28

16. UN General, Assembly, resolution 1514 (XV), Declaration on the granting of independence to colonial countries and peoples, preface and paragraph 2

17. UN General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources", paragr, 1-2 & 8

18. CCPR, General comment No. 12, paragraph 6

19. ICESCR article 1.2

20. A/69/272, paragraph 3

21. A/69/272, paragraph 4

22. United Nations, International Court of Justice, 2010 Kosovo Case

23. A/69/272, paragraph 4

24. A/69/272, paragraph 54

25. CCPR, General comment No. 12, paragraph 1

26. ICESCR article 1.2

27. ICESCR article 1.2

28. E/C.12/GC/20, paragraphs 15, 25 and 34-35

29. ICESCR article 1.2

30. ICESCR, article 1.3 and CCPR General comment No. 12 on self-determination, paragraph 6

31. E/2014/86, paragraphs 4 and 28

32. E/2014/86, paragraph 74

33. E/2014/86, paragraph 21

34. A/RES/73/165, UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, article 12.5

35. E/C.12/2002/11, General Comment 15, Right to water, paragraph 7

36. E/2014/86, paragraph 28

37. UNDRIP articles 10, 20.1, 26 and 32.1

38. A/HRC/45/38, Right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus Study of the Expert Mechanism on the Rights of Indigenous Peoples, paragraphs 1 and 5.

39. E/C.12/GC/21, paragraph 55 e

40. E/C.12/GC/21, paragraphs 32-33

41. E/C.12/GC/21, paragraph 36

42. E/C.12/GC/21, paragraph 16 a-b

43. CESCR, Draft General Comment 26, paragraphs 12 and 17

44. ICESCR, articles 1.2 and 25

45. UN General Assembly resolution 2625 (XXV), Declaration on Principles of International Law Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations and Vienna World Conference on Human Rights: The Vienna Declaration and Programme of Action, 1993, preamble and Part I, paragraph 2

46. A/69/272, paragraph 70

47. The Vienna Declaration and Programme of Action, adopted in 1993, preamble and Part I, paragraph 2

48. ICESCR, article 2.1

49. E/C.12/GC/24 , paragraph 12

50. A/69/272, paragraphs 74 and 78

51. A/69/272, paragraph 86 b

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