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A. Women

1. CESCR GENERAL COMMENTS

General Comment 7 (Forced Evictions)

- 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.

General Comment 12 (Right to Food)

- 26. The strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology

General Comment 15 (Right to Water)

- 7. [...[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.
- 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.
- 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, [...] In particular, States parties should take steps to ensure that:
 - (a) Women are not excluded from decision-making processes concerning water resources and entitlements. [...]

General Comment 16 (Equal Rights of Men and Women)

- 4. The Committee on Economic, Social and Cultural Rights (CESCR) has taken particular note of factors negatively affecting the equal right of men and women to the enjoyment of economic, social and cultural rights in many of its general comments, including those on the right to adequate housing, the right to adequate food, the right to education, the right to the highest attainable standard of health, and the right to water.
- 5. Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property,

- birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.
- 28. Article 11 of the Covenant requires States parties to recognize the right of everyone to an adequate standard of living for him/herself and his/her family, including adequate housing (para. 1) and adequate food (para. 2). Implementing article 3, in relation to article 11, paragraph 1, requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so. Implementing article 3, in relation to article 11, paragraph 2, also requires States parties, inter alia, to ensure that women have access to or control over means of food production, and actively to address customary practices under which women are not allowed to eat until the men are fully fed, or are only allowed less nutritious food.
- 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 20 (Non-Discrimination)

5. International treaties on racial discrimination, discrimination against women [...] include the exercise of economic, social and cultural rights, [...]

2. CEDAW GENERAL RECOMMENDATIONS

General Recommendation 16 (Economic consequences of marriage, family relations and their dissolution)

- 38. States parties should provide for equal access by both spouses to the marital property and equal legal capacity to manage it. They should ensure that the right of women to own, acquire, manage, administer and enjoy separate or non-marital property is equal to that of men.
- 50. Under customary forms of landholding, which may limit individual purchase or transfer and may only be subject to right of use, upon the death of the husband, the wife or wives may be told to leave the land or may be required to marry a brother of the deceased in order to remain on the land. The existence of offspring, or lack of offspring, may be a major factor in such marriage requirements. In some States parties, widows are subject to "property dispossession" or "property grabbing", in which relatives of a deceased husband, claiming customary rights, dispossess the widow and her children from property accumulated during the marriage, including property that is not held according to custom. They remove the widow from the family home and claim all the chattels, then ignore their concomitant customary responsibility to support the widow and children. In some States parties, widows are marginalized or banished to a different community.
- 52. The laws or practices of some States parties restrict the use of a will to override discriminatory laws and customs and increase women's share of inheritance. States parties are obligated to adopt laws relating to the making of wills that provide equal rights to women and men as testators, heirs and beneficiaries.
- 53. States parties are obligated to adopt laws of intestate succession that comply with the principles of the Convention. Such laws should ensure:
 - Equal treatment of surviving females and males.

- That customary succession to use rights or title to land cannot be conditioned on forced marriage to a deceased spouse's brother (levirate marriage) or any other person, or on the existence or absence of minor children of the marriage.
- That disinheritance of the surviving spouse is prohibited.
- That "property dispossession/grabbing" is criminalized, and that offenders are duly prosecuted.

See further General Recommendation 16 for more provisions regarding women and property generally.

General Recommendation 21 (Equality in Marriage)

- 7. When a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman's ability to provide for herself and her dependents.
- 8. A woman's right to bring litigation is limited in some countries by law or by her access to legal advice and her ability to seek redress from the courts. In others, her status as a witness or her evidence is accorded less respect or weight than that of a man. Such laws or customs limit the woman's right effectively to pursue or retain her equal share of property and diminish her standing as an independent, responsible and valued member of her community. When countries limit a woman's legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women's ability to provide for themselves and their dependents.

Article 16 (1) (h)

- 25. The rights provided in this article overlap with and complement those in article 15
 (2) in which an obligation is placed on States to give women equal rights to enter into and conclude contracts and to administer property.
- 26. Article 15 (l) guarantees women equality with men before the law. The right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.
- 27. In countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed.
- 28. In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.
- 30. There are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto

- relationship and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.
- 31. Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it.
- 33. In many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.
- 35. There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.

General Recommendation 27 (Older Women)

- 26. Under some statutory and customary laws, women do not have the right to inherit and administer marital property on the death of their spouse. Some legal systems justify this by providing widows with other means of economic security, such as support payments from the deceased's estate. However, in reality, such provisions are seldom enforced, and widows are often left destitute. Some laws particularly discriminate against older widows, and some widows are victims of "property grabbing."
- 47. States parties have an obligation to eliminate discrimination in all its forms against older women in economic and social life. All barriers based on age and gender to accessing agricultural credit and loans should be removed and access to appropriate technology for older women farmers and small landholders should be ensured.
- 34. States parties should enable older women to seek redress for and resolve infringements of their rights, including the right to administer property, and ensure that older women are not deprived of their legal capacity on arbitrary or discriminatory grounds.
- 48. Laws and practices that negatively affect older women's right to housing, land and property should be abolished.
- 49. States parties should ensure that older women are included and represented in rural and urban development planning processes.
- 51. States parties have an obligation to repeal all legislation that discriminates against older women in the area of marriage and in the event of its dissolution, including with regard to property and inheritance.
- 52. States parties must repeal all legislation that discriminates against older widows in respect of property and inheritance, and protect them from land grabbing. They must adopt laws of intestate succession that comply with their obligations under the

Convention. Furthermore, they should take measures to end practices that force older women to marry against their will, and ensure that succession is not conditional on forced marriage to a deceased husband's sibling or any other person.

General Recommendation 28 (Core Obligations under Article 2)

- 20. The obligation to fulfil encompasses the obligation of States parties to facilitate women shall be fulfilled by the promotion of de facto or substantive equality through all appropriate means, including through concrete and effective policies and programmes aimed at improving the position of women and achieving such equality, including where appropriate, through the adoption of temporary special measures in accordance with article 4, paragraph 1, and general recommendation No. 25.

3. HUMAN RIGHTS COMMITTEE GENERAL COMMENT 28

- 19. The right of everyone under article 16 to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status. This right implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. It also implies that women may not be treated as objects to be given, together with the property of the deceased husband, to his family. States must provide information on laws or practices that prevent women from being treated or from functioning as full legal persons and the measures taken to eradicate laws or practices that allow such treatment.

4. CESCR CONCLUDING OBSERVATIONS

- The Committee recommends that the State party take steps to ensure that women in rural areas, and in particular those who are heads of household, participate in decision-making processes and have improved access to health, education, clean water and sanitation services, income-generating projects and actual ownership of land. (*Tanzania*)
- The Committee notes with concern that the system of land tenure in the State party is out of step with the country's economic and cultural situation, and that it makes some indigenous population groups and small-scale farmers vulnerable to land grabs. It is also concerned about obstacles such as prohibitive land transaction fees that bar the way to land ownership, particularly by women. (art. 11, para. 1 (a)). (Cameroon)
- 14. The Committee is concerned that women continue to face discrimination in many domains, especially where access to employment, land and credit and inheritance rights are concerned, (...). (Chad)
- The Committee is concerned that customary land, which represents over 80 per cent of all land, is traditionally inherited by the man's family in accordance with rules of male primogeniture, to the detriment of widows and, especially, girl children. (...) 50. The Committee recommends that the State party ensure that the draft land policy with regard to the allocation of land to women does not contradict articles 3 and 11 of the Covenant. (Zambia, 2005)

- 11. The Committee is concerned that, although the 1990 Constitution says that men and women have equal rights (art. 26), women continue to face widespread discrimination, especially where access to employment, land and credit and inheritance rights are concerned. (Benin, 2002)
- 16. The Committee continues to be concerned at the de facto inequality that exists between men and women in Bolivia, as reflected in women's illiteracy, access to work and unequal pay for equal work, and difficulty in gaining access to housing and land ownership. The Committee also notes with concern that the State's social, economic and cultural plans and programmes do not reflect a fundamental gender perspective. (Bolivia)
- 15. With respect to article 3 of the Covenant, the Committee notes that, despite efforts by the Government, in particular at the legislative level, discrimination against women is still a major problem. In particular, it notes that, according to the State party's report to CEDAW, women are accorded low wages, low status and little opportunity for developing themselves economically. Moreover, the Committee notes that obstacles remain for women at the tertiary education level, that occupational segregation in the labour market persists, in particular at the decision-making level and in the public sector, and that women have limited access to credit and land ownership. (St. Vincent & the Grenadines)
- 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. (Kazakhstan)

5. UNIVERSAL PERIODIC REVIEWS

- Canada to Burkina Faso: Implement a public awareness campaign to promote the effective implementation of the law granting women the access to rural land ownership (Law no. 034/2009/AN).
- Egypt to Dominican Republic: Consider adopting legislative measures to facilitate access of women in rural areas to land ownership, to ensure that poverty reduction and income generating strategies include provisions relating to rural women, and to ensure access by rural women and girls to education.
- Chile and Slovenia to Tonga: Repeal legislation that deprives women from some rights, such as the right to inheritance and land ownership. Enact legislation to prohibit discrimination on the basis of gender, including with regard to land rights.
- Netherland to Viet Nam: Combat discrimination against women through by ensuring women's entitlement to land in the Land Law.
- Sweden to Burundi: Increase work on gender equality, sexual violence and empowerment of women, especially regarding women's rights to inheritance and access to land.

- Israel to Guinea: Ensure equal rights for women, in law and in practice, in the areas of landownership, inheritance, marriage and the protection of women and children, as recommended by the CEDAW.
- Netherlands to Republic of Congo: Introduce legislation that eliminates discrimination (of women) in ownership, co-sharing and inheritance of land.
- Belgium, Finland and Mexico to Tanzania: Harmonize the legislation to eliminate all forms of discrimination against women, notably to ensure equality relating to inheritance and land rights. Launch a credible investigation of forced evictions and land conflicts and use the results of this investigation to help draft new legislation, which fully takes the rights of indigenous peoples into account. Promote a legal framework giving legal certitude in terms of property, in particular with regard to land ownership and protection against force evictions and recognition of the rights of indigenous people, pastoralists, hunters and gathering peoples.

6. SPECIAL PROCEDURES

SR Indigenous- South Africa (2005)

- Indigenous women, not only in South Africa but in almost all countries SR has visited, are systematically excluded on matters of land reform policy and on discussions regarding solutions to their problems, in particular those of indigenous rural women

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.

SR Indigenous- Columbia, Ecuador (2006)

- In the inter-Andean corridors and the Andean heathlands, where demographic pressure on the land's limited resources is greater, indigenous agricultural production and living conditions are precarious, causing growing emigration to the cities and abroad, a phenomenon that particularly affects indigenous communities. Indigenous women and children are particularly vulnerable in this process.

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

- Particular efforts still need to be devoted to the issues faced by women in regard to housing and land. It is important that policies and programs, as well as any legal decision, including traditional ways of dispute resolution, take into account relevant international standards and gender equality.

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.

IE Minorities- Columbia (2011)

- Any new laws on reparations and land restitution must comply with relevant constitutional court rulings, be consistent with the Pinheiro principles on housing and property.

Restitution for refugees and displaced persons and take into account the specific needs of afro-Colombian communities and specifically protect the rights of women in the process.

RSG IDPs- Iraq (2011)

The representative recommends that the Kurdistan regional government (KRG) authorities, in coordination with the federal government, develop, in accordance with international standards (in particular the guiding principles), an action plan to address the immediate social needs and durable solutions for the 30,000 IDP families in the broader national displacement within the 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 and improved dropouts due poverty, access More targeted assistance programmes would also be necessary to address the specific problems of particularly vulnerable IDPs (including due to chronic poverty) and groups at risk of abuse or exploitation, including female-headed households, separated children, and children who have taken on the role of breadwinners.

SR Food-Nicaragua (2010)

- In order to ensure security of tenure and improve access to land, the implementation of the titling programme should be accelerated in order to limit the risk of more conflicts over land in the future. such titling should go hand in hand with improving the productive capacities of smallholders, in particular by providing them with access to credit on appropriate conditions. Women's' access to land should be prioritized, in accordance with article 14 paragraph 2 (g) of the convention on the elimination of all forms of discrimination against women.

SR Violence against Women- Tajikistan (2009)

- Ensure the rights of rural women to land use and management by providing them with legal and business training and simplifying the process of registration of private farms.

SR Extreme Poverty- Namibia (2013)

- Ensure that women have access to land and productive resources; ensure the effective implementation of the communal land reform act 2002, particularly in rural areas.

SR Violence against Women- United States of America (2011)

- Prioritize public safety on Indian land by fully implementing and funding the violence against women and tribal law and order acts.

SR Education- Paraguay (2010)

- In the SR Education's view it is important to consolidate conditional transfer programmes for the poorest families — they should target indigenous women and women in rural and marginal urban areas in particular — and to include the indigenous communities in all priority initiatives on lifelong education, given that 48 per cent of the indigenous communities have no land of their own and these communities are the primary conservers of the forests.

SR Housing- Iran (2006)

- Take steps to ensure that, both at policy and legislative levels, there is harmonization between provisions in international human rights instruments and Islamic law and practice in relation to women's equal rights to housing, land, property and inheritance.

IE Minorities- Afghanistan (2010)

82. Consultative mechanisms can provide useful opportunities for minority participation as supplements when equal participation in elected bodies is insufficient because the minority community is too small to impact an election. Such consultative bodies can be ad hoc, set up to address a particular issue, or they can be formalized structures at the national, regional and local levels. They may be general, such as minority round tables, or related to specific matters, such as housing, land, education, language or culture. They may be part of the institutional structure of government and there may be a legal requirement that they be consulted on particular matters. For such mechanisms to be effective, it is important that consultative bodies have a clear legal status, that the obligation to consult them is established in law and that their involvement in decision-making processes is of a regular, meaningful and permanent nature. Such bodies should be properly resourced and attention should be paid to the representativeness of their members, who should be chosen by the minority community through transparent procedures. It is important that the members appointed have the requisite qualifications to carry out the work and that they be truly representative, including of minority women. Finally, these structures must be commensurate with the needs of minority communities.

SR Food- India (2006)

- Land acquisition act should be amended, or new legislation adopted, to recognize justiciable right to resettlement and rehabilitation for all displaced or evicted persons, including those without formal land titles and including women.

SR Housing- Cambodia (2006)

- Specific policies should be developed to address discrimination against women in relation to equal access to and ownership of housing and land. Such policies should address disproportionately adverse impact that forced evictions, displacement and poor living conditions have on women.

SR Housing-Iran (2006)

- Introduce human rights education across country to ensure traditional practices do not lead to violation of women's equal rights to housing, land, property and inheritance.

7. JURISPRUDENCE

Inter-American Commission on Human Rights

Marino Lopez et al. v. Colombia (2011)

- 372. In Order 005-2009, the Constitutional Court recognized the disproportionate impact, in quantitative and qualitative terms, of the internal forced displacement on the Afro-Colombian communities, and on the protection of their individual and collective rights; that a disproportionate impact was mainly suffered by children, women, the disabled, senior citizens, and members of communities; and on the possibility for Afro-Colombian cultural survival.401
- 373. In the same way, in order 092 of 2008, the Constitutional Court recognized that the situation of women displaced by the armed conflict constitutes one of the most serious forms of the unconstitutional state of affairs declared by judgment T-025 of 2004. Their rights are being violated in a systematic, prolonged and massive way throughout the country and that the State's response to this situation has been patently insufficient to address its constitutional duties. Similarly, it declared that the authorities at every level were under an international and constitutional obligation to act determinedly to prevent the disproportionate impact of the displacement on women 402
- 374. For its part, the Constitutional Court has also recognized that the international agreements of the State of Colombia in matters of Human Rights and International Humanitarian Law, also require the authorities to adopt a preventive approach to forced displacement which should be sufficiently differentiated and specific as to have a bearing on the fundamental causes of this phenomenon and its disproportionate impact on the Afro-descendant communities and their members.403 In this respect. the Court considered that in Colombia the structural nature of the problem has not been acknowledged and the State's response is not systematic or comprehensive. It pointed out that public policy lacks a specific preventive approach to the actual causes of the disproportionate impact of forced displacement on the Afro-descendant population, and it referred to the actual case of the Cacarica basin.404 It also recognized that the State had not incorporated the differentiated approach that duly appreciates the special needs of the displaced Afro-descendants and that the attention to this population was limited to the programs and policies for the displaced population in general, with the added complication that the Afro-descendant population is the most marginalized within the attention given to displaced persons.405
- 375. The Constitutional Court established that the lack of an integral approach that considers the structural factors which feed back into the conflict and the problems facing the Afro-Colombian population prevent the measures adopted to avoid displacement from meeting the risks confronting the Afro-Colombian population; facilitate the implementation of contingency plans when the danger is related to the State's lawful operations to maintain public order; and they permit the adoption of appropriate preventive measures to guarantee the right to life and to prevent their uprooting and confinement.406

- 376. Finally, the Commission recalls that the Constitutional Court has established that in Colombia, a combination of the disproportionate effects of the internal armed conflict, the war on drugs, the advance of mega-projects and the adoption of legislation affecting the territorial and environmental rights of the Afro-Colombian communities, is causing conditions such as to dispossess them of their territorial property and from their environmental habitat, so that the inequality gap is thus maintained, consolidated and deepened.407

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).

- 65. However, the limitation applies only to unmarried and not to married mothers. Like the Commission, the Court considers this distinction, in support of which the Government put forward no special argument, to be discriminatory. In view of Article 14 (art. 14) of the Convention, the Court fails to see on what "general interest", or on what objective and reasonable justification, a State could rely to limit an unmarried mother's right to make gifts or legacies in favour of her child when at the same time a married woman is not subject to any similar restriction. In other respects, the Court refers, mutatis mutandis, to paragraphs 40 and 41 above.

B. Children

1. CESCR GENERAL COMMENTS

General Comment 7 (Forced Evictions)

- 10. Women, children, [...] and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction.

General Comment 15 (Right to Water)

- 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, [...]

General Comment 18 (Right to Work)

- 15. Several international human rights instruments adopted after the ICESCR, such as the Convention on the Rights of the Child, expressly recognize the need to protect children and young people against any form of economic exploitation or forced labour.

General Comment 20 (Non-Discrimination)

- 5. International treaties on racial discrimination, discrimination against [...] children, [...] include the exercise of economic, social and cultural rights, [...]

General Comment 21 (Right to Take Part in Cultural Life)

- 26. Children play a fundamental role as the bearers and transmitters of cultural values from generation to generation. States parties should take all the steps necessary to stimulate and develop children's full potential in the area of cultural life, with due regard for the rights and responsibilities of their parents or guardians.

2. CRC GENERAL COMMENTS

General Comment 3 (HIV/AIDS)

- 31. Special attention must be given to children orphaned by AIDS and to children from affected families, including child-headed households, [...] The Committee wishes to underline the necessity of providing legal, economic and social protection to affected children to ensure their access to education, inheritance, [...].
- 32. The Committee wishes to emphasize the critical implications of proof of identity for children affected by HIV/AIDS, as it relates to securing recognition as a person before the law, safeguarding the protection of rights, in particular to inheritance, [...]. In this respect, birth registration is critical to ensuring the rights of the child [...]

- States parties are, therefore, reminded of their obligation under article 7 of the Convention to ensure that systems are in place for the registration of every child at or immediately after birth.
- 33. [...] In this respect, States parties are particularly reminded to ensure that both law and practice support the inheritance and property rights of orphans, with particular attention to the underlying gender-based discrimination which may interfere with the fulfilment of these rights. Consistent with their obligations under article 27 of the Convention, States parties must also support and strengthen the capacity of families and communities of children orphaned by AIDS to provide them with a standard of living adequate for their physical, mental, spiritual, moral, economic and social development, including access to psychosocial care, as needed.

General Comment 11 (Indigenous Children)

- 35. In the case of indigenous children whose communities retain a traditional lifestyle, the use of traditional land is of significant importance to their development and enjoyment of culture. States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children's right to life, survival and development to the maximum extent possible.

General Comment 16 (Impact of the Business Sector)

- 19. [...] Selling or leasing land to investors can deprive local populations of access to natural resources linked to their subsistence and cultural heritage; the rights of indigenous children may be particularly at risk in this context.
- 29. [...] To meet this obligation, States should provide stable and predictable legal and regulatory environments which enable business enterprises to respect children's rights. This includes clear and well-enforced law and standards on labour, employment, health and safety, environment, anti-corruption, land use and taxation that comply with the Convention and the Optional Protocols thereto.
- 36. States should put in place measures to ensure that business activities take place within appropriate legal and institutional frameworks in all circumstances regardless of size or sector of the economy so that children's rights can be clearly recognized and protected. Such measures can include: awareness-raising, conducting research and gathering data on the impact of the informal economy upon children's rights, [...]; implementing clear and predictable land-use laws; [...]
- 38. Business enterprises increasingly operate on a global scale through complex networks of subsidiaries, contractors, suppliers and joint ventures. Their impact on children's rights, whether positive or negative, is rarely the result of the action or omission of a single business unit, whether it is the parent company, subsidiary, contractor, supplier or others. Instead, it may involve a link or participation between businesses units located in different jurisdictions. For example, suppliers may be involved in the use of child labour, subsidiaries may be engaged in land dispossession [...]

3. CESCR CONCLUDING OBSERVATIONS

- 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)
- 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)
- 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.
 - 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*)

4. UNIVERSAL PERIODIC REVIEWS

- Turkey to Tuvalu (2009): Continue cooperation with OHCHR with a view to making necessary improvements in the fields of legislative reform on the punishment of sexual abuse of children, land and family laws, and the establishment of a national human rights commission and a human rights office.
- Israel to Guinea (2010): Enact without delay national legislation on domestic violence and marital rape and all forms of sexual abuse, and ensure equal rights for women, in law and in practice, in the areas of land ownership, inheritance, marriage and the protection of women and children, as recommended by the committee on the elimination of discrimination against women.

5. SPECIAL PROCEDURES

SR Indigenous- Colombia, Ecuador (2006)

- In the inter-Andean corridors and the Andean heathlands, where demographic pressure on the land's limited resources is greater, indigenous agricultural production and living conditions are precarious, causing growing emigration to the cities and abroad, a phenomenon that particularly affects indigenous communities. Indigenous women and children are particularly vulnerable in this process.

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.

RSG IDPs- Iraq (2011)

The representative recommends that the Kurdistan regional government (KRG) authorities, in coordination with the federal government, develop, in accordance with international standards (in particular the guiding principles), an action plan to address the immediate social needs of and durable solutions for the 30,000 IDP families in the region within broader national displacement 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 improved dropouts due to poverty, and access health More targeted assistance programmes would also be necessary to address the specific problems of particularly vulnerable IDPs (including due to chronic poverty) and groups at risk of abuse or exploitation, including female-headed households, separated children, and children who have taken on the role of breadwinners.

SR Extreme Poverty- Namibia (2013)

- Review the Married Persons Equality Act of 1996 to eliminate all discriminatory provisions, including those affecting marriage, land ownership and inheritance rights.

6. JURISPRUDENCE

Inter-American Commission on Human Rights

Marino Lopez et al. v. Colombia (2011)

- 333. The Colombian State has recognized, through its Constitutional Court, the differentiated impact caused by displacements in children and adolescents, which is most critical when it affects afro-descendant communities 355.

- 334. In the present case, during the armed operations the children suffered from the violence caused by the State and which provoked their forced displacement. In this respect, it should be stressed that Article 37.a of the Convention on the Rights of the Child establishes that States must ensure that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."
- 335. For its part, the Convention on the Rights of the Child provides that children belong to an ethnic minority shall not be denied the right to enjoy their own culture, in common with the other members of the group.356 Accordingly, the Committee on the Rights of the Child has established that to determine what are the overriding interests of children from minority groups,357 the State authorities must take into account their cultural rights.358 This obligation is coupled with the States' duty to provide children with an education designed to teach them their own cultural identity and values,359 which must continue even in cases of displacement.360 The Human Rights Committee has also established that if a child belonging to an ethnic minority is placed outside his or her community, the State must adopt special measures so that the child can preserve its cultural identity.361

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).
- 172. The Court must highlight the special gravity of the situation of the children and the elderly members of the Yakye Axa Community. The Court has established, in previous cases, that regarding the right to life of children, the State has, in addition to the obligations regarding all persons, the additional obligation of fostering the protection measures mentioned in Article 19 of the American Convention. On the one hand, it must play the role of guarantor with greater care and responsibility, and it must take special measures based on the principle of the best interests of the child. [FN207] In the instant case, the State has the obligation, inter alia, of providing for the children of the Community the basic conditions to ensure that the situation of vulnerability of their Community due to lack of territory will not limit their development or destroy their life aspirations. [FN208]

[FN207] See Case of the "Juvenile Reeducation Institute", supra note 200, para. 160; Case of the Gómez Paquiyauri brothers, supra note 192, paras. 124, 163-164, and 171; Case of Bulacio, supra note 10, paras. 126 and 134; and Case of the "Street Children" (Villagrán Morales et al.), supra note 182, paras. 146 and 191. Likewise, see Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60.

[FN208] See Case of the "Juvenile Reeducation Institute", supra note 200, para. 160; Juridical Condition and Human Rights of the Child, supra note 207, paras. 80-81, 84, and 86-88, and Case of the "Street Children" (Villagrán Morales et al.), supra note 182, para. 196.

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 indispensible 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.

European Court of Human Rights

Case of Marckx v. Belgium (1974)

[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).
- 65. However, the limitation applies only to unmarried and not to married mothers. Like the Commission, the Court considers this distinction, in support of which the Government put forward no special argument, to be discriminatory. In view of Article 14 (art. 14) of the Convention, the Court fails to see on what "general interest", or on what objective and reasonable justification, a State could rely to limit an unmarried mother's right to make gifts or legacies in favour of her child when at the same time a married woman is not subject to any similar restriction. In other respects, the Court refers, mutatis mutandis, to paragraphs 40 and 41 above.

C. Indigenous peoples

1. CESCR GENERAL COMMENTS

General Comment 12 (Right to Food)

- 13. 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.

General Comment 14 (Right to Health)

- 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.

General Comment 15 (Right to Water)

- 7. [...] 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 parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.
- 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 [...] indigenous peoples [...] In particular, States parties should take steps to ensure that:
 - (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;

General Comment 21 (Right to Take Part in Cultural Life)

- 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 [...] 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.
- 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.
 - (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:
- 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:
- [...] 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:
- 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.
- 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.
- 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.

2. OTHER TREATY MONITORING BODIES

HRC General Comment 23 (Rights of Minorities)

- 7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially 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 5/. 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.

CERD General Recommendation 23 (Rights of Indigenous Peoples)

- The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.
- 4. The Committee calls in particular upon States parties to:
 - (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
 - (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
 - (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs [...].
- The Committee especially calls upon States parties 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 deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

3. CESCR CONCLUDING OBSERVATIONS

- The Committee is concerned that the State party does not give sufficient protection of the inalienable rights of indigenous people to their lands, territories, waters and maritime areas, and other resources, as manifested by the fact that Mãori free, prior and informed consent on the use and exploitation of these resources has not always been respected (arts. 1, para.2; and 15). (New Zealand)
- The Committee notes with concern that the system of land tenure in the State party is out of step with the country's economic and cultural situation, and that it makes some indigenous population groups and small-scale farmers vulnerable to land grabs. It is also concerned about obstacles such as prohibitive land transaction fees that bar the way to land ownership, particularly by women (art. 11, para. 1 (a)). (Cameroon)
- The Committee is concerned about the adverse effects of the exploitation of natural resources, particularly mining operations and oil exploration in indigenous territories, which is carried out in violation of the right of indigenous people with regard to their ancestral lands and natural resources. (Chad)
- 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)
- 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). (Australia)
- 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. (*Australia*).

- The Committee notes with concern the adverse effects that economic activities connected with the exploitation of natural resources, especially mining operations, carried out in indigenous territories continue to have on the right of indigenous peoples to their ancestral domains, lands and natural resources, as recognized in the 1997 Indigenous Peoples Rights Act (IPRA). The Committee is concerned about the conflict of laws between the 1995 Mining Act and IPRA, and notes in particular that section 56 of the IPRA, which provides for the protection of property rights already existing within the ancestral domains, de facto risks to undermine the protection of the rights recognized to indigenous peoples under the Act. (arts. 1, 11, 12 and 15)

The Committee urges the State party to fully implement the 1997 Indigenous Peoples Rights Act (IPRA), in particular by ensuring the effective enjoyment by indigenous peoples of their rights to ancestral domains, lands and natural resources, and avoiding that economic activities, especially mining, carried out on indigenous territories adversely affect the protection of the rights recognized to indigenous peoples under the Act. (*Philippines*)

- The Committee notes with concern that Act No. 26160 (extended by Act No. 26554), regarding the possession and ownership of lands traditionally occupied by indigenous peoples, has not been fully implemented. It is also concerned about delays in providing indigenous communities with ownership titles to such lands or territories (arts. 1, 11, 12 and 15). (Argentina)
- The Committee is particularly concerned by the negative consequences of lithium exploitation in Salinas Grandes (Salta and Jujuy provinces) on the environment, access to water, way of life and subsistence of indigenous communities (arts. 1, 11 and 12). (Argentina)
- The Committee is concerned about cases in which the increased use of chemical pesticides and transgenic soya seeds in regions traditionally inhabited or used by indigenous communities have negatively affected these communities. It worries the Committee that these communities find it increasingly difficult to apply their traditional farming methods, and that as a consequence, this may become an important obstacle to the access to safe, adequate and affordable food. (Argentina)
- 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)
- 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 notes with concern the lack of constitutional recognition of indigenous peoples in the State party and that indigenous peoples, despite the existence of various programmes and policies to improve their situation, remain disadvantaged in the enjoyment of their rights guaranteed by the Covenant. It also regrets that the State party has not ratified ILO Convention No. 169 (1989) concerning indigenous and tribal peoples, and that unsettled claims over indigenous lands and national resources remain a source of conflict and confrontation. (Chile)
- The Committee is concerned that infrastructure, development and mining megaprojects are being carried out in the State party without the free, prior and informed consent of the affected indigenous and Afro-Colombian communities. (Colombia)
- 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. (Costa Rica)
- 9. The Committee reiterates its concern about the failure to undertake consultations as a basis for obtaining the prior, freely given and informed consent of indigenous peoples and nationalities for natural resource development projects that affect them. (Ecuador)
- 10. The Committee is concerned about the criminal investigations and convictions of social and indigenous leaders who took part in public demonstrations protesting the bills submitted by the executive to the legislature concerning water management and development projects that would have an impact on natural reserves such as that of Lake Kimsakocha. (*Ecuador*)
- 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)
- 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 develop land titling plans in order to safeguard campesinos' ownership of their land and establish mechanisms for preventing forced sales in rural areas. (*Ecuador*)

- 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*)
- 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)
- 8.The Committee urges the State party to take the necessary measures, including legislative measures, to: (a) prevent the eviction of peasant and indigenous families who are occupying the land; (b) address the claims made by peasant and indigenous families and ensure that they are not repressed; (c) follow up on complaints filed with the Office of the Public Prosecutor; (d) ensure that the judicial authorities take the provisions of the Covenant into account when handing down their decisions; and (e) investigate, bring to trial and punish those responsible for forced evictions and violations related to the rights recognized by the Covenant. (*Paraguay*)
- 12. The Committee deplores 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)
- 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)
- The Committee recommends that the State party review its legislation and adopt all appropriate measures with a view to continuing agrarian reform and addressing land tenure issues, in such a manner as to take account of the needs of the campesinos and of the land rights of indigenous populations. (Honduras)

- The Committee is concerned about reports that members of indigenous and local communities opposing the construction of the La Parota hydroelectric dam or other projects under the Plan Puebla-Panama are not properly consulted and are sometimes forcefully prevented from participating in local assemblies concerning the implementation of these projects. It is also concerned that the construction of the La Parota dam would cause the flooding of 17,000 hectares of land inhabited or cultivated by indigenous and Local farming communities, that it would lead to environmental depletion and reportedly displace 25,000 people. It would also, according to the Latin American Water Tribunal, violate the communal and rights of the affected communities, as well as their economic, social and cultural rights. (Mexico)
- 11. The Committee expresses its concern at the existence of racial prejudice against indigenous people, especially in the Atlantic Autonomous Regions and in particular against indigenous and Afro-descendant women. The Committee also regrets the many problems affecting indigenous peoples, including serious shortcomings in the health and education services; and the lack of an institutional presence in their territories; and the absence of a consultation process to seek communities' free, prior and informed consent to the exploitation of natural resources in their territories. In this regard, the Committee notes that, more than six years after the Inter-American Court's judgement in the Awas Tingni case, that community still does not have title to its property. Furthermore, the territory of Awas Tingni is still exposed to unlawful acts by settlers and loggers (art. 2, para. 2). (Nicaragua)
- 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*)
- 26. The Committee is concerned that the State party's measures for the preservation and promotion of Sami culture do not sufficiently guarantee the right of the Sami people to enjoy their traditional means of livelihood (art. 15).
- The Committee recommends that the State party take steps to preserve and promote the traditional means of livelihood of the Sami people, such as reindeer-grazing and fishing. (Norway 2014)
- 26. The Committee urges the State party to ensure that the Finnmark Act, which is currently being considered by parliament, gives due regard to the rights of the Sami people to participate in the management and control of natural resources in the county of Finnmark. The Committee requests the State party to provide in its next periodic report updated information about the implementation of the Finnmark Act and the extent to which the opinions of representatives of the Sami people have been taken into consideration. (Norway 2005)
- 21. The Committee is concerned that the State party has not applied the principle of cultural self-identification in relation to the recognition of the Thule Tribe of Greenland as a distinct indigenous community (art. 15).

The Committee recommends that the State party take steps to recognize the Thule Tribe of Greenland as a distinct indigenous community capable of vindicating its traditional rights, including, to maintain its cultural identity and use its own language. (Denmark)

While taking note of the measures taken by the State party, in particular the adoption in February 2009 of a policy framework for the sustainable development of the indigenous peoples in the north, Siberia and the far east of the Russian Federation, the corresponding action plan for 2009-2011, and the federal target programme for the economic and social development of the indigenous peoples until 2011, the Committee is concerned at the lack of concrete outcomes of the new policy, action plan and target program. The Committee is also concerned that changes to federal legislation regulating the use of land, forests and water bodies, in particular the revised Land (2001) and Forest (2006) Codes and the new Water Code, deprive indigenous peoples of the right to their ancestral lands, fauna and biological and aquatic resources, on which they rely for their traditional economic activities, through granting of licences to private companies for development of projects such as the extraction of subsoil resources (art 2, para. 2).

The Committee recommends that:(a) The State party incorporate the right of indigenous peoples to their ancestral lands into the revised Land Code and the new revised draft Law on Territories of Traditional Nature Use, and the right to free access to natural resources on which indigenous communities rely for their subsistence into the Forest and Water Codes;

- (b) Seek the free informed consent of indigenous communities and give primary consideration to their special needs prior to granting licences to private companies for economic activities on territories traditionally occupied or used by those communities;
- (c) Ensure that licensing agreements with private entities provide for adequate compensation of the affected communities; (d) Intensify its efforts to effectively implement the federal target programme for the economic and social development of the indigenous peoples, extend it to all peoples that self-identify as indigenous;
- (e) Adopt and implement by the next periodic report, the new revised draft law on territories of traditional nature use of indigenous numerically small peoples of the north, Siberia and the far east of the Russian Federation;
- (f) The Committee urges again the State party to consider ratifying ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.
- 34. [...] The Committee is also concerned about the lack of adequate protection in the legal system of the State party of the right of indigenous peoples in the north, Siberia and the far east, to their ancestral lands and to the traditional use of their natural resources. It is also concerned about the lack of adequate protection of their intellectual property rights and of information on intellectual property rights (art. 15).
- [...] The Committee further recommends that the State party include in the new drafts of law being developed clear and precise norms for the effective protection of the

right of indigenous peoples in the north, Siberia and the far east, to their ancestral lands, natural resources and cultural heritage, including protection of their intellectual property rights to their works which are an expression of their traditional culture and knowledge. (Russian Federation)

- 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. The Committee also reiterates its regret that the State party has not yet ratified ILO Convention No. 169 concerning Indigenous and Tribal People. (arts. 1, 2.2, and 15).

The Committee urges the State party to ensure the adoption of the Nordic Sami Convention and consider ratifying ILO Convention No. 169. It also recommends the expeditious resolution of the Sami land and resource rights issues by introducing appropriate legislation, in cooperation with the Sami communities. (Sweden)

- 11. The Committee is concerned that in spite of the efforts made by the State party to solve the question of the ownership and use of land in the Sámi Homeland, the prevailing legal uncertainty surrounding this issue negatively affects the right of the Sámi to maintain and develop their traditional culture and way of life, in particular reindeer herding. The Committee also notes that failure to resolve the issue of land rights in the Sámi Homeland has so far prevented Finland from ratifying the International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.
 - 20. The Committee urges the State party to adopt all necessary measures to ensure that logging and other activities currently carried out by private actors in the Sámi Homeland do not negatively affect the right of the Sámi to maintain and develop their traditional culture and way of life, in particular reindeer herding, and the enjoyment of their economic, social and cultural rights. The Committee also urges the State party to find an adequate solution to the question of the ownership and use of land in the Sámi Homeland in close consultation with all parties concerned, including the Sámi Parliament, and then to ratify ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries as a matter of priority. (Finland)
- 15. The Committee is deeply concerned about the most recent FAO global forest survey estimating that the State party has lost 29 per cent of its primary tropical forest cover over the last five years, one of the most serious cases being the continuing destruction of the Prey Long forest in Northern Cambodia. The Committee is also concerned about the reports that the rapid increase in economic land concessions in the last several years, even within the protected zones, is the major factor in the degradation of natural resources, adversely affecting the ecology and biodiversity, resulting in the displacement of indigenous peoples from their lands without just compensation and resettlement, and in the loss of livelihood for rural communities who depend on land and forest resources for their survival. (art. 1). (Cambodia)
- 16. The Committee notes with concern the adverse effects that economic activities connected with the exploitation of natural resources, especially mining operations, carried out in indigenous territories continue to have on the right of indigenous

peoples to their ancestral domains, lands and natural resources, as recognized in the 1997 Indigenous Peoples Rights Act (IPRA). The Committee is concerned about the conflict of laws between the 1995 Mining Act and IPRA, and notes in particular that section 56 of the IPRA, which provides for the protection of property rights already existing within the ancestral domains, de facto risks to undermine the protection of the rights recognized to indigenous peoples under the Act. (arts. 1, 11, 12 and 15) (*Philippines*)

4. UNIVERSAL PERIODIC REVIEWS

- Nigeria to Argentina: Protection of indigenous peoples' right to land, to own and possess their land.
- Belgium, Ghana, Norway, Slovakia and Poland to Brazil: Improve the fate of people fighting for access to land in rural zones. Ensure the rights of indigenous peoples by ensuring that they are able to defend their constitutional right to ancestral land without discrimination, in particular the rights to traditional land conflicts, territories and resources, and their right to be consulted. Pakistan welcomed the land reforms made in Brazil but raised question on the implementation. Venezuela requested more information on agrarian reforms regarding land rights.
- Djibouti to Burundi: Improve living condition of Batwa community (IPs) and their access to land.
- Bulgaria, Cape Verde to Cameroon: Amend or repeal all discriminatory legislation, including discrimination regarding land ownership and to ensure the compatibility between customary law and statutory law. Strengthen measures to promote the rights of indigenous populations of the country, particularly, with respect to their access to the citizenship, land, justice and education.
- Dominican Republic, Serbia, Australia, Holy See, Bolivia, Panama, Canada, Switzerland, Germany, Norway, Mexico and New Zealand to Colombia: Implement the Victim and Land Restitution Law with justice and verify that it becomes part of an integral policy of development. Strengthen relevant institutions in order to take more effective measures at the national, regional and local level to guarantee the protection of persons involved (human rights defenders) in land restitution procedures. Take all necessary measures to ensure the full and sustainable protection of indigenous peoples and peoples of African descent, in terms of both physical security and land rights.
- Republic of Korea, Ireland and Slovakia to Guatemala: Adopt a legal instrument to protect the rights of the indigenous population especially in cases of land disputes and mining development. An appropriate and meaningful consultation procedure that will ensure genuine, free and informed consent of indigenous peoples in land disputes, and in rural areas reform eviction procedures to comply with international standards.
- Norway to Indonesia: Ensure the rights of indigenous peoples and local forest dependent peoples in law and practice, in particular regarding their rights to traditional lands, territories and resources.

- Norway and Finland to Malaysia: Ensure the rights of indigenous peoples and local forest dependent peoples in law and practice, in particular regarding their right to traditional lands, territories and resources. Take measures, with full and effective participation of indigenous peoples, to address the issues highlighted in the National Enquiry into the Land Rights of Indigenous Peoples.
- The United Kingdom to Mexico: Strengthen and expand the Mechanism to Protect Human Rights Defenders and Journalists including by providing it with adequate resources and powers to carry out its work and creating a mechanism for consultation with indigenous and other communities affected by land transactions.
- Mexico to Russian Federation: Harmonize the various laws on the rights of indigenous peoples, particularly regarding their access to land and natural resources.
- Slovenia to Belize: Protect Mayan customary property rights in accordance with Mayan customary laws and land tenure practices in consultation with affected Mayan people of the whole Toledo district.
- Denmark to Botswana: Provide access to land and support for the residents of the Reserve, as specified in the United Nations Declaration on the Rights of Indigenous Peoples, and work with the land boards of the various districts to ensure equity in land allocation among all applicants for residential, arable and grazing land, water sources and business sites.
- Holy See to Cameroon: Put in place a special law that will take into consideration the land rights of the pygmy communities.
- Canada, Sweden and Azerbaijan to Chile: Reinforce its efforts to recognize indigenous rights and effectively include them in Chile's legal and administrative structure, and address land claims of indigenous peoples and communities through a process of effective dialogue and negotiation and ensure that the Anti-Terrorism Act (Law 18.314) does not undermine their rights.
- Denmark to Guatemala: Ensure the protection of indigenous peoples' rights and ensure the right of indigenous peoples to be heard before traditional indigenous land is being exploited.
- Norway to Guyana: Consider ratifying ILO Convention No. 169, concerning Indigenous and Tribal Peoples, and take operational steps to implement the United Nations Declaration on the Rights of Indigenous Peoples, including through constitutional and statutory recognition of land and resource rights and effective political participation.
- Austria to Honduras: Enact legislation to protect the land rights of indigenous persons and to ensure that their interests are safeguarded in the context of the exploitation of natural resources.
- Algeria to Japan: Review, inter alia, the land rights and other rights of the Ainu population and harmonize them with the United Nations Declaration on the Rights of Indigenous Peoples.

- Norway to Kenya: Consider ratifying ILO Convention 169, and take steps to implement the United Nations Declaration on the Rights of Indigenous Peoples, including through constitutional and statutory recognition of land and resource rights and effective political participation.
- Hungary to Mongolia: Mandate the Constitutional Court to act upon violations of the land and environmental rights of indigenous and herder peoples, including the right to safe drinking water.
- Sweden to Nicaragua: Ensure that indigenous persons fully enjoy all human rights, including the rights to education, adequate access to health services and land rights.
- Norway to Panama: Take operational steps to implement the United Nations Declaration on the Rights of Indigenous Peoples, including the recognition of the right to land and natural resources of all indigenous peoples in Panama.
- Holy See, Spain, Norway, Canada, Norway and France to Paraguay: Create a specific national mechanism to address any complaint by the indigenous population in relation to the use of its traditional land. Take measures in order to ensure the compliance with the ILO Convention No. 169 and the Declaration on the Rights of Indigenous Peoples, including the recognition of the right to land and natural resources of all indigenous peoples in Paraguay. Fully implement the rulings of the Inter-American Court of Human Rights relating to the Yakya Axa and Sawhoyamaxa communities, rendered in 2005 and 2006 respectively, which stipulate, particularly, that the lands claimed by these two communities must be restored to them.
- Canada, Hungary, Norway, UK and Netherlands to Suriname: Acknowledge legally the rights of indigenous and tribal peoples to own, develop, control and use their lands, resources and communal territories according to customary law and traditional land-tenure system. Take the necessary steps to act in compliance with the verdict rendered in 2007 by the Inter-American Court of Human Rights in the Saramaka People case and to respect the right of indigenous people and Maroons to land, regarding logging and mining concessions in the territory of the Saramaka people and enshrine land rights of indigenous and Maroon groups in the Surinamese legal framework.
- Austria and Greece to Sweden: Develop measures in order to ensure that affected Sami communities can take part and participate actively in consultations held between federal government and municipalities on issues related to land rights, water and resources. Initiate further studies on methods by which Sami land and resource rights could be established, taking into account the culture of the Sami community. Transfer the administration of land-user rights and land use to the Sami people.
- Belgium, Finland and Mexico to Tanzania: Harmonize the legislation to eliminate all forms of discrimination against women, notably to ensure equality relating to inheritance and land rights. Launch a credible investigation of forced evictions and land conflicts and use the results of this investigation to help draft new legislation, which fully takes the rights of indigenous peoples into account. Promote a

legal framework giving legal certitude in terms of property, in particular with regard to land ownership and protection against force evictions and recognition of the rights of indigenous people, pastoralists, hunters and gathering peoples.

5. SPECIAL PROCEDURES

SR Food- Guatemala (2006)

Racial discrimination against indigenous communities is not acceptable and must be urgently addressed through broad national campaign. "Land-grabbing" of indigenous lands (as in La Perla case) be stopped.
 Right to land of indigenous communities be recognized, and communities should be protected from forcible expropriation of their lands.

RSG IDPs- Colombia (2007)

- As regards collective land titles of the indigenous and afro-Colombian communities, the authorities declare invalid the titles issued for parts of collective land sold by individuals out of collective property.

SR Indigenous- Surinam (2011)

- 40. There should also be a review of existing concessions and other third party interests in lands to be demarcated and titled in favor of indigenous and tribal peoples, as required by the Inter-American court in the *Saramaka* case. furthermore, in order to avoid further complications of the land tenure situation and minimize the possibility that indigenous and tribal land rights may be violated, it is advisable that no new concessions be issued within the lands used and occupied by indigenous and tribal peoples until their rights can be clarified and protected, and unless pursuant to the affected groups' free, prior and informed consent. this limitation on new concessions is currently required within the Saramaka territory under the judgment of the Inter-American court, which ordered that "[u]ntil [the] delimitation, demarcation, and titling of the Saramaka territory has been carried out, Suriname must abstain from acts which might lead the agents of the state itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the state obtains the free, informed and prior consent of the Saramaka people".

SR Indigenous- Botswana (2010)

- Certain indigenous groups continue to suffer from a lack of secure land tenure, including access to and use of their ancestral lands and resources, in part due to the non-recognition of these groups' customary land-use practices. In consultation with the affected indigenous peoples, the government should seek to identify the lands traditionally used and occupied by these indigenous groups and incorporate into the land-board system a respect for and recognition of those groups' particular interests in such lands.

In particular, a provision should be made for securing collective landholdings by communities in accordance with traditional land-use patterns.

SR Housing- Cambodia (2006)

- 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.

Until adoption of sub decree on collective ownership of indigenous lands, a moratorium on land sales affecting indigenous peoples should be considered by relevant authorities.

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.

SR Indigenous- South Africa (2005)

All indigenous peoples of South Africa were brutally oppressed by colonial system and apartheid regime up to 1994. Khoi-san were dispossessed of their lands and territories and their communities and cultures were destroyed. Tragic sequels to apartheid cannot be overcome in few years, and SR is fully conscious of tremendous efforts that have been made by democratic government of South Africa to redress many injustices inherited from old regime. Through his consultations with government authorities and Khoi-san people, he is also aware of challenges faced by these communities and their longstanding demands for land rights, official statutory recognition, respect of their cultural identities and full and equal access to social services.

Indigenous women, not only in South Africa but in almost all countries SR has visited, are systematically excluded on matters of land reform policy and on discussions regarding solutions to their problems, in particular those of indigenous rural women.

All indigenous groups face different challenges within national society as result of distinct historical processes and current circumstances. Khomani san in Kalahari were dispossessed of their lands and lost their traditional hunter-gatherer livelihood in process. Today they are probably among poorest and most marginalized indigenous communities in country and their situation requires priority attention.

Whilst they were successful in their land restitution claim of 1999, after many years of struggle, they still have to turn these farms into productive enterprises and they expect government to provide them with more of needed support than they have received so far.

SR Food-Nicaragua (2010)

- Nicaragua should accelerate the process of adoption of the act relating to the indigenous peoples of the pacific, central and northern regions. it should also ratify ILO Convention No. 169 (1989) concerning indigenous and tribal peoples in independent countries, which recognizes the special relationship of these peoples with

the lands or territories which they occupy or otherwise use, and in particular the collective aspects of this relationship (art. 13). Pending that ratification, as a minimum it should act in conformity with the united nations declaration on the rights of indigenous peoples and give legal recognition and protection to these lands, territories and resources, with due respect for the customs, traditions and land tenure systems of the indigenous peoples concerned. it should also put in place a rapid alert system in order to protect indigenous peoples from the impacts of weather-related events, and support them in building the resilience of their food systems against climate change.

SR Indigenous- Botswana (2010)

The government should strengthen and adopt new affirmative measures, consistent with universal human rights standards, to protect the rights of non-dominant indigenous groups to retain and develop the various attributes of their distinctive cultural identities, particularly those related to land rights, approaches to development, and political and decision-making structures.

SR Indigenous- Kenya (2007)

- The government should fully implement the recommendations of the Ndungu report, giving particular attention to the rights of indigenous and other marginalized communities to their lands and natural resources.

Stronger guarantees against the dispossession of indigenous communal lands should be incorporated in the land legislation, allowing for room to challenge fraudulent first registrations in the courts.

SR Indigenous- South Africa (2005)

- SR is encouraged by government's declared commitment to address demands of indigenous groups in country and by ongoing effort to formulate and implement appropriate legislation and policies to address such issues as land restitution, multilingual and multicultural education, representation of traditional authorities in public life, and delivery of health and other services.

SR Indigenous- Brazil (2009)

- A problem often to be confronted in the process of recognizing and securing indigenous land is non-indigenous occupation of the land. This problem is especially pervasive in areas outside of the Amazon region where there is heavy non-indigenous settlement, including in the agribusiness belt in southwestern

Brazil.

Tensions between indigenous peoples and non-indigenous occupants have been especially acute in the state of Mato Grosso do Sul, where indigenous peoples suffer from a severe lack of access to their traditional lands, extreme poverty and related social ills, giving rise to a pattern of violence that is marked by numerous murders of indigenous individuals as well as by criminal prosecution of indigenous individuals for acts of protest.

SR Food- Cameroon (2012)

- 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.

SR Food-Bolivia (2008)

- The programme of agrarian reform should also be speeded up to regularize land titles, improve protection of the lands of indigenous communities and improve access to land for campesinos, communities and rural families.

SR Indigenous- Russian Federation (2010)

Legislated land and resource use guarantees for indigenous people should be able to withstand any future land reform, hunting or fishing law amendments, and any other new laws that affect indigenous communities. Urgent attention should be paid to ensuring proper modifications or revisions to the land code, the federal law on hunting, and other legal provisions that currently contradict or hinder indigenous land and resource rights.

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.

It is essential that the state urgently bring coherence, consistency and certainty to the various laws that concern the rights of indigenous peoples and particularly their access to land and resources. In accordance with international standards, guarantees for indigenous land and resource rights should be legally certain; implemented fully and fairly for all indigenous communities; consistent between federal and regional frameworks; and consistent throughout various legislation dealing with property rights, land leases and auctions, fisheries and forestry administration, national parks and environmental conservation, oil development and regulation of commercial enterprises.

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.
- 86. Although the government has taken important steps to recognize and protect the rights of indigenous peoples to their traditional lands and natural resources, there is still a widespread lack of legal certainty in Argentina regarding these rights.

SR Indigenous- Bolivia (2009)

- The main challenges to the enjoyment of the rights of the indigenous peoples in Bolivia are access to land and recognition of their traditional territories, in both the Andean region, which is characterized by the scarcity and fragmentation of indigenous land ownership, and the low-lying Amazonian, Chaco and eastern regions, where indigenous territories are threatened by the powerful interests of the farming and forestry industries.

The lack of access to land and territory perpetuates low levels of human development, social exclusion and other phenomena affecting the majority of indigenous communities.

SR Cultural Rights- Brazil (2011)

- Address the concerns expressed by the special rapporteur on the rights of indigenous peoples, particularly in connection with land demarcation and ensuring indigenous peoples' right to self-determination.

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 HR Defenders- Honduras (2012)

- 135. Efforts to mediate in land ownership disputes should be strengthened. Consultations with indigenous communities should be undertaken in accordance with ILO Convention No. 169 and the United Nations declaration on the rights of indigenous peoples.

SR Indigenous- Finland, Norway, Sweden (2011)

- 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.

IE Minorities- Ethiopia (2007)

- The recognized system of land tenure should include protection of the use of land by pastoralist groups, and recognize individual and a variety of collective ownership arrangements.

6. JURISPRUDENCE

Human Rights Committee

Mahuika et al. v. New Zealand (1993)

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.¹ 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 <u>in abstracto</u> 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 belonging to a minority will not necessarily amount to a denial of the right under article 27."
- 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. 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. 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 (1999)

- 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

¹See <u>inter alia</u> 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).

²Committee's Views on case No. 511/1992, Lansmann et al. v. Finland, CCPR/C/52/D/511/1992, para. 9.4 ³General Comment No. 23, adopted during the Committee's 50th session in 1994, paragraph 3.2.

⁴ 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).

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 right⁵. The Committee must therefore reject the author's argument that the requirement of obtaining a fishing licence would in itself violate his rights under article 27.

Äärelä and Näkkäläjärvi v. Finland (1997)

- 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

⁵ 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 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.

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 (2001)

- 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. 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 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.
- 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.

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⁶ Views on case no. 197/1985 (<u>Kitok v. Sweden</u>), 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.

- 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. 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 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.

Inter-American Commission on Human Rights

Marino Lopez et al. v. Colombia (2011)

- 338. From the findings of fact it is apparent that the Afro-descendant communities displaced from the Cacarica basin were the victims of bombardments, ransacking and destruction of their homes. These communities were displaced from their territory, and prevented from enjoying their property, lands and the resources of traditional use found there.

⁷ Lubicon Lake Band v. Canada, op. cit., para. 32.2.

⁸ Communications Nos. 511/1992 and 1023/2001, *Länsman v. Finland*, Views adopted on 26 October 1994 and 15 April 2005 respectively.

- 339. Article 21 of the American Convention establishes 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.
- 340. The Inter-American Court has established that among the indigenous peoples there is a communitarian tradition of communal collective ownership of the land, in the sense that ownership is not centered on any one individual but on the group and the community. In this regard, it has established that 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.364
- 341. When applying Article 29 of the American Convention to cases relating to indigenous peoples and tribes, the IACHR has established that the Convention must be interpreted to include principles concerning the collective rights of indigenous peoples.365 In addition, the right to ownership of land has been recognized by the IACHR as one of the rights of indigenous peoples and tribes having a collective aspect.366
- 342. It is based on the collective dimension of the indigenous peoples and tribes that the Commission and Court have recognized that they have a particular relationship with their lands and resources traditionally occupied and used, by virtue of which these lands and resources are considered joint property and enjoyment for the communities, as is the case with the Saramaka tribal peoples.367
- 343. The Court has also established that given the close link between the indigenous peoples and their traditional lands and the natural resources tied to their culture which are found there, these and the intangible elements that emerge from them, must be safeguarded by Article 21 of the American Convention. In this respect, the Court has considered that the term "property" 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."368
- 344. The Commission observes that the Afro-descendant communities of Cacarica are made up of tribal peoples, as acknowledged by the Constitutional Court of Colombia.369 These tribal peoples also maintain a close bond with their land, as part of their ancestral tradition, and therefore both their traditional lands as well as their natural resources must be safeguarded by Article 21 of the American Convention, in their collective dimension.

- 192. The case-law of the inter-American human rights system has repeatedly recognized indigenous peoples' property rights over their ancestral territories, and the duty of protection that emanates from Article 21 of the American Convention and Article XXIII of the American Declaration, interpreted in light of the provisions of the International Labour Organization (ILO) Convention No. 169, the United Nations Declaration of the Rights of Indigenous Peoples, the Draft American Declaration of the Rights of Indigenous Peoples and other relevant sources, all of which compose a coherent corpus iuris that defines the obligations of OAS Member States with regard to the protection of indigenous property rights.280 In this respect, the IACHR has stated that indigenous and tribal peoples have a communal property right over the lands they have used and occupied traditionally, "and that the character of these rights is a function of ... customary land use patterns and tenure."281 Along these same lines, the Inter-American Court has indicated: "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."282
- 193.In addition to their collective conception of property rights, the indigenous peoples have a special, unique, and internationally protected relationship with their ancestral territories, which is absent in the case of non-indigenous communities. This special and unique relationship between indigenous peoples and their traditional territories enjoys international legal protection. As the IACHR and the Inter-American Court have argued, preserving the particular connection between the indigenous communities and their lands and resources is bound up with the very existence of these peoples, and therefore "warrants special measures of protection." 283 The right to property of indigenous and tribal peoples protects this close tie they maintain with their territories and with the natural resources linked to their culture that are found there 284
- 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
- 195. Similarly, the IACHR and the Inter-American Court have established that indigenous peoples, as collective subjects distinguishable from their individual members, are rightsholders recognized by the American Convention. In that respect, in its recent judgment in Case of Kichwa Indigenous People of Sarayaku v. Ecuador, the Inter-American Court stated that "international legislation concerning indigenous or tribal communities and peoples recognizes their rights as collective subjects of International Law and not only as individuals." In addition, the Court stated that "[g]iven that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise certain rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or issued in this Judgment should be understood from that collective perspective."287 In that

sense, and as in previous cases, 288 the IACHR will analyze the present case from a collective perspective.

Kichwa Indigenous People of Sarayaku v. Ecuador (2012)

- 145. Article 21 of the American Convention protects the close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from these 156 The indigenous peoples have a community-based tradition related to a form of communal collective land ownership; thus, land is not owned by individuals but by the group and their community.157 These notions of land ownership and possession do not necessarily conform to the classic concept of property, but deserve equal protection under Article 21 of the American Convention. Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people.158
- 146. Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their way of living. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.159
- 147. Furthermore, lack of access to their territories may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities;160 or from having access to their traditional health systems and other socio-cultural functions, thereby exposing them to poor or infrahuman living conditions and to increased vulnerability to diseases and epidemics, and subjecting them to situations of extreme vulnerability that can lead to the violation of various human rights, as well as causing them suffering and jeopardizing the preservation of their way of life, customs and language.161
- 148. In order to determine the existence of a relationship between indigenous peoples and communities and their traditional lands, the Court has established: (i) that this relationship can be expressed in different ways depending on the indigenous group concerned and its specific circumstances, and (ii) that the relationship with the land must be possible. The ways in which this relationship is expressed may include traditional use or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence such as seasonal or nomadic hunting, fishing or gathering; use of natural resources associated with their customs or other

elements characteristic of their culture.162 The second element implies that Community members are not prevented, for reasons beyond their control, from carrying out those activities that reveal the enduring nature of their relationship with their traditional lands.163

- 157. For this reason, in the case of *Saramaka v. Suriname*, the Court established that, to ensure that the exploration or extraction of natural resources in ancestral territories did not entail a negation of the survival of the indigenous people as such, the State must comply with the following safeguards: (i) conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to development or large-scale investment plans; (ii) conduct an environmental impact assessment, and (iii) as appropriate, reasonably share the benefits produced by the exploitation of natural resources (as a form of just compensation required by Article 21 of the Convention), with the community itself determining and deciding who the beneficiaries of this compensation should be, according to its customs and traditions.176
- 166. The obligation to consult the indigenous and tribal communities and peoples on any administrative or legislative measure that may affect their rights, as recognized under domestic and international law, as well as the obligation to guarantee the rights of indigenous peoples to participate in decisions on matters that concern their interests, is directly related to the general obligation to guarantee the free and full exercise of the rights recognized in the Convention (Article 1(1)). This entails the duty to organize appropriately the entire government apparatus and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights.216 This includes the obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards.217 Thus, States must incorporate those standards into prior consultation procedures, in order to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions.
- 180. Regarding the moment at which the consultation should be carried out, article 15(2) of ILO Convention No. 169 indicates that "governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any program for the exploration or exploitation of such resources on their lands." On this point, this Court has observed that consultation should take place, in accordance with the inherent traditions of the indigenous people, during the first stages of the development or investment plan and not only when it is necessary to obtain the community's approval, if appropriate, because prior notice allows sufficient time for an internal discussion within the community to provide an appropriate answer to the State.237
- 200. The Court reiterates that the search for an "understanding" with the Sarayaku People, undertaken by the CGC itself, cannot be considered a consultation carried out in good faith, inasmuch as it did not involve a genuine dialogue as part of a process of participation process aimed at reaching an agreement.

- 201. This Court has established in other cases that consultations with indigenous peoples must be undertaken using culturally appropriate procedures; in other words, in keeping with their own traditions.263 For its part, ILO Convention No. 169 provides that "governments shall [...] consult the peoples concerned, through appropriate procedures and in particular through their representative institutions,"264 and take "measures [...] to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means," taking into account their linguistic diversity, particularly in those areas where the official language is not spoken by a majority of the indigenous population.265

Inter-American Court of Human Rights

Sawhoyamaxa 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 legistlation 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 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.

[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]
- 128. The following conclusions are drawn from the foregoing: 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession therof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.

Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights. The instant case is categorized under this last conclusion

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 Sawhoyamaxa 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 Sawhoyamaxa 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.

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.

[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)

- 209. In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good

faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorised under this last conclusion. The African Commission thus agrees that the land of the Endorois has been encroached upon.

- 210. That such encroachment has taken place could be seen by the Endorois' inability, after being evicted from their ancestral land, to have free access to religious sites and their traditional land to graze their cattle. The African Commission is aware that access roads, gates, game lodges and a hotel have all been built on the ancestral land of the Endorois community around Lake Bogoria and imminent mining operations also threatens to cause irreparable damage to the land. The African Commission has also been notified that the Respondent State is engaged in the demarcation and sale of parts of Endorois historic lands to third parties.
- 211. The African Commission is aware that encroachment in itself is not a violation of Article 14 of the Charter, as long as it is done in accordance with the law. Article 14 of the African Charter indicates a two-pronged test, where that encroachment can only be conducted 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'. The African Commission will now assess whether an encroachment 'in the interest of public need' is indeed proportionate to the point of overriding the rights of indigenous peoples to their ancestral lands. The African Commission agrees with the Complainants that the test laid out in Article 14 of the Charter is conjunctive, that is, in order for an encroachment not to be in violation of Article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community and was carried out in accordance with appropriate laws.
- 212. The 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples. In 2005, this point was stressed by the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights who published the following statement:

Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.[FN167]

[FN167] Nazila Ghanea and Alexandra Xanthaki (2005) (eds). 'Indigenous Peoples' Right to Land and Natural Resources' in Erica-Irene Daes 'Minorities, Peoples and Self-Determination', Martinus Nijhoff Publishers. 27th Activity Report of the ACHPR 157

- 213. Limitations on rights, such as the limitation allowed in Article 14, must be reviewed under the principle of proportionality. The Commission notes its own conclusions that "... the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow."[FN168] The African Commission also notes the decisive case of Handyside v. United Kingdom, where the ECHR stated that any condition or restriction imposed upon a right must be "proportionate to the legitimate aim pursued."[FN169]

[FN168]Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95 (1999), para. 42 (hereinafter The Constitutional Rights Project Case

[FN169] Handyside v. United Kingdom, No. 5493/72, Series A.24 (7 December 1976),

para. 49.

- 214. The African Commission is of the view that any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible. In the present Communication, the African Commission holds the view that in the pursuit of creating a Game Reserve, the Respondent State has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve.
- 215. It is also of the view that even if the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need. From the evidence submitted both orally and in writing, it is clear that the community was willing to work with the Government in a way that respected their property rights, even if a Game Reserve was being created. In that regard, the African Commission notes its own conclusion in the Constitutional Rights Project Case, where it says that "a limitation may not erode a right such that the right itself becomes illusory."[FN170] At the point where such a right becomes illusory, the limitation cannot be considered proportionate – the limitation becomes a violation of the right. The African Commission agrees that the Respondent State has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a Game Reserve and the subsequent eviction of the Endorois community from their own land, the Respondent State has violated the very essence of the right itself, and cannot justify such an interference with reference to "the general interest of the community" or a "public need."

Front for the Liberation of the State of Cabinda v. Angola (2006)

- 103. Generally, this Commission has stated in its jurisprudence that the role of the State in relation to the right to property is "to respect and protect this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone.18 One way of fulfilling Charter obligation on the right to

property is therefore to adopt legislation which recognises the principle of ownership and peaceful enjoyment of property. The inclusion of the right to property in the Angolan Constitution is therefore in compliance with the Respondent State's Charter duty.

- 104. With regards to the general question whether a "people" can be bearers of the right to property under the African Charter, this Commission has previously answered in the affirmative in relation to indigenous peoples in Africa.19 The African Commission reaffirms that a collective or communal right to property exists as a component of the right to property in Article 14 of the African Charter. Similar to the individual right to property, the communal right to property entails a state duty to recognise and protect peaceful enjoyment of ownership by a group or people subject to limitation by a state in the interest of public need or in the general interest and in accordance with the provisions of appropriate laws.
- 105. The Commission has also expressed the opinion that natural resources located in land owned or occupied by a people can be the subject of ownership in the context of the right to property under the African Charter.20 In the Commission's view, protection of communal property rights to natural resources as a component of land right enjoyed by indigenous peoples is not alien to the African Charter or to international human rights generally.21 One justification for the protection of this aspect of the right is the strong traditional attachment to their cultural land that indigenous peoples hold on to such that their survival depends on the resources they traditionally extract from the land.22

D. Minorities

1. CESCR GENERAL COMMENTS

General Comment 7 (Forced Eviction)

- 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.

General Comment 15 (Right to Water)

- 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:
- (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;

General Comment 21 (Right to Take Part in Cultural Life)

- 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, [..] and on the right to development also contain important provisions on this subject.
- 16 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.
- 49 d. [...] 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. [...]
- 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.

2. HRC GENERAL COMMENT

HRC General Comment 23 (Rights of Minorities)

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially 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 5/. 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.

3. CESCR CONCLUDING OBSERVATIONS

- 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*)
- 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)

- 35. 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*)

4. UNIVERSAL PERIODIC REVIEWS

- 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.

5. 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 Minorities- Ethiopia (2007)

- Grant land title in recognition of historic usage in order to ensure security of land tenure for all communities, including minorities facing encroachment on traditional lands. The recognized system of land tenure should include protection of the use of land by pastoralist groups, and recognize individual and a variety of collective ownership arrangements.
- 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. Communities relocated according to the law must be consulted regarding appropriate compensation and relocation arrangements, including land of comparable quality.

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.

6. JURISPRUDENCE

Human Rights Committee

Mahuika et al. v. New Zealand (1993)

- 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.9 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 noncommercial 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 belonging to a minority will not necessarily amount to a denial of the right under article 27 "10
- 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. 11 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

¹¹General Comment No. 23, adopted during the Committee's 50th session in 1994, paragraph 3.2.

⁹See 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). ¹⁰Committee's Views on case No. 511/1992, Lansmann et al. v. Finland, CCPR/C/52/D/511/1992, para. 9.4

decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. 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 (1999)

- 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 right¹³. The Committee must therefore reject the author's argument that the requirement of obtaining a fishing licence would in itself violate his rights under article 27.

Äärelä and Näkkäläjärvi 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

¹² 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).

¹³ See inter alia <u>Kitok v. Sweden</u>, communication No. 197/1985, Views adopted on 27 July 1988, CCPR/C/33/D/197/1985 and <u>Länsmann v. Finland</u>, communication No. 511/1992, Views adopted on 26 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.

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 (2001)

- 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. 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 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

¹⁴ Views on case no. 197/1985 (<u>Kitok v. Sweden</u>), 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.

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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 (2006)

- 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. ¹⁵ 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 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

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¹⁵ Lubicon Lake Band v. Canada, op. cit., para. 32.2.

persons belonging to that community would not necessarily amount to a denial of the rights under article 27.¹⁶

E. Human rights defenders

1. CESCR GENERAL COMMENTS

General Comment 12 (Right to Food)

- 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.

General Comment 15 (Right to Water)

- 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

- The Committee expresses its deep concern about the culture of violence and impunity prevalent in the State party and the repression of human rights activists defending economic, social and cultural rights, particularly those defending housing and land rights. The Committee is also concerned about reports that the court system has been used to legitimize forced evictions and falsely prosecute housing rights defenders. (art. 11). (Cambodia)
- The Committee is concerned about the criminal investigations and convictions of social and indigenous leaders who took part in public demonstrations protesting the bills submitted by the executive to the legislature concerning water management and development projects that would have an impact on natural reserves such as that of Lake Kimsakocha. (*Ecuador*).
- The Committee is concerned about reports that members of indigenous and local communities opposing the construction of the La Parota hydroelectric dam or other projects under the Plan Puebla-Panama are not properly consulted and are sometimes forcefully prevented from participating in local assemblies concerning the implementation of these projects. (Mexico)

3. UNIVERSAL PERIODIC REVIEWS

- Ireland to Cambodia (2010): Investigate and prosecute any attacks on or false allegations in relation to human rights defenders, in particular those working with communities to protect land, houses and access to natural resources and prevent forced displacement, an issue that has been reported on by the special rapporteur and the committee on economic, social and cultural rights
- Sweden to Cambodia (2010): Strengthen efforts to protect freedom of expression and the right of all human rights defenders, including those working on land rights issues,

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

to conduct their work without hindrance or intimidation, including by way of safeguarding freedom of assembly and association.

4. SPECIAL PROCEDURES

IE Minorities- Colombia (2011)

- The government must take urgent and effective steps to protect the safety of afro-Colombian leaders, their organizations and the human rights non-governmental organizations that champion their rights. This is particularly crucial with respect to members of community councils and others who are advocating for land restitution.

SR Food- Guatemala (2006)

- Right to land of indigenous communities be recognized, and communities should be protected from forcible expropriation of their lands. Any evictions that take place should be conducted in accordance with human rights law

Impunity for violations of right to food be challenged, and all Guatemalans should be treated equally before law.

Legitimate peaceful protest should be permitted without repression.

Detention and killing of peasant leaders and human rights defenders should be stopped

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.

SRSG HR Defenders- Brazil (2006)

- Much of violence against defenders is rooted in conflicts over land and environmental protection and is perpetrated by powerful non-State actors who, in certain instances, reportedly benefit from collusion of local state authorities. Killings and threats against defenders also occur in number of urban settings at hands so-called "extermination groups", which are reported to have links with certain elements of security forces.

The state must play a more proactive role in mediation of social conflict and in giving legitimacy to interventions by human rights defenders to promote and protect economic, social and cultural rights. In particular defenders must not be left isolated in their struggle for or support of social justice against powerful or influential social entities and economic interests. In this regard the government must consider creating mechanisms to oversee the performance of agencies such as Incra, Ibama and Funai.

This would be a step towards addressing the serious issue of delays in the implementation of policies or completion of processes that relate to allocation or restoration of land.

Much of the violence against defenders is rooted in conflicts over land and environmental protection.

The social movements that have emerged to resist the violation of economic, social and cultural rights are an asset for Brazilian democracy.

The role of human rights defenders in strengthening these movements deserves better projection by the media and stronger political support by the state.

SR Cambodia (2013)

- 69. Human rights defenders and especially those defending land rights should be allowed to carry on with their work without intimidation and harassment.

SRSG Cambodia (2008)

 No one should be imprisoned in relation to protecting their rights to land and housing and anyone detained in this context should be released.

5. JURISPRUDENCE

Human Rights Committee

Coleman v. Australia (2003)

- 2.1 On 20 December 1998, the author delivered a public address at the Flinders Pedestrian Mall, Townsville, Queensland, without a permit. Standing on the edge of a water fountain in the mall with a large flag with a pole over his shoulder and then moving on to a concrete table close to the fountain, he loudly spoke for some 15 to 20 minutes on a range of subjects including bills of rights, freedom of speech and mining and land rights. On 23 December 1998, he was charged under section 8(2)(e) of *Townsville City Council Local Law No 39* ("the bylaw"), for taking part in a public address in a pedestrian mall without a permit in writing from the town council. On 3 March 1999, the author was convicted in the Townsville Magistrates Court for delivery of an unlawful address and fined \$300, with 10 days imprisonment on default, plus costs.
- 7.2 The Committee notes that the author's arrest, conviction and sentence undoubtedly amounted to a restriction on his freedom of expression, protected by article 19, paragraph 2, of the Covenant. The basis for restriction, set out in the bylaw, was prescribed by law, which leads to the question of whether the restriction was necessary for one of the purposes set out in article 19, paragraph 3, of the Covenant, including respect of the rights and reputations of others or public order (*ordre public*).
- 7.3 The Committee notes that it is for the State party to show that the restriction on the author's freedom of speech was necessary in the present case. Even if a State party may introduce a permit system aiming to strike a balance between an individual's freedom of speech and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with

¹⁷ Section 8 of the bylaw provided at the material time as follows:

[&]quot;(1) This bylaw does not apply to the setting up and use of booths for religious, charitable, educational or political purposes or of a booth to be used at or near a polling place for, or for a meeting in connection with, an election in respect of either House of the Commonwealth Parliament, the Legislative Assembly or a Local Authority.

⁽²⁾ No person shall – (e) take part in any public demonstration or any public address.

⁽³⁾ A person who desires to obtain a permit for the purposes of this bylaw shall make application in writing therefore in the prescribed form. The application shall be lodged with the Council [which may grant a permit, with or without conditions, or refuse it]

article 19 of the Covenant. In the present case, the author made a public address on issues of public interest. On the evidence of the material before the Committee, there was no suggestion that the author's address was either threatening, unduly disruptive or otherwise likely to jeopardise public order in the mall; indeed, police officers present, rather than seeking to curtail the author's address, allowed him to proceed while videotaping him. The author delivered his speech without a permit. For this, he was fined and, when he failed to pay the fine, he was held in custody for five days. The Committee considers that the State party's reaction in response to the author's conduct was disproportionate and amounted to a restriction of the author's freedom of speech which was not compatible with article 19, paragraph 3, of the Covenant. It follows that there was a violation of article 19, paragraph 2, of the Covenant.

F. IDP/refugees/migrants

1. CESCR CONCLUDING OBSERVATIONS

- The Committee also recommends that the State party ensure the effective enjoyment of rights covered by the Covenant by refugees and implement measures aimed at reintegrating returnees, in particular regarding access to land, free access to education, health care and income generating activities. (Rwanda)
- 19. The Committee is concerned that many internally displaced persons, following the violence between 1992 and 2002, continue to live in slums and that return to their areas of origin is slow due to, among other factors, the inadequate standard of living in those rural areas (art. 11). The Committee recommends that the State party implement measures to facilitate the return of internally displaced persons to their areas of origin, including by taking steps to increase the standard of living in rural areas, focusing in particular on access to safe drinking water, general infrastructure and access to quality health-care services. (Algeria)
- 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)
- 11. The Committee is concerned that refugees and internally displaced persons, especially those belonging to ethnic minorities, are still facing discrimination resulting in difficulties in access to economic, social and cultural rights, thereby impeding their sustainable return despite the State party's efforts in elimination of discrimination against returnees, especially in terms of restitution of property (arts. 2, para. 2; 6 and 9-14).

The Committee urges the State party to intensify its efforts, including through the adoption at State level of the draft law on amendments to the Criminal Law of the Federation of Bosnia and Herzegovina, which expands the definition of a hate crime, to ensure the sustainable return of refugees and internally displaced persons to their home communities by ensuring their equal enjoyment of Covenant rights, especially in the field of social protection, health care, education and employment.

30. The Committee notes with deep concern that, 18 years after the war and signing of the Dayton Peace Agreement, many returnees and displaced persons in the State party are still out of their pre-war homes. In this context, the Committee is also concerned about the continued existence of collective housing despite the fact that these collective housing centres were designed as a temporary solution to address the acute housing situation (art. 11).

The Committee recommends that the State party continue its efforts to ensure the sustainable return of refugees and internally displaced persons to their pre-war houses by facilitating the reconstruction of housing units, infrastructure and continued clearance of mines. [...] (Bosnia & Herzegovina)

- 28. The Committee is concerned about the illegal occupation by refugees and internally displaced persons of properties belonging to Armenians and other ethnic minorities.
- 54. The Committee recommends that the State party take corrective measures to ensure that Armenians and other ethnic minorities whose properties are illegally occupied by refugees and internally displaced persons are provided with adequate compensation or offered alternative accommodation, in accordance with the guidelines adopted by the Committee and its General Comment No. 7. (Azerbaijan)
- 27. The Committee is concerned about the low number of internally displaced persons and refugees, in particular those belonging to minority communities, who have returned to their pre-armed conflict homes in recent years, despite the efforts undertaken to facilitate sustainable returns. (art. 11)

The Committee recommends that UNMIK, in cooperation with the Kosovo authorities, intensify efforts to ensure the repossession of property, physical safety and sustainable return of internally displaced persons and refugees, in particular those belonging to minority communities, to their pre-armed conflict places of residence, e.g. by increasing income generation assistance for returnees, ensuring that the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2) are fully taken into account during the revision of the Revised Manual for Sustainable Returns (2006), and directly involving affected IDPs at all stages of adoption and implementation of Municipal Return Strategies.

28. The Committee notes with concern that the deadline for the submission of immovable property claims to the Kosovo Property Agency reportedly precluded many internally displaced persons with limited access to information about that deadline from filing their claims. It is also concerned about the backlog of some 18,000 civil claims for compensation of property damage allegedly caused by the lack

of protection from KFOR, UNMIK, the Provisional Institutions of Self-Government or the municipalities during civil unrest, which have not been processed by the courts pursuant to an instruction by the UNMIK Department of Justice in August 2004. (art. 11).

The Committee recommends that UNMIK review Section 8 of its Regulation 2007/8, with a view to making transitional arrangements for displaced claimants who were unable to comply with the December 2007 deadline for submitting immovable property claims to the Kosovo Property Agency due to limited access to information about such deadline. It also recommends that UNMIK, in cooperation with the Kosovo authorities, strengthen the human resources of and instruct courts to process all civil claims for compensation of property damage allegedly caused by KFOR, UNMIK, the Provisional Institutions of Self-Government or the municipalities during civil unrest and to prioritize cases involving discrimination. (UNMIK)

- 24. While acknowledging that most internally displaced persons (IDPs) have returned to their pre-conflict places of residence, the Committee is concerned that many remaining IDPs are unable to return to their homes on account of, inter alia, their difficult economic situation and security concerns, live in collective centres often under inadequate hygienic conditions and face constant pressure to leave these centres.
 - 44. The Committee recommends that the State party provide financial assistance to internally displaced persons (IDPs) in order to replace basic household and farming items that were destroyed during the conflict, ensure the safety and sustainability of the return of IDPs, provide adequate alternative housing to IDPs when collective centres are vacated, and settle pending compensation claims of IDPs. (Macedonia)
- The Committee notes with concern the persistence of illegal land seizures in Afghanistan as well as the numerous cases of land disputes, which undermine the rule of law and the enjoyment of the Covenant rights. It regrets that, due to the lack of trust in the formal judicial system, many land-dispute issues have been left to informal dispute resolution mechanisms, and that discriminatory practices have provided certain ethnic groups with preferential access to land to the detriment, in particular, of the Kuchis. The Committee notes that the deteriorating security situation and landlessness are factors that prevent the reintegration of IDPs and returnees, as well as the return of refugees (art. 11). (Afghanistan)
- The Committee notes with concern that in many parts of Nepal, internally displaced persons (IDPs) have not been allowed to return to their homes in safety or to fully integrate where they are currently residing. In many cases, the property and land of these persons have not been returned to them, contrary to the November 2006 Comprehensive Peace Agreement. The Committee also notes with concern that the ambiguous criteria for identifying genuine IDPs have resulted in a lack of protection against displacement and discrimination as concerns compensation and assistance. (Nepal)
- 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 expresses concern about the large number of land disputes and cases of land-grabbing in the State party. It is also concerned that regulations such as Presidential Regulation 65/2006 on Procurement of Land for Realizing Development for Public Interest render individuals and communities vulnerable to land-grabbing as only 34 per cent of land in the State party is certified. Similarly, the Committee is concerned that court decisions on land cases have been primarily made on the basis of the existence of titles. Furthermore, the Committee expresses concern at the prohibitive cost of titling that has accompanied the settlement of land disputes (arts. 1.2, 2.2 and 11). (Indonesia)
- 22. The Committee is concerned that many families remain without a formal ownership title over their house and land, in particular in rural areas. It is also concerned that interpretations of article 49 of the Constitution have led to cases of arbitrary property confiscations (art. 11). (*Iran*)

3. UNIVERSAL PERIODIC REVIEWS

- Bulgaria to Turkey (2010): Undertake all necessary steps to ensure just and timely settlement of the property claims of displaced persons of Bulgarian identity from eastern Thrace in conformity with the united nations principles on housing and property restitution for refugees and displaced persons and the instruments of the council of Europe related to the redress for loss of housing, land and property of refugees and displaced persons.
- Finland, Netherlands, Norway to Lebanon (2011): Grant Palestinian refugees the right to own land (Norway); take legislative action to ensure the right of the Palestinian refugees to inherit and register property, including the right to own land (Finland); amend legislation that restricts the ability of Palestinian refugees to own property, specifically the presidential decree of January 1969, as modified in April 2001 (Netherlands).

3. SPECIAL PROCEDURES

Joint Report- DRC (2009)

With much of the international discourse focusing on illegal mining, many still fail to recognize the important role of local conflicts over land, exacerbated by several waves of displacement and returns. Beginning in provinces of particular concern such as north Kivu, community-based land commissions should be set up, involving traditional leaders, provincial state officials and community representatives, in particular also women, returnees and minority groups, to address local disputes over land.

RSG IDPs- Kenya (2012)

- 63. Adopt a broader, more flexible approach to durable solutions comprised of resettlement, return and local integration, and which includes but is not limited to land-based solutions, with a greater emphasis on livelihoods, documentation and access to basic services. ensure that the choice of durable solutions by IDPs is informed, voluntary and safe; that they are provided with a meaningful opportunity for consultation and the opportunity to visit sites of return or potential resettlement before making a decision; and that a process of consultation and sensitization with host or return communities is undertaken in order to ensure sustainable durable solutions and a community based approach.
- 64. Strengthen community peace-building and reconciliation activities at the national and local levels, with an emphasis on sites of return and resettlement for post-election-violence IDPs. These activities continue to be critical to sustainable solutions and the prevention of future internal displacement. In sites of return and resettlement, address the lack of basic services, such as sanitation facilities. Review and address cases of uneven application of compensation, housing and land allocation to post-election-violence IDPs, and identify potential beneficiaries who may have been excluded for various reasons.
- 65. With regard to unregistered IDPs, and with the support of the international community and civil society: undertake, on a non-discriminatory basis, programmes to facilitate durable solutions for IDPs, many of whom have been displaced for several years, such as forest evictees; take into consideration the claims of IDPs with a particular attachment to their land and area of origin; and assist non-registered post-election-violence IDPs, including "integrated IDPs", with outstanding durable solution needs. Ensure that efforts in the areas of urban planning, national development strategies and land reforms include a cohesive approach to internal displacement issues, and the rights of IDPs. With regard to the latter, consider the establishment of a national land commission.

IE Haiti (2011)

- 80. With regard to the situation of internally displaced persons and Haitians who have been the subject of forced return, the independent expert recommends that the following measures be taken:
- (a) an appropriate strategy should be adopted to curb the spread of unofficial camps;
- (b) action should be taken to stop official camps from being turned into informal settlements and overcrowded shanty towns that the authorities can no longer service;
- (c) steps should be taken to stop people from selling land that they do not own in the camps.

RSG IDPs- Georgia (2009)

- IDPs have the right to freely choose whether they want to return, integrate locally or resettle in another part of the country.

RSG IDPs welcomes the recognition of this right by government authorities and the policy shift in accordance with it.

RSG IDPs urges relevant authorities to raise awareness of and promote this right so as to render the choice meaningful for IDPs and to create economic opportunities allowing IDPs to sustain themselves, irrespective of their choice as regards durable solutions.

Moreover, protection of IDPs' housing, land and property rights is an essential component of durable solutions.

IDPs are entitled to restitution or compensation for their property, regardless of whether they choose to return, integrate locally or resettle.

The restitution of housing, land and property left behind by IDPs or the provision of appropriate compensation in lieu of restitution remains a serious challenge that needs to be addressed.

As a first step, the representative calls upon the authorities in control in Abkhazia, Georgia, to undertake or commission a detailed study reviewing the various types of property-like rights which prevailed at the time when IDPs were displaced from their homes.

A mechanism should then be put in place to allow IDPs to submit property claims. In this regard, the representative recommends that the international community, in particular UNHCR, support the authorities in control in Abkhazia in the process of undertaking this thorough review of property legislation.

RSG IDPs- Serbia, Montenegro (2009)

- Internally displaced Roma, Ashkali and Egyptians continue to be in a very vulnerable position both in and outside Kosovo.

A lack of personal identification and other documents prevents these IDP groups from enjoying their rights on an equal basis.

Efforts in Serbia to draft a law on the recognition of the person before the law and to amend the law on residence.

Government and parliament to prioritize both legislative projects and adopt and implement them without further delay so as to end the legal invisibility of a significant section of the country's citizens, including many IDPs.

Similar problems in Kosovo and the representative encourages the Kosovo authorities to make a serious effort to provide this population with documents and regularize their situation, including with regard to land titles.

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.

Restitution of housing, land and property left behind by IDPs or at least the provision of appropriate compensation remains a challenge.

Restitution mechanisms set up by the international community have shielded the restitution process to some extent from the serious deficiencies of the Kosovo justice system and administrative apparatus.

Many other cases relating to IDP property are pending before Kosovo's courts, which do not yet have the capacity to handle this caseload and need to be strengthened as a matter of priority.

Police and municipal authorities in Kosovo also have to increase their efforts to protect IDP property in line with their international obligations.

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 Freedom of Religion- Serbia (2009)

- Refer to the conclusions of the representative of the secretary-general on the human rights of internally displaced persons (A/HRC/13/21/add.1) and she joins his

recommendations addressed to the European Union rule of law mission (Eulex) to pay particular attention to housing, land and property cases involving displaced parties to prevent miscarriages of justice.

RSG IDPs- Iraq (2011)

- In line with the two-pronged approach, strengthen support and financial commitment to UNHCR and other humanitarian actors, in order to address the urgent humanitarian needs in the informal IDP settlements, directing resources towards the construction of low cost houses for homeless IDPs and other vulnerable groups, in line with the prime minister's proposal for allocation of land to homeless and destitute IDPs.

SR Food- India (2006)

- Land acquisition act should be amended, or new legislation adopted, to recognize justiciable right to resettlement and rehabilitation for all displaced or evicted persons, including those without formal land titles and including women.

4. JURISPRUDENCE

Human Rights Committee

Ondracka v. Czech Republic (2007)

- 7.3 The Committee recalls its Views in the cases of *Adam, Blazek, Marik, Kriz*, and *Gratzinger*¹⁸ 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 26.¹⁹

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¹⁸ 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.

¹⁹ See Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13.

7.3 The Committee recalls its Views in the cases of Adam, Blazek, Marik, Kriz, Gratzinger and Ondracka²⁰ 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.

Polackova and Polacek v. Czech Republic (2002)

- The issue before the Committee is whether the application to the authors of - 7.2 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.
- 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 26.21 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, 22 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". ²³ The Committee further recalls its jurisprudence²⁴ that the citizenship requirement in these circumstances is unreasonable.

²⁰ 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.
²¹ See Communication No.182/1984, Zwaan-de Vries v. The Netherlands, Views adopted on 9 April 1987, paragraph 13. ²² 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.

²³ See footnote 7

²⁴ 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.

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.

- 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 26.²⁵
- 7.3 The Committee recalls its Views in the cases of *Adam, Blazek, Marik, Kriz, Gratzinger* and *Ondracka*²⁶ 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 of Human Rights

Marino Lopez et al. v. Colombia (2011)

- 290. From the findings of fact it can be inferred that the Afro-descendants of the Cacarica basin communities endured forced displacement for four years, away from their places of origin, from February 1997 until March 2001.

²⁵ See Communication No. 182/1984, *Zwaan-de Vries v. The Netherlands*, Views adopted on 9 April 1987, paragraph 13;

²⁶ 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.

- 291. Article 22.1 of the American Convention establishes that "[e]vey person lawfully in the territory of a State party has the right to move about in it, and to reside in it subject to the provisions of the law." The exercise of this right may only be restricted pursuant to specific laws for reasons of public interest. The Inter-American Court has stated that the right to free movement and residence is an essential condition for the free development of the person315 and consists, inter alia, of the right of everyone lawfully within a State to move freely within it and to choose his place of residence.316
- 292. Taking account of the applicable rules of interpretation and in accordance with Article 29.b of the Convention, which prohibits a restrictive interpretation of these rights, the Inter-American Court has considered that Article 22.1 of the Convention protects the right not to be forcibly displaced.317 The Inter-American Court has established that free movement is an indispensible condition for the free development of the individual318 and has recognized that the United Nations Human Rights Committee, in its General Comment No.27, establishes that the right to free movement and residence is comprised of, inter alia: a) the right of everyone lawfully with the territory of a State to move freely within that State and to choose his or her place of residence; and b) the right of an individual to enter his country and remain therein. The Court has established that the enjoyment of this right does not depend on any objective or particular motive of the person wishing to travel or remain in a place.319
- 298. From the findings of fact it is apparent that the transfer of the displaced from their places of origin to three refuge points, the living conditions of the displaced in those receiving areas, and the acts of harassment, threats and violence during the period of displacement, constituted a breach of their personal integrity.
- 299. Regarding Article 5, the Court has established that [t]he right to physical, mental and moral integrity of all persons and the obligation of the State to treat the individuals...with respect for the inherent dignity of the human person, entails the reasonable prevention of situations that may impair protected rights.321
- 300. As established in the preceding section, displacement also generates the obligation to bestow special treatment in favor of those affected and to adopt measures of a positive nature to reverse its effects.
- 301. With regard to the living conditions of especially vulnerable groups, the Inter-American Court has ruled on the State's duty to provide them with sufficient and adequate water, food and health services as part of its obligation to guarantee a dignified life.322 It has also ruled on the State's duty to adopt positive and specific measures aimed at satisfying the right to a dignified life, especially when it involves vulnerable and at risk persons, whose attention is a matter of priority.323 The Court has also established that displacement has affected the right to a dignified life.324
- 302. Based on these parameters, it is appropriate for the Commission to examine the situation of violence and security and the living conditions during the displacement which affected the right to personal integrity of the displaced persons.

G. Hunter gatherers/rural landowners/small-scale and marginalized farmers/peasants/landless & nomadic/traveller communities

1. CESCR GENERAL COMMENTS

General Comment 12 (Right to Food)

- 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.

General Comment 15 (Right to Water)

- 7. 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.
- 16. In particular, States parties should take steps to ensure that:
- (e) Nomadic and traveller communities have access to adequate water at traditional and designated halting sites;

General Comment 20 (Non-Discrimination)

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.

2. CESCR CONCLUDING OBSERVATIONS

Hunter gatherers

- 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). (...) 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)
- 11. The Committee is concerned that the conversion of the Veddahs's traditional land into a national park has led to their socio-economic marginalization and impoverishment, Veddahs having been prohibited access to their traditional hunting grounds and honey sites. The Committee is also concerned that Veddahs are highly stigmatized in the State party, in particular Veddah children who are the victim of ostracism in the school system and often employed in hazardous occupations. (art. 1, para. 2). (Sri Lanka)

- 31. The Committee is concerned about the resettlement of nomadic herdsmen in the "new socialist villages" carried out in the State party without proper consultation and in most cases without free, prior and informed consent, particularly in the western provinces and autonomous regions (arts. 1 and 11). (China)

Rural Landowners

- The Committee calls upon the State party to reform the real estate sector as soon as possible and urges it to take account of the vulnerability of rural landowners to land seizure, as well as the needs of the most marginalized and vulnerable social groups, with regard in particular to access to land. (Togo)
- 27. (h)The Committee urges the State party to take the necessary measures, including legislative measures, to: (i) prevent the forced eviction of rural families who are occupying land peacefully; (ii) ensure that the judicial authorities take the provisions of the Covenant into account when handing down their decisions; (iii) investigate and punish those responsible for forced evictions and violations related to the rights recognized in the Covenant; and (iv) implement and expand the Social Housing and Solidarity Programme, allocating sufficient budgetary resources to ensure the implementation of comprehensive housing policies, especially for low-income groups and marginalized individuals and groups. (*Bolivia*)

Small-scale Farmers

The Committee notes with concern that the system of land tenure in the State party is out of step with the country's economic and cultural situation, and that it makes some indigenous population groups and small-scale farmers vulnerable to land grabs. It is also concerned about obstacles such as prohibitive land transaction fees that bar the way to land ownership, particularly by women. (art. 11, para. 1 (a)).

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)

- 26. The Committee takes note of the difficulties faced by the State party to guarantee the right to adequate food by way of local production due to the frequency of natural hazards, inefficient farming practices, lack of suitable land, and increases in commodity prices. While noting the importance of food importation to meet the dietary needs of the population, the Committee is concerned at the information provided by the State party that exposure to cheaper imports based on new trading agreements has led to the displacement of local farmers. (art. 11). (Jamaica)
- 21. The Committee is concerned by reports of difficulties encountered by small farmers, especially young farmers, in Belgium, which can impede their enjoyment of economic, social and cultural rights. (art. 11).

The Committee recommends that the State party protect small-scale farming in Belgium and implement the plans designed to preserve it. The Committee also recommends that the State party take into account the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security adopted by the Food and Agriculture Organization of the United Nations (FAO) in November 2004 (Voluntary Guidelines on the Right to Food) and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, adopted in May 2012 by the FAO Committee on World Food Security, promoting the adoption of specific support measures for small farmers, by safeguarding and enhancing their access to agricultural land. (Belgium)

Peasants

- 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). (article 1.2). (DRC)
- 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)

3. UNIVERSAL PERIODIC REVIEW:

Rural landowners

- Norway to Tanzania (2011): Take appropriate measures to eliminate all forms of discrimination against rural women with respect to ownership of land in line with the recommendations of CEDAW.
- 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.
- 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.
- Canada to Cote D'Ivoire (2010): Speed up the implementation and take measures to ensure the popularization of the rural land act, an essential measure in settling intercommunal disputes.

- United Kingdom to Burkina Faso (2009): Continue efforts so that the language referring to human rights truly reflects gender equality (Canada); increase efforts to strengthen the respect of women's rights and to promote gender equality (Sweden); redouble efforts to eliminate discrimination against women and apply the convention on the elimination of all forms of discrimination against women fully (Mexico); 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 (Luxembourg); and strengthen awareness - raising efforts in rural areas where some cultural traditions inhibit women's rights.

4. SPECIAL PROCEDURES:

Rural Landowners

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.

SR Indigenous- South Africa (2005)

- Indigenous women, not only in South Africa but in almost all countries SR has visited, are systematically excluded on matters of land reform policy and on discussions regarding solutions to their problems, in particular those of indigenous rural women.

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 Food- Bolivia (2008)

- The programme of agrarian reform should also be speeded up to regularize land titles, improve protection of the lands of indigenous communities and improve access to land for campesinos, communities and rural families.

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.
- 41. The special rapporteur recommends that the government of china consider adopting the following measures to strengthen the security of tenure of rural households who depend on agriculture for their livelihood:
- (a) ensure a greater security of land use rights, including by automatically extending such rights beyond the current 30-year term, unless no member of the household to whom the land has been contracted still lives on the land;
- (b) improve transparency and limit the risks of corruption of local officials in land deals, thus ensuring effective compliance with the 2007 property law, for example by creating a system whereby the buyers authorized to develop land would pay the compensation due into a trust fund, which in turn would compensate the land-losing farmer, without the amount transiting through the local public officials;
- (c) better circumscribe the possibility for the collective to impose readjustments, as well as the possibility for the state to evict land users in the public interest, including by allowing courts to apply much stricter scrutiny to the authorities' reliance on these exceptions to the security of tenure of the land user;
- (d) ensure the issuance of land certificates, which should be written in the name of both husband and wife, rather than (as has often been the case in the past) in that of the husband only.

SR Housing- Iran (2006)

- 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 Food- Guatemala (2010)

Unequal access to land remains a source of conflict. In the short term, the government should abstain from carrying out forced evictions that are in violation of international standards. It should adopt legislation protecting land users from such evictions, and reform the 1997 law on mining, in particular in order to improve respect for the rights of indigenous communities over their natural resources. The possibility for landowners to claim up to 20 per cent of land in addition to the documented size of their property, provided for under the 2005 land registry law, should be removed immediately. The policy for integral rural development should also be fully implemented, including as regards land redistribution, and it should be adequately funded. The adoption of the policy into legislation would be a welcome step in this direction. Finally, the adoption of an agrarian code with objective criteria for the resolution of land conflicts and the creation of institutions to solve conflicts over land could significantly contribute to lessening tensions over land in the rural areas.

SR Food- Bolivia (2007)

- SR Food also welcomes efforts to promote progressive agrarian reform that will focus on eliminating feudal practices of bonded labour and improving access to land for campesinos, communities and rural families as well as recognizing traditional forms of land tenure and restituting lands of indigenous communities.

SR Violence against Women- Tajikistan (2006)

- r) ensure the rights of rural women to land use and management by providing them with legal and business training and simplifying the process of registration of private farms

SR Extreme Poverty- Namibia (2013)

- Ensure that women have access to land and productive resources; ensure the effective implementation of the communal land reform act 2002, particularly in rural areas.

IE Cote D'Ivoire (2012)

- 99. The government should develop a nationwide rural land policy in consultation and cooperation with the concerned communities in order to gain a clear picture of the issue of land and its prosperity, break the link between land and ethnicity and foster cooperation and complementarity in land use for shared prosperity.

Small-scale farmers

SR Food- Bolivia (2008)

The strategy should focus on eradicating malnutrition and on reversing the extreme inequality that has resulted from export-orientated trade in agriculture, by investing in small-scale peasant agriculture, implementing effective agrarian reform and protecting the rights of peasants and indigenous peoples over their land, water and own seeds.

SR Food- Cameroon (2012)

- 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.

Peasants

SR Food- Bolivia (2008)

The strategy should focus on eradicating malnutrition and on reversing the extreme inequality that has resulted from export-orientated trade in agriculture, by investing in small-scale peasant agriculture, implementing effective agrarian reform and protecting the rights of peasants and indigenous peoples over their land, water and own seeds.

H. Afro-descendants

1. CERD GENERAL RECOMMENDATION

General Recommendation 34 (Racial discrimination against people of African descent)

- 4. People of African descent live in many countries of the world, either dispersed among the local population or in communities, where they are entitled to exercise, without discrimination, individually or in community with other members of their group, as appropriate, the following specific rights:
 - (a) The right to property and to the use, conservation and protection of lands traditionally occupied by them and to natural resources in cases where their ways of life and culture are linked to their utilization of lands and resources:
 - (b) The right to their cultural identity, to keep, maintain and foster their mode of life and forms of organization, culture, languages and religious expressions;
 - (c) The right to the protection of their traditional knowledge and their cultural and artistic heritage;
 - (d) The right to prior consultation with respect to decisions which may affect their rights, in accordance with international standards.

2.CESCR CONCLUDING OBSERVATIONS:

- The Committee is concerned that infrastructure, development and mining megaprojects are being carried out in the State party without the free, prior and informed consent of the affected indigenous and Afro-Colombian communities. The Committee is also concerned that, according to the Constitutional Court, the legitimate representatives of the Afro-Colombian communities did not participate in the process of consultation and the authorities did not provide accurate information on the scope and the impact of the mining mega-project of Chocò and Antioquia. The Committee is further concerned that the Presidential Directive No. 001 aimed at establishing a general framework for prior consultation may not be sufficient and that indigenous and Afro-Colombian peoples were not consulted regarding the draft bill elaborated by the Working Party on Prior Consultation of the Ministry of the Interior that, therefore, does not create the adequate framework for the process of genuine consultation. (Colombia)
- The Committee regrets that indigenous communities and Afro-descendants suffer from higher levels of poverty and unemployment than the national average. Additionally, indigenous communities suffer from high illiteracy rates, limited access to water, housing, health and education. (Costa Rica)
- 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. (Costa Rica)

- The Committee expresses its concern at the existence of racial prejudice against indigenous people, especially in the Atlantic Autonomous Regions and in particular against indigenous and Afro-descendant women. (Nicaragua)

3. SPECIAL PROCEDURES

IE Cultural Rights- Brazil (2011)

- 31. Law 12.288 of 2010, known as the Statute on Racial Equality, aims to combat prejudice on racial grounds and to remedy historical wrongs. It created the National System for the Promotion of Racial Equality (SINAPIR) and promotes coordination among all institutions working in this area. The Statute aims to protect freedom of religion and belief, promote respect for cultural diversity through education, ensure access to land rights and recognize the collective manifestations of Afro-descendents as historical and cultural heritage, including, but not limited to, their clubs and associations, with a proven history. The Statute further seeks to ensure the cultural rights of Quilombo communities, to celebrate key dates related to Samba and other Brazilian cultural expressions of African origin nationally, and to promote and protect Capoeira, a sport of Brazilian origin, as intangible cultural heritage.
- 32. The independent expert considers that the celebration of the International Year for People of African Descent in 2011 will provide an impetus for redoubling efforts towards the effective implementation of this new law in Brazil.

RSG IDPs- Colombia (2007)

- As regards collective land titles of the indigenous and afro-Colombian communities, the authorities declare invalid the titles issued for parts of collective land sold by individuals out of collective property.

IE Minorities- Colombia (2007)

- The government must take urgent and effective steps to protect the safety of afro-Colombian leaders, their organizations and the human rights non-governmental organizations that champion their rights. This is particularly crucial with respect to members of community councils and others who are advocating for land restitution.

Forced displacement has massively impacted on the lives of afro-Colombians and has devastated communities. displacement is a current reality; not simply the legacy of a depleted war

The motivations of the perpetrators have evolved from tactical conflict-related to commercial, related to the acquisition of lands for illegal crops, agricultural megaprojects, economic development and exploitation of natural resources. Displacement continues to affect individuals and communities and remains a major concern of the afro-Colombian communities.

Afro-Colombian cultural identity, traditions, languages and traditional livelihoods are an important part of the history and rich and diverse cultural mosaic of Colombia that must be protected.

However, the damage inflicted by discrimination, racism and poverty, and the impact of violence, forced displacement and dispossession of territories, is immense. Solutions must focus on preventing further displacement and facilitating the urgent and secure return to their lands.

4. JURISPRUDENCE

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 "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 88 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 of Human and Peoples' Rights

Malawi African Commission 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 Mauritanians 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.
- 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 Mauritanians 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.
- 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 Mauritanians 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.

I. Roma

1. CESCR GENERAL COMMENTS

General Comment 15 (Right to Water)

- 16. In particular, States parties should take steps to ensure that:
 - (e) Nomadic and traveller communities have access to adequate water at traditional and designated halting sites;

2. CERD GENERAL REC

Gen Rec 27 (Discrimination Against Roma)

- 31. [...]; to act firmly against local measures denying residence to and unlawful expulsion of Roma, and to refrain from placing Roma in camps outside populated areas that are isolated and without access to health care and other facilities.
- 32. To take the necessary measures, as appropriate, for offering Roma nomadic groups or Travellers camping places for their caravans, with all necessary facilities.

3. CESCR CONCLUDING OBSERVATIONS:

- Combat discrimination against Roma communities in areas such as employment, education, land tenure, access to social welfare benefits, housing and health care. Roma communities in the state party continue to face widespread discrimination in areas such as employment, education, land tenure, access to welfare benefits, housing and health care, which impair the enjoyment of their economic, social and cultural rights (art. 2.2). (*Poland 2009*).

4. OTHER TREATY MONITORING BODIES

CERD- Belgium (2008)

- Provide, in next periodic report, detailed information on the enjoyment of social, economic and cultural rights of Roma and travellers, as well as on the impact of the measures taken to increase and improve sites on residential land for caravan-dwellers and improve access to health care and other basic facilities.

CRC- Slovakia (2007)

- Take all necessary measures to ensure that all communities, including Roma communities, are given equal access to adequate housing, sanitation and infrastructure, are protected from environmental hazards and given access to clean air, land and water.

CRC- Slovenia (2013)

- Provide security of tenure to all Roma communities by taking measures to regularize their settlements and, in so doing, undertake meaningful consultations with the Roma communities concerned. in the meantime, and as a matter of urgency, expand access

to safe drinking water and adequate sanitation to all Roma settlements regardless of the legal status of the land on which they live.

5. 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.

RSG IDPs- Montenegro, Serbia (2009)

Internally displaced Roma, Ashkali and Egyptians continue to be in a very vulnerable position both outside in and A lack of personal identification and other documents prevents these IDP groups from enjoying their rights equal basis. on an Efforts in Serbia to draft a law on the recognition of the person before the law and to amend the law residence. ٥n Government and parliament to prioritize both legislative projects and adopt and implement them without further delay so as to end the legal invisibility of a of the country's citizens, section including Similar problems in Kosovo and the representative encourages the Kosovo authorities to make a serious effort to provide this population with documents and regularize their situation, including with regard to land titles.

IE Minorities- Bulgaria (2012)

- 88. Some communities live in a situation of legal limbo with regard to housing. Despite the fact that they have existed for decades and are home to many thousands, some Roma communities have no prospect of resolving their illegal status; they are left outside of municipal master plans and face the prospect of eviction. The government remains intransigent to proposals to review the (il)legal status of Roma settlements. Review of the (il)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.

6. JURISPRUDENCE

Human Rights Committee

Assenova Naidenova et al. v. Bulgaria (2011)

- 14.2 The authors claim that the enforcement of the eviction order of 24 July 2006 and their subsequent removal from the Dobri Jeliazkov 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.²⁷ In the present communication, it is undisputed that the Dobri Jeliazkov 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 Jeliazkov 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 the Covenant and should be, in any event, reasonable in the particular circumstances.²⁸
- 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.

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²⁷ 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.

²⁸ 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.

- 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.
- 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 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 Jeliazkov community, the Committee considers that, by not giving due consideration to the consequences of the authors' eviction from the Dobri Jeliazkov, 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 lead 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.

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.