



# LAND AND HUMAN RIGHTS

## Annotated Compilation of Case Law



UNITED NATIONS  
HUMAN RIGHTS  
OFFICE OF THE HIGH COMMISSIONER

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## INTRODUCTION

**Land** impacts directly on the realization of a number of human rights and, given the inter-relation and interdependence of rights, land issues may potentially impact all human rights. Disputes over land are often the cause of violent conflict and place obstacles to restoring sustainable peace. Land access affects the protection and promotion of human rights in issues including: poverty reduction, access to livelihoods, development projects and humanitarian interventions, and has a bearing on urban and rural planning, agrarian reforms, post-disaster and post-conflict reconstruction, access to natural resources, property rights, to name but a few. Emerging global issues, such as food (in) security, climate change and rapid urbanization, have refocused attention on land and its use, control and possession by states or private actors.

Barring the explicit recognition of the right to land of indigenous peoples, relatively little has been said about land in the international human rights framework. This lack of clarity has led to various – and sometimes contradictory – interpretations and claims regarding land in relation to human rights.

While an explicit universal right to land under international human rights law has not been recognized, courts have dealt with cases where land is intrinsically linked to the enjoyment of several human rights, including the rights to adequate housing, food and an adequate standard of living. Consequently, this case law provides crucial guidance on delineating the human rights dimensions of access to and control over land.

The present publication contains an annotated collection of case law relevant to the various aspects of land and human rights, including indigenous or tribal peoples' rights, non-discrimination and equality, and relating to, explicit human rights standards. Under each judicial mechanism, cases appear in chronological order to give the reader a better understanding of the development of jurisprudence on land issues related especially to human rights in well-established and emerging areas.

The first is in the well-developed area of indigenous peoples' rights to land where the right to use and enjoy property in the Inter-American human rights system and the rights of minorities to enjoy their culture guaranteed by Article 27 of the International Covenant on Civil and Political Rights, have been informed by international law such as the land provisions in the ILO Convention No. 169 and the Declaration on the Rights of Indigenous Peoples.

Another area of jurisprudence is that of non-discrimination with a particular focus on women. Finally, forced evictions, displacement from and expropriation of land have each been addressed under several international instruments as well as domestic law.

Lessons learned from the advancement of the human rights dimensions of land, both in the context of indigenous or tribal peoples and non-discrimination against women, demonstrate that it is not necessarily explicit standards in these areas of the law that have resulted in relevant jurisprudence, but rather that concerted efforts to build upon and define existing standards have culminated in this jurisprudence.

This compilation aims to provide clarification on the normative linkages between human rights and land through the lens of jurisprudence. While the current version may not necessarily reflect a comprehensive overview of existing jurisprudence, it will be regularly revised to include additional cases.

The compilation of case law is part of a package of tools developed on land and human rights. This document should, therefore, be complemented with other documents, guidance and tools produced by OHCHR available on Land and Human Rights page on OHCHR website: [www.ohchr.org](http://www.ohchr.org).

To offer feedback on this publication, or for enquiries, please contact [Bghazi@ohchr.org](mailto:Bghazi@ohchr.org).

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# **I. DECISIONS OF INTERNATIONAL HUMAN RIGHTS MECHANISMS**

## 1. TREATY BODIES

### *Human Rights Committee: Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990)*

#### Key issues

- Cultural rights, Customary relationship to land, Indigenous rights, Maintenance of livelihood, Minority rights, Obligation to protect.

#### Summary of case

The Lubicon Lake Band, a people indigenous to Canada, alleged that the exploitation of oil, gas and timber in areas traditionally used by the Band resulted in destroying the resource base of their traditional way of life, such as hunting and fishing. The Band claimed that the Canadian Government violated their right to self-determination by allowing expropriation of their territory for the benefit of private corporate interests.

#### Legal questions related to land and human rights

Legal questions included whether the International Covenant on Civil and Political Rights provided protections of indigenous land rights. Applicants claimed a violation of the right to self-determination (Article 1), but the Committee decided it lacked subject matter jurisdiction under the Optional Protocol. The Committee, however, found a violation of the right of ethnic, religious or linguistic minorities to enjoy their culture (Article 27).

#### Main findings

The Committee referred to treaties that were entered into between the Government of Canada and the Band that recognized the latter's right to continue its traditional way of life. However, the Band's land had been expropriated for commercial interests (oil and gas exploration) and destroyed, thus depriving the people of their means of subsistence. The Committee, examined the competing use of land and resources which interfered with the traditional economy and way of life of an indigenous community. The Committee held that historical inequities and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band and constitute a violation of Article 27 of the Covenant.

#### Relevant sections of the case law

*Para. 33*      *Violations and the remedy offered: "Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of Article 2 of the Covenant."*

### Full text of the case law

*Selected Decisions of the Human Rights Committee under the Optional Protocol*, Volume 3, OHCHR, available in English, French, Russian and Spanish from:

<http://www.ohchr.org/EN/PublicationsResources/Pages/ReferenceMaterial.aspx>

### **Human Rights Committee: *Länsman et al. v. Finland*, Communication No. 511/1992 (8 November 1994)**

#### Key issues

- Cultural rights, Customary relationship to land, Indigenous rights, Maintenance of livelihood, Minority rights, Obligation to protect, Traditional use of land.

#### Summary of case

This case deals with indigenous herders who claimed that stone quarrying by a private company interfered with their traditional livelihoods and therefore their cultural rights, including by interfering with reindeer herding. The private company received a permit from the national government to carry out the quarrying activities.

#### Legal questions related to land and human rights

Legal questions included whether the scope of Article 27 of the International Covenant on Civil and Political Rights covers the protection of ethnic minorities' right to enjoy their own culture, including a customary relationship to land.

#### Main Findings

While the Human Rights Committee did not find a violation, it did reaffirm that economic activities or means of livelihood come under the ambit of Article 27 of the International Covenant on Civil and Political Rights and that the Article protects access to or control over land when such access or control was a base for traditional economic activities or cultural life. The Committee also held that, when granting permits for private economic activities or extending existing ones, States are obligated to ensure such activities do not substantially interfere with customary uses of indigenous peoples. It also emphasised that measures must be taken to ensure the effective participation of members of minority communities in decisions that affect them.

#### Relevant sections of the case law

*Para. 9.3* The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that Article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, although the Complainant may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology, they can nevertheless invoke Article 27 of the Covenant.

*Para. 9.4 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/her right to enjoy his/her culture. Thus, measures whose impact amount to a denial of that 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 question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region. The Committee recalls paragraph 7 of its General Comment on article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".*

*9.8 With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.*

### **Full text of the case law**

See, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Volume 5, OHCHR, available in English and French from:

<http://www.ohchr.org/EN/PublicationsResources/Pages/ReferenceMaterial.aspx>

### 1.1.3 Human Rights Committee: *Hopu and Bessert v. France*, Communication No. 549/1993 (29 July 1997)

#### Key issues

- Expropriation, Inviolability of the home

#### Summary of the case

This case dealt with expropriation without compensation by France of land owned and possessed on Tahiti by ethnic Polynesians. The Applicants were descendants of the original Polynesian owners and had taken back peaceful possession of the land in protest to a plan by the current owner, a company solely owned by the Territory of Polynesia, to develop it for tourism. The Applicants claimed that the land encompassed the site of a pre-European burial ground and that the adjacent lagoon remained a traditional fishing ground and provided the means of subsistence for some thirty families living next to the lagoon.

#### Legal questions related to land and human rights

Legal questions included whether forced removal and destruction of a burial ground containing remains of family members could be considered a violation of the right to be free from arbitrary or unlawful interference with privacy, family, home or correspondence (Article 17 of the International Covenant on Civil and Political Rights).

#### Main findings

The Committee did not look into the matter of forced removal in the context of Article 17, but did examine the issue of destruction of the burial ground. In doing so, it concluded “that the construction of a hotel complex on the authors’ ancestral burial grounds did interfere with their right to family and privacy” and that the “State party has not shown that this interference was reasonable in the circumstances” or that “the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex.” Consequently, the Committee concluded that there had been an arbitrary interference with the authors’ right to family and privacy, in violation of Article 17, paragraph 1. The Committee also found a violation of the right to protection of the family (Article 23, paragraph 1 of the Covenant).

#### Relevant sections of the case law

*Para. 10.3* The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term “family” be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term “family” in a specific situation. It transpires from the authors’ claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by

*the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable under the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.*

### **Full text of the case law**

Selected Decisions of the Human Rights Committee under the Optional Protocol, Volume 6, OHCHR, available in English, Russian and Spanish from:

<http://www.ohchr.org/EN/PublicationsResources/Pages/ReferenceMaterial.aspx>

## **Human Rights Committee: *Diergaardt et al. v. Namibia, Communication No. 760/1997 (25 July 2000)***

### **Key issues**

- Customary relationship to land, Expropriation, Traditional possession of land, Traditional use of land

### **Summary of case**

This case involved the expropriation by the State of land traditionally possessed and used by the Rehoboth Basters, a community of descendants of indigenous Khoi and Afrikaans settlers who originally lived in the Cape area of South Africa, but moved to their present territory in 1872. They had been recognized as autonomous peoples by both German and South African governments when those States had colonial rule over Namibia and the Rehoboth Basters continued to live under their own customs and laws. While the Complainants did not prevail, the Committee did clarify the scope of protections of minority rights under Article 27 of the International Covenant on Civil and Political Rights.

### **Legal questions related to land and human rights**

Legal issues included whether or not the scope of the protections of Article 27 of the International Covenant on Civil and Political Rights included groups without a cultural link to land.

### **Main findings**

The Committee found that there was no violation of Article 27 since the Rehoboth Basters community, while traditionally using the land in question for some 125 years, did not use it as a customary way of life.

### **Relevant sections of the case law**

*Para. 10.6 As to the related issue of the use of land, the authors have claimed a violation of Article 27 in that a part of the lands traditionally used by members of the Rehoboth community for the grazing of cattle no longer is in the de facto exclusive use of the members of the community. Cattle raising is said to be an essential element in the culture of the community. As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under Article 27 includes protection of a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples. However, in the present case the Committee is unable to find that the authors can rely on Article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee*

*therefore finds that there has been no violation of Article 27 of the Covenant in the present case.*

**Full text of the case law**

*Selected Decisions of the Human Rights Committee under the Optional Protocol, Volume 7, OHCHR, available in English, Russian and Spanish from:*

<http://www.ohchr.org/EN/PublicationsResources/Pages/ReferenceMaterial.aspx>

## **Human Rights Committee: *Des Fours v. Czech Republic, Communication No. 747/1997 (30 October 2001)***

### **Key issues**

- Expropriation, Right to property, Remedies

### **Summary of case**

This case dealt with a claim for restitution in the context of the confiscation of land and real property of residents, but non-citizens, of Czechoslovakia by the Government of Czechoslovakia after the Second World War. The Applicant's father was born a citizen of the Austrian-Hungarian Empire on 4 May 1904 in Vienna, and was of French and German descent. His family had been established in Bohemia since the seventeenth century. At the end of the First World War in 1918, he was a resident of Bohemia, a kingdom in the former empire, and became a citizen of the newly created Czechoslovakian State. In 1939, because of his German mother tongue, he automatically became a German citizen by virtue of Germany's decree of 16 March 1939, establishing the Protectorate of Bohemia and Moravia. On 5 March 1941, the father of the Applicant died and he thus inherited land known as the Hruby Rohozec estate. At the end of the Second World War, on 6 August 1945, his estate was confiscated under the Benes Decree 12/1945, pursuant to which the land properties of German and Magyar private persons were confiscated without any compensation. In the 1990s, laws allowing for property restitution were adopted, but according to these, restitution was contingent upon non-interrupted Czech citizenship.

### **Legal questions related to land and human rights**

Legal questions included whether restitution of land was contingent upon citizenship.

### **Main findings**

The Committee held that a distinction based on citizenship was arbitrary and discriminatory against persons who suffered similar injustices on account of State action, and thus violated the right to equal protection of the law (Article 26 of the International Covenant on Civil and Political Rights) in conjunction with general prohibition on discrimination (Article 2 of the Covenant).

### **Relevant sections of case law**

*Para. 8.3* "With regard to the author's allegation of a violation of Article 26 of the Covenant, the Committee begins by noting that Law No. 243/1992 already contained a requirement of citizenship as one of the conditions for restitution of property and that the amending Law No. 30/1996 retroactively added a more stringent requirement of continued citizenship. The Committee notes further that the amending Law disqualified the author and any others in this situation, who might otherwise have qualified for restitution. This raises an issue of arbitrariness and, consequently, a breach of the right to equality before the law, equal protection of the law and non-discrimination under Article 26 of the Covenant."

Para. 8.4      *“The Committee recalls its views in cases No. 516/1993 (Simunek et al.), 586/1994 (Joseph Adam) and 857/1999 (Blazek et al.) that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently a discriminatory distinction between individuals who are equally victims of prior state confiscations, and constitutes a violation of Article 26 of the Covenant. This violation is further exacerbated by the retroactive operation of the impugned Law.”*

#### **Full text of the case law**

*Selected Decisions of the Human Rights Committee under the Optional Protocol*, Volume 7, OHCHR, available in English, Russian and Spanish from:

<http://www.ohchr.org/EN/PublicationsResources/Pages/ReferenceMaterial.aspx>

## 2. INTERNATIONAL LABOUR ORGANIZATION

### *International Labour Organization Committee of Experts on the Application of Conventions and Recommendations (CEACR): Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Brazil – adopted 2008, published 98<sup>th</sup> ILC session (2009)*

#### Key issues

- Customary relationship to land, Eviction impact assessment, Obligation to consult, Remedies, Traditional possession of land, Traditional use of land.

#### Summary of case

The Single Confederation of Workers (CUT) alleged that a national legislation of Brazil undermines self-identification of the Quilombola communities as tribal communities, and thus preventing the communities from obtaining land titles for the land they have traditionally occupied.

#### Legal questions related to land and human rights

Legal questions concerned the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) consideration of the scope of protections under the ILO Convention No. 169 and in particular whether the protections afforded indigenous peoples also protects tribal people that are not indigenous.

#### Main findings

The CEACR considered that the Quilombola communities met the criteria as "tribal peoples" defined under Article 1(1)(a) of the ILO Convention No. 169. The Committee also stated that the Article 1(2) of the Convention provides for the self-identification as indigenous or tribal as a fundamental criterion for determining the groups which enjoy the protection of the Convention.

#### Relevant sections of the case law

*Article 1(2). Undermining of the application of the criterion of self-identification. The CUT also states that the criterion of self-identification established in Article 1(2) of the Convention was incorporated in national law by means of Decree No. 4887/2003, which regulates the procedure for granting titles regarding lands occupied by the remaining Quilombola communities. Nevertheless, the Government is allegedly undermining self-identification by means of subsequent legislation (Decree No. 98/2007), thereby preventing issues regarding land titles from being settled since doing so depends on registration of communities. It is, according to the trade union, more and more difficult to obtain registration and thus secure the application of other rights, in particular with regard to land. [...] In the light of the*

*information received, the Committee considers that the Quilombola communities appear to meet the requirements laid down by Article 1(1)(a) of the Convention, according to which the Convention applies to “tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations”. Article 1(2) states that “self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups for which the provisions of this Convention apply”.*

### **Full text of the case law**

The full text of the observation can be searched through ILO [NORMLEX](#) database ([www.ilo.org](http://www.ilo.org)) and available in English, French and Spanish.

### 3. INTERNATIONAL COURT OF JUSTICE

#### *International Court of Justice: Advisory Opinion – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004)*

##### Key issues

- Annexation, Expropriation, Freedom of movement and residence, Maintenance of livelihood, Restitution, Right to adequate housing, Right to an adequate standard of living, Right to education, Right to food, Right to health, Right to work.

##### Summary of case

This case dealt with the construction of a wall by Israel which resulted in the destruction of and the de facto annexation of land from the occupied Palestinian territory of the West Bank, including land used by individuals and communities for agriculture and water resources.

##### Legal questions related to land and human rights

Legal questions centred on the appropriateness of applying human rights treaty law by the International Court of Justice as well as on whether annexation or destruction of land rises to violations of the International Covenant on Economic, Social and Cultural Rights.

##### Main Findings

The Court held that the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR) and the Convention of the Rights of the Child (CRC) as well as international humanitarian law, is applicable both to territories over which a State has sovereignty and to those over which it exercises jurisdiction outside sovereign territory, such as in the case of Israel's occupation of Palestinian territory.

With respect to land, the Court held that the construction of the wall and its associated regime impeded the exercise by the persons concerned of their rights to freedom of movement guaranteed under the ICCPR and the rights to work, health, education and to an adequate standard of living as guaranteed by the ICESCR and the CRC, and contravened the requirements of the Hague Regulations of 1907 and the Fourth Geneva Convention.

The Court thus held that Israel is under an obligation to return the land seized from any person for purposes of construction of the wall in the Occupied Palestinian Territory, and if such restitution is not possible, to compensate for the damage suffered. The Court also considered that Israel is obliged to compensate all persons having suffered from material damage as a result of the wall's construction.

### Relevant sections of the case law

*Para 132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.*

*Para 134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.*

*Para. 153 Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.*

### Full text of the case law

Decision: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>



## **II. DECISIONS OF REGIONAL HUMAN RIGHTS MECHANISMS**

## 1. AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

### *African Commission on Human and Peoples' Rights: The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication No. 155/96 (27 May 2002)*

#### Key issues

- Eviction impact assessment, Forced eviction, Obligation to protect, Obligation to respect, Right to adequate housing, Right to food, Remedies.

#### Summary of case

This case dealt with the forced eviction and destruction of land of the Ogoni people in the Niger Delta region of Nigeria by State (armed forces and State oil company) and non-State actors (transnational oil corporation).

#### Legal questions related to land and human rights

Legal questions included whether the African Charter on Human and Peoples' Rights protected land rights, including rights associated with housing and food which are not explicit in the Charter.

#### Main findings

The African Commission on Human and Peoples' Rights found implicit rights to food and to adequate housing, and consequently the prohibition of forced eviction, in the African Charter. Specifically, the right to food was found to be implicit within the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22) of the African Charter. The right to adequate housing was found to be implicit in the right to property (Article 14), the right to health (Article 16) and the right to protection of the family (Article 18(1)) of the African Charter.

In applying these rights, the Commission found that the destruction of individual and communal farmland by acts and omissions of the State rose to violations of the obligations to respect and to protect the implicit rights to food and adequate housing. Remedies ordered by the Commission included undertaking a comprehensive clean-up of lands and rivers damaged by oil operations and environmental and social impact assessments prior to any further oil development.

#### Relevant sections of the case law

*Para. 61* At a very minimum, the right to shelter obligates the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating

*any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them which they find most appropriate to satisfy individual, family, household or community housing needs.[...] Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter goes further than merely guaranteeing a roof over one's head. It extends to embody the individual's right to privacy and to live in peace- whether under a roof or not.*

*Para. 62 The protection of the rights guaranteed in Articles 14, 16 and 18 (1) leads to the same conclusion. In the case of the Ogoni People, the Government of Nigeria has failed to fulfil these two minimum obligations. It has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute, amongst others, massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.*

*Para. 63 The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term "forced evictions" by the Committee on Economic Social and Cultural Rights which defines this term as "the permanent removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection [...]"*

*Para. 64 The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22). By violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.*

*Para. 65 The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter as well as international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should neither allow private parties to destroy or contaminate food sources, nor prevent peoples' efforts to feed themselves.*

*Para. 66 The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; it has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed*

*themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.*

*Para. 67 The Complainants also allege that the Nigerian Government had violated Article 4 of the Charter which guarantees the inviolability of human beings and everyone's right to life and integrity of the person respected. Given the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to an unacceptable level has made living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms which were destroyed by the direct involvement of the Government. What is more, these and similar brutalities did not only affect individuals in Ogoniland but the Ogoni Community as a whole.*

### **Full text of the case law**

Decision:

[http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf)

***African Commission on Human and Peoples' Rights: Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication No. 276/2003 (4 February 2010)***

### Key issues

- Indigenous rights, Ancestral land, Customary relationship to land, Communal tenure, Traditional possession of land, Traditional use of land, Right to property, Cultural rights, Obligation to consult, Meaningful participation, Demarcation, Restitution, Remedies, Right to development.

### Summary of case

This case dealt with the forced eviction and displacement of an indigenous community from their ancestral lands to make way for a game reserve. The community sought restitution of their ancestral lands.

### Legal questions related to land and human rights

Legal questions included whether the African Charter on Human and Peoples' Rights afforded protections for indigenous peoples including protection of access to or control over ancestral lands. The case also examined the content of such protections, including the adequacy of consultations prior to displacement and whether the African Charter allowed for collective legal claims.

### Main Findings

The Africa Commission relied on jurisprudence from the Inter-American human rights system to protect indigenous land rights in Africa. The African Commission found violations of the right to property (Article 14 of the African Charter on Human and Peoples' Rights) as well as the right to religious practice (Article 8), right to culture (Article 17), right to the free disposition of natural resources (Article 21) and right to development (Article 22). The Commission also held that meaningful participation of those affected by development decisions was guaranteed by Article 14. Remedies included recognizing rights of ownership over ancestral lands.

### Relevant sections of the case law

*Para. 173* "The African Commission is of the view that the Endorois' forced eviction from their ancestral lands by the Respondent State interfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion."

*Para. 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.”*

### **Full text of the case law**

Decision:

[http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf)

## ***African Commission on Human and Peoples' Rights: Centre on Housing Rights and Evictions (COHRE) v. Sudan, Communication No. 296/2005 (29 July 2010)***

### **Key issues**

- Forced eviction, Informal tenure, Right to property, Right to food, Right to water, Maintenance of livelihood, Right to development, Obligation to respect, Obligation to protect, Restitution, Remedies.

### **Summary of case**

This case dealt with human rights violations, including forced eviction and destruction of food and water resources associated with forced displacement from land, in the context of the conflict in Darfur. In this context attacks on civilian populations by paramilitary as well as government forces were taking place, including attacks on food and water resources necessary for the civilian population to maintain its livelihood.

### **Legal questions related to land and human rights**

Legal questions included whether forced eviction and displacement of non-indigenous peoples from land, including land not used for housing, amounts to a violation of Article 14 (right to property) of the African Charter and whether legal title is necessarily an element of the right to property.

### **Main Findings**

In *COHRE v. Sudan* the African Commission found violations of the right to property (Article 14) of the African Charter on Human and Peoples' Rights related to forced eviction from homes and land, including land used for agricultural or herding purposes. The Commission went on to hold that "It doesn't matter whether they had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14." By doing so, the Commission looked at the traditional use of land as a unique qualifier as opposed to indigenous status. The Commission also turned for guidance to the *UN Principles on housing and property restitution for refugees and displaced persons (Pinheiro Principles)* as "emerging principles in international human rights jurisprudence" including expressly Principle 5 which states that "States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of lands as a punitive measure or as a means or methods of war." The Commission also found a violation of the collective right to economic, social and cultural development (Article 22) as well as violations of an implicit right to water as access to resources on land were denied (implicit in Article 16 right to highest attainable standard of health). Remedies ordered included rehabilitating economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces.

### Relevant sections of the case law

*Para. 205 It doesn't matter whether they had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14." The Commission therefore finds the Respondent State in violation of Article 14.*

*Para. 209 The African Commission recommends that the Respondent State should take all necessary and urgent measures to ensure protection of victims of human rights violations in the Darfur Region, including to: rehabilitate economic and social infrastructure, such as education, health, water and agricultural services in the Darfur provinces in order to establish conditions for safe return of IDPs and Refugees. Further a National Reconciliation Forum was set up to address the long-term sources of conflict, dealing with equitable allocation of national resources to various provinces, including affirmative action for Darfur, the resolution of land issues, grazing and water rights, including destocking of livestock.*

### Full text of the case law

[http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45\\_279.03\\_296.05\\_eng.pdf](http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45_279.03_296.05_eng.pdf)

## 2. EUROPEAN COMMITTEE OF SOCIAL RIGHTS

### *European Committee of Social Rights: European Roma Rights Centre v. Italy, Communication No. 27/2004 (7 December 2005)*

#### Key issues

- Cultural rights, Expropriation Forced eviction, Minority rights, Right to adequate housing.

#### Summary of case

Decided under the Revised European Social Charter of 1996, this case involved, *inter alia*, the forced eviction of Roma communities from land used for nomadic, temporary housing as well as the issue of inadequacy of temporary camping sites for nomadic Roma.

#### Legal questions related to land and human rights

The case dealt with the question whether the right to adequate housing (Article 31) of the Revised European Social Charter can be applied to eviction from land.

#### Main findings

The Committee found that the insufficiency and inadequacy of camping sites for itinerant Roma constituted a violation of Article 31(1) (States Party's duty to promote access to housing of an adequate standard) in conjunction with Article E (prohibition of discrimination). The Committee also found that systematic forced evictions of Roma from sites or dwellings ostensibly unlawfully occupied by them constituted a violation of Article 31(2) (State Party's duty to prevent and gradually reduce and eliminate homelessness, taken together with Article E).

#### Relevant sections of the case law

*Para. 29 According to the ERRC, camping site facilities with limited or no access to basic amenities such as water, electricity and sewage and solid waste removal are inadequate. Although three-quarters of the camps have running water and electricity, such services are not sufficient to meet the needs, while very few camps are provided with sewage facilities and even fewer with waste collection. Moreover, the majority of camps are infested with insects and rats and only one-third is surfaced with asphalt.*

*Para. 34 The Committee observes that other than referring to local authority regulations (which were only provided as an appendix to the last written submission by Italy), the Government has adduced no evidence to refute the complainant's allegations.*

*Para. 37 The Committee therefore finds that Italy failed to show that: - it has taken adequate steps to ensure that Roma are offered housing of a sufficient quantity and quality to meet their particular needs and it has failed to show that it has ensured or has taken steps to ensure that local authorities are fulfilling their responsibilities in this area. The Committee*

therefore finds that the situation constitutes a violation of Article 31§1 taken together with Article E.

*Para. 39* According to the ERRC, the Italian authorities frequently evict Roma from sites they have occupied for some time and provide no alternative housing or resettle them in at least substandard housing.

*Para. 41* The Committee notes with regard to Article 31§2 that States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available (see Conclusions 2003, Article 31§2, France, p. 225, Italy, p. 345, Slovenia, p. 557, and Sweden, p. 653). The law must also establish eviction procedures, specifying when they may not be carried out (for example, at night or during winter), provide legal remedies and offer legal aid to those who need it to seek redress from the courts. Compensation for illegal evictions must also be provided.

*Para. 42* The Committee finds that Italy has failed to establish that the relevant evictions satisfy these conditions, and has not provided credible evidence to refute the claims that Roma have suffered unjustified violence during such evictions. The Committee therefore considers that the situation constitutes a violation of Article 31§2 in combination with Article E.

### **Full text of the case law**

English: [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC27Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC27Merits_en.pdf)

French: [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC27Merits\\_fr.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC27Merits_fr.pdf)

## **European Committee of Social Rights: European Roma Rights Centre v. Greece, Communication No. 31/2005 (18 October 2006)**

### **Key issues**

- Cultural rights, Expropriation, Forced eviction, Minority rights, Right to adequate housing.

### **Summary of case**

Decided under the original European Social Charter of 1961, this case involved, inter alia, the forced eviction of Roma communities from land used for nomadic, temporary housing as well as the issue of inadequacy of temporary camping sites for nomadic Roma.

### **Legal questions related to land and human rights**

The issue at hand was whether the right of the family to social, legal and economic protection (Article 16) of the original European Social Charter afforded protections related to land and housing.

### **Main findings**

The Committee relied on the principle of indivisibility, interdependence and interrelatedness of human rights and noted that the right to housing permits the exercise of many other rights and is of central importance to the family. The Committee reaffirmed that, in order to satisfy Article 16, States must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing is of an adequate standard and includes essential services. Furthermore, the obligation to promote and provide housing extends to security from forced or otherwise unlawful eviction. The Committee held that the implementation of Article 16 with regard to nomadic groups, including itinerant Roma, implies that adequate land necessary for stopping places should be provided and that forced eviction from such land should be prohibited.

### **Relevant sections of the case law**

*Para. 24 The right to housing permits the exercise of many other rights – both civil and political as well as economic, social and cultural rights. It is also of central importance to the family. The Committee recalls its previous case law to the effect that in order to satisfy Article 16 states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity). The Committee has stated that adequate housing refers not only to a dwelling which must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence. Furthermore, the obligation to promote and provide housing extends to security from unlawful eviction.”*

*Para. 25 The implementation of Article 16 as regards nomadic groups including itinerant Roma, implies that adequate stopping places must be provided. In this respect*

*Article 16 contains similar obligations to Article 8 of the European Convention of Human Rights.*

**Full text of the case law**

English: [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC15Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC15Merits_en.pdf)

French: [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC15Merits\\_fr.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC15Merits_fr.pdf)

### 3. EUROPEAN COURT OF HUMAN RIGHTS

#### *European Court of Human Rights: Connors v. United Kingdom, Application No. 66746/01 (27 May 2004)*

##### Key issues

- Expropriation, Forced eviction, Minority rights, Right to privacy.

##### Summary of case

This case dealt with the summary eviction by local government authorities of Roma/Gypsy<sup>1</sup> families from land used as a halting site for their nomadic homes. Prior to 2005, Gypsies and Travellers who occupied pitches on local authority sites ('local authority Gypsy and Traveller sites') were provided limited statutory protection from eviction under the Caravan Sites Act 1968. In order to evict a Gypsy or Traveller from their site, a local authority needed to only give twenty eight days' notice to terminate the licence. If the resident did not leave, the authority could seek a possession order from the court. The authority did not need to provide a justification to seek a possession order, and the court did not have an opportunity to consider whether it was reasonable to grant the order.

##### Legal questions related to land and human rights

Legal questions included whether summary eviction of Roma communities from public site falls under the scope of application of Article 8 (right to respect for private, family and home life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

##### Main findings

The European Court of Human Rights ruled that the lack of procedural safeguards to eviction from local authority Gypsy and Traveller sites breached Article 8 of the European Convention for Human Rights.

The Court ruled out the justification of such eviction under margin of appreciation by the State, stating that the eviction in question was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with the rights of the applicants and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued.

##### Relevant sections of the case law

*Para 82. [...]Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context*

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<sup>1</sup> The Court used the term "Gypsy" in its decision.

*of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant [...].*

*Para 83. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 [...]*

*Para 84. The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases [...] To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life [...]*

*Para 86. The serious interference with the applicant's rights under Article 8 requires, in the Court's opinion, particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed. The Court would also observe that this case is not concerned with matters of general planning or economic policy but with the much narrower issue of the policy of procedural protection for a particular category of persons. [...] In the present case, the applicant was lawfully on the site and claims that the procedural guarantees available to other mobile home sites, including privately run gypsy sites, and to local authority housing, should equally apply to the occupation of that site by himself and his family.*

*Para. 95 In conclusion, the Court finds that the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention.*

### **Full text of the case law**

Available in English and French at:

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":\["66746/01"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{)

**European Court of Human Rights: Case of Dogan and others v. Turkey,  
Applications Nos. 8803-8811/02, 8813/02 and 8815-8819/02  
(29 June 2004)**

### Key issues

- Communal tenure, Control over and use of property, Displacement, Forced eviction, Informal tenure, Right to property.

### Summary of case

This case involved forced eviction and displacement from homes and lands in the context of armed conflict in Turkey as well as denial of the right to return to those homes and lands. The lands in question comprised land owned by the applicants and also land not owned but used by the applicants and their ascendants as well as common lands in the village.

### Legal questions related to land and human rights

Legal questions included whether title to property is a necessary element of Article 1 of Protocol No. 1 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms which, *inter alia*, guarantees the right to peaceful enjoyment of possessions.

### Main Findings

Even though several Applicants did not have legal title to their homes, the European Court held that they either had their own houses constructed on the lands of their ancestors or lived in houses owned by their fathers and cultivated their fathers' land. They also had unchallenged rights over the common lands in the village and earned their living from breeding livestock and tree-felling. Those economic resources and the revenue the applicants derived from them, according to the Court, qualified as "possessions" for the purposes of Article 1 of Protocol No. 1 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (right to peaceful enjoyment of possessions). The Court found that the applicants have had to bear an individual and excessive burden which had upset the fair balance that should be struck between the requirements of the general interest and the protection of the right to peaceful enjoyment of one's possessions. The Court found that the Applicants had been denied the ability to use and dispose of their land and consequently the Court held that Article 1 of Protocol No. 1 had been violated.

### Relevant section of the case law

*Para. 145 The Court reiterates that Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, which is set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.*

*Para. 146 The Court notes that the parties did not comment on the rule applicable to the case. It points out that the measures in question did not involve a deprivation of property within the meaning of the second sentence of the first paragraph of Article 1 because the Applicants have remained the legal owner or possessor of the lands in Boydaş. The measures did not amount to control of the use of property either since they did not pursue such an aim. The Court considers therefore that the situation of which the Applicants complain has to be dealt with under the first sentence of the first paragraph of Article 1 since the impugned measures undoubtedly restricted the Applicants' rights to use and dispose of their possessions.*

### **Full text of the case law**

Decisions of the European Court decisions in English and French can be accessed at:  
<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

## **European Court of Human Rights: *Ucci v. Italy*, Application No. 213/04 (22 June 2006)**

### **Key issues**

- Expropriation, Right to property.

### **Summary of case**

This case dealt with government authorities taking possession of agricultural land with the intent of expropriating it without compensation.

### **Legal questions related to land and human rights**

Legal questions dealt with the scope of Article 1 of Protocol No. 1 (peaceful enjoyment of possessions) to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms in the context of government expropriation of land. In particular, the legal question centred on how to strike a fair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights including the right to peaceful enjoyment of possessions (Article 1 of Protocol No. 1 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms).

### **Main findings**

The European Court recalled its broad view of what the term “possessions” in the context of Article 1 of Protocol No. 1 entails, including housing and real property such as land. Also, according to the Court's Article 1 of Protocol No. 1 analysis, interference must be “for public purposes” and “as provided by law and general principles of international law.” Even then, an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. Under the Court's existing jurisprudence, this analysis also must take into account that ‘the concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole [and] the requisite balance will not be found if the person concerned has had to bear an individual and excessive burden.’ In other words, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The Court found that the actions of the government resulted in the Applicant being unable to dispose of his land. It also found that there was not remedy at the domestic level by which to challenge these actions. Consequently, the Court found a violation of Article 1 of Protocol No. 1 to the European Convention.

### **Full text of the case law**

Decisions of the European Court decisions in English and French can be accessed at:  
[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?{"appno":\["213/04"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?{)

## 4. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

### *Inter-American Commission on Human Rights: Brazil, Comunidad Yanomami, Case No. 7615, Report No. 12/85 (5 March 1985)*

#### Key issues

- Customary relationship to land, Demarcation, Indigenous rights, Obligation to protect, Positive obligations, Traditional use of land.

#### Summary of case

This case dealt with foreign extraction industries encroaching on indigenous lands, and included forced displacement to lands unsuitable for the community's traditional way of life. The situation involved the construction of a road through indigenous lands and the granting of mining licenses by the national government which led to an influx of foreign workers and mining development.

#### Legal questions related to land and human rights

This is a seminal case dealing with indigenous land rights under the Declaration on the Rights and Duties of Man. Legal questions dealt with the scope of protections afforded to indigenous peoples under the American Declaration; the content of the obligations,; positive obligations, the protection of indigenous rights, including rights related to land; and the use of other international law to interpret the American Declaration.

#### Main findings

The Inter-American Commission found that Brazil failed to take timely and effective measures to protect the Yanomami community's human rights, and that such failure detrimentally impacted the community's traditional way of life. The Commission held that resultantly there were violations of the following rights in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI).

The Commission drew reference to international law, including in particular Article 27 of the International Covenant on Civil and Political Rights, and that the rights of indigenous peoples to the protection of their culture and traditional way of life, comprising access to and control over their traditional land. As a remedy, the Commission required demarcation of their traditional land as well as positive measures to protect and ensure their traditional way of life as well as to ensure education, health protection and social integration programmes, all carried out in consultation with the community.

### Relevant sections of the case law

*Para. 2. That the reported violations have their origin in the construction of the trans-Amazonian highway BR-210 that goes through the territory where the Indians live; in the failure to establish the Yanomami Park for the protection of the cultural heritage of this Indian group; in the authorization to exploit the resources of the subsoil of the Indian territories; in permitting the massive penetration into the Indians' territory of outsiders carrying various contagious diseases that have caused many victims within the Indian community and in not providing the essential medical care to the persons affected; and finally, in proceeding to displace the Indians from their ancestral lands, with all the negative consequences for their culture, traditions, and costumes.*

*Para. 7. International law in its present state, and as it is found clearly expressed in Article 27 of the International Covenant on Civil and Political Rights, recognizes the right of ethnic groups to special protection with regard to the use of their own language, the practice of their own religion, and, in general, all those characteristics necessary for the preservation of their cultural identity.*

### Full text of the case law

English: <http://www.cidh.oas.org/annualrep/84.85eng/Brazil7615.htm>

Spanish: <http://www.cidh.org/annualrep/84.85sp/Brasil7615.htm>

***Inter-American Commission on Human Rights: Paraguay, Enxet-Lamenxay and Kayleyphapopyet (Riachito), Case No. 11.713, Report No. 90/99 (29 September 1999)***

**Key issues**

- Ancestral land, Indigenous rights, Remedies, Right to property.

**Summary of case**

The Lamenxay and Kayleyphapopyet indigenous communities sought restitution and recognition of their ancestral land which was sold by the State to private individuals. The case resulted in an amicable settlement.

**Legal questions related to land and human rights**

While the case was eventually resolved through an amicable settlement, it does provide examples of how to deal with restitution and recognition of ancestral lands. The Petitioners had originally alleged violations of the right to residence (Article VIII), the right to benefit from cultural life (Article XIII), the right to property (Article XXIII) and the right to judicial protection (Article XXIV) of the American Declaration on the Rights and Duties of Man.

**Main findings**

Ultimately, the community entered into an amicable settlement with Paraguay resulting in the State purchasing 22,000 hectares of the land in question and returning it to the indigenous peoples along with deeds of ownership and provision of food, sanitation and educational assistance.

**Full text of the case law**

English: <http://www.cidh.oas.org/annualrep/99eng/Friendly/Paraguay11.713.htm>

Spanish:

<https://www.cidh.oas.org/annualrep/99span/Soluci%C3%B3n%20Amistosa/Paraguay11713.htm>

## ***Inter-American Commission on Human Rights: Mary and Carrie Dann v. United States, Case No. 11.140, Report No. 75/02 (27 December 2002)***

### **Key issues**

- Ancestral land, Indigenous rights, Remedies, Right to property.

### **Summary of case**

The *Mary and Carrie Dann* case involved members of the Western Shoshone indigenous peoples in possession and actual use of the ancestral territory of the Western Shoshone tribe. The Petitioners alleged that the United States interfered with their occupation of the land by expropriating sections of land as federal property, i.e. by physically removing and threatening to remove the Dannels' livestock from the lands, and by permitting or acquiescing to gold prospecting activities within Western Shoshone traditional territory.

### **Legal questions related to land and human rights**

Petitioners sought relief through the enforcement of the right to equality under the law (Article II), the right to judicial protection (Article XVIII) and the right to property (Article XXIII) of the American Declaration of the Rights and Duties of Man. Petitioners also alleged violation of a right to cultural identity as implicitly protected by the right to equality before the law (Article II), the right freely to profess and practice religion (Article III), the right to protection of the family (Article VI) and the right to property (Article XXIII) as well as a violation of the right to self-determination as recognized under international law.

Legal questions centred around the weight to be given to emerging norms of international law, especially the Draft American Declaration on the Rights of Indigenous Peoples, in interpreting the rights in the American Declaration of the Rights and Duties of Man. In particular, questions related to the content of norms associated in part to cultural identity and self-determination were addressed.

### **Main findings**

The Inter-American Commission focused its review on the right to equality under the law (Article II), the right to judicial protection (Article XVIII) and the right to property (Article XXIII) of the American Declaration. Relying on emerging norms in international law related to indigenous rights, and in particular the Draft American Declaration on the Rights of Indigenous Peoples, as tools to interpret the American Declaration on the Rights and Duties of Man, the Commission found that the Petitioners did not receive a fair judicial proceeding necessary to ensure their collective, indigenous rights over the land appropriated by the U.S. Government.

The Commission recommended that the Petitioners be afforded an effective remedy, which includes adopting legislative or other measures necessary to ensure respect for the Dannels' right to property in accordance with Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands. The Commission also recommended that the United States of America review its laws,

procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration.

### Relevant section of case law

*Para. 124. [...] in addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands.*

*Para. 125. In particular, a review of pertinent treaties, legislation and jurisprudence reveals the development of over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples. Central to these norms and principles is a recognition that ensuring the full and effective enjoyment of human rights of indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. In most instances, this has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.*

*Para. 128. Perhaps most fundamentally, the Commission and other international authorities have recognized the collective aspect of indigenous rights, in the sense of rights that are realized in part or in whole through their guarantee to groups or organizations of people. This recognition has extended to acknowledgement of a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used, the preservation of which is fundamental to the effective realization of the human rights of indigenous peoples more generally and therefore warrants special measures of protection. The Commission has observed, for example, that continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples and that control over the land refers both its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group. The Inter-American Court of Human Rights has similarly recognized that for indigenous communities the relation with the land is not merely a question of possession and production but has a material and spiritual element that must be fully enjoyed to preserve their cultural legacy and pass it on to future generations.*

*Para. 129. The development of these principles in the inter-American system has culminated in the drafting of Article XVIII of the Draft American Declaration on the Rights of Indigenous Peoples, which provides for the protection of traditional forms of ownership and*

*cultural survival and rights to land, territories and resources. While this provision, like the remainder of the Draft Declaration, has not yet been approved by the OAS General Assembly and therefore does not in itself have the effect of a final Declaration, the Commission considers that the basic principles reflected in many of the provisions of the Declaration, including aspects of Article XVIII, reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.*

*Para. 130. Of particular relevance to the present case, the Commission considers that general international legal principles applicable in the context of indigenous human rights include:*

- *the right of indigenous peoples to legal recognition of varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;*
- *the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and*
- *where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.*

### **Full text of the case law**

English: <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm>

Spanish: <http://www.cidh.oas.org/annualrep/2002sp/EEUU.11140.htm>

***Inter-American Commission on Human Rights: Chile, Mercedes Julia Huenteao Beroiza et al., Petition No. 4617/02, Report No. 30/04 (11 March 2004)***

**Key issues**

- Ancestral land, Customary relationship to land, Indigenous rights, Obligation to protect, Remedies, Right to property.

**Summary of case**

The Mapuche Pehuenche indigenous community sought to protect their ancestral land from irreparable destruction that would occur if a hydroelectric dam was constructed. The case was initiated when the Government of Chile authorized construction of the dam by Endesa Chile, a private electrical company.

**Legal questions related to land and human rights**

While the case was eventually resolved through an amicable settlement, it does provide examples of how to deal with compensation for displacement from ancestral lands. The Petitioners had originally alleged violations of right to life (Article 4), the right to humane treatment (Article 5), the right to a fair trial (Article 8), freedom of conscience and religion (Article 12), rights of the family (Article 17), the right to property (Article 21) and the right to judicial protection (Article 25) of the American Convention on Human Rights.

**Main findings**

Ultimately, the community entered into an amicable settlement with Chile in which they voluntarily agreed to relinquish control over their ancestral land in exchange for quality alternative land, technical support to promote agricultural production, education scholarships and a compensation of US\$300,000 per family.

**Full text of the case law**

English: <http://www.cidh.oas.org/annualrep/2004eng/Chile.4617.02eng.htm>

Spanish: <http://www.cidh.oas.org/Indigenas/Chile.4617.htm>

***Inter-American Commission on Human Rights: Belize, Maya indigenous community of the Toledo District v. Belize, Case 12.053, Report No. 40/04 (12 October 2004)***

**Key issues**

- Ancestral land, Communal tenure, Demarcation, Indigenous rights, Traditional possession of land, Obligation to protect, Right to food, Right to property, Remedies.

**Summary of the case**

This case involved the failure of the State to recognize and protect the lands of the Mopan and Ke'kchi Maya People of the Toledo District of Southern Belize. It also dealt with the

State granting logging and oil exploration concessions, without adequate consultation, to private corporations with resulting activities that damaged the land including sources of food.

### Legal questions related to land and human rights

Legal questions included how to interpret the American Declaration on the Rights and Duties of Man in the context of indigenous land rights, with a particular focus on the scope of the obligation to protect the right to property.

### Main findings

The Commission looked at the current state of law with respect to indigenous land rights, including jurisprudence from the African Commission on Human and Peoples' Rights and the International Labour Organization to interpret, *inter alia*, the right to property in the American Declaration in the particular context of indigenous peoples. In doing so, the Commission held that the State violated the right to property "by failing to take effective measures to recognize their communal property right to the lands that they have traditionally occupied and used, without detriment to other indigenous communities, and to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their right exists" and "by granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled or otherwise clarified and protected, in the absence of effective consultations with and the informed consent of the Maya people."

### Relevant case law

*Para. 95 [...] a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples. Central to these norms and principles has been the recognition of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.*

*Para. 98 In deciding upon the complaints in the present petition, therefore, the Commission will afford due consideration to the particular norms and principles of international human rights law governing the individual and collective interests of indigenous peoples, including consideration of any special measures that may be appropriate and necessary in giving proper effect to these rights and interests.*

*Para. 151 In summary, based upon the foregoing analysis, the Commission concludes that the Maya people of southern Belize have a communal property right to the lands that they have traditionally used and occupied, and that the character of these rights is a function of Maya customary land use patterns and tenure. The Commission also considers that this right is embraced and affirmed by Article XXIII of the American Declaration.*

*Para. 152 The Commission further concludes that the State has violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people, by failing to take effective measures to recognize their communal property right to*

*the lands that they have traditionally occupied and used, and to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their right exists.*

*Para. 153 In addition, the Commission concludes that the State, by granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled or otherwise clarified or protected, without effective consultations with and the informed consent of the Maya people and with resulting environmental damage, further violated the right to property enshrined in Article XXIII of the American Declaration to the detriment of the Maya people.*

*Para. 154 Finally, the Commission notes the Petitioners' contention that the failure of the State to engage in meaningful consultation with the Maya people in connection with the logging and oil concessions in the Toledo District, and the negative environmental effects arising from those concessions, constitute violations of several other rights under international human rights law, including the right to life under Article I of the American Declaration, the right to religious freedom and worship under Article III of the American Declaration, the right to a family and to protection thereof under Article VI of the American Declaration, the right to preservation of health and well-being under Article XI of the American Declaration, and the "right to consultation" implicit in Article 27 of the ICCPR, Article XX of the American Declaration, and the principle of self-determination.*

*Para. 155 In its analysis of this case, the Commission has emphasized the distinct nature of the right to property as it applies to indigenous peoples, whereby the land traditionally used and occupied by these communities plays a central role in their physical, cultural and spiritual vitality. As the Commission has previously recognized with respect of the right to property and the right to equality, "[f]or indigenous people, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture." Similarly, the concept of family and religion within the context of indigenous communities, including the Maya people, is intimately connected with their traditional land, where ancestral burial grounds, places of religious significance and kinship patterns are linked with the occupation and use of their physical territories. Further, the Commission has specifically concluded in its analysis of this case that the duty to consult is a fundamental component of the State's obligations in giving effect to the communal property right of the Maya people in the lands that they have traditionally used and occupied.*

*Para. 156 Accordingly, in light of its analysis of the nature and content of the right to property in the context of indigenous peoples, including the Maya people of the Toledo District, the Commission considers that the additional claims raised by the Petitioners are subsumed within the broad violations of Article XXIII of the American Declaration determined by the Commission in this case and therefore need not be determined.*

### **Full text of the case law**

English: <http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm>

Spanish: <http://www.cidh.oas.org/annualrep/2004sp/Belize.12053.htm>

## 5. INTER-AMERICAN COURT OF HUMAN RIGHTS

### *Inter-American Court of Human Rights: Nicaragua, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Series C No. 79 (31 August 2001)*

#### Key issues

- Indigenous rights, Ancestral land, Communal tenure, Traditional possession of land, Right to property, Demarcation, Remedies.

#### Summary of case

A seminal case before the Inter-American Court of Human Rights dealing with indigenous land rights, *Awas Tingni* involved the State's failure to demarcate communal land, to protect the indigenous peoples' right to own their ancestral land and natural resources, and to guarantee access to effective remedy. Specifically, the decision prohibited the State from entering into land concessions with third parties that would have a detrimental impact on indigenous land.

#### Legal questions related to land and human rights

Legal questions included the first detailed examination of the scope of indigenous land protections under the American Convention of Human Rights, including the scope of the right to property (Article 21) in the context of indigenous and communal land as well as what property remedies exist for unlawful expropriation of indigenous land.

#### Main findings

The Inter-American Court of Human Rights held that Nicaragua had violated the right to judicial protection and the right to property as guaranteed in the American Convention of Human Rights. The Court held that the right to property included indigenous peoples' property rights as originating in indigenous tradition and, therefore, the State had no right to grant concessions to third parties with respect to indigenous land. To determine a property right, the Court looked to the Constitution of Nicaragua which, in Article 5, recognized communal property rights. As a remedy, the Court required Nicaragua to adopt measures to create an effective mechanism for demarcation and titling of the indigenous communities' territory, in accordance with their customary law, values, customs and mores. The State also had to refrain from any acts that might affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the indigenous community live and carry out their activities.

#### Relevant sections of the case law

*Para. 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.*

*Para. 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.*

*Para. 153. It is the opinion of the Court that, pursuant to Article 5 of the Constitution of Nicaragua, the members of the Awas Tingni Community have a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities. The Court believes that, in light of Article 21 of the Convention, the State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled.*

### **Full text of the case law**

English: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf)

Spanish: [http://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_79\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_79_esp.pdf)

## ***Inter-American Court of Human Rights: Case of the Moiwana Community v. Suriname, Series C No. 124 (15 June 2005)***

### **Key issues**

- Ancestral land, Communal tenure, Cultural rights, Demarcation, Displacement, Forced eviction, Right to property, Remedies, Traditional possession of land, Traditional use of land.

### **Summary of case**

The Moiwana community consists of descendants of African slaves who have lived a traditional way of life since the late 19<sup>th</sup> Century. The community possessed and occupied land in a traditional, customary manner although they lacked either individual or communal ownership. In 1986, State forces forcibly evicted and displaced the Moiwana community from these lands. The community sought to hold the State accountable for restitution of their ancestral lands.

### **Legal questions related to land and human rights**

The legal question deals with the scope of Article 21 (right to enjoyment of property) regarding land traditionally used and possessed by tribal communities that were not indigenous.

### **Main findings**

The Inter-American Court applied its jurisprudence related to indigenous land rights to the non-indigenous Moiwana community on account of the latter's communal possession and occupation of their ancestral lands in accordance with customary practices. The Court also did not rely on recognition of communal property rights under domestic law but rather the factual communal, customary possession of the Moiwana community.

### **Relevant sections of the case law**

*Para. 129. In order to determine whether such circumstances constitute the deprivation of a right to the use and enjoyment of property, naturally, this Court must first assess whether Moiwana Village belongs to the community members, bearing in mind the broad concept of property developed in the Tribunal's jurisprudence.*

*Para. 130. The parties to the instant case are in agreement that the Moiwana community members do not possess formal legal title – neither collectively nor individually – to their traditional lands in and surrounding Moiwana Village. According to submissions from the representatives and Suriname, the territory formally belongs to the State in default, as no private individual or collectivity owns official title to the land.*

*Para. 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. 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. 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.*

*Para. 132. The Moiwana community members are not indigenous to the region; according to the proven facts, Moiwana Village was settled by N'djuka clans late in the 19<sup>th</sup> Century. Nevertheless, from that time until the 1986 attack, the community members lived in the area in strict adherence to N'djuka custom.*

*Para. 133. In this way, the Moiwana community members, a N'djuka tribal people, possess an “all-encompassing relationship” to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole. Thus, this Court’s holding with regard to indigenous communities and their communal rights to property under Article 21 of the Convention must also apply to the tribal Moiwana community members: their traditional occupancy of Moiwana Village and its surrounding lands – which has been recognized and respected by neighboring N'djuka clans and indigenous communities over the years – should suffice to obtain State recognition of their ownership.*

*Para. 134. Based on the foregoing, the Moiwana community members may be considered the legitimate owners of their traditional lands; as a consequence, they have the right to the use and enjoyment of that territory. The facts demonstrate, nevertheless, that they have been deprived of this right to the present day as a result of the events of November 1986 and the State’s subsequent failure to investigate those occurrences adequately.*

### **Full text of the case law**

English: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_124\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf)

Spanish: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_124\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_esp.pdf)

## ***Inter-American Court of Human Rights; Paraguay, Case of the Indigenous Community Yakye Axa v. Paraguay, Series C No. 125 (17 July 2005)***

### **Key issues**

- Access to land, Ancestral land, Communal tenure, Cultural rights, Customary relationship to land, Displacement, Indigenous rights, Maintenance of livelihood, Positive obligations, Right to property.

### **Summary of case**

The *Case of the Indigenous Community Yakye Axa v. Paraguay* involved indigenous land rights. The community had been effectively displaced from their traditional land through the State not recognizing their communal ownership and possession. As a result of losing access to their ancestral land, they lived in extreme poverty.

### **Legal questions related to land and human rights**

Legal issues included to what degree domestic legislation must afford protections of indigenous land rights and what positive measures were required to ensure a dignified life. The Court also dealt with a conflict of laws issue whereby communal indigenous property rights conflicted with non-indigenous individual property rights.

### **Main findings**

The Inter-American Court found violations of the right to use and enjoy her or his property (Article 21), the right to judicial protection (Article 8) and the right to life (Article 4). The violation of the right to use and enjoy property had to do in part with Paraguay's failure to adopt adequate measures to ensure its domestic law guaranteed the community's effective use and enjoyment of their traditional land, thus threatening the free development and transmission of its culture and traditional practices.

If restitution of communal indigenous land is not possible, alternative land and/or compensation can be sought if there is a consensus with the people involved, in accordance with their own mechanism of consultation, values, customs and customary law. The unique indigenous attachment to particular land has to be given consideration, however.

In this case, the Court found that such a consultation did not occur. The Court ordered the State to demarcate the traditional land, to submit it to the community at no cost, and to provide basic goods and services necessary for the community to survive until they recovered their land.

The violation of the right to life was on account of the State's failure to take adequate measures, including positive obligations, to ensure a dignified life including traditional means of livelihood associated with access to land traditionally used by the community.

### Relevant sections of the case law

*Para. 127 In the instant case, in its analysis of the scope of Article 21 of the Convention, mentioned above, the Court deems it useful and appropriate to resort to other international treaties, aside from the American Convention, such as ILO Convention No. 169, to interpret its provisions in accordance with the evolution of the inter-American system, taking into account related developments in International Human Rights Law.*

*Para. 129 It is also necessary to take into account that, in view of Article 29(b) of the Convention, none of its provisions can be interpreted as “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.*

*Para. 130 ILO Convention No. 169 contains numerous provisions pertaining to the right of indigenous communities to communal property, which is addressed in this case, and said provisions can shed light on the content and scope of Article 21 of the American Convention. The State ratified and included the Convention 169 in its domestic legislation by means of Law No. 234/93.*

*Para. 131 Applying these criteria, this Court has underlined that the close relationship of indigenous peoples with their land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations.*

*Para. 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 constitute their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.*

*Para. 143 The Court agrees with the State that both the private property of individuals and communal property of the members of the indigenous communities are protected by Article 21 of the American Convention. However, merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established.*

*Para. 144 Now, when indigenous communal property and individual private property are in real or apparent contradiction, the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights, that is: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society.*

*Para. 150 In this regard, Article 16(4) of ILO Convention No. 169, when it refers to the return of indigenous peoples to territories from which they were displaced, states that:*

*When such return is not possible, [...] these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.*

*Para. 151 Selection and delivery of alternative lands, payment of fair compensation, or both, are not subject to purely discretionary criteria of the State, but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law.*

**Full text of the case law**

English: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf)

Spanish: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_esp.pdf)

## ***Inter-American Court of Human Rights: Paraguay, Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Series C No. 146 (29 March 2006)***

### **Key issues**

- Ancestral land, Control over and use of property, Indigenous rights, Meaningful participation, Obligation to consult, Right to property, Traditional possession of land.

### **Summary of case**

This case involves lands traditionally occupied by the Sawhoyamaxa indigenous community which were sold by the State to private investors in the late 19<sup>th</sup> Century. Over the years the land was divided and sold to individual owners. Beginning in 1991, the community sought recognition of their communal land rights over their ancestral lands.

### **Legal questions related to land and human rights**

Key questions in this case were whether current or recent possession by an indigenous community was a necessary element of the right to use and enjoy property as guaranteed by Article 21 of the American Convention of Human Rights and whether there was a time restriction with respect to when loss of possession occurred.

### **Main findings**

The Court built upon its jurisprudence in the *Awás Tingni* and *Moiwana* cases and held that current possession was not a necessary element of the right to use and enjoy property as guaranteed by Article 21 of the American Convention of Human Rights. Consequently, members of indigenous peoples who have unwillingly lost possession of their lands, including 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.

### **Relevant sections of the case law**

*Para. 127* Acting within the scope of its adjudicatory jurisdiction, the Court has had the opportunity to decide on indigenous land possession in three different situations. On the one hand, in the Case of the Mayagna (Sumo) Awás Tingni Community, the Court pointed out that 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 consequently registration. On the other hand, in the Case of the Moiwana Community, the Court considered that the members of the N'djuka people were the "legitimate owners of their traditional lands" although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them. In this case, the traditional lands have not been occupied by third parties. Finally, in the Case of the Indigenous Community Yakye Axa, the court considered that the members of the Community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as measure of reparation, to individualize those lands and transfer them on a for no consideration basis.

*Para. 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 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 people 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.*

*Para. 130 Consequently, under the very laws of Paraguay, the members of the Sawhoyamaxa Community have the right to claim restitution of their traditional lands even though said lands may be privately held and they, as claimants, may not be in full possession thereof.*

*Para. 131 The second issue under analysis refers to whether the right to the restitution of traditional lands lasts indefinitely in time. In order to solve this matter, the Court takes into consideration that the spiritual and material basis for indigenous identity is mainly supported by their unique relationship with their traditional lands. As long as said relationship exists, the right to claim lands is enforceable, otherwise, it will lapse. Said relationship may be expressed in different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it, and it may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture.*

*Para. 132 It is to be further considered that the relationship with the land must be possible. For instance, in situations like the case at hand, where the relationship with the land is expressed, inter alia, in traditional hunting, fishing and gathering activities, if the members of the indigenous people carry out few or none of such traditional activities within the lands they have lost, because they have been prevented from doing so for reasons beyond their control, which actually hinder them from keeping up such relationship, such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances disappear.*

*Para. 134 Based on the foregoing, the Court considers that the land restitution right of the members of the Sawhoyamaxa Community has not lapsed.*

### **Full text of the case law**

English: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_146\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf)

Spanish: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_146\\_esp2.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_esp2.pdf)

## ***Inter-American Court of Human Rights: Suriname, Case of the Saramaka People v. Suriname, Series C No. 172 (28 November 2007)***

### **Key issues**

- Ancestral land, Communal tenure, Cultural rights, Demarcation, Forced eviction, Displacement, Remedies, Right to property, Traditional possession of land, Traditional use of land.

### **Summary of case**

This case involved the construction of a dam by the State in the 1960s within territory traditionally occupied and used by the Saramaka people, which are a tribal although not indigenous people. The construction of the dam resulted in the State forcibly displacing the Saramaka people.

### **Legal questions related to land and human rights**

In a case submitted by the Inter-American Commission for Human Rights, the Commission alleged that Suriname has not adopted effective measures to recognize their right to the use and enjoyment of the territory they have traditionally occupied and used, that Suriname has allegedly violated the right to judicial protection to the detriment of such people by not providing them effective access to justice for the protection of their fundamental rights, particularly the right to own property in accordance with their communal traditions, and that the State has allegedly failed to adopt domestic legal provisions in order to ensure and guarantee such rights to the Saramakas. The Commission alleged violations of the right to property (Article 21) and the right to judicial protection (Article 25) of the American Convention of Human Rights.

Similar in some respects to the *Moiwana Community v. Suriname* case, issues included whether the norms applicable to indigenous peoples, including the right to property guaranteed by Article 21 of the American Convention, were applicable to non-indigenous tribal peoples. The case also dealt with the scope of protections of the use of natural resources related to the land.

### **Main findings**

The Inter-American Court found that while the Saramakas people were not indigenous, they were the descendants of escaped slaves that asserted their rights as tribal peoples. In particular, they share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions. The Court also found that, as tribal peoples, the Saramakas had a special relationship to land, as well as their communal concept of ownership, and thus enjoyed protections afforded under norms related to indigenous peoples, including not only possessing but using their land, and its natural resources, pursuant to their traditional practices.

## Relevant sections of case law

Para. 91. *In essence, pursuant to Article 21 of the Convention, States must respect the special relationship that members of indigenous and tribal peoples have with their territory in a way that guarantees their social, cultural, and economic survival. Such protection of property under Article 21 of the Convention, read in conjunction with Articles 1(1) and 2 of said instrument, places upon States a positive obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied.*

Para. 96. *Applying the aforementioned criteria to the present case, the Court thus concludes that the members of the Saramaka people make up a tribal community protected by international human rights law that secures the right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory.*

Para. 118. *An issue that necessarily flows from the assertion that the members of the Saramaka people have a right to use and enjoy their territory in accordance with their traditions and customs is the issue of the right to the use and enjoyment of the natural resources that lie on and within the land, including subsoil natural resources. In the present case, both the State and the members of the Saramaka people claim a right to these natural resources*

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

Para. 123. *Thus, in the present case, the Court must determine which natural resources found on and within the Saramaka peoples’ territory are essential for the survival of their way of life, and are thus protected under Article 21 of the Convention. Consequently, the Court must also address whether and to what extent the State may grant concessions for the exploration and extraction of those and other natural resources found within Saramaka territory.*

Para. 158. *[...] the Court concludes the following: first, that the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory that are necessary for their survival; second, that the State may restrict said right by granting concessions for the exploration and extraction of natural resources found on and within Saramaka territory only if the State ensures the effective participation and benefit of the Saramaka people, performs or supervises prior*

*environmental and social impact assessments, and implements adequate safeguards and mechanisms in order to ensure that these activities do not significantly affect the traditional Saramaka lands and natural resources; and finally, that the concessions already issued by the State did not comply with these safeguards. Thus, the Court considers that the State has violated Article 21 of the Convention, in conjunction with Article 1 of such instrument, to the detriment of the members of the Saramaka people.*

**Full text of the case law**

English: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf)

Spanish: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_esp.pdf)

## ***Inter-American Court of Human Rights: Case of the Xákmok Kásek Indigenous Community v. Paraguay, Series C No. 214 (24 August 2010)***

### **Key issues**

- Access to land, Ancestral land, Indigenous rights, Obligation to fulfil, Remedies, Restitution, Right to property, Traditional use of land.

### **Summary of case**

This case dealt with land rights of the Xákmok Kásek Community, an indigenous community, whose traditional and customary way of life involved nomadic small communities roaming vast areas of ancestral land. From 1885 to 1997, the State sold large tracts of their land to private interests. These sales happened without the community's knowledge. Since that time, large private landowners have continued to encroach on the community's ancestral lands. Furthermore, animals that roamed the land and which were used by the community for food were killed off to make way for cattle ranching and large segments of their land were cut off from access by the community. Members of the community moved towards sedentary lifestyles as cheap labour for factories and ranches and as a consequence had become impoverished.

In this case, the community claimed an area including a cattle ranch and a private nature reserve which were areas within its larger ancestral territory.

### **Legal questions related to land and human rights**

It was uncontested that the Xákmok Kásek Community has a right to its traditional land as community property, or that hunting, gathering, and fishing are elements that are essential to its culture. Rather, at issue were whether the Community had a right to restitution of the specific lands claimed by the Community as well as how to deal with conflicting property claims.

### **Main findings**

*The Court held that the area currently being claimed by the Community comprised a portion of that larger traditional territory roamed by the Community and includes sites that are important to the Community's life, culture, and history. The Court also found that anthropological studies concluded that the lands claimed are appropriate and suitable for the development of the Community. The Court therefore held that the lands claimed by the community are the actual community's traditional lands and are the most suitable for its settlement.*

*The Court also held that the community has a right to recover its lands even if they are privately owned and that Paraguay failed to provide an effective remedy for such recovery. The Court held that the possibility of expropriation of the land should be assessed in the first place as the adequate means by which to implement restitution of the indigenous lands.*

### Relevant sections of the case law

Para. 281. *In light of the conclusions in the chapter relative to Articles 8(1), 21(1), and 25(1) of the Convention, the Court considers that the return to the Xákmok Kásek Community of their traditional land is the reparatory measure that comes closest to restitutio in integrum, and for this reason, the State must to take all legislative, administrative, and any other measures necessary to ensure the Community members' right to property as regards their traditional land, thereby also ensuring their right to the land's use and enjoyment.*

Para. 282. *The Community's link to those lands is fundamental and unbreakable for its human and cultural survival, which is why returning it is so important. Contrary to what the State has argued, the land to be returned to the Community is not just any piece of real estate "within the Enxet Lengua's historical territory," but rather the land that the Community has, in this case, demonstrated is its specific traditional territory and the most suitable for an indigenous settlement [...]*

Para. 284. *Once the Community's traditional territory is fully identified in the manner and within the time period indicated in the prior paragraph, if it is owned by private parties – whether natural or legal personalities – the State must decide whether expropriation of the land through the appropriate authorities for the indigenous ensues. In order to resolve this question, the State authorities must follow the standards established in this Judgment (supra paras. 85 to 170), taking into account the special relationship that the indigenous have with their lands for preserving their culture and survival.*

### Full text of the case law

English: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_214\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf)

Spanish: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_214\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_esp.pdf)

## ***Inter-American Court of Human Rights: Kichwa Indigenous People of Sarayaku v. Ecuador, Series C No. 245 (27 June 2012)***

### **Key issues**

- Cultural rights, Indigenous rights, Obligation to consult, Traditional possession of land.

### **Summary of the case**

This case involved the granting of a permit by the State to a private oil company to carry out oil exploration and exploitation activities in the ancestral territory of the Kichwa Indigenous People of Sarayaku, without previously consulting them. The company's activities included the installation of high-powered explosives in several parts of their territory, depriving the people from subsistence activities and cultural practices. The forcible entry caused destruction of sacred sites and led to confrontations between the indigenous community, the company and Ecuador's armed forces.

### **Legal questions related to land and human rights**

The key legal question was whether the State had adequately respected and guaranteed the rights of the Sarayaku People, including the right to prior consultation and consent, the rights to free movement and residence, communal indigenous property, cultural identity, life and personal integrity. The Court also dealt with alleged lack of judicial protection and enforcement of judicial guarantees and elaborated on criteria for prior and informed consultation.

### **Main findings**

The Court held that Ecuador was responsible for the violation of the indigenous peoples' rights to consultation, communal property and cultural identity. The Court also found that the State was responsible for having gravely placed at risk the right to life and personal integrity and that it had violated the right to a fair trial (judicial guarantees) and to judicial protection of the Sarayaku People. The Court elaborated on prior consultation standards, pointing at principles of good faith, culturally adequate procedures, informed conduct and attempts to reach agreement. It reaffirmed the State duty to consult, which cannot be delegated to third parties and which requires that the State effectively organizes its standards and institutions in such a way that indigenous, native or tribal communities can be consulted effectively.

### **Relevant sections of the case law**

*Para. 149. In this case, the Court finds that there is no doubt regarding the Sarayaku Peoples' communal ownership of their territory, which is exercised in a time-honoured and ancestral manner. This was expressly recognized by the State through the adjudication made on May 12, 1992 (supra para. 61). Notwithstanding the foregoing, in addition to the points noted in the section on the facts of the case (supra paras. 51 to 57), the Court considers it pertinent to emphasize the deep cultural, non-pecuniary and spiritual ties that the community has with its territory, so as to fully understand the damages caused in this case.*

*Para. 160. It is for all the aforementioned reasons that one of the fundamental guarantees for ensuring the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation, which is recognized in the ILO Convention No. 169, among other complementary international instruments.*

*Para. 166. The obligation to consult Indigenous and Tribal Communities and Peoples on any administrative or legal 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 implies the duty to adequately organize the entire governmental apparatus and, in general, all the organizations through which public power is exercised, so that these are capable of legally guaranteeing the free and full exercise of those rights. The foregoing means that States have the obligation to structure their standards and institutions in such a way that indigenous, native or tribal communities can be consulted effectively, in accordance with international standards in this matter. Thus, States must incorporate those standards within the prior consultation processes, so as to generate sustained, effective and reliable channels for dialogue with indigenous communities in processes of consultation and participation through their representative institutions.*

*Para. 167. Given that the State must guarantee the rights to consultation and participation in all phases of planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival, these processes of dialogue and consensus-building should take place from the first stages of planning or preparation of the proposed measures, so that the indigenous peoples can truly participate in and influence the decision-making process, in accordance with the relevant international standards. To that effect, the State must ensure that the rights of indigenous peoples are not disregarded in any other activity or agreement reached with private or third parties, or in the context of public sector decisions that would affect their rights and interests. Therefore, where applicable, the State must also carry out the tasks of inspection and supervision of their application and, when appropriate, deploy effective means to safeguard those rights through the corresponding judicial organs.*

*Para. 177. The Court has established that in order to ensure effective participation by members of an indigenous community or people in development or investment plans within their territory, the State has the duty to consult the community in an active and informed manner, and in accordance with its customs and traditions, in the context of a continuous communication between the parties.*

*Moreover, these consultations should be undertaken in good faith, through culturally appropriate procedures and must be aimed at reaching an agreement. Similarly, the indigenous people or community must be consulted in accordance with its own traditions,*

*during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval. Also, the State must ensure that members of the community are aware of the potential benefits and risks so they can decide whether or not to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this obligation, or engaging in consultations without regard to their essential characteristics, compromises the State's international responsibility.*

*Para. 232. The State, by failing to consult the Sarayaku People on the execution of a project that would directly affect their territory, was in breach of its obligations, under the principles of international law and of its own domestic law, to adopt all necessary measures to guarantee the participation of the Sarayaku People, through their own institutions and mechanisms and in accordance with their values, traditions, customs and forms of organization, in the decisions made regarding matters and policies that affected or could affect their territory, their cultural and social life, their rights to communal property and to cultural identity. Consequently, the Court considers that the State is responsible for the violation of the right to communal property of the Sarayaku People, recognized in Article 21 of the Convention, in relation to the right to cultural identity, under the terms of Articles 1(1) and (2) thereof.*

#### **Full text of the case law**

English: [http://corteidh.or.cr/docs/casos/articulos/seriec\\_245\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf)

Spanish: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_245\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_245_esp.pdf)

***Inter-American Court of Human Rights: Case of Norín Catrimán y otros (Dirigentes, miembros y activista del Pueblo Indígena Mapuche) v. Chile. Series C No. 279 (29 May 2014)***

### Key issues

- Ancestral land, Due process, Freedom of thought, Freedom of expression, Indigenous rights, Right to take part in public life, Traditional possession of land.

### Summary of case

The case examined the criminalization of indigenous leaders and activists claiming for indigenous peoples' right to their ancestral land. Indigenous activists who were found guilty by Chile's Criminal court under the "Anti-terrorist Law" challenged the decision. The acts condemned under the Anti-terrorist Law, including setting fire, destruction of properties and closure of roads, as well as clashes with security forces, formed part of a protest movement arguing for the return of the ancestral lands to the indigenous Mapuche people, and the respect of their land use and natural resources. The sentence imposed on the claimants included a 15 year prohibition on operating a social media site, or disseminating opinions or information, and a 15 year disqualification from holding public office.

### Legal questions related to land and human rights

Legal questions included whether the authorities violated a number of rights protected under the law of criminal procedure, including the rights to due process, as well as the right to personal freedom, freedom of expression and political rights of the claimants.

### Main findings

In addition to the violations of principles of criminal law and the rights protected in criminal procedures, the Court found that the disproportionate sanction imposed on the claimants violated their freedom of thought and expression, as well as their right to take part in public life. The Court further stated that, taking into consideration that the claimants' status as indigenous leaders, such excess sanction could have caused a reasonable fear in other members of the Mapuche people involved in actions related to social protest and claim their territorial rights or wishing to participate in such protest and thus affected the freedom of thought and expression and the political rights of other members of Mapuche community.

### Relevant sections of the case law

374. *La Corte considera que la referida pena accesoria supone una restricción indebida al ejercicio del derecho a la libertad de pensamiento y expresión de los señores Norín Catrimán, Pichún Paillalao y Ancalaf Llaupe, no sólo por haber sido impuesta fundándose en sentencias condenatorias que aplicaron una ley penal violatoria del principio de legalidad y de varias garantías procesales [...], sino además porque en las circunstancias del presente caso es contraria al principio de la proporcionalidad de la pena. [...]*

375. *La Corte ha constatado que, como autoridades tradicionales del Pueblo indígena Mapuche, los señores Norín Catrimán, Pichún Paillalao y Ancalaf Llaupe les incumbe un*

*papel determinante en la comunicación de los intereses y en la dirección política, espiritual y social de sus respectivas comunidades [...]. La imposición de la referida pena accesoria les ha restringido la posibilidad de participar en la difusión de opiniones, ideas e información a través del desempeño de funciones en medios de comunicación social, lo cual podría limitar el ámbito de acción de su derecho a la libertad de pensamiento y expresión en el ejercicio de sus funciones como líderes o representantes de sus comunidades. Esto a su vez incide negativamente en la dimensión social del derecho a la libertad de pensamiento y expresión, la cual de acuerdo con lo establecido por la Corte en su jurisprudencia implica el derecho de todos a conocer opiniones, relatos y noticias vertidas por terceros.*

376. *Asimismo podría haberse producido un efecto intimidante e inhibitorio para el ejercicio de la libertad de expresión, derivado de los particulares efectos que tuvo la aplicación indebida de la Ley Antiterrorista a miembros del Pueblo indígena Mapuche. La Corte ya se ha referido en otros casos al efecto intimidante en el ejercicio de la libertad de expresión que puede causar el temor a verse sometido a una sanción penal o civil innecesaria o desproporcionada en una sociedad democrática, que puede llevar a la autocensura tanto a quien le es impuesta la sanción como a otros miembros de la sociedad. En el presente caso, el Tribunal considera que la forma en la que fue aplicada la Ley Antiterrorista a miembros del Pueblo indígena Mapuche podría haber provocado un temor razonable en otros miembros de ese pueblo involucrados en acciones relacionadas con la protesta social y la reivindicación de sus derechos territoriales o que eventualmente desearan participar en estas.*

384. *Lo anterior es particularmente grave en el caso de los señores Ancalaf Llaupe, Norín Catrimán y Pichún Paillalao, por su condición de líderes y dirigentes tradicionales de sus comunidades [...], de manera que por la imposición de las referidas penas también se afectó la representación de los intereses de sus comunidades respecto de otras, así como respecto del resto de la sociedad chilena en general. En concreto, la Corte resalta que estos fueron impedidos, en virtud de las referidas penas, de participar o dirigir funciones públicas en entidades estatales que, por su propia naturaleza, buscan promover, coordinar y ejecutar acciones de desarrollo y protección de las comunidades indígenas que estos representaban, lo que constituye una vulneración concreta de los derechos amparados en el artículo 23 de la Convención. [...]*

385. *Igualmente, cabe destacar, también por la condición de líderes y dirigentes mapuche de los señores Norín Catrimán y Pichún Paillalao (Lonkos), así como del señor Ancalaf Llaupe (Werkén), que la restricción de los derechos políticos de éstos también afecta a las comunidades de las cuales hacen parte puesto que, por la naturaleza de sus funciones y su posición social, no sólo su derecho individual resultó afectado sino, también, el de los miembros del Pueblo indígena Mapuche a quienes representaban.*

### **Full text of the case law**

Spanish: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_279\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_279_esp.pdf)

English: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_279\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_279_ing.pdf)



### **III. NATIONAL COURTS**

## ***Argentina, Supreme Court: Mendoza Beatriz Silva et al, v. State of Argentina et al. (8 July 2008)***

### **Key issues**

- Environmental protection, Obligation to fulfil, Obligation to protect, Right to water.

### **Summary of case**

Complainants resided on land in a basin which was, due to lack of proper water and sanitation infrastructure provided by the State, subject to pollution and contamination from various nearby activities of private enterprises.

### **Legal questions related to land and human rights**

Legal questions involved the scope of the State's obligation to protect persons by protecting land from environmental hazards and the obligation to ensure healthy and safe living conditions. The Court applied Article 41 (right to a healthy environment) and Article 43 (right to seek judicial remedies to prevent Constitutional violations) of the Constitution of Argentina.

### **Main findings**

The Court ordered the State to take measures to protect and improve the environment in the basin, including remedying the environmental damage and preventing further damage. Specific remedies concerned water and sanitation infrastructure necessary to prevent further environmental degradation. Participatory monitoring mechanisms were also established in order for the community to monitor compliance with the Court's decision.

### **Full text of the case law**

Spanish: [http://www.escri-net.org/usr\\_doc/Sentencia\\_CSJN\\_2008\\_spanish.pdf](http://www.escri-net.org/usr_doc/Sentencia_CSJN_2008_spanish.pdf)

English (unofficial translation): [http://www.escri-net.org/usr\\_doc/Sentencia\\_CSJN\\_2008\\_english.pdf](http://www.escri-net.org/usr_doc/Sentencia_CSJN_2008_english.pdf)

## ***Bangladesh, Supreme Court: Ain o Salish Kendra v. Government and Bangladesh & Ors 19 BLD (1999) 488 (29 July 2001)***

### **Key issues**

- Forced eviction, Maintenance of livelihood, Obligation to respect, Right to adequate housing.

### **Summary of the case**

Government authorities evicted a large number of residents of bastees (informal slum settlements) of Dhaka City without notice and demolished their homes with bulldozers. The eviction deprived residents of their means of livelihood.

### **Legal questions related to land and human rights**

Legal questions concerned the scope of the State's fundamental constitutional obligations to its citizens and residents with regard to the protection of the right to life (and livelihood), the respect for dignity and the principle of equal protection before the law. The Court also addressed obligations to provide natural justice before eviction and dealt with the question of resettlement.

### **Main findings**

The Supreme Court held that the duty to respect fundamental rights, particularly the right to life, required the government to refrain from forced evictions, therefore actions that deprived people of basic necessities. The Court noted the positive obligation to develop policies aimed at ensuring the provision of the basic necessities of life, including shelter, thus finding a positive right to housing implicit in the right to life. While the Court acknowledged the government's concern with criminal behaviour in the slums, it ordered the government to develop guidelines and pilot projects for the phased and properly facilitated resettlement of slum dwellers according to a person's ability to find alternative accommodation. Further, it stipulated that reasonable notice be given to residents before eviction. The Court did not, however, impose a positive obligation on the government to provide alternative accommodation for evictees.

This case is an important precedent in Bangladesh for recognizing that constitutional and human rights protections apply in the case of eviction.

### **Additional references**

Iain Byrne and Sara Hossain, "South Asia. Economic, Social and Cultural Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka", in Malcolm Lagford (ed.), *Social Rights Jurisprudence. Emerging trends in International and Comparative Law*, Cambridge UP, New York, 2008, p. 127.

***Bosnia and Herzegovina, Human Rights Chamber for Bosnia and Herzegovina, CH/96/29, The Islamic Community in Bosnia and Herzegovina v. the Republika Srpska, June 11, 1999)***

### Key issues

- Control over and use of property, Freedom of religion, Minority rights, Non-discrimination, Remedies, Positives obligations, Right to property, Traditional use of land.

### Summary of case

This case dealt with the destruction of mosques' remains and the ban on the construction of mosques in Banja Luka. In 1993 all 15 mosques in Banja Luka were destroyed by an unknown actor during the Bosnian War and in 1995-1996, the municipal bodies continued the remains 'demolition. At that time, lands where mosques were built was public property but the Islamic Community had the right to use it. In 1997 the Islamic Community asked Banja Luka's authorities for approval to rebuild mosques on their original sites. However, the authorities have not responded to this request and have instead banned construction in those areas arguing that they were reserved until the adoption of city's new regulatory plan. Consequently Muslims were obliged to worship in an inadequate office space.

### Legal questions related to land and human rights

Legal questions included whether the Islamic Community had a right to property (as set out in the Article 1 of Protocol 1 of the European Convention on Human Rights) on the land where mosques were built, whether authorities had violated this right by banning the construction in these areas; and whether they also violated freedom of religion.

### Main findings

The Chamber found that even if the land on which the 15 mosques stood was nationalized, the mosques, tombstones and domed burial sites remained the property of the Islamic Community. In fact, according to the national law (Building Land's law), the applicant retained a right to use the land occupied by the destroyed mosques. Besides, a general regulatory plan of Banja Luka's city adopted in 1975, which remained in force at the time the facts occurred, recognized the existence of the 15 mosques and afforded them protection. For those reasons, the Islamic Community had a priority right to use the sites of the mosques for construction purposes. This right to use the land is considered "possession" for the purposes of article 1 of Protocol N° 1. In fact, various economics assets and others personal rights may also be considered "possessions", thereby, the term "possessions" may include rights not recognized as property rights in the domestic law.

The Chamber found that authorities failed to guarantee applicants' freedom of religion by refusing the reconstruction of mosques and the erection of fences around the sites of destroyed mosques and by failing in the protection of Muslims against assaults and provocations during worships.

## Relevant sections of the case law

### The right to use land as “possession”

Para. 191 *In order to invoke the right under Article 1 of Protocol No. 1 in respect of real property the applicant may be required to show that he had title to the property in question or, failing a title deed, that ownership has been established via lengthy unchallenged possession and occupation [...]. However, apart from rights in rem various economic assets and other rights in personam may also be considered “possessions” falling within the scope of protection of Article 1 of Protocol No. 1 [...]. Thus, the term “possessions” within the meaning of Article 1 of Protocol No. 1 may include rights not recognised as “property rights” in the domestic law of a Contracting Party.*

Para. 195. *Be it based on Article 40 or Article 43 of the Law on Building Land, the Chamber finds that the applicant’s right to use the land of the sites of destroyed mosques for construction purposes is an enforceable right with an economic value which is to be considered a “possession” of the applicant for the purposes of Article 1 of Protocol No. 1. Furthermore, it appears to the Chamber that in respect of a majority of the sites the mosques enjoyed specific protection under the Law on Cultural Assets [...]. Accordingly, the applicant enjoyed a further right under Article 111 of that law, if not to reconstruct the mosques then at least to renovate any objects still remaining on the sites.*

Para. 196. *The Chamber concludes that the objects on the land on which the destroyed mosques were situated and the other assets such as the right to use that land for construction constituted, on 14 December 1995, “possessions” of the applicant within the meaning of Article 1 of Protocol No. 1. The Chamber must next consider whether the respondent Party has interfered with these possessions.*

### Freedom of religion

Para. 182. *The Chamber, recalling also that under the Declaration the right to religion includes the right to build a space for practising it, considers that the above refusal amounts to an interference with – or a “limitation” of - the right of the Muslim believers in Banja Luka to manifest freely their religion as guaranteed by Article 9(1). Leaving aside the question whether this interference or limitation has been prescribed by law”, the Chamber cannot find it established that it served any of the legitimate aims enumerated in Article 9(2). Accordingly, there has been a violation of Article 9 of the Convention on account of the refusal to date of permission to reconstruct any of the destroyed mosques.*

Para. 187. *The Chamber concludes that [...] the refusal to allow reconstruction of mosques and the erection of fences around the sites of destroyed mosques are the result of a failure by the respondent Party’s authorities to secure to those believers the right to manifest freely their religion.*

## Full text of the case law

English: <http://www.hrc.ba/database/decisions/CH96-29%20Islamic%20Community%20Admissibility%20and%20Merits%20E.pdf>

### 3.4 Canada, Supreme Court: *Tsilhqot'in Nation v. British Columbia*, 2014SCC 44 (26 June 2014)

#### Key issues

- Ancestral land, Indigenous rights, Obligation to consult, Traditional possession of land, Traditional use of land.

#### Summary of case

The Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, sought a declaration prohibiting commercial logging on their traditional territory and claimed for Aboriginal title to their traditional territory. The logging was licenced by the province of British Columbia in 1983. The Tsilhqot'in was one of hundreds of indigenous groups in British Columbia with unresolved land claims.

#### Legal questions related to land and human rights

Legal questions of this case include whether the aboriginal title for the Tscilhqot'in was established, what rights aboriginal title confers, and whether the State has duty to consult on land matters with the Tscilhqot'in over the aera claimed as their traditional territory.

#### Main findings

The Supreme Court unanimously granted a declaration of Aboriginal title over the area claimed by the Tsilhqot'i and declared that British Colombia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

#### Relevant sections of the case law

##### What rights does aboriginal title confer?

*Para. 67: [...] Aboriginal title “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes”[...], including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group’s attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits [...]*

*Para 73: Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.*

*Para 74: Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes— to the land may be possible. Whether a*

*particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.*

*Para 76: The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982.*

*Para 77: To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group[...]*

*Para 78: [...] The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.*

*Para 79: [...] In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right[...] Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed[...]*

*Para 91: [...] once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the Constitution Act, 1982 .*

*Para 92: Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.*

#### *Breach of the Duty to Consult*

*Para 95: The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.*

Para 96: *The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.*

Criteria for the justification of the infringement of aboriginal title

Para 122: *[...] in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right [...] the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right [...]*

Para 125: *[...] to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the rights holder and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. [...]*

Conclusion

Para 153: *I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.*

**Full text of the case law**

English: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do>

French: <http://scc-csc.lexum.com/scc-csc/scc-csc/fr/item/14246/index.do>

### 3.5 Colombia, Constitutional Court: SU-039/97 (3 February 1997)

#### Key issues

- Indigenous rights, Meaningful participation, Obligation to consult.

#### Summary of case

This case was taken to the Constitutional Court of Colombia by the Ombudsman on behalf of the U'wa people and against the Ministry of Environment and the private oil company Sociedad Occidental de Colombia, Inc. The case dealt with the right of indigenous peoples to participate through consultations in decisions that may affect them, in particular related to defence and preservation of indigenous land.

#### Legal questions related to land and human rights

The legal question examined the scope of the right to participation of indigenous peoples in projects that affect their land. The Court considered Constitutional rights related to protection of ethnic integrity (Articles 7, 10 and 70) as well as the right to self-determination (Article 330) and the right to participation (Article 40).

#### Main findings

The Constitutional Court found that the process used to secure an environmental license for oil exploration had not been adequate as it had ignored the U'wa community's fundamental right to be formally and substantially consulted. This decision was grounded on the principle that participation through consultation is a fundamental right because it is an essential way to preserve the ethnic, social, economic and cultural integrity of indigenous communities which was necessary for their survival as a social group.

#### Full text of the case law

Spanish: <http://www.corteconstitucional.gov.co/relatoria/1997/su039-97.htm>

## *Colombia, Constitutional Court: Judgment T-821/07, (5 October 2007)*

### Key issues

- Displacement, Forced eviction, Remedies.

### Summary of case

The complainant was forcibly evicted from her home and displaced from her land by armed men in 2006. She sought restitution of her land through domestic processes dealing with internally displaced persons but was denied. She then sought relief before the Constitutional Court.

### Legal questions related to land and human rights

Legal questions related to the use of international norms to interpret Constitutional protections and concerned in particular restitution of land that was possessed without legal title.

### Main findings

The Constitutional Court held that displaced persons have a fundamental right to restitution under the Colombian Constitution. In doing so, they relied in part on international norms and in particular on the UN Principles on housing and property restitution for refugees and displaced persons (Pinheiro Principles). By referring to the Pinheiro Principles, the Court made clear that there is a right to restitution of land regardless of the tenure status enjoyed at the time of displacement. The Court also ordered the State to take positive steps to protect the land of displaced persons and to inform displaced persons of their right to restitution and of mechanisms available to enforce that right and to protect their land.

### Full text of the case law

Spanish: <http://www.corteconstitucional.gov.co/relatoria/2007/t-821-07.htm>

## *Colombia, Constitutional Court: Judgement T-267/11, (8 April 2011)*

### Key issues

- Forced eviction, Maintenance of livelihood, Right to property.

### Summary of case

The community of Las Palvas occupied unused land in 1997 and subsequently started farming activities to feed themselves. The community's pursuit to improve their living conditions and to formalize their possession of the land was countered by repeated acts of intimidation and harassment, including attacks by paramilitary groups and the destruction of crops and food. At the request of two palm oil companies, who claimed ownership of the land, national police and mobile riot squad forcibly evicted 123 families of the Las Palvas community in 2009. The eviction was carried out despite a national law expressly prohibiting evictions from lands undergoing the process of ownership formalization.

### Legal questions related to land and human rights

Legal questions included whether the eviction was illegal, given the fact that the community had initiated a process of ownership formalization of the land prior to the eviction. Closely connected were questions related to the protection of fundamental rights under the Constitution, including the right to a life in dignity, to work, to equal treatment before the law and authorities, to due process and to property.

### Main findings

The Court held that the forced eviction of the Las Palvas community had been illegal, and had violated the claimants' rights to a life in dignity, to work, and to due process. It decided to annul the resolutions that ordered the forced eviction of the community in 2009, and reopened the process of ownership formalization according to law that had been unduly interrupted by the eviction.

### Full text of the case law

Spanish: <http://www.corteconstitucional.gov.co/relatoria/2011/t-267-11.htm>

## *Ecuador contra Arco Oriente, in case No. 994-99-RA (16 March 2000)*

### Key issues

- Indigenous rights, Meaningful participation, Obligation to consult, Obligation to protect.

### Summary of case

This case involved the encroachment on indigenous lands by a private company and failure of the State to abide by ILO Convention No. 169. The private company negotiated land deals with private individuals to circumvent consulting with the indigenous community, as represented by the community's traditional political organization and representation structures.

### Legal questions related to land and human rights

This case provides an example of enforcement of ILO Convention No. 169 by domestic courts and the scope of protections offered by that Convention. It also examined Constitutional protections of indigenous peoples including protecting their traditional political organization and representation structures.

### Main findings

The Constitutional Court decided Arco's behavior was incompatible with International Labour Organization Convention No. 169 and the Constitution, since both protect the right of indigenous peoples to be consulted and to participate in the design, implementation and evaluation of national and regional development plans and programs potentially affecting them directly, the rights to preserve their individual customs and institutions, and their cultural identity, as well as the rights to use and enjoy property and possession of ancestral land. The decision resulted in the legal protection of the indigenous communities' traditional ways of political organization and representation and the requirement that consultation had to occur with the proper representatives of the community.

### Full text of the case law

Decision: [http://www.escr-net.org/sites/default/files/FIPSE\\_Firmes\\_en\\_nuestro\\_territorio\\_2002.pdf](http://www.escr-net.org/sites/default/files/FIPSE_Firmes_en_nuestro_territorio_2002.pdf)

## ***Kenya, Court of Appeal at Eldoret: Mary Rono vs Jane Rono, Civil Appeal No. 66 of 2002***

### **Key issues**

- Customary law, Non-discrimination, Women's rights.

### **Summary of case**

This case dealt with the inheritance of land, regarding in particular customary law and practices which resulted in daughters receiving a lesser amount of land than sons based expressly on their gender.

### **Legal questions related to land and human rights**

The legal question was whether it was proper and lawful for the lower court to award less acreage of land forming part of the deceased father's estate to daughters of the deceased on the basis that they were women and thus had prospects of marrying in the future. Legal questions also asked whether fundamental rights trumped provisions of customary law.

### **Main findings**

The Court considered provisions of the Kenyan Law of Succession Act, which deferred matters concerning customary land ownership to customary law. It also considered the relevance and applicability of statutory and international law. In doing so, the Court observed that Kenya had ratified various human rights instruments and held that the deceased's land which was at the center of the succession dispute be equally and equitably shared by the deceased's nine sons and daughters since fundamental rights trumped conflicting customary law. The Court, for the first time in Kenya, relied in part on the Convention on the Elimination of All Forms of Discrimination against Women to determine an inheritance case.

### **Full text of the case law**

English: <http://www.chr.up.ac.za/index.php/browse-by-subject/332-kenya-rono-v-rono-2005-ahr-107-keca-2005.html>

## ***Kenya, High Court at Embu: Ibrahim Sangor Osman and Others v. the Hon. Minister of State for Provincial Administration & Internal Security and Others, Constitutional Petition No. 2 of 2011***

### **Key issues**

- Forced eviction, Remedies, Restitution, Right to adequate housing.

### **Summary of case**

This case involved the forced eviction of a large community by the municipal authorities of Garissa. Following the forced eviction, those affected were not provided with alternative land and housing and they were relocated to areas without access to primary education. This is one of the first right to adequate housing cases brought under the new Constitution of Kenya.

### **Legal questions related to land and human rights**

Legal questions included to what extent international human rights informed the Constitutional protection of adequate housing and whether remedies could include an order to ensure restitution of land and housing for those forcibly evicted.

### **Main findings**

The Court specifically cited international human rights law, including the prohibition of forced eviction as outlined in General Comments No. 4 and No. 7 of the Committee on Economic, Social and Cultural Rights and Article 17 of the International Covenant on Civil and Political Rights to inform the right to adequate housing enshrined in the Constitution of Kenya. The Court also relied on comparative jurisprudence from South Africa to demonstrate the justiciability of the right to adequate housing and that restitution of the *status quo ante* was the proper remedy in such circumstances. With respect to remedies, the Court further relied on Article 8 of the Universal Declaration of Human Rights and the Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.

### **Relevant sections of the case law**

*I consider that this forced eviction was a violation of the fundamental right of the Petitioners to accessible and adequate housing as enshrined in Article 43(1) (b) of the Constitution of Kenya 2010. More important, the eviction rendered the Petitioners vulnerable to other human rights violations. They were rendered unable to provide for themselves. The eviction grossly undermined their right to be treated with dignity and respect. The Petitioners were thrown into a crisis situation that threatened their very existence.*

*[...] by order of a mandatory injunction, the Respondents are compelled to return the Petitioners to the land from which they were evicted. The Respondents are further commanded to reconstruct reasonable residences and/or alternative accommodation and/or housing for the Petitioners. Such residences, accommodation and/or housing should have all the amenities, facilities and schools that were subsisting on the land at the time of the*

*evictions and demolitions, or should be mutually agreed upon. There will be a permanent injunction to restrain the Respondents from any such future evictions and/or demolitions unless and until the law is followed.*

**Full text of the case law**

English: [http://www.seri-sa.org/images/stories/osman\\_judgment.pdf](http://www.seri-sa.org/images/stories/osman_judgment.pdf)

## ***Malaysia, High Court of Malaya: Sagong Bin Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2 MLJ 591 (12 April 2002)***

### **Key issues**

- Ancestral land, Customary relationship to land, Forced eviction Indigenous rights, Right to property, Traditional possession of land.

### **Summary of case**

The complainants, families of the Temuan tribe, were forcibly evicted by the police from their ancestral land for the purpose of constructing part of a highway to the Kuala Lumpur International Airport. Their homes were demolished, fruit trees and crops destroyed. Prior to the eviction they were given written notice to leave their homes within 14 days. The State authorities offered monetary compensation for homes, fruit trees and crops. The complainants did not comply and claimed the compensation to be inadequate, because it did not compensate for the loss of the land as such.

### **Legal questions related to land and human rights**

Key legal questions related to the meaning of “land occupied under customary right”, thus whether proprietary interest of aboriginal people in their customary land was an interest in and to the land. This included the character of the rights to which aboriginal peoples as holders of native title are entitled. Another question touched upon the definition of an “aboriginal people” and whether the Temuan tribe can still account as one despite the fact that their culture has been affected by modernization.

### **Main findings**

The High Court held that the land was customary and ancestral land continuously occupied by the Temuan families for generations. Complainants belonged to an organized society, followed an aboriginal way of life, practiced their own customs and beliefs, and possessed their own language. Their proprietary interest in the land within the settlement was an interest in and to the land under the common law, limited however to the settlement area and not including the jungles at large where they used to roam to forage for their livelihood. The Court also found that the offered compensation was inadequate and therefore the deprivation of land as well as the eviction from the land unlawful. As the land was continuously occupied and maintained by the complainants to the exclusion of others in pursuance of their culture and inherited by them from generation to generation in accordance with their customs, it fell within the ambit of “land occupied under customary right”. Compensation in accordance with the respective Land Acquisition Act 1960 had to be granted. In addition to extending native title to include interest in land, the Court also recognized that State and federal governments owed fiduciary duties towards the aboriginal peoples to protect their welfare and the land.

### Relevant sections of the case law

Para. 11(1) *The common law recognises a form of native title which reflects the entitlement of the aboriginal people, in accordance with their laws and customs, to their traditional lands. The aboriginal peoples' right over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself (in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein) since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. [...] In the case at hand, the acquisition concerns a small portion of traditional and customary or ancestral land where aboriginal people resided, that is to say, their settlement. I follow the Adong case, and in addition, by reason of the fact of settlement, I am of the opinion that based on my findings of facts in this case, in particular on their culture relating to land and their customs on inheritance, not only do they have the right over the land but also an interest in the land.*

Para. 11(3) *[...] In keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the proprietary interest of the Orang Asli in their customary and ancestral lands is an interest in and to the land. However, this conclusion is limited only to the area that forms their settlement, but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. [...] his conclusion is limited only to the area that forms their settlement, but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. As to the area of the settlement and its size, it is a question of fact in each case. In this case, as the land is clearly within their settlement, I hold that the plaintiffs' proprietary interest in it is an interest in and to the land.*

### Full text of the case law

English:

[http://www.malaysianbar.org.my/selected\\_judgements/sagong\\_tasi\\_ors\\_v.\\_kerajaan\\_negeri\\_selangor\\_ors\\_2002\\_high\\_court.html](http://www.malaysianbar.org.my/selected_judgements/sagong_tasi_ors_v._kerajaan_negeri_selangor_ors_2002_high_court.html)

## ***South Africa, Constitutional Court: Port Elizabeth Municipality v. Various Occupiers 2004 (12) BCLR 1268 (CC) (1 October 2004)***

### **Key issues**

- Forced eviction, Informal tenure, Landless, Right to adequate housing, Right to property, Remedies.

### **Summary of case**

This case dealt with a small community of landless persons living informally on private land. The Port Elizabeth Municipality sought their eviction. The community agreed to eviction if alternative land was provided.

### **Legal questions related to land and human rights**

Under South African law, namely the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act), evictions must be found to be “just and equitable” considering the particular circumstances of the situation. Legal questions related to what was just and equitable for a community that has resided on land for a number of years and which, if evicted, would be rendered homeless. The Court also dealt with potential conflict between the right to property, guaranteed by Article 25 of the Constitution, and the right to adequate housing, guaranteed by Article 26.

### **Main findings**

The Constitutional Court considered that the eviction was not necessary for the land to be put to productive use and that the relatively small community would be genuinely homeless if evicted. In doing so, it concluded that the eviction would not be “just and equitable.” The Court held that under the PIE Act courts should be reluctant to evict relatively settled communities without the provision of alternative land, even if the eviction is from private land informally occupied by the community. The Court also required the government to engage meaningfully with such occupiers in resolving these issues.

### **Full text of the case law**

English: <http://www.constitutionalcourt.org.za/Archimages/15106.PDF>

## **South Africa, Constitutional Court: *Bhe v. Magistrate Khayelitsha & Ors.* 2005 (1) BCLR 1 (CC), (15 October 2004)**

### **Key issues**

- Customary law, Non-discrimination, Women's rights.

### **Summary of case**

The *Bhe* decision dealt with three related cases concerned with intestate succession in the context of customary law. The applicants challenged customary laws and applicable provisions under the Black Administration Act that favoured male primogeniture and precluded women as well as extra-marital children from being the heir to the land of a close male relative.

### **Legal questions related to land and human rights**

Legal questions included the legitimacy of laws, including customary law and section 23 of the Black Administration Act, which contravened constitutional protections related to equality and dignity, including the prohibition of unfair discrimination on the ground of sex and birth.

### **Main findings**

The inheritance laws at issue in *Bhe*, including section 23 of the Black Administration Act, were struck down as discriminatory, in particular against women and girls. Under the inheritance laws in question, property of men dying intestate (without a will) would pass to male relatives. The Court held that such discrimination in customary law and legislation was manifestly discriminatory and in breach of the rights to equality in section 9(3) and dignity in section 10 of the Constitution of the Republic of South Africa and thus unconstitutional and invalid.

### **Relevant sections of the case law**

*Para. 91*      *The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.*

*Order: 4.*      *The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.*

### **Full text of the case law**

English: <http://www.constitutionalcourt.org.za/Archimages/2167.PDF>

## ***South Africa, Constitutional Court: President of the Republic of South Africa and Anor. v. Modderklip Boerdery (Pty) Ltd., 40 2005 (5) SA 3 (CC), (13 May 2005)***

### **Key issues**

- Access to land, Forced eviction, Informal tenure, Right to property, Obligation to fulfil, Obligation to protect, Remedies, Right to adequate housing.

### **Summary of case**

Modderklip involved an informal settlement community which had been evicted from an adjacent municipal land and relocated to privately owned land. The Constitutional Court of South Africa dealt with a conflict between the private owner's property right, including the failure of the State to protect that right by evicting the informal settlement community, the informal settlement community's right to adequate housing and the State's obligation to protect the right to adequate housing by not carrying out a forced eviction that would render the community homeless.

### **Legal questions related to land and human rights**

A key legal question involved how to reconcile the right to property with the right to adequate housing, including the right not to be forcibly evicted from land.

### **Main findings**

The lower Courts sought to reconcile the right to property, as guaranteed in Article 25 of the Constitution, with the right to adequate housing, as guaranteed in Article 26 of the Constitution. The Constitutional Court, however, held that while not taking steps to protect the property right was a violation of Article 25, forced eviction of the community would result in a violation of Article 26. Therefore, the Court crafted a remedy for the violation of Article 25 that took into account the protections of Article 26. Specifically, the Court ordered the State to compensate the private land owner for loss of use of the land in question until such a time as alternative housing could be provided for the community, thereby providing an example of how disputes over land between informal occupiers and private landowners can be remedied while respecting and protecting social rights.

### **Relevant sections of the case law**

*Para. 13* [...] *the issue is not simply one relating to enforcement of a court order but is intimately connected to the larger legal, social and political issue of access to land.*

*Para. 43* [...] *Ordering the state to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the state has gained by not having to provide alternative land. The state may, obviously, expropriate the land in which event Modderklip will no longer suffer any loss and compensation will not be payable (except for the past use of the land). A declaratory order to this effect ought to do justice to the case. Modderklip will not receive more than what it has lost, the state has already received value for what it has to pay and*

*the immediate social problem is solved while the medium and long term problems can be solved as and when the state can afford it.*

**Full text of the case law**

English: <http://www.constitutionalcourt.org.za/Archimages/3493.PDF>

***South Africa, Constitutional Court of South Africa: Abahlali BaseMjondolo Movement SA and others v. Premier of the Province of Kwazulu, and others, 2010 (2) BCLR 99 (CC) (14 October 2009)***

**Key issues**

- Forced eviction, Informal tenure, Right to adequate housing.

**Summary of case**

The association “Abahlali BaseMjondo Movement of South Africa”, which acts in the interest of people living in informal dwellings, argued that certain provisions of the “Slum Act” of KwaZulu-Natal province would render informal settlements’ residents more vulnerable to eviction. The Association claimed that section 16 of the Act was contrary to the Constitution.

**Legal questions related to land and human rights**

Legal questions included whether section 16 of the Slums Act was in conformity with Constitution, particularly with section 26(2). Section 16 of the Slums Act gives the Member of the Executive Council of the province power to publish a notice determining a period within which an owner or person in charge of land or a building that is occupied by unlawful occupiers must institute proceedings to evict the occupiers under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act). If the owner or person fails to comply, the municipality must bring proceedings to evict the occupiers. Section 26 (2) of the Constitution stipulates that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right to have access to adequate housing].

**Main findings**

Section 16 of the Slums Act stipulates that if the Member of the Executive Council (MEC) asks the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupiers, it is mandatory to start the procedure. Secondly, if the owner fails to do so, the obligation falls upon the municipality. The Court found that section 16 of the Slums Act compels an owner of a building or land or the municipality within whose jurisdiction the building or land is located to institute eviction proceedings against unlawful occupiers even in circumstances where the requirements of the PIE Act, which protects unlawful occupiers against arbitrary evictions, may not be met. The Court noted that this provision will make residents of informal settlements, who are invariably unlawful occupiers, more vulnerable to evictions.

The Court also concluded that the power given to the MEC to issue a notice is overbroad and irrational because it applies to any unlawful occupier on any land or in any building even if it is not a slum and is not properly related to the purpose of the Act, which is to eliminate or to prevent the re-emergence of slums. Accordingly, the majority judgment granted an order declaring that section 16 of the Act is inconsistent with section 26 of the Constitution and invalid.

### Relevant sections of the case law

*Para. 112. Related to the coercive nature of section 16 is the fact that the PIE Act does not compel any owner or municipality to evict unlawful occupiers. Section 16 does. I am unable to support the reasoning that says that whilst the PIE Act does not compel eviction proceedings it does not prohibit legislation providing for the kind of compulsion required by section 16. In my view, to the extent that section 16 eliminates discretion on the part of the owner or municipality, it erodes and considerably undermines the protections against the arbitrary institution of eviction proceedings. It renders those who are unlawful occupiers and who are invariably found in slums and informal settlements liable to face eviction proceedings which, but for the provisions of section 16, would not have occurred.*

*Para. 122 There is indeed a dignified framework that has been developed for the eviction of unlawful occupiers and I cannot find that section 16 is capable of an interpretation that does not violate this framework. Section 26(2) of the Constitution, the national Housing Act and the PIE Act all contain protections for unlawful occupiers. They ensure that their housing rights are not violated without proper notice and consideration of other alternatives. The compulsory nature of section 16 disturbs this carefully established legal framework by introducing the coercive institution of eviction proceedings in disregard of these protections.*

### Full text of the case law

Judgment:

<http://www.constitutionalcourt.org.za/Archimages/13897.PDF>

***United States, Federal Court of Appeals (Ninth Circuit): South Fork Band and others v. United States DOI, 588 F.3d 718 (9th Cir. 2009), (3 December 2009)***

### Key issues

- Access to land, Customary relationship to land, Environmental protection, Indigenous rights, Obligation to consult.

### Summary of case

This case involved a decision by the U.S. Department of the Interior's Bureau of Land Management to allow Barrick Gold Corporation to construct the Cortez Hells gold mine in an area of cultural and spiritual significance to the Western Shoshone Tribe.

### Legal questions related to land and human rights

Legal questions were related to the proper weight to be given to protection of access to indigenous religious sites and environmental impact.

### Main findings

The Ninth Circuit Federal Court of Appeals granted an injunction on the basis that the Bureau of Land Management failed to make adequate finding on the environmental impact of the gold mine project, including impact on air and groundwater quality. The Court, however, also found that the Bureau had sufficiently studied the effects of the project on the tribes' religious practices. The Court gave weight to the fact that the Bureau would maintain consultations with the tribe during the entire project.

### Relevant sections of the case law

*Para. 8 BLM's failure to consider the transport and processing of five million tons of refractory ore over a ten-year period shows that it did not take the requisite "hard look" at the environmental impacts of the proposed project.*

*Para. 12 In this instance, the EIS states that BLM has identified fifty perennial springs and one perennial creek that are most likely to dry up, though among these it is impossible to "conclusively identify specific springs and seeps that would or would not be impacted." That these individual harms are somewhat uncertain due to BLM's limited understanding of the hydrologic features of the area does not relieve BLM of the responsibility under NEPA to discuss mitigation of reasonably likely impacts at the outset. [...] Even if the discussion must necessarily be tentative or contingent, NEPA requires that the agency give some sense of whether the drying up of these water resources could be avoided.*

*Para. 14 For the foregoing reasons, we agree with the district court that the Tribes have not established a likelihood of success on the merits of their FLPMA claims, but hold they have established a likelihood of success on the NEPA claims. Such a showing is required for a grant of preliminary injunctive relief. In addition, the party seeking such relief must establish that it "is likely to suffer irreparable harm in the absence of preliminary relief*

*that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter, 1295 S.Ct. 374. Plaintiffs have shown a likelihood of success on the NEPA claims because there was inadequate study of the serious effects of processing refractory ore and exhausting scarce water resources. The likelihood of irreparable environmental injury without adequate study of the adverse effects and possible mitigation is high. Indeed the district court did not question the irreparable environmental harm threatened by this massive project, which will be visited most directly on the plaintiffs. The resulting hardship asserted by Cortez and the government is cast principally in economic terms of employment loss, but that may for the most part be temporary. Given the narrow scope of our holding, which rejects the broader FLPMA contentions, the balance of hardship favors the appellants. As to the public interest, Congress’s determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest.*

### **Full text of the case law**

Decision: <http://cdn.ca9.uscourts.gov/datastore/opinions/2009/12/03/09-15230.pdf>



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