**Committee on Economic, Social and Cultural Rights, Draft General Comment No. 26**

**on Land and Economic, Social and Cultural Rights**

**CONTRIBUTION BY THE GOVERNMENT OF CANADA**

1. The Government of Canada appreciates the work of the Committee on Economic, Social and Cultural rights in monitoring States Parties’ implementation of the *International Covenant on Economic, Social and Cultural Rights* (“the Covenant”). Canada wishes to thank the Committee for the opportunity to comment on Draft General Comment No. 26 on Land and Economic, Social and Cultural Rights (“the Draft General Comment”). Canada welcomes constructive dialogue and engagement between the United Nations treaty bodies and States Parties on issues such as the content of General Comments.
2. Canada recognises the independence and impartiality of the Committee, and its ability to issue General Comments. Canada reiterates, however, that General Comments are capable only of providing guidance to States Parties in their interpretation of their obligations. The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Covenant that is necessarily agreed upon by States Parties.
3. The specific comments below are not exhaustive, but rather highlight areas of concern. Silence in respect of other areas does not constitute acquiescence in the Committee’s interpretation of States’ obligations. Canada has four mainareas of concern in relation to the Draft General Comment.
4. ***Comments concerning free, prior and informed consent (FPIC)***
5. In paragraph 18 it is stated that “The standards for indigenous peoples recognized in the international legal developments in relation to indigenous peoples and also in the VGGT (9.9) is that of free, prior and informed consent.”  Canada would like to have it clarified that the concept of free, prior and informed consent is not legally binding in international law.
6. In 2016 Canada announced its full and unqualified support for the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) as well as a commitment to implement it domestically, which would include the concept of free, prior and informed consent.  In furtherance of the objective to implement the Declaration, Parliament has enacted legislation, *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 which provides a framework for implementation of the Declaration by the federal Government.
7. Consistent with UNDRIP and the concept of free, prior and informed consent, both section 35 of the *Constitution Act, 1982* and the common law duty to consult serve to protect rights held by Indigenous peoples in Canada from federal, provincial and territorial government actions which might adversely impact them and their potential or established Aboriginal or Treaty rights, including rights over their lands, territories and resources. Under Canadian law, such consultation does not give Indigenous peoples a veto over government conduct, but guarantees a meaningful process for the reconciliation of Indigenous interests and other societal interests.
8. Further engagement with Indigenous peoples, as well as other interested stakeholders, will be undertaken, including through the Recognition and Implementation of Rights Framework engagement process, to develop a made-in-Canada approach to free, prior and informed consent and the various means through which Canada may seek to implement this concept in various contexts, across levels of government and in partnership with Indigenous peoples.
9. ***Comments concerning the obligations of States parties under the Covenant as related to land***

*Paragraphs 19 – 37*

1. In paragraph 19, it is stated that “States shall refrain from any infringement of legitimate tenure rights”. Under Canadian law, Aboriginal and Treaty rights that are protected by Canada’s constitution, including Aboriginal title, may be infringed in the public interest provided that the infringement is justified in line with the stringent legal test set out by the Supreme Court of Canada.[[1]](#footnote-1)
2. In paragraph 23 it is stated that international human rights law “respects and protects” the relationship of indigenous communities with their lands, territories and resources, employing terminology that is normally used to describe the nature of States’ human rights obligations. Canada suggests using alternative wording such as “International human rights law **affirms** the relationship of indigenous communities with their lands, territories and resources…”.
3. Paragraph 23 also states that “Regional human rights courts have also contributed to strengthening of the rights of indigenous peoples to their lands and territories.” While Canada agrees that certain rulings have been made by regional human rights courts, the principles enunciated in these rulings are not necessarily considered customary international law and may not binding on all States. Canada suggests that this sentence be made more factual by stating that “Regional human rights courts have also **made rulings concerning** the rights of indigenous peoples to their lands and territories”.
4. Paragraph 25 sets out a list of requirements for an eviction to be justifiable, and in this regard makes reference to the Basic Principles and Guidelines on Development-Based Evictions and Displacement (“Basic Principles and Guidelines”) developed by the Special Rapporteur on the right to adequate housing. The list of requirements in paragraph 25 differs in certain respects from the criteria identified in the Basic Principles and Guidelines, and also goes beyond what the Committee has stated in relation to forced evictions in its General Comment 7. In particular, there is no reference in these other instruments or documents or in Article 4 of the Covenant to the “common good”: rather, the Basic Principles and Guidelines and Article 4 of the Covenant refer to the “general welfare”. Canada also notes that Article 4 of the Covenant does not require that the benefits of a limitation on a Covenant right in promoting the common good ‘outweigh’ the impacts on the enjoyment of the right being limited; rather, it stipulates that any limitations imposed on a Covenant right must be solely for the purpose of promoting the general welfare.
5. Paragraph 36 states that “States should use the maximum of available resources to progressively realise the right to access productive resources for individuals and groups, whose right to an adequate standard of living would otherwise be violated”. Canada’s position is that while access to productive resources may be integral to realization of the right to an adequate standard of living in certain circumstances, no specific “right to access productive resources” has been recognized in international law. Accordingly, Canada suggests that this statement be amended to “States should **facilitate** access **to** productive resources for individuals and groups, whose right to an adequate standard of living would otherwise be violated”.
6. ***Comments concerning the extraterritorial application of the Covenant***

*Paragraphs 38 - 44*

1. While there is no overarching provision in the Covenant pertaining to the scope of its application, Canada cannot support an interpretation of the Covenant that affirms the general existence of extraterritorial obligations in relation to this instrument.
2. The Committee’s interpretation of the Covenant in paragraphs 38-44 attempts to expand the scope of the Covenant beyond the territory under the jurisdiction of the State. Such an interpretation would impinge on well-established principles of sovereignty. Canada notes that Article 2(1) of the *International Covenant on Civil and Political Rights* (ICCPR), to which Canada is a Party, provides that a State Party has the obligation to respect and ensure the rights recognized in that instrument for “all individuals within its territory and subject to its jurisdiction”. Article 2(1) reflects the principle that the jurisdictional competence of a State is primarily territorial. Exceptions to that general rule are generally defined and limited by the sovereign territorial rights of the other relevant States. It is Canada’s view that, consistent with the abovementioned principle, the obligations of States Parties under the Covenant are primarily territorial. Canada accordingly suggests that these paragraphs in the Draft General Comment be reconsidered.
3. ***Comments concerning climate change***

*Paragraphs 54-55*

1. In paragraph 54, the last sentence states “Moreover, States have the obligation to design adaptation policies to climate change at the national level sensitive to all forms of land use change induced by climate change and to register all affected persons and to use maximum available resources to address its impacts, particularly on disadvantaged groups”. This goes beyond what is required in the Paris Agreement, which is referenced earlier in the paragraph. Canada suggests the last sentence be changed to read “Moreover, States **should** design adaptation policies….” in order to reflect the non-binding nature of the recommendation.
2. In paragraph 55, climate financing usually flows to where developing countries indicate that they most need support. As such, Canada would suggest that the first sentence be modified to read as follows (suggested additions underlined and bolded)

“Since climate change also impacts the countries that may have contributed the least to it, those countries that historically contributed most to climate change and those who contribute mainly today **should** assist those that are most affected but are hardly able to cope with its impacts, **in line with the needs and priorities identified by those affected which may include** supporting and financing land-related adaptation measures….”

1. ***Other comments***
2. As a general comment, Canada recommends for greater certainty and clarity that the Committee, when referring to Covenant rights, consistently use wording that is aligned with the wording used in the Covenant to describe those rights.  This would be relevant to references in the Draft General Comment to the rights to “adequate food”, “adequate housing” and the “highest attainable standard of health” as per the following illustrative examples (suggested additions underlined and bolded);
   1. In paragraph 1

“Access to land is an important precondition for the realisation of several Covenant rights, particularly the rights to adequate food, water and housing as part of the right to an adequate standard of living, and the right **to the highest attainable standard of** health, the protection against non-discrimination in several of the Covenant Rights…”

* 1. In paragraph 9

“Secure access to land is a preconditions for the enjoyment of several rights under the Covenant. The right to **adequate** housing i.e. the availability, accessibility and affordability of housing. may be violated where people are evicted from land where they had built housing, whether informally or not. Such evictions can be done without respecting the requirements established by the Covenant, that the Committee clarified in General Comments No. 4 (1992) and No. 7 (1997). These standards have been further developed in the basic principles and guidelines on development*-*based evictions and displacement presented in 2007 by the Special Rapporteur on the right to adequate housing. Access to land in urban areas is providing not only space for a shelter; household related areas and potentially a garden can also be a place for domestic work in the informal and formal economy as well as non-domestic work done in contexts at home. Houses in rural areas are built normally on the land plot which is also used for production purposes. The loss of such land therefore often affects the right to **adequate** housing, the right to **adequate** food or access to employment.”

* 1. In paragraph 10

“Ensuring secure access to land and related productive resources is crucial for guaranteeing the enjoyment of the right to adequate food. The enjoyment of right to **adequate** food would be at risk where land users are deprived of the land on which they rely either to produce food for their own consumption, to feed their communities, or to produce for the markets. Article 11 paragraph 2 (a) of the Covenant recognizes the connection between the right to **adequate** food and the utilization of natural resources…”

* 1. In paragraph 11

“The right to water is infringed where communal grounds are enclosed, depriving people from access to water sources necessary to meet their daily needs. The right to **the highest attainable standard of** health may be affected where land is cultivated by industrial means, in particular with the use of pesticides. Other airborne compounds found on farms, such as dust, fertilizers and plant growth regulators, pollen, animal waste, and other micro-organisms, have been found to contribute to various respiratory diseases. When the loss of access to productive resources reduces income and sufficient social security benefits are not available, several rights of the Covenant may be at risk, such as rights to **adequate** food, access to healthcare or social services that require payments.”

* 1. In paragraph 19

“States parties shall recognize and respect existing access to land of all legitimate tenure right holders given that secure access to productive resources such as land is crucial to realize their right to **adequate** food and their right to **adequate** housing, which requires safe access to a place or shelter…”

* 1. In paragraph 34

“States parties must facilitate secure, equitable and sustainable access to, use of and control over land for those who are landless or live in poverty, especially women and marginalised sections of society, who depend on them to realise their economic, social and cultural rights, such as the rights to **adequate** food, **adequate** housing and adequate standard of living…”

1. Right to Water: As the right to water is referenced in paragraph 11, Canada would like to clarify that it interprets the right to water to mean the human right of everyone to safe drinking water and basic sanitation as essential to the right to an adequate standard of living, and therefore, implicit under Article 11 of the Covenant. Canada interprets the right to safe drinking water and basic sanitation as the right to a sufficient quantity and safe quality of reasonably affordable and accessible water for personal and domestic uses and to basic sanitation that is safe and hygienic. Canada further recognizes that the right to safe drinking water and basic sanitation does not encompass trans-boundary water issues including bulk water trade, nor any mandatory allocation of international development assistance. Canada undertakes to continue efforts domestically towards the progressive realization of the human right to safe drinking water and basic sanitation.
2. Livelihood rights: There is no agreed concept or definition of livelihood rights in international human rights law. Canada suggest removing the word “rights” after livelihood in paragraphs 18 and 52, which is also consistent with the other references to livelihood in the Draft General Comment.

***Conclusion***

1. In conclusion, Canada reiterates its appreciation of the opportunity to review the Draft General Comment, and more generally its support for the work of the Committee. Canada avails itself of the opportunity to renew to the Committee the assurances of its highest consideration.

Ottawa

14 August 2021

1. In *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, the Supreme Court of Canada held that where Aboriginal title is established, government must aim to see the consent of title holders to proceed with activities on Aboriginal title lands. If consent cannot be obtained, government can only proceed if an infringement is justified in the public interest. As part of that justification, the Government must demonstrate that it engaged in meaningful consultation and accommodation, that its actions must be supported by a compelling and substantial objective, and that its actions must be consistent with its fiduciary obligation to the Aboriginal body in question. [↑](#footnote-ref-1)