**Expert Mechanism on the Rights of Indigenous Peoples**

**6 August 2021**

**Submission to the Committee on Economic, Social and Cultural Rights on the Draft General Coment on Land and Economic, Social and Cultural Rights**

**General remarks**

1. EMRIP welcomes the references in the draft General Comment to indigneous peoples and notes that paragraph 23 does refer to the right to land of indigneous peoples, and the need to demarcate indigneous land and protect it from encroachment. The precursor to recognising indigenous peoples’ rights to their lands, terrritories and resources (and indeed all of their rights under the UNDRIP) is recognition of indigenous peoples as indigenous peoples. EMRIP would welcome an enouragement by the CESCR to States to do so.

2. EMRIP would also welcome specific references to the articles of the UNDRIP that relate to land rights (arts. 25, 26 and 27 and 28 on redress) and free, prior and informed consent (arts. 10, 11, 19, 28, 29 and 32). We note that there are specific references in the text to the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (para. 3B.6) but none on the UNDRIP. Given the centrality of the UNDRIP to the recognition of the minimum standards for the protection of indigenous peoples rights it would be important to include specific references to the relevant articles when indigenous peoples are mentioned in the draft.

3. References where relevant to EMRIP’s reports on Free, Prior and Informed Consent ([A/HRC/39/62](https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx)) and on the Right to Land ([A/HRC/45/38),](https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Call.aspx) would also reinforce the text, as it relates to indigenous peoples, as the reports set out the interpretation of land rights and free, prior and informed consent under the UNDRIP. Both reports also provide advice to States at the end, to which the CESCR may wish to refer.

4. EMRIP notes that sometimes in the draft text indigneous rights are conflated with those of other groups like peasants, or local communities. This may lead to confusion and obviate the clarity on indigenous peoples rights achieved under the UNDRIP. There are also paragaphs or sentences supported by regional jurisprudence on indigenous people’s rights without indicating in the draft that this juridprence relates to indigneous peoples, as in paragraph 12.

5. Thus, perhaps a separation of indigenous peoples from other groups with specfic references to the relevant UNDRIP articles would help to clarify indigenous land rights, in partciular on the issue of free, prior and informed consent.

**Collective Nature of Indigenous Land Rights**

6. Respect for indigenous peoples’ self-determination and their customary land tenure systems necessitates recognition of their collective ownership of lands, territories and resources. Collective rights of indigenous peoples are at the heart of regional jurisprudence, as expressed by the Inter-American Court of Human Rights (*Kaliña and Lokono Peoples case*) and by the African Commission on Human and Peoples’ Rights in the *Endorois case*.

7. EMRIP welcomes the reference to collective rights in the draft General Comment but notes the absence of a specific reference to the importance of collective rights for indigneous peoples such as in paragraph 20. However, the citations in the footnote in paragraph 20 referring to the jurisprudence of the Inter-American Court of Human Rights all relate to cases of indigenous peoples. As one of the main achievements of the UNDRIP was the recognition of collective (as well as individual) rights of indigenous peoples, which may not be protected in other instruments, EMRIP respectfully suggests that a reference to the UNDRIP would bring more clarity to the issue.

**Consultation and Free, prior and informed consent**

8. Articles 10, 11, 19, 28, 29 and 32 of the UNDRIP, refer to the necessity to seek indigenous peoples’ free, prior and informed consent on measures affecting them. This concept operates fundamentally as a safeguard for the collective rights of indigenous peoples. The UNDRIP sets out very specific guidance on when free, prior and informed consent is required, guidance that has been expanded upon and interpreted by several treaty bodies, including the CESCR.

9. The EMRIP appreciates the CESCR’s view that there is a requirement to respect the free, prior and informed consent of indigenous peoples (paragraph 18 on consultation and paragraph 55 on climate change). However, EMRIP would welcome more language in the draft on what this means, including the different elements of free, prior, and informed consent, and in what circumstances consent is required. In this regard, the CESCR may wish to cross-reference here the jurisprudence of the Human Rights Committee (*Länsman et al. v. Finland* and *Poma Poma v. Peru*.) in which the Committee considered whether the action taken by the State had a “substantive negative impact” on the lives of the indigenous peoples and thus amount to violations of the ICCPR. References to the relevant articles of the UNDRIP and the EMRIP report on the subject, might also be helpful here in establishing the breadth of free, prior and informed consent.

10. For EMRIP, free, prior and informed consent is a process of dialogue and negotiation, where consent is always the objective. Indigenous peoples should be able to influence the outcome of the decision making process not merely be involved in or heard in the process affecting them and in a number of cases (as set out in the UNDRIP) free, prior and informed consent will be required. For example, contrary to what is indicated in paragraph 23 of the draft General Comment, article 10 of the UNDRIP states that, “No relocation shall take place without the free, prior and informed consent of the indigenous peoples”. The draft currently qualifies the requirement of free, prior and informed consent in such cases of relocation with “in principle” language. For the EMRIP, consent is required in cases of relocation without qualification.

11. The EMRIP would also like to see a reference to the need to consult and reach consent in accordance with indigenous peoples own customary norms and traditional methods of decision-making, with their legitimate representatives, and should generally be evidenced by an explicit agreement. It is important here to ensure the participation of indigenous women, youth, older persons and persons with disabilities in these consultations. The implementation of free, prior and informed consent should also include accessible recourse mechanisms for disputes. States should be encouraged to establish consultation mechanisms by law and indigenous peoples are also encouraged to establish robust representative mechanisms and their own protocols for seeking free, prior and informed consent. When projects are to be pursued, necessary safeguards should include impact assessments, mitigation measures, compensation, benefit–sharing and redress for any human rights violations.

**Spirituality and land rights**

12. Article 25 of the UNDRIP highlights the importance of indigenous peoples’ spiritual attachment to their lands and their right to pursue practices and traditions associated with that spiritual relationship. This has been recognised by the Inter-American Court of Human Rights in *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, which stated that “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 fully enjoy, even to preserve their cultural legacy and transmit it to future generations”.

13. Importantly, under article 25 indigenous peoples have the right to maintain and strengthen their spiritual relationship with the lands, territories and resources, including the waters and seas, in their possession and no longer in their possession, but which they owned or used in the past. As indicated in EMRIP’s land report, this may require ensuring access to the land, protecting or restoring specific features or ecologies important to indigenous customs or traditions, and preventing uses and activities that would be detrimental to those ends. As the African Commission on Human and Peoples’ Rights has said, “without access to their traditional land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors”.[[1]](#footnote-1) Where land has been lost to third parties, indigenous peoples’ rights continue so long as the spiritual and material basis for indigenous identity is supported by their unique relationship with their traditional lands, as expressed by the Inter-American Court of Human Rights, in the *Yakye Axa* and *Sawhoyamaxa cases.*

14. Paragraph 2 of the draft General Comment refers to this spiritual relationship in general terms but does not make specific reference to indigenous peoples until the last sentence. Given that the citation in the draft referring to this spiritual connection is an Inter-American Court of Human Rights case relating to indigenous peoples, we would welcome more clarity in this paragraph on indigenous peoples spiritual relationship with their lands, territories and resources, with a specific reference to indigenous peoples relying on article 25 of the UNDRIP. A request to States that they should ensure indigenous peoples’ right to maintain and strengthen their spiritual relationship with their lands, territories and resources, including the waters and seas, in their possession and no longer in their possession but which they owned or used in the past, would also be helpful.

15. In addition, EMRIP advises to expand on the nature of spirituality as it relates to indigenous peoples. As EMRIP’s land report states, for indigenous peoples, the spiritual relationship to the land is an inseparable part of every activity on the land. It pertains not only to spiritual ceremonies but also to a wide range of other activities such as hunting, fishing, herding and gathering plants, medicines and foods that have a spiritual dimension and are inextricably part of the spiritual relationship to the land.

**Self-determination**

16. EMRIP notes the absence of the consideration of self-determination in the current draft. In its report on the land rights of indigenous peoples, EMRIP highlights that, “Respect for indigenous peoples’ self-determination and their customary land tenure systems necessitates recognition of their collective ownership of lands, territories and resources.”[[2]](#footnote-2) It states that, “All the rights in the Declaration are indivisible, interdependent and grounded in the overarching right to self-determination and that the exercise of self-determination is therefore indispensable for indigenous peoples’ enjoyment of all their other rights, including, importantly, land rights (arts. 25–28, 30 and 32 of the Declaration). In this regard, EMRIP respectfully suggests that the connection between indigenous peoples right to self-determination and land rights is address in the text.

17. The CESCR may wish to consider the Human Rights Committee’s approach to the self-determination of indigenous peoples as expressed in two recent Decisions, albeit it not on land rights[[3]](#footnote-3). For the first time, the Human Rights Committee made a specific reference to “internal self-determination” and cited the Declaration as an authority in its analysis of indigenous rights.[[4]](#footnote-4) In its Decisions, the Committee noted that the Sami Parliament ensured an internal self-determination process that was necessary for the continued viability and well-being of the indigenous community as a whole. It found that Finland had improperly intervened in the Sami’s rights to political participation regarding their specific rights as an indigenous people, finding a violation of articles 25 and 27 of the Covenant, as interpreted in the light of article 1.

**Redress**

18. Article 28 of the UNDRIP sets out the remedies required for the violation of indigenous peoples land rights. Paragraph 56 of the draft refers to the restitution of land as a form of remedy “when appropriate”, however, for indigenous peoples, restitution is the primary remedy, as expressed in article 28. This is supported by the Inter-American Court of Human Rights in the *Yakye Axa* and *Sawhoyamaxa* cases. The Court noted that the appropriate resolution of such disputes must consider the fact that non-indigenous interests may often be appropriately addressed through financial compensation, while for indigenous peoples the relationship to the land is spiritual, fundamental to identity and survival and therefore generally irreplaceable.[[5]](#footnote-5) Indigenous peoples who have unwillingly lost possession of their lands, or whose lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent, are entitled to restitution. As highlighted by the Committee on the Elimination of Racial Discrimination, compensation “should as far as possible take the form of lands and territories”.[[6]](#footnote-6)

19- If actual restitution of indigenous lands is not possible, just, fair and equitable compensation must be provided. As indicated in our land report, compensation should not be limited to financial awards but also take the form of alternative similar lands, equal in quality, size and legal status or, if freely agreed upon by the indigenous peoples concerned, other forms of compensation or redress.

20. Thus, the EMRIP would welcome a specific reference in the draft to the right to remedy for indigenous peoples as expressed in article 28.

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1. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*. [↑](#footnote-ref-1)
2. A/HRC/45/38 [↑](#footnote-ref-2)
3. CCPR/C/124/D/2668/2015, CCPR/C/124/D/2950/2017 [↑](#footnote-ref-3)
4. See Ibid.; see also CCPR/C/FIN/CO/7. [↑](#footnote-ref-4)
5. *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 146–148. [↑](#footnote-ref-5)
6. Committee on the Elimination of Racial Discrimination, general recommendation No. 23. [↑](#footnote-ref-6)