

“Security of Tenure: Legal and Judicial Aspects”

Research Paper prepared for 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, Raquel Rolnik, to inform her Study on Security of Tenure

By Bret Thiele,¹ Global Initiative for Economic, Social and Cultural Rights

¹ This research paper was prepared for an expert group meeting convened by the Special Rapporteur on 22-23 October 2012, on security of tenure. The Special Rapporteur thanks Mr Bret Thiele for his contribution.

Summary

National laws and policies protect various elements of security of tenure, although rarely in a comprehensive manner. Security of tenure is generally implicit in many of these laws and policies, with the notable exception of laws dealing with eviction protections and regularization, which often have explicit references to security of tenure.

These protections can be found in both civil and common law jurisdictions and some have been informed by international norms to various degrees, again most notably in the context of eviction protection. Forced evictions, however, continue to occur in all parts of the world and what security of tenure exists is all too often correlated with a property rights regime or socio-economic status – thus leaving marginalized individuals, groups and community most vulnerable to violations of their tenure status. Indeed, even within the same type of tenure, the degree of security of tenure often correlates to economic status. Consequently, marginalized groups are often at a disadvantage both between and amongst types of tenure.

Many States have made efforts to protect security of tenure for marginalized individuals or groups. For example, Scotland has adopted the Homelessness etc. (Scotland) Act which is designed to end homelessness, and thus provides an example of the creative use of law and the efficacy of making a concerted effort to end one of the most egregious results of lack of security of tenure. The Act demonstrates how state intervention can assist persons with gaining increasingly secure tenure over time.

International law has had an impact in informing national laws on security of tenure, particularly in the area of eviction protection. Laws and courts have both been informed by the international prohibition on forced eviction, including the requirement of providing the minimum degree of security of tenure to prevent forced evictions. This reliance on international norms has often resulted in increased security of tenure and better outcomes for those living in otherwise tenuous tenure arrangements.

In South Africa, for instance, courts have relied on international law to inform national constitutional and legislative protections. The results are that national law has proven to provide greater protections of security of tenure. South Africa also provides examples of dealing with social rights in conflict with property rights, including the constitutionally protected right to adequate housing's potential conflict with the constitutionally protected right to property. Jurisprudence from South Africa has shown how the human right to adequate housing, as an international human right, should be paramount and protected while still protecting property rights. With the Prevention of Illegal Evictions and Unlawful Occupation of Land Act, South Africa has also adopted legislation aimed at preventing illegal eviction.

Kenya also is moving towards legislation, now in the form of the Evictions and Resettlement Procedures Bill, that protects against forced eviction, thus creating some degree of security of tenure by articulating processes by which evictions, when necessary, are to occur. Meanwhile, the new Constitution of Kenya has been successfully used, and in particular the express right to adequate housing, to prevent forced eviction and provide a minimal guarantee of security of tenure.

While an improvement over the status quo ante, however, such anti-eviction laws as in South Africa and Kenya still often leave space for evictions unlawful under international law to occur by laying out procedures by which to evict.

There are other examples of the efficacy of reliance on international law as a means to model or interpret national laws, policies and practices. For instance, the Urban

Development and Housing Act from the Philippines was modelled after international law. It has, however, and in contrast to the experiences in South Africa and Kenya, failed to be implemented and interpreted consistently with those international obligations. As a result forced evictions have all too often occurred in the Philippines that contravene that country's international human rights obligations.

India provides an example of the benefit of justiciable rights complemented by the interpretive use of social norms. The Supreme Court of India has relied on justiciable rights and social directives to provide degrees of security of tenure to marginalized groups, including pavement dwellers. More recently, the courts in India have also turned to international human rights standards and norms, including the International Covenant on Economic, Social and Cultural Rights and the United Nations Basic Guidelines and Principles on Development-Based Evictions and Displacement.

Every regional human rights system has, in one way or another, dealt with the issue of security of tenure in the context of prohibiting evictions. The jurisprudence from these regional mechanisms demonstrates the efficacy of international legal protections in the absence of national law, policy or practice or lack of accessible and effective remedies to enforce security of tenure at the national level.

Beyond prevention of forced eviction, national laws also address the provision of security of tenure in the context of regularizing informal land systems. For instance, the National Land Policy of Kenya includes provision of security of tenure as a key principle of its aims to facilitate the regularization of existing squatter settlements found on public and community land for purposes of upgrading or development. It also requires a framework to facilitate the negotiation between private owners and squatters in cases of squatter settlements found on private land.

In the context of post-apartheid South Africa, the Extension of Security of Tenure Act demonstrates an attempt at remedying situations of large segments of the population's lack of security of tenure, particularly around land reform and past exclusionary and discriminatory laws and practices. The Act seeks to regularize tenure arrangements of disadvantaged groups by strengthening tenure over existing land and housing while reconciling potential competing property claims.

The City Statute from Brazil innovatively uses prescription, or usufruct, to provide security of tenure to marginalized groups, in particular the urban poor residing in informal settlements. The City Statute relies on the notion of valuing the social function of the urban area and of property and uses the concept of usufruct, similar to adverse possession in common law systems, to support State intervention and provision of housing with security of tenure. The City Statute applies to both individual occupancy and collective occupancy of urban land.

Kenya has also made strides in providing security of tenure, including recognition of communal tenure for groups that culturally consider residential areas to be a collective possession. Grounded in the Constitution, communal tenure is given specificity through Kenya's National Land Policy and implemented through a recently adopted innovative Community Land Rights Recognition Model.

Finally, the experience in the United States demonstrates that even relatively strong, freehold property rights rooted in a strong property-centric system fail to provide absolute security of tenure. There, despite a common tenure regime, the level of security of tenure often depends on one's socio-economic status, consequently leaving marginalized groups under-protected vis-à-vis other groups.

Furthermore, the notion of property rights can often be detrimental to security of tenure, as conflicts between owners of land or housing and occupiers of land or housing demonstrate.

This illustrative examination of laws exposes gaps in and raises questions about the current state of security of tenure as it is articulated in the current human rights framework. The identification of these gaps can help inform the development of guidelines on security of tenure at the international level that would benefit policy-makers at the national level.

One key gap is the lack of a concise, agreed upon, definition of security of tenure at the international level besides the minimum degree necessary to prevent forced eviction. Guidelines should take into account that differing social, historic, economic, and cultural contexts may require differing types of security of tenure while at the same time ensuring universal and meaningful protection of security of tenure for all.

Another gap is related to addressing non-discrimination. Differing forms of security of tenure across the continuum of tenure types provide varying degrees of security, with this variance often correlated to property or socio-economic status. Guidelines on security of tenure should address this issue of non-discrimination on account of property or other status. Specifically, how can States ensure that all members of society, regardless of property or socio-economic status, enjoy security of tenure on the basis of non-discrimination and equal protection of the law? The solution may require a paradigm shift from correlating security of tenure with a property rights regime to grounding security of tenure solidly in the human rights framework.

Finally, with rights and obligations comes accountability, including access to justice and adequate remedies. In practice, however, not all of the types of tenure allow for a means by which to challenge a threatened interference with tenure, including the ability to craft remedies to address the interference. This lack of accountability is contrary to another element of security of tenure grounded in the human rights framework, namely the right to access to justice and remedy when a human right is violated. Thus guidance is needed on how to make rights effective at the national level, including for those with little or no financial or other resources by which to access national accountability and remedial mechanisms.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-7	6-7
II. Protections of Security of Tenure at National and Regional Levels.....	8-91	7-25
A. Ending Homelessness: Provision of Security of Tenure	8-14	7-9
B. Informal Tenure: Eviction Protection	15-65	9-18
C. Regularization.....	66-70	18-20
D. Prescription: Usufruct/Adverse Possession	71-76	20-21
E. Communal Tenure	77-81	21
F. Occupancy Rights	82-85	23-24
G. Freehold Tenure: Titles and Deeds	86-91	24-25
III. Gaps in the Current Normative Framework related to Security of Tenure at the National Level and the need to move towards a Comprehensive Model of Security of Tenure Based on International Human Rights Obligations.....	92-102	25-27
A. Defining Security of Tenure	92-96	26
B. Universality and Cultural Adequacy.....	97-98	26-27
C. Non-Discrimination: Property or other status	99-100	27
D. Accountability.....	101-102	27
IV. Conclusions	103-116	27-29
Appendix 1: Brazil – City Statute		30-31
Appendix 2: Kenya – Evictions and Resettlement Procedures Bill		32-33
Appendix 3: Philippines – Urban Development and Housing Act (RA 7279)		34
Appendix 4: South Africa – Constitution Articles 25 and 26.....		35-36
Appendix 5: South Africa – Extension of Security of Tenure Act of 1997.....		37-38
Appendix 6: Regional Human Rights Mechanisms Jurisprudence		39-43

I. Introduction

1. Security of tenure is a key component of the right to adequate housing and one of the principal means by which that right can be effectively implemented. Security of tenure in practice ranges along a continuum, but no point on that continuum provides complete security of tenure. Security of tenure, furthermore, is ill-defined in the international human rights framework with the exception of the immediate obligation under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to provide a “degree of security of tenure”.

2. Under the ICESCR, security of tenure is one of the seven main elements of the right to adequate housing and “takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property.”² Thus, the ICESCR makes clear that security of tenure is not limited to property or ownership rights but extends to a variety of relationships between housing and those residing in that housing.

3. States parties to the ICESCR are obligated to, “notwithstanding the type of tenure, [ensure that] all persons possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.”³ Consequently, under the ICESCR, “States parties should take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.”⁴ Beyond this immediate requirement, however, international law becomes vague as to the provision of security of tenure.

4. Under the ICESCR, evictions can only be justified in the most exceptional circumstances and after all feasible alternatives to eviction have been explored in meaningful consultation with the persons affected.⁵ Eviction proceedings must also adhere to various due process protections as outlined in General Comment No. 7 of the Committee on Economic, Social and Cultural Rights.⁶ Finally, and even if the due process criteria have been satisfactorily met, evictions cannot be carried out in a discriminatory manner nor

² Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003), at para. 8(a).

³ *Ibid.*

⁴ *Ibid.*

⁵ See Committee on Economic, Social and Cultural Rights, General Comments. Nos. 4 and 7.

⁶ Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003) (para. 16 states that “The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.”).

can they result in rendering individuals homeless or vulnerable to the violation of other human rights.⁷

5. The Committee on Economic, Social and Cultural Rights has acknowledged that “in many instances legislation is highly desirable and in some cases may even be indispensable”⁸ to give effect to Covenant rights and that judicial remedies must be available to render these rights justiciable.⁹ The Committee has made clear that States must implement their international human rights obligations under the Covenant immediately so as to enable access to justice.¹⁰

6. Furthermore, the Vienna Convention on the Law of Treaties requires that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”¹¹ and that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹² Similarly, the United National General Assembly has stated that “States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations.”¹³

7. The following section provides examples of the provision of security of tenure at the national level. Gaps in national frameworks are then discussed as well as recommendations for comprehensive security of tenure consistent with international human rights obligations. This paper, however, should be read along with the report examining forms of tenure most prevalent worldwide and the key policies and practices, as well as challenges, with respect to ensuring tenure security for those who most need it (See A/HRC/22/46/Add.4). Elements of those policies and practices will be informative in coming to an understanding of a comprehensive model of effective security of tenure.

II. Protections of Security of Tenure at National and Regional Levels

A. Ending Homelessness: Provision of Security of Tenure

8. The Homelessness etc. (Scotland) Act 2003 was adopted to ensure that all persons unintentionally homeless have access to housing by 2012. As a means of ending and preventing homelessness, the Act touches upon various forms of security of tenure.

⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 7.

⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1990), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003), at para. 3.

⁹ *Ibid.* at para. 5

¹⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003), at para. 4.

¹¹ Vienna Convention on the Law of Treaties, Article 26, 1155 U.N.T.S. 331, entered into force 27 January 1980.

¹² *Ibid.* at para. 27.

¹³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by United National General Assembly, resolution 60/147, UN Doc. A/RES/60/147 (21 March 2005).

9. The Act amends other housing laws resulting in a comprehensive body of housing-related laws that seeks to provide housing to all homeless persons in Scotland. In its early phases of implementation, the law prioritized vulnerable groups but by 2012 had incrementally added all members of society with the effect of ultimately being inclusive of all.

10. With respect to who benefits from the Act, it utilizes a broad definition of homeless adapted from the Housing Task Force (an entity created in 1999 by the Scottish Executive to make legislative and policy recommendations), including those that are “intentionally homeless”. This definition includes:

(1) A person is homeless if he has no accommodation in the United Kingdom or elsewhere.

(2) A person is to be treated as having no accommodation if there is no accommodation which he, together with any other person who normally resides with him as a member of his family or in circumstances in which the local authority consider it reasonable for that person to reside with him:

(a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court, or

(b) has a right or permission, or an implied right or permission to occupy, or in England and Wales has an express or implied license to occupy, or

(c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession.

(2A) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy.

(2B) Regard may be had, in determining whether it would be reasonable for a person to continue to occupy accommodation, to the general circumstances prevailing in relation to housing in the area of the local authority to which he has applied for accommodation or for assistance in obtaining accommodation.

(3) A person is also homeless if he has accommodation but:

(a) he cannot secure entry to it, or

(b) it is probable that occupation of it will lead to abuse (within the meaning of the Protection from Abuse (Scotland) Act 2001 (asp 14)), or

(bb) [it is probable that occupation of it will lead to abuse (within the meaning of that Act) from some other person who previously resided with that person, whether in that accommodation or elsewhere, or

(c) it consists of a movable structure, vehicle or vessel designed or adapted for human habitation and there is no place where he is entitled or permitted both to place it and to reside in it; or

(d) it is overcrowded within the meaning of section 135 and may endanger the health of the occupants; or

(e) it is not permanent accommodation, in circumstances where, immediately before the commencement of his occupation of it, a local authority had a duty under section 31(2) in relation to him.¹⁴

11. Under the Act, local authorities must provide those meeting the definition of homeless with housing including secure tenure. Secure tenure is initially in the form of “short Scottish secure tenure” with the aim of converting to “full tenancy” at the end of a year. The law demonstrates how State intervention and assistance can move persons from homelessness toward increasingly secure forms of tenure.

12. Additionally, complementary policies allow for the purchase of social housing units and the right to sell ones home to the State and rent it back at affordable rates in order to prevent foreclosure.

13. The Act also is aimed at prevention of homelessness in the context of eviction from private rental housing. In such cases, private landlords are required to notify local authorities so that the latter can take steps to prevent homelessness either through intervention in the current rental agreement or the provision of alternative housing.

14. Finally, a Homeless Monitoring Group has been established to monitor implementation of the Act and Section 35a of the Act allows for justiciability of rights by providing a right of beneficiaries to judicial review of any decision by local authorities related to the Act.

B. Informal Tenure: Eviction Protection

15. In contrast to laws addressing tenure generally, laws providing minimal protections from eviction are often closely linked to international norms dealing with the prohibition on forced eviction, including acknowledging the degree of security of tenure under the international human rights framework aimed at preventing forced eviction. Indeed, courts have often looked to international law to interpret national laws providing eviction protection, often resulting in better outcomes for those facing interference with tenure.

1. South Africa

16. The Constitution of the Republic of South African (see Annex 4 for relevant articles) contains two key Articles that deal with security of tenure. The most prominent is Article 26 which guarantees the right to adequate housing. The second is Article 25 which guarantees the right to property. However, the right to property, it must be noted, also can be used to undermine security of tenure as case law from South Africa demonstrates.

17. The Constitution takes into account past discriminatory laws and practices that resulted in insecure tenure. For instance, those with such insecure tenure are entitled to secure tenure or comparable redress and those dispossessed of land are entitled to restitution or equitable redress.

18. A key strength of the Constitution, resulting in a progressive jurisprudence, is that Article 39(1) requires that the interpretation of the Bill of Rights, in which Articles 25 and 26 reside, must consider international law.¹⁵

¹⁴ Housing (Scotland) Act, 1987, c. 26. Part II, § 24 as amended by the Homelessness etc. (Scotland) Act, 2003.

¹⁵ Constitution of the Republic of South Africa, Art. 39(1) Housing, adopted 1996.

19. Indeed, South African courts have frequently turned to international law, including law related to the right to adequate housing in the International Covenant on Economic, Social and Cultural Rights, as a means to interpret Article 26 of the Constitution.

20. In the case of *Abahlali BaseMjondolo Movement SA and others v. Premier of the Province of Kwazulu*,¹⁶ the Constitutional Court held that Section 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act, which authorized provincial officials to implement eviction of informal settlements, was inconsistent with Article 26 of the Constitution and thus unconstitutional and invalid. In reviewing the case, the Constitutional Court held that the right to adequate housing enshrined in Article 26 of the Constitution trumped inconsistent legislation, and that Article 26 was in part adopted with the express purpose of protecting the rights of people with insecure land tenure. The decision also established that a failure to consider an upgrade of an informal settlement (as opposed to an eviction or relocation) likely renders the decision to evict or relocate reviewable under administrative law. Moreover, the Court suggested that where it is possible to upgrade an informal settlement on the site of the settlement itself, such an upgrade must be given preference.

21. The case of *Modder East Squatters and Another v. Modderklip Boerdery (Pty) Ltd*.¹⁷ dealt with a conflict between the Article 26 right to adequate housing and the Article 25 right to property. In *Modderklip*, an informal settlement was located on private land. The owner, a corporation, of the private land sought to compel authorities to enforce its Article 25 property rights by enforcing an eviction order against the community. The community, however, referred to its Article 26 right to adequate housing as well as relevant sections of Article 25 such as Section 5 (The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis) to prevent the eviction. The Supreme Court of Appeals ultimately reconciled this conflict of law by ordering the State authorities to compensate the owner of the land for the costs associated with its occupation by the informal settlement until the State authorities could provide alternative land for the residents of that settlement.¹⁸

22. *Modderklip* demonstrates how property rights can often be used in an attempt to interfere with, rather than enhance, tenure rights. However, it also demonstrates how such a conflict of rights can be reconciled if social rights such as the right to adequate housing are properly elevated to the status of a fundamental right. Other examples of a conflict between property rights and the right to adequate housing arise in the context of landlord – tenant arrangements. Caution should be taken, therefore, in seeing property rights as the means by which to best secure tenure rights. Rather, security of tenure grounded in the human rights framework should be clearly articulated and properly seen as a fundamental human right.

23. Article 26 of the Constitution is augmented by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act). In the context of post-apartheid South Africa, the PIE Act was adopted in 1998:

¹⁶ Constitutional Court of South Africa, *Abahlali BaseMjondolo Movement SA and others v. Premier of the Province of Kwazulu*, 2010 (2) BCLR 99 (CC) (14 October 2009).

¹⁷ *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (187/03, 213/03) [2004] ZASCA 47; [2004] 3 All SA 169 (SCA) (27 May 2004)*.

¹⁸ The *Modderklip* decision was ultimately upheld by the Constitutional Court of South Africa in *The President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*, CCT20/04 (13 May 2005).

24. To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951....¹⁹

25. While the PIE Act aims to prevent unlawful evictions, it does allow for lawful evictions of “unlawful occupiers” from private lands. The criteria to be followed in any eviction differ based on time of occupation and whether a vulnerable group is being evicted. Sections 6 and 7 of the Act lay out these criteria:

(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.²⁰

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.²¹

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).²²

26. A key phrase in whether a court will allow an eviction to occur is whether or not eviction is “just and equitable”, as this concept creates a better balance between the interests of land owners and occupants of land. In the case of *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v. Steele*, the Supreme Court of Appeals considered the threatened eviction of an impoverished community. In doing so the Court opined that:

27. It will, generally, not be just and equitable for a court to grant an eviction order where the effect of such an order would be to render the occupiers of the property homeless. In *Port Elizabeth Municipality*, the Constitutional Court cautioned that ‘a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available.’ I am of the view, having regard to the personal circumstances of the occupiers, and in particular the real prospect that their

¹⁹ Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, Act No. 19 of 1998, Preamble (1998).

²⁰ Ibid. at Section 6.

²¹ Ibid. at Section 7.

²² Ibid. at Section 8.

eviction could lead to homelessness, that they have established a bona fide defence that carries some prospect of success.²³

28. As such, the Court read into the definition of “just and equitable” the international human rights prohibition on evictions rendering persons homeless.

29. Additionally, in the case of *Tswelopele Non-Profit Organisation and Others v. City of Tshwane Metropolitan Municipality*²⁴ the Supreme Court of Appeal considered the forced eviction of a community without a court order. The Court held that the eviction contravened Article 26 of the Constitution as well as the PIE Act, which decrees that “no person may evict an unlawful occupier except on the authority of an order of a competent court.”²⁵ The Supreme Court of Appeal consequently held that the proper remedy was the restoration of the status quo ante and ordered that the “occupiers must get their shelters back” and that “the respondents should, jointly and severally, be ordered to reconstruct them.”²⁶ This case clearly demonstrates the efficacy of the right to adequate housing enshrined in domestic law and meaningfully applied by the judiciary.

30. In the recent case of *Mchunu and others v. Executive Mayor of eThekweni and Others*, the KwaZulu-Natal High Court ordered the implementation of alternative housing for a community evicted in 2009. The community had been residing in an informal settlement and was evicted to make way for a roadway and since that time had been residing in a transit camp. The eviction was contingent upon alternative housing within one year which the authorities failed to provide. The Court consequently ordered the construction of alternative housing within three months. Additionally, the Court held the authorities to be individually subject to contempt of court if they failed to implement the decision.

2. Kenya

31. The new Constitution of Kenya was adopted in 2010 and includes the right to adequate housing in Article 43. Furthermore, similar to South Africa, the Constitution of Kenya requires that “The general rules of international law shall form part of the law of Kenya”²⁷ and that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”²⁸

32. Cases dealing with forced evictions from informal settlements have begun to be taken under the new Constitutional framework. For instance, the case of *Ibrahim Sangor Osman et al. v. Municipal Council of Garissa et al.*²⁹ involved the forced eviction of 1,122 persons by the local authorities. While the community had been considered an informal settlement on public land, it had resided on the land since the 1940s, had constructed permanent housing and had close social ties to the area. The Court relied on the constitutional right to adequate housing as informed by the ICESCR (including General Comments No. 4 and No. 7) and the International Covenant on Civil and Political Rights in

²³ The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v. Steele, 2010 (9) BCLR 911 (SCA); [2010] 4 All SA 54 (SCA) at para 16.

²⁴ Supreme Court of Appeal of the Republic of South Africa, *Tswelopele Non-Profit Organisation and Others v. City of Tshwane Metropolitan Municipality*, 2007 SCA 70 (RSA).

²⁵ PIE § 8(1). Section 8(3) provides that contravention of §§ (1) is an offence on conviction of which the offender is liable to a fine or imprisonment not exceeding two years, or both.

²⁶ *Ibid.* at para. 28.

²⁷ Constitution of the Republic of Kenya, 2010, Article 2(5).

²⁸ *Id.* at Article 2(6).

²⁹ *Ibrahim Sangor Osman et al. v. Municipal Council of Garissa et al.*, Constitutional Petition No. 2 of 2011 (16 November 2011).

finding the forced eviction to be unlawful because it was carried out with no written notice, without a court order, and without consultation with the community. The Court ordered restitution of the land, reconstruction of the homes, schools and other buildings that were destroyed, the provision of infrastructure such as water and sanitation, and awarded other damages amounting to US\$2.6 million. The Court also placed the relevant authorities on notice that they would “be liable to process of contempt by committal, sequestration or otherwise as the High Court may direct for the purpose of compelling you to obey the same.”

33. Kenya currently has a Bill pending before Parliament that addresses security of tenure for informal settlements. Although not yet adopted, it provides a good example of a legislative framework dealing with tenuous tenure status, particularly in the context of informal settlements that are to be displaced.

34. The Evictions and Resettlement Procedures Bill seeks to:

set out appropriate procedures applicable to forced evictions; to provide protection, prevention and redress against forced eviction for all persons occupying land including squatters and unlawful occupiers; and to provide for matters incidental and connected thereto.³⁰

35. The Bill is heavily influenced by international human rights law, including in particular the ICESCR. For example, the definition of “forced eviction” is taken directly from General Comment No. 7 of the Committee on Economic, Social and Cultural Rights. The Bill, however, does not apply to “professional squatters” or to disputes in the context of landlord – tenant agreements.

36. Various provisions in the Bill would provide some degree of security of tenure to protect against forced eviction, including criminal sanctions to those carrying out unlawful forced evictions. However, the language in the Bill is a bit problematic as it allows for “forced eviction” with a court order as opposed to an “eviction” with a Court order (under international law, forced evictions amount to a gross violation of human rights and therefore unlawful in absolute terms).³¹ Part II of the Bill (see Annex 2 for relevant excerpts) lays out these protections, including that no person shall be forcibly evicted without a Court order and that when an eviction is authorized, due process protections must be afforded including genuine consultation, adequate notice, creation of an adequate resettlement action plan and the availability of legal redress to challenge the eviction. The Bill also requires environmental, economic and social impact assessments to be completed. In the case of development-based projects, an eviction assessment shall also be carried out that explores alternatives and strategies for minimizing harm to those evicted.

37. Using a term similar to that found in South Africa’s PIA Act, a court order will only be granted “if it is just and equitable to do so, after considering all the relevant circumstances.”³² According to Section 4:

(4) In deciding whether it is just and equitable to grant an order for eviction under this section, the Court must have regard to:

(a) The circumstances under which the squatters occupied the land and erected the buildings or structures;

³⁰ The Evictions and Resettlement Procedures Bill of 2012, Preamble.

³¹ See, e.g., UN Commission on Human Rights resolution 1993/77 (adopted 10 March 1993); and UN Commission on Human Rights resolution 2004/28 (adopted 16 April 2004).

³² The Evictions and Resettlement Procedures Bill of 2012, Part IV, Section 10.

(b) The period the squatter and his or her family have resided on the land in question, and;

(c) The availability to the squatter of suitable alternative accommodation or land³³

38. Furthermore, the Bill provides for remedies to challenge an eviction, including access to legal assistance:

(a).Notwithstanding the provisions of any law to the contrary, all persons threatened with or subjected to forced evictions have the right to timely access appropriate remedies including fair hearing and access to legal aid.³⁴

39. Finally, the Bill includes several safeguards and protections for those relocated, including that:

(b).Resettlement shall occur in a just and equitable manner and in accordance with the provisions of this Act and in full accordance with international law standards.³⁵

40. And that those resettled be provided with security of tenure to prevent forced eviction:

41. The person proposing or carrying out the resettlement shall pay for any associated costs including all resettlement costs and those resettled shall be given security of tenure to avoid future evictions.³⁶

3. Philippines

42. The Urban Development and Housing Act (UDHA 1992) is grounded in the Constitution of the Philippines, which in Section 10 (Social Justice and Human Rights), Article XIII, states:

Urban and rural poor dwellers shall not be evicted nor their dwellings demolished, except in accordance with law and in just and humane manner.³⁷

Section 28 of the UDHA addresses security of tenure and applies to evictions and housing demolition, stating that:

Eviction or demolition as a practice shall be discouraged.³⁸

43. Section 28 of the UDHA also articulates the exceptions for this general rule, citing when an eviction may occur, such as in exceptional circumstances such as occupancy in dangerous areas or for public purposes. If a situation meets one or more of these exceptions, authorities still have to follow mandatory requirements for the valid execution of eviction and demolition orders involving underprivileged and homeless citizens, including adequate notice of thirty days, adequate consultation and adequate relocation.³⁹

³³ Ibid.

³⁴ Ibid. at Part V, Section 13.

³⁵ Ibid. at Part V, Section 14.

³⁶ Ibid. at Part V, Section 12.

³⁷ Constitution of the Philippines, Section 10, Art. VIII (1987).

³⁸ Urban Development and Housing Act, (RA 7279), Section 28 ().

³⁹ Underprivileged and homeless citizens refer to the beneficiaries of the UDHA (RA 7279) and to individuals or families residing in urban and urbanized areas:

(a) whose income or combined household income falls within the poverty threshold as defined by National Economic Development Authority (NEDA); and

(b) who do not own housing facilities.

44. The UDHA as drafted aligns with the international human rights framework on the prohibition on forced evictions (in particular General Comments No. 4 and No. 7 of the Committee on Economic, Social and Cultural Rights) by requiring exceptional circumstances to justify eviction, consultation with the affected community, and due process protections. However, in practice and based in part on Executive Order No. 152 which was issued to provide clarity to the UDHA, rather than requiring a court order finding that this framework was adhered to, the law has been implemented whereby any court order is sufficient to carry out an eviction even if the exceptional circumstance bar has not been found to have been met.⁴⁰

4. India

45. The Supreme Court of India has relied on both the justiciable right to life in the Constitution of India as well as the non-justiciable Directive Principles in the Constitution to ensure some degree of security of tenure for marginalized groups including pavement dwellers. In doing so, it used the Directive Principles as means to interpret justiciable rights.

Article 21 of the Constitution of India states that:

No person shall be deprived of his life or personal liberty except according to procedure established by law.⁴¹

Directive Principle 39(a) requires that:

The State shall, in particular, direct its policy towards securing :

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood.

46. In the seminal case of *Maneka Gandhi v. Union of India* (1978, 1SCC 248), the Indian Supreme Court stated that the right to life provisions in the Constitution must be taken to mean ‘the right to live with dignity’.

⁴⁰ Under the Implementing Guidelines of Executive Order No. 152, Series of 2002, the following are the types of eviction and demolition:

a) Court-ordered Eviction and Demolition

It is eviction and demolition by virtue of a writ issued by a court of competent jurisdiction.

b) Extra-judicial Eviction and Demolition.

It is eviction and demolition without the need of a court order and pertains to the underprivileged and homeless citizens and their dwellings occupying:

1) danger areas;

2) public places; and

3) government infrastructure projects with available funding (Section 3(a)).

c) Summary Eviction and Demolition

It is the immediate removal and the dismantling by the LGUs or authorized government agency of structures of:

1) professional squatters;

2) members of squatting syndicate; and

3) new illegal structures (Section 3(p)).

d) Voluntary Eviction and Dismantling / Demolition.

It is the act of willingly vacating subject premises and the dismantling / demolishing or allowing the dismantling or demolition of one’s structure.

⁴¹ Constitution of India, Art. 21.

47. Four years later, the Court built upon *Maneka Gandhi* and held in *Francis Coralie v. Union Territory of Delhi* (AIR 1981, SC 746) that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing, and shelter.

48. Later, in the case of *Olga Tellis v. Bombay Municipal Corporation* (1985, 3 SCC 545), the Indian Supreme Court held that forced eviction would result in a deprivation of the ability to earn a livelihood – referring to the Directive Principles in the Constitution as a means to interpret the justiciable right to life. The Court further noted that the ability to earn a livelihood was essential to life and thus the forced evictions would result in a violation of the right to life as embodied in Article 21 of the Indian Constitution.

49. Finally, in *Ram Prasad v. Chairman, Bombay Port Trust* (AIR 1989, SC 1306) the Court relied on this line of jurisprudence and directed the relevant public authorities not to evict 50 slum dweller families unless alternative sites were provided for them, thereby providing a degree of security of tenure preventing eviction without provision of alternatives for housing.

50. The above case law demonstrates that security of tenure can be interpreted as a component of civil rights protections, particularly when well-articulated norms are used as interpretive tools. While the above protections relied on the Constitution's Directive Principles as interpretive guides, more recently Indian courts have also relied on international human rights law.

51. The case of *Sudama Singh & Others v. Government of Delhi & Anr.* dealt with the threatened eviction of residents of an informal settlement located in a right-of-way intended for construction of a road pursuant to the city's Master Plan. The residents sought relocation to an alternative site consistent with the State's policy governing relocation and rehabilitation of slum dwellers. In this case, the Court relied on the ICESCR (including General Comments No. 4 and No. 7) as well as the United Nations Basic Principles and Guidelines of Development-Based Evictions and Displacement drafted by the then-UN Special Rapporteur on the right to adequate housing. In doing so, the Court held that while the relocation and rehabilitation of slum dwellers policy may not apply to those who recently took up residence on public right-of-ways, it did apply to those that have resided in such a manner for decades. The Court ultimately ordered that alternative housing be provided that included basic amenities such as access to water, sanitation and transport as well as security of tenure.⁴²

52. In the subsequent case of *P.K. Koul et al. v. Estate Officer & Anr.*, the High Court of Delhi at New Delhi also applied the earlier Article 21 Constitutional jurisprudence as well as international law similar to *Sudama Singh & Others v. Government of Delhi & Anr.* The Court was dealing with IDPs relocated from Kashmir to Delhi where they were allotted accommodation in public premises linked to their employment. Upon retirement, however, they faced eviction. The Court ordered that residents at threat of eviction had a right to remain in their present location, thereby enforcing security of tenure, until such time as an alternative and adequate relocations site was available.⁴³

53. These latter two cases demonstrate the efficacy not only of international standards but also of "soft law" such as guidelines developed by United Nations Special Procedures in informing national legal protections.

⁴² High Court of Delhi at New Delhi, *Sudama Singh & Others v. Government of Delhi & Anr.*, WP(C) Nos.8904/2009, 7735/2007, 7317/2009 and 9246/2009 (11 February 2010).

⁴³ High Court of Delhi at New Delhi, *P.K. Koul et al. v. Estate Officer & Anr.*, W.P.(C) No.15239/2004 & CM No. 11011/2004 (30 November 2010).

5. Regional Mechanisms

54. Regional human rights mechanisms have also addressed issues related to security of tenure, particularly in the context of informal settlements. For a detailed examination of relevant jurisprudence for regional human rights mechanisms see Annex 6.

56. For instance, the European Committee of Social Rights referred to General Comments No. 4 and No. 7 of the Committee on Economic, Social and Cultural Rights in holding that the right to adequate housing enshrined in Article 31 of the Revised European Social Charter requires that that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats,” that evictions can “only be justified in the most exceptional circumstances,” and that “all feasible alternatives [to eviction] are explored in consultation with the affected persons.”⁴⁴

57. Article 31 of the Revised European Social Charter on the right to housing states that: With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. To promote access to housing of an adequate standard;
2. To prevent and reduce homelessness with a view to its gradual elimination; and
3. To make the price of housing accessible to those without adequate resources.⁴⁵

58. The Committee also referred to the due process protections in paragraph 16 of General Comment No. 7 as well as the principle that “evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights” and “that [therefore] alternative housing, resettlement or access to productive land, as the case may be, is available.”⁴⁶

59. As Article 31 makes clear, under the Revised European Social Charter security of tenure is also linked to adequacy of housing generally, including affordability and habitability.

60. Furthermore, the European Committee of Social Rights has also held there to be an implicit right to adequate housing in Article 16 of the original European Social Charter, which guarantees the right of the family to social, legal and economic protection.

61. The European Court of Human Rights has also considered security of tenure in the context of informal settlements, particularly as violations of Article 8 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) (guarantee of respect for the home) and Article 1 of Protocol 1 to that Convention (right to peaceful enjoyment of possessions).

62. In the recent case of *Yordanova and others v. Bulgaria*,⁴⁷ the European Court considered the threatened forced eviction of a long-standing Roma community living in an informal settlement on public land. While the Court noted that the housing conditions were inadequate, it also took under consideration the fact that if the eviction was implemented

⁴⁴ European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, Decision on the Merits, 25 June 2010 at para. 54.

⁴⁵ The Revised European Social Charter (ETS No. 163) entered into force in 1999 and is a single document that embodies the original 1961 Charter and the Additional Protocol, as well as a number of new rights and amendments.

⁴⁶ European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, Decision on the Merits, 25 June 2010 at para. 54.

⁴⁷ European Court of Human Rights, *Case of Yordanova and others v. Bulgaria*, Application no. 25446/06, 24 April 2012.

the residents could be rendered homeless and that the authorities never considered other alternatives such as regularization and improvement of the settlement.⁴⁸ The Court held that if implemented the eviction would constitute a violation of Article 8 of the European Convention, even though the community had informal tenure status, given the long presence of the community and the historic acquiescence of the authorities to that presence. Specifically, the Court stated:

63. That for several decades the national authorities did not move to dislodge the applicants' families or ancestors and, therefore, *de facto* tolerated the unlawful Roma settlement in Batalova Vodenitsa. In its view, this fact is highly pertinent and should have been taken into consideration. While the unlawful occupants cannot claim any legitimate expectation to remain, the authorities' inactivity has resulted in the applicants' developing strong links with Batalova Vodenitsa and building a community life there. The principle of proportionality requires that such situations, where a whole community and a long period are concerned, be treated as being entirely different from routine cases of removal of an individual from unlawfully occupied property.⁴⁹

64. The Court also reasoned that the legislation relied upon to justify the eviction did not require the examination of proportionality, as required by Article 8 of the European Convention, and was issued and reviewed under a decision-making procedure which did not offer safeguards against disproportionate interference. It also found that the authorities failed to demonstrate that the eviction was "necessity in a democratic society" as also required by Article 8 of the European Convention. Consequently, the Court order provided an injunction against the implementation of the eviction order.

65. Although with less specificity than the European examples, forced evictions, and thereby denial of at least the degree of security of tenure aimed at preventing forced evictions, have been condemned under the African Charter on Human and Peoples' Rights as well as the American Convention of Human Rights. In particular, forced evictions have been held to violate the implicit right to adequate housing guaranteed in Articles 14 (right to property), 16 (right to health) and 18(1) (right to protection of the family) of the African Charter as well as Articles 11 (the right to be free from arbitrary or abusive interference with the home) and 21 (right to property) of the American Convention.⁵⁰

C. Regularization

1. Kenya

66. One of the key goals of the National Land Policy of Kenya is to facilitate the regularization of existing squatter settlements found on public and community land for purposes of upgrading or development. As a means to implement regularization, a key principle of the National Land Policy is the provision of security of tenure. Under the Policy, the Government of Kenya is expected to:

Take an inventory of genuine squatters and people who live in informal settlements.

Determine whether land occupied by squatters is suitable for human settlement.

Establish appropriate mechanisms for the removal of squatters from unsuitable land and their resettlement.

Facilitate planning of land found to be suitable for human settlement.

⁴⁸ Ibid. at paras. 124 - 126.

⁴⁹ Ibid. at para. 212.

⁵⁰ See Annex 6 for elaboration and citations.

Ensure that land subject to informal settlement is developed in an ordered and sustainable manner.

Facilitate the negotiation between private owners and squatters in cases of squatter settlements found on private land.

Facilitate the regularization of existing squatter settlements found on public and community land for purposes of upgrading or development.

Establish a legal framework and procedures for transferring unutilized land and land belonging to absentee land owners to squatters and people living in informal settlements.

Develop, in consultation with affected communities, a slum upgrading and resettlement programme under specified flexible tenure systems.

Put in place measures to prevent further slum development on private land and open spaces.

Facilitate the carrying out of informal commercial activities in a planned manner.

Prohibit sale and/or transfer of land allocated to squatters and informal settlers.

Put in place an appropriate legal framework for eviction based on internationally acceptable guidelines.⁵¹

2. South Africa

67. The Extension of Security of Tenure Act of 1997 (ESTA) in South Africa applies to privately owned land, but is relevant to housing as its specific scope relates to those dwelling upon that land. In many cases, ESTA applies in the context of workers and their families residing on large, privately held land holdings. ESTA recognizes, and has the purpose of addressing, the fact that many South Africans do not have secure tenure of their homes and the land which they use and therefore are vulnerable to unfair eviction; that unfair evictions lead to great hardship, conflict and social instability; and that this situation is in part the result of past discriminatory laws and practices.⁵² Specifically, ESTA states its purpose as:

To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith.⁵³

68. While ESTA does not apply security of tenure to all, it may provide a degree of security of tenure based on length of possession or on account of vulnerable status related to age or disability. It also provides a degree of security of tenure by articulating those criteria that must be established in order to evict. In doing so, ESTA provides a balancing test between security of tenure and property rights.

69 Section 8 provides guidelines for termination of a right of residence on private land. Section 8 requires that any termination be “just and equitable” and that specific factors to be considering include the fairness of any agreements establishing residency, any hardship

⁵¹ Republic of Kenya, Ministry of Lands, Eviction and Resettlement Guidelines, March 2011.

⁵² Extension of Security of Tenure Act, Act No. 62 of 1997, Preamble (1997).

⁵³ Ibid.

to the owner or the occupier, reasonable expectations of the parties, whether the occupier has resided on the land for over ten years, the age of the occupier (*e.g.*, whether over sixty years of age), or whether the occupier was injured or otherwise in ill-health on account of employment with the land owner.

70. Section 9 requires a court order finding that the criteria for eviction have been met. Furthermore, offenders who evict contrary to ESTA may face criminal penalties thereby giving the law meaningful strength regarding compliance and enforcement. Problems with ESTA in practice, however, include courts requiring the tenant rather than the owner to establish that the provisions of ESTA apply, thereby often placing a financial burden on the beneficiary of security of tenure to enforce their tenure status.

D. Prescription: Usufruct/Adverse Possession

71. One of the more progressive examples related to provision of security of tenure for those living with informal tenure is the City Statute of Brazil (see Annex 1 for relevant excerpts), which is also a means by which to regularize informal settlements in urban areas. Adopted in 2001, the City Statute was informed in large part by civil society and grassroots groups.

72. Article 2 of the City Statute outlines general guidelines related to inclusive urban development, including those related to security of tenure. Article 2 makes clear that the purpose of “urban policy is to give order to the full development of the social functions of the city and of urban property.”⁵⁴ One of the novel elements of the City Statute is its focus on the social function of the city and of urban property. Also novel is the use of prescription, or usufruct (similar to adverse possession in a common law system) to further regularization including provision of tenure security for those living in informal settlements in urban areas. The City Statute augments Article 183 of the Federal Constitution of Brazil, which addresses acquisition of property by an occupant of an urban dwelling when that property is used for housing for her/himself and her/his family. Article 183 guarantees security of tenure through ownership essentially acquired through usufruct of either private or public land.

73. Section V of the City Statute lays out the means by which those living in informal tenure status can acquire security of tenure using the principle of usufruct. Article 9 addresses individual tenure while Article 10 addresses collective tenure arrangements.

74. For individuals to acquire security of tenure they have to be in uninterrupted possession of a dwelling for a minimum of five years for the purpose of a home. One caveat is that the individual cannot be the owner of any other urban or rural property. The City Statute also furthers gender equality by providing legal title to cohabitating couples. The home in question can be inherited by the heirs of those receiving title.

75. The City Statute aims to confer security of tenure on those living in informal settlements by regularizing their tenure status. This focus on keeping informal settlers in place can be contrasted with eviction laws and bills from, for instance, South Africa or Kenya which do provide some degree of security of tenure, but also have a focus on processes by which to evict informal settlers.

76. Finally, the use of usufruct or adverse possession to further the social function of property aligns with the human rights framework and can be contrasted with more property-centric legal regimes, such as in many common law systems, where adverse possession

⁵⁴ City Statute, Article 2, Law No. 10.257 of 10 July 2001.

cannot be used against public land and where the economic function of property, *e.g.*, putting property to its highest economic use, is the key goal of adverse possession.

E. Communal Tenure

1. Brazil

77. The City Statute of Brazil also provides for the recognition of collective tenure arrangements. Article 10 deals with low income residents of urban areas over two hundred and fifty square meters that are used for housing where it is not possible to delineate land occupied by individuals or families. Upon establishing a minimum of five years of residency residents of such areas can avail themselves of collective usufruct. The provision of collective usufruct requires a court order which serves as a title recognizing an equal portion of the land for each possessor. An exception is when a written agreement has established a condominium relationship recognizing differing portions of land for different individuals or families.

78. Collective *usucapiao* has been protected by the courts. In a case dealing with the informal settlement of *Jardim Noronha III*, fifteen residents challenged a threatened eviction by the municipality of São Paulo, which wanted the public land for another use. The residents, who had resided on the land since 1979, sought protection from eviction before the High Court of the State of São Paulo. The Court ultimately provided collective possession of the land and recognized the obligation of the municipality of São Paulo to provide a collective deed and to refrain from interfering with the community's tenure.⁵⁵

2. Kenya

79. The 2010 Constitution of Kenya recognizes and protects community land holding. Chapter 5 of the Constitution includes Article 61 which states that:

- (1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.
- (2) Land in Kenya is classified as public, community or private.⁵⁶

Article 63 specifies the protections accorded to communally held land, including those protections related to security of tenure:

- (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
- (2) Community land consists of :
 - (a) land lawfully registered in the name of group representatives under the provisions of any law;
 - (b) land lawfully transferred to a specific community by any process of law;
 - (c) any other land declared to be community land by an Act of Parliament; and
 - (d) land that is :
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

⁵⁵ See, Tribunal de Justiça de São Paulo, Ap. Civ. 0010201-92.2000.8.26.0053 (August 2011).

⁵⁶ Constitution of the Republic of Kenya, 2010, Art. 61.

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities;
or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

(5) Parliament shall enact legislation to give effect to this Article.⁵⁷

The National Lands Policy (2009) further details the nature of communal land tenure. Chapter 3 recommends:

Adoption of a pluralistic approach to land administration “in which different systems of tenure co-exist and benefit from equal guarantees of tenure security. The rationale for this plural approach is that the equal recognition and protection of all modes of tenure will facilitate the reconciliation and realization of the critical values which land represents” (Section 3.1 paragraph 33);

To secure community land, the Government shall Document and map existing forms of communal tenure, whether customary or contemporary, rural or urban, in consultation with the affected groups, and incorporate them into broad principles that will facilitate the orderly evolution of community land law (Section 3.3.1, paragraph 66 (a).

To lay out a clear framework and procedures for the recognition, protection and registration of community rights to land and land-based resources.⁵⁸

80. In order to implement these sections of the Constitution and the National Lands Policy, in 2011 the Ministry of Lands developed the Community Land Rights Recognition Model (CLRR Model), which has the following elements:

i. The Model acknowledges that community land rights may incorporate overlapping claims of land rights that may be enjoyed sequentially and/or concurrently, sometimes by different entities. To reflect this, the model ensures that in the transformation of lands from their previous tenure regime to Community Lands, all layers of overlapping claims are captured, while at the same time serving to provide evidence for any conflicting land claims that require special attention to be resolved.

ii. Considering that land was previously classified as Government Land, Trust Land, and Private Land, there is need to divest targeted lands from their previous tenure category to Community Land as stipulated in the Constitution. The CLRR Model proposes steps and processes that will enable the divestiture of land from one category to the Community Land category.

iii. For a community (identified using the Constitution’s criteria of ethnicity, culture, or similar community of interest under Article 63) to have land registered in their favour there is need for the establishment of community land holding and governance entities. The CLRR Model provides for the establishment of these entities early in the rights recognition process. These entities can take various legal forms which communities must be assisted to clearly identify. The Model

⁵⁷ Ibid. at Art. 63.

⁵⁸ Ministry of Lands (Kenya), Community Land Rights Recognition Model, 2012.

incorporates steps for the establishment of appropriately constituted land holding and governance entity to be registered and become the legal entity in which ownership of community lands would reside. However, the appropriate legal form that the community land holding and governance entity should take will need to be clarified in detail in subsequent land legislation.

iv. The Model envisages the need for a speedy, cost effective, dispute resolution mechanism to help resolve boundary and other land related disputes among community members as well as with outsiders and neighbouring communities. Therefore, an Alternative Dispute Resolution (ADR) mechanism is enshrined in the Model through the identification of existing ADR mechanisms and building their capacity to cater for community land dispute resolution needs.

v. The Model provides a rapid results method of “ring fencing” community rights and interests to land and protecting the same from alienation to other people against the community’s interest.⁵⁹

81. While it remains to be seen how implementation of this body of law and policy is carried out in practice, the intent that these laws and policies aim to serve is useful as a model for provision of security of tenure at the collective, or communal, level.

F. Occupancy Rights

82. The former Yugoslavia provided a form of tenure that protected security of tenure related to occupancy of state-owned housing. Occupancy Tenancy Rights (OTR) were constitutionally protected and provided for the right to occupy a residential home indefinitely and to transfer that right to heirs upon the death of the person in which the right was vested. OTR was regulated through the Law on Housing Relations (1985) which allowed for termination of the OTR in certain situations including prolonged unjustified absence (*e.g.*, more than six months) from occupying the residence. In any case, it required a court order to terminate the OTR.

83. During the conflict surrounding Croatia’s independence from the former Yugoslavia, many OTR holders fled their homes situated in conflict areas. Notwithstanding these extenuating circumstances, this absence triggered the rule related to absence from the dwelling

84. During privatization schemes that began in 1991 and until OTR was abolished in 1996, those with OTR had the possibility of purchasing their homes at favourable rates. The timing of this transformation from OTR to freehold title, however, had a disproportionately detrimental impact of Croats of Serbian descent that had fled Croatia during the conflict. In a legal challenge under the original European Social Charter, the European Court of Social Rights reaffirmed that it “has constantly interpreted the right to economic, legal and social protection of family life provided for in Article 16 as guaranteeing the right to adequate housing for families, which encompasses secure tenure supported by law.”⁶⁰

85. The Committee went on to hold “that the Government of Croatia is under a positive obligation by virtue of Article 16 to take appropriate steps to provide housing and security of tenure, to displaced families who lost housing rights and have expressed a clear desire to return to Croatia, or who have been discouraged from returning due to a lack of housing

⁵⁹ *Ibid.*

⁶⁰ European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. Croatia*, Complaint No. 52/2008 (22 June 2010) at para. 54.

and other forms of protection”⁶¹ and that the housing scheme designed for displaced persons had to be implemented without discrimination and that “the failure to take into account the heightened vulnerabilities of many displaced families, and of ethnic Serb families in particular, constitutes a violation of Article 16 read in the light of the non-discrimination clause of the Preamble.”⁶² However, while the degree of security of tenure provided to returnees was less than that enjoyed under OTR, the Committee ruled that the European Social Charter did not provide for restitution of lost OTRs.

G. Freehold Tenure: Titles and Deeds

86. Freehold, or fee simple, tenure provides some of the strongest security of tenure in many countries and is defined as ownership of real property and all immovable objects, such as housing, attached to that real property.⁶³ This form of tenure is secured through a legal title or deed resulting in legal and formal recognition of property ownership. The concept of freehold tenure is found in common law and civil law jurisdictions and is the strongest type of tenure within the range of property rights.

87. Security of freehold tenure can be found in constitutional frameworks in several countries. The United States, for example, includes a common law concept of protection of freehold tenure from State interference. Incidentally, this concept is similar to, and has informed the drafting of, Article 17 of the International Covenant on Civil and Political Rights as well as Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 11 of the American Convention of Human Rights.

88. The Constitution of the United States protects freehold tenure in the Takings Clause of the Fifth Amendment, which states in relevant part that:

No person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.⁶⁴

89. Ownership through freehold tenure also allows the owner to use the property for collateral to secure loans, such as a mortgage, to purchase the property in the first place. Freehold tenure, however, does not provide absolute security of tenure. For instance, mortgaging a property diminishes security of tenure and exposes the dweller to foreclosure on the property. Additionally, eminent domain has been used by the State to take housing against the owner’s will, often with a disproportionate impact on marginalized groups.

90. Eminent domain is the method by which State authorities can expropriate housing and land subject to freehold tenure. Generally, eminent domain requires an overwhelming showing of a need for public use of the property, due process protections and just and fair compensation. However, the U.S. Supreme Court has interpreted public use as public interest is such a way as to benefit private actors at the expense of owners of low cost housing. In the case of *Kelo v. City of New London*⁶⁵ the Supreme Court found that

⁶¹ Ibid. at para. 59.

⁶² Ibid. at para. 90.

⁶³ The notion of “property” has been described as a “bundle of sticks” with each stick representing a differing property interest. Freehold consists of legally recognized ownership often through formal title or deed that allows the owner permanent tenure, the ability to sell or mortgage the property, and the ability to bequeath the property to heirs. While freehold title or deed is often thought of as the only form of property, sticks in the bundle of sticks representing property interests have been defined as including within their scope the rights of possession, e.g., through leasehold or rental agreements, without actual ownership, while the owner retains the free hold property interests.

⁶⁴ Constitution of the United States of America, Article 5.

⁶⁵ *Kelo v. City of New London*, 545 U.S. 469 (2005)

expropriating low-cost owner-occupied housing to make way for private redevelopment was in the public interest as that development would create jobs and pay higher real estate taxes. The reasoning regarding higher real estate taxes is particularly troubling as such a situation would generally only occur if the housing to be expropriated was low-cost or otherwise affordable housing. Such an approach discriminates on account of property or socio-economic status in contravention of international human rights prohibition on discrimination. Indeed, in the dissenting opinion, the practical implications of the decision were pointed out: “Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.”⁶⁶

91. Subsequent to *Kelo v. City of New London*, laws were adopted to ensure that eminent domain was used solely for “public use” and not for private development. However, diminished security of tenure for marginalized groups with freehold tenure also predates *Kelo v. City of New London*. One oft cited example is the use of eminent domain to construct the freeway infrastructure in the United States. Disproportionately, it was lower-cost housing, often in areas predominately housing racial minorities of lower socio-economic status, that was expropriated for the public use of constructing such transportation infrastructure. This again demonstrates that even those with freehold tenure may lack security of tenure and that degree of security of tenure may correlate with marginalized status.

IV. Gaps in the Current Normative Framework related to Security of Tenure at the National Level and the need to move towards a Comprehensive Model of Security of Tenure Based on International Human Rights Obligations

A. Defining Security of Tenure

92. A key gap in the normative framework is the lack of a precise definition of security of tenure within the human rights framework at the international level that can be used to inform national laws, policies and practices. Laws, jurisprudence and practice demonstrate there is a range of security of tenure, but that range often is correlated to property or socio-economic status. Additionally, in practice security of tenure in most legal frameworks seems to be a product of a property rights regime rather than a human rights framework, which results in varying degrees of security correlated with degree of economic status.

93. Since the international prohibition on discrimination prohibits discrimination on account of property, or other, status, the current range of security of tenure is problematic, particularly since it is marginalized or vulnerable individuals, groups or communities that disproportionately lack more robust forms of secure tenure.

94. A key question regarding the development of guidelines on security of tenure therefore is how to define security of tenure grounded in the human rights framework that provides similar protections across all types of tenure.

95. General Comment No. 4 of the Committee on Economic, Social and Cultural Rights states that:

⁶⁶ *Kelo v. City of New London*, 545 U.S. 469 (2005) dissenting opinion of Justice O’Connor.

Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.⁶⁷

96. This language articulates the minimum degree of security of tenure that is an immediate obligation under the International Covenant on Economic, Social and Cultural Rights. This implies that security of tenure grounded in the human rights framework should be above and beyond this minimum degree. Whether or not that higher degree of security of tenure is tied to progressive realization is another sub-question.

B. Universality and Cultural Adequacy

97. The differing forms of security of tenure across both the continuum of tenure and within each type of tenure, as well as across national boundaries, leave persons in various states of vulnerability. One defining element of human rights generally is that they are universal. Consequently, universality should be an element of security of tenure.

98. Despite the need for universal protection of security of tenure, as various laws and court rulings examined above demonstrate, there is no one-size-fits-all notion of security of tenure. Rather, for security of tenure to be meaningful it must be adapted to specific historic, cultural, economic, and social contexts. Indeed, the right to adequate housing recognizes this matter as one of its seven key elements is cultural adequacy. Therefore, one task should be to define guidelines that ensure universal meaningful security of tenure while acknowledging that the substance of a particular form of security of tenure may differ by context in order to achieve that universal meaningful protection.

C. Non-Discrimination: Property or other status

99. Differing forms of security of tenure across the continuum of tenure types provide varying degrees of security, with this variance often correlated to the property interests associated with each type of tenure as well as to socio-economic status. For instance, those in informal settlements have minimal protections against eviction, with eviction protection laws in South Africa, Kenya and the Philippines also providing guidelines on how to evict, while those with freehold tenure secured by title deeds are able to avail themselves of a far higher degree of protection. Furthermore, as the U.S. expropriation case law demonstrates, even within the same type of generally very secure tenure those with less economic status seem to enjoy a lesser degree of security of tenure.

100. Guidelines on security of tenure will have to address this issue of non-discrimination on account of property or other status. Specifically, how can States ensure that all members of society, regardless of economic status or type of tenure arrangement, enjoy security of tenure on the basis of non-discrimination and equal protection of the law? The solution may require a paradigm shift from correlating security of tenure with a property rights regime to grounding security of tenure solidly in the human rights framework.

⁶⁷ Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003) at para. 8(a).

D. Accountability

101. International law requires access to justice and effective remedies.⁶⁸ In practice, however, not all of the types of tenure have accessible and effective remedies or other means by which to challenge a threatened interference with tenure, particularly given the high costs associated with bringing a legal claim before national courts. This lack of accountability is contrary to another element of security of tenure grounded in the human rights framework, namely that those who have their human rights violated have a right to accessible and effective accountability mechanisms and remedies. In most current national legislative regimes, the financial cost of accessing accountability mechanisms, if they exist at all, results in less access for those with less financial means – *e.g.*, the very persons that generally have the least secure forms of tenure. One suggestion for guidelines on security of tenure could involve funding or other means to provide financial assistance for legal aid for those that cannot otherwise access accountability mechanisms needed to ensure that their security of tenure was meaningfully enforced.

102. Additionally, while some legal regimes such as South Africa and Kenya recognize rights of those living in informal settlements and their standing to defend their housing rights, others without eviction protection laws have a more limited recognition of the rights of those living in informal tenure arrangements, often resulting in a lack of available remedies.

V. Conclusion

103. The application of security of tenure has taken various forms at the national level, but generally these forms involve elements of security of tenure implicitly guaranteed through legislation rather than explicit guarantees of security of tenure consistent with international human rights. As the above examination of national and regional law and jurisprudence demonstrates, the patchwork of laws dealing with aspects of security of tenure can be strengthened by reference to international law. This is particularly clear when examining jurisprudence at the national level dealing with eviction protections which refers expressly to the minimum degree of security of tenure, and the corresponding prohibition on forced eviction, articulated in General Comments No. 4 and No. 7 of the Committee on Economic, Social and Cultural Rights.

104. Such reference to international law provides greater consistency of protections related to security of tenure. For example, the failure of the UDHA in the Philippines to be interpreted consistent with the prohibition on forced eviction under international law has resulted in forced evictions that otherwise should have been prohibited. By contrast, the jurisprudence from South Africa and Kenya demonstrate the strength given to national law when it is influenced by international norms.

105. As touched upon above, property rights can be detrimental to the enjoyment of the right to adequate housing, including in particular security of tenure, by pitting property rights of owners of land or housing against the occupancy rights of others. Caution should be taken, therefore, in seeing property rights as the only means by which to best secure tenure rights. Rather, security of tenure grounded in the human rights framework should be

⁶⁸ See, *e.g.*, Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by United Nations General Assembly, resolution 60/147, UN Doc. A/RES/60/147 (21 March 2005).

clearly articulated and properly seen as a fundamental human right notwithstanding the property interests involved.

106. Lawmakers, policymakers and courts would benefit from a more holistic definition of security of tenure at the international level, so that all types of tenure can be informed from norms grounded in the human rights framework as opposed to a property rights regime.

107. One means by which to strengthen tenure security for all types of tenure could be to more clearly define the content of the existing obligation to, “notwithstanding the type of tenure, [ensure that] all persons ... possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats”⁶⁹ as well as to more clearly define the existing prohibition on forced eviction so as to ensure that it covers eviction from all forms of tenure. Again, under the ICESCR, evictions can only be justified in the most exceptional circumstances and after all feasible alternatives to eviction have been explored in meaningful consultation with the persons affected.⁷⁰ Even then, various due process protections as outlined in General Comment No. 7 of the Committee on Economic, Social and Cultural Rights must be adhered to.⁷¹ Finally, and even if the due process criteria have been satisfactorily met, evictions cannot be carried out in a discriminatory manner nor can they result in rendering individuals homeless or vulnerable to the violation of other human rights.⁷²

108. The “most exceptional circumstances” provision should provide a high bar to any exception allowing for eviction. Jurisprudence from national and regional bodies that has developed since this language was adopted in 1991 could be used to more clearly define what “most exceptional circumstances” entails. For example, the “just and equitable” jurisprudence from South African and well as European Court jurisprudence regarding proportionately could be examined to better define this term, as well as what constitutes a public purpose or public interest, which are often cited as reasons to evict.

109. The language from General Comment No. 7 regarding the exploration of all feasible alternatives is perhaps most in need of clarification. As drafted in 1997, this clause refers to exploring feasible alternatives “with a view to avoiding, or at least minimizing, the need to use force.” More recent jurisprudence could support a more expansive reading of this clause whereby one must explore all feasible alternatives that can meet the “most exceptional circumstances” that do not involved eviction. If such alternatives do not exist, then all feasible alternatives related to relocation and provision of alternative housing and/or land should be explored with genuine consultation of the affected population.

⁶⁹ Ibid.

⁷⁰ See Committee on Economic, Social and Cultural Rights, General Comments. Nos. 4 and 7.

⁷¹ Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003) (para. 16 states that “The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.”).

⁷² Committee on Economic, Social and Cultural Rights, General Comment No. 7.

110. Jurisprudence involving the “strict scrutiny” standard of review can also inform these terms. In several jurisdictions, the strict scrutiny standard is applied to fundamental rights and allows for interference of such rights only upon a compelling government interest. Such interference with the right must be narrowly tailored to achieve that interest, and utilize the least restrictive means to meet that interest.

112. Also, as evictions must be non-discriminatory, more clarity can be provided with respect to non-discrimination, including the prohibition on discrimination on account of property or socio-economic status, as those on the weaker end of such status often are disproportionately impacted by eviction. Again, a deeper examination of the issue of non-discrimination, including from General Comment No. 20 and other General Comments of the Committee on Economic, Social Cultural Rights adopted subsequent to General Comment No. 7 would go far in defining the scope of the prohibition on evictions that have a discriminatory intent or effect.

113. Additionally, the language regarding the prohibition on rendering persons homeless should be revisited to ensure that alternative housing and/or land is required in such cases and that such provision must be included in the costs of any eviction, rather than subject to available resources.

114. Finally, the right to adequate housing, including the element of security of tenure, is a right codified in national law as recommended by international norms can be transformative at the national level, again particularly if such national laws are interpreted through the lens of international human rights norms. Consequently, any guidelines on or definition of security of tenure should highlight the principle that national laws should be consistent with and informed by international human rights obligations.

115. The Vienna Convention on the Law of Treaties requires that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”⁷³ and that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁷⁴ Furthermore, the United National General Assembly has stated that “States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations.”⁷⁵

116. Indeed, the Committee on Economic, Social and Cultural Rights has adopted General Comment No. 9 which states that “although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party.”⁷⁶ The Committee also emphasized that “courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant.”⁷⁷

⁷³ Vienna Convention on the Law of Treaties, Article 26, 1155 U.N.T.S. 331, entered into force 27 January 1980.

⁷⁴ Ibid. at para. 27.

⁷⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by United National General Assembly, resolution 60/147, UN Doc. A/RES/60/147 (21 March 2005).

⁷⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant (Nineteenth session, 1998), para. 5, U.N. Doc. E/C.12/1998/24 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003).

⁷⁷ Ibid.

Appendix 1: Brazil – City Statute (relevant excerpts)

Section V. Special Usucapiao Rights for Urban Property

Article 9. Someone who has possession of an urban area or building of up to two hundred and fifty square meters, for five years, uninterruptedly and unopposed, who uses it as his or his family's home, can establish dominion over the property, as long as he is not the owner of any other urban or rural property.

§ 1. The title of dominion will be conferred to the man or woman, or both, whether or not they are married or single.

§ 2. The rights granted in this article will not be recognised to the same possessor more than once.

§ 3. For the purposes of this article, the legitimate heir continues to have full rights to the possession enjoyed by his predecessor providing he was residing in the property at the time that it was left open to succession.

Article 10. In urban areas of over two hundred and fifty square meters occupied by the low income population for housing purposes, for five years, uninterruptedly and without opposition, and where it is not possible to identify the land occupied by each possessor, residents can avail themselves of collective usucapiao, providing the possessors do not own any other urban or rural property.

§ 1. The owner can, for the purpose of calculating the timeframe required by this Article, add to his possession that of his predecessor, providing possession is continuous for both.

§ 2. The Special Collective Usucapiao of urban real estate shall be decided by the judge who shall pass down a ruling which will serve as a title for registering in the real estate deeds office.

§ 3. In his ruling the judge will award an equal ideal portion of the land to each possessor, regardless of the size of the land that each occupies, except in the case of a written agreement existing among the condominial parties establishing differentiated ideal portions.

§ 4. The special condominium thus constituted is indivisible and cannot be terminated except by a favourable determination submitted by at least two thirds of the members of the condominium, in the event of urbanisation works being implanted after the condominium has been constituted.

§ 5. The determinations related to the administration of the special condominium shall be based upon a majority vote by the condominium members present, requiring the others to comply with the decision, whether or not they in agreement or were absent from the voting session.

Article 11. While the special urban action for usucapiao is pending, any other actions, petitions, or possessions that are proposed relating to the property subject to usucapiao will be stayed.

Article 12. Legitimate parties involved in proposing an action to lead to special urban usucapiao include:

I - the possessor, alone, in a group or supervenient;

II - the possessors, in co-possession;

III - an association of community residents acting as a procedural substitute, duly established, with legal standing, providing this association is explicitly authorised by those that it represents.

§1. Intervention by the Ministério Público is obligatory in the event of Special Urban Usucapiao.

§2. The submitting party shall enjoy the benefits provided by the courts and free legal assistance, including assistance in the real estate deeds office.

Article 13. Special usucapiao for urban real estate can be invoked as defence, with the ruling that recognises it to be regarded representing a valid title which can be registered in the real estate deeds office.

Appendix 2: Kenya – Evictions and Resettlement Procedures Bill (relevant excerpts)

Part II:

4. (1) A person shall not be forcibly evicted from their home or have their property demolished without a Court order authorizing the eviction or demolition.

(2) Notwithstanding any written law to the contrary, the procedure set out in section 8 shall apply in proceedings for forced eviction or demolition orders under sub-section (1).

5. A person who forcibly evicts another person without a Court order issued pursuant to section 4 commits an offence and is liable to a fine not exceeding one million shillings or imprisonment for a term not exceeding two years, or both.

6. (1) Before any forced eviction is carried out the following procedures shall be observed ;

(a) an opportunity for genuine consultation between the land owner and the person to be evicted shall be availed;

(b) the person to be evicted shall be given adequate and reasonable notice of not less than three months before the date of the intended eviction;

(c) an environmental, economic and social impact assessment shall be done;

(d) there should be put in place adequate resettlement action plans;

(e) there should be an opportunity for legal redress;

(f) the notice issued under paragraph (b) shall be in writing and also through public barazas or broadcast media in the national and local language or the language spoken by the majority of people in the locality;

(g) the notice issued under paragraph (b) shall contain adequate information on the reasons for the proposed forced eviction and the alternative purpose for which the land or structure is to be used;

(h) adequate consultations shall be held through public hearings with the affected persons or their duly designated representatives on all feasible alternatives to evictions with a view to avoiding or at least minimizing the need for eviction;

(i) a holistic and comprehensive environmental, economic and social impact assessment and resettlement action plan shall be conducted which shall include but not be limited to:

(aa) establishing the prevailing land tenure system;

(bb) establishing a cut-off date for an enumeration process;

(cc) evaluating, enumerating and recording of individuals, families and their assets;

(dd) examining the proposed eviction plans and alternatives;

(ee) considering the magnitude of displacement;

(ff) examining information on the full resource base of the affected population, including income derived from informal sector and non-formal activities, and from common property;

(gg) examining the extent to which groups will experience total or partial loss of assets;

- (hh) examining the public infrastructure and social services that will be affected;
- (ii) dissemination by the authorities of relevant information in advance including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups;
- (jj) involving institutions such as community organizations and traditional ritual groups that can assist with designing and implementing the resettlement programmes;
- (kk) consideration of the views of the affected people to any proposed resettlement options;
- (ll) giving attention to special interest groups including people with disabilities, the elderly, youth, women and children and persons living with HIV/AIDS.

(2) Where an eviction is envisaged as a result of a development-based project an “eviction assessment” shall be conducted that shall include exploration of alternatives and strategies for minimizing harm and taking into account the differential impacts of evictions on women, children, the elderly and marginalized groups.

Part IV, Section 10:

(2) The Court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if :

- (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the squatter is occupying a building or structure on that land without such consent having been obtained; or
- (b) it is in the public interest to grant such an order.

(3) For the purposes of this section, “public interest” includes the interest of the health and safety of the squatters and the public in general.

(4) In deciding whether it is just and equitable to grant an order for eviction under this section, the Court must have regard to:

- (a) the circumstances under which the squatters occupied the land and erected the buildings or structures;
- (b) the period the squatter and his or her family have resided on the land in question, and;
- (c) the availability to the squatter of suitable alternative accommodation or land.

Part V:

12. (5) The person proposing or carrying out the resettlement shall pay for any associated costs including all resettlement costs and those resettled shall be given security of tenure to avoid future evictions.

13. (1) Notwithstanding the provisions of any law to the contrary, all persons threatened with or subjected to forced evictions have the right to timely access appropriate remedies including fair hearing and access to legal aid.

14. Resettlement shall occur in a just and equitable manner and in accordance with the provisions of this Act and in full accordance with international law standards.

Appendix 3: Philippines – Urban Development and Housing Act (RA 7279) (summary)

Section 28 of the Urban Development and Housing Act (UDHA) requires that:

Eviction or demolition as a practice shall be discouraged.

The UDHA also articulates the exceptions for this general rule, citing when an eviction may occur. Those exceptions are:

1. When the eviction or demolition is to be implemented in danger areas;
2. When the eviction or demolition is to be implemented in public places;
3. When the eviction or demolition has to be undertaken for the implementation of government infrastructure projects;
4. When there is court order (Section 28, UDHA);
5. When what is sought to be evicted or demolished are illegal structures constructed after March 28, 1992 (Section 30, UDHA); and
6. When what is sought to be evicted or demolished are structures owned by a professional squatter and squatting syndicate (Section 27, UDHA).

If a situation meets one or more of these exceptions, authorities still have to follow mandatory requirements for the valid execution of eviction and demolition orders involving underprivileged and homeless citizens.⁷⁸ These are:

- a) Notice should be given thirty (30) days prior to demolition;
- b) Adequate consultation with the settlers of the affected area;
- c) Adequate relocation; whether temporary or permanent;
- d) Members of the Philippine National Police must be properly uniformed
- e) Proper identification of all persons taking part in the demolition;
- f) Heavy equipment should not be used except for permanent structures;
- g) Local government officials or their representatives must be present; and
- h) Execution must be done only during regular office hours from Mondays to Fridays.

⁷⁸ Underprivileged and homeless citizens refer to the beneficiaries of the UDHA (RA 7279) and to individuals or families residing in urban and urbanized areas:
(a) whose income or combined household income falls within the poverty threshold as defined by National Economic Development Authority (NEDA); and
(b) who do not own housing facilities.

Appendix 4: South Africa – Constitution Articles 25 and 26

Article 25 of the Constitution states, in relevant part:

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application:

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a rent.

(2) Property may be expropriated only in terms of law of general application:

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a rent.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(e) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section-

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;

and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).

Article 26 of the Constitution of the Republic of South Africa states:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Appendix 5: South Africa – Extension of Security of Tenure Act of 1997 (relevant excerpts)

CHAPTER IV 15

Termination of right of residence and eviction

Termination of right of residence

8. (1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to:

- (a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
- (b) the conduct of the parties giving rise to the termination;
- (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
- (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
- (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.

(3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

(4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and:

- (a) has reached the age of 60 years; or
- (b) is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, may not be terminated unless that occupier has committed a breach contemplated in section 10(1)(a), (b) or
- (c): Provided that for the purposes of this subsection, the mere refusal or failure to provide labour shall not constitute such a breach.

(5) On the death of an occupier contemplated in subsection (4), the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependant has committed a breach contemplated in section 10(1).

(6) Any termination of the right of residence of an occupier to prevent the occupier from acquiring rights in terms of this section, shall be void.

(7) If an occupier's right to residence has been terminated in terms of this section, or the occupier is a person who has a right of residence in terms of section 8(5):

(a) the occupier and the owner or person in charge may agree that the terms and conditions under which the occupier resided on the land prior to such termination shall apply to any period between the date of termination and the date of the eviction of the occupier; or

(b) the owner or person in charge may institute proceedings in a court for a determination of reasonable terms and conditions of further residence, having regard to the income of all the occupiers in the household.

Limitation on eviction

9. (1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if:

(a) the occupier's right of residence has been terminated in terms of section 8;

(b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;

(c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and

(d) the owner or person in charge has, after the termination of the right of residence, given

(i) the occupier;

(ii) the municipality in whose area of jurisdiction the land in question is situated; and

(iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes, not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.

Appendix 6: Regional Human Rights Mechanisms Jurisprudence

A. European Social Charter

117 In 2004, the European Committee of Social Rights considered a collective complaint dealing with discrimination against Roma in Greece. The complaint focused on three aspects of the housing and land rights made in the complaint: (i) the insufficient number of permanent dwellings of an acceptable quality to meet the needs of settled Roma; (ii) the insufficient number of stopping places for Roma who choose to follow an itinerant lifestyle or who are forced to do so; and (iii) the systematic eviction of Roma from sites or dwellings considered to be unlawfully occupied by them. The Committee found that these facts violated Article 16 of the Social Charter. Article 16 on the right of the family to social, legal and economic protection states:

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.⁷⁹

118. Here, the European Committee of Social Rights relied on the principle of indivisibility, interdependence and interrelatedness of human rights, in part in considering legal protection related to security of tenure, and noted that the right to housing permits the exercise of many other rights (civil and political as well as economic, social and cultural) and is of central importance to the family. In doing so the Committee held that lack of security of tenure and forced eviction violated the obligation to undertake to promote the economic, legal and social protection of the family.

119. In 2005, the European Committee of Social Rights deliberated on *European Roma Rights Centre v. Italy*, a case involving Article 31 of the Revised European Social Charter.

Article 31 of the Revised European Social Charter on the right to housing states that:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. To promote access to housing of an adequate standard;
2. To prevent and reduce homelessness with a view to its gradual elimination; and
3. To make the price of housing accessible to those without adequate resources.⁸⁰

120. The case involved Roma in Italy who were denied an effective right to housing. The Committee found the systematic forced evictions of Roma from sites or dwellings ostensibly unlawfully occupied by them constituted a violation of Article 31(2) (State Parties' duty to prevent and reduce homelessness with a view to its gradual elimination) taken together with Article E (general prohibition on discrimination).⁸¹

⁷⁹ Ibid.

⁸⁰ The Revised European Social Charter (ETS No. 163) entered into force in 1999 and is a single document that embodies the original 1961 Charter and the Additional Protocol, as well as a number of new rights and amendments.

⁸¹ *European Roma Rights Centre v. Italy*,

121. In 2010, the European Committee of Social Rights again considered forced eviction of Roma communities in Italy, this time in the case of *Centre on Housing Rights and Evictions (COHRE) v. Italy*. In doing so, the Committee relied heavily on the prohibition on forced eviction framework under the International Covenant on Economic, Social and Cultural Rights. Specifically, the Committee considered General Comments No. 4 and No. 7 of the Committee on Economic, Social and Cultural Rights as relevant international law applicable to the present case. The Committee explicitly referred to those General Comments for the principle that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats,” that evictions can “only be justified in the most exceptional circumstances,” and that “all feasible alternatives [to eviction] are explored in consultation with the affected persons.” The Committee also referred to the due process protections in paragraph 16 of General Comment No. 7 as well as the principle that “evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights” and “that [therefore] alternative housing, resettlement or access to productive land, as the case may be, is available.”⁸²

B. [European] Convention for the Protection of Human Rights and Fundamental Freedoms

122. Article 8 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), on the right to respect for private and family life, states that:

1. Everyone has the right to respect for his [or her] private and family life, his home and his [or her] correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁸³

123. Outright forced eviction and destruction of housing is one of the clearest forms of a violation of Article 8. In the case of *Selçuk and Asker v. Turkey*,⁸⁴ for instance, the European Court found that the destruction of the applicants’ homes by Turkish military forces was, inter alia, a violation of their rights to respect for the home as well as a violation of guaranteeing peaceful enjoyment of their possessions (see discussion of Article 1 of Protocol 1 of the European Convention below). The Court also found that the circumstances of the destruction of their homes and their eviction from their village constituted a breach of Article 3 of the Convention, which states that no one shall be subject to torture or to inhuman or degrading treatment or punishment.

124. In *Connors v. United Kingdom*,⁸⁵ the Court reasoned that because eviction is such a serious interference with the Applicant’s rights under Article 8, the interference requires

⁸² European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, Decision on the Merits, 25 June 2010 at para. 54.

⁸³ Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

⁸⁴ European Court of Human Rights, *Selçuk and Asker v. Turkey*, (1998) 26 EHRR 477.

⁸⁵ European Court of Human Rights, *Connors v. United Kingdom*, Application no. 66746/01, Judgment of 27 May 2004.

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 also opined that the procedural safeguards available to the individual will be especially important in determining whether a State has remained within its margin of appreciation.

125. Finally with respect to Art. 8, in the case of *Yordanova and others v. Bulgaria*,⁸⁶ the European Court considered the threatened forced eviction of a long-standing Roma community. The Court held that the eviction was unlawful, even though the community had informal tenure status, given the long presence of the community and the historic acquiescence of the authorities to that presence. The Court also reasoned that the legislation relied upon to justify the eviction did not require the examination of proportionality and was issued and reviewed under a decision-making procedure which not only did not offer safeguards against disproportionate interference. It also found that the authorities failed to demonstrate that the eviction was “necessity in a democratic society.”

126. Article 1 of the First Optional Protocol to the ECHR provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his [or her] possessions. No one shall be deprived of his [or her] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.⁸⁷

127. It is important to note the nuanced language used in Article 1 of Protocol 1, as it is specifically designed to encompass the notion of possession rather than of ownership, *per se*.

128. Article 1 of Protocol 1 has been used to protect security of tenure related to housing. For instance, the European Court has applied Article 1 of Protocol 1 to protect housing structures even in cases of informal or “illegal” settlements. In *Öneryıldız v. Turkey*,⁸⁸ the Court examined a case involving the destruction of the homes of slum-dwellers by an avoidable and negligent gas explosion. The Court reasoned that the fact that the applicant had occupied land belonging to the State for approximately five years could not confer on him a right that could be regarded as a “possession” within the meaning of Article 1 of Protocol 1.⁸⁹ The Court, however, “considered that the applicant had been the owner of the structure and fixtures and fittings of the dwelling he had built and of all the household and personal effects which might have been in it, notwithstanding the fact that the building had been erected in breach of the law.”⁹⁰ The Court therefore held that the house and moveable property within “represented a substantial economic interest and that that interest, which the authorities had allowed to subsist over a long period of time, amounted to a ‘possession’

⁸⁶ European Court of Human Rights, *Case of Yordanova and others v. Bulgaria*, Application no. 25446/06, 24 April 2012.

⁸⁷ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, 213 U.N.T.S. 262, *entered into force* 18 May 1954.

⁸⁸ *Öneryıldız v. Turkey*, European Court of Human Rights, Application no. 48939/99, 18 June 2002.

⁸⁹ *Ibid.* at para. 140.

⁹⁰ *Ibid.* at para. 141.

within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1.”⁹¹

129. The Grand Chamber of the European Court considered *Öneriyildiz*⁹² on appeal, and reaffirmed the Court’s ruling, holding that “the applicant’s proprietary interest in his dwelling was of a sufficient nature and sufficiently recognised to constitute a substantive interest and hence a ‘possession’ within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1.”⁹³ The Grand Chamber recalled its jurisprudence that “the concept of ‘possessions’ in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law”⁹⁴ and that “the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision.”⁹⁵ The Grand Chamber recalled that “as well as physical goods, certain rights and interests constituting assets may also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision”⁹⁶ and that “the concept of ‘possessions’ is not limited to ‘existing possessions’ but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and ‘legitimate expectation’ of obtaining effective enjoyment of a property right.”⁹⁷

C. African Charter on Human and Peoples’ Rights

130. In the case of *SERAC v. Nigeria*, the African Commission recognized aspects of security of tenure in an implied right to adequate housing in the African Charter on Human and Peoples’ Rights, based on Articles 14 (right to property), 16 (right to health), and 18(1) (right to protection of the family).⁹⁸ Specifically on forced evictions, the Commission stated that it draws inspiration from the definition of the term “forced evictions” by the Committee on Economic Social and Cultural Rights which defines this term as “the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.” The Commission also relied on General Comment No. 4 for the proposition that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.”

131. In *CEMIRIDE and Minority Rights Group v. Kenya*,⁹⁹ the Commission explicitly relied on the International Covenant on Economic, Social and Cultural Rights to hold Kenya accountable for forced evictions. Including for the notions that evictions should only occur in the most exceptional circumstances and that they must be in accordance with relevant provisions on international law.¹⁰⁰ The Commission also opined that forced

⁹¹ Ibid.

⁹² European Court of Human Rights (GC), *Öneriyildiz v. Turkey*, Application no. 48939/99, 30 November 2004.

⁹³ Ibid. at para. 127.

⁹⁴ Ibid. at para. 124.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ African Commission on Human and Peoples’ Rights, *SERAC and CESR v. Nigeria*, Communication 155/96 (judgment of May 2002).

⁹⁹ African Commission on Human and Peoples’ Rights, *CEMIRIDE and Minority Rights Group v. Kenya*, Communication 276/2003 (judgment of May 2009).

¹⁰⁰ Ibid. at para. 200.

evictions are a gross violation of human rights, referring to Resolutions 1993/77 and 2994/28 of the UN Human Rights Commission.

132. Later, in *Centre on Housing Rights and Evictions (COHRE) v. Sudan*¹⁰¹ the Commission reaffirmed that forced eviction violated the right to adequate housing implicit in articles 14, 16 and 18(1) and referred to “the State’s obligation to respect, protect and fulfil security of tenure”¹⁰² including of pastoralist groups residing in the Darfur region of Sudan. Additionally, the African Commission went on to address the obligation to protect security of tenure and in that context found violations of the obligation to prohibit cruel, inhuman or degrading treatment or punishment by not controlling the actions of non-State actors.

D. American Convention on Human Rights

133. In 2006, the Inter-American Court dealt with forced evictions in Colombia and relied on similar rights as those protected under the European system. In the case of *The Massacres of Ituango v. Colombia*, decided on the merits by the Inter-American Court of Human Rights on 1 July 2006, the Court dealt with the forced eviction, displacement and housing destruction in the villages of Ituango, La Granja and El Aro in Colombia by paramilitaries aligned with the Government of Colombia. The Inter-American Court found that the forced evictions and destruction of housing violated Article 11(2) (the right to be free from arbitrary or abusive interference with the home) and Article 21 (the right to property). In its analysis of Article 11(2), the Court relied on the jurisprudence of the European Court of Human Rights which has previously held that similar rights under Article 8 of the European Convention prohibited such acts. Consequently, the Court held that the forced evictions and housing destruction violated Article 11(2) read in conjunction with Article 21 of the American Convention on Human Rights.

¹⁰¹ African Commission on Human and Peoples’ Rights, *Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication 296/05 (judgment of May 2009).

¹⁰² *Ibid.* at para. 118.