

Background Paper on Urban Resilience

Housing, Land and Property Rights in Colombia, Indonesia and Kenya

The state of Housing, Land and Property Rights (HLPR) not only determines people's opportunities to lead a comfortable life or earn a decent livelihood in any given state. They are rather all too often a matter of life or death. The most recent report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Leilani Farha, transmitted to the United Nations (UN) General Assembly by UN Secretary General Ban Ki-moon on 8 August 2016, underlines the importance of adequate housing for the right to life, security and dignity.¹ The Special Rapporteur states that "[a]n estimated one third of deaths worldwide are linked to poverty and inadequate housing", referring to research conducted by Anne-Emmanuelle Birn.²

The examples of Colombia, Indonesia and Kenya demonstrate that HLPR are becoming legislative priorities in all three states. It would be a mistake to examine HLPR in urban and rural areas separately. The existing and growing troubles plaguing urban areas, especially metropolitan Bogotá, Jakarta and Nairobi with regard to these issues, often stem from problems in other, rural, areas of the state. As in many other parts of the world, these problems include effects of climate change, conflict, land grabbing and similar issues. Despite the many legal and political advances the three states at hand have made in the field of HLPR over the last few years, much remains to be done.

A. Colombia

HLPR are of crucial importance to healing the wounds that Colombia's decades-long civil war has inflicted on its population. Propelled in large part by grievances over unequal distribution of land,³ some 14% of Colombia's territory have been abandoned or forcibly appropriated as a result of the conflict⁴ and over six million people have been internally displaced⁵. Remedying this issue is an important way to help the millions of internally displaced Colombians return to their lands and their homes and avoid renewed conflict. Land rights are an especially acute

¹ A/71/310 (08.08.2016): Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/253/02/PDF/N1625302.pdf?OpenElement>, para. 1.

² Ibid., para. 11.

³ Amnesty International (2014): A Land Title is not Enough - Ensuring Sustainable Land Restitution in Colombia, available at: <https://www.amnesty.org/en/documents/AMR23/031/2014/en/>, explains that "[c]oncentration of land ownership in Colombia is one of the highest in the world – just over 1% of landholders own over half of the country's agricultural lands[...]", p. 18

⁴ Ibid., p. 5.

⁵ As of 1 July 2015, the number of internally displaced people stood at 6.300.422 million, according to Colombia's State party report to the Committee on Economic, Social and Cultural Rights, E/C.12/COL/6 (21.07.2016): Examen de los informes presentados por los Estados partes en virtud de los artículos 16 y 17 del Pacto Internacional de Derechos Económicos, Sociales y Culturales, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/161/59/PDF/G1616159.pdf?OpenElement>, para. 173.

issue for peasants, indigenous peoples and afro-descendant communities, who make up a substantial part of the Colombian populace.⁶

This is because “[l]and is the most important resource for rural communities in terms of fulfilling their economic, social and cultural rights, including their rights to food, water, work and housing”.⁷

I. Domestic Law

1. Legislation

The Colombian government, a decade ago, made its first decisive efforts to demobilize right-wing paramilitary groups engaged in the civil war and began negotiations with the Fuerzas Armadas Revolucionarias de Colombia (FARC) that led to the signature of a 2016 peace agreement with the leftist guerilla, which was recently rejected by the people in a popular vote. During these efforts to reduce its scale and eventually end the conflict, Colombia has enacted a number of important laws dealing with HLPR issues to remedy the plight of its vulnerable populations.⁸ The state has outlined several of its efforts and current challenges in this regard as well as concerning HLPR in general in its most recent report of 2015 to the Committee on Economic, Social and Cultural Rights (CESCR).

Land restitution for people displaced during the armed conflict taking place in Colombia is regulated by the Victims and Land Restitution Law of 2011, which entered into force in January 2012 (Law 1448)⁹. The law restricts restitution of lands to victims¹⁰ to forced displacements or other ways of misappropriation of land that occurred after 1991, whereas violations of land rights committed before 1985 or between 1985 and 1991 may only be symbolically (in the former case) or financially repaired (in the latter case).¹¹

The law is in many regards an undeniable step forward for the HLPR situation in Colombia. It departs in several ways from the 2005 Justice and Peace Law¹², and follow-up legislation, which paved the way for the demobilization of paramilitary forces, while at the same time establishing extensive criminal immunity rules for these groups.¹³ Nevertheless, Law 1448 makes changes in that “the process of acquiring victim status is explicitly divorced from the

⁶ Amnesty International (2014), *supra* note 3, p. 11; For details on the, often overlooked, situation of the latter two see: Amnesty International (2015): Restoring the Land, Securing the Peace: Indigenous and Afro-Descendant Territorial Rights, available at: <https://www.amnesty.org/en/documents/AMR23/2615/2015/en/>.

⁷ Amnesty International (2014), *supra* note 3, p. 15.

⁸ Several reports by Amnesty International provide detailed summaries of the most important land laws passed in Colombia and analyse the implementation process. These include: Amnesty International (2012): The Victims and Land Restitution Law (2012), available at: <http://www.refworld.org/pdfid/4f99029f2.pdf>; Amnesty International (2014): A Land Title is not Enough - Ensuring Sustainable Land Restitution in Colombia, available at: <https://www.amnesty.org/en/documents/AMR23/031/2014/en/>; Amnesty International (2015): Restoring the Land, Securing the Peace: Indigenous and Afro-Descendant Territorial Rights, available at: <https://www.amnesty.org/en/documents/AMR23/2615/2015/en/>.

⁹ Ley No. 1448, The law in its entirety (in Spanish) as well as associated decrees can be accessed here: http://www.fiscalia.gov.co/jyp/direccion-de-fiscalia-nacional-especializada-de-justicia-transicional/relatoria/normatividad-de-paz-y-penal-en-colombia/ley_1448_de_2010_ley_de_victimas/.

¹⁰ See for details on the victim status according to Law 1448: Amnesty International (2012), *supra* note 8, p. 7, 8.

¹¹ Ley No. 1448, Art. 3; see for details: Amnesty International (2012), *supra* note 8, p. 7.

¹² Ley 975 de 2005, available at: <http://www.fiscalia.gov.co/jyp/wp-content/uploads/2013/04/Ley-975-del-25-de-julio-de-2005-concordada-con-decretos-y-sentencias-de-constitucionalidad.pdf>.

¹³ Amnesty International (2012), *supra* note 8, p. 9.

process of condemning the person responsible for victimization. This provision of the law overturns the Law of Peace and Justice, which made the establishment of perpetrator culpability a primary pathway for exercising victim rights.¹⁴ Victim status now only depends on having suffered grave violations of international human rights law or international humanitarian law.¹⁵ Other advantages include a shift of the burden of proof so that the person currently residing on the land must prove he or she acquired it lawfully.¹⁶ Further, the law assures that people whose land is restituted to them also receive legal title to it, irrespective of whether they had possessed such title at the time of displacement.¹⁷ In order to avoid a repetition of the scenarios that led to displacement, Law 1448 „attempts to regulate corporate purchases of land rights and also to hold businesses accountable for contributing to victimization“.¹⁸

However, there is concern that the Colombian government's failure to acknowledge the continued activity of paramilitary forces, engaging in land grabbing activities¹⁹, often to push through interests of businesses²⁰, may hinder the restitution of land to victims. There also seems to be a danger of a lot less land being earmarked for restitution than was actually stolen during the armed conflict.²¹ The leeway of judges in deciding whether acquisitions of property by parties wishing to re-acquire lands from the formerly displaced were conducted in good faith may lead to corruption, especially in rural areas where the rule of law is weak.²²

The restitution of Indigenous and Afro-descendant territories is not covered by Law 1448, but by two associated Decree Laws that also came into force in 2012²³: Law 4633²⁴ concerning Indigenous Peoples and 4635²⁵ concerning Afro-descendant communities, both groups claiming collective rights over certain lands they have lived on for a long time.

The armed conflict indirectly affects all parts of the state as it has led to migration of people displaced from rural areas to the cities, many of whom are now dwelling in the slum belts surrounding them.²⁶ In 2012, additional laws were put in place to improve the social housing situation.²⁷

¹⁴ Summers, Nicole (2012): Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?, in: Harvard Human Rights Journal, p. 226-227.

¹⁵ Ley No. 1448, Art. 3; see for details: Summers, p. 226.

¹⁶ Summers, *supra* note 14, p. 229.

¹⁷ *Ibid.*, p. 228.

¹⁸ *Ibid.*, p. 232.

¹⁹ Amnesty International (2015), p. 10, citing the example of the Afro-descendant community in La Toma, southwestern Colombia; Summers, *supra* note 14, p. 221.

²⁰ Summers, *supra* note 14, p. 221.

²¹ Amnesty International (2012), *supra* note 8, p. 12, 13.

²² Summers, *supra* note 14, p. 234.

²³ Amnesty International (2015), *supra* note 6, p. 5.

²⁴ Decreto No. 4633, available at: <http://www.fiscalia.gov.co/jyp/wp-content/uploads/2012/05/Decreto-4633-del-09-de-diciembre-de-2011-Pueblos-y-comunidades-ind%C3%ADgenas.pdf>.

²⁵ Decreto No. 4635, available at: <http://www.fiscalia.gov.co/jyp/wp-content/uploads/2012/05/Decreto-4635-del-09-de-diciembre-de-2011-Comunidades-negras-afrocolombianas-razaes-y-palenqueras.pdf>.

²⁶ See Summers, *supra* note 14, p. 223.

²⁷ Colombia has outlined its legislative and political efforts to provide housing in E/C.12/COL/6 (21.07.2016), *supra* note 5, paras. 165-171.

2. Judicial Decisions

Over the last years, several Colombian Courts have rendered important judgments on HLPR. The Constitutional Court, in a groundbreaking 2004 decision,²⁸ stressed the importance of housing in implementing the right to life of displaced populations. The plaintiffs had been internally displaced and claimed that the competent local and regional administrations had failed to protect them in the first place and subsequently failed to provide decent housing and other necessities, which the Court confirmed and asked the government to draw up a plan of action to remedy the situation of displaced people in Colombia.²⁹ It reiterated this stance on several occasions, which contributed to the eventual creation of Law 1448.³⁰

More recent decisions on indigenous rights include the September 2014 judgment by a Superior Tribunal in the department of Antioquia.³¹ The decision on restitution of the Alto Andágueda territory (*resguardo*) to the Emberá Katío people “became the [...] first judicial sentence for the restitution of Indigenous territory under Decree 4633”³². The court stated that “effective enjoyment of territorial rights of the Emberá Katío people of the *resguardo* must be protected and re-established”.³³

However, Amnesty International’s 2015 report on land rights of indigenous people and Afro-descendants, which examines implementation of court orders and judgments pertaining to their land rights, points to a statement by the Office of the Comptroller General concerning, in which it conceded major shortcomings in implementing the Superior Tribunal’s decision.³⁴ Indigenous leaders interviewed by Amnesty, blamed the failure to move ahead with the construction of new housing and other infrastructure on authorities’ “focusing mainly on the formalization of ownership”³⁵ instead of actually „restoring territorial rights”³⁶.

Some of the most pertinent legal problems concern the overlap of demands for land by different groups of people, such as peasants applying for lands already reclaimed by indigenous and afro-descendant groups.³⁷ In some cases, such as in the La Toma region that

²⁸ Corte Constitucional: Sentencia T-025/04, <http://www.corteconstitucional.gov.co/relatoria/qfullhit.htm?CiWebHitsFile=/relatoria/2004/t-025-04.htm&CiRestriction=%23filename%20%2AT-025-04%2A.htm&CiBeginHilite=%3CB%20CLASS=HIT%3E&CiEndHilite=%3C/B%3E&CiHiliteType=Full>;

An English translation of the decision can be found here: https://www.brookings.edu/wp-content/uploads/2016/07/Colombia_T-025_2004.pdf.

²⁹ Sentencia T-025/04, Resuelve, Primero, Segundo.

³⁰ See Summers, *supra* note 14, p. 225.

³¹ Tribunal Superior, Distrito Judicial de Antioquia, Sala Civil Especializada en Restitución de Tierras, Resguardo Indígena Embero Katio del Alto Andágueda v. Continental Gold Limited Sucursal Colombia y otros, available at: http://www.codhes.org/images/Articulos/Sentencia_007_del_23_de_septiembre_de_2014_rad_27001312100_120140000500.PDF.

³² Amnesty International (2015), *supra* note 6, p. 8.

³³ *Ibid.*, p. 8; The original wording of the Court's decision orders the state to "amparar y restablecer el goce efectivo de los derechos territoriales del pueblo Embera Katío del Resguardo del Alto Andágueda con el fin de posibilitar su retorno como consecuencia del despojo, abandono y confinamiento a que fuera sometida por el conflicto armado interno y sus factores vinculados y subyacentes", see *supra* note 31, p. 46.

³⁴ Amnesty International (2015), *supra* note 6, p. 9.

³⁵ *Ibid.*, p. 9.

³⁶ *Ibid.*, p. 9.

³⁷ *Ibid.*, p. 12

served as an Amnesty International case study, claims for both collective and individual land titles conflict and make it difficult to delimitate territory.³⁸

Issues hampering land delimitation and land restitution that go beyond legal technicalities include the insecurity of, especially indigenous and Afro-descendant, communities in the face of armed actors in the conflict³⁹ and insufficient implementation of court decisions in favour of vulnerable populations.⁴⁰

Statements on the International Plane and International Obligations

Colombia has signed and ratified the ICESCR and is thus bound by its provisions, including the right to housing, laid down in Article 11 of the Pact. In its 2016 report to the CESCR, Colombia has emphasized the importance it accords to HLPR.

Recommendations for further research

Colombia currently finds itself in a difficult position. Although a cease-fire between the government and the FARC guerilla is in place, the armed conflict is ongoing, as the smaller guerilla, Ejército de Liberación Nacional (ELN) is still active and paramilitary bands continue to deprive peasants, indigenous peoples and afro-descendants of land.

The state must be applauded for trying to tackle the housing, land and property issues with the help of new laws, now in force despite the ongoing armed conflict. However, several problems related to the laws in place as well as to implementation of the laws and judicial decisions persist.

Research should focus on the real impact of existing laws, particularly Law 1448, on the populations and the process of new policies and laws currently being planned or having been passed recently, especially as regards social housing in urban areas.

B. Indonesia

In its 2012 State party Report to the CESCR⁴¹, Indonesia declared that it "is implementing policies and programmes on poverty reduction that prioritize the poor and marginalized people, especially ethnic minorities, rural population, and urban slum dwellers."⁴²

Many of these groups do not have access to land or dispose of adequate housing. Addressing the right to housing in particular, the report identifies 12,12% of Indonesian households as located in urban slum dwellings, a decline of more than 8% since 1993.⁴³

³⁸ Ibid., p. 10.

³⁹ Ibid., p. 12.

⁴⁰ Ibid., p. 12.

⁴¹ E/C.12/IDN/1 (29.10.2012): Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Reports submitted by States parties under articles 16 and 17 of the Covenant, Indonesia, available at:

<http://tbinternet.ohchr.org/layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FIDN%2F1&Lang=en>.

⁴² Ibid., para. 153.

⁴³ Ibid., para. 187.

At the same time, the report points out the biggest challenges the state faces in trying to reduce the number of slum dwellers and providing them with adequate housing:

- “(a) Limited access of low-income households to land for housing in urban areas;
- (b) Limited access to housing finance
- (c) Limited capacity of the government and the private sector to build affordable houses;
- (d) Limited provision of basic facilities for urban settlements; and
- (e) Previous programmes have produced less than optimal results in improving the lives of slum dwellers.”⁴⁴

Domestic Law

1. Legislation

Indonesia’s most recent report to the CESCR summarizes the state’s efforts to improve its housing, land and property rights regime.⁴⁵

The 1945 Indonesian Constitution as amended⁴⁶ states in Article 33 (3), Chapter XIV on The National Economy and Social Welfare that the powers over land, waters as well as natural riches therein are vested in the State and shall be used to the greatest benefit of the people. To this end, focusing on housing, Indonesia has passed several laws, including Law No. 1 on Housing and Residential Areas (2011) and Law No. 26 on Spatial Structuring and Spatial Planning (2007).⁴⁷ Presidential Decree No. 22 of 2006 on Coordinating Team on the Acceleration of the Development of Apartments in Urban Areas (PPRSKP) has initiated a programme to subsidize urban housing.⁴⁸

According to Indonesia’s report to the CESCR, “many initiatives have been carried out to improve the welfare of urban households, such as the Kampung Improvement Program (KIP), urban renewal, the Urban Poverty Project (UPP), the Community-Based Initiatives for Housing and Local Development (CoBILD), and the Neighborhood Upgrading and Shelter Sector Program (NUSSP). In addition, several initiatives to empower those who live in urban slums are being implemented [...]”⁴⁹

Indonesia also tries to uphold non-discrimination in its legal framework on housing „as reflected in Law No. 1 of 2011 on Housing and Settlement Area, Law No. 20 of 2011 on Vertical Housing where it guarantees that every person has the right to obtain livelihood, shelter and healthy environment based on the principle of non-discrimination, justice and equality.”⁵⁰

⁴⁴ Ibid., para. 188.

⁴⁵ Ibid., paras. 186-201.

⁴⁶ The 1945 Constitution of the Republic of Indonesia, available at: http://www.ilo.org/wcmsp5/groups/public/-ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_174556.pdf.

⁴⁷ E/C.12/IDN/1, *supra* note 41, para. 190.

⁴⁸ Ibid, para. 194.

⁴⁹ Ibid., para. 187.

⁵⁰ E/C.12/IDN/Q/1/Add.1 (17.04.2014): List of issues in relation to the initial report of Indonesia

Addendum, Replies of Indonesia to the list of issues, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIDN%2fQ%2f1%2fAdd.1&Lang=en, para. 35.

Statements on the International Plane and International Obligations

Indonesia has signed and ratified the ICESCR, which has acquired binding force for the state in 2005. In its 2012 report to the CESCR, HLPR rights play an important role and the state tries to highlight that it takes its obligations with regard to ensuring adequate housing to its population seriously.

However, in its concluding remarks the CESCR lists a number of shortcomings regarding these issues.⁵¹ It “expresses concern at violations of human rights in the mining and plantation sectors, including the right to livelihood, the right to food, the right to water[...]. It is also concerned that the free, prior and informed consent of affected communities is not always sought in these projects, including under Law 25/2007 on Investment.”⁵²

The Committee also makes out land disputes and land grabbing as major problems in Indonesia, threatening people’s security of tenure.⁵³ It expresses its concern that Presidential regulation 65/2006 on Procurement of Land for Realizing Development for Public Interest⁵⁴ may increase land grabbing, especially in light of domestic courts’ tendencies to rely on the basis of formal land titles when ruling on land rights case. The latter point is problematic, as only 34% of the Indonesian territory have so far been certified or titled.⁵⁵

In the same vein, the Committee observes with concern forced evictions of populations without reparation or offering housing in other places to the evicted.⁵⁶ It “calls on the State party to bring its legislation on forced evictions into line with international standards,”⁵⁷ proposing several measures.

It also addresses Indonesia’s lack of safeguards for the land rights of indigenous peoples, especially within the framework of Masyarakat Hukum Adat communities living under customary laws.⁵⁸

Recommendations for further research

One of the conspicuous aspects of HLPR in Indonesia, is a marked absence of domestic and international court decisions on these issues. The State party has not provided information on such in its report to the CESCR. It will therefore be interesting and useful to examine in more detail the development of HLPR jurisprudence in the country, especially as the legal framework around HLPR may further develop over the coming months and years. Security of land tenure for vulnerable populations, such as peasants, indigenous peoples and urban slum dwellers, forced evictions and the right to housing are intimately connected and not yet as developed in Indonesia as they could be, although the state has improved efforts over the last years.

⁵¹ E/C.12/IDN/CO/1 (19.06.2014): Concluding observations on the initial report of Indonesia, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIDN%2fCO%2f1&Lang=en.

⁵² Ibid., para. 27.

⁵³ Ibid., para. 29.

⁵⁴ The Amendment to Presidential Regulation No. 36/3006 on Procurement of Land for Realizing Development for Public Interest, available at: <http://faolex.fao.org/docs/pdf/ins66235.pdf>.

⁵⁵ E/C.12/IDN/CO/1, *supra* note, para. 29.

⁵⁶ Ibid., para. 30.

⁵⁷ Ibid., para. 30.

⁵⁸ Ibid., para. 38, 39.

C. Kenya

The Kenyan legal system has been the object of major changes since the violent clashes opposing different ethnic communities in the wake of the contested 2007 presidential elections. HLPR are an important part of the legal framework that has developed over the last decade.

Domestic Law

1. Legislation

Kenya's most recent report to the CESCR⁵⁹ provides an overview over its legislative approaches towards tackling HLPR issues, among others.

Suite to a referendum, in which 66,9% of eligible voters declared themselves in favour of a new constitution, said document was promulgated on 27 August 2010.⁶⁰ The Constitution⁶¹ includes norms stipulating fundamental rights (Art. 26 to 51), including socio-economic rights (art. 43), in line with the ICESCR. Importantly, Art. 2 (6) of the Constitution states that treaties or conventions ratified by the state form part of Kenyan domestic law, that is to say without any further transformative legislative procedure.

Constitutional provisions on HLPR include Art. 43 (1) (b), which guarantees every person the right to accessible and adequate housing as well as sanitation.

Chapter Five of the Constitution is entirely dedicated to Land (Arts. 60-68) and Environment (Arts. 69-72). Art. 61 lays out principles, according to which land policies shall be conducted in Kenya. These principles include "(a) equitable access to land security of land rights; (b) elimination of gender discrimination in law; (f) customs and practices related to land and property in land [...]."

These norms at a constitutional level are also a reaction to the fact that land has often been a divisive factor in Kenya, due to "the perception that members of certain communities own land which properly should belong to individuals from other communities."⁶²

In accordance with Art. 60 (2) of the Constitution, Kenya has put in place a land policy that includes a number of new laws, such as the Land Act⁶³ and the Land Registration Act⁶⁴, both promulgated in 2012. A Land Commission and a Special Court to deal with land and environmental issues were also set up.⁶⁵

Art. 61 (2) of the Constitution distinguishes between three types of land: public land, private land and community land, definitions of which are provided in the following articles. Kenya has stated that concerns over women's inheritance of and access to land will be addressed by

⁵⁹ E/C.12/KEN/2-5 (26.02.2014): Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Combined second to fifth periodic reports of States parties due in 2013, Kenya, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fKEN%2f2-5&Lang=en.

⁶⁰ *Ibid.*, para. 7.

⁶¹ The 2010 Constitution of Kenya can be accessed here:

http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Kenya_19_2010_Constitution.pdf.

⁶² E/C.12/KEN/2-5, *supra* note 59, para. 43.

⁶³ Land Act (2012), available at: <http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%20280>.

⁶⁴ Land Registration Act (2012), available at:

<http://www.kenyalaw.org/lex//actview.xql?actid=No.%203%20of%202012>.

⁶⁵ E/C.12/KEN/2-5, *supra* note 59, para. 44.

the proposed Matrimonial Property Bill.⁶⁶

Kenya has also drafted an Eviction and Resettlement Bill with guidelines on how evictions are to be conducted.⁶⁷ The government is also currently reviewing its national policy on housing.⁶⁸

2. Judicial Decisions

Important judgments of Kenyan courts on HLPR, to which Kenya refers in its State party report to the CESCR,⁶⁹ include the case of *Satrose Ayuma and 11 Others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others (2011) Eklr*⁷⁰, in which the High Court at Nairobi judged in favour of the right to petitioners to remain in their homes during the time of an ongoing decision as to their right to housing.⁷¹

In another case, the High Court of Eku ordered the State to reinstate over 1,000 families back to land from which it had evicted them – *Brahim Sangor Osman v. Minister of State for Provincial Administration and Internal Security and 3 Others (2011) Eklr*.⁷² In its judgment, the court found the forced eviction of residents to have contravened Article 43 (1) (b) of the Constitution⁷³ and ordered Respondents to transfer the petitioners back to their land and reconstruct their houses.⁷⁴

In both instances, the respective Courts referred directly to Kenya's obligations under international treaty law, in this case Art. 11 ICESCR.

Statements on the International Plane and International Obligations

Kenya has signed and ratified the ICESCR. In its 2015 report to the CESCR it evoked domestic legislation as well as jurisprudence of domestic courts to demonstrate its implementation of obligations under the Covenant, which, as a treaty signed by Kenya, forms part of the state's national law, according to Article 2 (6) of the new Constitution.

However, in its Concluding Observations on Kenya's State party report⁷⁵, the CESCR showed concern as regards HLPR in several aspects:

It deplored the delay in passing legislation to implement the Covenant's norms in the domestic sphere. For example, as regards the right to housing, it showed concern about poor living conditions of people in informal settlements and recommended a timely adoption of the

⁶⁶ Ibid., para. 97.

⁶⁷ Ibid., para. 195.

⁶⁸ Ibid., para. 157.

⁶⁹ Ibid., para. 42.

⁷⁰ *Satrose Ayuma and 11 Others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others (2011) Eklr*. Available at: <http://kenyalaw.org/caselaw/cases/view/74154>.

⁷¹ Ibid., p. 19-20; E/C.12/KEN/2-5, *supra* note 59, para. 42.

⁷² Constitutional Petition No. 2 of 2011, Ibrahim Sangor Osman v. Minister of State for Provincial Administration and Internal Security and 3 Others (2011), available at: http://kenyalaw.org/Downloads_FreeCases/Embu_Pet_2_2011.pdf.

⁷³ Ibid., p. 11.

⁷⁴ Ibid., p. 11.

⁷⁵ E/C.12/KEN/CO/2-5 (06.04.2016): Concluding observations on the combined second to fifth periodic reports of Kenya, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/069/00/PDF/G1606900.pdf?OpenElement>.

Housing Act, the Community Land Bill and the National Slum Upgrading and Prevention Policy Housing Bill as options for improvement.⁷⁶

The Committee also criticized a lack of tenure security of vulnerable populations in informal (urban) settlements as well as of pastoralist communities, noting the absence of a comprehensive legal framework on forced evictions and providing recommendations on laws and judicial orders to be enacted.⁷⁷

Treatment by Regional and International Courts and Judicial Mechanisms

One of the most significant cases of the last years with regard to land rights of indigenous peoples was brought before the African Commission of Human Rights by the Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Indigenous Group Welfare Council against Kenya.⁷⁸

The Endorois are an indigenous people that centuries ago had made the region around Lake Bogoria in the Rift Valley Province its home. In the 1970s the State forcibly evicted hundreds of Endorois from this area in order to turn it into a game reserve for tourism purposes.⁷⁹

The Endorois claimed violations of the African (Banjul Charter on Human and Peoples' Rights, specifically of the right to property (Art. 14) and the right to freely dispose of their wealth and natural resources (Art. 21), among others.⁸⁰ They asked that their lands be restituted to them and demanded compensation for "the loss of their property, development and natural resources, but also freedom to practice their religion and culture"⁸¹.

The Commission concluded that Kenya had violated the Banjul Charter and recommended the State, among other measures, to

- “(a) Recognise rights of ownership to the Endorois and Restitute [...] ancestral land.
- (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.”⁸²

Although in its State party report to the CESCR, Kenya stressed its commitment to implement the recommendations⁸³, the State has still not complied with all measures. In its Concluding Observations on Kenya's report, although recognizing Kenya's creation of a Task Force to prepare implementation, the CESCR notes the absence of Endoroi representatives on said Task Force⁸⁴ and „recommends that the State party implement, without further delay, the decision [...] and ensure that the Endorois are adequately represented and consulted at all stages of the implementation process“.⁸⁵

⁷⁶ Ibid., paras. 45, 46.

⁷⁷ Ibid., paras. 47, 48.

⁷⁸ 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, available at: <http://www.achpr.org/communications/decision/276.03/>.

⁷⁹ Ibid., Summary of Alleged Facts, paras. 1-21.

⁸⁰ Ibid., para. 22.

⁸¹ Ibid., para. 22.

⁸² Ibid., Recommendations after para. 298.

⁸³ E/C.12/KEN/2-5, *supra* note 59, para. 33.

⁸⁴ E/C.12/KEN/CO/2-5, *supra* note 75, para. 15.

⁸⁵ E/C.12/KEN/CO/2-5, para. 16.

Recommendations for further research

Kenya has undergone major legislative changes over the last years. It will be interesting to follow the development of the existing HLPR, particularly implementation. The Endorois case demonstrates that this process is not yet going as smoothly as it could, given the legal framework in place. Researchers should also closely examine the relation between customary and formal land rights regimes in Kenya and how they can coexist within Kenya's HLPR framework.