**Submission of the Australian Government**

**Draft General Comment No. 26 (2021) on land and economic, social and cultural rights**

1. The Australian Government presents its compliments to the United Nations Committee on Economic, Social and Cultural Rights (the Committee) and has the honour to refer to the Committee’s call for submissions on its draft General Comment on land and economic, social and cultural rights.[[1]](#footnote-1)
2. Australia is a longstanding party to the *International Covenant on Economic, Social and Cultural Rights* (the Covenant), and is firmly committed to upholding the Covenant’s obligations.
3. Australia appreciates the Committee’s work in preparing the draft General Comment and its role in assisting States parties in fulfilling their reporting obligations.[[2]](#footnote-2)
4. Australia thanks the Committee for the opportunity to provide a written submission on the draft General Comment, and for the additional time to provide its submission. Australia sets out its views below and invites the Committee to clarify certain statements in the General Comment regarding the scope of the legal obligations under the Covenant.

**Land and tenure**

1. While the draft General Comment acknowledges that the Covenant contains no ‘self-standing “right to land”’, there are several references which imply that such a right exists, including:
   1. Paragraph 8 which states that a number of provisions in the Covenant ‘are relevant to the governance of land tenure’.[[3]](#footnote-3)
   2. References to ‘tenure rights’, and the ‘obligation’ of States to ‘protect’ access to land of ‘legitimate tenure rights holders’.[[4]](#footnote-4)
   3. References that that certain access and treatment needs are ‘so important for the realization of several Covenant rights that it functionally equates with a right to land’.
2. The Australian Government respectfully submits that there is no standalone right to land and other natural resources as a matter of international law, nor are there ‘tenure rights’, and that the draft General Comment be amended to clarify this issue.
3. The draft General Comment further contends that ‘States have a duty to support agrarian reform schemes that ensure adequate access to land, particularly for small-scale farmers who depend on access to land for their livelihoods’, and that this duty is implicit in Article 11(2)(a) of the Covenant. However, based on the ordinary meaning of the text, the Australian Government does not consider that such a duty can be inferred from Article 11(2)(a). For these reasons, the Australian Government respectfully suggests that the draft General Comment be amended to more closely align with the language used in Article 11(2)(a) of the Covenant.

**Right to an adequate standard of living**

1. The draft General Comment contains a number of references to ‘the right to housing’,[[5]](#footnote-5) ‘the right to food’,[[6]](#footnote-6) and ‘the right to water’.[[7]](#footnote-7) The Australian Government respectfully submits that there is no standalone right to housing or food, beyond the existing right to an adequate standard of living, including adequate food, clothing and housing, as set out in Article 11 of the Covenant. The Australian Government further submits that there is no general ‘right to water’, above that which may be implied from the right to an adequate standard of living in Article 11 of the Covenant, and the right to the highest attainable standard of physical and mental health in Article 12 of the Covenant. For these reasons, the Australian Government respectfully suggests that the draft General Comment be amended to reflect that these are components of the right to an adequate standard of living.

**Distinguishing between binding and non-binding instruments**

1. The Australian Government respectfully submits that the draft General Comment does not consistently distinguish between legally binding and non-binding instruments. For example:
   1. At paragraph 23, the draft General Comment cites a number of non-binding instruments in support of the proposition states that there is an obligation to recognise the right of indigenous peoples over the lands and territories that they have traditionally occupied. This includes the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)*,* the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, and a report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples.[[8]](#footnote-8)
   2. At paragraph 34, the draft General Comment cites State reporting guidelines and principles published by the African Commission on Human and Peoples’ Rights as legal authority.[[9]](#footnote-9)
   3. At paragraph 53, the draft General Comment relies upon the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* to support a legal obligation regarding respect for human rights defenders.
2. These instruments are of less-than-treaty status and do not otherwise reflect a customary international law rule, and are therefore non-binding on States.
3. For the reasons set out above, the Australian Government respectfully suggests that the Committee amend the draft General Comment to more clearly distinguish between the legally-binding and non-binding instruments referenced. For example, paragraph 4 of the draft General Comment distinguishes between the ‘legally binding obligations of States parties under the Covenant’ and ‘relevant soft law instruments’ that may ‘help in the interpretation’ of such obligations. The Australian Government respectfully submits that similar language could be included throughout the draft General Comment, to clarify the distinction between legally-binding and non-binding instruments.

**Indigenous rights**

1. The Australian Government acknowledges the importance of protecting the relationship between Indigenous peoples and their ancestral lands.
2. At paragraph 23, the draft General Comment states that:

International human rights law provides for the respect and protection of the relationship of indigenous communities with their lands, territories and resources, requiring States to demarcate their lands, protect them from encroachment and respect the right of the communities concerned to manage the lands according to their internal modes of organization.

1. In the absence of any reference to specific treaty provisions, the Australian Government respectfully submits that it is unclear precisely upon which international human rights obligations paragraph 23 is based. As set out above, the Australian Government recognises the importance of protecting the relationship between Indigenous peoples and their ancestral lands. However, the Australian Government respectfully reiterates that there is no human right to land or other natural resources as a matter of international law.

**Collective rights**

1. The draft General Comment contains several references to ‘collective rights’.[[10]](#footnote-10) Furthermore, at paragraph 36, the General Comment refers to ‘the right to access productive resources for individuals and groups’. However, the Australian Government respectfully submits that there is no right to access productive resources as a matter of international law. The Australian Government further submits that – with the exception of the right to self-determination in common Article 1 of the Covenant and the *International Covenant on Civil and Political Rights* (ICCPR) – international human rights obligations are afforded to individuals, rather than groups, and that the draft General Comment should reflect this.

**Armed conflicts and post-conflict situations**

1. Paragraph 45 states that ‘States are obliged to establish restitution programmes to guarantee to all refugees and internally displaced persons the right to have restored to them any land of which they were arbitrarily or unlawfully deprived’. While the draft General Comment cites the *Principles on housing and property restitution for refugees and displaced persons* in support of this proposition,[[11]](#footnote-11) the draft General Comment does not contain any reference to the treaty provision from which this purported obligation is derived. The Australian Government respectfully submits that there is no obligation on States to establish land restitution programmes for refugees and internally displaced persons as a matter of international law. The Australian Government respectfully suggests that paragraph 45 be amended to clarify this.
2. Additionally, the Australian Government notes that international law specifically applicable to armed conflicts on land, including Geneva Convention IV of 1949 ‘Relative to the Protection of Civilians in the Time of War’, and the Additional Protocols (I and II) of 1977 to the Geneva Conventions, do not contain such an express legal obligation.
3. Alternative language offered by the Australian Government for consideration could include: ‘If dispossessions do nevertheless occur, States are encouraged to consider establishing and to support programs and initiatives that seek to restore property and lands to refugees and internally displaced persons’.
4. Paragraph 46 of the draft General Comment describes a number of preventative measures to avoid land dispossession during armed conflict. The Australian Government considers the suggested mechanisms as indicative and aspirational, subject to the nature and scale of the armed conflict and exigencies of the operational circumstances. The Australian Government respectfully suggests that the General Comment would be clearer if it referred to preventative measures in terms that, for instance, ‘could include’ the following considerations…’.

**Extraterritorial obligations**

1. The draft General Comment contains a number of references to ‘extraterritorial obligations’, at pages 13 to 15. This includes:
   1. At paragraph 38, the draft General Comment posits that:

States parties should take the necessary steps to prevent human rights violations abroad by non-State actors over which they can exercise influence, without infringing the sovereignty or diminishing the obligations of the host States.

* 1. At paragraph 39, the draft General Comment refers to the ‘extraterritorial obligation to respect’.

1. The Australian Government’s long-standing view is that States’ international human rights obligations are limited to persons within their territory or subject to their jurisdiction. In exceptional circumstances, where a State Party exercises ‘effective control’ over territory or persons, international human rights obligations may be relevant beyond the territory of a State Party. The Australian Government notes that a high standard needs to be met and substantiated before a State could be considered as effectively controlling territory or persons abroad.
2. Accordingly, the relevant criteria for establishing whether a State exercises jurisdiction over persons outside its territory is whether the State exercises effective control, not whether the State exercises ‘influence’ over the relevant actor as suggested in paragraph 38.
3. Further, noting the high threshold for establishing effective control, the Australian Government notes that the range of circumstances in which a State might exercise jurisdiction over non-State actors within the territory of another State is likely to be very narrow or non-existent.
4. The Australian Government respectfully submits that the draft General Comment should be amended to reflect this.

**Other matters**

1. Paragraph 40 of the draft General Comment appears to suggest that States are obliged to conduct human rights impact assessments prior to making investments. However, the draft General Comment does not reference any treaty provision from which this purported obligation is derived. While conducting human rights impact assessments can be an important tool, this is not reflective of any obligation as a matter of international law.
2. Paragraph 41 appears to reflect an obligation on States under the Covenant to take into consideration the impact that the implementation of international agreements will have on access to productive resources in other countries. Australia takes its obligations under the Covenant seriously, and has taken steps, in good faith, to ensure the progressive realisation of those obligations. However, the Australian Government respectfully submits that there is no stand-alone obligation in the terms set out in paragraph 41.

**Remedies**

1. The draft General Comment asserts that States ‘must guarantee that even in remote areas’, access to justice is ‘accessible and affordable, particularly for disadvantaged and marginalized groups’.[[12]](#footnote-12) However, the Australian Government respectfully submits that under international human rights law, there is no general right to ‘access to justice’, beyond the rights to a fair hearing and fair trial, and the right to minimum guarantees in criminal proceedings, as set out in Article 14 of the ICCPR.
2. Australia reiterates its firm support for the work of the Committee and avails itself of this opportunity to renew to the Committee the assurances of its highest consideration.

1. Committee on Economic, Social and Cultural Rights, *Draft General Comment No. 26 (2021) on land and economic, social and cultural rights* (Draft version 3 May 2021) (‘draft General Comment’). [↑](#footnote-ref-1)
2. Committee on Economic, Social and Cultural Rights, *Rules of Procedure of the Committee*, E/C.12/1990/4/Rev.1 (1 September 1993), rule 65. [↑](#footnote-ref-2)
3. Draft General Comment, paragraph 8. [↑](#footnote-ref-3)
4. Ibid: see for example, paragraph 32. [↑](#footnote-ref-4)
5. Ibid, paragraphs 9; 19. [↑](#footnote-ref-5)
6. Ibid, paragraphs 9; 10; 19. [↑](#footnote-ref-6)
7. Ibid, paragraph 11. [↑](#footnote-ref-7)
8. Ibid, footnote 26. [↑](#footnote-ref-8)
9. Ibid, footnote 44. [↑](#footnote-ref-9)
10. Ibid, paragraphs 17; 20. [↑](#footnote-ref-10)
11. Ibid, footnote 63. [↑](#footnote-ref-11)
12. Ibid, paragraph 56. [↑](#footnote-ref-12)