

Contribution on The right to adequate housing for Indigenous Peoples by the New Wind Association

On human rights related to indigenous tenure and its registration

Summary

UN High Commissioner for Human Rights has observed that "according to estimates, between 280 million and 300 million people worldwide have been affected by development-related displacement over the past 20 years". "Economic and social rights, including the rights to food, housing, water, health, work and an adequate standard of living, are directly affected". For example "the right to adequate food may be violated whenever access to or use of productive land is restricted for those whose access to food depends on food production from land, such as [...] indigenous peoples." (1)

"Land-related decision-making that ignores human rights standards often leads to the forcible eviction or displacement of people" and "in many instances [...] national laws and court decisions run counter to human rights obligations." (2) One crucial problem in this respect are the unequal cultures of official registration which discriminate against diverse such ways by which lands, tenures, homes and living places have been held and used by countless poor ethnic and of indigenous communities to secure their human rights which remain violated under such official registration.

ICESCR States parties have recognised rights to adequate housing and living conditions also to indigenous people and have approved UNDRIP and other related commitments.

In practice the states tend however to act as if such prevailing 'modern ways' registering rights, houses and addresses under which the 'modern' society has captured the ancestral lands of indigenous people away from them often by force, would still secure equal rights to them when our land registration somehow covers them registering for some of them addresses with some rights.

But with such registration of lands, homes and houses the problem remains whether it treats equally different life-heritages, who may have had other criteria than the prevalent modern registration standards for justified ways of holding the land and using it for living.

Does the culture of prevailing 'modern' land registration treat indigenous cultures of living in culturally equal ways in respect to their human rights including their rights to their own diverse cultures?

As communities have lived and fulfilled their economic, social and cultural human rights by their indigenous ways of holding and using the lands and habitats for living, how does the modern land and ownership registration culture treat those human rights of the indigenous communities ?

If the land registration gets binding legal force but is not itself derived from human rights to adequate food, housing and living conditions, does not such legal force of registration undermine those human rights?

When a state party officially recognises the rights to lands for indigenous peoples or ethnic minorities in principle, it may often seem that what else is needed in addition to this would be just that registration of recognised rights would need to be carried out to implement in practice the recognition of those rights. But the registration of land and related rights can serve many other purposes which do not fulfil human rights, not even respect or protect them.

Such registration which is not derived from how to secure human rights but is structured to serve or secure commercial or administrative control which leads to forced evictions, violates human rights and particularly so if states order the lands and homes to become registered in a manner which does not respect, fulfil or protect human rights.

As indigenous peoples have been recognised their rights to live in and to use the lands and areas which they have traditionally used for their living, thus the ways how they have traditionally understood those lands and areas as their living places or as their homes or habitats where they have been able to live their life are crucial for their right to adequate housing and for the tenure of the living conditions needed for it.

Thus to respect, protect and fulfil this right, indigenous communities' own understanding of what they have traditionally used and understood as their home, living place and habitat is crucial for determining their rights to tenure, home, adequate housing, shelter and living conditions and how these can be duly registered.

Indigenous communities' own understanding on their home, living place and habitat where they have traditionally lived needs thus to become expressed and respected in that how their customary rights of tenure, housing and living conditions have to be determined to become duly registered and implemented.

Communities' indigenous ways of living and housing are crucial for their human rights but also for that how people can build their homes and live as adapted to the regeneration of the biodiversity and living environments of their living places.

Their indigenous understanding of their local environments is crucial also for sustaining the diversity of life and living environment of the area as Earth's self-regenerating biodiverse ecosystems have become much less displaced and degraded in areas of indigenous communities' houses, settlements and living practices than in the areas of other people's houses, settlements and living practices.

Implementation of the international law has to authorise/empower Indigenous communities to give expression to what have been their customary or traditional rights to the lands or places where they have lived, to their homes and habitats to be registered for them so that they can continue to live in an area whose life they are adapted to live and which fulfils their human rights and sustains their way of life - securing their access for example to:

- Homes and living places that carry their indigenous life, seeds and crops by their self cultivation
- Continue to live in the area their community life by which they are adapted to live in such area
- Equal treatment of their customary tenures and sustainable traditional occupations of the area
- Water sources for drinking water for people and animals, for washing, cultivations and house construction
- Indigenous crops, plant varieties and varied types of soil, cultivation & land forms to which they are adapted
- Gathering of what they find from diverse wild plants and trees of the area for their food, healing and livelihood
- Leaves, shoots, twigs, forest plants & roots used for fertilising, soil integrity, to prevent pests & crop disease
- Soils, stones, woods, bamboo, straw and other materials needed to build and sustain customary homes
- Indigenous households sustained by materials from forest for fuel, fodder, household and cultivation needs & tools

Community protocols can be for example used for these purposes, see for example:

https://www.siemenuu.org/sites/default/files/adviasi_biocultural_community_protocol_study_ville-veikko_hirvela_nov_2018_0.pdf

Background

1. Registered status misused to justify the capture of land which violates the right to tenure and housing

States are obliged to act to secure "the right of everyone to [...] adequate food [...] and housing, and to the continuous improvement of living conditions" securing - also by "reforming agrarian systems" - the right "to be free from hunger" equally for all (3) so that "In no case may a people be deprived of its own means of subsistence". (4)

It is thus also in case of indigenous peoples recognised that - no matter whether or to what extent states otherwise recognise or respect their right to self-determination as peoples -, at least "indigenous peoples, have the right [...] to be secure in the enjoyment of their own means of subsistence [...] and to engage freely in all their traditional and other economic activities." (5)

As the lands and territories, by which the communities of indigenous peoples have traditionally lived belong often crucially to their own "means of subsistence", states must secure their lands as source of their nutrition and "ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples". (6) Indigenous peoples' cultural [...] rights associated with their ancestral lands" have to be respected and "protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity". (7)

People have "the right to remain in situ" in their habitat. But "the colonization of indigenous territories [...] by not recognizing them" leads to unregistered habitats of people "creating homes, culture and community life in the most adverse circumstances." (8) Such "informality is created [...] by the imposition of a particular system of laws, private markets [...] and resource allocation that neglects and violates the fundamental rights". "Colonizing systems of land and property have been imposed on indigenous peoples' relationships to land and housing". People "are deemed

illegal [...] and live under constant threat of forced removal from their homes" forced to "informal settlements, a subsidiary housing system to meet urgent needs that the formal housing system has failed to meet".(9)

The measures which states must take in respect to the lands where people have lived and which they have used for their subsistence, nutrition and living need to ensure that "notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction" and "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" taking into account that "instances of forced eviction are prima facie incompatible with" human rights. (10)

Evictions have "adverse impact on a wide range of internationally recognized human rights" and "States are obliged to protect all vulnerable persons and affected groups, irrespective of whether they hold title to home and property under domestic law" - through "conferring legal security of tenure upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land". (11) Measures taken in respect to the lands which are sources of nutrition need to be "derived from the normative content of the right to adequate food" with "guarantees of full and equal access to economic resources", "self-employment and work which provides [...] a decent living" without retrogradation in such access to land which secures human rights of the vulnerable people. (12)

2. Why registration and governance of tenure need to be revised to respect the rights of indigenous people

Also by "maintaining registries on rights in land (including forests)" states have to secure human rights of basic living conditions to be "especially fulfilled for vulnerable population groups" taking into account that "a particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened". (13) "States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights" (14) including also such their specific right "right to the lands, territories and resources" which "they possess by reason of [...] traditional occupation or use", (15) that:

- "Indigenous peoples shall not be forcibly removed from their lands or territories [...] without the free, prior and informed consent" . They "have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and [...] to uphold their responsibilities to future generations in this regard." (16)

- "States shall give legal recognition and protection to these lands, territories and resources [...] with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned" so as "to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources", "giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems." "Indigenous peoples shall have the right to participate in this process" and "to determine and develop priorities and strategies for the development or use of their lands or territories and other resources." (17)

What would need to be secured in land registration are the ways how indigenous or ethnic communities have been adapted and able to live and sustain the life of the land or forest as source of their food, water, housing, health, work, subsistence, identity or heritage of their life.

If communities' life in the area has been adapted to secure this for example by living with the soils, rivers, plants, trees and stones of the area as with their ancestors towards whom they have such responsibilities that it is their land in the sense that they belong to it - without owning it as anyone's private property -, if the inhabitants become then registered to get private ownership titles to the land as the only justification for continuing to live there, what happens to their sustainable local life-heritage ?

What happens to their human rights and to land or forest as source of their food, water, housing, health, work, subsistence, identity or heritage of their life ?

While the prevalent 'modern' forms of land registration have been developed and structured mainly to secure the value of property ownership and to administratively control officially by the state what happens on areas under state's administration, such purposes have however often not belonged at all to the local indigenous life-heritages or to the ways how they have lived and sustained the life in the area.

Often when the land or forests are transferred from the indigenous, locally adapted ways of holding and using the land

or forest through the registration under modern ownership titles and consequent administrative and globalised commercial control, the indigenous and local communities tend to lose their common sources of food, water, housing, health, work, subsistence, identity or heritage of their life. They lose also their ability to protect and sustain their biodiverse lands and forests as sources for fulfilling their human rights.

To implement the rights recognised for indigenous peoples in respect to the lands, forests, territories or resources which they have traditionally used, it is thus not enough that states carry out some registration of land, forests, ownership, houses or addresses and force them by laws to respect the results of registration - often by evicting them. If the registration does not address, respect and reflect the diverse ways how indigenous communities have traditionally understood, held and used the lands and forests for living as sources of their food, housing, livelihood, health, and life-heritage, the registration may not protect or fulfil the respective human rights.

States are responsible to use registration only as a one possible tool to secure and realise human rights. Indigenous peoples' rights to live in areas, habitats and habitations which are integral to their life-heritage, to their identity or to their own, indigenous means of subsistence are crucial to fulfil their human rights to adequate housing, food and other living conditions and tenures needed for these.

But whether, in which form and which way it may duly function as such a tool to secure human rights, requires careful examination and modification to adjust registration in each case into conditions and forms which can best respect, protect and realise human rights, including the rights of indigenous people.

Instead of deriving the registration processes from what respects, protects, fulfils or promotes human rights, States and courts tend rather to shape and use registration often oppositely to stigmatise indigenous or customary land or forest use or tenures which fulfil human rights as if they were illegal and thus justified to be evicted.

3. Examples of India and Myanmar - how registration laws threaten millions of indigenous people by forced eviction

In India and in Myanmar for example the lack of registration is used currently to threaten millions of indigenous forest dwellers of tribes and ethnic minority communities by forced eviction.

India's Supreme Court ordered on 13/2/2019 the states to ensure on millions of forest dwellers (over 1 million families) whose claims have got rejected "that where the rejection orders have been passed, eviction will be carried out". (18) India threatens thus to violate human rights of millions of indigenous tribal or other traditional forest dwellers in disregard of its obligations to secure adequate legal protection from forced eviction. But since even India's Tribal Ministry did not have proofs on legality and validity of such rejections, on 28/2/-19 the Court stayed its eviction order, directing states to clarify by 10 July whether the claims verification and rejection procedure has been completed observing due process of law. (19)

While India's Forest Right Act recognises in principle the rights of tribal forest communities to the forestlands which they have traditionally held, used or protected, it sets the registration of these traditional rights to depend from what modern officers in different committees may approve to be communities' traditional rights.

But how can modern officials know the determinations of traditional rights of forest communities better than the traditional forest communities themselves?

While India is obliged under the ICESCR to ensure that the totality of its land and forest laws and their enforcement mechanisms shall not allow forced evictions or discrimination of tribals, still the enforcement of laws seems to continue to threaten by forced eviction millions of people, with disproportionate percentage of them being indigenous tribal forest dwellers. (20) And while CDESCR, CERD and other UN authorities have repeatedly required India to demonstrate how it would fulfil its treaty obligations, India has simply neglected even its obligations to report to the CDESCR or CERD, etc.

As "forced evictions constitute a gross violation of international human rights and must be strictly prohibited in domestic law, properly enforced by courts", it was already severe violation how "the demolition of over 53,000 homes inforced evictions in 2017 in India". Also the "courts frequently perpetuate systemic discrimination and stigmatization" where people "are treated as violators of laws and "encroachers" on the land" instead of being respected "as rights holders entitled to remedies". "indigenous peoples have the right to the adjudication of their claims to the right to land and housing in a manner which respects their own laws and traditions". They are entitled to making "the claim to a right to live in dignity and security" in their habitat to which their life belongs as to its home. (21)

Myanmar's laws and governance on land and forest use and management have led to many violations of the obligations of human rights and environmental protection. While Myanmar has ratified ICESCR in 2017 still it adopted in 2018 a new "Vacant, Fallow and Virgin Land Management Law Amendment" which can endanger in future even further the communities' customary tenure rights to land and forests by registering lands in a way which does not respect their human rights or their environment.

UN Special Rapporteur on the situation of human rights in Myanmar noted in her latest report In respect to economic, social and cultural rights, that this new law "requires millions" of people of "communities to give up" the lands by which they live and to apply for registered use permits which may not be given to them. "If they continue to use their lands as they have done for generations", they can be punished by prison. "Nearly a third of the land in Myanmar has been classified as vacant, fallow or virgin, with the majority in ethnic states." Such law, by criminalising sustainable customary non-registered land use and "by denying people access to lands essential for their livelihood and culture and potentially making people landless [...] likely contravenes Myanmar's obligations under ICESCR" including the "prohibition of forced evictions". (22)

To respect its obligations under the ICESCR, Myanmar has thus "to immediately halt implementation of the amended VFV Law" and "stop all coercive measures used to appropriate land and ensure that proper compensation and livelihoods are provided to people who are resettled". While Myanmar "is obliged not to deliberately enact any retrogressive measures; laws such as the VFV Law undermine existing access to livelihoods, housing and culture, breaching this obligation" and particularly so as "ethnic minorities disproportionately suffer displacement, loss of livelihood and lack of access to healthcare". Millions of "people must not be deprived of essential food, primary healthcare or basic shelter". (23)

In ratifying ICESCR Myanmar declared that "in consistence with the Vienna Declaration and Programme of Action of 1993, the term "the right of self-determination" [...] does not apply to any section of people within a sovereign independent state and cannot be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign and independent state." (24) But like the Vienna Declaration and Programme of Action also make clear:

- States have to represent "the whole people belonging to the territory without distinction of any kind" (25), securing "the rights of persons belonging to minorities" so that they "may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law" with equal "right to enjoy their own culture [...] without interference or any form of discrimination." (26) States have "to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization." (27)

- "The promotion and protection of all human rights and fundamental freedoms must be considered as a priority", "the first responsibility of Governments". (28) States have "to ensure that persons belonging to minorities" are secured their equal, free and "full participation in all aspects of the political, economic, social, religious and cultural life" and "to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them." (29)

States remain thus obliged to secure people's own means of subsistence equally for all sections of people as their inalienable rights in a culturally equal way so that "in no case may a people be deprived of its own means of subsistence" (30) which Myanmar has thus responsibility also in case of indigenous and minority peoples to secure for all in a way which treats equally their cultures - no matter whether or to what extent states otherwise recognise or respect their right to self-determination as peoples. (31)

4. How registration can discriminate against indigenous peoples' equal human rights on tenure and housing

"People around the world depend on access to land and natural resources for survival and their livelihood" and "no one should be deprived of his or her own means of subsistence, including those deriving from land" which is often needed as "an essential element for the improvement of living conditions" also in respect to adequate housing. Human rights are "violated when [...] marginalized peoples are not allowed to dispose freely [...] their means of subsistence." (32)

While inalienable universal human rights can not depend on whether some group of people happen to have their own state in their control or on whether states may or may not yet have adequately registered lands corresponding to

human rights, states are responsible to demonstrate that the domestic laws and their implementation and impacts are "in strict compliance with the relevant provisions of international human rights law".(33)

"The right to a secure home is a universal right", the "security of tenure under domestic law should not [...] be restricted to those with formal title or contractual rights to their land or housing" but includes also security on such customary "housing and land [...] that enables one to live in one's home in security, peace and dignity". (34) "The State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights" (35) and the nature of the rights to adequate food and housing is according to the CESCR - the respective UN monitoring committee authorised to interpret the nature of these rights -, such that:

Economic, social and cultural human rights "such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status" "or determined by, a person's current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle." (36)

As "property status, [...] (e.g. land ownership or tenure)" - whether registered or not - is "a prohibited ground of discrimination" (37) , the lack of registration can not justify forced eviction. All have to be secured in the place where they live such "degree of security of tenure that guarantees legal protection against forced eviction", "availability of access to housing" and living place, "conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups" "notwithstanding the type of tenure". (38)

While "people already have a right to security of tenure" in principle "what needs clarification is how this right can be recognized, protected and realized" in practice. State has to "record and protect all forms of tenure that are legitimate under international human rights law, on par with one another, and protect holders of those tenure rights equally" (39) - also in culturally equal way in respect to their life-heritages.

Now "the dominant economic and housing model" continues being the "registered individual freehold" even though "many other categories in other tenure systems offer equally high levels of security and legality" for "diverse social and economic contexts". (40) A correction is needed to secure equality. People's right "to retain their connections to their locality, protects social cohesion and can help to avoid disrupting livelihoods" and "the location and design of upgraded housing supports their means of livelihood." (41)

5. How registration and governance of land, property and habitation need to be corrected to respect human rights

Registration has to respect the diverse forms and rights of tenure equally for all in terms of human rights. Otherwise "creating secure formal title may give rise to speculation and erode affordability, leading to the displacement of the poorest residents" (42) and there "remains a tension between the obligation under international human rights law to confer security of tenure in law and approaches of de facto or administrative recognition." While "security of tenure, as the cornerstone of the right to adequate housing, is essential for human dignity and to sustain an adequate standard of living" (43) registration needs to be restructured to secure equally all ways how land is customarily held or used securing rights to adequate food, housing and living conditions.

"There is a risk in relying on property rights as the means by which to best secure tenure. Rather, security of tenure should be clearly articulated and grounded in the international human rights framework and expressed in a variety of tenure forms" - continuing the "evolution, from a narrow focus on property rights towards a more expansive recognition of diverse forms of tenure and rights". (44) "When statutory law fails to recognize tenure rights exercised as customary or subsidiary tenure [...] by indigenous peoples, or seasonal use of land [...] individual titling may undermine access and control over land by people whose livelihood depends on it." (45)

When indigenous communities' "way of life is closely linked to traditional relationships with ancestral lands, territories and natural resources" on which "they depend [...] for cultural survival, as well as for fishing, hunting, gathering", "deprivation of access to their land can mean denial of their very identity and existence as a people." (46) And as among many peoples the land and land use have not been primarily determined by ownership and particularly not by private commercial ownership, land ought not to get determined only according to who would have 'owned' it but states have to take into account all the different ways how lands have been held, used and sustained and what have been the customary rights to do so.

As "the lack of recognition of tenure rights is sometimes used as grounds for discrimination" states have "to recognize

and strengthen diverse tenure forms". Otherwise "people who depend on land "for their survival and livelihood [...] face threats and obstacles to access. Their exercise of customary, temporary and/or subsidiary tenure of land is often disregarded when land is [...] commodified or expropriated." (47)

"Tenure can take a variety of forms, and 'registered freehold' [...] should not be seen as the preferred or ultimate form of land rights, but as one of a number of appropriate and legitimate forms".(48) Even if states need to recognise and register customary tenures as legal rights, they have to respect and treat equally also non-registered and un-titled customary tenures as sources of food, water, housing or subsistence compliant to how these fulfil human rights. Respect for human rights shall not depend from which culture of land or ownership registration may prevail.

States shall act "to provide legal recognition for [...] customary land tenure rights not currently protected by law, recognizing the existence of different models and systems" ensuring people shall not get evicted. As people who "work in the non-monetized sectors of the economy [...] are often denied tenure and ownership of land, equal access to land, productive resources [...] employment or social protection", there is a need "to defend their human rights and tenure rights, and to secure the sustainable use of the natural resources on which they depend".(49)

"States must respect the special relationship that [...] indigenous and tribal peoples have with their territory in a way that guarantees their [...] survival." Their "use and enjoyment of the land and its resources are integral components of the physical and cultural survival" and of "the effective realization of their human rights" and "fundamental both for the material subsistence and for the cultural integrity". Their culture "directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their [religiousness], and therefore, of their cultural identity" (50)

"The terms of an international human rights treaty have an autonomous meaning" compared to domestic law. "The legal regime on the distribution and use of communal lands must be in accordance with the customary law, values, uses and customs of indigenous peoples and communities". (51) Their "lack of access to ancestral territories, and the lack of State action in this regard, expose indigenous and tribal peoples to precarious or sub-human living conditions in [...] access to food, water, dignified housing, basic utilities and health." (52)

"indigenous territorial property [...] whose foundation lies not in official state recognition, but in the traditional use and possession of land and resources" is "independent of state recognition" as arisen "from the longstanding use and occupancy of the territory", carrying "the physical and cultural survival of the [...] communities". Such "possession of the land should suffice for indigenous communities [...] to obtain official recognition" and "consequent registration" of property "as a process of' production of evidence establishing the prior ownership of the communities'" and not as a grant of new rights. Territorial titling and demarcation [...] do not constitute rights, but merely recognize and guarantee rights" based on customary use. Such indigenous rights can not be reduced to "a title of private, personal or real ownership." (53)

"The State duty to guarantee the right to indigenous communal property is autonomous from domestic legal provisions, and operates even in the absence of recognition of the right in States' domestic legal systems" as it has an "autonomous foundation in the context of International Law". (54) "The absence of national legal provisions [...] does not release the State party from its obligation" (55) to protect equally such "specific content of indigenous property rights over territories" which consists of diverse "traditional forms of ownership and cultural survival and rights to land, territories and resources". (56)

Indigenous communities have thus equal "right to legal recognition of their diverse and specific forms and modalities of control, ownership, use and enjoyment of their territories" also as rights to their "cultural survival" which "can differ from the classic notion of ownership" of commercial property. (57)

"Indigenous territorial rights encompass a broader [...] collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development" by which "indigenous communities preserve their cultural heritage" also as their "right to cultural identity and to the very survival of the indigenous communities". (58) It is "a State duty to prioritize" the rights of "indigenous and tribal peoples' cultural and material survival" also in relation to commercial profit interests and "in cases of conflict with third party property rights". (59)

The lack of official registration can not thus justify forced eviction. Also the human right that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home" but all have "the right to the protection

of the law against such interference or attacks" (60) do not come from the ownership - since one can not for example own one's family to which one has thus this same right of legal protection which this article provides. Thus "no interference can take place except in cases envisaged by law" and even then such law "must comply with the provisions, aims and objectives" enacted in human rights treaties.(61) Evicted persons must also be secured adequate compensation for the eviction and for the lost property. (62)

But even if "national law recognizes various forms of a "right to land"" and "land registration systems" in principle, still if forced evictions are not prohibited by law and if evictions are not limited to such resettlements which are verified to respect human rights, the registered ""land rights"" do not necessarily entail a human right". (63) Even if "law recognizes a right to land" - "to have access to, use, control and transfer land " - and can "provide for some form of land registration system", still "in many instances, however, national laws and court decisions run counter to human rights obligations". (64) "The State itself must refrain from forced evictions and ensure that the law is enforced" to prevent forced evictions by adopting such "legislation against forced evictions" which "must specify in detail the precise circumstances in which such interferences may be permitted" ensuring that eviction can "not result in individuals being rendered homeless or vulnerable to the violation of other human rights". (65)

Under "variety of tenure forms" "tenure arrangements of the most vulnerable and marginalized should be accorded priority" (66) as tenure arrangements which best secure human rights. Human rights have been recognised to become respected independently from the ways how lands happen to have been registered but registration can be used in respect to land and forest rights as a tool to implement equal human rights as far as these guide the registration - but not according to how a specific culture of registration, which has not been formed to fulfil equal human rights is set to bindingly determine how human rights are and are not allowed to be realised.

The registration of rights has to be used to implement them - not to justify how human rights remain unfulfilled. It is "a State duty to prioritize" rights of "indigenous and tribal peoples' cultural and material survival" "in cases of conflict with third party property rights" and to compensate publicly the innocent third parties. (67) "The right to remain in one's home and community is central to the right to housing", like also "living without discrimination, in security, peace and dignity" "with secure tenure, that is [...] habitable, culturally adequate, in a decent location, accessible" and "ensuring access to water [...] and other necessities, regardless of residents' ability to pay". (68)

6. Role to be secured for indigenous communities in determining rights on lands where they have traditionally lived

Thus such registration which does not fulfil or secure the above presented human rights but leads to the forced evictions violates human rights and particularly so if states order the lands and homes to become registered in a manner which does not respect, fulfil or protect human rights.

Their communities' indigenous ways of living and housing are crucial for their human rights but also for that how people can build their homes and live as adapted to the regeneration of the biodiversity and living environments of their living places.

As indigenous peoples have been recognised their rights to live in and to use the lands and areas which they have traditionally used for their living, thus the ways how they have traditionally understood those lands and areas as their living places or as their homes or habitats where they have been able to live their life are crucial for their right to adequate housing and for the tenure of the living conditions needed for it.

Thus to respect, protect and fulfil this right, indigenous communities' own understanding of what they have traditionally used and understood as their home, living place and habitat is crucial for determining their rights to tenure, home, adequate housing, shelter and living conditions and how these can be duly registered.

"Indigenous peoples' right to culturally appropriate housing has frequently been violated because they have been denied participation and control over the design and production of their own housing." (69) States "must address the needs of diverse populations wherever they live [...] regardless of their tenure status and including those [...] displaced or who have lost housing". "Those affected by displacement must be empowered to make decisions regarding alternative land and housing". (70)

Indigenous communities' own understanding on their home, living place and habitat where they have traditionally lived needs thus to become expressed and respected in that how their customary rights of tenure, housing and living conditions have to be determined to become duly registered and implemented.

It is crucial to get indigenous communities' own understanding on how the homes, living places and habitats where they have traditionally lived "enable the expression of cultural identity and diversity of housing" (71) also in providing:

- the opportunity "to live somewhere in security, peace and dignity" with adequate privacy equally "ensured to all persons irrespective of income or access to economic resources" and such "adequate location with regard to work and basic facilities" (72) "which allows access to employment" of their freely chosen occupation. (73)

- adequate facilities for their "health, security, [...] and nutrition" and "sustainable access to natural and common resources, safe drinking water, energy for cooking, [...] sanitation and washing facilities, means of food storage, refuse disposal", etc. (74) "providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors". (75)

- "where natural materials constitute the chief sources of building materials for housing" states need to "ensure the availability of such materials" (76) for housing which is not "built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants". (77)

Their indigenous understanding of their local environments is crucial also for sustaining the diversity of life and living environment of the area as Earth's self-regenerating biodiverse ecosystems have become much less displaced and degraded in areas of indigenous communities' houses, settlements and living practices than in the areas of other people's houses, settlements and living practices.

"Environmental pressures and concerns can often lead to conflict between those who depend on land for subsistence and other stakeholders who may want to use natural resources for other purposes, including for profit." "Some measures intended to protect the environment can also run counter to the interests and human rights of populations that depend on land for their subsistence and survival." (78)

"The ultimate purpose of environmental and social impact assessments is "to preserve, protect and guarantee the special relationship" of indigenous peoples with their territories, and guaranteeing their subsistence as peoples". (79)

31.5.2019

New Wind Association, Finland

Notes and references

1. E/2014/86, Report of the United Nations High Commissioner for Human Rights, paragraphs 5 and 10
2. E/2014/86, Report of the United Nations High Commissioner for Human Rights, paragraphs 12 and 74
3. ICESCR, article 11.1
4. ICESCR, article 1.2
5. UNDRIP, article 20
6. CESCR, E/C.12/2002/11, General Comment 15, Right to water, paragraph 7
7. CESCR, E/C.12/GC/21, General Comment 21, Right of everyone to take part in cultural life, paragraph 36
8. UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of A/HRC/4/18), principles 21 and 25
9. A/73/310/Rev.1, paragraphs 5-6 and 13-14
10. CESCR, General Comment 4, Right to adequate housing, paragraphs 8 (a) and 18
11. OHCHR, Land and Human Rights, Standards and Application, 2015, pages 7 and 10, https://www.ohchr.org/Documents/Publications/Land_HR-StandardsApplications.pdf
12. CESCR, E/C.12/1999/5, General Comment 12, The right to adequate food, paragraphs 22 and 26
13. CESCR, E/C.12/1999/5, General Comment 12, The right to adequate food, paragraph 13, 26 and 28
14. CESCR, E/C.12/GC/21, General Comment 21, Right of everyone to take part in cultural life, paragraph 36
15. UNDRIP, articles 26.(1)-(2)
16. UNDRIP, articles 20 and 25
17. UNDRIP, articles 26.3, 27 and 32.1
18. The Supreme Court of India order on 13-02-2019, Record of Proceedings, Writ Petition(s)(Civil) No(s). 109/2008 Wildlife First & ors. versus Ministry of Forest and Environment & ors.
19. The Supreme Court of India order on 28-02-2019, Record of Proceedings, Writ Petition(s)(Civil) No(s). 109/2008 Wildlife First & ors. versus Ministry of Forest and Environment & ors.
20. See an international appeal to India and to the UN organs:

http://maanystavat.fi/sites/default/files/attachments/appeal_to_india_and_to_the_un_to_protect_forest_communities_from_forced_evictions_2019.pdf

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22. A/HRC/40/68 Report of the Special Rapporteur on the situation of human rights in Myanmar, 5 March 2019, paragraph 21
23. A/HRC/40/68 Report of the Special Rapporteur on the situation of human rights in Myanmar, 5 March 2019, paragraphs 21 and 23, recommendations b 3 and c 2
24. Myanmar's ICESCR ratification declaration (2017)
25. Vienna Declaration, section 2
26. Vienna Declaration, section 19
27. Vienna Declaration, section 20
28. Vienna Declaration, sections 1 and 4
29. Vienna Declaration, Plan of Action, paragraphs 25 and 31
30. ICESCR, article 1.2
31. UNDRIP article 20
32. E/2014/86, Report of the United Nations High Commissioner for Human Rights, paragraphs 2, 21-22 and 28-29
33. CESCR General comment No. 7: The right to adequate housing: Forced evictions, paragraph 14
34. A/73/310/Rev.1, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 19 September 2018 paragraph 36
35. ICESCR article 4
36. CESCR General comment 20 on non-discrimination, E/C.12/GC/20, paragr. 15, 25 and 34
37. CESCR General comment 20 on non-discrimination, E/C.12/GC/20, paragr. 15, 25 and 34
38. CESCR General comment No. 4: The right to adequate housing 1991, paragraphs 8 (a) and 17 (d) and E/2014/86, Report of the UN High Commissioner for Human Rights on land and human rights, paragraph 70
39. A/HRC/22/46, paragraph s 100-101
40. A/HRC/22/46, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, paragraph 39
41. A/73/310/Rev.1, paragraph 21-27
42. A/73/310/Rev.1, paragraph 21-27
43. A/HRC/22/46, paragraph 91 and 97
44. A/HRC/22/46, paragraph 99
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46. E/2014/86, Report of the United Nations High Commissioner for Human Rights, paragraphs 16 and 45
47. E/2014/86, Report of the United Nations High Commissioner for Human Rights, paragraphs 53 and 70-71
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50. IACHR, Indigenous and Tribal Peoples' Rights over Their Ancestral Lands, OEA/Ser.L/V/II. Doc. 56/09, paragraphs 55-56
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58. IACHR Indigenous and Tribal Peoples' Rights over Their Ancestral Lands, OEA/Ser.L/V/II.Doc.56/09, paragraph 117
59. IACHR Indigenous and Tribal Peoples' Rights over Their Ancestral Lands, paragraph 122
60. ICCPR, article 17
61. CCPR/C/120/D/2171/2012, paragraph 9.3 and See general comment No. 16, para. 3
62. CCPR/C/120/D/2171/2012, paragraphs 9.4 - 10
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