

Jonathan Liljeblad

(Senior Lecturer,
Swinburne University
Law School)

jonathanliljeblad@gmail.com

Policy Brief: Indigenous Rights within the International Covenant on Economic, Social, & Cultural Rights (ICESCR)

Introduction & Approach

This document responds to a request for review of indigenous rights relevant for Myanmar embodied within the International Covenant on Economic, Social, & Cultural Rights (ICESCR). The approach identifies specific rights within the ICESCR that protect and enable indigenous rights, and discusses the relevance of particular rights within the ICESCR for indigenous rights in Myanmar, referencing official United Nations publications and General Comments from the Committee on Economic, Social, and Cultural Rights (CESCR).

ICESCR Rights Encompassing Indigenous Rights

The ICESCR requires that State Parties to the covenant recognize economic, social, and cultural rights and calls upon State Parties to fulfill duties to promote respect and observance of those rights. The rights presented in the text of the ICESCR fall into several groups of rights relevant to indigenous peoples. Specifically, the various articles of the ICESCR can be grouped as relevant to indigenous rights to self-determination; indigenous rights to equal treatment; indigenous rights to cultural life; indigenous rights to land, territories, and resources; indigenous rights regarding traditional knowledge. The various rights are discussed under the group headings below, and are accompanied by a section discussing the progressive realization of rights in the case of countries like Myanmar.



Indigenous Rights to Self-determination

Indigenous rights to self-determination are reflected in several paragraphs in Article 1 of the ICESCR. The ICESCR explicitly states that “All peoples have the right to self-determination” in terms of deciding their own political status and pursuit of economic, social, and cultural development (ICESCR 1966: Article 1, Paragraph 1). For indigenous peoples, including those in Myanmar, this provides rights to decide their own political status relative to State Parties. In addition, the ICESCR extends self-determination to cover natural wealth and resources, stating that “All peoples may, for their own ends, freely dispose of their natural wealth and resources” without affecting obligations related to international economic relations (ICESCR 1966: Article 1, Paragraph 2). The ICESCR also adds that there this is a minimum level regarding the use of natural wealth and resources, with the words that “In no case may a people be deprived of its own means of subsistence” (ICESCR 1966: Article 1, Paragraph 2). The application of the term “all peoples” is separate from the use of the word “States” in reference to ICESCR State Parties, suggesting that the term “all peoples” is expansive and covers rights of groups separate from nation-states—including indigenous groups.

Indigenous Rights to Equal Treatment

Indigenous rights to equal treatment are contained in Articles 2 and 3, with the ICESCR requiring each State Party to ensure that the treaty’s rights “will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (ICESCR 1966: Article 2, Paragraph 2). The ICESCR expands this by requiring that each State Party guarantees “the equal right of men and women to the enjoyment of all economic, social, and cultural rights” in the ICESCR (ICESCR 1966: Article 3). As a result, the ICESCR provides broad protection against discrimination, with the covenant’s language calling for equal rights regardless of any qualities that may potentially describe a person’s status. In General Comment 20, the Committee on Economic, Social, and Cultural Rights (CESCR) notes that “discrimination constitutes any distinction, exclusion, restriction, or preference or other differential treatment...which has the

intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights” (OHCHR 2009a: Paragraph 7). To the extent that the status of membership in an indigenous group is characterized by identifiable features, the ICESCR’s expectation for non-discrimination means that all individuals within an indigenous group must be granted the same treatment as all individuals outside the indigenous group. In mitigating unequal treatment, the General Comment 20 of the CESCR advises State Parties to address formal and substantive discrimination (OHCHR 2009a: Paragraph 8). General Comment 20 states that formal discrimination can be eliminated through a State Party’s constitution, laws, and policies. Substantive discrimination can be eliminated through measures that “prevent, diminish, or eliminate the conditions or attitudes which cause or perpetuate substantive or de facto discrimination” (OHCHR 2009a: Paragraph 8). General Comment 20 adds that “Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice” (OHCHR 2009a: Paragraph 8), and so encompasses indigenous groups which have experienced historical marginalization or which experience ongoing current marginalization. The ICESCR, in essence, places a duty on State Parties to ensure that all individuals of any status are treated the same, such that no one will be treated no worse or no less than anyone else. The above rights to equal treatment have implications for other specific rights in the ICESCR. Specifically, following the Committee on Economic, Social, and Cultural Rights (CESCR) General Comment 20, the principle of non-discrimination applies to the following rights (OHCHR 2013: 20; OHCHR 2009a: Paragraph 6):

- rights to adequate housing;
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- rights to adequate food;
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- rights to education;
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- rights to health;
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- rights to water;
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- rights to benefits from scientific, literary, or artistic works;
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- rights to work; and
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- rights to social security.
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The principle of non-discrimination means that enjoyment of the above rights cannot be denied to individuals simply because of their status as members of a group afflicted by “historical or persistent prejudice.” In fact, General Comment 20 states that the promotion of equal access to the above rights will help to overcome discrimination against marginalized groups (OHCHR 2009a: Paragraph 8).

Indigenous Rights to Cultural life

Indigenous rights to culture are related to the Article 15, which includes a right “To take part in cultural life” (ICESCR 1966: Article 15). State Parties to the ICESCR are expected to take steps to allow enjoyment of the right to culture, including steps “necessary for the conservation, the development, and the diffusion of science and culture” (ICESCR 1966: Art 15). ICESCR .This includes respect for the freedom “indispensable for scientific research and creative activity” and “the encouragement and development of international contacts and co-operation in the scientific and cultural fields” (ICESCR 1966: Art. 15). In CESCR General Comment 21, the CESCR interprets the right to cultural life upon a State Party as involving a negative duty to abstain from interfering in the “exercise of cultural practices” or “access to cultural goods and services,” as well as a positive duty to ensure “preconditions for participation, facilitation, and promotion of cultural life, and access to and preservation of cultural goods” (OHCHR 2009b: Paragraph 6). General Comment 21 views the right to cultural life as a choice exercised by a person “individually, or in association with others” that “should be recognized, respected, and protected on the basis of equality” (OHCHR 2009b: Paragraph 7). For indigenous peoples, General Comment 21 sees cultural choice as important because they “have the right to full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms” (OHCHR 2009b: Paragraph 7).

In defining culture, General Comment 21 sees “culture” broadly as “a living process, historical, dynamic, and evolving, with a past, a present, and a future” (OHCHR 2009b: Paragraph 10) involving “an interactive process whereby individuals and communities... give expression to the culture of humanity” (OHCHR 2009b: Paragraph 11). For purposes of implementation, culture is viewed as including

“ways of life, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities...build their world view” (OHCHR 2009b: Paragraph 13).

It should be noted that there are limits to the right to culture, with General Comment 21 stating that “no one may invoke cultural diversity to infringe upon human rights guaranteed by international law” (OHCHR 2009b: Paragraph 18) or restrict other rights in the ICESCR (OHCHR 2009b: Paragraph 20). In addition, General Comment 21 allows limitations to the right to take part in cultural life when the right infringes upon other human rights (OHCHR 2009b: Paragraph 19). General Comment 21 cautions that such limitations must be the least restrictive measures possible and must consider existing international human rights standards (OHCHR 2009b: Paragraph 19).

Indigenous Rights to Land, Territories, and Resources

CESCR General Comment 21 connects the ICESCR right to cultural life to indigenous rights, stating that in the case of indigenous peoples the right to cultural life includes the right to “land, territories, and resources which they have traditionally owned, occupied, or otherwise used or acquired” (OHCHR 2009b: Paragraph 36). A State Party to the ICESCR should protect indigenous cultural values and rights “associated with their ancestral lands and their relationship with nature...in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources, and, ultimately, their cultural identity” (OHCHR 2009b: Paragraph 36). General Comment 21 also asserts that the principle of Free, Prior, and Informed Consent (FPIC) in relation to the ICESCR, declaring that a State Party “should respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights” under the covenant (OHCHR 2009b: Paragraph

37). In describing the need for consent, General Comment 21 requires that a State Party must “recognize and respect the rights of indigenous peoples to own, develop, control, and use their communal lands, territories, and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories” (OHCHR 2013: 20; OHCHR 2009b: Paragraph 36).

Indigenous Rights Regarding Traditional Knowledge

The topic of traditional knowledge or scientific, literary, or artistic works of indigenous peoples is addressed by CESCR General Comment 17, which calls for each State Party to the ICESCR to “adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage or traditional knowledge” (OHCHR 2006: Paragraph 32). General Comment 17 notes that in “adopting measures to protect scientific, literary, and artistic productions of indigenous peoples” a State Party to the ICESCR “should take into account their preferences” (OHCHR 2013: 20-21; OHCHR 2006: Paragraph 32). Similar to the lands, territories, or resources, General Comment 17 asks each State Party to “respect the principle of free, prior, and informed consent of the indigenous authors concerned” and “...where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions” (OHCHR 2013: 20-21; OHCHR 2006: Paragraph 32).

To the extent that an indigenous group constitutes an ethnic, religious, or linguistic minority, a State Party has a duty “to protect the moral and material interests of authors belonging to these minorities through special measures to preserve the distinctive character of minority cultures” (OHCHR 2006: Paragraph 33).

Progressive Realization & Implementation in the Case of Myanmar

Myanmar is a 3rd-world country working to rise from Least Developed Country (LDC) status, and suffers from lack of capacity in all areas of state and society. As a result, as a recent State Party to the ICESCR, Myanmar faces major challenges meeting its duties to the

covenant. The ICESCR recognizes the challenges to implementation facing some countries and attempts to assist such countries through the principle of progressive realization. Specifically, the ICESCR does not require a State Party to immediately provide full realization of all rights in the covenant, but instead asks each State Party to “take steps, individually and thorough international assistance and co-operation...to the maximum of its available resources, with a view to achieving progressively the full realization” of rights contained in the ICESCR (ICESCR 1966: Article 2, Paragraph 1). The principle of progressive realization means that the efforts by a State Party to meet its duties to the ICESCR is adjusted based on the resources available to it (OHCHR 2000: 13). A lack of resources, however, does not justify inaction or delay in the implementation of rights under the ICESCR. The principle of progressive realization calls upon a State Party to “demonstrate that they are making every effort to improve the enjoyment of economic, social, and cultural rights, even when resources are scarce” (OHCHR 2000: 14). Hence, in the case of indigenous peoples, a State Party to the ICESCR has a duty to undertake steps to the greatest extent possible to enable the enjoyment by indigenous groups of the rights within the ICESCR.

In addition, for the case of countries like Myanmar struggling with a lack of capacity, there is an adjustment of requirements regarding the fulfilment of duties to the ICESCR but a continuing expectation that a country still demonstrates maximum effort to implement the ICESCR with available internal resources and international aid.

Conclusion

This document reviewed indigenous rights relevant for Myanmar embodied within the International Covenant on Economic, Social, & Cultural Rights (ICESCR).

The ICESCR requires that State Parties to the covenant recognize economic, social, and cultural rights and calls upon State Parties to fulfill duties to promote respect and observance of those rights.

The above sections identified specific rights within the ICESCR relevant for indigenous groups in Myanmar, referencing official United Nations publications and General Comments from the Committee on Economic, Social, and Cultural Rights (CESCR).

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POINT (Promotion Of Indigenous and Nature Together)

No.687, Gyogone 8th street(Sourth), East Gyogone,
Insein Township, Yangon, Myanmar.

Facebook Page / <https://www.facebook.com/PromotionOfIndigenousandNatureTogether>

Website / www.pointmyanmar.org

Email / point.org.mm@gmail.com

