

I. KEY ESCR PRINCIPLES INFORMING THE RIGHT TO LAND

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A. Overarching Principles

1. CESCR GENERAL COMMENTS

General Comment 20 (Non-Discrimination)

- 25. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement.¹
- 34. The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle.
- 35. Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society.

General Comment 16 (Equal Rights of Men and Women)

- 37. The right of individuals and groups of individuals to participate in decision-making processes that may affect their development must be an integral component of any policy, programme or activity developed to discharge governmental obligations under article 3 of the Covenant.

General Comment 3 (States Parties' Obligations)

- 9. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. [...] Nevertheless, [...] It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.
- 10. [...] the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. [...] In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.
- 11. [...] Moreover, the obligations to monitor the extent of the realization, or more especially of the non realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.
- 12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.

¹ See CESCR general comments Nos. 15 and 4 respectively.

- 13. [...] the undertaking given by all States parties is “to take steps, individually and through international assistance and cooperation, especially economic and technical” The Committee notes that the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.

2. JURISPRUDENCE

Human Rights Committee

Brok and Brokova v. Czech Republic (2001)

- 7.2 The question before the Committee is whether the application of Act No. 87/1991, as amended by Act No. 116/1994, to the author’s case entails a violation of his right to equality before the law and to the equal protection of the law.
- 7.3 These laws provide restitution or compensation to victims of illegal confiscation carried out for political reasons during the Communist regime. The law also provides for restitution or compensation to victims of racial persecution during the Second World War who had an entitlement under Benes Decree No. 5/1945. The Committee observes that legislation must not discriminate among the victims of the prior confiscation to which it applies, since all victims are entitled to redress without arbitrary distinctions.
- 7.4 The Committee notes that Act No. 87/1991 as amended by Act No. 116/1994 gave rise to a restitution claim of the author which was denied on the ground that the nationalization that took place in 1946/47 on the basis of Benes Decree No. 100/1945 falls outside the scope of laws of 1991 and 1994. Thus, the author was excluded from the benefit of the restitution law although the Czech nationalization in 1946/47 could only be carried out because the author’s property was confiscated by the Nazi authorities during the time of German occupation. In the Committee’s view this discloses a discriminatory treatment of the author, compared to those individuals whose property was confiscated by Nazi authorities without being subjected, immediately after the war, to Czech nationalization and who, therefore, could benefit from the laws of 1991 and 1994. Irrespective of whether the arbitrariness in question was inherent in the law itself or whether it resulted from the application of the law by the courts of the State party, the Committee finds that the author was denied his right to equal protection of the law in violation of article 26 of the Covenant.
- 8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it substantiate a violation of article 26 in conjunction with article 2 of the Covenant.
- 9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. Such remedy should include restitution of the property or compensation, and appropriate compensation for the period during which the author and his widow were deprived of the property, starting on the date of the court decision of 20 November 1995 and ending on the date when the restitution has been completed. The State party should

review its relevant legislation and administrative practices to ensure that neither the law nor its application entails discrimination in contravention of article 26 of the Covenant.

Blazek et al. v. Czech Republic (2001)

- 5.6 In the absence of any submission from the State party, the Committee must give due weight to the submissions made by the authors. The Committee has also reviewed its earlier Views in cases No. 516/1993, *Mrs. Alina Simunek et al.* and No. 586/1994, *Mr. Joseph Adam*. In determining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the original entitlement of the authors to the properties in question. In the instant cases the authors have been affected by the exclusionary effect of the requirement in Act 87/1991 that claimants be Czech citizens. The question before the Committee is therefore whether the precondition of citizenship is compatible with article 26. In this context, the Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.
- 5.7 Whereas the criterion of citizenship is objective, the Committee must determine whether in the circumstances of these cases the application of the criterion to the authors would be reasonable.
- 5.8 The Committee recalls its Views in *Alina Simunek v. The Czech Republic* and *Joseph Adam v. The Czech Republic*, where it held that article 26 had been violated: “the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for [their] ... departure, it would be incompatible with the Covenant to require [them] ... to obtain Czech citizenship as a prerequisite for the restitution of their property, or, alternatively, for the payment of compensation” (CCPR/C/57/D/586/1994, para. 12.6). The Committee finds that the precedent established in the Adam case applies to the authors of this communication. The Committee would add that it cannot conceive that the distinction on grounds of citizenship can be considered reasonable in the light of the fact that the loss of Czech citizenship was a function of their presence in a State in which they were able to obtain refuge.
- 5.9 Further, with regard to time limits, whereas a statute of limitations may be objective and even reasonable in abstracto, the Committee cannot accept such a deadline for submitting restitution claims in the case of the authors, since under the explicit terms of the law they were excluded from the restitution scheme from the outset.

Des Fours Walderode v. Czech Republic (2001)

- 8.3 With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee begins by noting that Law No. 243/1992 already contained a requirement of citizenship as one of the conditions for restitution of property and that the amending Law No. 30/1996 retroactively added a more stringent requirement of continued citizenship. The Committee notes further that the amending Law disqualified the author and any others in this situation, who might otherwise have qualified for restitution. This raises an issue of arbitrariness and, consequently, of a breach of the right to equality before the law, equal protection of the law and non-discrimination under article 26 of the Covenant.
- 8.4 The Committee recalls its Views in cases No. 516/1993 (Simunek et al.), 586/1994 (Joseph Adam) and 857/1999 (Blazek et al.) that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently a discriminatory distinction between individuals who are equally victims of prior state confiscations, and constitutes a violation of article 26 of the Covenant. This violation is further exacerbated by the retroactive operation of the impugned Law.
- 9.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that article 26, in conjunction with article 2 of the Covenant, has been violated by the State party.
- 9.2 In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the late author's surviving spouse, Dr. Johanna Kammerlander, with an effective remedy, entailing in this case prompt restitution of the property in question or compensation therefor, and, in addition, appropriate compensation in respect of the fact that the author and his surviving spouse have been deprived of the enjoyment of their property since its restitution was revoked in 1995. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

Fabryova v. Czech Republic (2001)

- 9.2 The Committee notes that the State Party concedes that under Law nr 243/1992 individuals in a similar situation as that of the author qualify for restitution as a result of the subsequent interpretation given by the Constitutional Court (para. 4.4). The State Party further concedes that the decision of the Jihlava Land Office of 14 October 1994 was wrong and that the author should have had the opportunity to enter a fresh application before the Jihlava Land Office. The author's renewed attempt to obtain redress has, however, been frustrated by the State party itself which, through a letter of the Ministry of Agriculture of 25 May 1998, informed the author that the decision of the Jihlava Land Office of 14 October 1994 had become final on the ground that the decision of the Central Land Office reversing the decision of the Jihlava Land Office had been served out of time.
- 9.3 Given the above facts, the Committee concludes that, if the service of the decision of the Central Land Office reversing the decision of the Jihlava Land Office

was made out of time, this was attributable to the administrative fault of the authorities. The result is that the author was deprived of treatment equal to that of persons having similar entitlement to the restitution of their previously confiscated property, in violation of her rights under article 26 of the Covenant.

- 10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the facts before it disclose a violation of article 26 of the Covenant.
- 11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

Polackova and Polacek v. Czech Republic (2002)

- 7.2 The issue before the Committee is whether the application to the authors of Act No. 87/1991 amounted to a violation of their rights to equality before the law and to equal protection of the law, contrary to article 26 of the Covenant.
- 7.3 The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.² Whereas the citizenship criterion is objective, the Committee must determine whether its application to the authors was reasonable in the circumstances of the case.
- 7.4 The Committee recalls its Views in the cases of *Simunek, Adam, Blazek and Des Fours Walderode*,³ where it held that article 26 of the Covenant had been violated: "the authors in that case and many others in analogous situations had left Czechoslovakia because of their political opinions and had sought refuge from political persecution in other countries, where they eventually established permanent residence and obtained a new citizenship. Taking into account that the State party itself is responsible for the author's ... departure, it would be incompatible with the Covenant to require the author ... to obtain Czech citizenship as a prerequisite for the restitution of [his] property or, alternatively, for the payment of appropriate compensation".⁴ The Committee further recalls its jurisprudence⁵ that the citizenship requirement in these circumstances is unreasonable.

² See Communication No.182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13.

³ See Communication No.586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, paragraph 12.6, Communication No.857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, paragraph 5.8, and Communication No. 747/1997, *Des Fours Walderode v. Czech Republic*, Views adopted on 30 October 2001, paragraph 8.3.

⁴ See footnote 7

⁵ See Communication 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, paragraph 11.6

- 7.5 The Committee considers that the precedent established in the above cases also applies to the authors of the present communication. It notes the State party's confirmation that the only criteria considered by the domestic courts in dismissing the authors' request for restitution was that they did not fulfil the citizenship criterion. Thus, the Committee concludes that the application to the authors of Act No. 87/1991, which lays down a citizenship requirement for the restitution of confiscated property, violated their rights under article 26 of the Covenant.

Ondracka v. Czech Republic (2007)

- 7.3 The Committee recalls its Views in the cases of *Adam, Blazek, Marik, Kriz, and Gratzinger*⁶ where it held that article 26 had been violated. Taking into account that the State party itself is responsible for the departure of the authors from the former Czechoslovakia in seeking refuge in another country, where they eventually established permanent residence and obtained that country's citizenship, the Committee considers that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation.

Kohoutek v. Czech Republic (2008)

- 7.2 The issue before the Committee is whether the application to the author of Act No. 87/1991 amounted to discrimination, in violation of article 26 of the Covenant. The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.⁷
- 7.3 The Committee recalls its Views in the cases of *Adam, Blazek, Marik, Kriz, Gratzinger* and *Ondracka*⁸ where it held that article 26 had been violated, and that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation. The Committee considers that the principle established in these cases also applies in the case of the author of the present communication, and that the application by the domestic courts of the citizenship requirement violated her rights under article 26 of the Covenant.

⁶ Communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, paragraph 12.6; Communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, paragraph 5.8; Communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, paragraph 6.4; Communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, paragraph 7.3; Communication 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, paragraph 7.5.

⁷ See Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13.

⁸ Communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, paragraph 12.6; Communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, paragraph 5.8; Communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, paragraph 6.4; Communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, paragraph 7.3; Communication 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, paragraph 7.5; and Communication No. 1533/2006, *Ondracka v. Czech Republic*, Views adopted on 2 November 2007, paragraph 7.3.

Susser v. Czech Republic (2008)

- 7.2 The issue before the Committee is whether the application to the author of Act No. 87/1991 amounted to discrimination, in violation of article 26 of the Covenant. The Committee reiterates its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.⁹
- 7.3 The Committee recalls its Views in the cases of *Adam, Blazek, Marik, Kriz, Gratzinger* and *Ondracka*¹⁰ where it held that article 26 had been violated. Taking into account that the State party itself is responsible for the departure of the author from the former Czechoslovakia to another country, where he eventually established permanent residence and obtained that country's citizenship, the Committee considers that it would be incompatible with the Covenant to require the authors to meet the condition of Czech citizenship for the restitution of their property or alternatively for its compensation.
- 7.4 The Committee considers that the principle established in the above cases also applies in the case of the author of the present communication, and that the application by the domestic courts of the citizenship requirement violated his rights under article 26 of the Covenant.
- 8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the Covenant.
- 9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation if the properties cannot be returned. The Committee reiterates that the State party should review its legislation to ensure that all persons enjoy both equality before the law and equal protection of the law.

Inter-American Commission on Human Rights

Marino Lopez et al. v. Colombia (2011)

- 354. As mentioned before, in the course of its in loco visit to Colombia in December 1997, the IACHR received statements evidencing active and passive discrimination by the State and from third parties, and took account of a systematic discrimination, both official and unofficial. In its Third Report, the Commission indicated that

⁹ See Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13;

¹⁰ Communication No. 586/1994, *Adam v. Czech Republic*, Views adopted on 23 July 1996, paragraph 12.6; Communication No. 857/1999, *Blazek v. Czech Republic*, Views adopted on 12 July 2001, paragraph 5.8; Communication No. 945/2000, *Marik v. Czech Republic*, Views adopted on 26 July 2005, paragraph 6.4; Communication No. 1054/2002, *Kriz v. Czech Republic*, Views adopted on 1 November 2005, paragraph 7.3; Communication 1463/2006, *Gratzinger v. Czech Republic*, Views adopted on 25 October 2007, paragraph 7.5; and Communication No. 1533/2006, *Ondracka v. Czech Republic*, Views adopted on 2 November 2007, paragraph 7.3.

"offensive stereotypes in the media, the arts and popular culture tend to perpetuate negative attitudes towards blacks and these often unconscious views are commonly reflected in public policy when governments at all levels distribute limited State resources"³⁷⁴ and there was a recognition both by the State and society that Afro-Colombians had been victims of racial discrimination."³⁷⁵

- 355. In the current case, before the displacement, the systematic discrimination referred afflicted the Cacarica Afro-descendant communities traditionally settled in the Department of Chocó, an area particularly compromised at the time by the internal armed conflict. During the displacement, the discrimination had an even greater impact on the displaced persons. The Commission recalls that in 2007, the IACHR observed that the Afro-Colombians are particularly affected by the violence caused by the conflict and the scale of violence affecting them remains hidden due to a lack of distinct estimations allowing an appreciation of the ways they are affected in comparison to the rest of the population.³⁷⁶
- 356. Article 1.1 of the American Convention prohibits discrimination of any kind, a concept including unjustified distinctions for reasons of race, color, national or social origin, economic status, birth or any other social condition.
- 357. For its part, Article 24 of the Convention, which enshrines the right to equality before the law and to receive equal protection of the law, without discrimination, has been interpreted in its reach by the Inter-American Court in the following terms: The prohibition against discrimination so broadly proclaimed in Article 1.1 with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.³⁷⁷
- 358. In this respect, the Inter-American has stressed that "[n]on-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights."³⁷⁸
- 359. As regards the contents of the concept of equality, the Inter-American Court has explained that this springs directly from the single nature of the human family and it is inseparable from the essential dignity of the individual in regard to which any situation is impermissible which considers a certain group as being inferior, leads to treating them with hostility or in any other way discriminates against them in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.³⁷⁹ On the principle of equality reposes the judicial framework of national and international public policy and that permeates all laws.³⁸⁰ This principle is a rule of jus cogens.³⁸¹

African Commission on Human and Peoples' Rights

Malawi African Association v. Malawi (2000)

- 129. Article 2 of the Charter states that: "Every individual shall be entitled to the enjoyment of the rights and freedoms

recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour..."

- 130. The representative of the government as well as the authors of the communications declared that many Black Mauritians were forced to flee or were detained, tortured or killed because of the colour of their skin, and that the situation in Mauritania became explosive due to the extreme positions adopted by the francophone and arabophone factions that were in opposition to each other in the country.

European Court of Human Rights

Case of Marckx v. Belgium (1979)

[Regarding property inheritance rights between mother and child]

- 32. Article 14 (art. 14) provides:
"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Court's case-law shows that, although Article 14 (art. 14) has no independent existence, it may play an important autonomous role by complementing the other normative provisions of the Convention and the Protocols: Article 14 (art. 14) safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions. A measure which, although in itself in conformity with the requirements of the Article of the Convention or the Protocols enshrining a given right or freedom, is of a discriminatory nature incompatible with Article 14 (art. 14) therefore violates those two Articles taken in conjunction. It is as though Article 14 (art. 14) formed an integral part of each of the provisions laying down rights and freedoms (judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, pp. 33-34, para. 9; National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 19, para. 44).

Accordingly, and since Article 8 (art. 8) is relevant to the present case (see paragraph 31 above), it is necessary also to take into account Article 14 in conjunction with Article 8 (art. 14+8).

- 33. According to the Court's established case-law, a distinction is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, inter alia, the above-cited judgment of 23 July 1968, p. 34, para. 10).
- 34. In acting in a manner calculated to allow the family life of an unmarried mother and her child to develop normally (see paragraph 31 above), the State must avoid any discrimination grounded on birth: this is dictated by Article 14 taken in conjunction with Article 8 (art. 14+8).

B. Right to Adequate Housing (article 11)

1. CESCR GENERAL COMMENT 4

- 8 (a). *Legal security of tenure*. Tenure takes a variety of forms, [...] including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;
- 11. States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.
- 13. For a State party to satisfy its obligations under article 11 (1) it must demonstrate, inter alia, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction. In this regard, the revised general guidelines regarding the form and contents of reports adopted by the Committee (E/C.12/1991/1) emphasize the need to “provide detailed information about those groups within ... society that are vulnerable and disadvantaged with regard to housing”. They include, in particular, [...] those living in “illegal” settlements, those subject to forced evictions and low-income groups.
- 17. The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; [...]

2. CESCR CONCLUDING OBSERVATIONS

- The Committee recommends that the State party take steps to ensure that ownership of houses and land is formally registered, and that the State party actively raise awareness among affected groups of the population. (*Egypt*)
- The Committee notes with concern that an estimated 16.5 million, roughly 30 per cent, of the urban population continue to live in informal settlements and slums, sometimes built on riverbanks, railroad tracks and other high-risk areas, with no or limited basic infrastructures and services, without legal security of tenure and under constant threat of eviction. The Committee also notes with concern that the percentage of the national budget allocated to the realization of housing programmes aimed at providing security of tenure and affordable housing, such as the Presidential Land Proclamation, is not sufficient to increase the supply of social housing units for

members of the most disadvantaged and marginalized groups. (art. 11). The Committee requests the State party to allocate sufficient funds for the realization of programmes aimed at providing security of tenure and affordable housing, particularly to members of the most disadvantaged and marginalized groups, in line with its general comment No. 4 (1991) on the right to adequate housing. (*Philippines*)

- The Committee is concerned that speculation with land, real estate, and construction has created difficulties in the access to housing for middle- and low-income populations. It also reiterates its concern over forced evictions of disadvantaged and marginalized individuals and groups in contravention of the State party's obligations under the Covenant, which affect in particular migrants and indigenous peoples. (art. 11, para. 1). (*Argentina*)
- 20. The Committee is concerned that, despite the measures taken by the State party to improve access to housing, including the Five-Year Housing Plan (2005–2009), a high number of irregular settlements continue to exist in urban and suburban areas, many of which lack access to proper sanitation and are hazardous due to structural defects. The Committee also notes with concern that many rural settlements are situated in flood-prone zones. (art. 11, para. 1). (*Uruguay*)
- 26. The Committee is concerned that, despite the State party's efforts to address housing shortage, a high percentage of dwellings, especially those inhabited by indigenous peoples, Afro-descendants and migrants, is in poor condition, often without access to drinking water and adequate sanitation, and that many of these communities still live in slums and squats, sometimes on river banks and in other high-risk areas. The Committee is also concerned about the lack of disaggregated data on the number of forced evictions in the State party. (*Costa Rica*)
- 20. The Committee is concerned at the precarious situation of a growing number of families who do not have decent housing in El Salvador and who settle, for example, along the railway or rivers, or in volcanic areas. (*El Salvador*)
- 25. The Committee notes with concern that 45 per cent of Managua's population live in unplanned settlements, with no legal security of tenure and thus at permanent risk of forced eviction. The Committee is also concerned at the major housing shortage and the fact that more than two thirds of Nicaraguans live in overcrowded housing, despite the existence of specific programmes such as the National Housing Plan 2005-2025. (art. 11). (*Nicaragua*)
- 27. The Committee reiterates its concern about the continuing housing deficit in the State party, both in terms of quantity and quality, and about housing conditions in the bateyes, including limited access to sanitation infrastructure, water supply and health and educational services. The Committee also reiterates its concern over forced evictions taking place in contravention of the State party's obligations under the Covenant and notes the absence of a law or decree prohibiting the practice of evictions. (art. 11). (*Dominican Republic*)
- 25. The Committee expresses concern at the acute housing situation in the State party, including the fact that almost a quarter of the population live as squatters on land they neither own nor lease, as well as the rapid growth of squatter communities in urban

areas in overcrowded, unsafe and dilapidated housing. Additionally, the Committee regrets the absence of data on the extent of homelessness in the State party, as well as the lack of effective programmes and policies to address the issue. (art. 11). (*Jamaica*).

- 23. The Committee also notes with regret reports received of occurrences of forced evictions, in particular a case where 150 persons were forced to leave their traditional homes and land as a result of the construction of a cruise ship berth. The Committee was informed that although the persons thus evicted received some cash compensation, they were not offered alternative accommodation. The Committee recalls in this respect its General Comment No. 7. (*St. Vincent & the Grenadines*)
- 28. The Committee is deeply concerned about the lack of housing programmes to provide the poorest members of society with appropriate accommodation. The Committee is also concerned at the number of urban squatter communities which are exposed to forced evictions, in the light of the highly restrictive legal conditions governing their right to tenure. (*Trinidad & Tobago*)
- 18. The Committee reiterates its deep concern at the acute housing shortage in the State party, the high number of persons living in slums (estimated at some 1.2 million) and vulnerable to forced evictions, the low implementation level of official construction projects and the disproportionately low budget level for housing [...] (*Algeria*)

3. UNIVERSAL PERIODIC REVIEWS

- Luxembourg to Burkina Faso (2008): Ensure that full access is given to rural women to education, health care and credit, as well as to land and housing as recommended by the Committee on the Elimination of Discrimination against Women.
- Mexico to Cambodia (2010): Promote a legal framework that provides legal certainty in property matters, in particular land ownership and protection against forced evictions.
- Spain to Lao People's Democratic Republic (2010): Seek the assistance of the Special Rapporteur on adequate housing to mitigate the problem of the lack of adequate land and assistance to the rural population.

4. SPECIAL PROCEDURES

SR Housing- Argentina (2011)

- 60. The special rapporteur recommends that a survey be carried out, on the basis of the 2010 census results and with the active participation of the municipalities and provinces, to map the various settlements and the housing demand created by economic investment plans. A national plan on urban land and urban and rural housing should also be prepared in line with the strategic land-use plan to develop a range of housing programmes and policies and clear allocation criteria.
- 59. The special rapporteur recommends the adoption at the national level of a framework law on the right to adequate housing that incorporates existing international standards on the right to adequate housing and sets out the budgets and

basic criteria for all housing policies at the national, provincial and local levels. The special rapporteur recommends the drafting and enactment of a law that recognizes the public function of land-use planning and modifies the general principles that form part of the current definition of the right to private property as regulated in the civil code so as to include the concept of the social function of property.

- 62. The special rapporteur calls for greater diversity and flexibility in housing programmes, to match funds with existing needs and to strengthen programmes aimed at improving, completing and extending inadequate housing, regularizing land title, promoting access to land and supporting self-build housing, services and equipment. The special rapporteur also recommends the introduction of a rent control policy and the establishment of a rental subsidy programme.
- 66. With regard to informal settlements, in view of the lack of an adequate, standardized regularization policy, the special rapporteur recommends the establishment of a general framework for the recognition of rights and clear criteria for consolidating settlements and the promotion by the competent authorities of a comprehensive regularization policy (via a process of urbanization and administrative and land-title regularization and shorter periods for adverse possession of land for social housing purposes), definitively integrating these settlements into cities and towns, and offering alternatives that comply with international standards on adequate housing to the inhabitants of settlements that are not to be regularized.
- 57. In conclusion, the special rapporteur believes that a number of factors currently impede the realization of the right to adequate housing in Argentina, including: the lack of market regulation for land transactions; real estate speculation; the lack of federal coordination in the formulation and implementation of housing policies; a legal framework for evictions that fails to guarantee due process; and a lack of comprehensive housing policies that are sufficiently diverse to provide long-term solutions to the various housing needs. The special rapporteur considers that, given the progress made in terms of legislation and investment in housing and the economic growth of recent years, Argentina is in a position to draw up and implement a social pact on land use to ensure the implementation of the right to adequate housing for all its inhabitants.

SR Food- Nicaragua (2010)

- (a) Protection against forced evictions should be improved, and the victims should have remedies against any eviction incompatible with the rule of law or international standards. Nicaragua should take measures which “provide the greatest possible security of tenure to occupiers of houses and land; conform to the [international] covenant [on economic, social and cultural rights]; and are designed to control strictly the circumstances under which evictions may be carried out”.^[28] Prior to carrying out any evictions, all feasible alternatives should be explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force; legal remedies or procedures should be provided to those who are affected by eviction orders; and all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected.^[29] Any eviction not complying with these conditions should be considered a violation of the right to housing and, where it leads to depriving families from their means of producing food, it also is a violation of the right to food.

SR Housing- Cambodia (2006)

- Regulations should be adopted that include provisions regarding housing situation of families living in state property and clarify legal situation of all land swaps that occurred between 2001 property law and its own adoption. In addition, information concerning all land swaps under negotiation should be immediately disclosed. In meanwhile, besides halting all swaps, full attention should be given to families already affected to guarantee adequate housing conditions and security of tenure in their relocation sites.
Measures aiming at realization of indigenous peoples' right to adequate housing should include respect for their traditional lands and elaboration of culturally sensitive land and housing policies.

SR Housing- Spain (2008)

- SR housing believes that there is no alternative but for the government, at all levels, to more rigorously intervene and regulate the market in land and housing, to secure the effective implementation of the right to adequate, affordable and accessible housing by bringing down housing and land prices.

SR Occupied Palestinian Territory- Israel (2006)

- Although Israel has abandoned plan to build wall through Jordan valley, policies in that region are designed to drive Palestinians from area. Settlements are expanding; Palestinian land is being confiscated, homes destroyed, access denied to non-Jordan valley residents, and access to water and electricity curtailed.
In short, life is being made increasingly difficult for residents in Jordan valley and neighbouring mountain ridges.

SR Housing- Maldives (2009)

- There is a need for a new approach to land distribution and territorial planning. Yet any new approach should keep the positive aspects of traditional land allocation, e.g. ensuring access to land for housing to all, regardless of social class and wealth.

SR Housing- Iran (2006)

- Develop further policies to address discrimination against women in relation to equal access to housing, land, property and inheritance, including urgent creation of safe houses for women subject to violence, runaway girls and street women.
Accelerate titling of housing and land acquired according to traditional practices in rural areas and regularization and upgrading of informal settlements in urban areas.

SR Housing- Afghanistan, Mexico, Peru, Romania (2009)

- It is important that the efforts aiming at the improvement of legislation, including the national land policy, fully integrate human rights and the right to adequate housing.

SR Housing- Brazil, Cambodia, Kenya (2010)

- The draft national land policy needs to be adopted by parliament in order to come into force.
At the same time, the draft housing bill must be revised to address the issues of forced evictions and slum upgrading, and thereby fully recognise the right to adequate housing.

IE Minorities- Afghanistan (2010)

- 33. Participation in economic and social life encompasses participation in development projects, as well as proper access to employment, land and property, housing, health care, social welfare and pensions, among others. Participation in social and cultural life covers areas such as proper access to education, media and the protection of cultural identity. In all of these areas, effective participation entails meaningful consultation, programmes designed to address the particular needs and circumstances of minorities, as well as the full and equal access to necessary services.

SR Housing- Spain (2007)

- Spanish authorities should consider:
 - seriously reflecting upon the functioning of the market, including intervening if necessary to control land and property speculation;
 - such a review of market policies should include a review of the current home-ownership model, including subsidies targeted to the higher end of the housing market, and its possible negative impact on low-income housing options.

IE Minorities- Bulgaria (2012)

- (II) legal status of Roma settlements and the initiation of a process of legalization would constitute an important first step towards improving housing and living conditions and should be considered. The moratorium on adverse possession of public land, which has been extended twice, should be terminated so as to allow Roma to legalize the houses built on public land and to become owners of dwellings that they have inhabited for decades. This would allow settlements to fall within the municipal master plans and policy frameworks for infrastructure improvement and housing renewal.

SR Housing- Canada (2009)

- Authorities should genuinely engage with aboriginal communities to resolve as soon as possible land claims such as in the Lubicon region so that housing problems can be resolved on a longer-term basis. In the meantime urgent steps should be taken to improve housing and living conditions regardless of the status of the land claims.

SR Myanmar (2013)

- (b) Ensure the protection of land and housing rights, including through impact assessments prior to development projects, consultation with affected individuals and communities, the provision of adequate restitution and compensation, and the conferment of legal security of tenure.

RSG IDPs- Montenegro, Serbia (2009)

- Eulex and other actors with a relevant mandate to pay particular attention to how housing, land and property cases involving displaced parties are handled by the courts, police and other authorities to prevent further miscarriages of justice and protect the human rights of IDPs.

SR Housing- Maldives (2010)

- Various factors including the growth of population and the scarcity in land make a new approach to land distribution and territorial planning unavoidable. Yet, SR housing believes that any new approach should keep the very positive aspects

of traditional land allocation, which provides access to land for housing purposes to all, regardless of social class and wealth.

5. JURISPRUDENCE

Human Rights Committee

Assenova Naidenova et al. v. Bulgaria (2012)

- 14.2 The authors claim that the enforcement of the eviction order of 24 July 2006 and their subsequent removal from the Dobri Jeliakov community would amount to subjecting them to arbitrary and unlawful interference with their homes and would, therefore, violate their respective rights under article 17 of the Covenant. In this regard, the Committee recalls that the term “home” as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation.¹¹ In the present communication, it is undisputed that the Dobri Jeliakov community where the authors’ houses are situated and where they have continuously resided existed with the acquiescence of the State party’s authorities for over seventy years and that the authors have police registration of their address. In these circumstances, the Committee is satisfied that the authors’ houses in the Dobri Jeliakov community are their “homes” within the meaning of article 17 of the Covenant, irrespective of the fact that the authors are not the lawful owners of the plot of land on which these houses had been constructed.

Inter-American Commission on Human Rights

Marino Lopez et al. v. Colombia (2011)

- 314. From the findings of fact it is apparent that the violence of the armed operations and the displacement had an effect on the family life of the displaced communities of the Cacarica basin. Families were forced to abandon their homes, some suffered from separation or being split up and they were prevented from living the type of family life that they had developed in accordance with their customs.
- 315. Article 17.1 of the American Convention establishes that: “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state.” For its part, Article 11.2 of the same instrument provides that: “[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”
- 316. The Inter-American Court has established that the right to the family may be seen as a complement to the positive obligation to protect the family enshrined in Article 17.1, understood as a fundamental aspect of society³³⁰ and to the State’s

¹¹ See general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, *Official Records of the General Assembly, Forty-third Session, Supplement No. 40, A/43/40, annex, para. 5.*

negative obligation, referring to the duty to abstain from causing arbitrary or abusive interference with the family surroundings³³¹ established in Article 11.2 of the Convention. The European Court has also established that the contents of the right to family life must also comprise this double viewpoint.³³²

African Commission on Human and Peoples' Rights

The Social and Economic Action Centre v. Nigeria (2001)

- 60. Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated.
- 61. At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual, family, household or community housing needs.[FN13] Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and landowners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.[FN14] The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be left alone and to live in peace - whether under a roof or not.

Shumba v. Zimbabwe (2012)

- 191. But on a more substantive point of law, what is a 'property right' (within the context of this matter) that accords with regional and international law? "Property rights" have an autonomous meaning under regional and international human rights law, which supersedes national legal definitions. In *Malawi African Association and Others v. Mauritania*, the African Commission considered land, houses etc as 'property' for the purposes of Article 14 of the African Charter.[FN37] The African Commission in the *Ogoni* case also found that the 'right to property' includes not only the right to have access to one's property and not to have one's property invaded or encroached upon,[FN38] but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.[FN39]
- 192. The African Commission also notes that the ECHR have recognized that 'property rights' could also include the economic resources and rights over the common land of the applicants.[FN40] Similarly, both the European Court of Human Rights (ECHR) and Inter American Court of Human Rights have examined the

specific facts of individual situations to determine what should be classified as ‘property rights’, like registered title.[FN41] The case of *Dogan and others v Turkey*[FN42] is instructive in the instant Communication. Although the Applicants were unable to demonstrate registered title of lands from which they had been forcibly evicted by the Turkish authorities, the European Court of Human Rights observed that; [T]he notion ‘possessions’ in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision.[FN43]

Malawi African Association v. Malawi (2000)

- 127. Article 14 of the Charter reads as follows:
"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."
- 128. The confiscation and looting of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed in article 14.

European Court of Human Rights

Dogan and Others v. Turkey (2004)

- 139. The Court notes that it is not required to decide whether or not in the absence of title deeds the applicants have rights of property under domestic law. The question which arises under this head is whether the overall economic activities carried out by the applicants constituted “possessions” coming within the scope of the protection afforded by Article 1 of Protocol No. 1. In this regard, the Court notes that it is undisputed that the applicants all lived in Boydas village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling.
- Accordingly, in the Court’s opinion, all these economic resources and the revenue that the applicants derived from them may qualify as “possessions” for the purposes of Article 1.

C. Forced Eviction (article 11)

1. CESCR GENERAL COMMENT 7

- 2. Agenda 21 stated that “people should be protected by law against unfair eviction from their homes or land.”

- 3. The term “forced evictions” as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.
- 7. Other instances of forced eviction occur in the name of development. Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other large-scale energy projects, with land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land, or the holding of major sporting events like the Olympic Games.
- 9. [...] it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land,
- 10. Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, [...] The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.
- 15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.
- 16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

2. CESCR CONCLUDING OBSERVATIONS

- The Committee calls upon the State party to resolve, as a matter of urgency, the situation of the groups and individuals concerned by expropriation in the public interest, for whom compensation or replacement rent have not been paid. (*Togo*)
- 24. The Committee is concerned about land expropriation and forced evictions caused by some development projects and that this has disproportionately affected minority groups, including the Kurdish and Baloch communities. (art. 11). (*Iran*)
- It recommends that the State party ensure that vulnerable communities, including pastoralist and hunter-gatherer communities, are effectively protected from forced evictions from traditional lands. It also recommends that past forced evictions and violations that have taken place during those evictions are properly investigated, the perpetrators brought to justice, the findings made public and those evicted offered adequate compensation. The Committee draws the attention of the State party to its general comment No. 7 (1997) on forced evictions. (*Tanzania*)
- The Committee is concerned about reports that the Voluntary Resettlement Program, as described in the State party report, entails the forced eviction of thousands of people in various regions of the State party, who are relocated to villages that lack basic infrastructure, such as health clinics, clean water supplies and schools, as well as agricultural assistance or food assistance. (art.11). (*Ethiopia*)
- The Committee notes with concern the high number of reported cases of forced eviction and demolition of houses conducted without sufficient notice, and without provision of adequate compensation or alternative accommodation. The Committee regrets that the State party has failed to provide details of Decree No. 2008/0738/PM of 23 April 2008 on land management procedures and requirements, or information on access to remedies for the persons concerned. (art. 11). (*Cameroon*)
- The Committee notes with concern: 12 (h) The widespread housing shortage, the incidence of forced evictions of farmers and indigenous populations to make way for mining and timber concessions, especially in the Chaco region, and the lack of effective measures to provide social housing for low-income, vulnerable and marginalized groups. (*Bolivia*)
- Despite the construction of many housing units, the Committee is concerned at the large number of people living in illegal settlements in the State party who are, consequently, liable to forced evictions. (*Chile*)
- 26. The Committee is concerned about corporate land purchases and their impact on landownership by campesinos. It is also concerned about living conditions in high-risk zones in which the supply of basic services is not guaranteed and about the effects of what the State party has referred to as “land trafficking”..... The Committee recommends that the State party put in place mechanisms for monitoring evictions and resettlement processes and their impact on such families’ right to housing, bearing in mind the Committee’ s general comments No. 4 and No. 7 on the right to adequate housing and forced evictions. (art. 11, para. 1, of the Covenant). (*Ecuador*)

- 17. The Committee notes with deep concern the large number of forced evictions of peasant and indigenous families, particularly in the communities of Tetaguá Guaraní, Primero de Marzo, María Antonia and Tekojoja, who had been occupying the land, and the reports received that the National Police used excessive force in carrying out those evictions, by burning and destroying housing, crops, property and animals. *(Paraguay)*
- 18. The Committee notes with concern that some 45 per cent of indigenous people do not hold legal title to their ancestral lands and are thus exposed to forced eviction. *(Paraguay)*
- The Committee is concerned about the occurrence of forced evictions, especially among peasants and indigenous populations and in the areas where mining activities are conducted, without adequate compensation or appropriate relocation measures. *(Honduras)*
- 12. The Committee is also concerned that the issue of land rights of indigenous peoples has not been resolved in many cases and that their land rights are threatened by mining and cattle ranching activities which have been undertaken with the approval of the State party and have resulted in the displacement of indigenous peoples from their traditional ancestral and agricultural lands. *(Panama)*
- 20. The Committee is concerned at inadequate investment of the State party in affordable housing resulting in a high percentage of the population living in informal settlements which do not have adequate infrastructure or facilities. It is also concerned about widespread forced evictions due to the lack of secure tenure. (art. 11).

The Committee recommends that the State party take steps to ensure that ownership of houses and land is formally registered, and that the State party actively raise awareness among affected groups of the population, including through the dissemination of knowledge, on relevant legal provisions and registry procedures. It recommends that the State party establish legal definitions for, inter alia, adequate housing, informal settlements and security of tenure, including with regard to the Egypt 2052 Plan, that are in compliance with the Covenant. Moreover, the Committee recommends that the State party ensure that persons affected by forced evictions have access to an adequate remedy, restitution of their property and compensation, as appropriate, taking into account the Committee's general comment No. 7 (1997) on the right to adequate housing: forced evictions. The Committee also draws the State party's attention to its general comment No. 4 (1991) on the right to adequate housing. *(Egypt)*

- 26. The Committee is deeply concerned about home demolitions and forced evictions in the West Bank, in particular Area C, as well as in East Jerusalem, by Israeli authorities, military personnel and settlers. (art.11).

The Committee urges the State party to stop forthwith home demolitions as reprisals and ensure that evictions in Area C are in conformity with the duty (a) to explore all possible alternatives prior to evictions; (b) to consult with the affected persons; and (c) to provide effective remedies to those affected by forced evictions carried out by

the State party's military. The Committee recommends that the State party ensure that the development of special outline plans and closed military zones are preceded by consultations with affected Palestinian communities. The Committee also recommends that the State party review and reform its housing policy and the issuance of construction permits in East Jerusalem, in order to prevent demolitions and forced evictions and ensure the legality of construction in those areas. The Committee furthermore urges the State party to intensify efforts to prevent attacks by settlers against Palestinians and Palestinian property in the West Bank, including East Jerusalem, and investigate and prosecute criminal acts committed by settlers.

27. The Committee is concerned that the Plan for the Regularization of Bedouin Housing and for the Economic Development of the Bedouin Population in the Negev, based upon the recommendations of the Goldberg Committee and adopted in September 2011, foresees a land planning scheme that will be operated in a short and limited period of time, and includes an enforcement mechanism for the implementation of the planning and construction laws. (art.1)

The Committee recommends that the State party ensure that the implementation of the Plan does not result in the forceful eviction of Bedouins. The Committee recommends that any eviction should be based on free, prior and informed consent and that those relocated are offered adequate levels of compensation, in line with the Committee's general comment No.7 (1997) on the right to adequate housing: forced evictions. The Committee also recommends that the State party officially regulate the unrecognized villages, cease the demolition of buildings in those villages, and ensure the enjoyment of the right to adequate housing. (*Israel*)

- 22. The Committee is concerned about the information received on the thousands of forced evictions, unlawful expropriations and demolitions with little or no notice carried out in the capital Baku primarily in respect of apartments and homes in middle-class neighbourhoods for the purpose of building parks, highways and luxury apartments. The Committee is also concerned about the lack of consultation, adequate compensation and effective legal remedies. (art. 11).

The Committee urges the State party to halt all expropriations that do not fully comply with the established international human rights standards. The Committee urges the State party to guarantee the right to appeal in domestic courts to these households and to provide effective legal remedies, adequate compensation and guarantees of adequate alternative housing.

The Committee also urges the State party to ensure that any relocation of homes necessary for city renewal is carried out with prior consultations among affected households, with their informed consent and with full respect to the safety and dignity of people following an adequate and transparent procedure. (*Azerbaijan*)

- 21. The Committee is concerned at reports that the State party has forcibly relocated human rights activists, members of ethnic minorities and their family members to inhospitable parts of Turkmenistan. The Committee is also concerned at reports that a large number of forced evictions have been carried out in the context of the urban renewal project commonly known as "National Programme of Improvement of Social

Conditions for the Population of Villages, Settlements, Towns, Districts, and Rural Centers through 2020”.

The Committee urges the State party to refrain from forcibly relocating or evicting individuals. The Committee recalls that in cases where eviction or relocation is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law. [...] (*Turkmenistan*)

- 26. The Committee is deeply concerned at the potential impact of the Ilisu dam under construction and other dams on the enjoyment of economic, social and cultural rights in the areas concerned, especially with regard to forced evictions, resettlements, displacement, and compensation of people affected, as well as at the environmental and cultural impact of the construction of these dams. (arts. 11, 12 and 15).

The Committee urges the State party to take account of a human-rights based approach in its infrastructure development projects, especially dams, and to undertake a complete review of its legislation and regulations on evictions, resettlement and compensation of the people affected by these construction projects, especially the Ilisu dam, in line with the Committee’s general comment No. 7 (1997) on forced evictions.

27. The Committee notes with concern that forced evictions have taken place in Istanbul as part of the urban renewal project, without adequate compensation or alternative accommodation to those affected. It is also concerned that, in the case of the Roma community, evictions and displacement have seriously affected the schooling of children. Moreover, the Committee expresses concern that laws applied in urbanization projects, which neglect participation, the respect of property rights and other human rights dimensions, are not compatible with international standards (art. 11).

The Committee urges the State party to review its legal framework regulating urbanization projects to ensure that persons forcibly evicted are provided with adequate compensation and/or relocation, taking into account the guidelines adopted by the Committee in its general comment No. 7 (1997) on forced evictions. The Committee also draws the State party’s attention to the basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18, annex I) developed by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. (*Turkey*)

- 30. The Committee is gravely concerned over reports that since the year 2000, over 100,000 people were evicted in Phnom Penh alone; that at least 150,000 Cambodians continue to live under threat of forced eviction; and that authorities of the State party are actively involved in land-grabbing. (*Cambodia*)
- 31. The Committee, while noting that the draft resettlement and rehabilitation bill is currently before Parliament, remains deeply concerned about the reports of displacement and forced evictions in the context of land acquisition by private and state actors for the purposes of development projects, including constructions of dams and mining, and that the members of disadvantaged and marginalized groups, in

particular, the scheduled castes and scheduled tribes, are adversely affected by such displacement from their homes, lands and their sources of livelihood. (*India*)

3. UNIVERSAL PERIODIC REVIEWS

- France, Sweden, Switzerland to Cambodia (2010): Fully implement the 2001 land law and institute a moratorium on evictions until safeguards such as full compensation and access to basic services in resettlement areas can be guaranteed (Sweden); Adopt a moratorium on eviction until measures are taken to guarantee effective implementation of the 2001 law on land property and to deal with this problem in a more humane and dignified manner (Switzerland); Put an end to forced evictions, notably by improving the application of the land law of 2001, ensuring a better verification of land titles and guaranteeing strengthened protection of the population affected by the expropriations, which implies in particular prior consultations, a search for alternative solutions to expropriations, offers of re-housing and appropriate compensation of evicted persons (France).
- France to Georgia (2011): Implement the recommendations made by the representative of the secretary - general on the human rights of internally displaced persons following his visit to Georgia on the eviction of IDPs and their relocation.
- Canada to Papua New Guinea (2011): Provide comprehensive human rights training for law enforcement officers, including on issues related to forced eviction and violence against detainees and to racial discrimination and xenophobia.
- Turkey to Greece (2011): Revise the relevant legislation concerning the Waqfs in consultation with the minority with a view to enabling the minority to directly control and to use its own Waqf properties, and to put an end to misuse and expropriation of Waqf properties.

4. SPECIAL PROCEDURES

SR Housing- Argentina (2011)

- 72. Likewise, the special rapporteur urges the government to observe the order suspending any ruling or procedural or administrative act involving the eviction of an indigenous community (act no. 26160 and act no. 26554) and recommends that the duration of the suspension be extended pending the regularization of indigenous community property throughout the country, with full respect for the rights of indigenous peoples.

SR Food- Nicaragua (2010)

- Protection against forced evictions should be improved, and the victims should have remedies against any eviction incompatible with the rule of law or international standards. Nicaragua should take measures which “provide the greatest possible security of tenure to occupiers of houses and land; conform to the [international] covenant [on economic, social and cultural rights]; and are designed to control strictly the circumstances under which evictions may be carried out”.^[28] Prior to carrying out any evictions, all feasible alternatives should be explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force; legal remedies or procedures should be provided to those who are affected by

eviction orders; and all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected.[29] Any eviction not complying with these conditions should be considered a violation of the right to housing and, where it leads to depriving families from their means of producing food, it also is a violation of the right to food.

RSG IDPs- Kenya (2012)

- 68. Provide specialized support to urban planning and national or regional development processes, with a view to ensuring these are sensitive to the prevention and mitigation of internal displacement and the rights of IDPs, and adopt eviction guidelines in line with international standards.

SR Housing- Kazakhstan (2011)

- The new law should ensure that forced evictions are carried out only in the exceptional circumstances provided for by national legislation, and only for the purpose of promoting general welfare. The circumstances under which an eviction can be justified should be defined, and interpreted by national courts, in a restrictive manner. Protection against forced eviction should apply to all vulnerable individuals and groups, irrespective of whether they hold title to a home and or property under domestic law. The implementation of general plans of city development should in no way be used as a justification for forced evictions. While the new law is developed, a total moratorium on forced evictions should be implemented.

SR Indigenous- Argentina (2012)

- 98. The multiple cases of evictions of members of indigenous peoples from land claimed by them on the basis of their traditional or ancestral occupation of it are of great concern to indigenous peoples throughout the country.

SRSG Cambodia (2008)

- The government must do all it can to stop forced evictions. It must never be complicit in unlawful evictions. Internationally accepted guidelines must be observed, including the principles that nobody should be made homeless as a result of development-based evictions, the full and informed consent of those targeted for eviction. Evictions should be carried out only in exceptional circumstances, and solely for the purpose of promoting the general welfare in a democratic society. The use of force should be prohibited. No one should be imprisoned in relation to protecting their rights to land and housing and anyone detained in this context should be released. A moratorium on forced evictions should be declared, to allow the determination of the legality of land claims to be made in an objective and fair manner.

SR Housing- Afghanistan, Mexico, Peru, Romania (2009)

- SR housing is also concerned about continuing reports regarding eviction, segregation and inadequate consultation affecting Roma communities, and calls on the authorities to continue and further strengthen their efforts and to monitor closely their impact on the elimination of discrimination suffered by the Roma.

SR Housing- Algeria (2011)

- 63. The special rapporteur recalls the importance of guaranteeing the right of persons subject to an eviction procedure to legal assistance, access to the courts, social assistance and housing when they are destitute. She recommends that eviction orders should be subject to appeal or annulment. She also urges the government to ensure that the “winter truce” is respected and that persons over 60 years of age are not evicted under executive decree no. 507 bis. She encourages the government to ensure that, in the framework of urban renewal or slum clearance projects, no one becomes a de facto victim of a forced eviction and is rendered homeless. She recalls the obligation of the state to ensure that victims of forced evictions either receive compensation or are adequately resettled.

SR Housing- South Africa (2008)

- The authorities should prosecute all farmers who illegally evict farm workers. Human rights education is necessary to ensure that all citizens know about their human right to housing and their right to be protected against eviction. Given the apparently widespread problem of forced evictions across the country, a halt in the introduction of new provincial bills regarding eradication of slums and evictions until all national, provincial and local legislation, policies and administrative actions have been brought into line with constitutional provisions, relevant constitutional court judgements, and international human rights standards that protect the human right to adequate housing and freedom from forced eviction.

IE Haiti (2010)

- With regard to forced eviction and the many different human rights at stake (right to own property, right to education), the independent expert recommends that, with MINUSTAH assistance, a clear strategy should be put in place which states specific criteria for establishing an order of priority understood by all the parties.

SR Housing- Argentina (2011)

- 67. The special rapporteur recalls that where eviction is considered to be justified, Argentina has an obligation to ensure that it is carried out in strict compliance with the relevant provisions of international human rights law and in accordance with the general principles of reasonableness and proportionality. Furthermore, it is obliged to provide legal remedies or procedures to those who are affected by eviction orders and to see to it that all the individuals concerned have a right to adequate compensation.

RSG IDPs- Somalia (2010)

- Conclude agreements with private landowners on the allocation of land plots for IDPs, where they can settle with security of tenure and are protected from eviction and exploitation.

SR Housing- Spain (2008)

- All levels of governments should consider the application of the basic principles and guidelines on development-based evictions and displacement, including the recommendation to conduct eviction impact assessments.

SR Housing- Kazakhstan (2011)

- A comprehensive approach needs to be adopted to address the issues of forced evictions, security of tenure, the legalization of informal settlements and slum upgrading, and to ensure open, participatory and meaningful consultation with affected residents and communities prior to implementing development and urban renewal projects.

In particular, the special rapporteur urges Kazakhstan to adopt a specific law on eviction, which should be developed in accordance with existing human rights standards, such as general comment no. 7 of the committee on economic, social and cultural rights and the guidelines on development-based evictions, and implemented in accordance with relevant principles and procedures of international human rights law.

In this regard, the special rapporteur wishes to reaffirm that forced eviction can only be justified in the most exceptional circumstances, and always in accordance with relevant principles and procedures established by international human rights law. In particular, the special rapporteur wishes to reiterate that the state has the obligation to take all appropriate measures to ensure that no one is rendered homeless or vulnerable to the violation of other human rights as a result of an eviction, whether legal or not.

RSG IDPs- Georgia (2009)

- The issue of formal recognition of the newly displaced as IDPs under relevant national legislation and the associated social benefits and legal protection mechanisms linked to this status should be addressed, particularly as regards housing and security of tenure, as well as protection from forceful eviction from collective centres. RSG IDPs welcomes the information provided by the government, indicating that persons displaced as a result of the august 2008 hostilities will be granted IDP status during the first quarter of 2009.

IE Minorities- Ethiopia (2007)

- Ensure that communities are secure from forced displacement or eviction from their lands and that measures are undertaken to effectively consult with communities regarding decisions that affect them and their respective territories.

SR Food- Brazil (2009)

- The authorities should systematically perform ex ante impact assessments on the right to food when engaging in large-scale infrastructural projects, such as dams, with the participation of the communities affected. they should ensure that no eviction takes place which would not comply with the existing relevant international standards, particularly general comment no. 7 of the committee on economic, social and cultural rights on the right to adequate housing (art. 11, para. 1): forced evictions [45] and the basic principles and guidelines on development-based evictions and displacement presented in 2007 by the former special rapporteur on the right to adequate housing.

SR Cambodia (2011)

- When engaging in land deals either with the government of Cambodia or other land owners, foreign governments and international business organizations should bear in mind that they have a responsibility under international law to respect the human rights of the people of Cambodia. Sponsorship of the use of armed law enforcement

officials to carry out an unlawful eviction is illegal under international law and should be made illegal in Cambodia as well.

SR Housing- Iran (2006)

- Investigate forced eviction cases and development-induced displacement, to ensure that evictions are only carried out as last resort and in accordance with international standards, making certain religious and ethnic minorities are not disproportionately affected by development projects, and they have recourse to legal remedies to challenge state acquisition of homes and lands.

5. JURISPRUDENCE

Human Rights Committee

Assenova Naidenova et al. v. Bulgaria (2012)

- 14.2 The authors claim that the enforcement of the eviction order of 24 July 2006 and their subsequent removal from the Dobri Jeliaskov community would amount to subjecting them to arbitrary and unlawful interference with their homes and would, therefore, violate their respective rights under article 17 of the Covenant. In this regard, the Committee recalls that the term “home” as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation.¹² In the present communication, it is undisputed that the Dobri Jeliaskov community where the authors’ houses are situated and where they have continuously resided existed with the acquiescence of the State party’s authorities for over seventy years and that the authors have police registration of their address. In these circumstances, the Committee is satisfied that the authors’ houses in the Dobri Jeliaskov community are their “homes” within the meaning of article 17 of the Covenant, irrespective of the fact that the authors are not the lawful owners of the plot of land on which these houses had been constructed.
- 14.3 The Committee must then determine whether the authors’ eviction and the demolition of their houses would constitute a violation of article 17 of the Covenant if the eviction order of 24 July 2006 were to be enforced. There is no doubt that the eviction order, if enforced, would result in the authors’ losing their homes and that, therefore, there would be an interference with their homes. The Committee recalls that, under article 17 of the Covenant, it is necessary for any interference with the home not only to be lawful, but also not to be arbitrary. The Committee considers, in accordance with its general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, that the concept of arbitrariness in article 17 of the Covenant is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of

¹² See general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, *Official Records of the General Assembly, Forty-third Session, Supplement No. 40, A/43/40, annex, para. 5.*

the Covenant and should be, in any event, reasonable in the particular circumstances.¹³

- 14.4 The Committee notes the State party's argument that the fact that the authors had not produced any evidence establishing their property rights over the plot of land where the structures of the Dobri Jeliazkov community are situated, was sufficient to establish that the eviction order of 24 July 2006 was lawful. Even assuming that the authors' eviction and the demolition of their houses were permitted under the State party's law, namely, article 65 of the Municipal Property Act and article 178, paragraph 5, of the Territory Law, the Committee notes, however, that the issue remains whether such interference would be arbitrary.
- 14.5 The Committee notes the authors' claims that the Dobri Jeliazkov community existed with the acquiescence of the State party's authorities for over seventy years, that the "green zone" was established retroactively (see paragraphs 6.2 and 7 above) and that, according to the mayor of the Sofia Municipality, Vuzrajdane subdistrict, they could not be provided with social housing, since they lived in unlawful buildings constructed on municipal land (see paragraph 2.4 above). The Committee further notes that, although the State party's authorities are in principle entitled to remove the authors, who occupy municipal land unlawfully, their lack of property rights over the plot of municipal land in question was the only stated justification for the issuance of the eviction order against the Dobri Jeliazkov community and that the State party has not identified any urgent reason for forcibly evicting the authors from their homes before providing them with adequate alternative accommodation.
- 14.6 The Committee considers it highly pertinent that, for several decades the State party's authorities did not move to dislodge the authors or their ancestors and, therefore, de facto tolerated the presence of the informal Dobri Jeliazkov community on municipal land. Moreover, despite the issuance of an expropriation order in 1974, the community has remained at its present location for over thirty years thereafter. While the informal occupants cannot claim an entitlement to remain indefinitely, the authorities' inactivity has resulted in the authors' developing strong links with the Dobri Jeliazkov site and building a community life there. In the Committee's view, these facts should have been taken into consideration in deciding whether and how to proceed with regard to the authors' homes built on municipal land. The eviction order of 24 July 2006 was based on section 65 of the Municipal Property Act, under which persons unlawfully living on municipal land can be removed regardless of any special circumstances, such as decades-old community life, or possible consequences, such as homelessness, and in the absence of any pressing need to change the status quo. In other words, under the relevant domestic law, the municipal authorities and the State party's courts were not

¹³ Ibid., para. 4. See also communications No. 1510/2006, *Vojnović v. Croatia*, Views adopted on 30 March 2009, para. 8.5, and No. 687/1996, *Rojas García v. Colombia*, Views adopted on 3 April 2001, para. 10.3.

required to have regard to the various interests involved or to consider the reasonableness of the authors' immediate eviction.

- 14.7 In the light of the long history of the authors' undisturbed presence in the Dobri Jeliakov community, the Committee considers that, by not giving due consideration to the consequences of the authors' eviction from the Dobri Jeliakov, such as the risk of their becoming homeless, in a situation in which satisfactory replacement housing is not immediately available to them, the State party would interfere arbitrarily with the authors' homes, and thereby violate the authors' rights under article 17 of the Covenant, if it enforced the eviction order of 24 July 2006.

Georgopoulos v. Greece (2008)

- 7.3 The facts, as to whether and when a home demolition occurred in the Roma Riganoskampos settlement, are in dispute. However, the Committee notes the information provided by the authors, according to which the Patras Prosecutor launched an investigation in December 2006, which remains pending. The Committee observes that the State party refuted the authors' allegations based on two police reports but, nevertheless, has not adduced any further evidence on the planned "cleaning operation" by the municipality in the Roma Riganoskampos settlement on 25 or 26 August 2006. It further notes that the State party has not explained the length of the criminal investigation into the authors' allegations before the Patras Prosecutor, which has not led to any decision. The Committee considers that the authors' allegations, also corroborated by photographic evidence, claiming arbitrary and unlawful eviction and demolition of their home with significant impact on the authors' family life and infringement on their rights to enjoy their way of life as a minority, have been sufficiently established. For these reasons, the Committee concludes that the demolition of the authors' shed and the prevention of construction of a new home in the Roma Riganoskampos settlement amount to a violation of articles 17, 23 and 27 read alone and in conjunction with article 2, paragraph 3, of the Covenant.
- 7.4 In the light of the Committee's findings, it does not deem it necessary to examine the authors' allegation of a violation under articles 7 and 26 alone and read in conjunction with article 2, paragraphs 1, 2 and 3, of the Covenant.
- 8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is consequently of the view that the facts before it disclose a violation by the State party of articles 17, 23 and 27, alone and read in conjunction with article 2, paragraph 3, of the Covenant.
- 9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, as well as reparations to include compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

Inter-American Commission on Human Rights

Corumbiara Massacre v. Brazil (2004)

- 168. The Commission will now analyze the facts specifically related to the deaths of the occupying workers reported in this case, and issue its opinion on violation of the right to life of which the State of Brazil is accused.
- 169. First, it is important to point out that the forced eviction of an invaded ranch, executed with the assistance of the forces of law and order and the rational use of force, in compliance with a court order, is not *per se* contrary to the American Convention on Human Rights, which includes the right to property as a protected right. The State has the duty and obligation to enforce the Constitution, the law, and court judgments. However, State agents are not permitted to use unlimited discretion in performing their functions to enforce the law.
- 170. The jurisprudence of the Inter-American Court of Human Rights makes it clear that State agents have the right and the responsibility to enforce the law and to maintain order, even, in some cases, when death or bodily harm may result.^[43] However, the Court has clearly held that the force used must not be excessive.^[44] Whenever excessive force is used, the right to humane treatment is not respected, and any resulting deprivation of life is arbitrary.^[45] Consequently, to determine the responsibility incurred by the State of Brazil in this case, the Commission must determine, on the basis of the allegations and evidence of the parties, whether the police agents who went to Santa Elina ranch to carry out the forced eviction ordered by the court used excessive force, which would give rise to violations of the right to life recognized in the American Convention, for noncompliance with the explicit obligation to respect the right to life. The Commission will also determine whether Brazil was in breach of its aforesaid obligation to guarantee the human right to life, for failing to duly investigate the deaths of the occupying workers.

African Commission on Human and Peoples' Rights

Dino Noca v. DRC (2013)

- 159. The Commission further believes that it is the obligation of the Respondent State to respect the right to property. For the African Commission, the right to property set out in Article 14 of the Charter relating to land and housing, implies in particular, the protection from arbitrary deprivation of the enjoyment of property rights, adequate compensation for public acquisition, nationalisation or expropriation, peaceful enjoyment of property and protection from arbitrary eviction²⁹.
- 160. This obligation prohibits States from interfering arbitrarily in the enjoyment of property rights. Expropriation without legal grounds or which is not performed in the

public interest is an example of breach of the obligation to respect the right to property.

- 161. It is also noteworthy that the Commission has an independent and broad conception of the right to property, particularly in Communication n° 276/03, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) vs. Kenya -the *Ogoni* case, where it held that “the right to property includes not only the right of access to one’s property and freedom from violation of the enjoyment of such property or injury to it, but also the free possession and utilization and control of such property, in a manner the owner deems adequate”³⁰.
- 162. The Commission feels that the State is obliged to protect the holders of rights against other subjects, by legislation and the provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interference. Protection generally entails the creation and maintenance of an atmosphere or a framework through an effective interplay of laws and regulations, so that individuals can freely exercise their rights and freedoms. This is inextricably linked to one of the obligations of the State which consists in promoting the enjoyment of all human rights³¹.
- 163. The Commission further believes that by adopting laws on abandoned properties, the State should have taken all the necessary measures to ensure that there would be no misapplications whatsoever of these laws to the extent of arbitrarily and unjustly depriving an individual for the benefit of another.

The Social and Economic Rights Center v. Nigeria (2001)

- 63. The particular violation by the Nigerian government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic, Social and Cultural Rights which defines this term as 'the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'[FN15]. Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths. Evictions break up families and increase existing levels of home-lessness.[FN16] In this regard, General Comment no 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that'... all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.' (E/1992/23, annex III, paragraph 8(a)). The conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.

Malawi African Association v. Malawi (2000)

- 125. Article 12,1 states that: "Every individual shall have the right to freedom of movement and residence within the borders of the State provided he abides by the law."
- 126. Evicting Black Mauritians from their houses and depriving them of their Mauritanian citizenship constitutes a violation of article 12,1. The representative of the Mauritanian government described the efforts made to ensure the security of all those who returned to Mauritania after having been expelled. He claimed that all those who so desired could cross the border, or present themselves to the Mauritanian Embassy in Dakar and obtain authorisation to return to their village of birth. He affirmed that his government had established a department responsible for their resettlement. The Commission adopts the view that while these efforts are laudable, they do not annul the violation committed by the State.

European Court of Human Rights

Dogan and Others v. Turkey (2002)

- 140. The applicants argued that it was not in doubt that there had been an interference with their right to peaceful enjoyment of their possessions. They were forcibly evicted from their homes and land by the security forces and restrictions were imposed by the authorities on their return to their village. As a result of continuous denial of access to the village they were effectively deprived of their revenue and forced to live in poor conditions in other regions of the country.
- 141. The Government denied that the applicants had been compelled to evacuate their village by the security forces. They claimed that the applicants had left their village on account of the disturbances in the region and intimidation by the PKK. They admitted however that a number of settlements had been evacuated by the relevant authorities to ensure the safety of the population in the region. The Government further submitted that the applicants had no genuine interest in going back to their village since in its present state Boydas village was not suitable for accommodation and offered very poor economic conditions to sustain life. Nevertheless, with reference to the Ministry of Interior Gendarmerie General Command's letter of 22 July 2003, the Government pointed out that there remained no obstacle to the applicants' return to Boydas village (see paragraph 37 above).
- 142. In the present case, the Court is required to have regard to the situation which existed in the state of emergency region of Turkey at the time of the events complained of by the applicants, characterised by violent confrontations between the security forces and members of the PKK. It notes that this two- fold violence resulting from the acts of the two parties to the conflict forced many people to flee their homes (see paragraphs 56 and 62 above). Furthermore, and as admitted by the Government, the authorities have evicted the inhabitants of a number of settlements to ensure the safety of the population in the region (see paragraph 141 above). The Court has also found in numerous similar cases that security forces deliberately destroyed the homes and property of the respective applicants, depriving them of their livelihoods and forcing them to leave their villages in the state of emergency region of Turkey (see,

among many others, *Akdivar and Others*, *Selçuk and Asker*, *Mentes and Others*, *Yöyler*, *Ipek*, judgments cited above; *Bilgin v. Turkey*, no. 23819/94, 16 November 2000, and *Dulas v. Turkey*, no. 25801/94, 30 January 2001).

- 143. Turning to the particular circumstances of the instant case, the Court observes that it is unable to determine the exact cause of the displacement of the applicants because of the lack of sufficient evidence in its possession and the lack of an independent investigation into the alleged events. On that account, for the purposes of the instant case it must confine its consideration to the examination of the applicants' complaints concerning the denial of access to their possessions since 1994. In this connection, the Court notes that despite the applicants' persistent demands, the authorities refused any access to Boydas village until 22 July 2003 on the ground of terrorist incidents in and around the village (see paragraphs 15, 17 and 18 above). These disputed measures deprived the applicants of all resources from which they derived their living. Moreover, they also affected the very substance of ownership in respect of six of the applicants in that they could not use and dispose of their property for almost nine years and ten months. The result of these contested measures has been that since October 1994 their right over the possessions has become precarious. In conclusion, the denial of access to Boydas village must be regarded as an interference with the applicants' right to the peaceful enjoyment of their possessions (see *Loizidou v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2216, § 63).

Case of Kehaya and others v. Bulgaria (2006)

- 72. The Court notes that by final judgment of 20 September 1996 the applicants were recognised as the owners of plots of land of 14 ha, adjacent to the Dospat reservoir, in the Okusha area, near Sarnitza. On 3 February 1997 the local agricultural land commission ordered the restitution of the applicants' land to them. On 4 April 1997 they formally entered into possession thereof. On 20 August 1997 they obtained a notary deed (see paragraphs 18 and 19 above). It follows that the applicants had a "possession" within the meaning of Article 1 of Protocol No. 1. That provision was therefore applicable.
- 73. It is also evident that the events of 1997-2002 constituted a State interference with the applicants' possessions in that their land was taken by the State pursuant to judicial decisions delivered in proceedings instituted by the local forest authority, a State body (see paragraphs 24-26 and 55 above).
- 74. As to whether that interference was a deprivation of property within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention, the Court observes that the effect of the judgment of the Supreme Court of Cassation of 10 October 2000 was to deny to the applicants the fruits of the final judgment of 20 September 1996 in their favour. The State was declared the owner of the disputed land, the forest authority entered into possession thereof and the applicants were accordingly deprived of their title, including the rights to possess, use or dispose of the property (see paragraphs 24-26 above). In these circumstances, the Court finds that the effect of the judgment of 10 October 2000 the Supreme Court of Cassation was to deprive the applicants of their possessions (see *Brumarescu*, cited above, §§ 76 and 77).

- 75. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Pincová and Pinc v. the Czech Republic*, no. [36548/97](#), § 45, ECHR 2002-VIII, with further references). The principle of lawfulness also presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see *Broniowski v. Poland [GC]*, no. [31443/96](#), § 147, ECHR 2004-V). Furthermore, a deprivation of property can only be justified if it is shown to be “in the public interest” and if it satisfies the requirement of proportionality by striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, pp. 26-28, §§ 69-74).
- 76. In the present case the Court already found that by depriving of any legal effect the final judgment of 20 September 1996, the authorities acted in breach of the principle of legal certainty inherent in Article 6 § 1 of the Convention (see paragraph 70 above). It cannot be maintained, therefore that the deprivation of property at issue was lawful, in the sense of the Convention. The present case does not concern reopening of civil proceedings, within time-limits and under conditions regulated by law, but a failure to recognise the *res judicata* effect of a final judgment delivered in contentious proceedings. It cannot be considered that a public interest overriding the fundamental principle of legal certainty and the applicants' rights justified a re-examination of the dispute and the resulting deprivation of property without compensation.
- 77. The Court finds, therefore, that the applicants were deprived of their property in violation of Article 1 of Protocol No. 1 to the Convention.

D. Right to Food (article 11)

1. CESCR GENERAL COMMENT 12

- 12. Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources,
- 13. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

Physical accessibility implies that adequate food must be accessible to everyone, [...] A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

- 23. The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's

participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the right to food.

- 26. The [national] strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: [...] maintaining registries on rights in land (including forests).
- 27. As part of their obligations to protect people's resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.
- 28. Even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.
- 35. States parties should respect and protect the work of human rights advocates and other members of civil society who assist vulnerable groups in the realization of their right to adequate food.

2. CESCR CONCLUDING OBSERVATIONS

- The Committee recommends that the State party effectively implement and allocate sufficient resources to relevant programmes and funds to ensure physical and economic access for everyone, especially those from the most disadvantaged social groups, to the minimum essential food, which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger, in line with the Committee's general comment No. 12 (1999) on the right to adequate food as well as its Statement on the world food crisis (E/C.12/2008/1). The Committee also urges the State party to ensure that expropriations of farmlands do not have a negative impact on the right to food of those who have been expropriated. (*Angola*)
- 27. The Committee is concerned at the negative impact of climate change on the right to an adequate standard of living, including on the right to food and the right to water, affecting in particular indigenous peoples, in spite of the State party's recognition of the challenges imposed by climate change. (art. 1, para. 1) (*Australia*)
- The Committee is concerned that several vulnerable communities, including pastoralist and hunter-gatherer communities, have been forcibly evicted from their traditional lands for the purposes of large-scale farming, creation of game reserves and expansion of national parks, mining, construction of military barracks, tourism and commercial game-hunting. The Committee is concerned that these practices have resulted in a critical reduction in their access to land and natural resources, particularly threatening their livelihoods and their right to food. (art. 11). (*Tanzania*)
- The Committee urges the State party to take the necessary measures to protect the right to adequate food, including by setting up a public food distribution system for the most disadvantaged and marginalized regions and groups. It also calls on the State

party to tackle structural problems related to food insecurity, such as security of land tenure for small-scale producers, (...). (*Cameroon*)

- 19. The Committee notes with concern the persistence of infant malnutrition and the fact that the right to food is not guaranteed to vulnerable groups in the State party. The Committee also notes with concern the large quantity of arable land devoted to the production of bio fuels, a situation which affects the availability of food for human consumption and leads to price increases. (*Bolivia*)
- The Committee recommends that the State party develop agricultural policies which prioritize the production of food; implement program measures that protect national food production with incentives for small producers; and ensure the restitution of lands taken from indigenous and Afro-Colombian peoples, as well as peasant communities. (*Colombia*)
- 16. The Committee notes with concern that the expansion of soybean cultivation has fostered the indiscriminate use of toxic agro-chemicals, leading to deaths and illnesses among children and adults, contamination of the water supply and the disappearance of ecosystems, while it has jeopardized the traditional food resources of the affected communities. (*Paraguay*)
- 18. The Committee is concerned at the increased rates of food insecurity, particularly in rural areas and among families in vulnerable situations. The Committee is concerned that retrogressive measures, such as the reduction or removal of subsidies, without adequate alternative support measures, disproportionately impact vulnerable and marginalized groups (art. 11). The Committee urges the State party to expeditiously assess the human rights impact of the reduction in food subsidies and undertake immediate measures to address the retrogression in the right to adequate food. (*Egypt*)
- 23. While acknowledging the severe draught (sic) that often affects the State party, the Committee notes with concern the frequent food crises occurring in the State party as well as the chronic food insecurity which has affected some 500,000 to 2 million persons over the last five years. Moreover, the Committee is concerned that, in spite of the measures taken by the State party to respond to food shortages such as rapid action programmes, it did not receive information about steps taken to address the structural causes of food insecurity, as identified by the Commissariat à la Sécurité Alimentaire (art. 11). The Committee urges the State party to strengthen its food security mechanisms, from production to distribution. [...]. (*Mauritania*)
- 28. The Committee is concerned about the increasing food insecurity among disadvantaged and marginalized individuals or groups, including older persons, the Jewish Ultra-Orthodox population group, and Palestinians living in the Occupied Palestinian Territory. It is also concerned about the rising prices of consumer goods and the increasing share that these take in the overall family household budget. (art.11) The Committee recommends that the State party intensify its efforts to address food insecurity and hunger in the State party, as well as in the Occupied Palestinian Territory, focusing on all disadvantaged and marginalized individuals or groups, without discrimination. (*Israel*)

- 25. The Committee is concerned about the extent of malnutrition in the State party, the high rates of wasting, underweight and stunting, as well as rising household food insecurity, especially in rural areas. The Committee expresses its deep concern that this situation has been aggravated by the rise in food prices. The Committee is also concerned that a disproportionate portion of agricultural land is allocated to the cultivation of qat. (art. 11). (*Yemen*)
 - 19. The Committee remains concerned about the high level of poverty, estimated to be as high as nearly 30 per cent, especially for those above 65 years of age, persons living in rural areas, persons with disabilities, and Roma. The Committee is also concerned about reports of food insecurity, especially in rural areas. (art. 11). (*Moldova*)
 - 27. The Committee is deeply concerned that 28 per cent of the population - or about 6.7 million people - are living below the poverty line and are unable to meet their basic food needs, two thirds of whom live in rural areas.
62. The Committee urges the State party to take all necessary measures to ensure access to essential food which is sufficient, nutritionally adequate and safe for everyone living in the State party, in particular in Karakalpakstan. (*Uzbekistan*)

3. UNIVERSAL PERIODIC REVIEWS

- Belgium to Ethiopia (2010): Develop a constructive partnership with the United Nations and NGOs working on food and medical assistance, and guarantee safe access to the country, including in areas where violent actions against federal authorities take place; this partnership should constitute one of the cornerstones of the new agriculture and land-use policies in Ethiopia.
- Algeria to Ethiopia (2010): Give priority to programmes for upgrading land and water resources to reduce the long - term vulnerability caused by drought and allowing the population to satisfy its needs in water and food; and, in this regard, request the assistance of competent United Nations agencies and programmes.
- Libya to Nicaragua (2010): Make more efforts and mobilize plans and programmes to assist farmers in rural areas, ensure equity in land distribution, and increase funding and resources for farmers to improve agricultural productivity.
- Democratic People's Republic of Korea to Zimbabwe (2011): Continue to take steps to ensure that land is made productive.

4. SPECIAL PROCEDURES

SR Food- Nicaragua (2010)

- Protection against forced evictions should be improved, and the victims should have remedies against any eviction incompatible with the rule of law or international standards. Nicaragua should take measures which “provide the greatest possible security of tenure to occupiers of houses and land; conform to the [international] covenant [on economic, social and cultural rights]; and are designed to control strictly the circumstances under which evictions may be carried out”.^[28] Prior to carrying

out any evictions, all feasible alternatives should be explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force; legal remedies or procedures should be provided to those who are affected by eviction orders; and all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected.[29] Any eviction not complying with these conditions should be considered a violation of the right to housing and, where it leads to depriving families from their means of producing food, it also is a violation of the right to food.

SR Food- South Africa (2012)

- The department of agriculture, forestry and fisheries could better target beneficiaries of its programmes and prioritize vulnerable groups identified by the integrated food security strategy, focusing initially on the 12 districts that have relatively high concentrations of black farmers and of land reform beneficiaries.

SR Food- Brazil (2009)

- The government should pursue and scale up the strategy to ensure a more equitable redistribution of land, in accordance with the voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security. He urges the government of Brazil to review the obstacles to the acceleration of the land redistribution process.

SR Food- Guatemala (2006)

- Government should adopt policy to decriminalize social and land conflicts and provide training and tools to security forces, ombudsman and judiciary to deal with those conflicts within framework that respects right to food.

SR Food- Mexico (2012)

- Launching a joint programme by the ministry of agriculture, livestock, rural development, fisheries and food and the ministry of the environment and natural resources to develop agro-forestry systems and rainwater harvesting techniques on the basis of the successful principles of ProARbol programme, including participation of local communities and payments for ecological services, in order to stop soil erosion and land degradation, to improve water retention and the replenishment of aquifers, and to increase the resilience of agricultural systems to climate change.

SR Food- Cameroon (2012)

- Adopt measures to improve the situation of marginalized and vulnerable groups in respect to food, and, in particular:
Ensure that the views of communities are taken into account in decisions concerning the concessions of the land on which they depend for their livelihood;
Review the tenure systems with a view to the implementation, in the context of national food security, of voluntary guidelines on responsible governance of tenure systems as they apply to land, fisheries and forests. In this process, take due account of the minimum principles and measures proposed to ensure that large-scale investments are made with due respect for all human rights (a/hrc/13/33/add.2), so that the rights of land users, including indigenous communities, are better protected and a legal framework is established to avert the possibility of multiple land disputes in the future.;

- In the framework of the review recommended above, hold a transparent and participatory dialogue on the opportunity costs of ceding land to investors intending to develop agro-industrial plantations, when providing local small farmers with improved access to land, through adequate state support, could be more effective in supporting local food security and reducing poverty;
- Build the capacity of the labour inspection service to carry out its mandate in large plantations and empower it to conduct surprise inspections;
- Reconsider the tax policy on concessions of agricultural land and on the exploitation of natural resources (particularly forests and minerals) so as to optimize the revenue earned from the harnessing of these resources and to improve food security for vulnerable groups.

SR Food- China (2012)

- 40. The special rapporteur on the right to food is encouraged by the impressive progress made in china in the achievement of food security. However, serious challenges remain. These challenges include improving the situation of people living in rural areas and the situation of rural migrant workers, improving security of land tenure and access to land, making a transition towards more sustainable agriculture, and addressing the areas of nutrition and food safety. In response to these challenges, the special rapporteur makes the following recommendations.

SR Food- Bolivia (2007)

- Longstanding inequalities between rich and poor and between non-indigenous and indigenous populations are reflected in the fact that wealthiest 7 per cent of bolivia's landholders still control 85 per cent of cultivated land while millions of subsistence farmers struggle to produce enough food to feed their families on small plots of land.

5. JURISPRUDENCE

Inter-American Commission on Human Rights

Kuna Indigenous People v. Panama (2012)

- 194. The right to territory includes the use and enjoyment of the natural resources found in the territory, and is directly tied to, indeed is a prerequisite for, the rights to a dignified existence, food, water, health, and life.²⁸⁵ For this reason, the IACHR has indicated that “an indigenous community’s ‘relations to its land and resources are protected by other rights set forth in the American Convention, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence.’”²⁸⁶

Inter-American Court of Human Rights

Sawhoymaxa Indigenous Community v. Paraguay (2006)

- 168. In the instant case, together with the lack of lands, the life of the members of the Sawhoymaxa Community is characterized by unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking

water, as well as marginalization due to economic, geographic and cultural causes (supra paras. 73(61) to (74).)

- 169. During the two years following the submission by Miguel Chase-Sardi of the anthropological report to the INDI, communicating the precarious situation of the Community and the death of several children, the State did not take any specific measure to prevent the violation of the right to life of the alleged victims. During that period, at least four persons died (supra para. 73(74)(2), (3), (4) and (21).)
- 170. It was not until June 23, 1999 that the President of the Republic of Paraguay issued the aforementioned Presidential Order N° 3789 declaring the Sawhoyamaxa Community in a state of emergency. However, the measures adopted by the State in compliance with such order cannot be considered sufficient and adequate. Indeed, for six years after the effective date of the order, the State only delivered food to the alleged victims on ten opportunities, and medicine and educational material in two opportunities, with long intervals between each delivery (supra para. 73(64) to (66).) These deliveries, as well as the amounts delivered, are obviously insufficient to revert the situation of vulnerability and risk of the members of this Community and to prevent violations to the right to life, to the point that after the emergency Presidential Order became effective, at least 19 persons died (supra para. 73(74)(1), (5) to (16), (20), (22) and (27) to (30).)
- 171. As it has been shown in the chapter of Proven Facts (supra para. 73(74),) most of the Community members that died were boys and girls under 3 years of age, and the causes of their deaths range from enterocolitis, dehydration, cachexia, tetanus, measles, and respiratory illnesses, such as pneumonia and bronchitis; all of them are reasonably foreseeable diseases that can be prevented and treated at a low cost. [FN219]

[FN219] Cf. The United Nations Children’s Fund (UNICEF) and the World Health Organization (WHO), Immunization Summary 2006 (2006).

- 172. The illnesses of Rosana López (supra para.73(74)(2)), Esteban González (supra para. 73((74)(5),) NN Yegros (supra para. 73(74)(7),) Guido Ruiz-Díaz (supra para.73(74)(9),) Luis Torres-Chávez (supra para. 73(74)(11),) Francisca Brítez (supra para. 73(74)(16),) and Diego Andrés Ayala (supra para. 73(74)(15),) were not treated. These persons simply died in the Community. The State has not specifically contested these facts and has not filed any evidence to prove the contrary, in spite of the requests made by the Tribunal (supra para. 20.) Consequently, this Court finds that the said deaths are attributable to the lack of adequate prevention and to the failure by the State to adopt sufficient positive measures, considering that the State had knowledge of the situation of the Community and that action by the State could be reasonably expected. The aforesaid cannot be applicable to the death of the male child NN Torres (supra para. 73(74)(13,) who suffered from blood dyscracia and whose death cannot be attributable to the State.
- 173. The Court does not accept the State argument regarding the joint responsibility of the ill persons to go to the medical centers to receive treatment, and of the Community leaders to take them to such centers or to communicate the situation to

the health authorities. From the issuance of the emergency Order, the INDI and the Ministerio del Interior [Ministry of the Interior] and the Ministerio de Salud Pública y Bienestar Social [Ministry of Public Health and Social Welfare] had the duty to take “the actions that might be necessary to immediately provide food and medical care to the families that form part of [the Sawhoyamaxa Community], pending the judicial proceedings regarding the legislation of the lands claimed by such Community as part of [their] traditional habitat” (supra para. 73(63).) Therefore, the provision of goods and health services did no longer specifically depend on the individual financial capacity of the alleged victims, and therefore, the State should have taken action contributing to the provision of such goods and services. That is to say, those measures which the State undertook to adopt before the members of the Sawhoyamaxa Community were different, in view of their urgent nature, from those that the State should adopt to guarantee the rights of the population and of the indigenous communities in general. To accept the contrary would be incompatible with the object and purpose of the American Convention, which requires that its provisions be interpreted and applied so that the rights contemplated therein be effectively protected in practice.

Yakye Axa Indigenous Community v. Paraguay (2005)

- 164. In the chapter on proven facts (supra paras. 50.92 to 50.105) the Court found that the members of the Yakye Axa Community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that are the subject matter of this proceeding, as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim. This Court notes that, according to the statements of Esteban López, Tomás Galeano and Inocencia Gómez during the public hearing held in the instant case (supra para. 39.a, 39.b and 39.c), the members of the Yakye Axa Community could have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the Community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.
- 165. These conditions have a negative impact on the nutrition required by the members of the Community who are at this settlement (supra para. 50.97). Furthermore, as has been proven in the instant case (supra paras. 50.98 and 50.99), there are special deficiencies in the education received by the children and lack of access to health care for the members of the Community for physical and economic reasons.
- 166. In this regard, the United Nations Committee on Economic, Social, and Cultural Rights, in General Comment 14 on the right to enjoy the highest attainable standard of health, pointed out that [i]ndigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines [...].

[I]n indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this regard, the Committee considers that [...] denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health. [FN205]

[FN205] UN. Doc. E/C.12/2000/4. The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (22d session, 2000), para. 27.

- 167. Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water. [FN206]

[FN206] See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16.

- 168. In the previous chapter, this Court established that the State did not guarantee the right of the members of the Yakye Axa Community to communal property. The Court deems that this fact has had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses. Furthermore, the State has not taken the necessary positive measures to ensure that the members of the Yakye Axa Community, during the period in which they have been without territory, have living conditions that are compatible with their dignity, despite the fact that on June 23, 1999 the President of Paraguay issued Decree No. 3.789 that declared a state of emergency in the Community (supra para. 50.100).

Xakmok Kasek Indigenous Community v. Paraguay (2010)

- 189. In the present case, on June 11, 1991, [FN198] and on September 22, 1992, [FN199] INDI officials confirmed the state of vulnerability and necessity in which the members of the Community were found because they did not have title to their land. On November 11, 1993, the indigenous leaders repeated to the IBR that their request to claim land was a priority given that “they [were] living in very difficult, precarious conditions and [did] not know how long they [could] hold up.” [FN200].
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[FN198] Cf. Handwritten record of procedures carried out in the on-site inspection of June 11, 1991, of the Xákmok Kásek Community in relation with the land being claimed en (case file of annexes to the application, appendix 3, tome II, folio 790), and report of on-site visit carried out by Pastor Cabanellas, supra note 62, folios 791 to 794).

[FN199] Cf. Extension of On Site Visit of September 22, 1992, supra note 62, folios 883 and 884).

[FN200] Communication of the Community addressed tot he President of the IBR on November 11, 1993, supra note 65 (case file of annexes to the application, annex 5, folio 2351).

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- 190. The States Attorney on Labor for the First Circuit carried out an inspection of the Salazar, Cora-í, and Maroma Ranch. This States Attorney confirmed “the precarious situation in which [the Community] lives [...] on not having the minimum standards as far as hygiene, clothing, and space per number of inhabitants. Also, [the] houses [...] do not have insulated walls or tile roofs and were built in such a way that they threatened the physical wellbeing and the health of the indigenous; the floors [were] of earth.” [FN201] Likewise, the report indicated “that they received rations [...] but very few.” [FN202] During that visit, irregularities in terms of the labor exploitation suffered by the members of the Community were verified.

[FN201] Cf. Substantial Report by Labor Office of the Primer Turno, no date (case file of annexes to the application, appendix 3, tome IV, folio 1808).

[FN202] Cf. Substantial Report by Labor Office of the Primer Turno, no date, supra note 201, folio 1810.

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- 191. On April 17, 2009, the Office of the President of the Republic and the Ministry of Education and Culture, issued Decree No. 1830. [FN203] The decree declared a state of emergency in two indigenous communities, [FN204] one of them the Xákmok Kásek Community. The pertinent part of Decree No. 1830 states that:
Due to situations beyond their control, these communities are prohibited access to the traditional means of subsistence within the territory being claimed as part of their ancestral territories that are tied to their colonial identity [...] [For this reason] the normal living activities of said provided by worldcourts.com communities are made difficult [...] due to the lack of access to minimum and indispensable food and medical care. This is a concern for the Government that demands an urgent response [...].
[Consequently, it ruled that]
The [INDI], together with the ministries of the interior and public health and social wellbeing, will take the necessary actions to immediately provide medical care and food to the families who form part of [the Xákmok Kásek Community] during the time that the legal and administrative procedures regarding the legalization of the land being claimed as part of the Community’s traditional habitat last. [FN205]

[FN203] Cf. Decree No. 1830 on April 17, 2009 (case file of annexes to the answer to the application, annex 7, folios 3643 to 3646).

[FN204] The referenced Decree No. 1830 of April 17, 2009, supra note 203, also refers to the Kelyenmagategma Community of the Enxet and Y’ara Marantu villages.

[FN205] Cf. Decree No. 1830, supra note 203.

- 197. In regard to access to food, the members of the Community suffered, “ serious restrictions [...] on behalf of those with title to [the] lands [being claimed in replevin]. One was that they did not have their own hacienda (cattle) as this was prohibited by the patron, [and] they were prohibited from cultivating [and hunting]” [FN217] (supra paras. 74 and 75). Therefore, their sources of food were limited. [FN218] Similarly, the diet was imited and poor. [FN219] On the other hand, if the members of the Community had money, they could purchase food at the Ranch or at the food trucks on the Traschaco route. Nevertheless, these options depended on their limited monetary means. [FN220]
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[FN217] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1740. See also: Declaration of Tomás Dermott, supra note 24, folio 597; 63, folio 585; Declaration of Gerardo Larrosa, supra note 75, folio 605, and Declaration of Maximiliano Ruíz, supra note 28.

[FN218] Cf. Health Evaluation regarding four Enxet Communities, May and June 2007 (annexes to the brief of pleadings and motions, tome VI, folio 2650).

[FN219] Generally, composed and characterized by a cactus of edible fruit, some small gardens where papaya and Karanda’y palm were grown, and fishing was done in the ponds. Cf. Health evaluation of the four Enxet Communities, supra note 218, folio 2642.

[FN220] Cf. Health Evaluation regarding four Enxet Communities, supra note 218, folio 2642.

- 201. The nutritional inadequacy of the food provided to the members of the Community has affected the growth of the children, as “the minimum prevalence of growth atrophy was 32.2% [...], more than double what would be expected for the population in question (15.9%).” [FN235] Likewise, the Community’s health official indicated that at least “90% of the children are malnourished.” [FN236]
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[FN235] Cf. Health Evaluation regarding four Enxet Communities, supra note 218, folio 2649.

[FN236] Cf. Declaration of Gerardo Larrosa, supra note 75, folio 606.

- 202. Consequently, in spite of what the State has indicated, there is no evidence that the assistance provided has met the nutritional necessities that existed according to Decree No. 1830 (supra para. 191).

African Commission on Human and Peoples’ Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (2010)

- 286. The precariousness of the Endorois' post-dispossession settlement has had similar effects. No collective land of equal value was ever accorded (thus failing the test of ‘in accordance with the law’, as the law requires adequate compensation). The

Endorois were relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area's medicinal salt licks or traditional water sources. Few Endorois got individual titles in the Mochongoi Forest, though the majority live on the arid land on the outskirts of the Reserve. [FN206]

[FN206] See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16. In these documents the arguments is made that in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, the Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.

- 287. In the case of the Yakye Axa community, the Court established that the State did not guarantee the right of the members of the Yakye Axa community to communal property. The Court deemed that this had a negative effect on the right of the members of the community to a decent life, because it deprived them of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.
- 288. In the instant Communication in front of the African Commission, video evidence from the Complainants shows that access to clean drinking water was severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence – through grazing their animals – has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement.[FN207] The African Commission is of the view that the Respondent State has done very little to provide necessary assistance in these respects.

The Social and Economic Action Center v. Nigeria (2001)

- 9. The communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farm lands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni communities.

- 64. The communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (article 4), the right to health (article 16) and the right to economic, social and cultural development (article 22). By its violation of these rights, the Nigerian government disregarded not only the explicitly protected rights but also upon the right to food implicitly guaranteed.
- 65. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.
- 66. The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and state oil company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.

E. Right to Water (articles 11 and 12)

1. CESCR GENERAL COMMENT 15

- 6. Water is required for a range of different purposes, besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.
- 7. The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see General Comment No.12 (1999)).¹⁴ Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, States

¹⁴ This relates to both *availability* and to *accessibility* of the right to adequate food (see General Comment No. 12 (1999), paras. 12 and 13).

parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.¹⁵

- 10. The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

- 13. The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water. The Committee recalls paragraph 12 of General Comment No. 3 (1990), which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

- 16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:
 - (a) Women are not excluded from decision-making processes concerning water resources and entitlements. [...]

 - (c) [...] Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution. [...] No household should be denied the right to water on the grounds of their housing or land status;

 - (d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water;

 - (e) Nomadic and traveller communities have access to adequate water at traditional and designated halting sites;

- 21. The obligation to respect [...] includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water;

¹⁵ See also the Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (A/51/869 of 11 April 1997), which declared that, in determining vital human needs in the event of **conflicts over the use of watercourses** “**special attention is to be paid to providing sufficient water** to sustain human life, including both drinking water and water **required for production of food in order to prevent starvation**”..

arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, [...]

- 23. The obligation to protect requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.
- 26. The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.
- 28. States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations. Such strategies and programmes may include: (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; (b) reducing and eliminating contamination of watersheds and water-related eco-systems by substances such as radiation, harmful chemicals and human excreta; (c) monitoring water reserves; (d) ensuring that proposed developments do not interfere with access to adequate water; (e) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity; (f) increasing the efficient use of water by end-users; (g) reducing water wastage in its distribution; (h) response mechanisms for emergency situations; (i) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.
- 37. In the Committee's view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect: [...]
- (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
- (f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;
- (g) To monitor the extent of the realization, or the non-realization, of the right to water;

- (h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;
- 44. (b) Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties. This includes, inter alia: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iv) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction; and
- (c) Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to water. Examples include, inter alia: (i) failure to adopt or implement a national water policy designed to ensure the right to water for everyone; (ii) insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups, particularly the vulnerable or marginalized; (iii) failure to monitor the realization of the right to water at the national level, for example by identifying right-to-water indicators and benchmarks; (iv) failure to take measures to reduce the inequitable distribution of water facilities and services; (v) failure to adopt mechanisms for emergency relief; (vi) failure to ensure that the minimum essential level of the right is enjoyed by everyone (vii) failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organizations.
- 48. The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.
- 59. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to water.

2. CESCR CONCLUDING OBSERVATIONS

- 29. [...] The Committee is further concerned that the lack of adequate sanitation systems has led to the contamination of the State party's scarce water resources in some areas (art. 12). [...] Furthermore, the Committee calls on the State party to ensure that water and sanitation policies take account of the increase in demand in the near future in urban areas as a result of sedentarization of nomadic people and rural exodus. The Committee refers the State party to its general comment No. 15 (2002) on the right to water and its statement on the right to sanitation. (*Mauritania*)
- 27. The Committee is concerned at the negative impact of climate change on the right to an adequate standard of living, including on the right to food and the right to water,

affecting in particular indigenous peoples, in spite of the State party's recognition of the challenges imposed by climate change. (art. 1, para. 1) (*Australia*)

- The Committee strongly recommends that the State party, as a matter of priority, undertake open, participatory and meaningful consultations with affected residents and communities prior to implementing development and urban renewal projects and to ensure that persons forcibly evicted from their properties be provided with adequate compensation and/or offered relocation that complies with the guidelines adopted by the Committee in its general comment No. 7 (1997) on forced evictions and guarantee that relocation sites are provided with basic services including drinking water, electricity, washing and sanitation, as well as adequate facilities including schools, health care centres and transportation at the time the resettlement takes place. (*Cambodia*)
- 13. The Committee is also concerned that many communities in the State party do not have access to safe drinking water and proper sanitation facilities, which poses severe health risks to them. (*Solomon Islands*)
- 29. The Committee is concerned that in spite of progress made by the State party to resettle internally displaced persons (IDPs) and to rebuild damaged infrastructure in conflict-affected areas, thousands of IDPs are still prevented from returning due to the establishment of High Security Zones (HSZs) on their homelands. The Committee is also concerned about the conditions of re settlement of internally displaced persons who often lack basic shelter, access to sanitation and water and livelihood opportunities , a situation aggravated by the regular restrictions placed on United Nations agencies, international organizations and international and national NGOs to access internally displaced persons requiring urgent assistance. (arts.11 and 12). (*Sri Lanka*)
- 29. The Committee [...] is also concerned about the continuing destruction of the water infrastructure in Gaza and in the West Bank, including in the Jordan Valley, under military and settler operations since 1967. (art.11)

[...] The Committee urges the State party to take urgent steps to facilitate the restoration of the water infrastructure of the West Bank including in the Jordan Valley, affected by the destruction of the local civilians' wells, roof water tanks, and other water and irrigation facilities under military and settler operations since 1967. The Committee draws the State party's attention to its general comment No.15 (2002) on the right to water. (*Israel*)

- 26. The Committee is concerned about the increasing lack of water, insufficient and unequal access to water, and the shortage of safe drinking water in the State party, in particular in rural and remote areas. The Committee is also concerned about the depletion of non-renewable groundwater reserves. [...]. (art. 11).

The Committee [...] also recommends that the State party strengthen its efforts, including through international cooperation, to address the shortage of water resources, improve water management, in particular in the agricultural sector, and rationalize the use of non-renewable groundwater reserves. (*Yemen*)

- 18. The Committee notes with concern that 28 per cent of the population do not have sustainable access to an improved water source. It is also concerned that improvements achieved in the North of the country in terms of access to safe water have not yet been made available to the Amazigh population, in particular in the regions of Nefoussa and Zouara.

35. The Committee recommends, in line with general comment No. 15 (2002) on the right to water, that the State party increase its efforts to ensure the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses, without any discrimination. The Committee recommends that the State party take steps to implement the right of the Amazigh population to access safe water in the regions of Nefoussa and Zouara, and to report back to the Committee on this issue in its next report. (*Libya*)

3. UNIVERSAL PERIODIC REVIEWS

- Algeria to Ethiopia (2010): Give priority to programmes for upgrading land and water resources to reduce the long - term vulnerability caused by drought and allowing the population to satisfy its needs in water and food; and, in this regard, request the assistance of competent United Nations agencies and programmes.
- Hungary to Mongolia (2011): Mandate the Constitutional Court to act upon violations of the individual rights and freedoms guaranteed under the Constitution. This possibility should also help to remedy violations of the land and environmental rights of indigenous and herder peoples, including the right to safe drinking water.
- Netherlands to Uganda (2011): Align policies to ensure access to land and water for pastoralists with the African Union Framework on Pastoralism and conclude regional agreements to facilitate cross-border pastoralism.
- Netherlands to United Republic of Tanzania (2011): Align policies to ensure access to land and water for pastoralists with the African Union Framework on Pastoralism and to conclude regional agreements to facilitate cross-border pastoralism.

4. SPECIAL PROCEDURES

SR Water & Sanitation- Slovenia (2011)

- Provide security of tenure to all Roma communities by taking measures to regularize their settlements. These measures must be undertaken in full consultation with and ensure the meaningful participation of the communities concerned. the government should also consider multiple models of regularization and recognize that no one solution will be appropriate in all cases. In the interim, the government should ensure that all communities have access to safe drinking water and sanitation regardless of the legal status of the land on which they live. Furthermore, special attention should be paid to ensuring that the most disadvantaged groups, such as women, people with disabilities, and children, have access to safe water and sanitation.

5. JURISPRUDENCE

Inter-American Commission on Human Rights

Kuna Indigenous People v. Panama (2012)

- 194. The right to territory includes the use and enjoyment of the natural resources found in the territory, and is directly tied to, indeed is a prerequisite for, the rights to a dignified existence, food, water, health, and life.²⁸⁵ For this reason, the IACHR has indicated that “an indigenous community’s ‘relations to its land and resources are protected by other rights set forth in the American Convention, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence.’”²⁸⁶

Inter-American Court of Human Rights

Sawhoyamaxa Indigenous Community v. Paraguay (2006)

- 168. In the instant case, together with the lack of lands, the life of the members of the Sawhoyamaxa Community is characterized by unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes (supra paras. 73(61) to (74).)
- 169. During the two years following the submission by Miguel Chase-Sardi of the anthropological report to the INDI, communicating the precarious situation of the Community and the death of several children, the State did not take any specific measure to prevent the violation of the right to life of the alleged victims. During that period, at least four persons died (supra para. 73(74)(2), (3), (4) and (21).)
- 170. It was not until June 23, 1999 that the President of the Republic of Paraguay issued the aforementioned Presidential Order N° 3789 declaring the Sawhoyamaxa Community in a state of emergency. However, the measures adopted by the State in compliance with such order cannot be considered sufficient and adequate. Indeed, for six years after the effective date of the order, the State only delivered food to the alleged victims on ten opportunities, and medicine and educational material in two opportunities, with long intervals between each delivery (supra para. 73(64) to (66).) These deliveries, as well as the amounts delivered, are obviously insufficient to revert the situation of vulnerability and risk of the members of this Community and to prevent violations to the right to life, to the point that after the emergency Presidential Order became effective, at least 19 persons died (supra para. 73(74)(1), (5) to (16), (20), (22) and (27) to (30).)
- 171. As it has been shown in the chapter of Proven Facts (supra para. 73(74.)) most of the Community members that died were boys and girls under 3 years of age, and the causes of their deaths range from enterocolitis, dehydration, cachexia, tetanus, measles, and respiratory illnesses, such as pneumonia and bronchitis; all of them are reasonably foreseeable diseases that can be prevented and treated at a low cost. [FN219]

[FN219] Cf. The United Nations Children’s Fund (UNICEF) and the World Health Organization (WHO), Immunization Summary 2006 (2006).

- 172. The illnesses of Rosana López (supra para.73(74)(2)), Esteban González (supra para. 73((74)(5),) NN Yegros (supra para. 73(74)(7),) Guido Ruiz-Díaz (supra para.73(74)(9),) Luis Torres-Chávez (supra para. 73(74)(11),) Francisca Brítez (supra para. 73(74)(16),) and Diego Andrés Ayala (supra para. 73(74)(15),) were not treated. These persons simply died in the Community. The State has not specifically contested these facts and has not filed any evidence to prove the contrary, in spite of the requests made by the Tribunal (supra para. 20.) Consequently, this Court finds that the said deaths are attributable to the lack of adequate prevention and to the failure by the State to adopt sufficient positive measures, considering that the State had knowledge of the situation of the Community and that action by the State could be reasonably expected. The aforesaid cannot be applicable to the death of the male child NN Torres (supra para. 73(74)(13,) who suffered from blood dyscracia and whose death cannot be attributable to the State.

- 173. The Court does not accept the State argument regarding the joint responsibility of the ill persons to go to the medical centers to receive treatment, and of the Community leaders to take them to such centers or to communicate the situation to the health authorities. From the issuance of the emergency Order, the INDI and the Ministerio del Interior [Ministry of the Interior] and the Ministerio de Salud Pública y Bienestar Social [Ministry of Public Health and Social Welfare] had the duty to take “the actions that might be necessary to immediately provide food and medical care to the families that form part of [the Sawhoyamaxa Community], pending the judicial proceedings regarding the legislation of the lands claimed by such Community as part of [their] traditional habitat” (supra para. 73(63).) Therefore, the provision of goods and health services did no longer specifically depend on the individual financial capacity of the alleged victims, and therefore, the State should have taken action contributing to the provision of such goods and services. That is to say, those measures which the State undertook to adopt before the members of the Sawhoyamaxa Community were different, in view of their urgent nature, from those that the State should adopt to guarantee the rights of the population and of the indigenous communities in general. To accept the contrary would be incompatible with the object and purpose of the American Convention, which requires that its provisions be interpreted and applied so that the rights contemplated therein be effectively protected in practice.

Yakye Axa Indigenous Community v. Paraguay (2005)

- 164. In the chapter on proven facts (supra paras. 50.92 to 50.105) the Court found that the members of the Yakye Axa Community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that are the subject matter of this proceeding, as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim. This Court notes that, according to the statements of Esteban López, Tomás Galeano and Inocencia Gómez during the public hearing held in the instant case (supra para. 39.a, 39.b and 39.c), the members of the Yakye Axa Community

could have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the Community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.

- 165. These conditions have a negative impact on the nutrition required by the members of the Community who are at this settlement (supra para. 50.97). Furthermore, as has been proven in the instant case (supra paras. 50.98 and 50.99), there are special deficiencies in the education received by the children and lack of access to health care for the members of the Community for physical and economic reasons.

- 166. In this regard, the United Nations Committee on Economic, Social, and Cultural Rights, in General Comment 14 on the right to enjoy the highest attainable standard of health, pointed out that [i]ndigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines [...].
[I]n indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this regard, the Committee considers that [...] denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.
[FN205]

[FN205] UN. Doc. E/C.12/2000/4. The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (22d session, 2000), para. 27.

- 167. Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water. [FN206]

[FN206] See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16.

- 168. In the previous chapter, this Court established that the State did not guarantee the right of the members of the Yakye Axa Community to communal property. The Court deems that this fact has had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses. Furthermore, the State has not taken the necessary positive measures to ensure that the members of the Yakye Axa Community, during the period in which they have been without territory, have living conditions that are compatible with their dignity, despite the fact that on June 23, 1999 the President of Paraguay issued Decree No. 3.789 that declared a state of emergency in the Community (supra para. 50.100).

African Commission on Human and Peoples' Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (2010)

- 286. The precariousness of the Endorois' post-dispossession settlement has had similar effects. No collective land of equal value was ever accorded (thus failing the test of 'in accordance with the law', as the law requires adequate compensation). The Endorois were relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area's medicinal salt licks or traditional water sources. Few Endorois got individual titles in the Mochongoi Forest, though the majority live on the arid land on the outskirts of the Reserve. [FN206]

 [FN206] See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16. In these documents the arguments is made that in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, the Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.

- 287. In the case of the Yakye Axa community, the Court established that the State did not guarantee the right of the members of the Yakye Axa community to communal property. The Court deemed that this had a negative effect on the right of the members of the community to a decent life, because it deprived them of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.
- 288. In the instant Communication in front of the African Commission, video evidence from the Complainants shows that access to clean drinking water was

severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence – through grazing their animals – has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement.[FN207] The African Commission is of the view that the Respondent State has done very little to provide necessary assistance in these respects.

The Social and Economic Action Center v. Nigeria (2001)

- 50. The complainants allege that the Nigerian government violated the right to health and the right to a clean environment as recognised under articles 16 and 24 of the African Charter by failing to fulfil the minimum duties required by these rights. This, the complainants allege, the government has done by:
 - Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population
 - Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage
 - Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations, article 16 of the African Charter reads:

Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 24 of the African Charter reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'

- 51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.[FN6] As has been rightly observed by Alexander Kiss:

An environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development of personality as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.[FN7]

- 52. The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and

industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a generally satisfactory environment favourable to development (article [24]) already noted, obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect these rights and this largely entails non-interventionist conduct from the state; for example, to desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.[FN8]

- 53. Government compliance with the spirit of articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

F. Right to Health (article 12)

1. CESCR GENERAL COMMENT 14

- 4. [...] the right to health embraces a wide range of socio economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.
- 27. [...] The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.
- 34. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, [...].
- 36. [States should] ...formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, ...
- 51. Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; [...] the failure to

enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.

- 55. The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.

2. CESCR CONCLUDING OBSERVATIONS

- 8. The Committee is concerned at the negative impact of extractive and mining activities in the State party on the environment and on the population's enjoyment of the right to health, as illustrated by the serious public health problems encountered in mining towns such as Akjoujt. The Committee is concerned that this is indicative of insufficient regulatory measures and weak enforcement capacity. The Committee is further concerned that these extractive and mining activities have hitherto generated little employment for the local population. (arts. 2 and 11).

The Committee calls on the State party to (a) implement the Extractive Industries Transparency Initiative; (b) ensure that adequate sanctions are applied for breach of environmental clauses in extractive and mining contracts; (c) take corrective measures to address environmental and health hazards caused by extractive and mining activities; (d) ensure that the free, prior and informed consent of the population is obtained in decision-making processes on extractive and mining projects affecting them; and (e) ensure that these activities as well as the resources generated, bring about tangible benefits to the enjoyment of economic, social and cultural rights by the population. (*Mauritania*)

- 35. The Committee is concerned about the regional environmental hazards that have a negative impact on the enjoyment of the right to health by the population in the State party, in particular the depletion and pollution of the Aral Sea and the environmental pollution of the former nuclear test site of Semipalatinsk. The Committee is also concerned about air pollution and accumulation of waste, as well as contamination of soil and water by industrial waste, agricultural pollutants and chemicals.

The Committee urges the State party to take immediate steps, including through regional cooperation as appropriate, to address environmental hazards that affect the health of the population and to strengthen its efforts to address environmental issues. The Committee further calls on the State party to allocate more resources in this regard and to strictly enforce its environmental legislation. The Committee requests that the State party provide in its next periodic report information on remedies available and redress afforded to those who have contracted illnesses due to environmental pollution. (art. 12). (*Kazakhstan*)

- 59. The Committee urges the State party to continue its efforts to find a regional solution to the Aral Sea catastrophe, including through international technical

cooperation, in line with the provisions of article 2, paragraph 1, of the Covenant, and to take all necessary measures to ensure that the population affected is given full possibility to enjoy economic, social and cultural rights under the Covenant, and in particular the right to health. (*Uzbekistan*)

The Committee recommends that the State party take all the necessary and adequate measures to ensure the enjoyment of the right to food and of the right to affordable drinking water and sanitation in particular by indigenous peoples, using a human-rights based approach, in line with the Committee's general comments No. 15 (2002) on the right to water, No. 14 (2000) on the right to the highest attainable standard of health and No. 12 (1999) on the right to food. It also recommends that the State party intensify its efforts to address issues of climate change, including through carbon reduction schemes. The State party is encouraged to reduce its greenhouse gas emissions and to take all the necessary and adequate measures to mitigate the adverse consequences of climate change, impacting the right to food and the right to water for indigenous peoples, and put in place effective mechanisms to guarantee consultation of affected Aboriginal and Torres Strait-Islander peoples, so to enable them to exercise their rights to an informed decision as well as to harness the potential of their traditional knowledge and culture (in land management and conservation). (*Australia*)

3. UNIVERSAL PERIODIC REVIEWS

- Thailand to Australia (2011): Intensify its on-going efforts to close the gap in opportunities and life outcomes between Indigenous and non-Indigenous peoples, especially in the areas of housing, land title, health care, education and employment.
- Belgium to Ethiopia (2010): Develop a constructive partnership with the United Nations and NGOs working on food and medical assistance, and guarantee safe access to the country, including in areas where violent actions against federal authorities take place; this partnership should constitute one of the cornerstones of the new agriculture and land-use policies in Ethiopia.
- Sweden to Nicaragua (2010): Ensure that indigenous persons fully enjoy all human rights, including the rights to education, adequate access to health services and land rights.
- South Africa to Sweden (2010): Implement measures aimed at eliminating discrimination against the Sami people, with particular focus on ensuring access to basic services in education, employment and health, as well as access to land, and ensuring that their right to land and cultural life is preserved.

4. SPECIAL PROCEDURES

SR Toxic Wastes- Marshall Islands (2012)

- Engage in a broad consultative process, including with victims, families of victims, victims' associations and other relevant civil society actors, on outstanding issues and measures required to address any long-term human health and environmental effects of the testing, with particular emphasis on solutions aimed at reconciling the traditional land tenure system with durable solutions to displacement.

SR Housing- South Africa (2008)

- South Africa should improve coordination amongst all government departments in charge of service delivery such as water, sanitation or electricity, and institutions in charge of implementing housing, land, health and social services policies, in order to ensure an integrated approach which recognizes the indivisibility of the human rights of individuals.

5. JURISPRUDENCE

Inter-American Commission on Human Rights

Kuna Indigenous People v. Panama (2012)

- 194. The right to territory includes the use and enjoyment of the natural resources found in the territory, and is directly tied to, indeed is a prerequisite for, the rights to a dignified existence, food, water, health, and life.²⁸⁵ For this reason, the IACHR has indicated that “an indigenous community’s ‘relations to its land and resources are protected by other rights set forth in the American Convention, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence.’”²⁸⁶

Inter-American Court of Human Rights

Sawhoyamaxa Indigenous Community v. Paraguay (2006)

- 168. In the instant case, together with the lack of lands, the life of the members of the Sawhoyamaxa Community is characterized by unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes (supra paras. 73(61) to (74).)
- 169. During the two years following the submission by Miguel Chase-Sardi of the anthropological report to the INDI, communicating the precarious situation of the Community and the death of several children, the State did not take any specific measure to prevent the violation of the right to life of the alleged victims. During that period, at least four persons died (supra para. 73(74)(2), (3), (4) and (21).)
- 170. It was not until June 23, 1999 that the President of the Republic of Paraguay issued the aforementioned Presidential Order N° 3789 declaring the Sawhoyamaxa Community in a state of emergency. However, the measures adopted by the State in compliance with such order cannot be considered sufficient and adequate. Indeed, for six years after the effective date of the order, the State only delivered food to the alleged victims on ten opportunities, and medicine and educational material in two opportunities, with long intervals between each delivery (supra para. 73(64) to (66).) These deliveries, as well as the amounts delivered, are obviously insufficient to revert the situation of vulnerability and risk of the members of this Community and to prevent violations to the right to life, to the point that after the emergency Presidential Order became effective, at least 19 persons died (supra para. 73(74)(1), (5) to (16), (20), (22) and (27) to (30).)

- 171. As it has been shown in the chapter of Proven Facts (supra para. 73(74,)) most of the Community members that died were boys and girls under 3 years of age, and the causes of their deaths range from enterocolitis, dehydration, cachexia, tetanus, measles, and respiratory illnesses, such as pneumonia and bronchitis; all of them are reasonably foreseeable diseases that can be prevented and treated at a low cost. [FN219]

[FN219] Cf. The United Nations Children’s Fund (UNICEF) and the World Health Organization (WHO), Immunization Summary 2006 (2006).

- 172. The illnesses of Rosana López (supra para.73(74)(2)), Esteban González (supra para. 73((74)(5,)) NN Yegros (supra para. 73(74)(7,)) Guido Ruiz-Díaz (supra para.73(74)(9,)) Luis Torres-Chávez (supra para. 73(74)(11,)) Francisca Brítez (supra para. 73(74)(16,)) and Diego Andrés Ayala (supra para. 73(74)(15,)) were not treated. These persons simply died in the Community. The State has not specifically contested these facts and has not filed any evidence to prove the contrary, in spite of the requests made by the Tribunal (supra para. 20.) Consequently, this Court finds that the said deaths are attributable to the lack of adequate prevention and to the failure by the State to adopt sufficient positive measures, considering that the State had knowledge of the situation of the Community and that action by the State could be reasonably expected. The aforesaid cannot be applicable to the death of the male child NN Torres (supra para. 73(74)(13,)) who suffered from blood dyscracia and whose death cannot be attributable to the State.
- 173. The Court does not accept the State argument regarding the joint responsibility of the ill persons to go to the medical centers to receive treatment, and of the Community leaders to take them to such centers or to communicate the situation to the health authorities. From the issuance of the emergency Order, the INDI and the Ministerio del Interior [Ministry of the Interior] and the Ministerio de Salud Pública y Bienestar Social [Ministry of Public Health and Social Welfare] had the duty to take “the actions that might be necessary to immediately provide food and medical care to the families that form part of [the Sawhoyamaxa Community], pending the judicial proceedings regarding the legislation of the lands claimed by such Community as part of [their] traditional habitat” (supra para. 73(63,)) Therefore, the provision of goods and health services did no longer specifically depend on the individual financial capacity of the alleged victims, and therefore, the State should have taken action contributing to the provision of such goods and services. That is to say, those measures which the State undertook to adopt before the members of the Sawhoyamaxa Community were different, in view of their urgent nature, from those that the State should adopt to guarantee the rights of the population and of the indigenous communities in general. To accept the contrary would be incompatible with the object and purpose of the American Convention, which requires that its provisions be interpreted and applied so that the rights contemplated therein be effectively protected in practice.

Yakye Axa Indigenous Community v. Paraguay (2005)

- 164. In the chapter on proven facts (supra paras. 50.92 to 50.105) the Court found that the members of the Yakye Axa Community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that are the subject matter of this proceeding, as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim. This Court notes that, according to the statements of Esteban López, Tomás Galeano and Inocencia Gómez during the public hearing held in the instant case (supra para. 39.a, 39.b and 39.c), the members of the Yakye Axa Community could have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the Community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.

- 165. These conditions have a negative impact on the nutrition required by the members of the Community who are at this settlement (supra para. 50.97). Furthermore, as has been proven in the instant case (supra paras. 50.98 and 50.99), there are special deficiencies in the education received by the children and lack of access to health care for the members of the Community for physical and economic reasons.

- 166. In this regard, the United Nations Committee on Economic, Social, and Cultural Rights, in General Comment 14 on the right to enjoy the highest attainable standard of health, pointed out that
[i]ndigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines [...].
[I]n indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this regard, the Committee considers that [...] denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.
[FN205]

[FN205] UN. Doc. E/C.12/2000/4. The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (22d session, 2000), para. 27.

- 167. Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special

vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water. [FN206]

[FN206] See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16.

- 168. In the previous chapter, this Court established that the State did not guarantee the right of the members of the Yakye Axa Community to communal property. The Court deems that this fact has had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses. Furthermore, the State has not taken the necessary positive measures to ensure that the members of the Yakye Axa Community, during the period in which they have been without territory, have living conditions that are compatible with their dignity, despite the fact that on June 23, 1999 the President of Paraguay issued Decree No. 3.789 that declared a state of emergency in the Community (supra para. 50.100).

Xakmok Kasek Indigenous Community v. Paraguay (2010)

- 189. In the present case, on June 11, 1991, [FN198] and on September 22, 1992, [FN199] INDI officials confirmed the state of vulnerability and necessity in which the members of the Community were found because they did not have title to their land. On November 11, 1993, the indigenous leaders repeated to the IBR that their request to claim land was a priority given that “they [were] living in very difficult, precarious conditions and [did] not know how long they [could] hold up.” [FN200].

[FN198] Cf. Handwritten record of procedures carried out in the on-site inspection of June 11, 1991, of the Xákmok Kásek Community in relation with the land being claimed en (case file of annexes to the application, appendix 3, tome II, folio 790), and report of on-site visit carried out by Pastor Cabanellas, supra note 62, folios 791 to 794).

[FN199] Cf. Extension of On Site Visit of September 22, 1992, supra note 62, folios 883 and 884).

[FN200] Communication of the Community addressed to the President of the IBR on November 11, 1993, supra note 65 (case file of annexes to the application, annex 5, folio 2351).

- 190. The States Attorney on Labor for the First Circuit carried out an inspection of the Salazar, Cora-í, and Maroma Ranch. This States Attorney confirmed “the precarious situation in which [the Community] lives [...] on not having the minimum standards as far as hygiene, clothing, and space per number of inhabitants. Also, [the] houses [...] do not have insulated walls or tile roofs and were built in such a way that they threatened the physical wellbeing and the health of the indigenous; the floors [were]

of earth.” [FN201] Likewise, the report indicated “that they received rations [...] but very few.” [FN202] During that visit, irregularities in terms of the labor exploitation suffered by the members of the Community were verified.

[FN201] Cf. Substantial Report by Labor Office of the Primer Turno, no date (case file of annexes to the application, appendix 3, tome IV, folio 1808).

[FN202] Cf. Substantial Report by Labor Office of the Primer Turno, no date, supra note 201, folio 1810.

- 191. On April 17, 2009, the Office of the President of the Republic and the Ministry of Education and Culture, issued Decree No. 1830. [FN203] The decree declared a state of emergency in two indigenous communities, [FN204] one of them the Xákmok Kásek Community. The pertinent part of Decree No. 1830 states that:

Due to situations beyond their control, these communities are prohibited access to the traditional means of subsistence within the territory being claimed as part of their ancestral territories that are tied to their colonial identity [...] [For this reason] the normal living activities of said communities are made difficult [...] due to the lack of access to minimum and indispensable food and medical care. This is a concern for the Government that demands an urgent response [...].

[Consequently, it ruled that]

The [INDI], together with the ministries of the interior and public health and social wellbeing, will take the necessary actions to immediately provide medical care and food to the families who form part of [the Xákmok Kásek Community] during the time that the legal and administrative procedures regarding the legalization of the land being claimed as part of the Community’s traditional habitat last. [FN205]

[FN203] Cf. Decree No. 1830 on April 17, 2009 (case file of annexes to the answer to the application, annex 7, folios 3643 to 3646).

[FN204] The referenced Decree No. 1830 of April 17, 2009, supra note 203, also refers to the Kelyenmagategma Community of the Enxet and Y’ara Marantu villages.

[FN205] Cf. Decree No. 1830, supra note 203.

- 203. As far as access to healthcare services, the Commission argued that the children “suffer from malnutrition” and that the members of the Community in general suffer from illnesses like tuberculosis, diarrhea, Chagas disease, and other occasional epidemics. Likewise, it indicated that the Community has not had adequate medical care and the children do not receive the necessary vaccines. The representatives agreed with the Commission’s allegations and added that the new settlement, known as “25 de Febrero,” is located 75 kilometers from the closest health center, a center which itself is “deficient and does not have a vehicle that could, eventually, get to the [C]ommunity.” As a result, “the seriously ill must be attended to at the Hospital in the city of Limpio, which is more than 400km from the [C]ommunity’s settlement and whose bus fare is beyond the means of the Community members.” provided by worldcourts.com
- 205. The case file indicates that prior to Decree No. 1830, the members of the Community had “receiv[ed] [...] minimal healthcare assistance” [FN238] and that the healthcare centers were very far apart and limited. In addition, for years “no medical

care or children’s vaccination assistance [was] receive[d].” [FN239] Regarding access to healthcare services, “only those who worked on the ranches [could] access the [Healthcare Provider Institution], and even [then], the use of this insurance has not been possible because the cards are not delivered or [the Community members] do not have the resources to go stay in the Hospital de Loma Plata, which is the closest one.” [FN240] Also, “a sanitary census of the National Health Services – SENASA (1993) [...] confirmed that a large percentage of the Xákmok Kásek population carried the Chagas disease virus.” [FN241]

[FN238] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1742.

[FN239] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1742.

[FN240] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1742.

[FN241] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1742.

- 208. The Court recognizes the progress made by the State. However, the measures taken subsequent to Decree No. 1830 in 2009 are characterized as temporary and transitory. In addition, the State has not guaranteed the Community members' physical or geographical accessibility to a healthcare establishment. Also, according to the evidence submitted, there is no indication that positive actions were taken to guarantee that the medical goods and services provided would be accepted, nor were there any educational measures taken on matters of healthcare that were respectful of traditional uses and customs.

African Commission on Human and Peoples’ Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (2010)

- 286. The precariousness of the Endorois' post-dispossession settlement has had similar effects. No collective land of equal value was ever accorded (thus failing the test of ‘in accordance with the law’, as the law requires adequate compensation). The Endorois were relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area's medicinal salt licks or traditional water sources. Few Endorois got individual titles in the Mochongi Forest, though the majority live on the arid land on the outskirts of the Reserve. [FN206]

[FN206] See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16. In these documents the arguments is made that in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, the Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.

- 287. In the case of the Yakye Axa community, the Court established that the State did not guarantee the right of the members of the Yakye Axa community to communal property. The Court deemed that this had a negative effect on the right of the members of the community to a decent life, because it deprived them of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.
- 288. In the instant Communication in front of the African Commission, video evidence from the Complainants shows that access to clean drinking water was severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence – through grazing their animals – has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement.[FN207] The African Commission is of the view that the Respondent State has done very little to provide necessary assistance in these respects.

The Social and Economic Action Center v. Nigeria (2001)

- 50. The complainants allege that the Nigerian government violated the right to health and the right to a clean environment as recognised under articles 16 and 24 of the African Charter by failing to fulfil the minimum duties required by these rights. This, the complainants allege, the government has done by:
 - Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population
 - Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage
 - Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations, article 16 of the African Charter reads:

Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 24 of the African Charter reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'
- 51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.[FN6] As has been rightly observed by Alexander Kiss:

An environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development of

personality as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.[FN7]

- 52. The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a generally satisfactory environment favourable to development (article [24]) already noted, obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect these rights and this largely entails non-interventionist conduct from the state; for example, to desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.[FN8]
- 53. Government compliance with the spirit of articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

G. Right to Work (article 6)

1. CESCR GENERAL COMMENT 18

- 10. Moreover, domestic and agricultural work must be properly regulated by national legislation so that domestic and agricultural workers enjoy the same level of protection as other workers.

2. CESCR CONCLUDING OBSERVATIONS

- 9. The Committee is concerned about the continuing obstacles to employment by the Arab Israeli population, the considerably higher levels of unemployment rates of the Arab Israeli population, and the concentration of members of the Arab, Druze and Circassian population in some sectors characterized by low wages, including agriculture and the hotel and restaurant sector. (art. 6). (*Israel*)
- 17. The Committee notes with concern that [...] agricultural workers are not protected by the 2003 Labour Code and are thus exposed to exploitation. (*Kazakhstan*)

- 17. The Committee reiterates its concern about the relatively high unemployment in the State party which impacts disproportionately the members of disadvantaged and marginalized groups including minorities as well as people living in rural areas. (art. 6).

24. The Committee is concerned about the high proportion of children below the legal age for employment established by the State party – of 15 years – who work in hazardous conditions in areas such as mining, construction or agriculture. (art 10). (*Albania*)

- 25. [...] the Committee expresses concern that the measures undertaken by the State party to combat child labour, which continues to be used in agriculture [...] have not been commensurate with the scale of the problem (art. 10).

The Committee calls on the State party to ensure that children are protected from social and economic exploitation, including by bringing its legislation fully into conformity with International Labour Organization (ILO) standards on minimum age of employment and the regulation of employment of children in hazardous condition [...] (*Turkey*)

- 19. The Committee notes with concern that women are employed predominantly in sectors and employment which carry lower wages, such as in agriculture, health and education. The Committee is also concerned about the disproportionate representation of women in the informal economy.

The Committee requests the State party to provide in its next periodic report detailed information on:

- (b) Protection measures for women working in the informal economy;

20. The Committee is deeply concerned at the precarious situation of migrant workers who are employed without contracts in tobacco plantations and are, together with their families, vulnerable to exploitation and abuse. The Committee urges the State party to assess the extent of the problem of migrant workers who are employed in plantations and agricultural farms and their conditions of work, with a view to establishing mechanisms that enforce the relevant Labour Code provisions on fair wages and favourable conditions of work (arts. 7, 2, para. 2).

27. The Committee is concerned about the persistence of child labour in the State party, including by children of migrant workers in tobacco and cotton farms. The Committee is also concerned that these children do not attend school during farming periods.

The Committee calls on the State party to take urgent measures to ensure protection of all children against all forms of exploitation and undertake effective measures to enable them to fully enjoy their right to education. The Committee requests that the State party in its next periodic report include detailed information on the problem of child labour, measures undertaken to eradicate child labour, and progress achieved in this regard. [...] (art. 10, para. 3). (*Kazakhstan*)

- 16. The Committee is concerned that a large part of the working-age population is employed in the informal sector.
- 17. The Committee is concerned about the lack of gainful employment opportunities for low-skill rural inhabitants.
- 20. The Committee is concerned about the persistent reports on the situation of school-age children obliged to participate in the cotton harvest every year who, for that reason, do not attend school during this period.
- 45. The Committee recommends that the State party take all necessary measures to reduce employment in the informal sector by adopting a National Employment Plan and strengthening programmes to reduce unemployment, targeting on a priority basis the most affected groups, including through the creation and stimulation of small and medium-sized enterprises, and the establishment of an obligatory quota for employment of disabled persons. The Committee requests the State party to provide detailed information in its next periodic report on progress made in the field of employment stimulation.
- 46. The Committee recommends that the State party consider ratifying the ILO Unemployment Convention No. 2.
- 47. The Committee encourages the State party to adopt effective measures to stimulate rural development, inter alia, through the ongoing agrarian reform, as well as by encouraging local employment initiatives and ecotourism, and ensuring special training and retraining measures.
- 50. The State party is urged to take all necessary measures to ensure the protection of minors against economic and social exploitation and to enable them to fully enjoy their right to education and an adequate standard of living. The Committee strongly recommends that the State party consider ratifying ILO Convention No. 182 (1999) concerning the prohibition and immediate action for the elimination of the worst forms of child labour.
- 51. The Committee recommends that the State party provide labour inspections with adequate human and financial resources, to enable them to effectively combat abuses of workers' rights. (*Uzbekistan*)

3. UNIVERSAL PERIODIC REVIEWS

- Thailand to Australia (2011): Intensify its on-going efforts to close the gap in opportunities and life outcomes between Indigenous and non-Indigenous peoples, especially in the areas of housing, land title, health care, education and employment.
- Norway to Ethiopia (2010): Apply effective strategies and measures to reduce inconsistencies between laws and practice, including with regard to access to land for women, the gender gap in employment and trafficking in women.
- South Africa to Sweden (2010): Implement measures aimed at eliminating discrimination against the Sami people, with particular focus on ensuring access to

basic services in education, employment and health, as well as access to land, and ensuring that their right to land and cultural life is preserved.

4. SPECIAL PROCEDURES

IE Minorities- Rwanda (2011)

- 98. Batwa families should be allocated land sufficient for them to engage in agriculture or livestock farming and should receive the necessary training. Targeted poverty alleviation programmes should be developed with vocational training specifically targeted to their particular needs as a population group transitioning from a hunter-gathering livelihood and assistance to find employment.

IE Somalia (2012)

- 121. The international community should provide Puntland authorities with support to eradicate piracy. In this regard, an integrated strategy that combines local and international measures aimed at addressing the root causes on land, including livelihood and job opportunities, vocational training and awareness-raising, as well as illegal fishing and the dumping of toxic waste, should be implemented.

RSG IDPs- Iraq (2011)

- Such a regional action plan should include housing interventions such as rental subsidies, housing and land allocations, livelihood and employment projects (including language training for non-Kurdish speakers), improved access to educational facilities, including through language training and measures to address dropouts due to poverty, and improved access to health care.

5. JURISPRUDENCE

European Court of Human Rights

Dogan and Others v. Turkey (2002)

- 140. The applicants argued that it was not in doubt that there had been an interference with their right to peaceful enjoyment of their possessions. They were forcibly evicted from their homes and land by the security forces and restrictions were imposed by the authorities on their return to their village. As a result of continuous denial of access to the village they were effectively deprived of their revenue and forced to live in poor conditions in other regions of the country.
- 141. The Government denied that the applicants had been compelled to evacuate their village by the security forces. They claimed that the applicants had left their village on account of the disturbances in the region and intimidation by the PKK. They admitted however that a number of settlements had been evacuated by the relevant authorities to ensure the safety of the population in the region. The Government further submitted that the applicants had no genuine interest in going back to their village since in its present state Boydas village was not suitable for accommodation and offered very poor economic conditions to sustain life. Nevertheless, with reference to the Ministry of Interior Gendarmerie General Command's letter of 22 July 2003, the Government pointed out that there remained no obstacle to the applicants' return to Boydas village (see paragraph 37 above).

- 142. In the present case, the Court is required to have regard to the situation which existed in the state of emergency region of Turkey at the time of the events complained of by the applicants, characterised by violent confrontations between the security forces and members of the PKK. It notes that this two- fold violence resulting from the acts of the two parties to the conflict forced many people to flee their homes (see paragraphs 56 and 62 above). Furthermore, and as admitted by the Government, the authorities have evicted the inhabitants of a number of settlements to ensure the safety of the population in the region (see paragraph 141 above). The Court has also found in numerous similar cases that security forces deliberately destroyed the homes and property of the respective applicants, depriving them of their livelihoods and forcing them to leave their villages in the state of emergency region of Turkey (see, among many others, *Akdivar and Others*, *Selçuk and Asker*, *Mentes and Others*, *Yöyler*, *Ipek*, judgments cited above; *Bilgin v. Turkey*, no. 23819/94, 16 November 2000, and *Dulas v. Turkey*, no. 25801/94, 30 January 2001).
- 143. Turning to the particular circumstances of the instant case, the Court observes that it is unable to determine the exact cause of the displacement of the applicants because of the lack of sufficient evidence in its possession and the lack of an independent investigation into the alleged events. On that account, for the purposes of the instant case it must confine its consideration to the examination of the applicants' complaints concerning the denial of access to their possessions since 1994. In this connection, the Court notes that despite the applicants' persistent demands, the authorities refused any access to Boydas village until 22 July 2003 on the ground of terrorist incidents in and around the village (see paragraphs 15, 17 and 18 above). These disputed measures deprived the applicants of all resources from which they derived their living. Moreover, they also affected the very substance of ownership in respect of six of the applicants in that they could not use and dispose of their property for almost nine years and ten months. The result of these contested measures has been that since October 1994 their right over the possessions has become precarious. In conclusion, the denial of access to Boydas village must be regarded as an interference with the applicants' right to the peaceful enjoyment of their possessions (see *Loizidou v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2216, § 63).

H. Right to Take Part in Cultural Life (article 15)

1. CESCR GENERAL COMMENT 21

- 3. The right of everyone to take part in cultural life is also recognized in article 27, paragraph 1, of the Universal Declaration of Human Rights, which states that "everyone has the right freely to participate in the cultural life of the community". [...] Instruments on civil and political rights, on the rights of persons belonging to minorities to enjoy their own culture, [...] and to participate effectively in cultural life, on the rights of indigenous peoples to their cultural institutions, ancestral lands, natural resources and traditional knowledge, and on the right to development also contain important provisions on this subject.

- 15. There are, among others, three interrelated main components of the right to participate or take part in cultural life: (a) participation in, (b) access to, and (c) contribution to cultural life.
- (b) Access covers in particular the right of everyone — alone, in association with others or as a community — [...] to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, [...]
- (c) Contribution to cultural life refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.
- 16. The following are necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination.
- (a) Availability is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including [...] nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities.
- (b) Accessibility consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination. [...]
- (c) Acceptability entails that the laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them;
- (d) Adaptability refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities;
- (e) Appropriateness refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples. The Committee has in many instances referred to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation in particular to the rights to food, health, water, housing and education. The way in which rights are implemented may also have an impact on cultural life and cultural diversity. The Committee wishes to stress in this regard the need to take into account, as far as possible, cultural values attached to, inter alia,

food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed.

- 36. [...] The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, 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. States parties must therefore take measures to recognize and protect 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.
- 37. Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, [...]. States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.
- 49. The obligation to respect includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group:
 - (a) To freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected;
 - This includes the right not to be subjected to any form of discrimination based on cultural identity, exclusion or forced assimilation, and the right of all persons to express their cultural identity freely and to exercise their cultural practices and way of life. States parties should consequently ensure that their legislation does not impair the enjoyment of these rights through direct or indirect discrimination.
 - (d) To have access to their own cultural and linguistic heritage and to that of others;
 - In particular, States must respect free access by minorities to their own culture, heritage and other forms of expression, as well as the free exercise of their cultural identity and practices. [...] States parties must also respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life.
 - (e) To take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights under article 15, paragraph 1 (a).

- 50. In many instances, the obligations to respect and to protect freedoms, cultural heritage and diversity are interconnected. Consequently, the obligation to protect is to be understood as requiring States to take measures to prevent third parties from interfering in the exercise of rights listed in paragraph 49 above. In addition, States parties are obliged to:
 - (a) Respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters; [...] Such obligations include the care, preservation and restoration of historical sites, monuments, [...] among others.
 - (b) Respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups, in economic development and environmental policies and programmes;
 - Particular attention should be paid to the adverse consequences of globalization, [...] on the right to participate in cultural life.
 - (c) Respect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression
 - This includes protection from illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations.
 - (d) Promulgate and enforce legislation to prohibit discrimination based on cultural identity, as well as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence [...]
- 54. The obligation to fulfil requires that States parties must provide all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realize this right for themselves with the means at their disposal. This level of obligation includes, for example:
 - (a) The enactment of appropriate legislation and the establishment of effective mechanisms allowing persons, individually, in association with others, or within a community or group, to participate effectively in decision-making processes, to claim protection of their right to take part in cultural life, and to claim and receive compensation if their rights have been violated;
- 55. [...] the Committee considers that article 15, paragraph 1 (a), of the Covenant entails at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice, which includes the following core obligations applicable with immediate effect: [...]
 - (e) To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their

free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.

- 70. States parties, in implementing the right enshrined in article 15, paragraph 1 (a), of the Covenant, should go beyond the material aspects of culture (such as museums, libraries, theatres, cinemas, monuments and heritage sites) and adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions).

2. CESCR CONCLUDING OBSERVATIONS

- The Committee is concerned that restrictions to land and resources, threats to livelihoods and reduced access to decision-making processes by vulnerable communities, such as pastoralist and hunter-gatherer communities, pose a threat to the realization of their right to cultural life (art. 15). (*Tanzania*)
- The Committee recommends that the State party take effective measures to protect the right of each group of indigenous people to its ancestral lands and the natural resources found there, and to ensure that national development programmes comply with the principle of participation and the protection of the distinctive cultural identity of each of these groups. In this regard, the Committee refers the State party to its general comment No. 21 (2009) on the right of everyone to take part in cultural life. (*Cameroon*)
- The Committee is concerned about the systematic exploitation of land and natural resources which affects the standard of living of the Malagasy population and its different ethnic groups, thus preventing them from maintaining their cultural and social links with their natural environment and their ancestral lands. (art. 15). (*Madagascar*)
- The Committee notes with concern that, despite the reforms to the native title system, the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act, have a negative impact on the recognition and protection of the right of indigenous peoples to their ancestral lands. (art.15). The Committee recommends that the State party increase its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples, and remove all obstacles to the realization of the right to land of indigenous peoples. (*Australia*).
- The Committee is deeply concerned that the systematic and abusive exploitation of forest resources in the State party has negatively affected the lands and the way of life of numerous indigenous peoples, especially the pygmies living in the Province of Equateur, impeding the enjoyment of their rights as well as their material and spiritual relationship with nature and, ultimately, their own cultural identity. (*DRC*)
- 23. The Committee expresses its concern that the right to land, in particular ancestral lands, is not duly guaranteed to indigenous peoples. It notes with concern that nearly 70 per cent of all land is owned by only 7 per cent of the population. (*Bolivia*)

- 12(b) The slow pace of agrarian reform. While noting that the Rural Welfare Institute has become the National Institute of Rural and Land Development (INDERT), the Committee reiterates its concern over the situation of farmers and the indigenous population, who do not have access to their traditional and ancestral lands. The Committee notes with concern the concentration of land ownership in the hands of a very small proportion of the population. *(Paraguay)*
- 12. The Committee deplors the discrimination against indigenous people, particularly with regard to access to land ownership, housing, health services and sanitation, education, work and adequate nutrition. The Committee is particularly concerned about the adverse effects of the economic activities connected with the exploitation of natural resources, such as mining in the Imataca Forest Reserve and coal-mining in the Sierra de Perijá, on the health, living environment and way of life of the indigenous populations living in these regions. *(Venezuela)*
- 29. The Committee recommends that the State party increase its efforts to combat discrimination against indigenous peoples, in particular in the areas of employment, health services, land ownership, adequate nutrition, housing and education. *(Guatemala)*
- 42. The Committee reiterates its previous recommendation (E/C.12/1/Add.3, para. 24) and urges the State party to implement the measures contained in the Peace Agreements of 1996, in particular those related to the agrarian reform and the devolution of communal indigenous lands. *(Guatemala)*
- The Committee is concerned about the persisting discrimination against indigenous populations, especially in the field of employment, and the protection of traditional ancestral and agricultural lands. *(Honduras)*
- The Committee deeply regrets the lack of measures by the State party to address effectively the problem of excessive deforestation, which negatively affects the habitat of indigenous populations. *(Honduras)*
- 12. Notwithstanding the absence of legal discrimination and the rights granted to indigenous communities by the Constitution, the Committee is deeply concerned about the persisting disadvantage faced in practice by members of indigenous communities in Panama, and in particular about the marked disparities in the levels of poverty and literacy and access to water, employment, health, education and other basic social services. *(Panama)*
- 31. Noting that the State party has taken steps for the protection of the archaeological sites on Failaka Island, the Committee is nevertheless concerned at the risk posed by development projects to the preservation of other archaeological sites in the State party. The Committee is also concerned at reports of limited access to cultural goods such as historical sites and artifacts (art. 15). The Committee recommends that the State party take measures for the proper implementation of relevant laws and regulations aimed at the protection of historical sites, and undertake systematic assessment of the impact of development projects on their conservation. The Committee also recommends that the State party facilitate and promote effective access to the State party's cultural heritage by the general population. *(Kuwait)*

- 37. The Committee is concerned that the measures adopted by the State party to relocate the Arab-Bedouin villages in new settlements will negatively affect their cultural rights and links with their traditional and ancestral lands. The Committee recommends that the State party fully respect the rights of the Arab-Bedouin people to their traditional and ancestral lands. *(Israel)*
- 26. The Committee stresses the importance to preserve and protect the cultural, natural and archaeological heritage in its jurisdiction, including the medieval cemetery in Julfa (art. 15). The committee recommends that the State party ensure the protection and preservation of all cultural, natural and archaeological heritage in its jurisdiction. *(Azerbaijan)*
- 26. The Committee is deeply concerned at the potential impact of the Ilisu dam under construction and other dams on the enjoyment of economic, social and cultural rights in the areas concerned, especially with regard to forced evictions, resettlements, displacement, and compensation of people affected, as well as at the environmental and cultural impact of the construction of these dams (arts. 11, 12 and 15). *(Turkey)*

3. UNIVERSAL PERIODIC REVIEWS

- UK to Australia (2011): Reform the Native Title Act 1993, amending strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life.
- Holy See to Paraguay (2011): That constant protection be provided to indigenous people and their rights over their lands and the preservation of their culture.
- South Africa to Sweden (2010): Implement measures aimed at eliminating discrimination against the Sami people, with particular focus on ensuring access to basic services in education, employment and health, as well as access to land, and ensuring that their right to land and cultural life is preserved.

4. SPECIAL PROCEDURES

SR Indigenous- United States of America (2012)

- 90. Measures of reconciliation and redress should include, inter alia, initiatives to address outstanding claims of treaty violations or non-consensual takings of traditional lands to which indigenous peoples retain cultural or economic attachment, and to restore or secure indigenous peoples' capacities to maintain connections with places and sites of cultural or religious significance, in accordance with the United States international human rights commitments. In this regard, the return of Blue Lake to Taos Pueblo, the restoration of land to the Timbisha Shoshone, the establishment of the Oglala Sioux Tribal Park, and current initiatives of the National Park Service and the United States Forest Service to protect sacred sites, constitute important precedents or moves in this direction.

SR Indigenous- Finland, Norway, Sweden (2011)

- 84. Finland should step up its effort to clarify and legally protect Sami rights to land and resources. In particular, Finland should ensure special protections for Sami reindeer husbandry, given the centrality of this means of livelihood to the culture and heritage of the Sami people.

SR Indigenous- Botswana (2010)

- The government should reorient its policies and laws regarding land use, conservation and wildlife management to accommodate the subsistence needs and cultural practices of communities that have been dispossessed of access to lands or resources by policies and measures such as the tribal grazing land policy and the creation of conservation and wildlife management areas.

5. JURISPRUDENCE

Human Rights Committee

Mahuika et al. v. New Zealand (2000)

- 9.3 The first issue before the Committee therefore is whether the authors' rights under article 27 of the Covenant have been violated by the Fisheries Settlement, as reflected in the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community.¹⁶ The recognition of Maori rights in respect of fisheries by the Treaty of Waitangi confirms that the exercise of these rights is a significant part of Maori culture. However, the compatibility of the 1992 Act with the treaty of Waitangi is not a matter for the Committee to determine.
- 9.4 The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology. In this case the legislation introduced by the State affects, in various ways, the possibilities for Maori to engage in commercial and non-commercial fishing. The question is whether this constitutes a denial of rights. On an earlier occasion, the Committee has considered that:
 - " A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons

¹⁶See inter alia the Committee's Views in *Kitok v. Sweden*, communication No. 197/1985, adopted on 27 July 1988, CCPR/C/33/D/197/1985, paragraph 9.2. See also the Committee's Views in the two *Länsman* cases, Nos. 511/1992, 26 October 1994 (CCPR/C/52/D/511/1992) and 671/1995, 30 October 1996 (CCPR/C/58/D/671/1995).

belonging to a minority will not necessarily amount to a denial of the right under article 27.”¹⁷

- 9.5 The Committee recalls its general comment on article 27, according to which, especially in the case of indigenous peoples, the enjoyment of the right to one’s own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them.¹⁸ In its case law under the Optional Protocol, the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.¹⁹ The Committee acknowledges that the Treaty of Waitangi (Fisheries Settlement) Act 1992 and its mechanisms limit the rights of the authors to enjoy their own culture.

Howard v. Canada (2005)

- 12.4 The Committee notes that it is undisputed that the author is a member of a minority enjoying the protection of article 27 of the Covenant and that he is thus entitled to the right, in community with the other members of his group, to enjoy his own culture. It is not disputed that fishing forms an integral part of the author’s culture.
- 12.5 The question before the Committee, as determined by its admissibility decision, is thus whether Ontario’s Fishing Regulations as applied to the author by the courts have deprived him, in violation of article 27 of the Covenant, of the ability to exercise, individually and in community with other members of his group, his aboriginal fishing rights which are an integral part of his culture.
- 12.6 The State party has submitted that the author has the right to fish throughout the year on and adjacent to his Nation’s reserves and that, with a fishing licence, he can also fish in other areas in the region which are open for fishing when the area surrounding the reserves is closed. The author has argued that there is not enough fish on and adjacent to the reserves to render the right meaningful and that the other areas indicated by the State party do not belong to his Nation’s traditional fishing grounds. He has moreover argued that fishing with a licence constitutes a privilege, whereas he claims to fish as of right.
- 12.7 Referring to its earlier jurisprudence, the Committee considers that States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right²⁰. The Committee must therefore reject the author’s argument that

¹⁷Committee’s Views on case No. 511/1992, Lansmann et al. v. Finland, CCPR/C/52/D/511/1992, para. 9.4

¹⁸General Comment No. 23, adopted during the Committee’s 50th session in 1994, paragraph 3.2.

¹⁹ Committee's Views on case 511/1992, I. Länsman et al. v. Finland, paras. 9.6 and 9.8 (CCPR/C/52/D/511/1992).

²⁰ See inter alia *Kitok v. Sweden*, communication No. 197/1985, Views adopted on 27 July 1988, CCPR/C/33/D/197/1985 and *Länsmann v. Finland*, communication No. 511/1992, Views adopted on 26

the requirement of obtaining a fishing licence would in itself violate his rights under article 27.

Äärelä and Näkkäljärvi v. Finland (1997)

- 7.5 Turning to the claim of a violation of article 27 in that logging was permitted in the Kariselkä area, the Committee notes that it is undisputed that the authors are members of a minority culture and that reindeer husbandry is an essential element of their culture. The Committee's approach in the past has been to inquire whether interference by the State party in that husbandry is so substantial that it has failed to properly protect the authors' right to enjoy their culture. The question therefore before the Committee is whether the logging of the 92 hectares of the Kariselkä area rises to such a threshold.
- 7.6 The Committee notes that the authors, and other key stakeholder groups, were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response to criticisms from those quarters. The District Court's evaluation of the partly conflicting expert evidence, coupled with an on-site inspection, determined that the Kariselkä area was necessary for the authors to enjoy their cultural rights under article 27 of the Covenant. The appellate court finding took a different view of the evidence, finding also from the point of view of article 27, that the proposed logging would partially contribute to the long-term sustainability of reindeer husbandry by allowing regeneration of ground lichen in particular, and moreover that the area in question was of secondary importance to husbandry in the overall context of the Collective's lands. The Committee, basing itself on the submissions before it from both the authors and the State party, considers that it does not have sufficient information before it in order to be able to draw independent conclusions on the factual importance of the area to husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under article 27 of the Covenant. Therefore, the Committee is unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party to properly protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant.

Lansman (2) v. Finland (2005)

- 10.1 As to the claims relating to the *effects* of logging in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas of the territory administered by the Muotkatunturi Herdsmen's Committee, the Committee notes that it is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture and that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community.²¹ Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27. As noted by the Committee in its Views on case

October 1994, CCPR/C/52/D/511/1992 and communication No. 671/1995, Views adopted on 30 October 1996, CCPR/C/58/D/671/1995.

²¹ Views on case no. 197/1985 (*Kitok v. Sweden*), Views adopted 27 July 1988, para. 9.2; on case No. 511/1992 (*I. Länsman et al. v. Finland*), adopted 26 October 1994, paragraph 9.2.

no. 511/1992 of *Länsman et al. v. Finland*, however, measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.

- 10.2 The Committee recalls that in the earlier case no. 511/1992, which related to the Pyhäjärvi and Kirkko-outa areas, it did not find a violation of article 27, but stated that if logging to be carried out was approved on a larger scale than that already envisaged or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of article 27. In weighing the effects of logging, or indeed any other measures taken by a State party which has an impact on a minority's culture, the Committee notes that the infringement of a minority's right to enjoy their own culture, as provided for in article 27, may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by that minority. Thus, the Committee must consider the overall effects of such measures on the ability of the minority concerned to continue to enjoy their culture. In the present case, and taking into account the specific elements brought to its attention, it must consider the effects of these measures not at one particular point in time – either immediately before or after the measures are carried out - but the effects of past, present and planned future logging on the authors' ability to enjoy their culture in community with other members of their group.

Poma Poma v. Peru (2009)

- 7.2 The Committee recalls its general comment No. 23, according to which article 27 establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant. Certain of the aspects of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This might particularly apply in the case of the members of indigenous communities which constitute a minority. This general comment also points out, with regard to the exercise of the cultural rights protected under article 27, that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. The protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole.
- 7.3 In previous cases, the Committee has recognized that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.²² In the present case, it is undisputed that the author is a member of an ethnic minority and that raising llamas is an essential element of the culture of

²² *Lubicon Lake Band v. Canada*, op. cit., para. 32.2.

the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child. The author herself is engaged in this activity.

- 7.4 The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.²³

Inter-American Court of Human Rights

Sawhoyamaya Indigenous Community v. Paraguay (2006)

- 116. Article 21 of the American Convention declares that:
 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
 3. Usury and any other form of exploitation of man by man shall be prohibited by law.
- 117. In analyzing the content and scope of Article 21 of the Convention in relation to the communal property of the members of indigenous communities, the Court has taken into account Convention No. 169 of the ILO in the light of the general interpretation rules established under Article 29 of the Convention, in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution of the Inter-American system considering the development that has taken place regarding these matters in international human rights law. [FN184] The State ratified Convention No. 169 and incorporated its provisions to domestic legislation by Law No. 234/93. [FN185]

[FN184] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, paras. 124-131, and Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August, 31, 2001. Series C No. 79, paras. 148 and 149.

[FN185] Law No. 234/93 whereby ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries is ratified.

- 118. Applying the aforementioned criteria, the Court has considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American

²³ Communications Nos. 511/1992 and 1023/2001, *Länsman v. Finland*, Views adopted on 26 October 1994 and 15 April 2005 respectively.

Convention. [FN186] The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the provided by form part of their worldview, of their religiousness, and consequently, of their cultural identity. [FN187]

[FN186] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 137, and Case of the Mayagna (Sumo) Awas Tingni Community, supra note 184, para. 149.

[FN187] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 135.

- 119. The foregoing is related to the contents of Article 13 of Convention No. 169 of the ILO, in that States must respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”
 - 120. Likewise, this Court considers that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land “is not centered on an individual but rather on the group and its community.” [FN188] This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.
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[FN188] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 184, para. 149.

- 121. Consequently, the close ties of indigenous peoples with their traditional lands and the native natural resources thereof, associated with their culture, as well as any incorporeal element deriving therefrom, must be secured under Article 21 of the American Convention. On the matter, the Court, as it has done before, is of the opinion that the term “property” as used in Article 21, includes “material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value”. [FN189]

Yakye Axa Indigenous Community v. Paraguay (2005)

- 135. The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.

- 136. The above relates to the provision set forth in Article 13 of ILO Convention No. 169, that the States must respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
- 137. Therefore, the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them, must be safeguarded by Article 21 of the American Convention. In this regard, the Court has previously asserted that the term “property” used in said Article 21 includes “those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value” [FN197].

Xakmok Kasek Indigenous Community v. Paraguay (2010)

- 85. This Court has ruled that the close link that indigenous peoples have to their traditional lands, to the natural resources found that are part of their culture, and to the lands' other intangible elements, should be safeguarded by Article 21 of the American Convention. [FN100]

 [FN100] Cf. Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 137; Case of the Sawhoyamaya Indigenous Community v. Paraguay, supra note 20, para. 118, and Case of the Saramaka People v. Suriname, supra note 16, para. 88.

- 86. Moreover, the Court has taken into account that amongst the indigenous, there exists a communitarian tradition of a communal manner regarding collective property of land, in the sense that ownership does not pertain to an individual, but rather to the group and the community. Indigenous peoples, as a matter of survival, have the right to live freely on their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy to preserve their cultural legacy and transmit it to future generations. [FN101]

 [FN101] Cf. Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations, and Costs. Judgment of August 31, 2001. Series C No. 79, para. 149; Case of Sawhoyamaya Indigenous Community v. Paraguay, supra note 20, para. 118, and Case of the Saramaka People. v. Suriname, supra note 16, para. 90.

- 87. Moreover, the Court has indicated that the concepts of property and possession in indigenous communities can have a collective meaning, in the sense that possession “does not focus on individuals but on the group and the community.” [FN102] This concept of ownership and possession of lands does not necessarily correspond to the classic concept of property, but it deserves equal protection under Article 21 of the

Convention. The failure to recognize the different versions of the right to use and enjoy goods that come from the culture, uses, customs, and beliefs of different peoples would be equivalent to arguing that there is only one way for things to be used and arranged, which in turn would make the protection granted by Article 21 of the Convention meaningless for millions of individuals. [FN103]

[FN102] Cf. Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 101, para. 149; Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 120, and Case of the Saramaka People v. Suriname, supra note 16, para. 89.

[FN103] Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 120.

Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001)

- 148. Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.
- 149. Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.
- 150. In this regard, Law No. 28, published on October 30, 1987 in La Gaceta No. 238, the Official Gazette of the Republic of Nicaragua, which regulates the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua, states in article 36 that:
Communal property are the lands, waters, and forests that have traditionally belonged to the Communities of the Atlantic Coast, and they are subject to the following provisions:
 1. Communal lands are inalienable; they cannot be donated, sold, encumbered nor taxed, and they are inextinguishable.
 2. The inhabitants of the Communities have the right to cultivate plots on communal property and to the usufruct of goods obtained from the work carried out.
- 151. Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land

should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.

Saramaka People v. Suriname (2007)

- 85. This Court has previously held, based on Article 1(1) of the Convention, that members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival. [FN75] Other sources of international law have similarly declared that such special measures are necessary. [FN76] Particularly, in the *Moiwana* case, this Court determined that another Maroon community living in Suriname was also not indigenous to the region, but rather constituted a tribal community that settled in Suriname in the 17th and 18th century, and that this tribal community had “a profound and all-encompassing relationship to their ancestral lands” that was centered, not “on the individual, but rather on the community as a whole”. [FN77] This special relationship to land, as well as their communal concept of ownership, prompted the Court to apply to the tribal *Moiwana* community its jurisprudence regarding indigenous peoples and their right to communal property under Article 21 of the Convention. [FN78]

[FN75] Cf. Case of *The Mayagna (Sumo) Awas Tingni Community*, supra note 49, paras. 148-149, and 151; Case of the *Indigenous Community Sawhoyamaxa v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118-121, and 131, and Case of the *Indigenous Community Yakye Axa v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005 Series C No. 125, paras. 124, 131, 135-137 and 154.

[FN76] As early as 1972, in the resolution the Commission adopted on “Special Protection for Indigenous Populations – Action to Combat Racism and Racial Discrimination”, the Commission proclaimed that “for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of states”. Cf. Resolution on Special Protection for Indigenous Populations. Action to Combat Racism and Racial Discrimination, OEA/Ser.L/V/II.29 Doc. 41 rev. 2, March 13, 1973, cited in Inter-American Commission on Human Rights, Report 12/85, Case No. 7615, Yanomami. Brazil, March 5, 1985, para. 8. Cf. also Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OAS/Ser.L/V/II.96 Doc.10 rev 1, April 24, 1997, Chapter IX (stating that “within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions”); UNCERD, General Recommendation No. 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V, August 18, 1997, para. 4 (calling upon States to take certain measures in order to recognize and ensure the rights of indigenous peoples), and ECHR, Case of *Connors v. The United Kingdom*, Judgment of May 27, 2004, Application no. 66746/01, para. 84 (declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way to provide equality under the law).

[FN77] Cf. Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paras. 132-133.

[FN78] Cf. Case of the Moiwana Community, supra note 77, para. 133.

- 86. The Court sees no reason to depart from this jurisprudence in the present case. Hence, this Tribunal declares that the members of the Saramaka people are to be considered a tribal community, and that the Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival.

Moiwana Village v. Suriname (2005)

- 131. Nevertheless, this Court has held that, in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership. [FN71] That conclusion was reached upon considering the unique and enduring ties that bind indigenous communities to their ancestral territory. The relationship of an indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. [FN72] For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations. [FN73]

[FN71] Cf. Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79, para. 151.

[FN72] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 71, para. 149.

[FN73] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 71, para. 149.

African Commission on Human and Peoples' Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (2010)

- 246. The African Commission is of the view that in its interpretation of the African Charter, it has recognised the duty of the state to tolerate diversity and to introduce measures that protect identity groups different from those of the majority/dominant group. It has thus interpreted Article 17(2) as requiring governments to take measures "aimed at the conservation, development and diffusion of culture," such as promoting "cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions; . . . promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the

population."[FN192]

[FN192] Guidelines for National Periodic Reports, in Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988–1989, ACHPR/RPT/2nd, Annex XII.

- 247. The African Commission's WGIP has further highlighted the importance of creating spaces for dominant and indigenous cultures to co-exist. The WGIP notes with concern that:

Indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation.[FN193]

[FN193] Report of the African Commission's Working Group on Indigenous Populations/Committees (2005), p. 20. [Emphasis added]

- 248. The African Commission is of the opinion that the Respondent State has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois,[FN194] but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction.[FN195]

[FN194] See UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4(2): States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs; CERD General Recommendation XXIII, Article 4(e): Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages; International Covenant on Economic, Social and Cultural Rights, Article 15(3). [FN195] See statement by Mr. Sha Zukang Under-Secretary General for Economic and Social Affairs and Coordinator of the Second International Decade of the World's Indigenous People to the Third Committee of the General Assembly on the Item "Indigenous Issues" New York, 20 October 2008.

- 249. In its analysis of Article 17 of the African Charter, the African Commission is aware that unlike Articles 8 and 14, Article 17 has no claw-back clause. The absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. It further notes that even if the Respondent State were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community's cultural rights. Thus, even if the creation of the Game Reserve constitutes a legitimate aim, the Respondent State's failure to secure access, as of right, for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim. The Commission is of the view that the cultural activities of the Endorois community pose no harm to the ecosystem of the Game Reserve and the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community.
- 250. It is the opinion of the African Commission that the Respondent State has overlooked that the universal appeal of great culture lies in its particulars and that imposing burdensome laws or rules on culture undermines its enduring aspects. The Respondent State has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake.
- 251. By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17(2) and (3) of the Charter.

European Court of Human Rights

Case of Chapman v. United Kingdom (2001)

- 71. The applicant submitted that measures threatening her occupation of her land in caravans affected not only her home, but also her private and family life as a Gypsy with a traditional lifestyle of living in mobile homes which allow travelling. She referred to the consistent approach of the Commission in her own and similar cases (see, for example, Buckley, cited above, opinion of the Commission, p. 1309, § 64).
- 72. The Government accepted that the applicant's complaints concerned her right to respect for her home and stated that it was unnecessary to consider whether the applicant's right to respect for her private and family life was also in issue (see Buckley, cited above, pp. 1287-88, §§ 54-55).
- 73. The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the

applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.

- 74. The Court finds, therefore, that the applicant's right to respect for her private life, family life and home is in issue in the present case.
- 75. The Government accepted that there had been an “interference by a public authority” with the applicant's right to respect for her home disclosed by the refusal of planning permission to allow her to live in her caravan on her own land and the enforcement measures taken against her.
- 76. The applicant contended that, in addition to these measures constituting an interference with her rights, the framework of legislation and planning policy and regulations disclosed a lack of respect for those rights as they effectively made it impossible for her to live securely as a Gypsy: either she was forced off her land and would have to station her caravans unlawfully, at the risk of being continually moved on, or she would have to accept conventional housing or “forced assimilation”.
- 77. The Court considers that it cannot examine legislation and policy in the abstract, its task rather being to examine the application of specific measures or policies to the facts of each individual case. There is no direct measure of “criminalisation” of a particular lifestyle as was the case in *Dudgeon v. the United Kingdom* (judgment of 22 October 1981, Series A no. 45), which concerned legislation rendering adult consensual homosexual relations a criminal offence.
- 78. Having regard to the facts of this case, it finds that the decisions of the planning authorities refusing to allow the applicant to remain on her land in her caravans and the measures of enforcement taken in respect of her continued occupation constituted an interference with her right to respect for her private life, family life and home within the meaning of Article 8 § 1 of the Convention. It will therefore examine below whether this interference was justified under paragraph 2 of Article 8 as being “in accordance with the law”, pursuing a legitimate aim or aims and as being “necessary in a democratic society” in pursuit of that aim or aims.

I. Self-determination (article 1)

1. TREATY MONITORING BODIES

Human Right Committee General Comment 12: Article 1 (Right to Self Determination)

- 2. Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely “determine their political status and freely pursue their economic, social and cultural development”. The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.

- 5. Paragraph 2 affirms a particular aspect of the economic content of the right of self determination, namely the right of peoples, for their own ends, freely to “dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”. This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

CERD General Recommendation 11 (Right to Self-determination)

- 4. In respect of the self determination of peoples two aspects have to be distinguished. The right to self determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin.

2. CESCR CONCLUDING OBSERVATIONS

- The Committee is concerned that Law No. 2007-036 of 14 January 2008, relating to investment law which allows land acquisition by foreign investors, including for agricultural purposes, has an adverse impact on the access of peasants and people living in rural areas to cultivable lands, as well as to their natural resources. The Committee is also concerned that such land acquisition leads to a negative impact on the realization by the Malagasy population of the right to food. (art. 1). (*Madagascar*)
- Committee expresses further concern at the numerous cases of peasants expelled from their land due to mining operations in Kijiba, Kaposhi, Ngaleshi, Kifunga and Chimanga (Katanga). (art. 1.2). (*DRC*)
- The Committee is concerned at the negative impact of climate change on the right to an adequate standard of living, including on the right to food and the right to water, affecting in particular indigenous peoples, in spite of the State party’s recognition of the challenges imposed by climate change. (art. 1, para. 1). (*Australia, 2009*)
- The Committee is concerned at the slow progress in the land reform process notwithstanding the constitutional rights to property and self-determination, as well as the enactment of legislation to facilitate the demarcation of land belonging to the indigenous peoples, the State party’s adoption of the United Nations Declaration on the Rights of Indigenous Peoples (adopted in 2007) and its ratification of ILO Convention No. 169.(art. 1, para. 1). (*Brasil*)
- The Committee recommends that the State party take the necessary measures to combat continued deforestation in order to ensure the effective enjoyment of

economic, social and cultural rights, especially by indigenous and vulnerable groups of people. *(Brasil)*

- The Committee is concerned that access to safe drinking water and sanitation is not universal and that, in some rural areas, especially in the Chocò region, almost 90 per cent of the population do not have access to safe drinking water. *(Colombia)*
- The Committee is concerned about the environmental impacts of mining and agribusiness projects and, in particular, about their effects on people's ability to exercise their right to water in rural areas. *(Ecuador)*
- 19. The Committee is also concerned about the insufficient provision of water and sanitation services, in particular in peripheral urban areas and rural regions (art.11). *(Peru)*
- 22. The Committee is concerned about the adverse effects as a result of the extractive industries' activities on the health of the population, in particular on the access to safe drinking water. It is also concerned that independent impact assessments on water, air and soil conditions are not always carried out prior to the granting of licenses to companies (art.12). *(Peru)*
- 13. The Committee notes with regret [...]
 - (b) The fact that no clear solution has yet been found to the question of self-determination for the people of Western Sahara. The Committee notes with concern reports of the straitened circumstances endured by people displaced by the conflict in Western Sahara, particularly women and children, who apparently suffer multiple violations of their rights under the Covenant;
- 35. The Committee again encourages the State party to make every effort to find a clear and definitive solution to the issue of self-determination for the people of Western Sahara. The Committee calls on the State party to take steps to protect the rights of persons displaced by the conflict in Western Sahara and to ensure their safety. *(Morocco)*
- 27. The Committee is concerned that the Plan for the Regularization of Bedouin Housing and for the Economic Development of the Bedouin Population in the Negev, based upon the recommendations of the Goldberg Committee and adopted in September 2011, foresees a land planning scheme that will be operated in a short and limited period of time, and includes an enforcement mechanism for the implementation of the planning and construction laws. (art.1). *(Israel)*
- 15. The Committee, while welcoming the initiative of a Nordic Sami Convention, reiterates its concern that the Sami land rights have not yet been resolved and that this fact negatively affects their right to maintain and develop their traditional culture and way of life, particularly reindeer herding. [...] (arts. 1, 2.2, and 15). *(Sweden)*

3. SPECIAL PROCEDURES

SR Indigenous- Costa Rica (2011)

- 47. Almost all the indigenous representatives who met with the special rapporteur during his visit claimed that the ADIs did not adequately represent the indigenous peoples, adding that indigenous peoples see the presence of the ADIs in their territories as a denial of their right to self-government and their right to make decisions regarding their land and communities. The ADIs are apparently regarded as state institutions that regularly make decisions without notifying or consulting the indigenous communities they supposedly represent. While some indigenous territories have adapted their representation procedures to those of the ADIs, in other territories, such as that of the Teribe people, the presence of the ADIs has led to a deterioration in the indigenous peoples' traditional representation procedures. It should be noted that there are similar concerns about the lack of adequate representation on the national commission on indigenous affairs.

RSG IDPs- Cote D'Ivoire (2006)

- 59. Rural land is governed by the 1998 rural land act, [11] the prime purpose of which was to clarify land rights by providing a legal framework for them and to modernize customary land rights. Under article 1 of the act, only the state, public authorities and individual Côte d'Ivoire nationals can own rural land. This provision represents a break with the past policy of President Houphouët-Boigny, under which the land belonged to the person cultivating it. Against a background of political tension linked to the power struggle, the act aroused a sense of injustice in many non-Ivorian owners, some of whom had been cultivating the land for several generations. They were especially worried that their non-Ivorian descendants would not be able to become owners of the land. In response to their fears, and in implementation of the Linas-Marcoussis agreement, the 1998 act was modified by a law dated 14 August 2004, under which rights to rural land ownership acquired before 2004 can be transmitted to descendants. The owners concerned by this derogation must be on a list drawn up by the council of ministers. At a time when the question of identifying Ivorian citizens is at the heart of the discussions, the representative of the secretary-general is concerned about the risks that the law will either not be applied or will be applied in a discriminatory fashion.

SR Indigenous- Finland, Norway, Sweden (2011)

- 80. The special rapporteur recognizes the efforts of the Nordic governments in recent decades to advance the rights of Sami people to their lands, territories and resources. These efforts should be redoubled in order to guarantee the Sami people a sustainable basis for their economic, social and cultural development.
- 79. For the Sami people, as with other indigenous peoples throughout the world, securing rights over land and natural resources is fundamental to their self-determination, and is considered a prerequisite for the Sami people to be able to continue to exist as a distinct people.
- 84. Finland should step up its effort to clarify and legally protect Sami rights to land and resources. In particular, Finland should ensure special protections for Sami reindeer husbandry, given the centrality of this means of livelihood to the culture and heritage of the Sami people.

SR Indigenous- Russian Federation (2010)

- In light of the scope of indigenous peoples' right to self-determination with regard to their economic development, it is necessary to ensure an overall legal and policy regime that is forward looking, taking into account the evolving nature of indigenous cultures, land use patterns and economic relationships.

SR Indigenous- Botswana (2009)

- While the SR indigenous acknowledges the important advances that Botswana has made, he must also take into account the repeated statements of discontent he heard among all the communities visited (predominantly Basarwa and Bakgalagadi indigenous communities), including in relation to the fulfilment of rights associated with access to health and education services, land and resources, and the decision-making processes affecting them

4. JURISPRUDENCE

Inter-American Court of Human Rights

Saramaka People v. Suriname (2007)

- 120. In this regard, this Court has previously held [FN121] that the cultural and economic survival of indigenous and tribal peoples, and their members, depend on their access and use of the natural resources in their territory “that are related to their culture and are found therein”, and that Article 21 protects their right to such natural resources (supra paras. 85-96). [FN122] Nevertheless, the scope of this right needs further elaboration, particularly regarding the inextricable relationship between both land and the natural resources that lie therein, as well as between the territory (understood as encompassing both land and natural resources) and the economic, social, and cultural survival of indigenous and tribal peoples, and thus, of their members.

[FN121] Cf. Case of the Indigenous Community Yakye Axa, supra note 75, para. 137, and Case of the Indigenous Community Sawhoyamaya, supra note 75, para. 118.

[FN122] The Court also takes notice that the African Commission, as well as the Canadian Supreme Court and the South African Constitutional Court, have ruled that indigenous communities' land rights are to be understood as including the natural resources therein. Nevertheless, according to the African Commission and the Canadian Supreme Court, these rights are not absolute, and may be restricted under certain conditions. Cf. African Commission on Human and Peoples' Rights, The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication 155/96 (2001), paras. 42, 54 and 55, and Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (December 11, 1997), paras. 194, 199 and 201. The South African Constitutional Court, citing a domestic law that required the return of land to owners who had been dispossessed by racially discriminatory policies, affirmed the right of an indigenous peoples to the mineral resources in its lands. Cf. Alexkor Ltd. and the Government of South Africa v. Richtersveld Community and Others, CCT/1903 (October 14, 2003), para. 102.

- 121. In accordance with this Court’s jurisprudence as stated in the Yakye Axa and Sawhoyamaxa cases, members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake. [FN123] Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. That is, the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.

 [FN123] Cf. Case of the Indigenous Community Yakye Axa, supra note 75, para. 137, and Case of the Indigenous Community Sawhoyamaxa, supra note 75, para. 118.

- 122. As mentioned above (supra paras. 85-96), due to the inextricable connection members of indigenous and tribal peoples have with their territory, the protection of their right to property over such territory, in accordance with Article 21 of the Convention, is necessary to guarantee their very survival. Accordingly, the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities’ right to the use and enjoyment of their property. From this analysis, it follows that the natural resources found on and within indigenous and tribal people’s territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people’s way of life. [FN124]

African Commission on Human and Peoples’ Rights

Shumba v. Zimbabwe (2012)

- 191. But on a more substantive point of law, what is a ‘property right’ (within the context of this matter) that accords with regional and international law? “Property rights” have an autonomous meaning under regional and international human rights law, which supersedes national legal definitions. In *Malawi African Association and Others v. Mauritania*, the African Commission considered land, houses etc as ‘property’ for the purposes of Article 14 of the African Charter.[FN37] The African Commission in the *Ogoni* case also found that the ‘right to property’ includes not only the right to have access to one’s property and not to have one’s property invaded or encroached upon,[FN38] but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.[FN39]

African Commission on Human and Peoples' Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (2010)

- 267. In the instant case of the Endorois, the Respondent State has a duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community. The African Commission is aware that the Endorois do not have an attachment to rube. Nevertheless, it is instructive to note that the African Commission decided in The Ogoni case that the right to natural resources contained within their traditional lands vested in the indigenous people. This decision made clear that a people inhabiting a specific region within a state can claim the protection of Article 21.[FN200] Article 14 of the African Charter indicates that the two-pronged test of 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws' should be satisfied.

[FN200] The Ogoni Case (2001), paras 56-58.

- 268. As far as the African Commission is aware, that has not been done by the Respondent State. The African Commission is of the view the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the Respondent State. Article 21(2) also concerns the obligations of a State Party to the African Charter in cases of a violation by spoliation, through provision for restitution and compensation. The Endorois have never received adequate compensation or restitution of their land. Accordingly, the Respondent State is found to have violated Article 21 of the Charter.

European Court of Human Rights

Case of Chapman v. United Kingdom (2006)

- 71. The applicant submitted that measures threatening her occupation of her land in caravans affected not only her home, but also her private and family life as a Gypsy with a traditional lifestyle of living in mobile homes which allow travelling. She referred to the consistent approach of the Commission in her own and similar cases (see, for example, Buckley, cited above, opinion of the Commission, p. 1309, § 64).
- 72. The Government accepted that the applicant's complaints concerned her right to respect for her home and stated that it was unnecessary to consider whether the applicant's right to respect for her private and family life was also in issue (see Buckley, cited above, pp. 1287-88, §§ 54-55).
- 73. The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the

applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.

- 74. The Court finds, therefore, that the applicant's right to respect for her private life, family life and home is in issue in the present case.
- 75. The Government accepted that there had been an “interference by a public authority” with the applicant's right to respect for her home disclosed by the refusal of planning permission to allow her to live in her caravan on her own land and the enforcement measures taken against her.
- 76. The applicant contended that, in addition to these measures constituting an interference with her rights, the framework of legislation and planning policy and regulations disclosed a lack of respect for those rights as they effectively made it impossible for her to live securely as a Gypsy: either she was forced off her land and would have to station her caravans unlawfully, at the risk of being continually moved on, or she would have to accept conventional housing or “forced assimilation”.
- 77. The Court considers that it cannot examine legislation and policy in the abstract, its task rather being to examine the application of specific measures or policies to the facts of each individual case. There is no direct measure of “criminalisation” of a particular lifestyle as was the case in *Dudgeon v. the United Kingdom* (judgment of 22 October 1981, Series A no. 45), which concerned legislation rendering adult consensual homosexual relations a criminal offence.
- 78. Having regard to the facts of this case, it finds that the decisions of the planning authorities refusing to allow the applicant to remain on her land in her caravans and the measures of enforcement taken in respect of her continued occupation constituted an interference with her right to respect for her private life, family life and home within the meaning of Article 8 § 1 of the Convention. It will therefore examine below whether this interference was justified under paragraph 2 of Article 8 as being “in accordance with the law”, pursuing a legitimate aim or aims and as being “necessary in a democratic society” in pursuit of that aim or aims.