



Contribution of the Unrepresented Nations and Peoples Organization (“UNPO”) General Comment No. 26 (2021), Committee on Economic, Social and Cultural Rights

This submission makes two recommendations to the Committee. First, we recommend that the Committee adds discussion of the right of self-determination in Part II of the current draft as the right provides the strongest basis for Committee’s interpretation of the right to land under the Convention. Second, we recommend that the Committee reinforce Section III.D on extraterritorial obligations by tracing those obligations back to the right of self-determination. The information below is grounded in the experience of the members of the UNPO, the international organization for unrepresented nations and peoples, including via a recent a [UNPO members’ meeting on land rights](#),ⁱ the report from which is available [on our website](#) and provided as an Annex to this contribution.¹

I. The realization of the right to land is essential to the full exercise of self-determination.

A. Jurisprudence

First, international authorities including international legal instruments suggest that the right to self-determination has always been the basis of the principle of permanent sovereignty over natural resources,ⁱⁱ which include lands. The principle of permanent sovereignty over natural resources, though originally developed to guarantee former colonies’ exercise of political and economic self-determination, has since evolved to encompass indigenous peoples living within state boundaries. In particular, Article 1 of both the ICCPR and ICESCR, while it confers former colonies a right over their natural wealth and resources, also protects against the newly independent states from using the same principle of permanent sovereignty to infringe upon indigenous peoples’ rights over natural resources through, for example, nationalization of land properties.ⁱⁱⁱ Articles 47 and 25 of the ICCPR and ICESCR, respectively, also provide a safeguard against states’ invoking the self-determination principle of the common Article 1 to repeat the imperialist policies that they themselves had had to endure under former colonial powers.^{iv} Moreover, a 1955 report of the Secretary-General, in describing the debates surrounding the drafting of the common Article 1, acknowledged that “the right of self-determination [included the] principle that a nation or people should be master of its own natural wealth or resource.”^v In short, the evolving human rights framework shows that the right of sovereignty over natural resources including land is a shield not only for state independence but also for all peoples with a right of self-determination.

Second, indigenous peoples’ right to free, prior, and informed consent (FPIC), an emerging customary international legal norm, is not only an expression of the right to self-determination, but also a materialization of the right to land. Article 10 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)^{vi} states: “Indigenous peoples shall not be forcibly removed from their land or territories . . . without the free, prior and informed consent of the indigenous peoples . . .” Granted that the UNDRIP is a declaration—i.e., a soft law—versus a binding treaty like the ICCPR or ICESCR, a survey of jurisprudence shows that the FPIC is emerging as a customary international legal norm. In particular, the UNDRIP (2007) was a product of a half-century-long evolution of jurisprudence around participatory rights of indigenous peoples. The very first articulation of indigenous peoples’ rights, including the FPIC, in an international instrument was in the International Labour Organization (ILO) Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1959)

1 Available at <https://unpo.org/article.php?id=22152>.

(ILO No. 107).^{vii} Though a binding instrument, the ILO No. 107 governed only seventeen states, and it contained an “escape clause” allowing states to bypass the consent requirement if in the states’ security or economic interests,^{viii} which in effect were no different than the justifications often invoked by past colonial powers in forcibly taking away lands from and relocating indigenous peoples.^{ix} Over thirty years later, the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (1991) (ILO No. 169)^x filled the gap left by the ILO No. 107 by no longer placing state interests before the participatory rights of indigenous peoples.^{xi} Still, in addition to governing just twenty states, the ILO No. 169 only required a communications mechanism, short of judicial enforcement.^{xii}

After another sixteen years, the FPIC underwent another major stage of development under the Inter-American Court of Human Rights in *Saramaka People v. Suriname*, which involved a dispute over Suriname’s resource concessions to private companies within Saramaka people’s lands without their consultation.^{xiii} The Inter-American Court, while recognizing that indigenous peoples’ land rights are not absolute but subject to restrictions to promote broader public interests, did hold that those restrictions could not violate the right of indigenous peoples to their very existence.^{xiv} Moreover, in order to ensure this protection, the Inter-American Court required states to not only consult but also obtain “free, prior, and informed consent” of the affected communities in the case of large-scale projects with the potential to endanger the very existence of the affected peoples.^{xv} This judgment of the Inter-American Court was a pivotal moment in the development of the FPIC because it set a binding precedent on all states parties in the Inter-American Convention on Human Rights.^{xvi} Hence, even though the Inter-American Court’s decisions and subsequent applications do not create a customary international legal norm *per se* due to the court’s limited jurisdiction, these opinions, coupled with legally binding instruments in other fora, demonstrate the FPIC requirement is emerging as a “legitimate expectation” for states.^{xvii}

The conclusion that the FPIC is emerging as a customary international legal norm is significant to indigenous peoples’ land rights because the FPIC is the major safeguard for protecting land rights. The case involving Mayan communities of Sipacapa and San Miguel Ixtahuacan demonstrates this relationship between the participatory rights of indigenous peoples and their land rights. In the Mayan communities case, the Guatemalan government granted a private company licenses to explore and exploit mineral deposits (the site of the Marlin Mine) in the western highlands of Guatemala, where the indigenous peoples of Maya-Mam and Maya-Sipacapense make up greater than eighty percent of the population.^{xviii} Regarding the case, the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which monitors the application of the ILO conventions including the No. 169, clarified that the terms, “lands” and “territories,” do not only include lands owned in the European sense of property but also territories that affected peoples have traditionally occupied and used.^{xix} Therefore, the sales of lands by individual landowners alone do not fulfill the consultation or FPIC requirement when the lands are considered to be of a collective nature—often the case of indigenous peoples.^{xx} Such a reformulation of “lands” and its implication on the FPIC exhibits how the FPIC functions as a mechanism to promote land rights of indigenous peoples.

Indigenous peoples’ exercise of their right to self-determination, and thereby, right to lands, is a sensitive issue because of its implications on the territorial integrity of sovereign states. However, those rights of indigenous peoples do not violate the principle of state sovereignty because the modern conception of “sovereignty” differs from its traditional meaning. The Special Rapporteur on the Rights of Indigenous Peoples, Erica-Irene A. Daes, in her final report on indigenous peoples’ permanent sovereignty over natural resources, defined “sovereignty” as “governmental control and authority over the resources in the exercise of self-determination,” as opposed to an absolute and “supreme power within a State without any restriction.”^{xxi} It is under this new understanding of the term, “sovereignty,” that *imperium in imperio* is possible.^{xxii} The United States Supreme Court Chief Justice John Marshall said in *Worcester v. Georgia*, “a weaker power does not surrender . . . its right to self-government . . . by associating with a stronger, and taking its protections,” but rather, “[a] weak state . . . may place itself under the protection of one more powerful, without stripping itself of [“sovereignty”].”^{xxiii} In other words, when applied to indigenous

peoples, sovereignty does not mean absolute power over a territory within existing state borders, which would effectively contradict state sovereignty.^{xxiv} Rather, sovereignty in such a context merely indicates the peoples' right of self-governance.^{xxv} On the flip side, without the new understanding of "sovereignty," much of the international system rife with treaties that limit states' absolute power in return for certain benefits would break down.^{xxvi} Various state practices from a federal system to recognition of the special status of indigenous peoples illustrate the changed but prevailing limited concept of "sovereignty."^{xxvii} Hence, indigenous peoples' exercise of their self-determination or land rights does not conflict with the sovereignty of existing independent states.^{xxviii}

B. Member Experiences^{xxix}

The experiences of UNPO members provide further support for the jurisprudential argument that the right of self-determination subsumes land rights. First, the infringement of indigenous peoples' land rights threatens the very survival of the indigenous peoples, without whose continued existence the right of self-determination has little meaning. For example, the heritage site and national park designation of lands traditionally occupied and used by Barotse people without their consent has deprived the Barotse people of their central governance space and made it impossible for them to continue rituals that they have practiced for centuries. Also, the development activities through foreign actors such as China have depleted the natural resources and taken away their source of livelihood. On the other hand, Biafrans in Nigeria are frequent targets for various atrocities including extrajudicial killings because of Nigeria's interest in the mineral and oil deposits found in their lands. Unless their land rights are respected, violence will continue to threaten the lives of the Biafran people. Outside Africa, mining and deforestation effected by companies under the enforcement by the military and with the financial backing of foreign banks strip South Malukans of their lands, without which their survival as a people is at risk.

Second, UNPO members' testimonies show that when states violate peoples' land rights, they effectively disregard their FPIC right and thereby, all but repudiate the principle of self-determination. The situation of Khmer-Kroms, an indigenous people in the Mekong Delta, exemplifies this link between the violation of land rights and the FPIC. According to Article 4 of Vietnam's Land Law, "Land belongs to the entire people with the State acting as the owner's representative and uniformly managing land."^{xxx} The "people's ownership" and "state management" reflect Vietnam's communist ideology and have justified land grabbing from landowning farmers. Such land grabbing has ultimately resulted in a transfer of land ownership from Khmer-Kroms, almost all of whom depend on lands for their subsistence, to Vietnamese with no consultation, much less consent, of Khmer-Kroms. The Jumma people of the Chittagong Hill Tracts in Bangladesh also continue to have their FPIC right infringed through violations of their land rights. For example, government authorities evict the Jumma farmers from their own lands through seizure to expand the state's tourism industry, which deprives them of their basic means of livelihood. Other projects including the dam at Sijokchara of Sajek have permanently damaged the ecosystem of affected areas. Such predicaments of the Jumma people typify a pattern across UNPO members, in which the state ushers in private developers at the expense of the indigenous peoples' land rights. In forcing development projects upon the traditional lands of indigenous peoples, not only do states and private developers disrespect the FPIC right of the peoples but also threaten their very survival through violent enforcement and harm to the biodiversity and environment, which are usually crucial to the livelihoods of indigenous peoples.

Third, the experiences of UNPO members demonstrate that the violations of peoples' land rights are a direct affront to the principle of self-determination because they raise the very same concerns that led the international community to denounce colonialism. For example, in Zambesia, the influence of colonialism persists due to the unresolved status of the Anglo-German Agreement of 1890, which stipulated access rights to the Zambezi river for the two European colonial powers. As a result of imperfect implementation and lack of recognition of the treaty following the end of the Second World War, newly independent states such as Namibia and Botswana regularly plunder natural resources in the lands of Zambesia with impunity.

The peoples of Western Togoland, on the other hand, are not able to fully enjoy their land rights or exercise their right of self-determination because of Ghana's discriminatory economic and political policies against them even after a referendum under the United Nations' auspices determined the fate of Western Togoland back in 1957.^{xxxix} Meanwhile, the arbitrary border-drawing, effected through former colonial powers through agreements in which indigenous peoples in Africa took no part not only created artificial minorities by dividing the Yoruba population, but also, opened doors for certain minorities to continue the same oppressive and discriminatory policies that had led the international community to denounce colonialism. From the Yoruba perspective, the Nigerian state, for example, is but an extension of past colonialism under a different name and by other Africans instead of Europeans.

Outside Africa, in the Kurdistan Region of Iraq, the government, reminiscent of colonial conquests and similar to the mistreatment to which other UNPO members are often subject, has confiscated and occupied lands belonging to Assyrians while indigenous peoples under the Persian rule in Iran, such as Southern Azerbaijanis, lose their lands to the benefit of Persians. In Aceh as well as West Papua, the indigenous peoples are subject to forcible population transfer and land grabbing by Indonesia and have suffered permanent harm to their native lands through industrial development projects, endangering the very existence of the Aceh and West Papua peoples. Lastly, the current situation for Crimean Tatars under the Russian Federation well illustrates the continuing effects of colonialism. From Crimean Tatars' perspective, the current Russian occupation of Crimea is nothing but a continuation of its colonial practice dating back to Imperial Russia followed by Soviet Russia. Particularly, the Soviet Union deported Crimean Tatars from their ancestral lands in 1944 and re-populated the region with ethnic Russians, who still reside there to this day. Ukraine has proposed a draft law "On the indigenous peoples of Ukraine" (No. 5506),^{xxxix} but the ongoing occupation of the region by the Russian Federation renders those rights without much force.

II. Peoples' right of self-determination gives rise to states' extraterritorial obligations to respect, protect, and fulfill peoples' land rights.

Perhaps the most emblematic of the 21st century "colonialism" are the cases involving the People's Republic of China. For example, the Chinese Communist Party (CCP) has occupied East Turkestan (also known as *Xin-Jiang*, literally meaning "new land" in Mandarin), the native lands of [Uyghurs](#), since its inception. Nowadays, the Xinjiang Production Construction Corps (XPCC), a paramilitary entity, has taken control of the forest and other natural resources and taken away lands from indigenous farmers, which has effectively deprived Uyghurs of their "means of subsistence."^{xxxix} Southern Mongolians have also been under the CCP's rule in a manner similar to the Uyghurs as state-owned farms and enterprises began to take away lands from the Southern Mongolians while mass migration of Han Chinese push out the Southern Mongolians whose livelihood as hunters relies on access to their ancestral lands. On the other hand, [Baluchis](#), though not under China's political rule, have been subject to similar influence of new "colonialism" as a result of the China-Pakistan Economic Corridor (CPEC), a flagship project of China's belt and road initiative (BRI). This "corridor," referring to a vast network of transportation and electrical grid stretching over 3,000 km from East Turkestan to Gwadar in Balochistan, Pakistan, is problematic for the Baluchis native to Balochistan because it will entail transformation of the affected regions into a quasi-Chinese city outside China.^{xxxix} Western Baluchis across Pakistan's southwestern border in Iran have been subject to similar deprivation due to China's activities with the Iranian government's endorsement.^{xxxv}

The infringement of Baluchis' rights is not the only violation of international law effected via activities related to the CPEC. Perhaps the most glaring violation of international law by CPEC activities is that Pakistan effectively violates the UN Security Council Resolution 47 by entering into an agreement with China that ultimately splits Kashmir apart and heightens insecurity in the disputed region, which exposes peoples native to the lands in the "corridor" to an increased likelihood of human rights violations.^{xxxvi} In a conference organized by the UNPO on the negative impact of China's growing influence in Asia on unrepresented peoples, Dr. Ariell Ahearn, from the School of Geography and the Environment, University

of Oxford, also highlighted the acute effect of the BRI in active conflict zones and disputed territories.^{xxxvii} Among the key consequences for unrepresented peoples that Dr. Ahearn identified were the loss of land and traditional livelihoods.^{xxxviii}

Conclusion

In summary, this submission, as a contribution toward the Committee's general comment, attempts to ground land rights as well as states' extraterritorial obligations regarding those rights on the established right of self-determination. A survey of international jurisprudence suggests that the principle of self-determination underlies peoples' permanent sovereignty over natural resources, which include lands, and that the free, prior, and informed consent (FPIC) requirement, as an emerging customary international legal norm to effectuate the right of self-determination, materializes the right to lands. The testimonies of UNPO members provide additional anecdotal evidence to the relationship between the right of self-determination and the right to lands. On the other hand, UNPO member experiences and UNPO's previous work also show the importance of extraterritorial obligations arising from the right to lands. Specifically, China's occupation of the native lands of Uyghurs, Southern Mongolians, and Tibetans and their oppression by the Chinese Communist Party as well as its Belt and Road Initiative activities abroad in areas such as Balochistan and Kashmir exemplify the emergence of "new colonialism" and its implications on the land rights of the indigenous peoples. Unless the international community recognizes states' obligation to prioritize the FPIC right of indigenous peoples over economic or geopolitical interests of the states, states' "neo-colonialist" foreign policies will continue to infringe upon the land rights and thereby, self-determination rights of indigenous peoples.

In light of the findings and expositions above, this contribution will conclude with the following recommendations.

- The general comment should add to Part II ("Provisions in the Covenant relating to land") a discussion grounding peoples' land rights on their fundamental right of self-determination, as enshrined in Article 1 of the Covenant.
- The general comment should retain the section on extraterritorial obligations (III.D) and also link states' extraterritorial obligations back to peoples' right of self-determination by highlighting the "neo-colonialist" nature of some current state activities.
- States should promote education of evolving conceptions of borders and statehood with particular attention to the heavy influence of the colonial period on the current international order. Examples of these efforts include an interactive mapping system that traces histories of indigenous peoples and their relations to the geography.
- International human rights organizations should provide legal and technical assistance to the civil society to build coalitions to hold large private actors accountable to improve their corporate social responsibility regarding land rights of indigenous peoples and environmental protection.
- International jurists should reframe the self-determination right of indigenous peoples as a way to satisfy their obligation as custodians of the lands. Such an understanding better reflects the relationship of most indigenous peoples to their ancestral lands, for until colonial powers and industrialization began to destroy the earth, indigenous peoples had for centuries acted as responsible stewards.
- The United Nations should develop more effective mechanisms to refer state-enforced population transfers under the International Criminal Court's jurisdiction.

- i Available for viewing at <https://bbb.unpo.org/playback/presentation/2.3/d93a19c2cd7929a744680f635204908a3181c8e3-1626092157782?meetingId=d93a19c2cd7929a744680f635204908a3181c8e3-1626092157782>
- ii See General Assembly resolution 1803 (XVII) of 14 December 1962, “Permanent sovereignty over natural resources,” <https://www.ohchr.org/EN/ProfessionalInterest/Pages/NaturalResources.aspx>.
- iii Allan Rosas, “The Right of Self-Determination,” in *Economic, Social and Cultural Rights*, A. Eide, C. Krause, and A. Rosas (eds.), Martinus Nijhoff, p. 84 (1995).
- iv See Matthew C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development*, Clarendon Press, p. 147 (1995).
- v E/CN.4/Sub.2/2004/30, para. 13 (quoting “Draft international covenant on human rights; annotation,” report of the Secretary-General (A/2929), paras. 19-21 (1 July 1955)).
- vi A/61/295, <https://undocs.org/A/RES/61/295>.
- vii International Labour Organization (ILO), Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO No. 107), adopted June 26, 1957, entered into force June 2, 1959, 328 U.N.T.S. 247.
- viii *Id.*, art. 12(1).
- ix Tara Ward, “The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law,” *Northwestern Journal of International Human Rights*, 10(2), Winter 2011, p. 59 (citing **Alexandra Xanthaki, Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land**, 49, 63 (2007)).
- x ILO, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Doc. 169), adopted June 27, 1989, entered into force September 5, 1991, 28 I.L.M. 1382.
- xi Ward, *supra* n. 8, at 60 (quoting ILO No. 169, art. 6(2) (requiring that consultations undertaken in the application of the Convention be “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”); see also ILO No. 169, art. 15(2) (right to consultation prior to exploration or exploitation of resources); ILO No. 169, art. 16(2) (free informed consent prior to relocation); ILO No. 169, 17(2) (consultation prior to transfer of land rights outside community).
- xii Ward, *supra* n. 8, at 59 (citing Xanthaki, *supra* n. 8, at 91).
- xiii Preliminary Objections, Merits, Reparations, and Cost, Inter-Am. Ct. H.R. (ser. C) No. 174 (Nov. 28, 2007).
- xiv *Id.* para. 127.
- xv *Id.* para. 134.
- xvi Organisation of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 123.
- xvii Ward, *supra* n. 8, at 66 (quoting Committee on Formation of Customary (General) International Law, *Final Report of the Committee Statement of Principles Applicable to the Formation of General Customary International Law*, at 8 (2000) (defining customary international law)).
- xviii Ward, *supra* n. 8, at 75 (citing FREDEMI & The Center for International Environmental Law, *Specific Instance Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises Concerning: The Operations of Goldcorp Inc. at the Marlin Mine in the Indigenous Community of San Miguel Ixtahuacán, Guatemala*, 4-5 (2009)).
- xix Ward, *supra* n. 8, at 82 (citing CEACR, *Individual Observation concerning Indigenous and Tribal Peoples Convention*, 1989 (No. 169) Guatemala (ratification: 1996), para. 5, ILO Doc. 062007GTM169 (ILO, 2007)).
- xx Ward, *supra* n. 8, at 82.
- xxi E/CN.4/Sub.2/2004/30, paras. 18-19.
- xxii See Emmerich de Vattel, *The Law of Nations*, American ed. (1805), Bk. I, Ch. 1, p. 60.
- xxiii 31 U.S. (6 Pet.) 515, 520 (1832).
- xxiv See E/CN.4/Sub.2/2004/30, para. 46.
- xxv *Id.*
- xxvi E/CN.4/Sub.2/2004/30, para. 20.
- xxvii *Id.*
- xxviii E/CN.4/Sub.2/2004/30, para. 30.
- xxix This section is informed by a [UNPO members meeting on land rights](https://unpo.org/members/20425) held on July 12, 2021 as well as other private meetings held with member representatives.
- xxx Vietnam Law in English, <https://vietnamlawenglish.blogspot.com/2013/11/vietnam-land-law-2013-law-no-452013qh13.html>.
- xxxi Unrepresented Nations & Peoples Organization, “Western Togoland,” <https://unpo.org/members/20425>.
- xxxii President of Ukraine, “President submitted a draft law ‘On the indigenous peoples of Ukraine’ to the Verkhovna Rada as urgent,” <https://www.president.gov.ua/en/news/prezident-podav-do-parlamentu-yak-nevidkladnij-zakonoproekt->

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xxxiiiICCPR art. 1.2.

xxxivPauley, L., & Shad, H. (2018). "Gwadar: Emerging Port City or Chinese Colony?" *The Diplomat*,
<https://thediplomat.com/2018/10/gwadar-emerging-port-city-or-chinese-colony/>.

xxxvSimon Watkins, "China Inks Military Deal with Iran Under Secretive 25-Year Plan," *Oil Price*, Jul. 6, 2020,
<https://oilprice.com/Energy/General/China-Inks-Military-Deal-With-Iran-Under-Secretive-25-Year-Plan.html>.

xxxviUNPO, "Empire-Building in Asia: the Belt and Road Initiative and its Impact on Minorities and Indigenous
Communities," <https://unpo.org/article/22116>.

xxxvii*Id.*

xxxviii*Id.*