Comments

on the

Second Revised Text of the Draft Convention on the Right to Development

(A/HRC/WG.2/24/2)

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1. Indigenous Peoples Rights International ("IPRI") has the honour of submitting these brief comments on the Second Revised Text of the Draft Convention on the Right to Development (A/HRC/WG.2/24/2) ("the Draft Convention"). These comments are respectfully submitted in response to the call on the website of the Working Group on the Right to Development ("WGRD").[1]

2. Established in 2019, IPRI is an indigenous peoples' organization that aims to prevent, respond, reduce and prevent acts of criminalization, violence and impunity against indigenous peoples, and to provide better protection and access to justice for actual and potential victims, not only as individuals but as collectives or communities.[2] Indigenous peoples decided that a global effort is needed to defend our rights against criminalization and impunity, led by indigenous peoples' leaders and organizations and to strengthen coordination, solidarity and actions on this critical issue at all levels. This Initiative is led by IPRI.

3. For these and other reasons, IPRI takes great interest in the Draft Convention and related issues, and we commend the WGRD for its efforts to date. IPRI especially welcomes the affirmation of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") in the preamble (PP4), including as it reaffirms the right to development (PP6). We stress that the General Assembly declared that the rights in the UNDRIP are "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (art. 43). Dignity etc., are core concepts that underlie the right to development and human rights in general. Accordingly, the text of the draft Convention should not fall below the level set in the UNDRIP, including by omitting key rights that may not now be reflected therein.

4. IPRI also acknowledges the reference to the 2016 American Declaration on the Rights of Indigenous Peoples ("ADRIP") in PP10. It provides that indigenous peoples have the right to decide our own priorities for development "in conformity with their own cosmovision," and to implement policies, plans, programs, and strategies "in accordance with their political and social organization, norms and procedures, own cosmovisions, and institutions" (art. XXIX(1) and (2)).[3] As with the UNDRIP, the full range of rights recognized in the ADRIP are integral to the right to

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1 https://www.ohchr.org/en/calls-for-input/2023/call-comments-and-textual-suggestions-second-revised-text-draft-convention.

2 https://www.iprights.org/index.php/en/.

3 *See also* ILO 169, art. 7(1), providing that: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

development and vice-versa, a fact now recognized in the general principles in article 3 of the Draft Convention (e.g., 3(b) and (c)). The analogous provision in the UNDRIP is discussed below.

5. IPRI recalls that the right to development for indigenous peoples is informed and framed by our right to self-determination, both in its political and material aspects.[4] Tracking common article 1 of the Covenants and article 3 of the UNDRIP and ADRIP, the former provides for indigenous peoples' right to freely determine our political status and freely pursue our economic, social and cultural development. The latter concerns the right to freely dispose of natural wealth and resources and not to be deprived of our means of subsistence.[5] The latter are especially important rights in context as indigenous peoples are being denied the rights to freely dispose of our natural wealth and resources and be secure in our means of subsistence (and, in turn, our right to development) in myriad ways, all over the world.[6] Often these violations are the cumulation of numerous activities, usually over an extended period of time, rather than a single event, and they are normally grounded in denials of our rights more broadly (e.g., to legal personality and to the full extent of our traditional territories).

6. In the light of the preceding, IPRI fully endorses the general principle set out in article 3(f), which provides that "the priorities of development are determined by individuals and peoples as rights holders in a manner consistent with the provisions of the present Convention. The right to

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[4] *See e.g*., *Yaku Pérez Guartambel v. Ecuador,* CERD/C/106/D/61/2017 (26 July 2022), para. 4.6 ("the main purpose of the self-determination of indigenous peoples is none other than to recognize the cultural diversity that exists in a national territory and to ensure its special protection and conservation, since, in addition to being a true intangible heritage, it involves the realization of the rights of indigenous peoples, which is materialized through the rights of these populations to conserve and develop their own political, legal, cultural, social and economic institutions"); *Derecho a la libre determinación de los Pueblos Indígenas y Trib*ales, OEA/Ser.L/V/II. Doc. 413 (28 December 2021); *Tiina Sanila-Aikio vs. Finland,* CCPR/C/124/D/2668/2015 (2019), para. 6.8 (ICCPR, art. 27, "interpreted in light of the UN Declaration and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to 'freely determine their political status and freely pursue their economic, social and cultural development'"); Klemetti *Käkkäläjärvi et al. v. Finland*, CCPR/C/124/D/2950/2017, para. 9.8; *General Commendation No. 39 on the Rights of indigenous Women and Girls*, CEDAW/C/GC/39 (2022), para. 57(b) (calling on states parties to "Recognize legally the right to self-determination and the existence and rights of Indigenous Peoples to their lands, territories, and natural resources in treaties, constitutions, and laws at the national level"); and *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Ser C No. 400 (2020), para. 153 ("the adequate guarantee of communal property does not entail merely its nominal recognition, but includes observance and respect for the autonomy and self-determination of the indigenous communities over their territory").

[5] *See also* ICCPR, art. 45, providing that "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."

[6] Twenty years-ago, in a statement that remains equally valid today, the former UN Special Rapporteur on indigenous land rights observed that "The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every sector of the globe, indigenous peoples are being impeded in every conceivable way from proceeding with their own forms of development, consistent with their own values, perspectives and interests. … Economic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development." *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21, para. 49-50.

development and the right to self-determination of peoples are integral to each other and mutually reinforcing." This in turn requires adherence to indigenous peoples' right to determine their own membership[7] and the composition of their institutions without external interference.[8] There is an extensive body of law and practice as well as considerable evidence that supports the fundamental applicability of these principles to indigenous peoples. The 'right to regulate' that is vested in States parties in article 3(h) of the Draft Convention must be tempered and understood accordingly in this context, requiring that parties fully respect indigenous self-determination, autonomy, self-government, and jurisdiction.[9] This requires that indigenous institutions and legal systems are also respected, and their independence is guaranteed.[10]

We recommend that article 3(h) is amended to provide that the right to regulate must be exercised in full compliance with indigenous peoples' rights:[11] e.g., **'Without prejudice to the rights of indigenous peoples, the realization of the right to development entails the right for States Parties, on behalf of the rights holders, to take regulatory or other related measures….' For the sale of clarity, the same could also be said of the general obligations in article 8, which also could be conditioned by the addition of the language: 'without prejudice to the rights of indigenous peoples'.**

7. IPRI fully concurs that "the right to development cannot be realized if development is unsustainable" (art. 3(g)). However, in much the same way that the prevailing concept of development is perceived as harmful by many indigenous people, the term "sustainable" sometimes also suffers from manipulation and abuse. Such abuse has been used to harm indigenous peoples in the past (in the conservation sector especially, where false notions of

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[7] *See e.g., Matson et al v. Canada*, CEDAW/C/81/D/68/2014 (2022), para. 18.4 (quoting from and citing UNDRIP, arts. 8 and 9 and ruling that "…indigenous peoples do have the fundamental right to be recognized as such, as a consequence of the fundamental self-identification criterion established in international law"). *See also Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, A/HRC/EMRIP/2019/3/Rev.1, para. 74 (where the EMRIP explains that "Recognition as indigenous peoples is the most basic, critical form of recognition, from which other types of recognition flow").

[8] *Anne Nourgam v. Finland*, CERD/C/106/D/59/2016 (2022), para. 9.10 ("… under article 33 of the [UNDRIP], indigenous peoples have … the right to determine the structures and to select the membership of their institutions in accordance with their own procedures"); and; *Tiina Sanila-Aikio vs. Finland*, CCPR/C/124/D/2668/2015 (2019).

[9] *See e.g., Anne Nourgam v. Finland*, CERD/C/106/D/59/2016 (2022), para. 9.12 (referring to judicial oversight by state courts of the operations of indigenous institutions and emphasizing that "when adjudicating on the rights of indigenous peoples … domestic courts, however, have to pay due regard to the right to self-determination of indigenous communities…"); and *Indigenous justice systems and harmonisation with the ordinary justice system*, A/HRC/42/37, 02 August 2019, para. 74 ("… giving State authorities the primary responsibility for ensuring the integrity of indigenous justice actors risks undermining the autonomy of the indigenous system").

[10] *Yaku Pérez Guartambel v. Ecuador,* CERD/C/106/D/61/2017 (2022).

[11] *See e.g., Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, CERD/C/64/CO/9 (12 March 2004), para. 11 ("While noting the principle set forth in article 41 of the Constitution that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that this principle must be exercised consistently with the rights of indigenous and tribal peoples").

cultural supremacy abound).[12] For this and other reasons, we again endorse the basic principle of self-determined development (3(f)), whereby indigenous peoples determine and implement our internal development processes, avoid unwanted development, as well participate on at least an equal footing with other citizens from national development initiatives.

That the connection to the right to self-determination is reinforced in article 5 is also welcome, although we propose that it be amended as follows: e.g., **"1. The right to development implies the full realization of the right of all peoples[, including indigenous peoples, to self-determination]."**

8. Article 6 is also a welcome reminder of the inextricable and positive connection between human rights and the right to development. However, indigenous peoples are often falsely accused of seeking to obstruct national development or the like when we object to unwanted projects or policies. In this light, it is equally important, and we hereby propose, that the Draft Convention also reaffirms the basic principle that **"[w]hile development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."[13]** Likewise, the Human Rights Committee has long-ruled that a state's freedom to encourage economic development is limited by the obligations it has assumed under international human rights law[14] as have other intergovernmental human rights bodies.[15] In other words, states may not promote or seek to justify violations of indigenous peoples' rights in the name of national or economic development.

9. In article 11, it is not clear whether the obligation to protect also applies to transnational corporations. While it seems it may apply in certain instances, it would be very helpful to clarify the scope of this provision, both against existing and general human rights law on the same and on what the justification may be if there is a deviation.

10. Turning to Draft Convention "Article 17 Indigenous Peoples, IPRI again commends the WGRD for drawing inspiration from the UNDRIP. We note that UNDRIP is largely restating existing,

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[12] Criminalization also manifests sometimes because of disproven notions that some indigenous knowledge, customs and/or traditional practices are inferior to "western science" (e.g., demonstrably false notions that non-indigenous management of biodiversity is superior to indigenous peoples' relations to territory), such as traditional use of fire. This has deep historical roots; as one commentator notes with respect to Australia, the "ideological justification for the dispossession of Aborigines was that 'we' could use the land better than they could…." P. Wolfe, *Settler colonialism and the elimination of the native*, 8 J. GENOCIDE RESEARCH 387 (2006), p. 389.

[13] *Vienna Declaration and Programme of Action,* adopted by the World Conference on Human Rights, Part I, para. 10. A/CONF.157/23 (12 July 1993).

[14] *I. Lansman et al. vs. Finland* CCPR/C/52/D/511/1992 (1994) 10.

[15] *See e.g., Report on the Situation of Human Rights in Ecuador.* OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (1997), 89; *Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, para. 58 and 69 ("The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities"); *General Recommendation XXIII (51) concerning Indigenous Peoples,* CERD/C/51/Misc.13/Rev.4 (18 August 1997); and *General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions* (1997)*,* para. 18.

binding sources of law, and for that reason should not be dismissed as merely aspirational. For example, the case law of the Committee on the Elimination of Racial Discrimination and the Human Rights Committee both require that States parties secure indigenous peoples' free, prior and informed consent ("FPIC"),[16] a view endorsed in different formats by the other treaty bodies and by the regional human rights tribunals.[17]

11. Our concerns relate mostly to sub-paragraph (1), mainly because it is lacking a reference to indigenous lands, territories and resources and the right to development is not necessarily, or may not be interpreted to be, co-terminous with or inclusive or indigenous land rights. As the Committee on Economic, Social and Cultural Rights observed recently, "**Indigenous peoples can only freely pursue their political, economic, social and cultural development and dispose of their natural wealth and resources for their own ends if they have land or territory in which they can exercise their self-determination.**" The relationship to indigenous territories thus needs to be made explicit.

We propose the following: **"1. Indigenous Peoples have the right to freely pursue their development in all spheres, in accordance with their own [perspectives,] needs and interests. They have the right to determine and develop priorities and strategies for exercising their right to development [and for the development or use of their lands, territories and resources]."**

12. We are also concerned that the linkage between indigenous peoples and self-determination is insufficiently clear, at least without the clarification proposed in paragraph 7 above, and that there is a tendency to denigrate and devalue certain indigenous economic activities. Drawing again from the UNDRIP and human rights instruments more broadly, we propose the following additional subsection to article 17:

(x) Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

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[16] *See e.g.*, *Lars-Anders Ågren et al. v. Sweden*, CERD/C/102/D/54/2013 (2020), para. 6.7 (disregard for indigenous territorial rights and "for their right to offer free, prior and informed consent whenever their rights may be affected by projects carried out in their traditional territories constitutes a form of discrimination as it results in nullifying or impairing the recognition, enjoyment or exercise by indigenous peoples, on an equal footing, of their rights to their ancestral territories, natural resources and, as a result, their identity"); and *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega and the Indigenous Community of Campo Agua'ẽ, of the Ava Guaraní People v. Paraguay*, CCPR/C/132/D/2552/2015 (2021), para 8.7 (ruling that "it is of fundamental importance that measures that compromise or interfere with the economic activities of cultural value of an indigenous community have been subjected to the [FPIC] of the members of the community…").

[17] *See e.g.*, *African Commission on Human and Peoples' Rights (Mau Ogiek) v. Kenya, Reparations* (2022), para. 6-8 (ruling that indigenous property rights entail "the right to control access to indigenous lands," and "the right to give or withhold their [FPIC]…"); *Saramaka People v. Suriname*, Ser C No. 172 (2007), para. 134; and *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24 (2017), para. 12 ("States parties and businesses should respect the principle of [FPIC] of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired").

Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

13. To conclude, with more time, we would have provided additional comments to supplement those above. We respectfully suggest that a dedicated consultation with indigenous peoples on the Draft Convention would be an important step in soliciting further and invaluable information. IPRI would be happy to assist in such a process should the WGRD be interested in pursuing the same.

14. We again thank the WGRD for its stellar work and respectfully proffer the above comments and suggestions for its consideration.