

CSO Consolidated Comments

on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests

The elaboration of these comments has been facilitated by the International CSO Facilitating Team that the International Planning Committee for Food Sovereignty (IPC) put in place early 2010 to facilitate CSO participation in the elaboration process of the FAO Guidelines. It requested comments from all CSO interested in this process through the Civil Society Mechanism of the CFS. The organizations which endorse these comments can be seen at the end of the document.

The Civil Society Organizations (CSO) thank the FAO for the Zero Draft and its efforts to include the substantive issues raised during the broad process of consultation.

Our comments are presented in two parts in this document. The first part refers to the normative framework of the Guidelines, which is fundamental as the groundwork for the content. The second part presents those aspects of the Zero Draft that we consider positive, followed by a summary of those elements deemed problematic and in need of amendment.

Part I: Normative framework

As paragraph 2.2 of the Zero Draft states, the Guidelines should be interpreted and applied with respect for existing obligations that address human rights and secure access to land, fisheries and forests under national and international law. We welcome this approach. However the contradictions and important omissions highlighted in this document could be addressed through explicit clarification of the Guidelines' commitment to existing human rights standards. Principally, it must be clear that the Guidelines are based on the universal human rights framework as laid down in the International Bill of Human Rights and other relevant human rights treaties. These treaties are binding for ratifying States and promote a clear normative standard about the nature of responsible governance. As such, they must form the basis of the Guidelines' normative framework.

1. The Zero Draft lacks any explicit reference to the legal standards enshrined in human rights treaties.

Access to *and* benefits from land and natural resources are explicitly recognized as indispensable elements of several specific human rights, and particularly the right to adequate food and housing. These rights are enshrined in international legal instruments including but not limited to the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social, and Cultural Rights (ICESCR, particularly art. 6-8, 11, 12), the International Covenant on Civil and Political Rights (ICCPR, particularly art. 6) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW, particularly art. 14). These standards prescribe the entitlements of those who directly depend on land and natural resources for their livelihoods.

2. The Zero Draft does not follow international agreed language when it introduces human rights concepts. This may lead to misinterpretation and a potential lowering of existing agreed standards, which is not acceptable. It may also contradict the obligation of States that have ratified human rights treaties to not develop any new instruments which would undermine existing obligations.

The Zero Draft does not mention that States have human rights obligations and does not recall what these obligations are. Instead Part 2 (General Matters: Guiding objectives and principles for responsible tenure governance, paragraph 3), introduces as "guiding objectives" the categories 'respect', 'protect' and 'fulfil' which resemble the States' human rights obligations as spelled out by the UN Committee on Economic, Social and Cultural Rights.

Even more problematic is the fact that the Zero Draft does not clearly identify States as duty bearers of human rights obligations and tends to mistakenly present "all parties" as having the same level of obligations throughout the document. In some cases "rights and responsibilities" are discussed without

identification of the duty bearers and the right holders (see Part 2, paragraph 4).

Moreover, the Zero Draft conflates human rights with other rights that regulate specific aspects of access to, use of and control over land and other natural resources (such as tenure regimes, demarcation and titling, etc.). By definition, a human right is a right that seeks to protect human dignity without discrimination based on sex, origin, race, place of residence, religion or any other status. Human rights are universal, interdependent, indivisible and interrelated. Derived from various sources of international law such as treaties and customary law, they impose obligations on States. In contrast, tenure rights are not universal but subject to the specificities of national/local historical, social, economic and political contexts.

Finally, key concepts which have been carefully defined by the UN human rights treaty bodies, such as the concepts of security of tenure and forced eviction, are not appropriately addressed in the Zero Draft. Likewise, the principle of free, prior and informed consent (FPIC), under which the States must obtain the approval of indigenous peoples for any measure affecting indigenous territory or resources, is scarcely referred to despite its paramount importance to the purpose of these Guidelines. Other rights enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), such as the indigenous peoples' right to territory, are not mentioned at all.

3. The Status of the Guidelines cannot be “voluntary”

The Guidelines are grounded in binding treaty obligations and principles of international human rights and other public law, thereby making it incumbent upon States to apply the principles they outline. Qualifying the Guidelines as “voluntary” will promote the mistaken understanding that they are somehow “optional” and not binding national and international obligations, and encourage the idea that States and international organizations can act entirely at their own privately driven discretion in the administration and disposal of land and other natural resources. The Guidelines alone will not create new obligations, but should provide an authoritative interpretation of existing obligations so as to assist policy makers and implementers to know their duties, as well as *how* to fulfil them. For these reasons CSO strongly recommend the removal of “voluntary” from title of the Guidelines.

We strongly recommend that the FAO Secretariat seek the assistance of the specialized UN Human Rights bodies and experts, and in particular that of the UN Special Rapporteurs on the Right to Adequate Food, on the Right to Water, on the Right to Adequate Housing, on the Rights of Indigenous Peoples and the Office of the High Commissioner for Human Rights in making improvements to the existing draft.

Part II:

A. Positive elements

The Zero Draft contains the following positive elements that should be retained and may, in some cases, be strengthened:

1. References to the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (particularly Guidelines 8.1, 8.6, 8.7, 8.10 and 8.13 could be cited in the Guidelines on Tenure), the International Conference on Agrarian Reform and Rural Development (ICARRD), the International Labour Organization Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries, the United Nations Declaration on the Rights of Indigenous Peoples, the Convention on Biological Diversity (CBD), the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (“Pinheiro Principles”) and the stated intention to base the Guidelines on existing obligations under international human rights law;
2. The cross-cutting gender approach;
3. The attempt to mainstream the legal concept of forced eviction;
4. Recognition of different tenure systems including indigenous, customary and informal tenure within various socio-legal contexts;
5. The inclusion of restitution and redistributive reforms.
6. Recognition of the importance of tackling the impact of high-level corruption in elite business and political spheres in the misgovernance of land and natural resources.

B. Omissions

We welcome the Guidelines' emphasis on improving the governance of tenure for the benefit of vulnerable and marginalized people (as stated in paragraph 1.1) however we strongly recommend that this is presented in terms of the realization of the right to adequate food and other human rights. The core mandate of the FAO and the CFS is to overcome hunger. The Guidelines should explicitly aim to contribute to the achievement of this goal. It is essential that the Guidelines give priority to the groups most affected by hunger and malnutrition due to factors including lack of access to land, water and other natural resources, and insecurity of tenure. The Guidelines should therefore emphatically state that the rights of vulnerable groups must be protected in order to secure livelihoods and achieve food security.

One of the core objectives of the Guidelines must be to protect the rights of vulnerable groups in any process of land development or investment in rural areas. The following issues covered in the Zero Draft are not consistent with this objective.

(1) The new title of the Guidelines excludes water.

This is illogical when the Guidelines express the intention to apply a holistic approach to natural resources and their use (stated in paragraph 3.2(4)). Access to water for drinking, food production and livestock tending is absolutely crucial to hunger eradication. The use of land for productive purposes cannot be separated from the use of water. Investment in land is inextricably linked to the availability of water. The severe negative impacts of land investment on the availability of water for local users can be witnessed in many cases. Control of land often results in the extraction of groundwater and/or diversion of rivers for irrigation and other purposes at will. Moreover, the use to which the land is put may also result in water being contaminated. Such practices severely affect the access of neighbouring and downstream communities to water.

Recommendation: Include water in the title of the Guidelines, refer to the human right to water and explicitly reference it throughout, particularly in paragraph 2.2.

(2) Fisheries and Forests are not equally and comprehensively represented in the Guidelines.

The current draft is primarily oriented to land issues while tenure issues in fisheries and forests are not adequately addressed (despite reference to both in the title). The section on Safeguards, for instance, mentions "tenure rights to land, fisheries and forest" (7.1) but only deals with evictions (7.5), neglecting the impediment of user rights (gathering, grazing, fishing rights, etc.). Moreover, the Guidelines fail to reference the Code of Conduct on Responsible Fisheries, specifically articles 6.18, 9.1.4 and 10.1.3.

Recommendation: Forests and fisheries tenure issues should be incorporated throughout the Guidelines.

(3) The new title does not adequately reflect the extent to which the Guidelines address access to natural resources, in general.

It is not clear if the scope of the Guidelines includes rights of access to, use of, and control over range lands, hunting rights, gathering of non-timber forest products, sub-surface resources (such as oil, gas and minerals), above-surface resources, and carbon.

Recommendation: Explicit reference to general access to natural resources is made in the Guidelines.

(4) The Preface of the Guidelines fails to mention the key driving forces behind the growing conflicts over land and natural resources, and related human rights violations.

Practices including land and natural resource-grabbing, and the (re)concentration of access to land, forests, fishing grounds, water sources (freshwater and marine) and other natural resources are accelerating as a result of the dominant development model. This model is based on industrial monocrop agriculture (including crops for agrofuel production and tree plantations); industrial tourism, fishing, and ranching; large-scale mining and energy production; destructive industrial and infrastructure projects; the commodification of natural resources; rapid, unplanned urbanization; and needless consumption.

Recommendation: The Guidelines should make explicit their operational context and the major problems

that they seek to address.

(5) The Guidelines do not address power imbalances in tenure issues.

Rather, they deceptively represent “all parties” as equal, as if states, transnational companies and landless women bear the same rights, responsibilities and duties. Governance of land and other natural resources involves deciding not only how land and other natural resources are to be managed, but also who gets to decide and how the key decisions will be made, including how different social groups’ priorities, interests and rights will be considered. At the heart of this matter lies the power relations and modes of production that prevail in a society, and the broader international context. The predominant problems faced by marginalized rural and urban groups in relation to land and natural resource tenure are inextricably linked to distorted power relations in dominant government structures influencing land and natural resources. Power imbalances are manifested in discrimination in mainstream economic development models; exclusion from decision-making processes on land and natural resources laws and policies; discrimination in access to justice; and abuses by powerful non-State actors. The Zero Draft barely touches upon these issues. The impact of corruption among high level business and political elites, State capture of natural resources and kleptocratic misgovernance are not addressed. Of particular concern is the Guidelines’ silence regarding the persecution, harassment and violent repression that defenders of the human rights of peasants, indigenous peoples, fisherfolk, pastoralists and other traditional users suffer for defending rights related to land and natural resources.

Recommendation: The Guidelines should explicitly elaborate on power imbalances related to tenure issues. Moreover, they should include provisions guaranteeing the rights of all people (not just citizens) to due process. The Guidelines should also guarantee the civil and political liberties of human rights defenders to prohibit the criminalization and repression of those engaged in social and community struggles in defense of land and other natural resources. The Guidelines should also promote the development of right to information legislation at the domestic level.

(6) Women tenure issues are poorly taken into consideration.

As previously acknowledged, the Zero Draft applies a cross-cutting gender approach. Nevertheless, women’s tenure issues should be referenced more explicitly.

Recommendation: The Guidelines should highlight the necessity of guaranteeing that women have direct access to and control over land and other natural resources, in collective and individual tenure systems.

(7) Environmental sustainability, climate change and the relevance of these issues for the tenure of natural resources have not been sufficiently addressed in the Guidelines.

Recommendation: The sustainable use of natural resources should be included in the Zero Draft as a principle. Moreover, the protection of ecosystems according to international conventions, and the treatment of ecosystem functions with regard to adaptation and mitigation of climate-change, should be referenced more explicitly.

(8) The language of international human rights treaties, as agreed upon by States regarding their obligations, commitments and plans for implementation, must form the basis of the Guidelines.

This is particularly relevant to Part 2, paragraphs 3 and 4. The reference to binding obligations of States in international law should be more prominent. We suggest reference to all relevant treaties and guidelines in a preliminary chapter with a concise explanation of their relevance for the Guidelines. Of particular relevance are the UDHR, IESCR, ICCPR, CEDAW and ICERD. This chapter might be modeled on the introduction to the Right to Food Guidelines, “Basic Instruments”. The text must explicitly reference international law standards, particularly in Part 2. The Guiding Objectives to respect, protect and fulfil (3.1) provide the standard description of state obligations under international law and should be incorporated following agreed language, for example, in the manner of the language of paragraph 17 in the Basic Instrument chapter of the Right to Food Guidelines. Equally important is clear identification of right holders and duty bearers of human rights obligations related to tenure of natural resources. It is also vital to clearly distinguish between human rights and tenure rights.

Additionally, the “Principles of Implementation” (Chapter 3.2) should focus firstly on the internationally

agreed standards for the implementation of human rights (human rights principles) such as non-discrimination, participation, gender equity, rule of law, transparency, accountability and progressive realization (as opposed to 'continuous improvement'). Again, it is vital to use agreed language, which is more precise and does not require redrafting. The Guidelines should also incorporate other relevant standards such as "holistic approach". Holding States accountable to their human rights obligations should be addressed (in paragraph 4.8). The current draft limits the concept of access to justice to the resolution of disputes over tenure rights. It fails to state that all persons and communities have the right to an effective remedy in case of violations of rights in relation to tenure of natural resources. This implies the right to access political, administrative, judicial and quasi-judicial mechanisms that provide adequate, accessible, effective and rapid appeals/recourse (including the possibility of creating national and international independent jurisdictions) when rights have been threatened or violated, or when the States do not fulfil their related Free, Prior and Informed Consent (FPIC) obligations.

Recommendation: The language of international human rights treaties, as agreed upon by States regarding their obligations, commitments and plans for implementation, must form the basis of the Guidelines. This is particularly relevant to sections 2. 3, 2. 4, 3.2 and 4.8.

(9) **The concepts of security of tenure, forced evictions and adequate compensation, as developed in the respective human rights instruments, are neglected in the Zero Draft.**

Recommendation: The inclusion of these concepts in Part 2 of the Guidelines, particularly with reference to the General Comment 7 of the UN Committee on Economic, Social and Cultural Rights on Forced Evictions and the UN Basic Principles and Guidelines on Development-based Evictions and Displacement.

(10) **The principle of free, prior and informed consent (FPIC) should be made more prominent throughout the Guidelines.** FPIC is a right and principle enshrined in UNDRIP (Art. 10, 11.2, 19, 28, 29.2, 32.2). The Guidelines should make clear that this right/principle is also applicable to non-indigenous groups who also directly depend on land and natural resources for their livelihoods, taking care to avoid undermining the specific FPIC right of indigenous peoples.

Recommendation: Although FPIC is mentioned in the Guidelines (paragraph 9.8) we recommend its further inclusion in paragraph 3.2 on the principles of implementation and also in paragraphs 5.8, 8.3, 8.5, 9.8, 12, 13, 16, 20, 23.

(11) **The Guidelines refer to indigenous communities or groups only.**

Recommendation: The Guidelines should also refer to indigenous *peoples* in keeping with UN standards.

(12) **The Guidelines do not clearly distinguish the role of the state, the private sector and civil society.** Particular attention should be given to the accountability of the private sector. The Zero Draft does not deal with the issues of abuses by powerful non-state actors and the responsibilities of transnational companies (TNCs) and other enterprises with respect to human rights related to tenure issues. The term "ethical behaviour" is often used in relation to private sector obligations (for example, in 19.6) but the term is never defined and no reference to current international standards is made.

Recommendation: The Guidelines must emphasize States' obligations to properly regulate the activities of TNCs and other commercial entities in order to prevent negative impacts on the realisation and enjoyment of human rights related to land and other natural resources by workers, nomadic pastoralists/herders, artisanal and small-scale fisher-folk, indigenous peoples and peasants. The Guidelines should also encourage the establishment of effective mechanisms that make TNCs and businesses legally accountable for losses and damages arising from violations and/or crimes they commit locally or internationally.

(13) **The Guidelines (Part 3) fail to acknowledge the natural commons, their significance for the food and livelihood security of local users and communities, and their role in the conservation of terrestrial and aquatic biodiversity.** The natural commons comprise farm/crop lands, wetlands, forests, wood-lots, open pasture, grazing and range-lands, hill and mountain slopes, streams and rivers, ponds, lakes and other fresh water bodies, fishing grounds, seas and oceans, coastlines, minerals, terrestrial and aquatic biodiversity. In every part of the world, agricultural, forest, fishing, coastal, pastoral, nomadic and indigenous communities have developed sophisticated systems of using, sharing, governing and regenerating their natural commons. These systems, often rooted in collective rights, are

essential dimensions of the cultural-political identities of individuals and communities, and are crucial to their very survival.

Recommendation: The Guidelines should recognise the natural commons, collective rights to natural resources, and community-based tenure rights systems and include provisions to protect and strengthen them.

(14) **The Guidelines (Part 4) deals with different ways of transferring and changing tenure rights as if they had the same importance for the rural and urban marginalized groups.** Restitution and redistributive reforms should clearly have the priority as they seek to address historic dispossession of natural resources and unjust and discriminatory tenure patterns. They are of the utmost importance to Indigenous Peoples, pastoralists, ethnic groups, Dalits and landless people.

Recommendation: Prioritize restitution and redistributive reforms. The latter should explicitly include aquatic reforms (for example, 15.1 and 15.4). We recommend that explicit reference be made to the principles contained in the Final Declaration of the International Conference on Agrarian Reform and Rural Development (ICARRD) and The Peasant Charter, these being the most authoritative instruments on this issue.

(15) **The Guidelines fail to promote regulations that restrict the transferability of land and other natural resources tenure rights** in order to protect the commons and indigenous peoples' territories, areas that have undergone redistributive agrarian/aquatic reforms, and areas of peasant and small-scale farming that should maintain an equitable tenure structure.

Recommendation: This omission should be addressed in the section on "markets" (paragraph 11).

(16) **The Guidelines' reference to investments and concessions (paragraph 12) contradicts the objective defined in 1.1.** This is of major concern, particularly in food insecure countries, as it implies tolerance of large-scale acquisition of tenure rights regardless of the serious human rights impacts of these activities on local populations. Moreover, the Guidelines fail to provide guidance regarding the appropriate regulation of all types of investment to prevent negative impacts on the security of tenure of the poor and their realization of the right to food and other human rights. Instead of formulating strong provisions based on the principle of FPIC of Indigenous Peoples and all peoples whose livelihoods directly depend on the natural resources targeted for investments and concessions, the Guidelines require States and investors to ensure "negotiations" with the affected men and women (paragraphs 12.3 and 12.5).

Recommendation: Include provisions in the Guidelines which subject both public and private investments to strict, legally-enforced regulation that safeguards indigenous peoples' rights to territory and peoples' rights to land and natural resources, as well as the rights of workers to decent employment, fair wages and other compensation in accordance with relevant human rights treaties. All private investments must be coherent with the public interest and be subject to public monitoring to ensure that they do not violate human rights or negatively affect food security and sovereignty and environmental sustainability objectives. Furthermore, the Guidelines should encourage States to introduce provisions which prohibit large-scale appropriation and concentration of land, water and other natural resources, and impose maximum limits on the quantity of these resources that private investors (domestic and foreign) can control or own to avoid the transfer of land and resources from the commons/peoples' territories to private hands; the concentration of resources in the hands of a few actors; and increased power by private companies over the productive structure of a country.

(17) **The Guidelines do not adequately address spatial planning.** Spatial planning links national, regional and local land use planning and also combines different land uses such as infrastructure development, settlement, agriculture, water catchment protection, environmental protection, and natural habitats.

Recommendation: The incorporation of spatial and temporal planning in the Guidelines with reference to the ICARRD principles, to the CBD and to the Rio Declaration. In the Guidelines, spatial planning must reflect the overall objectives of poverty eradication, environmental sustainability and realization of human rights. This should be addressed in the beginning of the document in combination with the reference to human rights principles. Land and natural resource use plans should be formulated in a participatory manner through open and public consultations and decision-making processes. Long-term strategies for managing natural resources should include social and environmental safeguards based on economic,

environmental, social and human rights impact assessments of different types of land and natural resource use. FPIC should be guaranteed in conservation and management initiatives. “Temporal planning” should also be considered since some people, particularly nomadic pastoralists, may need rights that allow for access to some areas at certain times of the year and/or in certain situations.

- (18) **The Guidelines’ treatment of monitoring and evaluation (Part 7) is extremely weak.**
Without a strong system of monitoring, the Guidelines will not achieve their objectives.

Recommendation: That the CFS and the FAO develop a monitoring mechanism to ensure compliance at national and international level. The establishment of independent national and multi-actor bodies to observe compliance should be encouraged. Regional and international institutions, and especially international financial institutions (IFIs), must be required to incorporate the Guidelines in their operational policies and directives as a means to avoid supporting private or public projects, programmes or measures that violate human rights.

- (19) **The Zero Draft does not address the dimension of international cooperation in tenure issues beyond the issue of transboundary matters.**

Recommendation: The Guidelines must require States, specialized UN organizations, multilateral agencies and IFIs to not promote measures that obstruct or impede in any way the realisation of human rights related to land and other natural resources, including policies that destroy present and future access and tenure rights of local users and promote the concentration of land and other natural resources in the hands of elite groups. States, specialized UN organizations, multilateral agencies and IFIs should contribute to the fulfilment of these Guidelines in all countries. Under no circumstances should forced evictions or involuntary displacements be supported, encouraged or condoned. All bilateral and multilateral, regional and international trade, investment and economic cooperation agreements should incorporate these Guidelines. The Guidelines should be incorporated in the aid and cooperation policies of FAO, IFAD, other pertinent UN agencies, multilateral bodies and bilateral donors.

List of endorsing organizations

ACORD, Africa

Action Aid International

Africa Europe Faith & Justice Network (AEFJN), Africa and Europe

African Network for the Right to Food (RAPDA), Africa

Both Ends, Netherlands

Brot für die Welt, Germany

Cenesta, Iran

Centre Africain pour la Démocratie et la Gouvernance – CADEG, Africa

CIDSE, Europe and North America

Conseil d'Appui au Développement Communautaire (CADEC), Democratic Republic of Congo

Crocevia, Italy

Economic Justice Network (EJN) of the Fellowship of Christian Councils in Southern Africa (EJN of FOCCISA),

Southern Africa Ecumenical Advocacy Alliance, international

European Food Security group (EFSG) of CONCORD, Europe

FIAN Belgium

FIAN Brazil

FIAN Ecuador
FIAN International
FIAN Netherlands
FIAN Norway
Focus on the Global South, South Asia and South East Asia
Food Secure Canada, Canada
Friends of the Earth International
Habitat International Coalition – América Latina (HIC-AL), Latin America
Habitat International Coalition – Housing and Land Rights Network, international
Institute for Agriculture and Trade Policy (IATP), USA
International Collective in Support of Fishworkers (ICSF), international
International Food Security Network (ISFN), International
International Presentation Association of the Sisters of the Presentation,
International Italian Committee for Food Sovereignty, Italy
JONCTION, Senegal
La Via Campesina, international
Misereor, Germany
Norwegian Forum for Environment and Development, Norway
Oxfam International Presbyterian Church, USA
Presentation Sisters, English Province, South West Province/Ireland, Fargo/USA, San Francisco/USA,
Western Australia Prisma, The Netherlands
Reseau des Organisations Paysannes et des Producteurs Agricoles de L’Afrique de L’Ouest (ROPPA),
West Africa
Traidcraft, UK
Trócaire, Ireland
US Food Sovereignty Alliance, USA

ANNEX I

Problems and Guidelines related to Specific Constituencies

Fishing communities

1. Introduction

It is estimated that small-scale fisheries contribute over half of the world's marine and inland fish catch, nearly all of which is used for direct human consumption. They represent over 90 per cent of the world's about 28 million fishers working in capture fisheries and support another approximate 84 million people employed in jobs associated with fish processing, distribution and marketing (FAO, 2009). This important contribution to global food security and employment generation has been possible because of their *simultaneous* and secure rights to both fishing grounds and the adjacent coastal residential habitats.

Indigenous and local small-scale fishing communities need secure rights to access, use, and sustainably manage living resources in the sea, intertidal zones and inland waters, and to benefit from these resources. Equally important they need secure rights to coastal lands for residential, cultural and occupational purposes, as for housing, worship, burial grounds, landing their catch, launching their vessels, cleaning and processing their catch, and storing their gear. For small-scale fishing communities the coastal area is as much a lived space as an occupational and cultural space, encompassing both the land and the water on which they live and work. Women generally rely heavily on the commons and community coastal habitats and resources to perform both their fisheries-related work, such as collecting and gleaning crabs and shellfish and drying fish, as well as reproductive work, such as procuring fuel wood, fodder, food and water for the household.

Tenure security in relation to fishing grounds and aquatic and fisheries resources has been a much neglected dimension of discussions on tenure rights which tend to focus on terrestrial land tenure systems and land-based natural resources. For many indigenous and local fishing communities who live along the coast, the distinction between land and sea tenure is a false one as they themselves do not distinguish between landscape and seascape. This is so for Aboriginal peoples in Australia, for whom both are part of country and whose dreaming tracks extend to offshore waters (UN Indigenous Forum, 2010) as well as others for whom the "indigenous seas" cannot be separated from the ancestral land claim as each sustains the other, and neither is viable as a separate entity (Capistrano, 2010:457). Even for traditional fishing communities in the industrialized countries of Europe and North America, fishing is not merely an economic 'enclave' activity—it is inextricably linked to communities, culture, land and localities.

2. Customary institutions, norms and "rights" governing the use of natural resources

Indigenous and local small-scale fishing communities often have a long, often centuries-old tradition of fishing. Across the world many such communities have naturally evolved their own institutions and systems of internal governance that mediate their relationships with natural resources. There is often a clear perception of 'claims' to the resources (land and water/sea-based) on which their lives and livelihoods depend. Their perceptions and claims have, in some cases, obtained wider social acceptance in the larger community and attained the status of unwritten 'rights'. Migration of fishers pursuing migratory fish stocks has also been a common and accepted feature in several regions, and migrant fishing communities have evolved very distinctive tenure relations.

The nature of customary institutions and the norms that have evolved usually reflect the specific gender, caste, class and ethnic relations that exist within these communities and vary in the extent to which they secure equitable access for all members of the community. For example, they may be biased towards men and impede women's access or use rights to land and coastal resources.

Such customary institutions and the norms and "rights" associated with them, may not be formally recognized, including by the State. Some countries do recognize customary law in their constitutions, the way in which customary law is integrated with statutory law in relation to governance of marine resources is often problematic.

The lack of proper recognition and the associated imposition of State-led centralized systems of management, as well as the influx of capital and technology, adaptations of fishing methods and fishing vessels, the growth in fish trade and the competing uses for inland and coastal spaces, have, in cases, weakened these systems. Notwithstanding this, customary law appears to continue to be the dominant legal system operating at local level in many countries, resulting in a system of 'legal pluralism', albeit not always acknowledged. The continuing prevalence of such systems and their associated norms and notions of 'rights' to natural resources challenges the mainstream representation of fisheries as "open access" resources.

3. Tenure rights under threat

Tenure rights to coastal and aquatic resources are currently being threatened in various ways, due to developments both within and outside the fisheries sector. In many parts of the world the imposition of colonial and post-colonial wildlife and fisheries management practices have eroded pre-existing customary resource tenure systems. Instead new statutory systems have been imposed, undermining customary practices and introducing regulatory systems and institutional arrangements at odds with local practices and 'living customary law' as practiced on the ground.

In recent years, the introduction of market-led rights-based approaches to fisheries management, based on the basic premise that the main reason for resource overexploitation and stock depletion, as well as the building up of excess fishing capacity, lies in the "open-access" nature of fisheries, have created their own distortions and inequities. This is particularly where private property rights, through individual transferable quotas (ITQs) and ITQ-like systems, have been introduced. Such forms of resource privatization have been contrary to the socio-cultural ethos of 'collective rights' to access, use and manage resources ingrained in the way many communities relate to their resources. They have systematically eroded the access rights of small-scale fishing communities to fishing grounds and to aquatic and fisheries resources.

The rights of fishing communities to coastal lands and resources are equally under threat as coasts and coastal lands come under increasing pressure from tourism and real estate developments, aquaculture, energy and other industrial developments as well as the expansion of protected areas in aquatic habitats. There is evidence that women of small-scale fishing households are disproportionately affected by these developments—for example women's work spaces on the coast and intertidal areas are often the first to be affected. Losing rights to coastal lands adjacent to aquatic habitats often means that communities are unable to pursue their fisheries-based livelihoods. For many communities, their access to coastal land and aquatic resources forms the material basis of their culture and hence their loss of secure access to land adjacent to the coast threatens the sustainability of their culture.

Recent trends in post-disaster coastal rehabilitation projects in south-east Asia, south Asia and in South America indicate that governments do not respect the interdependence of fishing communities' access to marine resources and their secure access to adjacent coastal lands. Many communities' tenure security in coastal lands has been undermined by land use policies introduced post-tsunami that give priority to tourism and industrial developments.

Tenure rights in the context of fishing communities, therefore, need to consider the 'double vulnerability' that these communities face—growing tenure insecurity both in relation to coastal lands and resources and in relation to fishing grounds and aquatic and fisheries resources. Tenure rights in a fisheries context must thus speak to **both** systems of accessing and holding land as well as accessing, using and managing fishing grounds and aquatic and fisheries resources.

Recognition of these rights, within the framework of sustainable utilization of living natural resources, is necessary if fishing communities are to progressively share the responsibility of managing coastal and fisheries resources sustainably for future generations. It is also necessary if small-scale fisheries are to fulfil their potential for meeting societal goals of ensuring food security, poverty alleviation, cultural diversity and the creation of dignified employment and livelihoods.

4. Proposals/guidelines to protect tenure rights

- Guarantee preferential access rights of small scale and indigenous fishing communities to territories, lands, and waters on which they have traditionally depended for their life and livelihoods and the resources they have traditionally harvested therein,
- Prohibit the displacement of fishing communities through the privatization of waters and lands of fishing communities for activities that include tourism, aquaculture, defence/military establishments, conservation and industry
- Recognize customary tenure systems which have proven to result in a sustainable utilization of living natural resources and that promote equitable distribution of benefits to all community members.
- Recognize the interdependence of secure rights to lands and secure access to fishing grounds and aquatic and fisheries resources, adopting special measures to ensure women's rights to land and other natural resources.
- Recognize traditional and more recent community-based governance systems, including for the conservation and management of specific species, habitats or protected areas
- Ensure free and informed prior consent of indigenous and local fishing communities, including women and underprivileged groups, to any changes to their tenure security
- Guarantee full and effective participation in decision making of indigenous and local fishing communities, including women and underprivileged groups on issues pertaining to land and natural resource policy and legislation as well as management
- Guarantee protection from displacement due to climate change REDD projects and put in place effective mechanisms for consultation on the implementation of these projects
- In situations where displacement or loss of tenure security cannot be avoided, provide adequate and appropriate compensation for both economic loss as well as loss related to sense of place, culture and livelihood, taking special measures to ensure that all forms of discrimination are excluded.

- In all instances, secure access to coastal lands and aquatic resources for cultural and spiritual purposes should be guaranteed

Rural Women

Rural women who include peasant and indigenous women, women fisherfolk, pastoralists and agricultural workers, play critical roles in farming, fishing, animal husbandry and forestry. Rural Women contribute tremendously to food and agricultural production through their toil, knowledge, and their nurturing capacities. They are involved in all aspects of agriculture – sowing, nurturing and protecting crops from pests, harvesting, selecting and preserving seeds for the next crop, soil enrichment and so on. Their productive roles are directly linked to helping sustain, protect and conserve the environment including biological diversity, soil, water, seeds, and other natural resources and are considered as managers of biodiversity. Learning by experience, and experimenting and innovating when faced with problems, they have developed a vast amount of knowledge and varied skills in agriculture over generations, and have provided food security and nutrition to millions of families. As such, rural women should be recognised as powerful agents whose tenure rights to own, access, manage and control land and resources are critical.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a human rights instrument whose main objective is to recognise and protect the rights of rural women. Article 14 calls on States “to ensure, on a basis of equality of men and women, that they (women) participate in and benefit from rural development” including, having the right to “access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes”¹. While gender equality is recognised and promoted in various international instruments, such as the CEDAW, gender discrimination is rampant and women rarely own land and do not have access and control to productive resources such as seeds, forests and marine resources.

Rural women have very little rights over land and productive resources - to own, access, use, manage, conserve and enjoy the benefits from land, territories and resources. They are often not able to own or inherit land and have limited access to credit, markets, training and technology. In marital custody, transfer of land and housing rights goes to men. Agrarian reforms and laws favouring access to land benefit men. Preference is also given to men in social, economic and cultural structures.

According to FAO statistics, women produce between 60 to 80 per cent of the food in most developing countries, yet less than 2 per cent of land is owned by women. In Nepal, ownership of land and livestock is dominated by men with only 15% owned by women². In the Philippines, land re-distribution schemes favour men with only 26.38% of lands distributed to women compared to 73.62 % distributed to men³. However, the Certificate of Land Ownership Awards (CLOAs) granted under its agrarian reform law are not even guarantees for both women and men farmers to actually own the lands.

The feminisation of agriculture characterised by the heavy work burden of women in agriculture is highlighted in a study conducted in India which noted that Dalit women work 50 per cent more in comparison to the combined agricultural work load of bullocks and men⁴.

¹ Food and Agriculture Organization of the United Nations Rome (2005). *Guidelines for reporting on Article 14*. Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

² Sabitra Bhusal (2007). *Women's Access to Food and Land Rights*. All Nepal Women's Association.

³ Asian Peasant Women's Conference on Land Rights and Globalisation Proceedings (June 2004). Philippines.

⁴ Tamil Nadu Women's Forum (2007). *Unheard Voices – Dalit Women*. An alternative report for the 70th session of the Committee on the Elimination of Racial Discrimination in Switzerland.

Since women rarely own land in India, they are also unable to have access to agricultural support services such as credit, appropriate technology and agricultural extension services.

The prevalence of global and national policies that benefit transnational and big corporations, and the imposition of market-oriented approaches by international institutions (the WTO, and IFIs) and trade agreements (regional and bilateral) further supplant women's rights to control, manage and use land, territories and resources. The prevalence of the intellectual property rights (IPR) regimes advanced by WTO and bilateral trade and investments agreements benefit corporations. TNCs have large numbers of patents on animal and plant genetic material. Local knowledge is also now up for grabs by corporations. This IPR system is undermining the role and rights of rural women who are the community seed stewards and with their skills and knowledge select, save and propagate seeds.

Rural women are disproportionately affected and become victims of massive land conversions and development aggression through land grabbing, resource destruction, dislocation and forced migration due to corporate interests. The commodification and monopoly control by the state, corporations and local elites of land and natural resources are further destroying women's traditional and local knowledge and practices in agriculture that have kept communities self-sufficient. In West Bengal (India), agricultural lands have been expropriated by the state government to become sites for car manufacturing by a TNC¹. In Thailand, marine and coastal resources are transformed from community resources into industrial areas, shrimp farms, tourist areas and residential enclaves². Commercial logging, mining and militarisation have destroyed the land, environment and traditional practices of an indigenous community in the Philippines.³

The patriarchal structure rooted in societies tends to constrain rural women by reinforcing attitudes that limit and even exclude women from participating in decision-making processes (from homes, communities to formal governmental mechanisms). There is a lack of or limited representation of women in crucial decision-making bodies. Women have fewer legal rights than men, resulting in them having little or no say in decisions that affect their lives and livelihoods. Access to information and other livelihood opportunities are often limited and even denied.

Rural women face multiple burdens of class, caste and gender-based violence and abuse. In India, caste and class discrimination are prevalent where 160 million Dalits, of which 49.96% are women, continue to suffer discrimination, violence and sexual abuse.⁴ Transnational corporations and private armies employ violence, intimidation and abuse to drive indigenous and local communities from their lands and resources, putting women and children more at risk.

Within land tenure and natural resource conflicts, women are more vulnerable to exploitation, oppression and multiple forms of discrimination and violence. Yet, rural women's groups and movements continue their struggle and have shown resilience using various strategies and mechanisms to assert their rights to own, access and manage land and natural resources.

Taking into account the distinct problems faced by rural women and the significant roles they play, it is critical to view women's access to land and natural resource as an issue of equity, social justice, human rights, sustainability and gender justice. Thus, women's control and access to land and resources, which are the means of production and the basis of food self-sufficiency and sustainability, must be ensured. Rural women's skills, roles and contribution

¹ Pesticide Action Network Asia and the Pacific (2009). *Booklet 2: Land and Resources: Claiming our Rights*. Women's Resistance and Struggles: Asserting our Rights to Land, Resources and Livelihood. Malaysia.

² Ibid. p37.

³ Ibid. p45.

⁴ Tamil Nadu Women's Forum. op. cit. p. 1.

must be recognised and respected. Securing these fundamental rights for women ensures food and nutrition, economic development and poverty reduction for rural communities.

Recommendations:

1. Recognise and protect rural women's distinct rights to land, territories and natural resource tenure;
2. Re-distribution policies, such as genuine agrarian, fisheries, forestry and pastureland reforms as well as recognition and protection of ancestral domain must be reviewed and implemented recognising and ensuring rural women's rights to own, access and control land, territories and productive resources which should also include access to credit, market, training and appropriate technology;
3. Equal representation of women and men must be ensured with emphasis on meaningful participation in decision-making processes related to issues of land and natural resource including the right to information.
4. Rural women's contribution, knowledge and skills in biodiversity-based agriculture should be recognised and protected through gender-responsive policies on land, territories and natural resources;
5. International agreements, public policies and regulatory frameworks should be reformed to ensure that women have access, control and management of land and natural resources;
6. In respecting and protecting women's rights, strengthen and ensure strict enforcement of laws and policies that bring to justice the perpetrators of violence against women, as well as those who abuse and harass women.

Young People

Specific Problematic points:

- **Exodus of young people**

In the majority of regions worldwide, we are witnessing a massive exodus of young people from the countryside to the city. This abandonment of the land-related activities has various causes.

- (a) Lack of economic attraction to small-scale production activity in competition with industrial and agribusinesses production.
- (b) Lack of social recognition pushes young people toward other, more accepted professions.
- (c) Lack of technical and theoretical training.
- (d) Some national policies that seek the suppression of small-holder family production in favor of super-productions by means of payments for ceasing activities (as in India) or policies such as PAC (Europe) that favor the concentration of production, capital and natural resources such as land.
- (e) Some young people are forced to leave the rural environment in order to satisfy their families' needs by working elsewhere.

- (f) The customs of transferring family lands favor the exclusion of one part of the young people that must then immigrate to other countries (Niger).

- **The impossibility of accessing land**

For young people with rural facilities projects and above all for those who do not come from agriculture families, there are many obstacles:

- (a) The obstacles are often related to the absence of mechanisms, on a national or international level, to access land.
- (b) The cost of land varies greatly, although the majority of the time it is too high for young people or small-holder structures to access.
- (c) Transnational land grabbing in some countries is detrimental to the local people, especially to young people.
- (d) Lack of access to the necessary financial resources to maintain agricultural facilities for youth with small-holder projects considered unsustainable or economically unproductive.
- (e) The cost of transferring existing holdings is too high because of the concentration of production (i.e. Europe, growing agricultural industrialization leads to the impossibility of transferring numerous agricultural holdings to the future generations because of size, land prices and the obligation to indebt oneself).

Recommended Guidelines

In an international context, we believe that young people's lack of access to land and/or natural resources and their rural exodus is directly related to the production model that has been promoted and valued until now. It is impossible to think about land access policies without relating them to the production model defined by the peasants that will have that access. This also applies to access to natural resources and fishing production, a small-scale model for sustainable production that is supplied for and by the local populations (see food sovereignty principles). Furthermore, it is important to modify our relationship with natural resources and our notion of property. If we continue to consider land and natural resources as economic goods, their ecologic, social and cultural values will be denied. The latter values must be integrated into our vision of access to these resources to guarantee FS (food sovereignty) and maintain young people in the sectors mentioned.

For these reasons:

Land must recover its importance as public wealth. We have to reduce the commodification of land and promote the public management of territories on the legal and political level.

- Create or modify the public management frameworks (such as Safer in France) to facilitate access for young people and peasants without land or other resources such as water.
- Facilitate access to pastures, water, etc. (the role of management of land, landscapes, biodiversity, and fire prevention).
- Review the methods of transfer and surrender of the existing holdings in order to not enrich other bigger structures.
- Create or modify the land renting regulations to allow secure access for the young farmer.

- Develop legal frameworks for cooperative holdings and co-ownership mechanisms.
- Rural reform in the areas of property concentration.
- Policies that sustain the transformation of industrial holdings into agricultural farms for young people.
- End the concentration of production and consequently land. Prioritize young people's facilities over the expansion of existing holdings.
- Limit access to a "human" scale (the worker/resources relationship linked to the FS model)
- Prohibit all forms of land grabbing.
- Encourage young people's access to financing for young people's projects in alignment with FS.
- Limit the prices of agricultural lands to be accessible to young people.
- Create or support a training model for young people.

An example that is being developed:

In Europe, the recovery of abandoned lands and public property for the purpose of young people's agriculture, with low or no interest.

Indigenous People

Actions and recommendations:

1. Stop the processes of protected Natural Areas, for Communal Conservation Areas, regarding Indigenous People's territories. Through programs for de-concentrating and decentralizing the functions of land and protected areas administration to local governments, local indigenous communities, local and other pertinent instances: permits, licenses, boosts (incentives), supervision and monitoring.
2. Promote traditional, ecological, sustainable and tenable agriculture and ranching by the Indigenous People and Communities and in governments' public policies, as part of the action to stop global warming.
3. Stop the use of indigenous people's lands for mono-crop plantations.
4. The Guidelines must be consistent with the rights recognized internationally for the indigenous people, for example the Universal Declaration of Human Rights, the International Pacts of Civil and Political Rights and Economic, Social and Cultural Rights, CEDaW, ILO Convention 169, the United Nations Declaration of Indigenous People's Rights.
5. The urgent ratification of the ILO Convention No. 169 by the governments that have not done so already. And the adoption of the United Nations Declaration on the Indigenous People's Rights.
6. Harmonize national legislature with the established international instruments of Indigenous People's individual and collective human rights, including the rights of indigenous women, young people, and children.

7. The Guidelines must call for the Indigenous People's rights to Consultation and free, prior and informed consent to be respected before the development of any project or program or legislation that may affect them in any way, especially the megaprojects in mining and hydroelectricity, or REDD projects, and mechanisms of clean development, dams, and aquaculture projects.
8. Oblige governments to realize process of Comprehensive Agrarian Reform that include the recognition of territories belonging to Indigenous People and Communities, and their traditional tenure and inheritance of land systems.
9. The Guidelines should establish mechanisms to ensure that governments respect the sacred sites of indigenous people and do not privatize them.
10. The Voluntary Guidelines should promote respect for the regulatory institutions and systems of the Indigenous Peoples and Communities.
11. The Guidelines should promote mechanisms for the protection of traditional knowledge of soil management, food production, environmental care that are outside of the Intellectual Property system.
12. The Guidelines should establish sanction mechanisms for the businesses that contaminate soil and water in the Indigenous People's territories.
13. The lands for the common use of indigenous peoples and communities can never be considered "idle" at any time.
14. Lands abandoned because of conflicts foreign to the Indigenous People or Community should be respected and returned to their original owners, in a process of restitution and restoration of land.
15. The Guidelines must include a mandate to the States that the Population Census must include questions about indigenous ethnicity and language.
16. The Guidelines must promote technical assistance for sustainable development for indigenous women strengthening gender-equal relations and shared responsibility, with a participatory role as well as compensative measures for a woman's condition and childcare.
17. The Guidelines order that the FAO approves work policies for and with Indigenous People, including women and children.
18. Businesses must respect the Indigenous Territories' water sources, or establish themselves in a place far away from the indigenous communities' water sources.
19. The Guidelines must force the suspension of the installation of military bases in indigenous territories and they should promote peace.
20. Land, territories and natural resources must be seen as a whole that maintain an intrinsic relationship and indigenous people maintain a profoundly spiritual relationship with these other living elements, as a complementary and reciprocal system. The Indigenous People must be recognized as stewards of Mother Earth-
21. For this reason, the Guidelines must commit the governments to adopt an international legislation that favors Mother Earth's rights.
22. Effective mechanisms for conflict resolution should be established that respect the Indigenous People's cosmovision and customary institutions.

23. Full and effective mechanisms for the Indigenous communities' and people's participation in all instances of decision-making regarding policies of land tenure.
24. Recognize Food Sovereignty as the sustainable model for the production of healthy and culturally-appropriate food.
25. The Guidelines should establish mechanisms to stop the criminalization of the defenders of indigenous land and territories.
26. Establish a mechanism for the reconstitution of the Indigenous People's Territories that were divided during the colonial imposition of territorial divisions.
27. Prohibit the sowing of genetically modified products in the Indigenous Peoples' or Communities' lands.
28. Establish processes of education, diffusion, training and capacity-building on land tenure (school programs, permanent diffusion campaigns, experience exchanges, technical cooperation programs on the topic, community investigation centers).
29. The Guidelines must establish guaranteed access to land for indigenous women in the case of inheritance, and including situations of stable common-law unions.
30. Implement access to land programs for young indigenous people in the rural context.
31. Strengthen peasant and indigenous agriculture and their participation in the production systems or agribusiness chains.
32. Promote the creation of peasant and indigenous community businesses that advance the phases of processing and commercialization, based on communal initiatives. Participatory elaboration of territorial zoning plans. Strengthen the local communities' capacities so that they can apply adaptive strategies to climate change and risk management, as well as reducing their vulnerability.
33. Territoriality is a relevant topic, which requires its own institutionality that allows for management and maintaining control of natural resources. In some countries, local congresses or other indigenous instances exist. These must be strengthened. For example, some countries have indigenous territories that have regional legislations, as occurs in the area under the control of the Kuna community in Panama. All this involves the recognition of the Indigenous People.
34. Recognize the utilization of collective rights to land (instead of individual rights), as a relevant factor in the achievement of adequate land governance. The topic of collective ownership is key in the indigenous world and is associated with their cosmovision.
35. Strengthen the fair trade treaties, bartering, communal agreements, commercial and cultural exchanges in the indigenous communities.

The Urban Constituency

Land and natural resources in urban centers are the subjects of especially concentrated and multiple forms of use, as well as competition for their access and control. As always, the first obligation of the modern state is to ensure equity in the enjoyment of land and natural resources, ensuring priority to those who are the least advantaged and most vulnerable. Human rights treaties and other state obligations require that governments and other state actors respect, protect and fulfill rights, while upholding equity in the access to, and use of land and natural resources by consistently applying the covenanted over-riding principles of

implementation (i.e.: self-determination, nondiscrimination, gender equality, rule of law, maximum of available resources, progressive realization and international cooperation).

The objective of corresponding policies, programs and legislation is to ensure that the administration of equitable access to, and use of land and natural resources serve as a means toward realizing the right to live in a home, community and environment in security, peace and dignity.¹ Whether the land and/or other natural resources are used for housing, urban agriculture or other livelihood activities, states are obliged to “take immediate measures aimed at conferring legal security of [needed land and natural resources] tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.”²

Accompanying the available, accessible and acceptable land and natural resources sufficient to ensure a dignified life in the city, town or village, also services, materials, facilities and infrastructure are needed for urban constituents to realize their rights to an adequate standard of living, including food, clothing and shelter.³ Public institutions must ensure that all urban dwellers have sustainable access to these services, materials, facilities and infrastructure be managed effectively and economically in order to meet the essential requisites for health, security, comfort and nutrition. All urban constituents should have equitable, affordable and sustainable access to natural and common resources: safe drinking water; energy for cooking, heating and lighting; sanitation and washing facilities; means of food storage; refuse disposal and waste management; site drainage and emergency services.⁴

Within many states, increasing access by landless or impoverished segments of the society to serviced urban land should constitute a central policy goal. Corresponding municipal-level efforts should develop with the aim to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.⁵ Such land and other needed natural resources must be in a location that allows access to employment options, health-care services, schools, child-care centers and other social facilities. This requirement is as vital in large cities as in rural areas, where the temporal and financial costs of commuting to and from the place of work and livelihood can place excessive demands upon the budgets of poor households and, thus, at the expense of the realization of other rights and human needs. Similarly, land for housing, urban agriculture and other livelihood purposes should not be polluted, or in immediate proximity to pollution sources, or other hazards that threaten the inhabitants’ right to health.⁶

Land, Natural Resources and the Urban Challenge

In previous decades, governments promised that land tenure reforms would generate a surplus in agricultural production to feed and finance greater urbanization and industrial production. Over half of the world’s population of six billion people now lives in urban areas: cities and towns, large and small. The urban population is set to rise to two-thirds of an even larger number in another generation.

¹ GC4, para. 7.

² GC4, para. 8(a).

³ ICESCR, Article 11, para. 1.

⁴ GC4, para. 8(b).

⁵ GC4, para. 8(e).

⁶ GC4, para. 8(f).

Today, urbanization and its drivers are increasing dramatically in every region, despite the obvious detriments. These global-local forces often drive rural people off their land—peasants, indigenous people and others—and subject people in cities and towns to an inactive and unhealthy life because of poor diets—also responsible for the “hidden hunger.”

The world recently has witnessed food riots and related unrest, particularly in urban areas, as the access and availability of food, as well as the means to produce it, were foreclosed or became threatened by rising and overlapping waves of food maldistribution and spiking inflation, the price of oil and the global financial crisis.

Urban and rural people, particularly the disadvantaged, suffer the same global-local forces of marginalization that contribute to massive violations of their common rights to food, housing, health and a bundle of other rights. The food and nutrition needs of affected urban and rural people are linked in many ways, but both suffer the tendency of policy makers and other observers to treat these communities as separate, and even as competing with each other.

Often, city dwellers in low-income neighborhoods and informal settlements lack sufficient information and capacity to determine and develop their own land and natural resource tenure options. In many countries, land records are not public, or are difficult to access, and obtaining title can be extremely costly and time consuming. Official and/or private-sector development plans typically exclude the poorer households from any sustainable benefits of development, seeking instead to remove them from the city in favor of private profit making from use of the local land and natural resources by other parties, especially those from outside the community.

Urban Dwellers’ Productive Use of Land and Natural Resources to Meet Their Food Needs

While food sovereignty is often associated with rural social movements, it is no less relevant or critical to urban movements grappling with their own set of pressing challenges related to food and agriculture, such as disparities in food access and food quality. In many poor urban communities, a lack of access to healthy food combined with a barrage of highly processed food from multinational food corporations is fueling the epidemics of obesity, diabetes and other diet-related disease. Effectively tackling issues of urban hunger, malnutrition and diet-related disease would encourage city dwellers to become active participants in shaping food systems in cooperation with food producers in surrounding areas, while contributing to food sovereignty.

The people who flood into cities and those who are already there continue to produce food on available land. The presence of the vast urban market helps such backyard or small farmers make a living from the crops and livestock they produce, although they mostly do it to feed themselves and their families. This food production provides household food security for those small farmers and contributes to the food security of the cities they live in.¹ Key sectors are fresh vegetables and dairy produce. The children of urban livestock keepers are healthier as a result of their families farming activities.

Because such small farmers have easy market access and easily available organic inputs in the form of urban solid waste and waste water, their outputs per unit area tend to be much higher than rural farmers. However, they tend not to be supported by official extensions programs or agriculture policies. There is often a mismatch between rural and urban

¹ By about a third of urban dwellers and a higher proportion of peri-urban dwellers in one typical African city recently measured. See Kampala nutritional data in Gertrude Atukunda, “Urban Agriculture in Kampala, Uganda: Reviewing Research Impacts,” CFP Report 29B; and Diana Lee-Smith and Davinder Lamba, “Urban Food, Fuel, and Shelter,” CFP Report 29A; papers presented to the Cities Feeding People Workshop: Lessons Learned from Projects in African Cities. 21–25 June 1998, Nairobi, Kenya, at: http://www.idrc.ca/en/ev-8249-201-1-DO_TOPIC.html#2.Makerere.

administrations that leads to discrimination against small farmers operating inside urban jurisdictions, instead of helping them. The urban poor are less able than the rich to farm, mainly because the rich have better land access, for example to backyards that the poor in dense settlements do not.

Land, Natural Resources and a Right to the City

Urban social movements worldwide have been struggling for the “right to the city” in order to obtain secure tenure and access to relevant land and natural resources to develop livelihoods and gain access to housing and services, as well as to public spaces and facilities in the city. The administration of land and natural resource tenure relates to the right to the city, conceived as the right to an equitable use of cities under the principles of sustainability, democracy and social justice. Because all human rights are indivisible and interdependent, the “right to the city” embodies the rights to land, natural resources, means of subsistence, decent work, health, education, culture, housing, social protection, healthy environments, sanitation, public transportation, leisure, participation and information. It also includes the rights to freedom of association, peaceful assembly and to organize freely. The “right to the city” encompasses respect for the human rights of minorities, refugees and migrants, and for ethnic, sexual, and cultural plurality, and guarantees the preservation of historical and cultural heritage. The “right to the city” movement provides an important opportunity to advance the Guidelines and related principles in the cities and towns of the world, taking into account the worsening food security situation of urban disadvantaged people and areas.

Social Production of Habitat

Most housing and community development in the world is achieved by individual, joint and collective initiatives in processes often delinked from the formal market. Although many governments attempt to build urban housing and related facilities, the result typically falls short of the quality and quantity of housing needed. Despite fluctuations in public housing investment and production, formal housing starts and increasing costs of construction materials, low-income households and communities invest and build consistently according to their need.¹

This social production of habitat encompasses all nonmarket processes carried out under inhabitants’ initiative, management and control that generate and/or improve adequate living spaces, housing and other elements of physical and social development, preferably without—and often despite—impediments posed by the state or other formal structure or authority.² Responsible governance in land and natural resource tenure in urban settings should complement such popular initiatives with technical, administrative, financial and other assistance to ensure the optimum outcome of urban people’s social production of habitat.

Proposals for policies and actions:

Land and natural resource tenure administration and agrarian-reform policies should:

- Support a continuum of food production from city centers into the countryside, including urban and peri-urban farms and gardens. This also applies to women, especially women-headed households, whose access to land is typically inferior to men’s.
- Encourage urban livestock farming and support greater food security and health. Urban and peri-urban agriculture needs to be recognized and supported as a subsector of national agriculture policy.

¹ Rino Torres, *La Producción Social de Vivienda en México: Su importancia nacional y su impacto en la economía de los hogares pobres* (México DF: Habitat International Coalition, June 2006).

² For more information and cases, go to [HIC general website](#) and [HIC-HLRN website](#).

- Adopt urban and regional planning that prioritizes land for food production, space for public markets and other locally owned food retail outlets, as well as additional infrastructure to support local and regional food systems, including transportation, storage, and processing facilities.
- Support community markets and introduce and facilitate direct marketing opportunities to connect farmers, fishers and urban consumers, such as community-supported agriculture and fisheries, box schemes, mobile markets, and food purchasing cooperatives, without the involvement of corporate retail chains.
- Ensure equitable distribution of food through, *inter alia*, well-functioning public distribution systems and school meal programs. Officials need to pay specific attention to meeting the needs of vulnerable populations, including women, children, senior citizens, and the chronically ill or disabled. All schools, for example, should provide students with free meals of locally produced, safe and nutritious food.
- Invest public funds in infrastructure for regional food systems that connect cities to the countryside, including transportation, storage, and processing facilities for local and regional foods.

ANNEX II

Good Governance and Human Rights in Land and Natural Resource Tenure*

Land and Natural Resource Tenure

Land and natural resources tenure is the relationship, defined either in law or in custom, of people with the land and related resources found in the earthly environment. Land administration is the way in which the rules of land tenure are applied and made operational, including the official recognition of traditional use, formal land registration, land use planning, land consolidation and zoning, land management and property taxation. The administration of natural resources, more generally, includes the formulation and implementation of rules related to elements on and/or beneath the land and subject to human exploitation. That exploitation may be by consumption, or extraction, or by speculating future exchange values, among other means. The rules of use vary depending upon whether the resource is renewable or subject to depletion without the prospect of renewability. The rules also distinguish between and among various types of use, possession and/or ownership of such resources.

In their primordial state, both land and other natural resources derive from, and remain related to the global, national and/or local commons, regardless of the form of tenure attributed to them. Thus, this paper applies the principle found in many of our constitutions applying to property, in general, such that especially those values derived from the commons are ethically and administratively subject to their social function.¹

Governance is the process of managing and administering resources on behalf of the public. It is the way in which society is managed and how the competing priorities and interests of different groups are reconciled. It includes the formal institutions of government but also informal arrangements. Governance is concerned with the processes by which citizens participate in decision making, how government is accountable to its citizens and how society obliges its members to observe its rules and laws required to maintain democratic order and civil peace.

Good governance is the administration of the public interests effectively and efficiently, with transparency, ensuring effective participation and consultation of the affected people, while ensuring accountability to the public for disposition of its funds (taxes) and values derived from the commons.

Good governance also suggests political stability as an outcome of reconciling public and private interests, government effectiveness in delivering services responsively, regulatory quality and fair and diligent rule of law, as well as control of corruption and other offenses and crimes by public officials and their cohorts.

The concept of good governance also means that government is well managed, inclusive, and produces desirable outcomes. The principles of good governance can be made operational through equity, efficiency, transparency and accountability, sustainability, subsidiarity, civic engagement and security.²

* This annex was compiled by Joseph Schechla, coordinator, Housing and Land Rights Network - Habitat International Coalition.

As one of the desired outcomes of good governance is security, it is important to note the economic and social dimensions of security to encompass at least three cardinal points: First, national security, including the protection of the right of the peoples of the region to self-determination; secondly, democratic security entails the promotion of citizenship rights of the individuals and peoples in each country through their institutions of democratic accountability; and, thirdly, human security, particularly in the forms of social protection and decent employment, which should be promoted through regional regulation and economic integration.”³ All of these aspects of security, while constituting essentials of modern statecraft, also constitute human rights with corresponding treaty obligations on the states to respect, protect and fulfill.

Good Governance and Human Rights

The UN Commission on Human Rights has noted that, beyond the principles statements of human rights declarations, “a conducive environment, at both the national and the international levels, for the full enjoyment of all human rights” is required. States collectively has recognized that “transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests...” Moreover, “such a foundation is a *sine qua non* for the promotion of human rights.”⁴ Consistent with this paper, the states in the Commission emphasized, in this context, the need “to promote partnership approaches to international development cooperation and to ensure that prescriptive approaches to good governance do not impede such cooperation.” Thus, good governance through the human rights regime is essential to the intergovernmental effort to maintain the conditions of good governance and the social progress intended for it to enable.

State subsequently have recognized also that “good governance at the national level, including through the building of effective and accountable institutions for promoting growth and sustainable human development, is a continuous process for all Governments, regardless of the level of development of the countries concerned.”⁵ Thus, indispensable good governance requires corresponding government performance at both the global and local levels by applying the criteria of human rights.

International Human Rights Law

Human rights are the codified recognition of human needs that must be fulfilled for a human to live a dignified life to which s/he is thus entitled.⁶ All of the world’s inhabitants living in human settlements rely directly or indirectly on land and natural resources for their survival.

Until now, however, the human rights system has not yet codified a “human right to land,” or a “human right to natural resources.” That lacuna in human rights law as developed does not mean that equitable access to, and enjoyment of land and natural resources are any less indispensable to a life of human dignity. Rather, the link among human rights, states’ human rights treaty obligations, and land and natural resource tenure embodies the essential elements (normative content) of other rights upon which the dignified life of every human person depends.

The authority of the legal sources carries corresponding obligations on most States as parties to the international human rights treaties, and applies universally to all people on the planet as *human* rights. Popular and nongovernmental parties also advance claims in human rights language that may qualify as “emerging” human rights, eventually to be codified in the law. All legally established human rights norms originated as popular claims carried forth through various forms of historic struggle.

The Moral Dimension

The popular sources are useful especially in demonstrating ground-level recognition of the various elements of the land and natural resources-related human rights in and of themselves, but also provide a list of human rights that reflect common human needs, but await codification as *bona fide* rights. The “emerging rights” claims to land, energy and natural resources, among others, contain elements inextricable from human rights, including the human right to life, adequate housing, water, food, health, property, development, a clear and healthy environment and, often, to self-determination and freedom from discrimination. The popular sources and their emerging-rights claims are indicators of the ever-evolving specificity of human rights law and the legal and problem-solving horizons toward which social movements and the human rights community are heading.

The Legal Authority

Please note that the legal instruments cited here carry differing levels of obligation, and they are organized. Customary law is made up of those norms and principles that legal opinion and interstate institutions consider so basic and so repeatedly affirmed as to be binding on all legal personalities, in particular states. The Universal Declaration of Human Rights, the principled antecedent to all subsequent UN human rights treaties, is the most relevant example of customary law for our purposes, even though it does not establish a monitoring and enforcement mechanism to ensure compliance with the states commitments—although not obligations—that it enshrines.

The ratified treaties (Covenants, Charters, Conventions, etc.) are binding on all their ratifying states parties, and each of the current generation of human rights treaties establishes an independent body to monitor and guide implementation. The treaty-monitoring process provides an opportunity for civil society, states and the authorized international legal monitoring bodies each to play a role. These international treaties are characterized as hard law (*lex lata*), because of their binding nature. Treaty law, by definition, is any agreement between two or more states. These treaties are either international or regional in nature and scope.

The “soft-law” instruments (*lex feranda*) include the Declarations, Basic Principles, Minimum Rules, General Comments, etc., that are the multilateral commitments arising from international conferences, assemblies, summits, congresses and other specialised meetings. Also included in this category are the general and country-specific guidance that the treaty-monitoring bodies issue to guide and specify treaty obligations, as well as those instruments of interstate agreement (decisions and resolutions) arising from the various political bodies of the international system (e.g., UN Commission on Human Rights, Human Rights Council, International Labour Organisation [ILO], General Assembly, etc.). These instruments contain standards that are declaratory of already-binding international law, reflect the collective political will and commitment of states and provide specificity to the general articles in the binding instruments. However, these form legal and policy guidance without the corresponding obligations of treaty law and without the corresponding legal monitoring mechanisms.

The codified human rights that contain land and natural resources access as normative content are found in most of the major human rights treaties, including the International Convention on the Elimination of all Forms of Racial Discrimination, (ICERD) (1965), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), International Covenant on Civil and Political Rights (ICCPR) (1966), the Convention to Eliminate All Forms of Discrimination against Women (CEDaW) (1979), the Convention on the Rights of the Child (CRC) (1989) and the corresponding rights enshrined in the fundamental ILO Conventions: Freedom of Association and Protection of the Right to

Organise No. 87 (1948); Right to Organise and Collective Bargaining No. 98 (1949); Forced Labour No. 100 (1951); Discrimination (employment and Occupation) Convention No. 111 (1958); Minimum Age Convention No. 138 (1973); and Worst Forms of Child Labour Convention No. 182 (1999). Other ILO Conventions addressing land and natural resources include the Rural Workers' Organisations Convention No. 141 (1975) and Indigenous and Tribal Peoples Convention No. 169 (1989).

The treaty interpretation and jurisprudence of the UN Committee on Economic, Social and Cultural Rights (CESCR), the treaty body authorized to interpret and monitor implementation of ICESCR, have contributed much to the clarity on the relationships between land and natural resources, on the one hand, and human rights entitlements and state obligations, on the other. Among the CESCR's interpretive instruments are the General Comment (GC) No. 4 on the right to adequate housing, No. 7 on forced evictions, No. 12 on the right to adequate food, No. 14 on the right to the highest attainable standard of health, No. 15 on the right to water) and No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights.

By way of interpreting the rights and state obligations under the ICCPR, the monitoring body, the Human Rights Committee, addresses land and natural resources in its GCs No. 12 on the right to self-determination, No. 21 on equality in marriage and family relations, No. 23 on the rights of minorities and No. 32 on the right to equality before courts and tribunals and to a fair trial. The CEDaW monitoring body also addresses land and natural resources tenure in its GC No. 24 on women and health, while the Committee on the Elimination of Racial Discrimination (CERD), which monitors and interprets ICERD, also sets out the human rights and state obligations related to land and natural resources in its General Recommendations No. XXI on the right to self-determination and No. XXIII on the rights of indigenous peoples.

Another lacuna in human rights law affecting land and natural resource tenure and its governance is in the recognition of property "rights." The moral arguments for "property rights" and/or "a right to property" have been long contested and variously established in national laws and constitutions. However, owing the Cold War and ideological polarization in the UN system during the adoption of the Covenants, a "right to property" does not appear in either of the Covenants. Therefore, that right, which is inextricably linked to governance of land and natural resources, has not developed as a prominent subject of interpretation in international human rights jurisprudence, or in the GCs of CESCR or HRC. However, a "right to property" is enshrined in ICERD⁷ and, with particular application to indigenous populations, in ILO Convention 169. The principal of the "social function of property" for regulating that right is found in national constitutions and legislation and remains a subject for debate and legal clarification in many jurisdictions.

What Must States Do to Implement Their State's Human Rights Obligations:?

Given the nature of treaty law and human rights treaties in particular, every human right imposes corresponding obligations for the state, as the legal personality that guarantees those rights. Arising from any human right are the two practical questions of *what* the state is treaty bound to do, and *how* the state is to carry out those duties. Answering those two questions evokes both hard law and its authoritative interpretations.

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The principal human rights codified and/or legally interpreted to have bearing on governance over land and natural resource tenure include the human rights to adequate housing, water, food and health, among others. As noted above and below, other human rights whose enjoyment relies on access to land and natural resources include the right to self-determination and freedom from discrimination, which coincidentally constitute over-riding principles to follow in the implementation of all other human rights. As established in the

General Comments (GCs) and in practice, the methodology for states to implement their human rights obligations rests on three aspects of what a state is obliged to do:

- To **respect** the rights; that is, not to interfere with the exercise of a right;
- To **protect** the rights; which means to ensure that others do not interfere, primarily through effective regulation and remedies; and
- To **fulfill** the rights, including take positive steps to promote the rights and their remedies, facilitate access to rights, and provide for those unable to provide for themselves.⁸

The obligation to **respect** human rights requires that states refrain from interfering directly or indirectly with people's enjoyment of human rights.⁹ This is an immediate aspect of the state's human rights obligation that includes respecting efforts people themselves exert to realize their rights. Therefore, this aspect forms a "negative" state obligation in the sense that the state and government avoid violating human rights. For example, governments must not carry out evictions without due process of law or providing alternative accommodation, among other preconditions.

Under the obligation to **protect** human rights, states must actively prevent, investigate, punish and ensure remedy and reparations for the damage and harm caused by abuses of human rights by third parties (i.e., private individuals, commercial enterprises, or other nonstate actors). This is an immediate aspect of obligation by which governments must regulate and monitor, for instance, third parties whose activities have public consequences such as private security firms, industries emitting potentially hazardous waste, public services delegated or contracted to private actors, or subcontractors on public works projects.¹⁰

States have an obligation to take positive steps to fulfill human rights by undertaking legislative, administrative, budgetary, judicial and other measures toward the full realization of human rights. This obligation should be realized progressively, according to ICESCR; however, the progressive nature does not permit the state and its government to delay the necessary measures. This obligation includes duties to facilitate (increase access to resources and means of attaining rights), promote (inform people about the rights and encourage their application) and provide (ensure that the whole population may realize their rights where they are unable to do so themselves). That means that authorities must, for example, provide defendants with any necessary interpretation so that they can understand court proceedings, or introduce meaningful vocational training to ensure that students benefit from education. Above all, governments must give priority to meeting the minimum essential levels of each right, especially for the most vulnerable.

How Must States Implement Their Obligations?

While the foregoing principles establish the parameters as to *what* the state is treaty bound to do, the "over-riding principles" clarify *how* the state is to accomplish these essential human rights tasks. These principles are repeated in the initial articles of both international human rights Covenants and other major international human rights treaties and standards, and correspond to norms of justice arising from the major legal systems of the world. These are principles of immediate application to ensure that all human rights related to good governance in land and natural resource tenure are respected, protected and fulfilled within a context that ensures (1) the realization of the inalienable right to self-determination; (2) freedom from discrimination, in general; (3) the effective application of gender equality; (4) the rule of law, including access to justice and domestic application of the human rights contained in each treaty, particularly by adopting legislative measures.

Common to Article 2 in the two human rights Covenants, nondiscrimination stands out as an over-riding principle with *immediate* application to all the rights contained in those instruments.¹¹ The Covenants prohibit arbitrary preferential or punitive treatment and oblige

States parties to undertake steps to ensure that rights be exercised without distinction or discrimination “of any kind [as to] race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹²

The nondiscrimination principle of implementation, whether generally or in application to a specific population segment, requires that the state also exert special efforts, in law and in fact, to ensure respect, protection and fulfillment of the human right to water for vulnerable, marginalized or historically disadvantaged sections of the population as a means of remedy or “positive discrimination,” “special temporary measures,” or “affirmative action.”¹³

Gender equality is a legal principle that is wider in concept than nondiscrimination, entailing also the recognition of, and appropriate response to women’s special needs simultaneous with their roles as domestic providers. International hard and soft law instruments elaborate the application of this over-riding principle in land and natural resource administration, including women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing.¹⁴

In the case of economic, social and cultural rights (ESCR), of which land and natural resource tenure are closely tied, these over-riding principles for implementing states’ human rights obligations involve also (5) the progressive realization of the rights by positive and nonretrogressive measures that realize “the constant improvement of living conditions,” especially for those deprived of the enjoyment of their ESC rights. Moreover, states are obligated also (6) to apply the maximum of available resources and, at least, to ensure the core content of the rights as an absolute minimum, regardless of the economic status of the country, and to engage in (7) international cooperation that ensures the respect, protection and fulfillment of human rights domestically and extraterritorially.

For our purposes, ICESCR serves as the principle source of these rights and implementation principles in treaty form.¹⁵ ICESCR’s Article 2.1 explains that states are required to undertake steps, individually and through international assistance and cooperation, especially economic and technical, progressively to achieve the full realization of the covenanted rights by all appropriate means. This obligation applies equally to the state able to provide assistance, as well as to the state receiving it, as in cases of disaster or serious economic decline. Thus, states party to ICESCR bear an obligation to apply these principles extraterritorially and in their international relations not only to respect, protect and fulfill ESCRs within the state’s jurisdiction and/or territory of effective control. Any state’s treaty obligations, as well as all of the codified human rights, impose an extraterritorial obligation on the state, regardless if the state is acting unilaterally or jointly with others. Thus, states are required to ensure that their actions as members of international organizations take due account of the right to water. Accordingly, states that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, are required to take steps to ensure that the rights and corresponding obligations discussed here are taken into account in their lending policies, credit agreements and other international practices.

Among the obligations of states’ parties to human rights treaties is to monitor and report implementation of the treaty, submitting initial and periodic reports to the treaty-monitoring bodies. Comprehensive monitoring of the human right to adequate housing requires assessing each entitlement (element) in light of the rights and corresponding obligations arising from the seven over-riding human rights treaty-implementation principles:

Seven Over-riding Treaty-Implementation Principles

- Self-determination
- Nondiscrimination

- Gender equality
- Rule of law
- Progressive realization (nonregressivity/nonretrogression)
- Maximum of available resources
- International cooperation

The normative approach provided in the international human rights system prevails upon the monitor to pose a number of relevant questions related to implementation not only of the specific content of the particular right, but also these over-riding principles common to the principal human rights treaties and applicable to all rights. Consistent with the requirements of modern statecraft, these human rights obligations provide mandatory guidance for governance—that is, legislation, regulations, policies and practices, etc.—that affects the enjoyment of all of the above-specified rights related to land and natural resource tenure.

While the state's obligation to respect, protect and fulfill all human rights is subject to certain conditions such as international cooperation and progressive realization, the state is obliged to ensure that it meets its "core obligations" under each of the rights. CESCR has confirmed that such a core obligation is for states to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights with immediate effect.¹⁶

When a state fails to uphold its obligations to respect, protect and fulfill through application of all of the over-riding principles, then the state is responsible for a violation. Such a violation could be either one of outright commission by the state or any of its representatives, or it could be by way of omission; that is, by failing to act according to its obligations. A violation by commission or omission entitles the victim/affected persons to remedy, which the state is required to effect through various means. (See remedy and reparations below.)

Which Related Rights Are Established in Human Rights Law?

The Human Right to Life

Article 6.1 of the ICCPR provides that everyone has the inherent right to life, prohibits the arbitrary deprivation of life and that the right to life shall be protected by law. The Human Rights Committee has interpreted the right to life as:

.... the supreme right from which no derogation is permitted even in time of public emergency, which threatens the life of the nation. The protection against arbitrary deprivation of life is of paramount importance....State Parties should take measures not only to prevent and punish deprivation of life by criminal act, but also to prevent arbitrary killings by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore the law must strictly control and limit the circumstances in which a person may be deprived of life by such authorities.

The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights,¹⁷ foremost among them the right to food, water and human dignity.¹⁸ The right to water is also inextricably related to the right to the highest attainable standard of health (Art. 12, para. 1)¹⁹ and the rights to adequate housing and adequate food (Art. 11, para. 1).²⁰

Nonetheless, acts of war and other mass violence continue to plague humanity and sacrifice the lives of thousands of innocent human beings every year.²¹ States parties to the human rights treaties are obliged to take measures not only to prevent and punish deprivation of life by criminal acts, but they also have the duty to prevent arbitrary killing by their own forces. The deprivation of life by the authorities of the state is a grave violation. The law must strictly control and limit the circumstances in which such authorities may deprive a person of her/his life.²² The state bears a particular obligation to prevent, prosecute and punish public or

private actors who engage in violence at any scale as part of disputes over land and natural resources tenure.

The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures to respect, protect and fulfill the right to a minimum standard of living “consistent with human dignity.” Thus States parties are required to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate hunger, malnutrition and the consequences of drought and other threats to human life, particularly through good governance in land and resources tenure. The Aarhus Convention, in force in the European Community, asserts that “adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself” which encompasses “the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations...”²³

Certain well-known domestic court cases have given examples of violations to the right to life through deprivation of land and natural resources, including through forced evictions.²⁴ Regional human rights courts also have reached similar rulings where impeded resources access have had a negative impact on access to food, and hence violated the right to life recognized by Article 4 of the American Convention on Human Rights (ACHR).²⁵

Some domestic courts actually have overruled statutory law authorizing local officials forcibly to evict urban dwellers occupying public property without due process safeguards. In such a case the right to life was found to encompass the right to housing. The Court found that forcibly to evict “pavement dwellers” would deprive them of their means of livelihood, because of the proximity of the dwellings to their place of employment. The court resolved that to “[d]eprive a person of his right to livelihood, you shall have deprived him of his life,” and therefore “if the petitioners are evicted from their dwellings, they will be deprived of their livelihood.”²⁶

The Human Right to a Clean and Healthy Environment

In international human rights law, the right to a clean and safe environment is derived from other human rights codified in treaty form. The CESCR’s GC No. 4 on the right to adequate housing recognizes that “all beneficiaries of the right to adequate housing should have sustainable access to natural and common resources...”²⁷ The legal interpretation of the human right to health also recognizes that the right to health embraces a wide range of socioeconomic factors that promote conditions for a healthy life, including a healthy environment.²⁸ Other soft law instruments reaffirm the human rights dimensions of the environment. Principle 1 of the Stockholm Declaration of 1972 states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.” The subsequent Rio Declaration (1992) affirms that “human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature” (Principle 1). The Rio Declaration also reaffirms states’ “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction” (Principle 2) and recognizes that, “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

In that connection, too, CESCR recognizes and explicit “right to healthy natural and workplace environments.” The fulfillment of that right entails the state ensuring the “the improvement of all aspects of environmental and industrial hygiene”²⁹ involves, among other

actions, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.³⁰

While respecting, protecting and fulfilling the right to health, states are required also to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline.³¹

In addition, access to, and quality of the environment in human rights law establishes entitlements such that "all peoples shall freely dispose of their wealth and natural resources." This right, arising from the right to self-determination (see below), shall be exercised "in the exclusive interest of the people" and "in no case shall a people be deprived of it..."³²

Several regional human rights treaties contain an explicit pronouncement of a human right to (a clean and healthy) environment. The African Charter establishes that states parties "shall undertake to eliminate all forms of foreign exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."³³ The European Charter of Fundamental Rights (2000) calls for "a high level of environmental protection, and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."³⁴ In the Inter-American Human Rights System, the "Protocol of San Salvador" (not yet in force) explicitly recognizes a "Right to a Healthy Environment," providing that "Everyone shall have the right to live in a healthy environment and to have access to basic public services" and that "the States Parties shall promote the protection, preservation, and improvement of the environment."³⁵

The European Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention) recognizes that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations." The Convention recognizes further that, "to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights," Thus, as with all rights, the right to a clean and healthy environment is interdependent and indivisible with other rights, including the human rights to participation³⁶ and the right to information.³⁷

Although regional in scope, the Aarhus Convention carries a global significance. It also forms the legal elaboration of Principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities. (See the right to participation below.)

With its thematic focus on a particularly affected group, the nonbinding UN Declaration on the Rights of Indigenous Peoples, *recognizes* that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment."³⁸ The Declaration proclaims that "Indigenous peoples have the right to the conservation and protection of the environment..."³⁹ and that "states shall provide effective mechanisms for just and fair redress for any such activities, and appropriate

measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”⁴⁰

The Right to Property

The right to own and freely dispose of property is a well-established “natural right” in Western legal traditions. Customary human rights law recognizes that “Everyone has the right to own property alone as well as in association with others” and that “No one shall be arbitrarily deprived of his property.”⁴¹ However when the right is applied to land and natural resources, wider and competing interests enter into consideration and often are the subject of restrictions on the private and absolute right to own and dispose of land and natural resources, as well as principles of the social function of property.

Applying the full complement of human rights contained in the UDHR, ICERD guarantees “the right to own property alone as well as in association with others.”⁴² The ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries recognizes the need for special measures to accommodate forms other than private, freehold tenure among indigenous communities, including measures “for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”⁴³

On the subject of a right to landed property, ILO 169 stipulates that “lands” entails “the concept of territories, which covers the total environment of the areas [that] the peoples concerned occupy or otherwise use.” The treaty also establishes that state parties’ obligation such that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”⁴⁴ States parties to the Convention recognize “the rights of ownership and possession of the peoples concerned over the lands [that] they traditionally occupy” and to protect such property rights by law,⁴⁵ and violations are subject to judicial and material remedy.⁴⁶

The normative content of the right to adequate housing is much more than a right to property, and involves other nonmaterial and ambient dimensions. However, CESCR’s GC No. 4 acknowledges the various types of tenure relations to the possession of property, including freehold, leasehold, communal tenure, etc. The state is required to respect, protect and fulfill each applicable form of tenure under law, including to “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.”⁴⁷

The Human Right to an Adequate Standard of Living

Conceptually linked to life and livelihood, the right to an “adequate standard of living” is enshrined in law under ICESCR’s Article 11, encompassing more specific rights including the human rights to adequate housing, adequate food and water. Already in 1962, ILO Convention No. 117 on Social Policy set forth obligations of states and competent authorities for the promotion of productive capacity and the improvement of living standards of agricultural producers. ILO 117 explicitly clarifies that duty to include “the supervision of tenancy arrangements and of working conditions with a view to securing for tenants and labourers the highest practicable standards of living...”⁴⁸

In addition to the need to ensure that persons with special needs and disabilities have access to adequate food, water, accessible housing and other basic material needs, states must ensure also that support services, including appropriate facilities and devices are available for

such persons, in order to assist them to increase their level of independence in their daily living and to exercise their rights.⁴⁹

Legal recognition and guarantees for the protection of indigenous and tribal rights to land and other resources are not only good governance issues, but also human rights treaty obligations of the state. Such enterprises as logging and mining concessions often are granted without consulting or even informing indigenous and tribal groups, while depleting their access to the means of an adequate standard of living. Such practiced would constitute a breach of a state's obligations under certain treaties.

For all persons subject to discrimination and bearers of the human right to an adequate standard of living, the corresponding obligation of the state includes to ensure equal/equitable access to tenure-protected land and natural resources. Good governance in land and natural resource tenure is vital for women in ways that link to their rights to land, property and adequate housing.

Deprivation of access to land and natural resources may be result from direct or indirect acts of state or government. For example, when the authorities decide not to assign a needed teacher to a rural area, families may lose their will and ability to remain on their land in search of another way to educate the children. Many rural communities tire of knowing that their children are keen to learn when such facilities are denied to them, while the state and governance provide for others instead. Similarly, when rural and land-based communities have no health services to ensure their physical well-being, many are forced to leave their lands as well as a consequence of the state's violation of other right by *omission*.⁵⁰

The Human Right to Adequate Housing

ICERD actually contains the historic first codification of the human right to housing,⁵¹ which was earlier recognized in UDHR (Article 25). GC No. 4 on the right to housing provides the normative content of the right enshrined in Article 11 of the ICESCR, which places adequate housing within the broader right to an adequate standard of living. That GC provides seven elements of the right to housing, all of which must present in order for the housing to be considered adequate in international human rights law. These minimum requirements begin with the property dimension of adequate housing, recognizing that legal guaranteed security of tenure is an entitlement essential to the enjoyment of the right, and that the state's corresponding obligation is to protection against dispossession and forced eviction from housing or land.

International law prohibitions against forced eviction characterize the practice variously as "prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law,"⁵² and as "a gross violation of human rights."⁵³

The exceptional circumstances required in international human rights law for any eviction to be legally permissible include features of governance that apply the state's treaty obligations corresponding to the human right to adequate housing, including appropriate procedural protection and due process as essential. The required procedural protections include ensuring: (a) an opportunity for genuine consultation for and 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 must 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.⁵⁴ In addition, evictions should never result in individuals being rendered homeless or vulnerable to the violation of other human rights. Explaining the corresponding state obligations in this aspect, CESCR instructs that “Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”

Beyond secure tenure and freedom from dispossession, GC No. 4 stipulates also that other elements equally indispensable include the availability of services, materials, facilities and infrastructure such that the housing contain certain facilities essential for health, security, comfort and nutrition. “All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.”⁵⁵ This entitlement recognizes the link between the right to adequate housing and the enjoyment of both public goods and services and environmental goods and services, which should be understood to include land and natural resources required for adequate housing.

Also related to land and natural resources and no less essential to the enjoyment of the right to adequate housing are affordability, habitability, accessibility, location and cultural adequacy. Governance of land and natural resource tenure can have a profound effect on these entitlements in societies where natural materials constitute the chief sources of building materials for housing. As noted above, governance of land and natural resources can have a direct effect on environmental quality and safety, thus, affect housing habitability and forming the nexus between the human right to adequate housing and the right to health.⁵⁶

A person’s accessibility to adequate housing is particularly relevant to land and natural resource tenure in the case of impending or actual natural disasters; whereas, people living in disaster-prone areas and other vulnerable groups should be ensured some degree of priority consideration in the housing sphere. (See vulnerable groups below.) Law, policy, budgets, regulations and official practices related to land and natural resources should take fully into account the special housing needs of such groups. CESCR advises that, “Within many States parties, increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.”⁵⁷

The location entitlement of adequate housing also relies on good governance in land and natural resources tenure. The location of housing should be consistent with the other human needs and rights to access services and facilities, including environmental and recreational facilities. Housing should not be built without access to such services and facilities, on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

The housing rights entitlement to cultural adequacy bears a material dimension in relation to the way that housing is constructed. The building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. “Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.”⁵⁸ The connection to the governance of land and natural resource tenure become clear, particularly in certain minority and/or indigenous communities, whose special relationship to land and environment, including the

use and maintenance of natural resources, and must be respected, protected and fulfilled as a matter of their survival as a community.⁵⁹

The Human Right to Water

The human right to water, enshrined in Articles 11 and 12 of ICESCR, is also a component of the broader right to an adequate standard of living, but also is closely linked with other rights. Water is not only an essential human need for domestic consumption, for eating, drinking, bathing, and sanitation, for example, but also for more social and public needs, such as securing livelihoods (the right to decent work) and enjoying certain cultural practices and the right to take part in cultural life (Article 15).

Human rights treaties guaranteeing equitable access to material needs of life for particular groups also specifically mention water rights and state obligations related to water.⁶⁰ In ensuring adequate and equitable access to water for the various essential purposes of human life, states are required to give priority to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the other rights contained in ICESCR.⁶¹

The human right to water for all means that, while the adequacy of water required for the right to water may vary according to different conditions, it always should be subject to standard factors in all circumstances:

Availability: The water supply for each person must be sufficient and regular for personal and domestic uses continuous for personal and domestic uses.⁶² The quantity of water available for each person should correspond to WHO guidelines as a minimum,⁶³ while some individuals and groups may also require additional water due to health, climate, and work conditions.

Quality: The water required for each personal or domestic use must be safe and, therefore, free from micro-organisms, chemical substances and radiological hazards that threaten a person's health.⁶⁴ Furthermore, water should be of acceptable characteristics (e.g., color, odor and taste) for each personal or domestic use.

Accessibility: Water and water facilities and services have to be accessible to everyone wherever they live, and without discrimination of any kind, in accordance with the over-riding principles of human rights treaty implementation. The state bears the obligation to ensure accessibility in its four coinciding dimensions:

Physical accessibility: Water, and adequate water facilities and services, must be within safe physical reach for each household, educational institution and workplace and serve all segments of the population.⁶⁵

Economic accessibility: Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other human needs and, consequently, human rights.

Information accessibility: Accessibility includes the right to seek, receive and impart information concerning water issues, as well as to seek, understand and manage relevant information. (See the right to information below.)

Nondiscrimination: As a standard feature of implementing any human right, water and water facilities and services must be accessible to all without arbitrary discrimination by the state, its agents or other third parties.⁶⁶

The authoritative interpretation of the human right to water in CESCR's GC No. 15 guides the state on what to do and how to implement its corresponding obligations. The obligation to

respect the right to water requires that states refrain from interfering directly or indirectly with the enjoyment of the right to water such as any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from state-owned or state-managed facilities, or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.⁶⁷

Protecting the right to water is the obligation that requires states parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Such third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, adopting the necessary and effective legislative and other measures to restrain third parties from denying, compromising or interfering with equal access to adequate water in any way. To prevent such abuses the required regulatory system should include independent monitoring, genuine public participation and imposition of penalties for noncompliance.⁶⁸

The obligation to *fulfil* the right to water can be understood as facilitating, promoting and providing access to water. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. Promotion, in this context, means that the state is obliged to take steps to ensure appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States are obliged also to fulfill (provide) the right to water when a person or a group is unable, for reasons beyond their control, to realize that right by the means at their disposal.

In order to fulfill the right to water, states must ensure that water is affordable through measures that may include: (a) the use of appropriate low-cost techniques and technologies; (b) pricing policies such as free or low-cost water; and (c) income supplements or subsidies, especially for disadvantaged groups. In order to ensure these measures and the application of the human rights methodology required under treaty, the state should adopt a corresponding policy. Failure to do so may constitute a violation, or series of violations. Adhering to the obligations to respect, protect and fulfill the right to water, the state should sufficiently recognize this right within the national political and legal systems, by way of legislation and enforcement.⁶⁹

The rights water bears a particular international cooperation dimension; whereby, states have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction or effective control must not deprive another country, or residents of another country, of the ability to realize the right to water for all persons in its jurisdiction and effective control.⁷⁰

The Human Right to Adequate Food

The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. Therefore, realizing the right to adequate food is a process, not simply a matter of possessing food, and cannot be interpreted in a narrow or restrictive sense that equates the food with a minimum package of calories and other specific nutrients. The state's obligation relative to the right to adequate food has to be realized progressively. However, states bear a core obligation to take the necessary action to mitigate and alleviate hunger, even in times of natural or other disasters.⁷¹

Adequacy of food means that realization of the right involves the fulfillment of a variety of conditions, including that the food is available, accessible, sustainable and of good quality. The notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*, implying food being accessible for both present and future generations.

The core content of the right to adequate food implies that food be available in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable according to the criteria of the local culture. The accessibility of adequate food should be sustainable and not interfere with the enjoyment of other human rights.

Availability and accessibility of food refer to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning processing, distribution and market systems that can move food from the site of production to where it is needed. Accessibility encompasses both economic and physical accessibility, which means that personal or household financial costs associated with food acquisition for an adequate diet should not threaten or compromise other human needs and human rights. Economic accessibility relates to any acquisition pattern or entitlement through which people gain access to their food. It is a measure by which food access is deemed to be satisfactory.

The state must ensure that disadvantaged or vulnerable groups such as landless persons and other particularly impoverished segments of the population are served through special food, nutrition and/or distribution programs. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need to receive priority consideration. Especially with respect to good governance in land and natural resources tenure, states must address the particular vulnerability of many communities of indigenous peoples whose access to their ancestral lands may be threatened or foreclosed.

To meet these criteria and avoid violations by omission or commission, the state should formulate and implement a national strategy on the right to food. Such a national strategy should address critical issues and vulnerable populations, and establish measures to ensure effective functioning of all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security. Such a strategy in force should ensure the sustainable management and use of natural and other resources for food at the international, national, regional, local and household levels.

The Human Right to Health

ICESCR's Article 12.1 provides a definition of the right to health, while Article 12.2 illustrates examples of states' obligations to respect, protect and fulfill the right. The human right to the highest attainable standard of mental and physical health contains both freedoms and entitlements: The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, nonconsensual medical treatment and experimentation. The actual entitlements include the right to a system of health protection that ensures equal opportunity for people to enjoy the highest attainable level of mental and physical health.

Similar to the normative content of other rights such as food and water, the human right to health in all its forms and at all levels contains interrelated and essential elements:

Availability: Functioning public health and health-care facilities, goods, services and programs must be present in sufficient quantity within the state and its territory. As noted above, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, essential drugs,⁷² hospitals, clinics and other

health-related personnel and facilities are essential to the respect, protection and fulfillment of the human right to health.

Accessibility: Health facilities, goods and services have to be accessible to everyone without discrimination, within the states jurisdiction or territory of effective control. This means also applying the over-riding principle of nondiscrimination in the provision of facilities, goods and services on the basis of geographical location, so as not to disadvantage people and communities in rural, informal or traditionally managed areas. The economic dimension of accessibility relates to affordability of health care for all. Payment for health-care services, as well as services related to the underlying determinants of health deriving from natural resources, has to be based on the principle of equity. Thus, states must ensure that health-related goods, services and facilities, whether privately or publicly administered, are accessible for all, including socially disadvantaged groups. Accessibility of health and health care relates also to information such that the right to seek, receive and impart information and ideas⁷³ concerning health issues. However, accessibility of information should not compromise the right to privacy in this context, such that personal health data always be treated with confidentiality.

Acceptability: All health facilities, goods and services—including those related to the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities—must be respectful of medical ethics and culturally appropriate for all individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements.

Quality: As well as being culturally acceptable, health facilities, goods and services, including those related to the governance of land and natural resources that form underlying factors of health, must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water and adequate and environmentally safe sanitation.

The world health situation has changed dramatically over time and the notion of health correspondingly has become substantially wider in scope. More risks to health are known and addressed, and public related concerns as social violence and armed conflict.⁷⁴ Environmental hygiene, as an aspect of the right to health,⁷⁵ encompasses taking steps on a nondiscriminatory basis to prevent threats to health from unsafe and toxic water conditions.⁷⁶

Therefore, the right to health, defined as an inclusive right, incorporates not only to effective and appropriate health care, but also involves the underlying determinants of health. These relate to safe and potable water access, adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, and effective participation of the concerned population in all health-related decision making at the community, national and international levels.

Related also to policies and programs in other sectors (e.g., for national food sovereignty), the state's national health strategy should address critical issues and measures in regard to all aspects of the food system, the various fields of health, education, housing, employment and social security for the sustainability of physical health. States are required to ensure the most sustainable management and use of natural and other resources for food at the international, regional, national, local and household levels.

Emerging international law, national and regional jurisprudence, common practice by states have established the need to take special measures in relation to indigenous peoples' right to health.⁷⁷ Appropriate health services should be culturally appropriate, considering traditional preventive care, therapeutic and healing practices and medicines. That not only requires

effective participation in a collective manner of governance for affected community, but also requires the preservation and conservation of vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples. The Committee notes that, in indigenous communities, the health of the individual has a collective dimension, and health often is linked to the health of the community or society as a whole. The state scrupulously should avoid development-related activities that lead to the displacement of land-based communities and indigenous peoples from their traditional territories and environment, especially when against their will, denying them their sources of nutrition and impeding their symbiotic relationship with their lands and natural resources, has a deleterious effect on their health.

The Human Right to Self-determination

The principle of equal rights and self-determination of peoples is considered to have been a general principle of international law arising from common state practice long before the founding of the League of Nations. However, self-determination was first codified as a human right in the Charter of the United Nations (1945), which provides self-determination as among the purposes of the United Nations.⁷⁸

States have progressively reaffirmed and legally defined the principle of self-determination through the UN system since its founding.⁷⁹ The material significance of self-determination as it relates to land and natural resources is further elaborated in the Covenants on human rights adopted in 1966.⁸⁰ The common Article 1.2 of both the ICCPR and ICESCR sets forth that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

How concerned persons/communities exercise an effective role in determining the terms by which they realize many human rights is also a subject of the inalienable right of self-determination. Self-determination is the right of peoples, not of states. It is the state, however, that is the legal personality obliged to ensure the respect, protection, defense, promotion and fulfillment of self-determination as a duty under public international law, as well as the essential legitimizing factor of the state itself.⁸¹

The self-determination of peoples bears distinct internal and external aspects. An internal aspect arises from all peoples' right to pursue freely their economic, social and cultural development without outside interference. With respect to self-determination in modern statecraft, governments are supposed to represent the whole population without distinction as to race, color, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.⁸² States have an obligation to respect, protect and fulfill, to the extent possible, the right to self-determination for those peoples denied that inalienable right. This right entails corresponding duties for all states and the international community as a whole, as well as its institutions.

The concept of, and right to self-determination manifest in a spectrum of types and expressions of effective local control over land, natural resources and their development. Relations within a community and territory may involve either external or internal self-determination; that is, national independence as in the formal distinction of a self-determination unit with its own internationally recognized borders, a self-determination unit within the internationally recognized borders of a unitary state, or a community's⁸³ effective control over land, resources, developments and relations affecting it.⁸⁴

In its GC No. 12 on “the right of self-determination of peoples” (1984), The UN Human Rights Committee (HRC) gave its guidance on the corresponding obligations of states and the centrality and interdependence of self-determination:

...the right of self-determination is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of all rights.

The right—and over-riding treaty implementation principle—of self-determination imposes specific obligations on states not only in relation to peoples domestically, but toward all peoples who have been unable to exercise or have been deprived of the possibility of exercising their right to self-determination.

*Self-determination applied to communities*⁸⁵

The right and over-riding principle of self-determination is subject to both international legal and popular claims to the same, including self-determined development at the community level for the autonomous management of their lands and natural resources.

Self-determination becomes as vital as any other need that grounds other human rights, including those other over-riding principles of rule of law, nondiscrimination, gender equality and international cooperation consistent with all human rights. In their collective dimension, these all become community *needs* and, consequently, *rights* insofar as their absence leads to erosion and violation of a bundle of individual, stand-alone rights and can lead to the deprivation or demise of a community as such.

That having been said, and recognizing that self-determination can be either internal or external, the international public law term of art "internal self-determination unit" applies in the case of a group or community, and is subject to case-by-case interpretation. This could refer to the rightful place of a minority or an indigenous people. It could conceivably apply also to a community of rural or urban poor, particularly if their survival and/or well-being is threatened and their self-determination then becomes a need/right and requisite to the realization of other rights (life, adequate housing, culture, health, etc.).

The Human Right to Freedom from Discrimination

Like self-determination, an inalienable human right common to the major legal systems throughout the world, a fundamental requisite of justice is the absence of discrimination on any arbitrary basis. Thus, along with self-determination, the right to freedom from discrimination also was codified first in the Charter of the United Nations.⁸⁶

Given its centrality, the principle of nondiscrimination, consequently, is an over-riding human rights principle embodied in the first articles of each major human rights treaty. Nondiscrimination, and its corresponding State obligation to ensure nondiscrimination, are enshrined in the preamble of all international declarations and resolutions concerned with human rights matters, governance and the relations between and among States, nations and peoples.

Discrimination typically results in deprivation of human needs and rights. ICERD defines discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin [that] has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁸⁷

In the Convention and its negotiation history, an important distinction emerges: While it is the obligation of States' parties and their governments to combat both "racism" and "racial discrimination," the former is a state of mind that should be eradicated through measures including education and other efforts to bring about a cultural and social transformation toward antidiscrimination. The latter, "racial discrimination" is the actual activation of prejudice which, in its manifestation, is a material violation of the rights of others. Any official action or omission of practicing or condoning racial discrimination is a violation of an *immediate* obligation of the state, not subject to "progressive realization."

Inherent in the principle of nondiscrimination is the understanding that programs formally providing advantages to persons and groups historically subject to discrimination are not considered to constitute unlawful discrimination. On the contrary, international public law calls upon States to provide additional assistance to those persons and groups subject to past and/or present discrimination, as in corrective/positive discrimination or affirmative action programs that redress foregoing patterns of deprivation.⁸⁸ Therefore, in the field of land and natural resource tenure, governments should take measures to ensure that vulnerable and disadvantaged groups are provided for in policies and programs to combat discrimination. Accordingly, the UN Habitat Governing Council has recognized the need for further such measures.⁸⁹ The UN Special Rapporteur on adequate housing also has provided guidance on how to avoid discrimination in development projects involving displacement.⁹⁰

The Human Right to Development

Arising from the fundamental tenets of the UN Charter and the UN's purposes,⁹¹ the right to development is inextricably linked to the over-riding treaty-implementation principle human right to self-determination.⁹²

Development is a comprehensive economic, social, cultural and political process that seeks the constant improvement of the well-being for the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the resulting benefits.⁹³ The right to development, as defined in the UN Declaration on the Right to Development, recognizes also that development and its corresponding rights have an international dimension as well.

The international community has recognized that the "human person is the central subject of development and should be the active participant and beneficiary of the right to development."⁹⁴ The Declaration on the Right to Development also recognizes corresponding responsibilities of "all human beings." The right to development also contains duties as well as *rights* of states, to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population.⁹⁵ Therefore, the over-riding principle of international cooperation bears a special importance to states' realizing their own right to development on behalf of their constituents. However, the Declaration recognizes that states bear "the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development."

Relevant to development as such, the Declaration enshrines the recognition that "All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights."⁹⁶ Thus, development, by definition, is the condition that combines respect, protection and fulfillment of all human rights.

Other Congruent Rights

As the above definitions indicate, the human rights and corresponding obligations for good governance in land and human rights tenure are multifaceted. Clearly, understanding the

human rights framework necessarily entails several core entitlements related to substantive aspects and processes necessarily to respect, protect and fulfill the associated human rights. Certain of these essential elements are recognized in international law as distinct human rights human rights guarantee these processes and, therefore, human rights methodology provides further criteria for states to know the *how* of implementing their treaty obligations related to administration of land and natural resources tenure. To the extent that these distinct human rights are indispensable to the implementation of the above-mentioned rights, those can be called “congruent rights” or “transversal rights.”

Information, Education, Capability and Capacity Building

As noted in connection to the above-cited rights, individuals and communities must have access to appropriate data, documents and intellectual resources that affect their right to obtain adequate housing. Having access to appropriate data means being informed about potential industrial and natural hazards, infrastructure, planning design, availability of services and natural resources and other factors that affect the right. The state has the obligation to ensure that laws and policies facilitate such access and ward against denial of the right to adequate housing. Unimpeded opportunity and reasonable means for public debate and expression with respect of the process of government, administration and finance procedures, market mechanisms and the activities of the private sector and others engaged in the housing sphere are presupposed in a democratic society.

Individuals and communities should have access to technical assistance and other means to enable them to improve their living standards and fully realize their economic, cultural and social rights and development potential. The state, for its part, should strive to promote and provide for catalysts and mechanisms for the same, including efforts to ensure that all citizens are aware of procedural measures available toward defending and realizing her/his right to adequate housing. This concept is sometimes also referred to as empowerment, which is defined as a process that enhances the ability of disadvantaged (“powerless”) individuals or groups to challenge and change (in their favor) existing power relationships that place them in subordinate economic, social and political positions.⁹⁷

The Human Right to Information

UDHR affirms that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁹⁸ ICESCR guarantees also that states recognize “the right of everyone to take part in cultural life; to enjoy the benefits of scientific progress and its applications.”⁹⁹ However, the principle instrument that established the right to information and corresponding state obligations is ICCPR, which sets forth: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹⁰⁰ Regional treaties also guarantee the human right to information in their context.¹⁰¹

In particular, victims/affected persons possess rights to remedy and reparations that include relevant information concerning violations and reparation mechanisms.¹⁰² States adopting and participating in the Desertification Convention (1994), as well as soft-law instruments such as the Habitat II Agenda (1996) and World Summit on Sustainable Development Plan of Implementation (2002) have echoed the commitment to ensure rights to information to people affected in the development process.¹⁰³ Women and vulnerable groups are particularly recognized for their special needs for, and traditional exclusion from access to information in processes related to land and natural resources tenure.¹⁰⁴

The Human Right to Education

Likewise, respect, protection and fulfillment of the human right to education is essential to manage of information indispensable to achieve other human rights in the context of land and natural resource tenure administration. ICESCR establishes this right with corresponding state obligation, including the guarantee of free and compulsory elementary education.¹⁰⁵

Human rights law establishes that education in all its forms and at all levels shall exhibit the certain interrelated and essential features:¹⁰⁶

Availability: Education must be available so that functioning educational institutions and programs are present in sufficient quantity within the state's effective territory. More specifically related to land and natural resource tenure is the presence of such elements as proper sanitation facilities for both sexes, safe drinking water and information technology;

Accessibility: Educational institutions and programs must be accessible to everyone, without discrimination, within the jurisdiction of the state, and must ensure both physical and economic accessibility for all.

Acceptability: The form and substance of education, including curricula and teaching methods, have to be acceptable in the sense that they are relevant, culturally appropriate and of good quality.

Adaptability: Education has to be flexible and subject to periodic review, evaluation and reform so that it can meet the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings and address the major challenge emerging in the field of land and natural resource tenure administration. The international community has affirmed the essential requirement of education as a right in order to achieve development.¹⁰⁷

As recognized in international practice, the implementation of the right to education is not only a theoretical process of accumulating data, but one of developing capability and capacity in a way that enables the enjoyment of other human rights. ICESCR obliges states to direct education "to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms." States have agreed "that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace."¹⁰⁸ ICERD further recognizes the right to "to education and training..."¹⁰⁹

In the sphere of land natural resource tenure administration, the tripartite constituents of the ILO have recognized the need for state authorities to promote productive capacity and improve living standards of agricultural producers, including through the supervision of tenancy arrangements and of working conditions "with a view to securing for tenants and labourers the highest practicable standards of living..."¹¹⁰ In declaratory instruments such as the FAO Peasants Charter (1979),¹¹¹ Habitat II +5 Declaration (2001),¹¹² the World Summit on Sustainable Development Plan of Implementation (2002)¹¹³ and the FAO Voluntary Guidelines on the Right to Adequate Food (2004), states expressed the need and commitment to "support investment in human resource development such as health, education, literacy and other skills training, which are essential to sustainable development, including agriculture, fisheries, forestry and rural development."¹¹⁴

Participation, Association, Peaceful Assembly and Self-expression

Effective participation in decision making is essential to the fulfillment of all human rights.¹¹⁵ At all levels of the decision-making process in respect of the equitable and effective administration

of land and natural resources, individuals and communities must be able to express and share their views, they must be consulted and be able to contribute substantively to such processes. The state must ensure access to decision-making centers and effectively combat fraudulent and corrupt practices.

Everyone must be free to engage and form an association with others in accordance with one's own interest and consistent with the norms of human rights and democratic society. As affirmed in ICCPR and several instruments of the ILO, for effective self-expression, it is often necessary for people and communities to exercise rights to freedom of association and assembly, thereby organizing themselves according to their shared interests in order to make their voices heard. Such association can serve many other purposes as well, including sharing vital information, capacities and technologies, and advocating measures toward solving housing and land rights problems.¹¹⁶

Everyone shall have the right to hold opinions without interference, and everyone has the right to freedom of expression. Within certain restrictions in the interest of human rights and nondiscrimination in a democratic society, the right to freedom of expression includes the freedom and capacity to seek, receive and impart information and ideas of all kinds and in all forms.¹¹⁷ The state must ensure that land and natural resource tenure laws, practices and policies to not preclude free expression, including cultural and religious diversity. Moreover, the right to self-expression must be respected, protected, promoted and fulfilled to ensure harmonious and effective design, implementation and maintenance of the community, for which necessarily addressing the interests of multiple parties is only possible through cooperation in consideration of their views.

Education, information, free expression and related capabilities are prerequisites to the enjoyment of the human rights to participation, which, in turn, transverses all of the other rights affected by land and natural resource tenure administration. The human right to participation in government and public life was first recognized and then codified to address electoral processes and access to public service.¹¹⁸

However, in actual application, the right has a much broader scope. It has come to mean that effective participation includes cooperation, coordination and partnership at all levels between and among affected parties, especially nongovernmental organizations; local populations, both women and men; and particularly resource users, including farmers and pastoralists and their representative organizations, in policy planning, decision making, and implementation and review of programs affecting land and natural resources.¹¹⁹ Further commitments by states and guidance for implementing these rights in the context of land and natural resource governance are found in such instruments as Vancouver Declaration on Human Settlements (1976),¹²⁰ the Declaration on the Right to Development (1986),¹²¹ Agenda 21 (1992),¹²² the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001),¹²³ the Habitat II Agenda,¹²⁴ and regional instruments.¹²⁵ The FAO's Peasants Charter (1979) is also explicit as to the meaning of the rights to expression, association, assembly and participation, in particular the inclusion of vulnerable, grassroots and marginalized groups, with local and national government in decision making related to land reform.¹²⁶

Right to Freedom of Movement and Related Rights

Every person lawfully within the territory of a state has the right to liberty of movement and freedom to choose his residence within that territory, and everyone shall be free to leave any country, including his own. Movement and resettlement may be essential to survival in the case of natural or human-made disaster.

Good governance in land and natural resource tenure may affect a bundle of human rights of affected persons facing displacement. Any resettlement arrangement, whatever the cause, must be consensual, fair and adequate to meet individual and collective needs. It must provide sufficient access to the sources of livelihood, productive land, infrastructure, social services and civic amenities, including for aliens and refugees. Moreover, there must also be fair and adequate remedy and reparations for damage, loss and costs,¹²⁷ particularly when human caused. It is expressly prohibited for a state to *refouler* a person back across an international border when that person faces a well-founded fear of persecution upon her/his return.¹²⁸

Human Rights to Privacy and Security of Person

Every man, woman, youth and child has the right to live and conduct her/his private life in a secure environment and place of residence that is protected from threats or acts that compromise her/his mental or physical well-being or integrity. The state, correspondingly, must address the security needs of the community once determined, in particular the needs of women, the elderly, children and other vulnerable individuals and groups. As one of its principal tasks and functions, the state must then ensure physical security to the extent possible, refraining from threat to, or interference in personal and private activity in the home that does not infringe upon the corresponding rights of others. However, domestic violence, in particular, and all forms of violence against women and child abuse must be prosecuted as any other violent crime.

Customary and human rights treaty law have established the rights to security of person and freedom from interference with his privacy, family, home or correspondence,¹²⁹ including through specific regional instruments.¹³⁰ Thus, these two distinct rights are closely intertwined and often cited together. Often, too, these rights are linked to the safety and privacy of the home. Thus, to these rights are inherently connected to the enjoyment of the human right to adequate housing, which good governance in land and natural resource tenure directly affects, as noted above. The explicit human rights recognized in the Universal Declaration of Human Rights, Article 3 are formulated such that "Everyone has the right to life, liberty and security of person," thus linking security rights and obligations to the first of the series of rights provided in this framework: the human right to life itself.

Human Rights Law and Humanitarian Law

Most human rights and corresponding state obligations apply in all situations. Certain human rights are nonderogable, which means that they cannot be relegated to a lower priority or be violated even in states of emergency or time of war.¹³¹

International humanitarian law—also known as the law of war—governs the conduct of armed conflict and seeks to limit its effects, including those violating human rights and those affecting land and natural resource tenure and their governance. At the core of IHL are the four Geneva Conventions of 1949 and their Additional Protocols (Protocol I and II) of 1977.¹³² Among the most significant for the protection of land and natural resource tenure is the Fourth Geneva Convention of 1949 (Civilians Convention), which lays out rules to protect civilians, including civilians in occupied territory, from the consequences of war. Common Article 3 (so named because it applies to all the Geneva Conventions) specifically accounts for conflict of a noninternational nature including civil wars, internal conflicts that cross borders into other states, and internal conflicts where third party states or multinational forces intervene. The Additional Protocols I and II of 1977, which develop and supplement the Geneva Conventions and relate to the protection of victims of armed conflicts in international and noninternational conflicts, respectively. Several other treaties also prohibit or restrict the use of specific weapons due to their disproportionate damage to civilian populations, environment, land, property and natural resources.¹³³

The Geneva Conventions are today universally applicable, all States having ratified them. Notably, the Fourth Geneva Convention for the protection of civilians was preceded by the Hague Regulations of 1899 and 1907 and their annexes, which first codified the laws and customs of war on land and today are also considered customary international humanitarian law (customary IHL). That means that they are universally binding, regardless of whether or not a state has ratified the treaty.¹³⁴ It is generally accepted that the Geneva Conventions and the Hague Regulations are both complimentary and supplementary. The Civilians Convention offers additional provisions, such as those contained in article 49, prohibiting population transfer and members of an occupying Power settling in an occupied territory). As for the Additional Protocols, even if some states still have not ratified them, many of their provisions are considered as being part of customary IHL, including all the provisions on the conduct of hostilities.¹³⁵

At the heart of IHL are the principles of distinction, necessity and proportionality, which oblige parties to a conflict, including both state and nonstate actors, to target only military objectives¹³⁶ and not the civilian population, individual civilians or civilian objects¹³⁷. While it is understood that civilian casualties cannot always be avoided during conflict, IHL requires parties to distinguish between combatants and civilians and military targets and civilian objects and to take precautions in attacks to minimize the injury and damage caused to the latter.¹³⁸ Failing to make this distinction in military conduct and to accurately assess the necessity of an attack and weigh the anticipated military advantage against the damage caused to civilians and civilian infrastructure constitutes an indiscriminate attack or an excessive and disproportionate use of force.¹³⁹ For example, bombardment and missile strikes that treat a number of clearly separated and distinct military objectives located in an urban area or rural village as a single military objective are strictly prohibited.

The only circumstance in which a party may target civilians is if they assume a direct role in hostilities, making them *de facto* combatants¹⁴⁰. Likewise, the only circumstance in which attacks on civilian objects are lawful is if, at the time of the attack, they were used for military purposes and their destruction serves a definite military purpose, fulfilling the requirement of military "necessity." Still, the proportionality principle governs attacks on all legitimate military objectives in order to prohibit excessive effect in relation to the concrete and direct military advantage sought.¹⁴¹ Because military forces are proscribed special obligations toward the civilian population in IHL, they bear an extremely heavy burden of proof that any injury to civilians and civilian infrastructure was necessary. Indeed, jurists and international tribunals have firmly negated assertions that military necessity prevails over other considerations proscribed in IHL or human rights law.

IHL is then explicit in its protection of the HRAH. Both the Hague Regulations and the Fourth Geneva Convention provide that a State's military must respect and protect civilian property, both private and public, that it cannot confiscate such property unless that action fulfils the strict criterion of military necessity, in which case any confiscation would be temporary, and that destruction and appropriation of property is forbidden and constitutes a grave breach of the laws of war unless rendered absolutely necessary.¹⁴²

Grave breaches of international humanitarian law are defined in the Geneva Conventions as well as the Additional Protocol I and amount to war crimes in international law.¹⁴³ Parties to the treaty are obliged to pursue and punish suspected perpetrators before their own courts. Thus, each state is also obliged to enact legislation to provide for punishment of any person who has committed such a grave breach, regardless of the nationality of the perpetrator or the place where the offense was committed.¹⁴⁴

IHL also forbids damage to property as a preventive means and expressly forbids military

forces from destroying property with the intent to deter, terrify, or take revenge against the civilian population. Injury to property intended to cause permanent or prolonged damage is also expressly forbidden.

In addition to recognizing attacks on civilian persons in their homes or other shelters and attacks on, or damage and destruction of civilian property (private and public) as war crimes, IHL recognizes other acts that are violations of the HRAH or could potentially lead to violations of land and natural resource tenure such that constitute war crimes and/or crimes against humanity. For example, according to Article 147 of the Fourth Geneva Convention, “unlawful deportation or transfer” constitutes a grave breach to the Convention. War crimes also encompass other serious violations of international humanitarian norms applicable in international and noninternational armed conflict.

The Applicability of Human Rights Law in Armed Conflict

While international conflict is regulated by IHL, many judicial bodies, including the ICJ, have addressed the applicability of international human rights law during armed conflict, both international and noninternational. The Court first affirmed the applicability of international human rights law during armed conflicts in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: “The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant, whereby certain provisions may be derogated from in a time of national emergency.”¹⁴⁵ Important recent ICJ decisions and Advisory Opinions have affirmed the applicability of international human rights law to situations of military operations and occupation.¹⁴⁶ Other international courts, including the ECtHR¹⁴⁷ and the Inter-American Court of Human Rights (IACHR)¹⁴⁸ have applied the human rights treaties over which they have jurisdiction to situations of armed conflict.

The UN Human Rights Committee has also recognized the applicability of ICCPR to both international and noninternational conflicts, including situations of occupation.¹⁴⁹ Various interpretations address the relationship between human rights law and IHL, as applied in intergovernmental resolutions and domestic legal systems, supporting the idea that human rights law should be considered a complimentary system to IHL, or at least that human rights law must be considered alongside IHL in certain situations. The “complimentary” and “harmonious” approach considers that each system should be considered simultaneously and that neither should take precedent. Another approach, called *lex specialis*, recognises that IHL was designed specifically to regulate conduct during conflict and therefore, while human rights law may still be applied and considered, IHL takes precedence as the specific law that should prevail over certain other general rules. Yet another approach simply considers that the application of the two must be considered on a case-by-case basis, according to the most appropriate norm for the situation of concern.¹⁵⁰

However, some do hold that the complementarity of human rights law and IHL is challenged by the fact that state parties engaged in armed conflict can derogate from (suspend or restrict) certain human rights norms in narrowly defined circumstances, and only to the extent strictly required by the situation.¹⁵¹ In proclaiming a state of emergency, a government is still bound by the rule of law and this situation should not become a law unto itself.

While legal questions persist regarding the extent of the application of human rights law during armed conflict, few dissent from the position that human rights and their corresponding state obligations do apply in times of war.

Relevant to natural resources in time of conflict, some human rights instruments are explicit as to the continuing obligations of state to respect, protect and fulfill human rights. CESCR

has noted that during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law.¹⁵² This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.¹⁵³

Criminal Law

The development of international criminal law concerned with the worst forms of violation also has addressed numerous aspects of land and natural resource management, defining related obligations and liabilities. The representatives of the nine occupied countries, exiled in London, adopted a joint resolution in 1942 stating, *inter alia*, that the occupying Power:

from the beginning of the present conflict, has erected regimes of terror in the occupied territories...characterized in particular by...mass expulsions...¹⁵⁴

On 17 October 1942, the Polish Cabinet in Exile issued a decree on the punishment of war crimes committed in Poland, which provided that life imprisonment or the death penalty would be imposed "if such actions caused death, special suffering, deportation or transfer of population."¹⁵⁵

In reaction to the flagrant violations of the laws and customs of war during the Second World War, the Allied Powers established the International Military Tribunal (IMT) to try the principle war criminals. The IMT Charter introduced into international law the notions of crimes against the peace, war crimes and crimes against humanity. It defined "war crimes" as "Murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory..."¹⁵⁶

Article 6 (c) of the Charter defined "crimes against humanity" as:

Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war...in execution of or in connection with any crime within the jurisdiction of the Tribunal...¹⁵⁷

The notion of "crimes against humanity" differs from war crimes in that crimes against humanity can be committed before or after, as well as during, a war and against any population, including the perpetrator's own population.

In addition to the four Powers approving the IMT Charter, 19 other States acceded to it as well. Furthermore, the United Nations General Assembly affirmed the principles of international law recognized by the IMT Charter and reflected by the judgment of the Tribunal.¹⁵⁸ The Nuremberg judgment held that population transfers and colonization in occupied territory constituted both a war crime and a crime against humanity, and that deportation of persons was illegal.¹⁵⁹

The General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity in its resolution 2391 on 26 November 1968, and it entered into force on 11 November 1970. The Convention is relevant to the legal discussion concerning housing and land rights and evictions as it extends the concept of war crimes and crimes against humanity as defined by the Charter of the Nuremberg Tribunal. It also embodies the principle that no time limits to prosecution shall apply to the crimes referred to in the Convention, "irrespective of the date of their commission."¹⁶⁰ In accordance with article 1(b), the Convention includes the following acts among crimes against humanity:

...eviction by armed attack or occupation¹⁶¹ and inhumane acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed....

Article 1 (b) also specifies that crimes against humanity may be committed "in time of war or in time of peace", thus delinking it from the ambiguity of article 6 (c) of the Charter of the Nuremberg Tribunal, which could be interpreted as not extending to the same category of crimes committed in time of peace not followed by war.

Article 2 stresses that inaction, as distinct from active involvement, on the part of the State authorities in not preventing the commission of international crimes is sufficient to bring those persons responsible within the ambit of the Convention.

International Criminal Court

In July 2000, States adopted the Rome Statute of the International Criminal Court.¹⁶² The Statute limits the jurisdiction of the Court to the most serious crimes of concern to the international community as a whole, which the Statute classifies as:

- (a) The crime of genocide,
- (b) Crimes against humanity,
- (c) War crimes,
- (d) The crime of aggression.¹⁶³

The Statute defines "crime against humanity" to mean any of eleven acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."¹⁶⁴ Related to the purposes of this review, these crimes include:

- (d) Deportation or forcible transfer of population;...
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender..., or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;...
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

For the purpose of Article 7, paragraph 1, "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

The ICC also holds jurisdiction over war crimes, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."¹⁶⁵ The Rome Statute defines such crimes in a detailed list. Those that pertain to the violations of rights to housing, food, natural resources etc. and related aspects of land and civic services include:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;...
 - (vii) Unlawful deportation or transfer or unlawful confinement;...
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:...
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;...

- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;...
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;...
- (xii) Declaring that no quarter will be given;...
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;...
- (xvi) Pillaging a town or place, even when taken by assault;...
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions...

Endnotes

¹ Social function: in theory, a social function is "the contribution made by any phenomenon to a larger system of which the phenomenon is a part." [Thomas Ford Houtt, *Dictionary of Modern Sociology* (Totowa NJ: Littlefield Adams 1969), p. 139.] In practice, the social function of a thing is its use or application to the benefit of the greater society, in particular, prioritizing those with the greatest need. Thus, the social function of a property, good, resource or service is realized when it is applied to satisfy a general social need or the unmet need of a segment of society. The social function of property imposes "the obligation of the owner to use the property for the satisfaction of his needs, but also the collective needs of society; as such, it refers to the rules regulating the relationship between the needs of the individual and the needs of society." [Theo van Banning, *The Human Right to Property* (Antwerp, Intersentia/Hart, 2002), pp. 147–48.]

Islamic philosophy, prophetic authority and law recognize ownership, but reserve water, pasture and fire as common entitlement of the people with a social function, restricting their privatization. [The Prophet Muhammad (PBUH) famously enjoined: "Muslims are to share in these three things: water, pasture, and fire." 15. Hadith related by Abu-Dawud, Ibn Majah, and al-Khallal. See *Islamset*, at: <http://www.islamset.com/env/contenv.html>.]

Many state constitutions recognize the social function of property. The 1988 Brazilian Constitution explicitly recognizes the right to decent housing, and provides that property, whether urban or rural, "shall fulfill its social function" (Article 5, §XXIII). The Constitution provides for the state's duties in ensuring the social function of property (Articles 183, 184, 186). Unoccupied buildings or unproductive land, thus, become susceptible to expropriation in the social interest. The Egyptian Constitution also explicitly recognizes the social function of property (Articles 30 and 32).

The South African Constitution (1996), stands as an example of the right to property functioning as a means to realize other human rights, as well as of the state's obligation in the process.⁴⁵ The Constitution provides that "no law may permit arbitrary deprivation" (Article 25.1). Expropriation is permitted, if prescribed by law, in the public interest or for a public purpose and it is subject to compensation (Article 25.2). The same article defines the public interest as including "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" (para. 4). It establishes that compensation should reflect "an equitable balance between the public interest and the interests of those affected" (para. 3) and specifies the duty of the State to fulfil the right to property in respect to land: "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." Thus, a person or community whose land tenure is insecure as a consequence of *apartheid* is entitled "either to tenure which is legally secure or to comparable redress" (25.6).

The Constitution of Ireland (*Bunreacht Na hÉireann*) of 1937, recognizes the right to property as fundamental, but that its "exercise...ought, in civil society, to be regulated by the principles of social justice" and that "The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good" (Article 43.2(1) and 43.2(2)). The *Grundgesetz* (Basic Law) of the Federal Republic of Germany (1949, amended upon reunification in 1990) recognizes that: "Property entails obligations. Its use shall also serve the public good" (Art. 14(2)).

The social function of property as a concept of international law can be found in the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The first Article of its first Protocol, entitled the "Protection of Property" (1952), provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." The Protocol recognizes the states party's right "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."

The American Convention on Human Rights (ACHR) guarantees everyone's "right to the use and enjoyment of his property," but provides also that "The law may subordinate such use and enjoyment to the interest of society" Article 21.1). See also CESCR General Comment No. 17: "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15)," thirty-fifth session (2005), para. 35 and "CESCR statement "Human Rights and Intellectual Property", Statement by the

Committee on Economic, Social and Cultural Rights, twenty-seventh session, 29 November 2001, E/C.12/2001/15, at paragraph 9.

Article 17 of the UDHR provides that “everyone has the right to own property alone as well as in association with others.” The universal acceptance of “general interest” as a lawful limitation to the right to property (with the fulfillment of other conditions), as also illustrated by the concept of “eminent domain,” places the social function of property in the realm of customary norms such that guarantee the realization of the core content of other economic, social and cultural rights.

2 FAO, 2007

3 “Summary of the survey of economic and social developments in the Economic and Social Commission for Western Asia region, 2008–2009,” E/2009/20, 24 April 2009, p.1, at:
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/314/07/PDF/N0931407.pdf?OpenElement>.

4 Commission on Human Rights resolution 2000/64, para. 1.

5 Commission on Human Rights resolution 2001/72, preamble.

6 Len Doyle and Ian Gough, *A Theory of Human Need* (New York: Guilford Press, 1991).

7 Article 5.d.(v) “The right to own property alone as well as in association with others.”

8 This typology has now been recognized by treaty monitoring bodies as well as regional human rights enforcement bodies. See General Comments of the Committee on Economic, Social and Cultural Rights and, for example, Inter-American Court of Human Rights, *Case Velázquez Rodríguez*, Judgment of 29 July 1988, Series C, No. 4, and *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples’ Rights, Communication No. 155/96, October 2001.

9 UN Charter Articles 55 and 56 provide that all members pledge themselves to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction.

10 The duty to protect applies to all human rights: Human Rights Committee, General Comment 31 on Article 2, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. HRI/GEN/1/Rev.6, para 8.

11 For further guidance on the legal obligations to immediate implementation of the nondiscrimination principle applied to housing rights, see the report of the Special Rapporteur on Adequate Housing E/CN.4/2002/59.

12 ICESCR, Article 2.2; ICCPR, Article 2.1.

13 CEDaW, General recommendation No. 25: temporary special measures, para. 17.

14 “Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing,” Commission on Human Rights Resolution 2005/25 (2005); World Summit on Sustainable Development Plan of Implementation (2002), 7(d); Beijing Platform for Action: “Action for Equality, Development and Peace” (September 1995), paras. 112, 113, 116, 117, 119, 120, 121 and 123; Declaration on the Elimination of Violence against Women (1993), Preamble and Articles 2 and 4.

15 Article 2, paragraph 1, and articles 11, paragraph 1, and 23 of ICESCR.

16 General Comment No. 3 (1990).

17 UNDHR, ICCPR and ICESCR.

18 HRC GC 6, the right to water, para. 15.

19 See general comment No. 14 (2000) on the right to the highest attainable standard of health, paragraphs 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 51.

20 CESCR General Comment No. 4 (1991), para. 8(b). See also the report by Commission on Human Rights’ Special Rapporteur Miloon Kothari on adequate housing as a component of the right to an adequate standard of living, E/CN.4/2002/59; and Special Rapporteur Jean Ziegler on the right to food, E/CN.4/2002/58.

21 HRC GC 6, the right to water, para. 2.

22 *Ibid.*, para. 3.

23 Convention on Access to Information, Public Participation In Decision Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25 June 1998, preamble.

24 The High Court of Botswana found that the refusal to issue hunting permits to pastoral people living in a game reserve, while terminating basic services (including food rations) there, was unlawful and, according to one judge, was “tantamount to condemning the remaining residents of the [reserve] to death by starvation” (para. 137); and found that such measures violated the pastoralists’ constitutional right to life. In a separate opinion by J. Phumaphi, *Sesana, Setlhobogwa and Others v Attorney General*, para. 137. See also Lorenzo Cotula, ed., *The Right to Food and Access to Natural Resources Using Human Rights Arguments and Mechanisms to Improve Resource Access for the Rural Poor* (Rome: FAO, 2008), p. 26.

25 Lorenzo Cotula, ed., *The Right to Food and Access to Natural Resources Using Human Rights Arguments and Mechanisms to Improve Resource Access for the Rural Poor* (Rome: FAO, 2008), p. 32.

26 Mumbai Supreme Court, *Olga Tellis v. Bombay Municipal Corporation* 73 A.I.R. 180 (1985), 193–94 (1986).

27 CESCR GC No. 4, para. 8(b).

28 CESCR General comment No. 14: The right to the highest attainable standard of health, paras. 4 and 11.

29 *Ibid.*, Article 12.2 (b).

30 The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”, as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments such as article 10 of the San Salvador Protocol to the American Convention on Human Rights.

31 CESCR GC No. 12, para. 36. See also ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161) and, more generally, The Rio Declaration on Environment and Development (1992), Principles 6, 7, 8, 11.

32 African Charter on Human and Peoples’ Rights (1981), Article 21.1.

33 African Charter on Human and Peoples’ Rights (1981), Article 21.1.

34 Article 36.

35 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
 36 "Protocol of San Salvador" (1988), Article 11, "Right to a Healthy Environment."
 37 ICCPR, Article 25.
 38 UN Declaration of the Rights of Indigenous Peoples, A/61/295, 13 September 2007, preamble.
 39 Ibid., Article 29.
 40 Ibid., Article 32.3
 41 UDHR, Article 17.1, 17.2.
 42 ICERD, 5.d(v).
 43 Article 4.
 44 ILO No. 169, Article 13.
 45 Article 14.
 46 Articles 17 and 18.
 47 General Comment No. 4, "the right to housing," para. 8(a).
 48 International Labour Organisation Convention No. 117 on Social Policy (Basic Aims and Standards) (1962), Article 4(d).
 49 Standard Rules on the Equalization of Opportunities for Persons with Disabilities (see note 6 above), Rule 4.
 50 Testimony of Luis Angel, "Colombia: The right of an adequate standard of living (food, shelter, water, clothing, health)," *IDP
 Voices*, at:
[http://www.internal-
 displacement.org/80257297004E5CC5/\(httpPages\)/4641C151995E6FF3C12572F8005458CE?OpenDocument](http://www.internal-displacement.org/80257297004E5CC5/(httpPages)/4641C151995E6FF3C12572F8005458CE?OpenDocument).
 51 With particular reference to the over-riding principle of nondiscrimination, ICERD provides: In compliance with the
 fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate
 racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or
 national or ethnic origin, to equality before the law, notably in the enjoyment of...(e) Economic, social and cultural rights,
 in particular: (iii) The right to housing...
 52 GC 4, para. 1 and GC 7, para. 18.
 53 Commission on Human Rights resolution 1993/77.
 54 GC 7, para. 15.
 55 GC 4, para. 8(b).
 56 *Health Principles of Housing* (Geneva, World Health Organization, 1990).
 57 GC 4, para. 8(e).
 58 Ibid., para. 8(g).
 59 Jayantha Perera, ed., *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia* (Manila:
 Asia Development Bank, 2009), at:
<http://www.adb.org/Documents/Books/Land-Cultural-Survival/land-cultural-survival.pdf>.
 60 For instance, Article 14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women
 stipulates that States parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to
 [...] water supply." The Convention on the Rights of the Child (Article 24, paragraph 2) requires States parties to combat
 disease and malnutrition "through the provision of adequate nutritious foods and clean drinking water."
 61 See World Summit on Sustainable Development, Plan of Implementation 2002, paragraph 25 (c).
 62 According to the CESCR's General Comment 15, "drinking" means water for consumption through beverages and
 foodstuffs. "Personal sanitation" means disposal of human excreta. Water is necessary for personal sanitation where
 water-based means are adopted. "Food preparation" includes food hygiene and preparation of foodstuffs, whether water
 is incorporated into, or comes into contact with, food. "Personal and household hygiene" means personal cleanliness and
 hygiene of the household environment. GC 15, para. 12.
 63 See J. Bartram and G. Howard, "Domestic water quantity, service level and health: what should be the goal for water and
 health sectors", WHO, 2002. See also P.H. Gleick, "Basic water requirements for human activities: meeting basic needs,"
Water International (1996), 21, pp. 83–92.
 64 WHO, *Guidelines for drinking water quality*, 2nd edition, vols. 1–3 (Geneva: WHO, 1993) provides water-quality criteria
 "intended to be used as a basis for the development of national standards that, if properly implemented, will ensure the
 safety of drinking water supplies through the elimination of, or reduction to a minimum concentration, of constituents of
 water that are known to be hazardous to health."
 65 See also General Comments No. 4 (1991), paragraph 8 (b), No. 13 (1999), paragraph 6 (a) and No. 14 (2000),
 paragraphs 8 (a) and (b). Household includes a permanent or semipermanent dwelling, or a temporary halting site.
 66 GC 15, para. 48.
 67 Ibid, para. 22.
 68 Ibid., para. 23.
 69 Ibid., para. 28.
 70 The Committee notes that the United Nations Convention on the Law of Non-Navigational Uses of Watercourses requires
 that social and human needs be taken into account in determining the equitable utilization of watercourses, that States
 parties take measures to prevent significant harm being caused, and, in the event of conflict, special regard must be given
 to the requirements of vital human needs: see articles 5, 7 and 10 of the Convention.
 71 As provided in ICESCR, Article 11, para. 2.
 72 See WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information, vol. 13, No. 4, 1999.
 73 International Covenant on Civil and Political Rights, Article 19.2.
 74 Common article 3 of the Geneva Conventions for the protection of war victims (1949); Additional Protocol I (1977) relating
 to the Protection of Victims of International Armed Conflicts, article 75 (2) (a); Additional Protocol II (1977) relating to the
 Protection of Victims of Non-International Armed Conflicts, article 4 (a).
 75 Under ICESCR, Article 12, para. 2 (b).
 76 See also paragraph 15, General Comment No. 14.

- ⁷⁷ Recent emerging international norms relevant to indigenous peoples include the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); articles 29 (c) and (d) and 30 of the Convention on the Rights of the Child (1989); article 8 (j) of the Convention on Biological Diversity (1992), recommending that States respect, preserve and maintain knowledge, innovation and practices of indigenous communities; Agenda 21 of the United Nations Conference on Environment and Development (1992), in particular chapter 26; and Part I, paragraph 20, of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive steps to ensure respect for all human rights of indigenous people, on the basis of non-discrimination. See also the preamble and article 3 of the United Nations Framework Convention on Climate Change (1992); and article 10 (2) (e) of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994). During recent years an increasing number of States have changed their constitutions and introduced legislation recognizing specific rights of indigenous peoples.
- ⁷⁸ Charter of the United Nations, 26 June 1945, Article 1(2): "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace..." The Charter's Article 55 stipulates further:
With a view to the creation of conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
- a. higher standards of living, full employment, and conditions of economic and social progress and development;
 - b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
 - c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
- ⁷⁹ For example, see Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), preamble and Article 7; "Permanent sovereignty over natural resources," General Assembly resolution 1803 (XVII) (1962), preamble and paras. 1–2, 5–7; International Convention on the Elimination of All Forms of Racism and Racial Discrimination (1965), Articles 1 and 5; Declaration on Social Progress and Development (1969), Articles 2, 3 and Part II; Declaration on Principles of International Law (1970), preamble and, esp., "The principle of equal rights and self-determination of peoples"; ECOSOC Declaration on Race and Racial Prejudice (1978), Articles 1, 3, 5 and 9 Declaration on the Right to Development (1986) preamble and Article 1, 6 and 8.
- ⁸⁰ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI), 16 December 1966 (entered into force 3 January 1976 in accordance with Article 27); Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI), 16 December 1966 (entered into force 23 March 1966 1976 in accordance with Article 49).
- ⁸¹ Consistent with the principle of the Universal Declaration of Human Rights, Article 21, which states that "the will of the people shall be the basis of the authority of government."
- ⁸² UN Committee on the Elimination of Racial Discrimination has provided its General Recommendation XXI on the right to self-determination, which provides a classical interpretation of this over-riding principle for application of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted in document A/51/18, at the Committee's forty-eighth session (1996).
- ⁸³ While a standard legal definition of nation and people remains a subject of debate, the International Court of Justice has offered criteria for a community, having distinct rights as "a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by the identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other," *Permanent Court of International Justice, The Greco-Bulgarian "Communities" Advisory Opinion No. 17*, 13 July 1939 (Leyden: Sijthoff, 1930), 21.
- ⁸⁴ For a comprehensive consideration of the human right of self-determination and its applications, see Hurst Hannum. *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1996).
- ⁸⁵ Legally defined as "A group of persons living in a given country or locality having a race, religion, language and tradition of their own and united in the identity of race, religion, language and tradition in a sentiment of solidarity, with a view to preserving traditions, maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other." *Permanent Court of International Justice, The Greco-Bulgarian "Communities," Advisory Opinion No. 17*, 31 July 1930 (Leyden: Sijthoff, 1930), p. 21.
- ⁸⁶ Charter of the United Nations, Preamble: "We the peoples of the United Nations...reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. Article 1.2: The Purposes of the United Nations are: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace..."; Article 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..."
- ⁸⁷ Article 1, International Convention on the Elimination of All Forms of Racial Discrimination, adopted by General Assembly resolution 2106 (XX) of 21 December 1965, entered into force, 4 January 1969.
- ⁸⁸ See Marjorie Cohn, "Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations," *Virginia Journal of International Law*, Vol. 43 (2002), 249–74.

- ⁸⁹ Governing Council of the United Nations Human Settlements Programme, resolution HSP/GC/RES/20/13, “Housing as a component of the right to an adequate standard of living for persons who are vulnerable and disadvantaged,” 8 April 2005.
- ⁹⁰ “Basic principles and guidelines on development-based evictions and displacement,” Annex I in “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context,” A/HRC/4/18, 5 February 2007.
- ⁹¹ UN Charter, *op. cit.*, Preamble and Article 2.1.
- ⁹² Declaration on the Right to Development, *op. cit.*, Preamble.
- ⁹³ Declaration on the Right to Development, G.A. res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).
- ⁹⁴ *Ibid.*, Article 2, para. 2.
- ⁹⁵ *Ibid.*, Article 2.
- ⁹⁶ *Ibid.*, Article 6, para. 2.
- ⁹⁷ Bina Agarwal, *In A Field of One's Own* (1994), p. 39.
- ⁹⁸ Universal Declaration of Human Rights (UDHR) (1948), Article 19.
- ⁹⁹ 15.1a, 15.1b.
- ¹⁰⁰ Article 19.2
- ¹⁰¹ African Charter on Human and Peoples’ Rights (1981), Article 9: 1: “Every individual shall have the right to receive information”; Arab Declaration on Sustainable Development for Human Settlements (Rabat Declaration) (1995): “General Principles and Goals...5. The youth are the main element of society’s development and production, must be provided with wide-ranging opportunities to exercise their right to education and training, and to secure work and adequate housing in order to start and maintain families. They must be enabled for effective and collective participation in all activities of sustainable development...”
- ¹⁰² “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations Humanitarian Law,” UN General Assembly, A/RES/60/147, 16 December 2005, Articles VII, VIII and X.
- ¹⁰³ Desertification Convention (1994), Article 10.2e: “National action programmes shall specify the respective roles of government, local communities and land users and the resources available and needed. They shall, *inter alia*...promote policies and strengthen institutional frameworks which develop cooperation and coordination, in a spirit of partnership, between the donor community, governments at all levels, local populations and community groups, and facilitate access by local populations to appropriate information and technology...”; Habitat Agenda, adopted by the second United Nations Conference on Human Settlements (Habitat II) (1996): “Article 45.k: Promoting equal access to reliable information, at the national, subnational and local levels, utilizing, where appropriate, modern communications technology and networks”; World Summit on Sustainable Development Plan of Implementation (2002), Article 11(e): “Support local authorities in elaborating slum upgrading programmes within the framework of urban development plans and facilitate access, particularly for the poor, to information on housing legislation.”
- ¹⁰⁴ Commission on Human Rights, “Women’s equal ownership of, access to and control over housing,” resolution 2000/13, para. 7: “Also encourages Governments, specialized agencies and other organizations of the United Nations system, international agencies and nongovernmental organizations to provide ... concerned persons, as appropriate, with information and human rights education concerning women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing...”; Declaration on Cities and Other Human Settlements in the New Millennium (Habitat II +5 United Nations General Assembly resolution S-25/2 [2001]): “38. Also resolve to empower the poor and vulnerable, *inter alia* through...enabling better access to information and good practices, including awareness of legal rights.”
- ¹⁰⁵ Article 13: “(1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. (2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right...”
- ¹⁰⁶ Committee on Economic, Social and Cultural Rights General comment No. 13, the right to education (art. 13) (1999).
- ¹⁰⁷ Declaration on the Right to Development (GAR 41/128 [1986]), Article 8: 1: “States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia* , equality of opportunity for all in their access to basic resources, education,... housing...”; Article 9: 1: “All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.”
- ¹⁰⁸ ICESCR, Article 13.1: “The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”
- ¹⁰⁹ ICERD, Article 5 (e) (v).
- ¹¹⁰ International Labour Organisation Convention No. 117 on Social Policy (Basic Aims and Standards) (1962) 4(d).
- ¹¹¹ Declaration of Principles and Programme of Action (Peasants Charter), adopted by World Conference on Agrarian Reform and Rural Development, Rome (July 1979): VII. Education, training and extension: “Education, including preschool and primary education, and training and extension services are fundamental needs for human development in rural areas and also for expansion and modernization of rural economies. Basic literacy and numeracy and free education for all children, including those in rural areas, deserve the highest priority. No less essential is the creation and expansion of training and extension networks for both men and women to develop and improve skills and to increase productivity and income-generating capabilities. There is also need for establishment of effective linkages between extension and

problem-solving research. In view of the great urgency of these needs and the magnitude of the task in relation to the resources of developing countries, low-cost techniques of education and training for short periods merit close consideration.

In formulating policies and programmes, governments should consider action to: *B. Broadening understanding of development personnel...*(i) Institute and strengthen continuing education programmes for men and women on equal terms, including retraining and reorientation for public officials, policy makers and administrators, technicians and educators, especially to improve their understanding of the conditions and problems of rural areas and their ability to respond to the needs of the rural poor. (ii) Expand education and extension training in agriculture, forestry and fisheries, especially at the middle level, with emphasis on problem-solving and adaptation to local conditions, drawing upon practical experience. (iii) Increase interaction and communication between development planners, rural educators, extension workers, and the members of broad-based people's organizations with respect to the objectives, design and implementation of rural development programmes. (iv) Recruit male and female extension and research workers and rural educators from rural communities and encourage them to return to work within their own communities. (v) Improve communication and interchange between research institutions, extension agencies and farmers, and devise ways for participation by representatives of peasant groups in setting research, extension and training priorities and in formulating grassroots education and training programmes that are more responsive to their needs. (vi) Make effective use of regional and national centres to serve as focal points for the dissemination of appropriate basic rural technological skills and crafts.

¹¹² Habitat II +5 United Nations General Assembly resolution S-25/2 (2001), Article 45: "We further commit ourselves to the objectives of: (f) Promoting gender-sensitive institutional and legal frameworks and capacity-building at the national and local levels conducive to civic engagement and broad-based participation in human settlements development; (h) Institutionalizing a participatory approach to sustainable human settlements development and management, based on a continuing dialogue among all actors involved in urban development (the public sector, the private sector and communities), especially women, persons with disabilities and indigenous people, including the interests of children and youth; (m) Facilitating participation by tenants in the management of public and community-based housing and by women and those belonging to vulnerable and disadvantaged groups in the planning and implementation of urban and rural development."

¹¹³ In the World Summit on Sustainable Development Plan of Implementation (2002), article 8, states promise to: "Take joint actions and improve efforts to work together at all levels to improve access to reliable and affordable energy services for sustainable development sufficient to facilitate the achievement of the millennium development goals, including the goal of halving the proportion of people in poverty by 2015, and as a means to generate other important services that mitigate poverty, bearing in mind that access to energy facilitates the eradication of poverty. This would include actions at all levels to: (a) by intensifying regional and international cooperation in support of national efforts, including through capacity-building, financial and technological assistance and innovative financing mechanisms, including at the micro and meso levels, recognizing the specific factors for providing access to the poor; (f)...by facilitating the creation of enabling environments and addressing capacity-building needs, with special attention to rural and isolated areas, as appropriate;...39. (a) Mobilize adequate and predictable financial resources, transfer of technologies and capacity-building at all levels..."

¹¹⁴ FAO Voluntary Guidelines on the Right to Adequate Food, November 2004, Guideline 11.1: Education and awareness raising.

¹¹⁵ Shue 1996.

¹¹⁶ ICESCR, Article 6; International Labour Organisation Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize (1948), ICCPR, Articles 21 and 22, paras. 1-3; ILO Convention No. 135 Workers' Representatives Convention (1971); Right to Organise and Collective Bargaining Convention (1949), Article 1.1, 1.2 (a) and (b); also ICERD, Article 5 (d) (ix), Article 5 (e) (ii).

¹¹⁷ ICCPR, Article 19.

¹¹⁸ UDHR, Article 21; ICCPR, Article 2; ICERD (1965), Article 5; African Charter on Human and Peoples' Rights (1981), Articles 8 and 13, paras. 1-3; American Convention on Human Rights (1969), Article 23, paras. 1-2. European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 11, paras. 1-2.

¹¹⁹ Desertification Convention (1994), Article 10.2e, 10.2f: "National action programmes shall specify the respective roles of government, local communities and land users and the resources available and needed. They shall, *inter alia*...promote policies and strengthen institutional frameworks which develop cooperation and coordination, in a spirit of partnership, between the donor community, governments at all levels, local populations and community groups, and facilitate access by local populations to appropriate information and technology...provide for effective participation at the local, national and regional levels of nongovernmental organizations and local populations, both women and men, particularly resource users, including farmers and pastoralists and their representative organizations, in policy planning, decision-making, and implementation and review of national action programmes."

¹²⁰ Vancouver Declaration on Human Settlements (1976), II. General Principles...13; III. Guidelines for Action...10.

¹²¹ Declaration on the Right to Development UN General Assembly resolution 41/128 (1986), Articles 1.1 and 8.2.

¹²² Agenda 21, adopted at the United Nations World Conference on Environment and Development (UNCED) (1992), para. 7.20:

¹²³ Paras. 34, 102 and 108.

¹²⁴ Habitat Agenda, adopted by the second United Nations Conference on Human Settlements (Habitat II) (1996), Article 44.

¹²⁵ Such as the Arab Declaration on Sustainable Development for Human Settlements (Rabat Declaration) (1995), General Principles and Goals...3, 5 and 10; Commitments...9.

¹²⁶ Declaration of Principles and Programme of Action (Peasants Charter), adopted by World Conference on Agrarian Reform and Rural Development, Rome (July 1979), III. People's participation, A. Popular organization (i), (ii), (iii), (iv), (v) and (vi); B. Strengthening of local government, (i), (ii), (iii); C. Participation in agrarian reform, (i), (ii) and (iii).

¹²⁷ 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, A/60/147, 21 March 2006.

- ¹²⁸ Convention relating to the Status of Refugees (1951), "(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it..." and Article 33: Prohibition of expulsion or return ("*refoulement*"); also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Article 3.1: "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."
- ¹²⁹ UDHR, Article 12; ICCPR, Article 17.1; ICERD, Article (9b0) :
- ¹³⁰ European Charter of Fundamental Rights (2000), Article 7; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women Convention of Belém do Pará (1994), Articles 1, 2 and 7; American Convention on Human Rights (1969), Article 11; European Convention for Protection of Human Rights and Fundamental Freedoms (1950), Article 8.
- ¹³¹ Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). See also HRC GC No. 29: "States of Emergency (article 4)," CCPR/C/21/Rev.1/Add.11 (2001); and The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, 28 September 1984.
- ¹³² The First Geneva Convention on the wounded and the sick is the most recent version of its predecessors adopted in 1854, 1906 and 1929; the Second Geneva Convention protects wounded, sick and shipwrecked military personnel at sea during war and replaced the Hague Convention of 1907 for the Adaption to Maritime Warfare of the Principles of the Geneva Convention; the Third Geneva Convention applies to prisoners of war and replaced the Prisoners of War Convention of 1929.
- ¹³³ These include, among others, the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, as well as their various Protocols.
- ¹³⁴ "Unlike treaty law, customary international law is not written. To prove that a certain rule is customary one has to show that it is reflected in state practice and that there exists a conviction in the international community that such practice is required as a matter of law. In this context, "practice" relates to official state practice and therefore includes formal statements by states. A contrary practice by some states is possible because if this contrary practice is condemned by other states or denied by the government itself the original rule is actually confirmed", at: <http://www.icrc.org/eng/customary-law>.
- ¹³⁵ See Customary International Humanitarian Law, Jean-Marie Henckaerts & Louise Doswald-Beck (eds.), ICRC and Cambridge University Press (Vol I, 2009 ; Vol II, 2005, out of print), published as the result of a major international study into current state practice in international humanitarian law in order to identify customary law in this area. Presented in two volumes, it analyzes the customary rules of IHL and contains a detailed summary of relevant state practice throughout the world.
- ¹³⁶ Military objectives are defined as those objects that, by their nature, location, purpose or use, effectively contribute to military action, and whose total or partial destruction, capture or neutralization, in the current circumstances provides a definite military advantage.
- ¹³⁷ Everything that is not a military objective is considered a civilian property. In case of doubt, presumptions of civilian status and civilian object exist in IHL.
- ¹³⁸ The general IHL principle of precaution also requires each party to the conflict to give effective advance warning of attacks that may affect the civilian population, providing enough time and opportunity to evacuate safely, unless circumstances do not permit.
- ¹³⁹ Similarly prohibited are indiscriminate attacks including those actions that employ a method or means of combat that cannot be directed at a specific military objective, or employ a method or means of combat with effects that cannot be limited as required by IHL.
- ¹⁴⁰ Nils Meltzer, *Interpretive Guidance on the notion of direct participation in hostilities under IHL* (Geneva: International Committee of the Red Cross, 2009) aims to clarify the meaning and consequences of direct participation in hostilities under international humanitarian law (IHL).
- ¹⁴¹ Disproportionate attacks would be those that cause incidental civilian injury or loss of life, damage to civilian objects, or any combination thereof.
- ¹⁴² The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Annex Article 46 and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 53 and 147.
- ¹⁴³ Grave breaches are defined in First Geneva Convention, Article 50, Second Geneva Convention, Article 51, Third Geneva Convention, Article 130, Fourth Geneva Convention, Article 147, and Additional Protocol I, Articles 11 and 85.
- ¹⁴⁴ *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949*, Article 146. In addition, State Parties also have to take appropriate measures for the suppression of all acts violating the provisions of the Fourth Convention other than the grave breaches defined in article 147

- ¹⁴⁵ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, ICJ Reports (8 July 1996), at § 25.
- ¹⁴⁶ See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ Reports (9 July 2004), at § 106-113; and International Court of Justice, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports (19 December 2005), §. 216.
- ¹⁴⁷ European Court of Human Rights, *Cyprus v. Turkey*, Judgment (10 May 2001); European Court of Human Rights, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment (19 December 2002).
- ¹⁴⁸ Inter-American Court of Human Rights, *Bamaca Velásquez v. Guatemala*, Judgment (25 November 2000).
- ¹⁴⁹ UN Human Rights Committee, *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 11. Also Concluding observations of the Human Rights Committee: "The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war" – United States, UN Doc. CCPR/C/USA/CO/3 (2006), at § 10. "The State party should take all necessary steps to strengthen its capacity to protect civilians in the zones of armed conflict, especially women and children"- Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/3 (2006), at § 13. See also Israel, UN Doc. CCPR/CO/78/ISR (2003), Sri Lanka, UN Doc. CCPR/CO/79/LKA (2003), Colombia, UN Doc. CCPR/CO/80/COL (2004).
- ¹⁵⁰ For more details, see http://www.adh-geneva.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php
- ¹⁵¹ The ICCPR does allow for the possibility to derogate from obligations to respect, protect and fulfill certain rights, in particular circumstances that threaten the nation's existence, such as armed conflict, provided that the measures are strictly necessary and are rescinded as soon as the relevant circumstances ceases to exist. ICESCR too allows for limits to be placed on the guarantees of the Covenant in times of armed conflict.
- ¹⁵² GC 14: right to water, para. 22. The Committee For the interrelationship of human rights law and humanitarian law, the Committee notes the conclusions of the International Court of Justice in , paragraph 25.
- ¹⁵³ See articles 54 and 56, Additional Protocol I to the Geneva Conventions (1977), article 54, Additional Protocol II (1977), articles 20 and 46 of the third Geneva Convention of 12 August 1949, and common article 3 of the Geneva Conventions of 12 August 1949.
- ¹⁵⁴ Allied Declaration (Resolution) on German War Crimes, 12 January 1942. *Inter-Allied Review* (15 February 1942), at: <http://www.ibiblio.org/pha/policy/1942/420112a.html>.
- ¹⁵⁵ Louise W. Holborn, ed., *War and Peace Aims of the United Nations: 1 September 1939–31 December 1942* (Boston, World Peace Foundation, 1943), p. 462.
- ¹⁵⁶ Article 6 (b) of the Charter of the International Military Tribunal, in *International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal (IMT), Nuremberg, 1945–1946*, 42 vols. (London, H.M. Stationery Office, 1947–1949) vol. I, p. 11.
- ¹⁵⁷ Ibid.
- ¹⁵⁸ See General Assembly resolution 95 (1), adopted on 11 December 1946.
- ¹⁵⁹ Alfred M. de Zayas, "International law and mass population transfers," *Harvard International Law Journal*, vol. 16, No. 2 (1974), p. 214.
- ¹⁶⁰ For a detailed discussion of the Convention, see Robert H. Miller, "The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity," *American Journal of International Law*, vol. 65, No. 3 (July 1971), pp. 476–501.
- ¹⁶¹ Many participants in the negotiation of the Convention strongly approved inclusion of this particular inhuman act "as covering some of the most evil crimes against humanity [that] were being committed at present." Ibid., p. 490.
- ¹⁶² "Rome Statute of the International Criminal Court," UN Doc. 2187 U.N.T.S. 90, entered into force 1 July 2002.
- ¹⁶³ The General Assembly and its Special Committee on the Question of Defining Aggression arrived at a legal definition of aggression, which the Special Committee adopted by consensus and the General Assembly adopted without a vote in 1974: United Nations General Assembly resolution 3314 (XXIX), "Definition of Aggression" defines the crime as follows: "Article 1: Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition...."
- Article 3: Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."
- However, as the Security Council has not yet adopted the legal definition of the crime of aggression, the Rome Statute only provides for the Court's jurisdiction over acts constituting aggression in that event and with the Security Council's

determination of conditions under which the Court is to exercise jurisdiction. While the International Court of Justice has affirmed the principle that the Security Council's responsibilities relating to peace and security are "primary," but not "exclusive": Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, ICJ Reports 1962, p. 163. The International Court of Justice has noted that the existing definition of aggression in GA resolution 3314 "may be taken to reflect customary international law" and has found that the 3314 definition "marks a noteworthy success in achieving by consensus a definition of aggression": "Separate Opinion of Judge Elaraby," *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, at:

http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_opinions_elaraby_20051219.pdf.

¹⁶⁴ Rome Statute, op. cit., Article 7 "Crimes against Humanity," which include: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

¹⁶⁵ Rome Statute, op. cit., Article 8 "War Crimes."