

Indigenous peoples' right to adequate housing

A global overview

United Nations Housing Rights Programme
Report No. 7

United Nations Human Settlements Programme (UN-HABITAT)
Office of the High Commissioner for Human Rights (OHCHR)

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Preface

“In shelter and urban development and management policies, particular attention should be given to the needs and participation of indigenous people....”

(Habitat Agenda, paragraph 14).

In the course of the International Decade of the World’s Indigenous People (1995-2004), the international community has taken important steps towards addressing the disadvantage of indigenous peoples and contributing to improvements in their living conditions. The General Assembly in proclaiming the Decade called for international cooperation to develop solutions to problems faced by indigenous peoples and adopted the slogan “indigenous people – partnership in action”. The present collaboration between UN-HABITAT and the Office of the High Commissioner for Human Rights (OHCHR) is a part of the growing effort of the United Nations system to work together to incorporate indigenous rights and interests into their programmes.

The right to adequate housing has been recognized in article 11 of the International Covenant on Economic, Social and Cultural Rights and in other international instruments. Having a secure place to live, is one of the fundamental elements for human dignity, physical and mental health and overall quality of life, which enables one’s development. Against this backdrop, in 2002, the Commission on Human Rights appointed an independent Special Rapporteur on adequate housing, whose mandate is to focus on the realization of adequate housing as a component of the right to an adequate standard of living, worldwide. To support the efforts by governments, the civil society and the national human rights institutions towards the full and progressive realization of the right to adequate housing, UN-HABITAT and OHCHR established the United Nations Housing Rights Programme (UNHRP) in 2002, under which the present research project has been realized.

As part of the efforts to promote the full and progressive realization of the right to adequate housing globally, the particular concerns of indigenous peoples – their generally poor housing situation, their vulnerability as groups affected by displacement, the insecurity of tenure they often have over their traditional homelands, and the culturally inappropriate housing alternatives offered by the authorities – have emerged repeatedly as important issues. Indigenous peoples themselves have called upon the United Nations to recognize and respect their rights to lands and resources, a right that would assure them the basis for adequate and appropriate housing and living conditions.

The present report, “Indigenous peoples’ right to adequate housing – A global overview”, is a preliminary effort to identify whether, and to what

extent, indigenous peoples enjoy the right to adequate housing in different regions of the world and identify strategies that might assist in the realization of this right. The report includes seven case studies on the status of housing for indigenous peoples – in practice and in law – and includes information about policies and programmes aimed at addressing their needs and disadvantage. The preliminary findings and recommendations of this report were presented to the 3rd session of the Permanent Forum on Indigenous Issues and were greatly appreciated by the members and participants of the Forum.

This report constitutes a preliminary but important first step toward understanding the relationship between all economic, social and cultural rights and the progressive realization of the right to adequate housing of indigenous peoples, and to improving their living conditions worldwide. The report calls for further attention to be given to this critical human rights concern and above all, it calls for renewed commitment from the international community to improve the living conditions of the world's indigenous peoples.

We wish to express our appreciation and gratitude to all those who have contributed to the preparation of this report.



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List of acronyms and special terms

Accession	‘Accession’ is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other States. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question. See also succession, ratification and signatory (UN-HABITAT, 2002c).
<i>Adivasis</i>	The preferred term to describe themselves of indigenous peoples in India, rather than ‘scheduled tribes and castes’
AFN	Assembly of First Nations. The national representative organization of the First Nations in Canada.
<i>Amicus curie</i>	Latin for ‘friend of the court,’ a party or an organization interested in an issue which files a brief or participates in the argument in a case in which that party or organization is not one of the litigants. Usually the court must give permission for the brief to be filed and arguments may only be made with the agreement of the party the <i>amicus curiae</i> is supporting, and that argument comes out of the time allowed for that party’s presentation to the court (< http://dictionary.law.com/ >).
ATSIC	Aboriginal and Torres Strait Islander’s Commission (Australia).
CEACR	Committee of Experts on the Application of Conventions and Recommendations.
CBO	Community-based organization.
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women; and Committee on the Elimination of Discrimination against Women.
CEMIRIDE	Center for Minority Rights Development. An international NGO that works to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities.
CERD	Committee on the Elimination of Racial Discrimination.
CESCR	Committee on Economic, Social and Cultural Rights.
CHIP	Community Housing Infrastructure Program (Australia).
CHR	Commission on Human Rights.
CHRC	Canadian Human Rights Commission
CISFA	<i>Comprehensive and Integrated Shelter and Finance Act of 1994</i> (the Philippines).

CMHC	Canada Mortgage and Housing Corporation.
CMP	Community Mortgage Program (the Philippines).
CODENPE	<i>Consejo de Desarrollo de las Nacionalidades y Pueblos del Ecuador</i> (Council for the Development of Ecuadorian Nationalities and Peoples).
COHRE	Centre on Housing Rights and Evictions.
CONAIE	<i>Confederación de Nacionalidades Indígenas del Ecuador</i> (Confederation of Indigenous Nationalities of Ecuador).
CONFENIAE	<i>Confederacion de Nacionalidades Indígenas de la Amazonia Ecuatoriana</i> (Confederation of the Nationalities Indigenous to the Amazon of Ecuador).
CSHA	Commonwealth-State Housing Agreement (Australia).
DIAND	Department of Indian and Northern Development (Canada).
Discreet indigenous communities	Used in the Australian context: A geographic location, bounded by physical or cadastral (legal) boundaries, and inhabited or intended to be inhabited predominantly by indigenous people, with housing or infrastructure that is either owned or managed on a community basis. This definition covers discrete communities in urban, rural and remote areas.
ECOSOC	United Nations Economic and Social Council.
<i>Ejido</i>	<i>“The Mexican ejido was established under the land reform of 1915. It granted agrarian communities the right to farmland in perpetuity. Members of the community had the right to cultivate land but not to sell it. Urban development has increasingly led to cities spreading onto ejido land and many ejidatarios have illegally sold out. This has created a major problem for the authorities.”</i> (UN-HABITAT, 2003a: xii.).
<i>Enkangs</i>	Temporary houses (Kenya).
ESCR	Economic, Social and Cultural Rights.
EZLN	<i>Ejército Zapatista de Liberación Nacional</i> (Zapatista National Liberation Army).
Fiduciary duty	Fiduciary duty arises when one party has placed a special trust and confidence in another party to act on their behalf and in their best interest (Canada).
First Nations of Canada	Comprised of four main groups, excluding the Inuit in the North and the Métis. These groups each contained many tribes and adapted to their different environments. The four main groups were subdivided by the following geographic areas: the Pacific coast and mountains; the plains; the St. Lawrence valley and the North-East Woodlands (broad region, encompassing the woods near the Atlantic/Maritimes to the tree-line in the Arctic) (< http://www.free-definition.com/First-Nations-of-Canada.html >).
Habitat II	Second United Nations Conference on Human Settlements.
HIGC	Home Insurance Guaranty Corporation (the Philippines).
HIV	Virus that causes acquired immune deficiency syndrome (AIDS).

Homelessness	Definition varies between countries and regions, and is political rather than semantic. UN-HABITAT encourages the use of a narrow definition in developing countries, e.g., of the type used by the United Nations for statistical purposes (for more details, see UNCHS, 2000): “households without a shelter that would fall within the scope of living quarters. They carry their few possessions with them sleeping in the streets, in door ways or on piers, or in any other space, on a more or less random basis” (United Nations, 1998: 50). In developed countries a wider definition is more appropriate, e.g., “Homelessness is the absence of a personal, permanent, adequate dwelling. Homeless people are those who are unable to access a personal, permanent, adequate dwelling or to maintain such a dwelling due to financial constraints and other social barriers...” (Avramov 1996: 71, cited in FEANTSA, 1999: 10.).
Homeswest	Government housing provider in Western Australia.
HRC	United Nations Human Rights Committee.
HREOC	The Human Rights and Equal Opportunity Commission (Australia).
HUDCC	Housing and Urban Development Coordinating Council (the Philippines).
ICCPR	International Covenant on Civil and Political Rights.
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination.
ICESCR	International Covenant on Economic, Social and Cultural Rights.
IERAC	<i>Instituto Ecuatoriano de Reforma Agraria y Colonización</i> (Land and Colonizing Institute) (Ecuador).
IESS	<i>Instituto Ecuatoriano de seguridad Social</i> (National Institution of Social Security) (Ecuador).
ILO	International Labour Office.
INFONAVIT	<i>Instituto del Fondo Nacional de la Vivienda para los Trabajadores</i> (National Housing Institute Fund for Workers) public services program created in 1972 to establish a credit system that allows workers access to housing (Mexico).
Informal housing	Housing that begins informally, without a title deed or services, and which the members of the household design, finance and often build with their own hands. Such housing usually belongs to the poor and gradually improves over time. In this report, the term is used synonymously with self-help and spontaneous housing (UN-HABITAT, 2003a).
IPRA	Indigenous Peoples Rights Act (the Philippines).
KMICYDI	Kalinga Mission for Indigenous Children and Youth Development, Inc. (the Philippines).
Landlord / Landlady	Landlord (male), landlady (female), someone who rents property to a tenant.

<i>Mestizo</i>	Term of Spanish origin which describes peoples of mixed European and Amerindian racial descent. In colonial Latin America, the term originally referred to the children of one European and one Amerindian parent. Today, however it refers to all people with a significant amount of both European and Amerindian ancestry in Latin America. (Mexico and Ecuador) (< http://www.free-definition.com/Mestizo.html >; see also: < http://www.webster-dictionary.org/definition/mestizo >).
MIDUVI	<i>Ministerio de Desarrollo Urbano y Vivienda</i> (Ministry of Urban Development and Housing).
NACHU	National Cooperative Housing Union Ltd. (Kenya).
NCIP	National Commission on Indigenous People (the Philippines).
NGO	Non-governmental organization.
NHMFC	National Home Mortgage Finance Corporation (the Philippines).
NSP	National Shelter Program (the Philippines).
OECD	Organisation for Economic Cooperation and Development.
OHCHR	Office of the United Nations High Commissioner for Human Rights.
Owner	Those with legal or <i>de facto</i> right to occupy, let, use or dispose of a dwelling. This includes those who are in the process of acquiring the right to ownership (e.g., through payments on a mortgage).
PCUP	Presidential Commission for the Urban Poor (the Philippines).
PRODEPINE	<i>Proyecto de Desarrollo de Los Pueblos Indígenas y Negros del Ecuador</i> (Development Project for Indigenous and Black Peoples of Ecuador).
PUSH	Philippine Undertaking for Social Housing.
Ratification	‘Ratification’ defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty. See also accession, succession and signatory (UN-HABITAT, 2002c).
RCAP	Royal Commission on Aboriginal Peoples (Canada).
Regalian Doctrine	Legal doctrine allowing the Crown to make legal claims to land it acquired through conquest (the Philippines).
Reindeer-herding or reindeer husbandry	Traditional occupation of indigenous peoples of Scandinavia, representing a core aspect of Saami culture. Reindeer herding involves following the migration patterns of the reindeer throughout the year. Reindeer hides are used for clothing and handicrafts; the meat is used for food.
SAAP	Supported Accommodation Assistance Program (Australia).

SALIGAN	<i>Senrong Alternatibong Lingap Panlegal</i> (Alternative Legal Assistance Center) (the Philippines).
Secure tenure	<i>“[T]he right of all individuals and groups to effective protection by the State against unlawful evictions”</i> (UN-HABITAT, 2002d: 6.).
SIISE	<i>Sistema Integrado de Indicadores Sociales del Ecuador</i> (Social Indicators System of Ecuador).
Signatory	A ‘Signatory’ to a treaty which has yet to be ratified or acceded to has not yet consented to be bound by the treaty. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. See also accession, succession and ratification (UN-HABITAT, 2002c.).
SILCA	Survey of Living Conditions in the Arctic (Saami).
SIPAT	Sustainable Indigenous Peoples Agricultural Technology (the Philippines).
Slum	Poor quality housing, e.g. <i>“a contiguous settlement where the inhabitants are characterized as having inadequate housing and basic services. A slum is often not recognised and addressed by the public authorities as an integral or equal part of the city”</i> (UN-HABITAT, 2002d: 6.).
Social housing	A vague term increasingly reserved for housing that is developed by non-profit making institutions, predominantly for the poor. The institutions involved may range from educational institutions, through charities, to housing associations and cooperatives. However, sometimes the term is applied to all formal housing built for poor people, and sometimes to all kinds of housing built by non-profit organizations. In Latin America, the term social-interest housing is occasionally used meaning, formal housing built for poor people and often subsidized, but produced by private sector companies. In this report, the term is confined to private non-profit making institutions building housing for poor people (UN-HABITAT, 2003a.).
State party	When a government ratifies or accedes to an international treaty it becomes a “party” to the treaty, and thus is referred to as a “State party”.
Sub-Commission	Sub-Commission on the Promotion and Protection of Human Rights. Until 1999 known as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.
Succession	‘Succession’ is a means by which a State automatically and immediately becomes a State Party to particular international instruments when that State succeeds or separates from a State Party to that particular international instrument (for example, the Czech Republic and Slovakia are State Parties by succession to all international instruments to which Czechoslovakia was a State Party). See also accession, ratification and signatory (UN-HABITAT, 2002c.).

Tenant	Households paying a prearranged rent for the exclusive occupation of all or part of a dwelling unit. This tenure also includes both formal and informal situations. That is to say, the term renting embraces households who pay a regular sum of money to a landlord whether the landlord is a government institution, a cooperative or a private individual and irrespective of whether a formal contract has been issued. A landlord in a self-help settlement who has established a verbal contract with the tenant is still a landlord. So long as the tenant recognizes that there is a contractual relationship with another individual who has ownership rights over the property and a regular payment is being made, the distinction between owners and tenants is a real one (UN-HABITAT, 2003a).
<i>Terra nullius</i>	A doctrine that, as applied to indigenous peoples, holds that indigenous lands are legally unoccupied until the arrival of a colonial presence, and can therefore become the property of the colonizing power through effective occupation.
UDHA	Urban Development and Housing Act (the Philippines).
UNCHS	United Nations Centre for Human Settlements (Habitat), since 2002 known as the United Nations Human Settlements Programme (UN-HABITAT).
UNDP	United Nations Development Programme.
UN-HABITAT	United Nations Human Settlements Programme.
VAT	Value Added Tax: a form of indirect tax applied to the value added at each stage of production (primary, manufacturing, wholesale and retail), (Saami) (http://traveltax.msu.edu/vat/vat.htm >).
<i>Vecindad</i>	Tenement houses, where the rooms all open onto one big patio or courtyard where tenants share amenities such as washrooms and laundry, often of lower quality. “ <i>Following institution of rent control by the government during World War II, investors often abandoned the vecindad market, depleting an already poor housing stock.</i> ” (Mexico).
WHO	World Health Organization.

Executive summary

1. This study was undertaken within the framework of the United Nations Housing Rights Programme – a joint initiative of UN-HABITAT and the OHCHR. The study includes a review of relevant literature, identification of case studies, the collection of primary data through direct contacts with organizations/networks of indigenous peoples and the Permanent Forum on Indigenous Issues.

2. The report provides a global overview of the housing and related living conditions of indigenous peoples and an assessment of the extent to which indigenous peoples' housing rights are recognized and implemented. Where possible and relevant, the study focuses on the experiences of indigenous women, who often bear the brunt of poor housing conditions, and includes a gender perspective. Despite the importance of housing in the everyday lives of indigenous peoples and the deep connection between housing and land rights, this study appears to be the first global research report specifically devoted to the housing conditions of indigenous peoples.

3. The socio-economic disadvantage experienced by indigenous peoples across the world can be traced to both the historical and contemporary dispossession of indigenous peoples from their lands and the exclusion of indigenous peoples from economic activity. The expropriation of indigenous peoples' lands for development purposes without adequate compensation measures is particularly harmful to the socio-economic status of indigenous peoples. The dispossession of indigenous peoples from their lands has robbed them of the ability and opportunity to use their own resources to further their own development. This has deeply affected their ability to access and maintain adequate housing and it is one of the central causes of their inadequate housing conditions. Because the enjoyment of adequate housing is intertwined with indigenous peoples' access to and control over resources, housing must be understood as an integral component of the right to land – the cornerstone of indigenous peoples' struggles around the world.

4. Indigenous peoples' right to housing is protected under two international human rights legal frameworks: international legislation pertaining to housing rights and international legislation pertaining to indigenous peoples. The rights of indigenous women are protected within each of these frameworks through provisions on non-discrimination and equality. There are several international human rights documents pertaining to the right to adequate housing which are reviewed in this report, as well as a number of human rights instruments pertaining specifically to indigenous peoples that include important references to the right to adequate housing and related rights and principles.

5. More than half the report contains reviews of specific housing conditions of indigenous peoples in different regions of the world. The seven case studies are drawn from ten countries: Australia, Canada, Ecuador, Finland, Kenya, Mexico, Norway, the Philippines, the Russian Federation and Sweden. Each of the case studies covers the following elements:

a) A brief historical overview of the status of indigenous peoples in that region or country, with specific attention paid to the evolution of their housing and land rights.

b) An overview of housing and other relevant living conditions of indigenous peoples, with specific attention paid to the various elements of the right to adequate housing, as defined under international law, including *inter alia*: security of tenure, accessibility, affordability and cultural adequacy. Where possible and relevant, information is provided regarding gender specific housing experiences pertinent to indigenous women, including information regarding women's rights to own and inherit land, housing and property. Examples of forced eviction are also highlighted.

c) An overview of pertinent national laws, legal cases, policies and programmes pertaining to indigenous peoples' housing rights. Where possible and relevant, information about initiatives that have been effective in improving the housing conditions of indigenous peoples is also provided.

6. The case studies reveal that while indigenous peoples and communities across the world are culturally distinct, there are common traits in the way their right to housing is violated. Below follows a brief list of observation of the most prominent similarities (applying to all, or at least most, indigenous peoples' situations reviewed):

a) erosion of indigenous culture and identity;

b) lack of self-determination and exclusion from decision-making;

c) discrimination and inequality in almost all aspects of housing (including: laws and policies which have discriminatory effects, discriminatory allocation of resources for housing including credit and loans, and discriminatory practices of private landlords in the rental market);

d) inferior standard of living compared to the non-indigenous population (such disadvantage spans the social spectrum: health, education, employment and housing);

e) indigenous poverty and housing disadvantage is related to the dispossession of indigenous peoples from their lands (often leading to rural-urban migration);

f) widespread inadequate (and often intolerable) housing conditions (in terms of security of tenure, affordability, habitability, availability of services, accessibility, location, and cultural adequacy);

g) indigenous women encounter further barriers in terms of housing access as a result of sex-based discrimination in laws, customs and traditions;

h) increase in rural-urban migration (as a result of extreme poverty, the deterioration and dispossession of lands, forced evictions, employment prospects, and the centralization of services in cities, combined with the general lure of ‘city life’);

i) domestic violence (in particular violence against women) is identified as one of the most serious and pressing issues facing indigenous women in their communities;

j) forced evictions is one of the most egregious housing rights violations facing indigenous peoples across the world, in both rural and urban settings (often resulting from development projects such as hydroelectric dams, mining, and logging);

k) forced evictions and the dispossession of lands have particularly severe impacts on indigenous women (who often as a result get an increased workload as they must walk long distances to find alternate sources of water or fuel wood, or are driven out of income-earning productive activities and into a situation of economic dependence on men);

l) although the States examined in the case studies have ratified or acceded to key international human rights instruments of general application such as the ICESCR, the ICERD, the CEDAW, the ICCPR, and three of the States have also ratified or acceded to ILO Convention No. 169; this has not resulted in the immediate enjoyment of the right to adequate housing by indigenous peoples;

m) indigenous peoples’ rights are protected in national constitutions or in legislation specific to indigenous peoples in many of the States reviewed, and several of these States have also enshrined the right to housing in their constitutions; however, implementation of these legal provisions remains a major problem;

n) although there are examples of indigenous peoples who have used the courts to enforce their housing rights, it appears that they are not doing so in large numbers – and the results of litigation on issues related to indigenous land and housing rights have been quite mixed;

o) the most successful housing programmes and projects are those that have involved indigenous peoples in meaningful and diverse ways; and

p) housing policies and programmes require sufficient allocation of resources to achieve success.

7. The report concludes by providing a series of recommendations. These are largely aimed at governments, although some are directed at other relevant stakeholders such as financial institutions, indigenous communities and leaders, non-governmental organizations (NGOs), or the United Nations system. The recommendations have been organized as follows:

- a)** general issues;
 - identity and self-determination;
 - participation in decision-making processes;
 - discrimination and inequality;
 - the relation between land and housing;
- b)** housing and living conditions;
 - addressing poverty;
 - ensuring housing adequacy;
 - urban housing;
 - violence against women;
 - forced evictions;
- c)** matters of legislation;
 - international law;
 - national law;
- d)** housing policy and programmes; and
- e)** other matters.

8. This report offers a variety of recommendations on how the housing rights' situation of indigenous peoples' can be addressed. States and other stakeholders are encouraged to initiate or continue discussions with indigenous communities about how these recommendations can best be implemented.

I. Introduction

In the last two decades, indigenous peoples worldwide have been successful in bringing about legal changes in favour of their human rights and specific situation. However, in most countries indigenous peoples still constitute one of the most disadvantaged groups. Their disadvantage is experienced in all realms – economic, social, political, environmental and cultural – and is reflected clearly in their housing conditions. This report provides a global overview of these conditions, in an attempt to determine the extent to which indigenous peoples' housing rights are recognized and implemented.

The report exposes the profound connection between indigenous peoples' rights to land and housing. It demonstrates that in almost every region of the world, the dispossession of indigenous peoples from their lands has had a ripple effect and resulted in inadequate housing conditions for indigenous peoples. Whether in Australia, Canada, Ecuador, Finland, Kenya, Mexico, Norway, the Philippines, the Russian Federation or Sweden, indigenous peoples often lack security of tenure and live constantly with the threat of forced eviction from their homes and/or lands. In many States, indigenous peoples live in overcrowded houses, that are in poor condition and that often have neither schools nor hospitals nearby. The report also exposes that indigenous women and men continue to face discrimination in most aspects of housing. Housing and development policies and programmes either discriminate against indigenous peoples directly or have discriminatory effects. The report also reveals that the loss of traditional lands and housing contributes to the increased migration of indigenous peoples to urban centres, where barriers to adequate housing (such as unemployment/poverty, discrimination, and lack of affordable and adequate housing) are particularly acute.

Indigenous women bear the brunt of these inadequate conditions. At the same time, they experience gender specific problems, such as domestic violence, and discrimination and inequality as a result of institutional and cultural factors which often curtail or prohibit women's access to, control over and the right to inherit land, property and housing.

The report also uncovers that these inadequate and discriminatory conditions prevail even in those States where there are domestic laws and mechanisms aimed at promoting equality and protecting against discrimination in housing and/or legislation recognizing land title rights for indigenous peoples. In many instances, States have also ratified international conventions or treaties that secure the housing and land rights of indigenous peoples, but these international legal obligations often appear to fall on the wayside in the face of international trade agreements and development interests.

In addition to this introductory chapter, the report is divided into five chapters:

Chapter II is intended to provide context for the proceeding chapters of the report. It outlines definitions of “indigenous” and then provides an overview of the living conditions of indigenous peoples. Though this section is just a snapshot, it establishes the disadvantage experienced by indigenous peoples worldwide, highlighting in particular, their disproportionate poverty situation.

Chapter III of the report provides an overview of international law pertaining both to indigenous peoples and to housing rights. The objective of this chapter is threefold:

- to provide an overview of the meaning and content of the right to adequate housing as established in law;
- to identify the international norms that are available to assist indigenous peoples in claiming and enforcing their housing rights; and
- to identify gaps or weaknesses in these instruments with regard to indigenous peoples from a gender perspective.

This chapter examines relevant international treaties and conventions and the work of treaty monitoring bodies, relevant United Nations documents including those from the Commission on Human Rights, world conferences’ documents, and the reports of the United Nations Special Rapporteurs. Information about the ‘draft declaration on the rights of indigenous peoples’ and a gender analysis of each of these international instruments is also provided.

Chapter IV constitutes the main part of the report and is focused on case studies on the housing situation of indigenous peoples in ten countries in different regions of the world: Australia, Canada, Ecuador, Finland, Kenya, Mexico, Norway, the Philippines, the Russian Federation and Sweden.

Chapter V draws conclusions on the situation of indigenous peoples’ housing rights on the basis of the case studies and highlights common problems and emerging themes. These conclusions are used to develop recommendations, in **chapter VI**, for international and national actors that aim at a better promotion, protection and fulfilment of indigenous peoples’ housing rights.

I.A. Methodology

The methodology of the research on which this report is based was informed by its global scope. The following activities were undertaken:

Background literature review: A preliminary literature review was undertaken for two purposes:

- to assess the extent to which housing is discussed in literature pertaining to indigenous peoples; and
- to assess which countries might lend themselves to informative case studies.

Identification of case studies: The results from the literature review were measured against four criteria:

- geographical diversity;
- the identification of housing as a significant issue of concern by the indigenous peoples in a particular region;
- the researchers' contacts within the region/country; and
- the availability of information in English, French and/or Spanish (the languages spoken by the researchers involved).

Using these criteria, seven case studies were identified.

Secondary sources: Once the case studies were selected, extensive research was undertaken to locate relevant secondary sources. In a number of cases there was only limited information about housing conditions specifically, which then required the researchers to extrapolate from related materials on issues such as: land rights, self-determination, women's rights and development and infrastructure projects.

Primary sources: A questionnaire was developed and distributed to various stakeholders. The shape and structure of the case studies were based on the responses received. As the case studies were being developed, the researchers contacted relevant experts, NGOs and indigenous peoples, for clarifications, comments and further resources, especially on those issues raised by the questionnaire.

I.B. Obstacles

This research was not without difficulties. While the scope of the project required a case-study approach, it was difficult to determine, in advance, whether the case studies would be representative of the wide-ranging housing issues confronting indigenous peoples. The researchers also had to grapple with the often ambiguous or complex legal landscape governing indigenous peoples and housing. In many cases, though there might be specific legislation on indigenous peoples' rights, mainstream laws regarding non-discrimination, equality and housing also apply. Difficulties also arose in accessing primary or secondary sources regarding indigenous women's housing. Most NGOs that focus on housing do not focus on indigenous peoples' housing. Few indigenous organizations focus specifically on housing and even less focus on women's

housing. Most frame their struggle in terms of broader issues such as self-determination, land rights, and economic empowerment. Indigenous women's organizations also tend to concentrate on broader issues, albeit from women's perspectives. Gender-specific issues tend to focus on violence against women, though there is an increasing amount of information on women's rights to use, own and inherit land and property.

Because of these obstacles, the researchers were often required to piece together information in order to develop a good picture of the status of housing rights for indigenous people worldwide. For this reason, this report is preliminary in nature. That being said, it does provide a good foundation and overview of indigenous housing in different regions of the world and certainly sets the stage for more in-depth research, analysis and action pertaining to indigenous peoples' housing rights.

II. Context

II.A. Who are indigenous peoples?

The United Nations estimates that there are at least 300 million indigenous people in more than 70 countries worldwide.¹ The working definition of ‘indigenous peoples’ proposed by the United Nations Sub-Commission Special Rapporteur on the Problem of Discrimination Against Indigenous Populations, Mr. Martinez Cobo, is as follows:²

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”

He continues by saying that:

“Historical continuity envelops the notion that the indigenous existence is a current, ongoing and persistent distinction comprised of one or more of the following factors:

- a) full or partial occupation of ancestral lands;*
- b) common ancestry among the original occupants of these lands;*
- c) general culture or way of life in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);*
- d) language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);*
- e) residence in certain parts of the country, or in certain regions of the world;*
- f) other relevant factors.”*

ILO Convention No. 169 uses the terms ‘indigenous and tribal peoples’ and states that people are considered indigenous either because they are the descendants of those who lived in the area before colonization, or because they have maintained their own social, economic, cultural and political institutions since colonization and the establishment of new states.

Article 2 of ILO Convention No.169 states that, *“self-identification as indigenous or tribal shall be regarded as a fundamental criterion for de-*

termining the groups to which the provisions of this Convention apply.” The UNDP has recognized that no single accepted characterization of indigenous peoples captures their diversity. Therefore, in accordance with indigenous peoples’ perspectives, self-identification as indigenous or tribal has been used as a main variable in any definition.³

II.B. Living conditions today

Indigenous peoples today live under conditions of severe disadvantage relative to others.⁴

*“Indigenous peoples have been deprived of vast landholdings and access to life-sustaining resources, and they have suffered historical forces that have suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened and their integrity of their cultures has been undermined. In both industrial and less developed countries, the indigenous populations are almost invariably on the lowest rung of the socioeconomic ladder, and are on the margins of power.”*⁵

In almost every country, indigenous peoples are more likely than the rest of the population to have low incomes, poor physical living conditions, less valuable assets, less and poorer access to education, health care and related services, worse access to markets for labour, land, credit and a range of other goods and services, and weaker political representation, and in many circumstances, also experience systemic discrimination.⁶

Poverty is one of the characteristics that most defines the lives of indigenous peoples.^a In many Latin American countries, for example, indigenous peoples are often disproportionately poor as reflected in table 1.

Africa has some of the highest poverty levels for indigenous peoples in the developing world. In Namibia, the *San* indigenous communities have the lowest income in the country and record a Human Development Index rate that is nearly half the rate recorded for the next highest group. Indigenous peoples

a. It should be noted that many measures of poverty are not culturally appropriate for indigenous peoples. For example, a certain housing structure might be deemed uninhabitable by other population groups, while it might be deemed adequate by indigenous peoples. The best measures of indigenous poverty are those undertaken by indigenous peoples themselves. It should also be noted that many indigenous peoples do not consider themselves to be poor, but rather victims of impoverishment processes such as land dispossession. Their richness comes from their resources, unique knowledge and know-how and their cultures which have special values and strength. On this point see: Vinding, 2003.

in Asia and the Pacific also experience high rates of poverty. In India, indigenous peoples are more likely to be poor with much worse social indicators.^b Indigenous women, who experience multiple and intersecting forms of oppression – because they are indigenous and because they are women⁷ – experience extreme and disproportionate poverty.⁸

Globally, indigenous peoples struggle to achieve equal levels of education with majority groups. For example, in Mexico, 63 per cent of the indigenous population is illiterate compared to 42 per cent of the non-indigenous population. In Colombia, the primary school enrolment rate for indigenous children is just 11.3 per cent and 44 per cent of adults in the indigenous population are illiterate. In Peru, the national average illiteracy rate is 13 per cent but among the indigenous population it reaches 33 per cent, and in the case of indigenous women it is 44 per cent.

Indigenous peoples also suffer from poor health and are often excluded from health care services. The infant mortality rate in Canada for indigenous children is twice as high as for the population as a whole.⁹ In Australia, for the three-year period, 1999-2001, the indigenous infant mortality rate of 12.7 infant deaths per 1,000 live births was 2.5 times the non-indigenous rate of 5.0.¹⁰ In Peru, 27 per cent of all children under the age of five suffer chronic malnutrition. This number jumps to 70 per cent in the Amazon region of Peru where the majority of the population are indigenous.¹¹ Life expectancy rates are also much lower for indigenous peoples. Life expectancy for Inuit males in Canada is 67.7 years as compared to an average of 76.3 years for all Canadian males.¹² In Australia, indigenous males born in 1999-2001 could be expected to live to 56.3 years, almost 21 years less than the 77.0 years expected for all males. The expectation of life at birth of 62.8 years for indigenous females in Australia was almost 20 years less than the average life expectancy of 82.4 years for all Australian females.¹³

Table 1. Percentage of the population living in poverty (selected Latin American countries)

Country	Indigenous	Non-indigenous
Bolivia	64	48
Guatemala	87	54
Mexico	81	18
Panama	84	32
Peru	79	50
Paraguay	37	11

Source: Psacharopoulos and Patrinos, 1994.

b. In India, indigenous peoples refer to themselves by the term 'Adivasis' whereas, officially they are referred to as 'scheduled castes and tribes'.

II.C. Indigenous peoples and land

Lands, territories and resources are of spiritual, social, cultural, economic and political significance to indigenous peoples and are inextricably linked to their identity and continued survival.¹⁴ The severe socio-economic disadvantage experienced by indigenous peoples across the world (as described above) can be traced – at least in part – to the historical and contemporary dispossession of indigenous peoples from their lands and their corresponding loss of resources and modes of production.¹⁵

Historically, the dispossession of lands occurred through a variety of means. In many cases, the colonizers used military force to secure ‘ownership’ of indigenous lands, territories and resources. Occasionally treaties were concluded. Territory that remained was diminished further by forcible or coerced removal, relocation and allotment.¹⁶

In contemporary times, dispossession of indigenous lands and resources occurs when, *inter alia*:¹⁷

- States fail to recognize indigenous rights to lands, territories and resources and fail to issue the corresponding land titles;
- States assert a power to extinguish the land titles and rights of the indigenous peoples within their borders; and
- States expropriate indigenous lands for ‘national interests’ including development.
- States privatize indigenous peoples’ land, a process which is sometimes accompanied with land speculation and rapid land loss by indigenous peoples.

Moreover, in many African and Asian countries, dominant development paradigms view the modes of production of indigenous peoples – such as pastoralism, and hunting/gathering – as backward and therefore, not in line with the State’s development goals. In turn, many development policies are aimed at weakening and/or eradicating the modes of production employed by indigenous peoples.¹⁸

The expropriation of their lands for development purposes can be particularly harmful to the socio-economic status of indigenous peoples. In many parts of the world, the lands and resources of indigenous peoples are being taken for large-scale development projects such as hydroelectric and multi-purpose dams, as well as for mining and logging operations, or for tourism development projects. The negative implications of these types of projects on the human rights of indigenous peoples have been described by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people¹⁹ as follows:

“The principle human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.”²⁰

Analysis also shows the impact of land loss and development projects on indigenous women in Asia.²¹ Physical displacement from their ancestral territories and places of production, leads to economic and cultural dislocation. With the loss of their land, women often also lose control over the natural resources that have traditionally been the source of their income. which can make them becoming dependent on men who might be the only income earner and seeing their workload within the home being increased. The loss of water and forests due to mining, logging, plantations or the declaration of parks and forest reservations make it difficult for indigenous women to maintain the needed supply of water and fuel in the home. They are forced to walk long distances to fetch heavy pails of water or to wait for many hours with other women at water sources. Dislocation from their lands has pushed many indigenous women to migrate to urban centres in search of other livelihood opportunities.

II.D. Links between land, self-determination and housing

“The collective historical experience of Aboriginal people has been one of exclusion from the lands they traditionally occupied and used. As a consequence of that exclusion Aboriginal people lost control over the location, design and function of their living spaces. Aboriginal people have been denied the right to live in the locations of their choice or under terms within their control.”²²

In terms of housing, it is essential to note:

“...the importance of land rights and native title in providing a secure land base for Indigenous communities. It must be recognized that many Indigenous communities have been displaced from their traditional lands and territories. ...[A]ny winding back of land rights, will only confirm such communities in their homelessness, and they will continue to live as virtual refugees, locked out of their own land. For Indigenous peoples, the right to housing can often include the right to maintain their attachment to their own country and to be housed [in] that country.”²³

There is a connection between indigenous peoples' relationship to land and the realization of their right to adequate housing. The dispossession of indigenous peoples' from their lands has robbed them of the ability and opportunity to use their own resources to control and determine their economic, social and cultural development. If they had access to their own land and control over their own and public resources, they would be in a better position to solve their housing problems themselves.²⁴

Under international human rights law, "*the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing*"²⁵ and, as described above, it is a practice that has devastating consequences, particularly for women.

Some indigenous organizations claim that the realization of their right to adequate housing is part of the compensation owed to them by the State in return for indigenous people's having – voluntarily or involuntarily – given up effective use of their lands.²⁶ In the Canadian context indigenous organizations assert that housing is, in fact, part of the federal government's obligations arising from treaties with indigenous peoples. The Assembly of First Nations (AFN)^c has argued that, "*housing is a federal responsibility which flows from the special relationship with the federal Crown created by ... the British North America Act of 1867 and treaty agreements themselves.*"²⁷ The Federation of Saskatchewan Indian Nations in Canada has asserted that "*shelter in the form of housing, renovations and related infrastructure is a treaty right, and forms part of the federal trust and fiduciary responsibility.*"²⁸ In this case, this 'fiduciary duty'^d requires the State to provide indigenous people with the economic means to develop, manage and maintain their own housing.

Because the enjoyment of the right to adequate housing is intertwined with indigenous peoples' access to and control over resources, housing must be understood as an integral component of the rights to land and a cornerstone of indigenous peoples' struggles around the world.

c. "*The Assembly of First Nations (AFN) is the national representative organization of the First Nations in Canada. There are over 630 First Nation's communities in Canada. The AFN Secretariat, is designed to present the views of the various First Nations through their leaders in areas such as: Aboriginal and Treaty Rights, Economic Development, Education, Languages and Literacy, Health, Housing, Social Development, Justice, Taxation, Land Claims, Environment, and a whole array of issues that are of common concern which arise from time to time*"(Assembly of First Nations, n.d.).

d. 'Fiduciary duty' arises when one party have placed a special trust and confidence in another party to act on their behalf and in their best interest.

Notes

1. OHCHR, 2001a: p. 4.
2. UN Doc E/CN.4/Sub.2/1986/7/Add.4.
3. UNDP, n.d.
4. Anaya, 1996: p. 3.
5. Anaya, 1996: pp. 3-4.
6. Justino and Litchfield, 2003: p. 3. See also UN Doc E/CN.4/2002/97: paragraph 80.
7. Carino, 2000: p. 12.
8. BDIW, 1995, cited in IWGIA, 2000: p. 10.
9. Justino and Litchfield, 2003: p. 12.
10. Australian Indigenous HealthInfoNet, 2003.
11. Justino and Litchfield, 2003: p. 12.
12. Health Canada, 2003; and Health Canada, 2002a.
13. Australian Indigenous HealthInfoNet, 2003.
14. UN Doc E/CN.4/Sub.2/2001/21: paragraph 12.
15. See for example, RCAP, 1996b.
16. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 21-32.
17. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 34-36; 42-47; and 66-69 respectively.
18. IWGIA, n.d.b.
19. UN Doc E.CN.4/RES/2001/57.
20. UN Doc E/CN.4/2003/90: p. 2.
21. Carino, 2000: p. 12.
22. Royal Commission into Aboriginal Deaths in Custody, 1991: pp. 428-429.
23. ATSIC, 2000a: p. 35.
24. RCAP, 1996b.
25. UN Doc E/CN.4/RES/1993/77.
26. RCAP, 1996b.
27. As cited in: RCAP, 1996b.
28. As cited in: RCAP, 1996b.

III. International human rights law

This chapter provides an overview of the status of indigenous peoples' housing rights within international law, with a focus on indigenous women. It commences by focusing on legally binding treaties, documenting provisions which are relevant to indigenous women and men's housing rights and assessing the extent to which these laws have been applied in the context of indigenous peoples. Subsequently, it focuses on international human rights documents that are non-binding in nature, but which have been negotiated by States and are indicative of political intent. These documents include resolutions adopted by the Commission on Human Rights, the Commission on Human Settlements and the Permanent Forum on Indigenous Issues, as well as world conference documents. Finally, it concludes with an overview of the draft declaration of the rights of indigenous peoples, which has yet to be adopted by the international community.

III.A. International human rights treaties and treaty monitoring bodies

Human rights treaties, in the form of covenants and conventions, are legally binding on States that have become parties to these instruments through the ratification or accession process.¹ When a State ratifies or accedes to a treaty they become a Party to that treaty, and commit themselves to fulfil certain legal obligations. Treaties provide a framework for human rights guarantees focusing on a number of specific areas of human rights protection, such as: indigenous rights, civil, economic, political, social and cultural rights, racial discrimination, and discrimination against women.

Attached to each human rights treaty is a treaty body, or a Committee, charged with the responsibility of reviewing State parties' compliance with its obligations under the treaty. For example, the Committee on Economic, Social and Cultural Rights (CESCR), comprised of 18 independent expert members, is responsible for reviewing State party compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR).² To facilitate this review process, State parties are required to submit regular periodic reports to the treaty body, which are then reviewed by the Committee. In most cases, after the review of the country, the treaty body adopts 'concluding observations', recommendations based on the review process. State parties are expected to address the Committee's concerns and take up their recommendations between reporting periods. Though there are no formal mechanisms to enforce concluding observations, many treaty bodies have included follow-up mechanisms in their work.

United Nations human rights treaty monitoring bodies are also developing ‘general comments’ or ‘general recommendations’, which are legal interpretations of the treaty’s provisions. For example, the CESCR has adopted general comments on the right to adequate housing and on forced evictions.^a

There are many treaties that are relevant to the housing rights of indigenous women and men. The following treaties and relevant aspects of concluding observations and general comments/recommendations adopted by the corresponding treaty bodies are reviewed in this section of the report:

- ICESCR;
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and
- International Covenant on Civil and Political Rights (ICCPR).

In addition to core human rights treaties, housing rights of indigenous peoples are also covered by a number of other international instruments, notably ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, which will be covered in detail as a point of departure to describe the existing international legal framework.

For each treaty the following information is provided: a brief description of the treaty and the monitoring body; an overview of pertinent legal provisions; and an overview of the application by treaty monitoring bodies of the legal provisions pertaining to indigenous peoples and housing rights. An exhaustive review of treaty monitoring body jurisprudence was beyond the scope of this research project. To determine the extent to which these bodies have considered indigenous peoples’ housing rights, the concluding observations of countries included as case studies in this report, as well as countries where some mention of indigenous housing issues could reasonably be expected, was undertaken. Countries reviewed include: Australia, Canada, Ecuador, Finland, Israel, Kenya, Mexico, Nigeria, Norway, Peru, the Philippines, the Russian Federation, and Sweden.

III.A.1. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

This Convention is the most comprehensive and up-to-date international instrument on the conditions of life and work of indigenous and tribal peoples. It is the only Convention on the subject (other than the earlier ILO Convention

a. For more information on these general comments see the sections below.

No. 107, which it replaces). Convention No. 169 is a marked departure from Convention No. 107 as it is informed by more current trends in thinking by the international community with respect to indigenous peoples. It was informed by largely non-western perspectives, and particularly, by the desires and demands of the global indigenous community itself.⁵

As with other treaties, States are obligated to periodically inform ILO’s supervisory bodies regarding the measures taken for the application of the ratified Convention and to respond to the questions, observations or direct requests submitted by the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CEACR consists of 20 independent experts in legal or social fields and with an intimate knowledge of labour conditions or administration. From this exchange, the CEACR writes a report, which is subsequently examined at the annual International Labour Conference by a special tripartite Conference committee, comprised of 150 representatives of governments, employers, and workers. After its general discussion the Committee examines individual cases. Governments mentioned in the CEACR’s report as not fully applying a ratified convention may be invited to make a statement in writing and/or orally. The discussions of cases are summarized in the annexes to the report which the CEACR submits to the International Labour Conference.⁴

III.A.1.a. Legal provisions

ILO Convention No. 169 does not include any specific references to housing rights. However, in its preamble, it refers to both the ICESCR and the Universal Declaration of Human Rights, both of which recognize the right to adequate housing. The Convention takes account of the responsibility of governments to promote the:

“full realization of economic, social and cultural rights [of indigenous and tribal peoples] with respect for their social and cultural identity, their customs, traditions and their institutions.”⁵

Table 2. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

Abbreviated title:	ILO Convention No. 169
Monitoring body and abbreviation:	Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Conference Committee
Date of adoption:	27 June 1989
Entry into force:	5 September 1991
Ratifications:	17 countries, as of August 2004.*

*: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru, and Venezuela. For current list of ratifications see <[http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?\(C169\)](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?(C169))>.

The provisions also include an instruction to governments to assist indigenous peoples:

*“to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.”*⁶

The Convention also contains a non-discrimination clause which states that:

*“Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.”*⁷

The Convention also emphasizes the right of indigenous and tribal peoples to:

*“decide their own priorities for the process of development ... and to exercise control, to the extent possible, over their own economic, social and cultural development.”*⁸

In respect of development projects, the Convention specifies that governments shall:

*“ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities.”*⁹

An important aspect of Convention No. 169 is its emphasis on indigenous peoples' rights to land, contained in Part II. The Convention recognizes that indigenous and tribal peoples have a special relationship with the land and that this is the basis of their cultural and economic survival. It calls for special measures of protection to recognize:

- The special importance for the cultures and spiritual values of indigenous and tribal peoples of their relationship with their lands or territories;¹⁰
- the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy;¹¹
- the responsibility of governments to identify the lands which the peoples concerned traditionally occupy and to guarantee effective protection of their rights of ownership and possession;¹²
- the need to protect indigenous and tribal peoples from being removed or evicted from their lands;¹³
- the need to protect indigenous and tribal peoples from:
 - ü unauthorized intrusion or use of their lands;¹⁴
 - ü outsiders using fraudulent or dishonest means to acquire lands belonging to indigenous or tribal peoples.¹⁵

The provisions of ILO Convention No. 169 are subject to mixed reviews from indigenous peoples and their organizations. Some indigenous peoples and organizations have expressed concern with the Convention, in particular because it qualifies the right to self-determination, stating that the:

*“use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”*¹⁶

Others, however, regard it as providing minimum standards and not precluding national governments from adopting standards that are farther reaching.¹⁷

III.A.1.b. Application of legal provisions

Two themes have arisen repeatedly in the comments of the CEACR: the obligation of States to consult with indigenous peoples with respect to legislative or administrative measures that affect them; and the same obligation to consult prior to the exploration or exploitation of natural resources on the lands they occupy or use.¹⁸ For example, in its report to the International Labour Conference in June 2003, with respect to Ecuador, the CEACR expressed its concern regarding the lack of involvement of the *Shuar* people in an oil exploration contract awarded by the government.¹⁹ As a result of this concern, the CEACR asked the government to report in detail on:

*“the establishment of an effective mechanism for prior consultations ... including information on the participation of these peoples in the use, management and conservation of these resources and in the benefits from oil-producing activities, as well as their receipt of fair compensation for any damage caused by exploration and exploitation in the zone.”*²⁰

The ILO reports that the Convention has had *“considerable influence at the national, regional and international levels.”*²¹ At the national level, the Convention has been used to inform revisions of national constitutions, such as in Bolivia, Mexico and Peru. It has also been used to prompt the establishment or reform of government agencies responsible for working on policies of relevance to indigenous peoples in Brazil, Mexico and Colombia. The CEACR has also documented that Convention No. 169 has been issued as an interpretive guide in several Supreme Court decisions in Latin America, particularly in Colombia. The reach of the Convention goes beyond States that have ratified it. For example, in the Philippines, the Convention was used in the development of the 1997 *Indigenous Peoples Rights Act*.^b The Convention has also been used by other treaty monitoring bodies in the course of country reviews.

b. For more on the Philippines' *Indigenous Peoples Rights Act*, see section IV.F.

For example, in its review of Finland, the CESCR encouraged the government to “*adhere to ILO Convention No. 169 as soon as possible*”.²²

III.A.2. International Covenant on Economic, Social and Cultural Rights

Like all treaties, the ICESCR is legally binding on those States that are party to the Covenant. According to Article 2(1) of the ICESCR, States are obliged:

*“to take steps ... to the maximum of [their] available resources”,... [to achieve] “progressively the full realization of the rights recognized in the ... Covenant”.*²³

As noted earlier, CESCR is the body that monitors State party compliance with the ICESCR. The Committee is comprised of 18 independent experts. It also engages in legal interpretation of the provisions of the ICESCR through the adoption of reports and general comments. There is no individual complaints mechanism available under the ICESCR, which means individuals and/or groups cannot file complaints against States under the ICESCR.^c

The ICESCR is, perhaps, the most important document with respect to housing rights.²⁴ This is because the right to adequate housing is explicitly codified within the text of the Covenant and because the Committee on Economic, Social and Cultural Rights has played a prominent role in interpreting the contents of the right to adequate housing and addressing non-respect of this right²⁵ through its examinations of State party compliance with the ICESCR and in its general comments.

III.A.2.a. Legal provisions

One of the most common misunderstandings associated with the right to adequate housing is the view that this right requires the State to build housing for the entire population, and that people without housing can automatically demand housing from the authorities. Accepting the right to adequate housing

Table 3. International Covenant on Economic, Social and Cultural Rights

Abbreviated title:	ICESCR
Monitoring body and abbreviation:	Committee on Economic, Social and Cultural Rights (CESCR)
Date of adoption:	16 December 1966
Entry into force:	3 January 1976
Ratifications:	149 States, as of August 2004.*

*: For current list of ratifications see:

<www.ohchr.org/english/countries/ratification/index.htm> or <www.ohchr.org/english/bodies/treaty/index.htm>.

c. Work is currently ongoing on a draft Optional Protocol to the Covenant which would possibly allow for individual complaints in the future.

does not, clearly, oblige States to construct a nation's entire housing stock. However, from State obligations under human rights law flows that special attention must be given to vulnerable or marginalized groups such as the homeless, the disabled and children, groups that in some countries do have a statutory right to be provided with adequate housing by the State. Indigenous peoples also belong to a category often in need of particular attention by the State.

The right to adequate housing is enshrined in a number of international treaties, the chief articulation of which is the ICESCR. It codifies the right to housing as a constituent element of the right to an adequate standard of living:

*"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."*²⁶

The potential application of the right to adequate housing to indigenous peoples, including indigenous women, can be understood through a number of provisions of the ICESCR. Article 11(1) stipulates that the right to adequate housing extends to everyone. Despite the male-specific language used in the provision, the CESCR has articulated in its own jurisprudence that this Article, like all Articles in the ICESCR, extends to everyone.²⁷ All of the rights in the ICESCR must be exercised in accordance with Article 2(2) (non-discrimination) and Article 3 (equality between men and women). This means that indigenous peoples are entitled to enjoy the right to adequate housing without discrimination and equally with the majority population. Similarly, indigenous women are entitled to enjoy the right to adequate housing without discrimination and equally with both indigenous men and the majority population. The housing rights of indigenous women and men can also be understood as protected through Article 1 of the ICESCR which codifies the right to self-determination, stating:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."^d

Article 15 of the ICESCR, which codifies, *inter alia*, the right to participate in cultural life, can also be used in conjunction with the aforementioned articles toward the realization of housing rights.

d. For a discussion of the relationship between the right to adequate housing and self-determination, see section II.D above.

The CESCR has interpreted the meaning of the right to adequate housing in its General Comments Nos. 4 and 7. General Comment No. 4, on the right to adequate housing provides:

“the most authoritative legal interpretation of the right to adequate housing under international law to date”.²⁸

General Comment No. 4 is unequivocal that the right to housing must be regarded as an expansive right; the right to housing must go beyond having a roof over one’s head. It must be regarded as the right to live somewhere in peace, security and dignity.²⁹ General Comment No. 4 also outlines seven elements required in order for housing to be adequate. These are:³⁰

- **Legal security of tenure:** *“Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.”*
- **Availability of services, materials, facilities and infrastructure:** *“An adequate house must contain certain facilities essential for health, security, comfort and nutrition... [including, inter alia, access to] safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.”*
- **Affordability:** *“Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by State parties to ensure that the percentage of housing-related costs is, in general commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. Tenants should be protected by appropriate means against unreasonable rent levels or rent increases....”*
- **Habitability:** *“Adequate housing must be habitable, in terms of 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. The physical safety of occupants must be guaranteed as well....”*
- **Accessibility:** *“Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources.”* Disadvantaged groups *“should be ensured some degree of priority consideration in the housing sphere. Both law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal....”*

- **Location:** *“Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centers and other social facilities. This is true both in large cities and in rural areas ... Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.”*
- **Cultural adequacy:** *“The way 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 toward development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed...”*

The Comment concludes by outlining legal steps that governments must take to comply with their housing rights obligations under the ICESCR.

Analyzing the housing conditions of indigenous peoples against these seven aspects of housing adequacy can assist in developing an understanding of the extent to which indigenous peoples enjoy the right to adequate housing. Chapter IV below exposes the relevance of issues such as security of tenure, habitability and cultural adequacy for indigenous peoples. At the same time, to ensure the relevance of this understanding of the right to housing to indigenous peoples’ and specifically women, these elements must be interpreted and applied from their perspectives and in a manner that responds to their lived experiences. More radically, it may also require developing new and different elements that derive from and correspond with their lived experiences.³¹

General Comment No. 7, on forced evictions, is the most comprehensive legal document pertaining to forced evictions under international law. The Comment is an elaboration on the:

“circumstances under which forced evictions are permissible and ... the types of protection required to ensure respect for the relevant provisions of the [ICESCR].”³²

Forced eviction is defined as:

“The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy without the provision of, and access to, appropriate forms of legal or other protection.”³³

General Comment 7 recognizes that the practice of forced evictions has a disparate impact on both indigenous peoples and women.³⁴ It stipulates that the State must refrain from implementing forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.³⁵

According to the General Comment, the development of legislation which protects against forced eviction will be a key instrument in preventing the practice of forced eviction. The General Comment further requires countries to ensure that:

*“legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies.”*³⁶

And so, beyond governments, private landlords, developers and even international institutions such as the World Bank, are subject to legal sanction should they engage in the practice of forced evictions.³⁷

The Comment also provides States and other actors with direction prior to and following an eviction. For example, it stresses that prior to a planned eviction; the State should explore *“all feasible alternatives”* with a view to avoiding the eviction or minimizing the use of force during the eviction.³⁸ Moreover, it presents the following eight procedural protections which should be applied in relation to forced evictions:³⁹

“(a) an opportunity for genuine consultation with those affected;
(b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
(c) information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
(d) government officials or their representatives must be present during an eviction;
(e) all persons carrying out the eviction must be properly identified;
(f) evictions are not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
(g) affected persons must have access to legal remedies; and
(h) affected persons must have access to legal aid to seek redress from the courts.”

According to General Comment No. 7, when forced evictions are carried out, they must be undertaken without rendering a single individual homeless and affected persons must receive compensation for any real or personal property lost.

General Comment No. 7 provides a legal interpretation of State parties' obligations with respect to the practice of forced evictions. As revealed in Chapters III and IV of this report, forced eviction is one of the most devastating housing issues confronting indigenous women and men throughout the world. General Comment 7 could be used to support activities to prevent forced evictions, whether legal challenges or urgent campaigns.

The CESCR has also developed comprehensive ‘reporting guidelines,’ which outline the information States parties should provide to the Committee in their report.⁴⁰ For example, with respect to Article 1 of the ICESCR, the guidelines pose the following question: *“In what manner has the right to self-determination been implemented?”* The guidelines also pose a number of questions regarding the right to housing that could be posed specifically in the indigenous context and then used as a basis for measuring the degree to which indigenous peoples are enjoying the right to housing.^e

III.A.2.b. Application of legal provisions

The CESCR is responsible for reviewing the compliance by State parties with their obligations under the ICESCR. In this regard, the CESCR adopts concluding observations on State parties under review. While the CESCR has expressed its concern with economic, social and cultural rights of indigenous peoples’ in a variety of country contexts, there are only a few instances where indigenous housing issues are raised explicitly.

In the 2000 review of Australia, the CESCR expressed deep concern that: *“despite the efforts and achievements of the State Party, the indigenous populations of Australia continue to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights,*

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- e. For example, the Revised Guidelines, ask State parties to: *“provide detailed information about those groups within your society that are vulnerable and disadvantaged with regard to housing. Indicate, in particular:*
- (i) The number of homeless individuals and families;*
 - (ii) The number of individuals and families currently inadequately housed and without ready access to basic amenities such as water, heating (if necessary), waste disposal, sanitation facilities, electricity, postal services, etc. (...). Include the number of people living in over-crowded, damp, structurally unsafe housing or other conditions which affect health;*
 - (iii) The number of persons currently classified as living in ‘illegal’ settlements or housing;*
 - (iv) The number of persons evicted within the last five years and the number of persons currently lacking legal protection against arbitrary eviction or any other kind of eviction;*
 - (v) The number of persons whose housing expenses are above any government-set limit of affordability, based upon ability to pay or as a ratio of income;*
 - (vi) The number of persons on waiting lists for obtaining accommodation, the average length of waiting time and measures taken to decrease such lists as well as to assist those on such lists in finding temporary housing;*
 - (vii) The number of persons in different types of housing tenure by: social or public housing; private rental sector; owner-occupiers; ‘illegal’ sector; and other”* (paragraph 3(b) of the Section dealing with ‘Article 11 of the Covenant’).

*particularly in the field of employment, **housing**, health and education” [Emphasis added].⁴¹*

In its review of Peru, the CESCR expressed its concern about the great number of forced evictions of people in the Amazon basin, resulting in the destruction of their habitat and way of life.⁴² Some of its most far reaching comments were made in its review of Canada in 1998. The CESCR expressed concern at:

*“... the gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights. There has been little or no progress in the alleviation of social and economic deprivation among Aboriginal people. In particular, the Committee is **deeply concerned at the shortage of adequate housing**, the endemic mass unemployment and the high rate of suicide, especially among youth, in the Aboriginal communities. **Another concern is the failure to provide safe and adequate drinking water to Aboriginal communities on reserves. The delegation of the State Party conceded that almost a quarter of Aboriginal household dwellings required major repairs and lacked basic amenities**”⁴³ [Emphasis Added].*

Immediately thereafter, the CESCR notes the interrelationship between the economic marginalization of indigenous people in Canada and the ongoing dispossession of their lands.⁴⁴ The CESCR then notes⁴⁵ that indigenous women living on reserves do not enjoy the same right to an equal share of matrimonial property upon marriage breakdown as women that live off reserves.^f The CESCR did, on several occasions, refer to the land rights of indigenous peoples and the necessity for State parties to address inequalities as a means of improving the overall economic and social conditions of indigenous peoples.⁴⁶ In this regard, the CESCR recommended in each case that the State party ratify ILO Convention No. 169.

The CESCR has also expressed concern about the state of housing of the Bedouin people of Israel. In particular the Committee has urged Israel to discontinue land confiscations, house demolitions, the implementation of fines for building ‘illegally’ and the destruction of unrecognized villages. Also of concern to the Committee is the destruction of agricultural crops, fields and trees. In this regard, the CESCR has urged Israel to recognize all existing Bedouin villages, Bedouin property rights and Bedouin rights to basic services,

f. In the survey of CESCR concluding observations undertaken for this report, this was the only reference to indigenous women found.

especially water and to desist from the destruction and damaging of agricultural crops and fields, including in unrecognized villages.⁴⁷

III.A.3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

This broad-based Convention is aimed at addressing and eliminating racial discrimination. Under the Convention, States parties undertake the following obligations:

“• To engage in no act or practice of racial discrimination against individuals, groups of persons or institutions, and to ensure that public authorities and institutions do likewise;

• Not to sponsor, defend or support racial discrimination by persons or organizations;

• To review government, national and local policies and to amend or repeal laws and regulations which create or perpetuate racial discrimination;

• To prohibit and put a stop to racial discrimination by persons, groups and organizations; and

• To encourage integrationist or multiracial organizations and movements and other means of eliminating barriers between races, as well as to discourage anything which tends to strengthen racial division.”⁴⁸

The Committee on the Elimination of Racial Discrimination (CERD) is responsible for reviewing State party compliance with the Convention. The CERD is comprised of 18 independent experts. The Convention includes several procedures through which the CERD can review States’ compliance with their legal obligations. In addition to the submission of periodic reports by State Parties to the CERD, there is an individual complaint mechanism, where an individual or a group of persons alleging to be victims of racial discrimination can file a complaint against their State once they have exhausted all domestic remedies – if the State has declared that it recognizes the competence of the Committee to receive such complaints.⁴⁹ Like other United Nations treaty monitoring bodies, the CERD adopts General Recommendations to aid States parties in understanding the provisions contained in the ICERD.

Table 4. International Convention on the Elimination of All Forms of Racial Discrimination

Abbreviated title: ICERD	
Monitoring body and abbreviation:	Committee on the Elimination of Racial Discrimination (CERD)
Date of adoption:	21 December 1965
Entry into force:	4 January 1969
Ratifications:	169 States, as of August 2004.*

*: For current list of ratifications see:

www.ohchr.org/english/countries/ratification/index.htm or www.ohchr.org/english/bodies/treaty/index.htm.

III.A.3.a. Legal provisions

The ICERD explicitly refers to the right to housing. It instructs States parties to prohibit racial discrimination and to guarantee the right to equality in the enjoyment of economic and social rights, including the right to housing.⁵⁰ As such, the Convention has adequate provisions for the protection of indigenous peoples' housing rights. While there is no explicit guarantee in the Convention of equality between men and women within racial groups, CERD General Recommendation XXV deals with gender-related dimensions of racial discrimination, noting that:

“There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.”⁵¹

General Recommendation XXV also commits the Committee and States parties to examine the:

“disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin.”⁵²

CERD has also adopted General Recommendation XXIII specifically about indigenous peoples. This does not include any explicit references to housing. However, it does contain several provisions which support housing rights claims. For example, paragraph 4 calls on States parties to:

“provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics.”

‘Development’ could be interpreted to include adequate housing. Paragraph 5 calls on States parties to:

“recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.”

Where indigenous peoples have been deprived of their land and territories without their free and informed consent, States parties are called upon to *“take steps to return those lands”*. As discussed in the previous chapter and as is illuminated in the case studies, there is a direct relationship between the dispossession of indigenous peoples' lands, and indigenous peoples' housing. Most often, the dispossession of lands is achieved through forced eviction, a violation of housing rights, and results in insecure tenure, increased levels and depths of poverty, rural-urban migration, and ultimately, housing that is of poorer quality and that is unstable.

III.A.3.b. Application of legal provisions

The informal survey of jurisprudence reviewed for this report revealed that of the treaty monitoring bodies, the CERD was one of the most consistent in its consideration and expression of concern with respect to the situation of discrimination against indigenous peoples. In many instances, the CERD expressed concern with the devastating levels of poverty experienced by indigenous peoples, and the inequality they suffer in economic and social realms. The CERD commented on the status of land rights for indigenous peoples in a number of countries,⁵³ however, it did not issue as many comments regarding their housing rights. With respect to Israel, the CERD expressed concern about inequalities in housing experienced by the Bedouin. With respect to the Philippines the CERD expressed concern with respect to the forcible eviction of indigenous populations in development zones and the denial by force of the right to return. With respect to Canada, concern was expressed regarding Aboriginal women's rights to own and inherit property upon marriage.⁵⁴

III.A.4. Convention on the Elimination of All Forms of Discrimination Against Women

This is a broad-based Convention that is aimed at protecting women against discrimination and ensuring women's equality in political, economic, social and cultural realms. The Convention defines discrimination against women and establishes an agenda for national action to end such discrimination. Once a State has ratified or acceded to the Convention, it is obliged to undertake a variety of measures to address and end such discrimination. According to the United Nations Division for the Advancement of Women, these measures include:

“to incorporate the principle of equality of men and women in their legal system; abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.”⁵⁵

Table 5. Convention on the Elimination of All Forms of Discrimination Against Women

Abbreviated title:	CEDAW
Monitoring body and abbreviation:	Committee on the Elimination of Discrimination against Women (CEDAW)
Date of adoption:	18 December 1979
Entry into force:	3 September 1981
Ratifications: ^a	177 States, as of August 2004.*

*. For current list of ratifications see:

<www.ohchr.org/english/countries/ratification/index.htm> or <www.ohchr.org/english/bodies/treaty/index.htm>.

The Committee on the Elimination of Discrimination against Women (CEDAW), comprised of 23 independent experts on women's issues from around the world, is responsible for reviewing State party compliance with the Convention, as well as adopting General Recommendations to aid in the interpretation of the provisions of the Convention. States are required to submit periodic reports to the Committee every four years, “*detailing the measures they have taken to comply with their treaty obligations.*”⁵⁶

III.A.4.a. Legal provisions

The Convention has a number of articles that are pertinent to the protection of indigenous housing rights:

- It protects women’s equality in economic and social realms, particularly with respect to securing bank loans, mortgages and other forms of financial assistance.⁵⁷
- It protects women living in rural areas from discrimination and ensures them the right to enjoy adequate living conditions including in relation to housing.⁵⁸
- It states that rural women should participate in and benefit from rural development.⁵⁹
- It protects women’s equal right to conclude contracts and to administer property.⁶⁰
- It stipulates that spouses should have the same rights with respect to the ownership, acquisition, management, administration, enjoyment and disposition of property.⁶¹

The CEDAW Committee has also adopted ‘General Recommendation 21 on Equality in Marriage and Family Relations’ which elaborates on Articles 15 and 16 of the Convention.

III.A.4.b. Application of legal provisions

Research into the concluding comments of the Convention revealed that while they are concerned with discrimination against indigenous women, this concern is not often expressed in the context of housing. The concluding observations reviewed on Australia, Canada, Mexico, and Sweden did not refer explicitly to housing rights of indigenous women, however, they did refer to various forms of discrimination experienced by indigenous women in those regions.⁶² For example, the Committee explicitly recognized that in Australia, indigenous women experience discrimination and disadvantages with regard to opportunities, resources, and access to rights.⁶³ Pursuant to two key High Court cases (*Mabo* and *Wik*); CEDAW recommended that the government establish legislation and policy to ensure women’s equal access to individual ownership of

native land.⁶⁴ In light of efforts to address discrimination by the government of Sweden, CEDAW noted concern for gender-based discrimination against the Saami population.⁶⁵ With respect to Mexico, CEDAW took issue with the discrimination faced by indigenous women in Mexico, noting that health, employment and education statistics for this group was below the national average.⁶⁶ CEDAW noted specific concern for rural women living in extreme poverty. The Committee characterized discrimination against aboriginal women in Canada as “*systematic*”, and noted overrepresentation of Aboriginal women in lower-skill lower-paying jobs. CEDAW acknowledged that Aboriginal women are faced with barriers to education, high incidents of incarceration, and domestic violence.⁶⁷ It expressed reservation about the now-defunct *First Nations Governance Act* because of its failure to address discriminatory provisions in other legislation that are inconsistent with the Convention, especially provisions on matrimonial property rights, status and band membership.⁶⁸ CEDAW recognized that although generally poverty has been on the decline in Canada since 1997, indigenous women in Canada have low rates of employment in the wage economy and are over-represented in lower-skill and lower-paying positions.⁶⁹

III.A.5. International Covenant on Civil and Political Rights

The ICCPR codifies basic civil and political rights, such as: the right to self-determination, the right to life, liberty, freedom of movement, the right to legal recourse when rights are violated, freedom of opinion, expression, thought, conscience and religion; and freedom from torture and inhuman or degrading treatment.

The Human Rights Committee (HRC) was established to monitor the implementation of the Covenant and its Optional Protocols^g in the territory of States parties. The HRC: “*is composed of 18 independent experts who are persons of high moral character and recognized competence in the field of human rights.*”⁷⁰ As with the CERD, the HRC has two principle

Table 6. International Covenant on Civil and Political Rights

Abbreviated title:	ICCPR
Monitoring body and abbreviation:	Human Rights Committee (HRC)
Date of adoption:	16 December 1966
Entry into force:	23 March 1976
Ratifications:	152 States, as of August 2004.*

*: For current list of ratifications see:

<www.ohchr.org/english/countries/ratification/index.htm> or <www.ohchr.org/english/bodies/treaty/index.htm>.

g. The first Optional Protocol is a mechanism to allow the HRC to receive and consider communications from individuals claiming to be victims of violations of any of the rights contained in the ICCPR. The Second Optional Protocol aims to abolish the death penalty.

methods of monitoring State party compliance with the ICCPR: by considering complaints from individuals that their rights under a particular treaty have been violated and by considering reports, periodically submitted by governments, on how those governments are implementing treaties.⁷¹ Like other United Nations treaty monitoring bodies, the HRC adopts general comments to aid in the interpretation of the provisions of the ICCPR.

III.A.5.a. Legal provisions

The ICCPR has five provisions of particular relevance to this study:

- Article 1 recognizes the right of all peoples to self-determination, and to “*freely determine their political status and freely pursue their economic, social and cultural development*”;
- Article 3 calls for equality between men and women;
- Article 26 prohibits any discrimination on a variety of grounds including race, national and social origin, property, or birth or other status;
- Article 17 protects everyone from arbitrary or unlawful interference with their privacy, family, or home; and
- Article 27 states that ethnic, religious or linguistic minorities should not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

III.A.5.b. Application of legal provisions

In its concluding observations, the HRC has consistently explored and addressed human rights concerns of indigenous peoples. A number of references to indigenous peoples’ land rights can be found in concluding observations on: Australia, Canada, Ecuador, Finland, Israel, Mexico, the Philippines, and Sweden.⁷² The Committee also expresses concern over the housing situation for indigenous people in the Observations on Israel and the Philippines, and in so doing, reflects the close relationship between the housing rights and land rights of indigenous peoples. For example, in its 1998 review of Israel, the Committee expresses concern:

“... that the Israel Lands Administration (ILA), responsible for the management of 93 per cent of land in Israel, includes no Arab members and that while the ILA has leased or transferred land for the development of Jewish towns and settlements, few Arab localities have been established in this way until recent years. The Committee recommends that urgent steps be taken to overcome the considerable inequality and discrimination which remain in regard to land and housing.”⁷³

In the concluding observations examined, one reference to indigenous women's rights was found. In its review of Canada, the HRC expresses concern regarding the prohibitions around transferring indigenous status from an indigenous woman (who marries a non-indigenous male) to her grandchildren and other generations. This has indirect implications for housing, for without 'status', an indigenous person cannot dwell on 'reserves' and thus is disentitled to reside on his or her homelands.

III.B. Resolutions

United Nations resolutions are formal expressions of the opinion or will of United Nations organs, representative of political intent. Resolutions are not legally binding on governments, *per se*; however, because they are adopted by States, they indicate a "*political willingness to work towards the achievement of the respective resolution's contents*".⁷⁴ As such, resolutions can be used at the national and regional levels to assist in the claiming of rights.

The following section of this report focuses predominantly on the resolutions of the Commission on Human Rights (CHR) as it is the most significant Charter-based human rights body at the United Nations. It also refers to resolutions adopted by other United Nations bodies such as the Commission on Human Settlements and the Permanent Forum on Indigenous Issues.

III.B.1. Commission on Human Rights

The Commission on Human Rights (CHR) is the main policy-making United Nations human rights body at the international level.⁷⁵ More than three thousand people – government representatives, United Nations agencies, NGOs and others – participate in the CHR during its annual session. The Commission is comprised of 53 member countries, each of which is represented by a government delegation. The agenda of the CHR covers a wide range of human rights issues. The CHR adopts resolutions on country specific situations as well as thematic issues. The CHR adopts approximately one hundred resolutions, decisions and Chairperson's statements at each session.⁷⁶

In recent years, the CHR has paid an increasing amount of attention to indigenous issues.

*"In 1996, the Commission included a special agenda item, "Indigenous Issues", for the first time. Resolutions adopted under this item relate to such issues as the draft Declaration on the Rights of Indigenous Peoples, the Working Group on Indigenous Populations, the Permanent Forum on Indigenous Issues, and the International Decade of the World's Indigenous Peoples."*⁷⁷

Resolution 2003/56 on ‘human rights and indigenous issues’⁷⁸ is aimed especially at ensuring that indigenous peoples exercise and fully enjoy their civil, political, economic and social rights. The resolution, however, does not deal specifically with the issue of housing or land. It does though, take account of indigenous women and requests that a gender perspective be used in any analysis of human rights violations. The resolution:

*“Reiterates the invitation to the Special Rapporteur^h to pay special attention to violations of the human rights and fundamental freedoms of indigenous children and women, and to take into account a gender perspective”.*⁷⁹

The resolution also urges those States that have not yet done so to consider, as a matter of priority, signing, ratifying or acceding to ILO Convention No. 169.⁸⁰

A number of resolutions pertaining to housing rights have also been adopted by the Commission. During the 1980s, the CHR adopted three resolutions on ‘the realization of the right to adequate housing’ between 1986 and 1988, which reiterate the right of all persons to an adequate standard of living, including adequate housing and the need to take appropriate measures to ensure the enjoyment of these rights.⁸¹ More recently, in 2000 the Commission appointed an independent Special Rapporteur on adequate housing with the task to report on the status of the realization of this right world-wide.¹ The Commission has also adopted several resolutions on ‘adequate housing as a component of the right to an adequate standard of living’.⁸² These resolutions refer specifically to indigenous peoples, calling upon all States:

*“To counter social exclusion and marginalization of people who suffer from discrimination on multiple grounds, in particular by ensuring non-discriminatory access to adequate housing for indigenous people and persons belonging to minorities”.*⁸³

The CHR has also adopted resolutions on forced evictions.⁸⁴ The first of these is most noteworthy for its affirmation:

*“that the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing”.*⁸⁵

Though the resolution does not refer explicitly to indigenous peoples, it does recognize that:

*“forced evictions ... invariably affect the poorest, most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of society”.*⁸⁶

h. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. Roldolfo Stavenhagen.

i. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, see section III.C.2.

Within its preambular paragraphs, the 2004 resolution on the prohibition of forced evictions refers specifically to the disproportionate disadvantage experienced by indigenous people in the eviction process,⁸⁷ and

*“...strongly urges Governments to protect all persons who are currently threatened with forced eviction, and to adopt all necessary measures giving full protection against forced eviction, based upon effective participation, consultation and negotiation with affected persons or groups.”*⁸⁸

The most explicit articulation of women’s equal rights to housing in international human rights law is found in the resolutions of the CHR. The Commission has adopted a series of resolutions between 2000 and 2003, on ‘women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing.’⁸⁹ Though these resolutions do not contain any direct references to indigenous women, they establish fundamental principles that may be used by indigenous women to claim these rights.^j In this context it should also be noted that the Commission has requested the Special Rapporteur on adequate housing to report to it specifically on the issue of women and housing. Each of the resolutions reaffirms basic international human rights norms such as, the right to be free from discrimination, and rights to an adequate standard of living including housing. These norms are then used to claim women’s housing, land and property rights. For example, operative paragraph 4:

“Urges governments to comply fully with their international and regional obligations and commitments concerning land tenure and the equal right of women to own property and to an adequate standard of living including adequate housing”.

Operative paragraph 8:

“Recommends that governments encourage financial lending institutions to ensure that their policies and practices do not discriminate against women”.

III.B.2. The Permanent Forum on Indigenous Issues

In May 2002 the United Nations Permanent Forum on Indigenous Issues held its inaugural session in New York. The Forum is the first United Nations mechanism for indigenous peoples, which enables them to represent their own interests directly to the Economic and Social Council (ECOSOC) – one of the six main organs of the United Nations. The Forum, comprised of 16 indepen-

j. In 2000, government representatives of Pakistan attempted to have references to indigenous women included in the resolution. Unfortunately, these efforts failed.

dent experts,^k acts as an advisory body to ECOSOC.⁹⁰ It is mandated to discuss a broad range of indigenous issues relating to: economic and social development, culture, the environment, education, health and human rights.⁹¹ The Forum meets once a year and each session is devoted to a particular theme. It receives communications from governments on its thematic issues as well as on other issues of general concern to the Forum and, at the end of each session, makes recommendations which it forwards to ECOSOC for review and potential adoption.

The most recent session, in May 2004, was devoted to indigenous women. During this session, participants and members of the Forum discussed and documented indigenous women's disadvantage. The Forum recognized that indigenous women share many concerns with other women throughout the world, such as poverty, but that indigenous women also "*offer a distinct and important perspective.*"⁹² In this regard, the Forum highlighted the:

*"multiple forms of discrimination experienced by indigenous women, based on gender and race/ethnicity, and the complex problems stemming from this discrimination."*⁹³

The Forum also noted the erosion of indigenous women's roles within their societies, particularly, as a result of the loss of natural resources, the transformation of their societies from subsistence to cash economies and their lack of access to decision making and political structures.⁹⁴

A variety of recommendations have been adopted by the Forum to date. For example, at its 2003 session, the Forum recommended that a workshop be convened by the Department of Economic and Social Affairs on the collection of data concerning indigenous peoples.⁹⁵ This recommendation was later approved in a resolution by ECOSOC.⁹⁶ At its third session, in 2004, a number of broad recommendations were made to United Nations bodies and governments aimed at improving the living conditions of indigenous women. The Forum, for example, recommends that the United Nations pay closer attention to the vulnerability of indigenous women migrants,⁹⁷ and that mechanisms be created to ensure that indigenous women play a central role in decision making processes. It specifically recommends that governments integrate a gender framework into their policies and actions so that they directly benefit indigenous women, including creating:

*"specific measures that enhance indigenous women's participation in their own development processes [and creating] national policies that generate employment for indigenous women".*⁹⁸

k. 8 are nominated by governments and 8 are appointed by the President of ECOSOC.

Furthermore, the Forum calls on the United Nations to advise governments to revise laws and administrative structures to ensure:

*“women’s equal rights and access to social and economic services and resources, including land ownership”.*⁹⁹

Lastly, the Forum took note of the research activity on which this report is based:

*“The Forum takes note with appreciation of the focus and work of UN-Habitat, particularly regarding the ongoing study jointly initiated with the Office of the United Nations High Commissioner for Human Rights on indigenous peoples and the right to adequate housing, and recommends that UN-Habitat submit a report on the conclusions and recommendations of this study to the Forum at its fourth session [in 2005], and that it participate in the dialogue.”*¹⁰⁰

III.B.3. Other United Nations bodies

A number of other United Nations bodies have also adopted resolutions of general application pertaining to housing rights. For example, the Commission on Human Settlements has adopted several resolutions recognizing and reaffirming housing rights.¹ The Sub-Commission on the Promotion and Protection of Human Rights^m (the Sub-Commission) adopted a number of resolutions, from 1991 to 1998, on housing rights.¹⁰¹ The Sub-Commission has also adopted two resolutions on ‘women and the right to adequate housing and to land and property’.¹⁰² And, the Commission on the Status of Women adopted Resolution 42/1 in 1998 on ‘human rights and land rights discrimination’.¹⁰³

III.C. Special rapporteurs

‘Special procedures’ is the general name given to the mechanisms established by the CHR or the Sub-Commission to address either specific country situations or thematic issues. The special procedures are a way for the Commission to be constantly engaged on an issue of concern throughout the year. Special procedures are most commonly either an individual, called a ‘special rapporteur’, a ‘representative’ or an ‘independent expert’, or a group of individuals, called a ‘working group’. Special Rapporteurs are independent, are not paid,

1. Including Resolution 14/6, “The human right to adequate housing”, adopted 5 May 1993 (<http://www.unhabitat.org/programmes/housingrights/documents/HS.C.RES.14.6.htm>); and Resolution 16/7, “The realization of the human right to adequate housing” (A/52/8), adopted 7 May 1997, <<http://www.unhabitat.org/programmes/housingpolicy/documents/HS.C.RES.16.7.htm>>.

m. Until 1999 known as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

nor employed by the United Nations, and serve in a personal capacity for a maximum of 6 years.¹⁰⁴

The reports written by special rapporteurs of the CHR or the Sub-Commission are not legally binding. They do, however, make an important contribution to the development of international law, providing detailed analyses of pertinent issues. The reports of three Special Rapporteurs, whose work is of particular relevance to this study, are reviewed in the sections below.

III.C.1. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

The Special Rapporteur's first report, submitted in 2002,¹⁰⁵ provides an overview on a number of human rights issues of concern to indigenous peoples, and of direct relevance to their housing rights. The report highlights the overall disadvantage suffered by indigenous peoples across the world, especially with respect to their economic, social and cultural rights.¹⁰⁶

It provides a succinct overview of international legal instruments concerning indigenous peoples, and national legislation and reforms. The report then details some of the major issues currently facing indigenous peoples.

On land rights, the report notes the connection between aboriginal title (or lack thereof), the dispossession of indigenous lands, and the ability of indigenous peoples to exercise and enjoy their human rights, in particular their right to be free from poverty or to an adequate standard of living.¹⁰⁷ The report notes that land is not only essential to the livelihood of indigenous peoples because it provides necessary resources, but that lands or "*homelands and territories*" have important spiritual, cultural and social connections for indigenous peoples, that are also essential for the full protection of the human rights and fundamental freedoms of indigenous peoples.¹⁰⁸ The report also suggests that development projects exacerbate the poor living conditions of indigenous people. Though the report does not devote a great deal of attention to women, it does note that women suffer terribly from the violence that occurs on many indigenous lands.¹⁰⁹

The Special Rapporteur's second report¹¹⁰ is devoted to an analysis of the human rights violations caused by the implementation of large-scale or major

Table 7. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

Name:	Rodolfo Stavenhagen
Body appointing	Commission on
Special Rapporteur:	Human Rights
Resolution of	CHR, Resolution
appointment:	2001/57
Date and period of	April 2001, for a
appointment:	period of three years

development projects, like hydro-electric dams. The report stipulates that these projects constitute one of the most serious concerns for indigenous peoples around the world and has grave consequences in terms of indigenous peoples' housing.

*"Wherever such developments occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes... Large-scale development projects will inevitably affect the conditions of living of indigenous peoples. Sometimes the impact will be beneficial, very often it is devastating, but it is never negligible. Indigenous peoples are said to bear disproportionately the costs of resource-intensive and resource-extractive industries ..."*¹¹

The report indicates that the practice of forced eviction or involuntary resettlement (which the Special Rapporteur notes is a *prima facie* violation of the right to housingⁿ) is commonplace in large-scale development projects and that this practice violates civil, cultural, economic, political and social rights of indigenous peoples. It also mentions that women and children are particularly affected by this practice. The Special Rapporteur provides a number of case studies to underscore the implications of these projects. For example, he discusses the case of the Sardar Sarovar Dam in India, a project which has the potential to uproot and negatively affect at least one million people, many of whom are *Adivasis* or tribal people.^o The report also provides information on the San Roque Multipurpose project in the Philippine Cordillera region which involves the construction of a large dam on the Agno River. The dam reservoir is expected to submerge eight small upland villages that are home to indigenous people and many other villages are likely to be affected by sediment build-up and upstream flooding. It is estimated that 8,000 indigenous households (approximately 37,000 individuals) are going to be affected.¹²

The report closes with a series of conclusions and recommendations relevant to housing rights:

n. Forced eviction as a *prima facie* violation of housing rights is in keeping with CHR Resolution 1993/77, *Forced Evictions*, which affirms: "*that the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing*" (UN Doc E/CN.4/RES/1993/77: operative paragraph 1). In its General Comment No. 4 the CESCR stipulates: "*that instances of forced eviction are 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*" (paragraph 18).

o. *Adivasis* is the preferred term of indigenous peoples, rather than scheduled tribes and castes (UN Doc E/CN.4/2003/90: paragraphs 44 -52).

“Potential long-term economic, social and cultural effects of major development projects on the livelihood, identity, social organization and well-being of indigenous communities must be included in the assessment of their expected outcomes, and must be closely monitored on an ongoing basis. Such effects would include health and nutrition status, migration and resettlement, changes in economic activities, levels of living as well as cultural transformations and socio-psychological conditions, with special attention given to women and children.”¹¹³

To the extent that major development projects impinge upon traditional indigenous territories or ancestral domains, indigenous land and property rights must be considered as human rights at all times, whether they are so recognized legally or not.

III.C.2. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living

In his 2001 report to the Commission on Human Rights,¹¹⁴ the Special Rapporteur on adequate housing, includes a short section on indigenous and tribal peoples’ housing and land rights. In this section he declares his intention to examine the links between housing rights and indigenous peoples’ relationship to their lands generally and, more particularly, the relationship between the rights protected in ILO Convention 169 and the right to adequate housing.¹¹⁵ In his discussion on the adoption of an optional protocol or a complaint mechanism to the ICESCR, he notes the efficacy of such a procedure to address large-scale housing rights violations of vulnerable communities, including indigenous and tribal peoples.¹¹⁶

The Special Rapporteur also submitted a report to the Commission on Human Rights on women and adequate housing, in March 2003, which explores the gender dimensions of the right to adequate housing. The report provides the following succinct overview of women’s inequality with respect to housing:

“Despite numerous resolutions and the strategies implemented both nationally and internationally, ..., women continue to suffer from

Table 8. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living

Name:	Miloon Kothari
Short title:	Special Rapporteur on adequate housing
Body appointing Special Rapporteur:	Commission on Human Rights
Resolution of appointment:	CHR, Resolution 2000/9 & 2003/27
Date and period of appointment:	September 2000, renewed in 2003 for a period of three years

discriminatory treatment in all areas seminal to the attainment of adequate housing. Equal access to credit and finance, equal rights in respect of inheritance of land and property and the elimination of gender-biased customs and traditions that deny women their rights to their natal and marital homes are critical issues that must be addressed. Moreover, laws and policies must be articulated and implemented in ways that recognize the specific constraints and vulnerabilities of women in relation to the right to adequate housing. The attainment of legal security of tenure is also of critical importance to women; without it they are disproportionately affected by forced evictions and resettlement schemes, slum clearance, domestic violence, civil conflict, discriminatory inheritance laws, development projects and globalization policies that circumscribe access to productive land and natural resources."¹¹⁷

The report underlines the contradictions between local legislation which can protect women's housing rights and deeply rooted customs which undermine their rights.¹¹⁸ The Special Rapporteur highlights that often women do not benefit from gender neutral legislation on house and land ownership when it is implemented and interpreted by the judiciary and the public administration, which tend to uphold social norms and attitudes and traditional values. Women often face bias from judicial and administrative officials who do not believe that women should have equal or individual rights and control over housing, land and property.¹¹⁹

The report also notes that international law recognizes women's right to adequate housing, and by ratifying international human rights treaties, States commit themselves to upholding this right. The report emphasizes that women are not a homogeneous group and recognizes indigenous and tribal women as one of the:

*"groups/categories of women who are more vulnerable than others, at higher risk of becoming homeless or suffering from the consequences of inadequate housing and living conditions."*¹²⁰

The Special Rapporteur states:

*"There is a need to examine policies and laws on indigenous groups and their particular impact on indigenous women. Conservation laws that remove indigenous groups from their traditional environment may lead to the deterioration of their standard of living and the breakdown of indigenous cultures and relationships that can have a particular effect on indigenous women. Very few laws address cross-sectional discrimination, and indigenous women may risk facing double discrimination in access to housing and civic services."*¹²¹

He recommends that:

*“existing laws and policies should be reviewed and revised, where necessary, to recognize the special condition of particular groups of women and to provide them with adequate immediate protection.”*¹²²

III.C.3. Special Rapporteur on indigenous people and their relationship to land

In the final working paper on indigenous peoples and their relationship to land,¹²³ the Special Rapporteur provides a succinct overview of the fundamental nature of indigenous peoples’ relationship to their homelands. The report also offers a discussion of the history and contemporary forms of land dispossession. It highlights the following means by which indigenous peoples continue to be dispossessed of their lands and resources:

- *“Failure of States to acknowledge indigenous rights to lands, territories and resources.”*¹²⁴ The report notes that this problem has two aspects: *“the failure of States to recognize the existence of indigenous use, occupancy and ownership, and the failure of States to accord appropriate legal status, juridical capacity and other legal rights in connection with indigenous peoples’ ownership of land.”*¹²⁵
- Discriminatory laws allowing the extinguishment of indigenous peoples’ land and resource rights, unlimited power, control and regulation of indigenous lands by the State, and discriminatory violations of treaty rights.¹²⁶
- *“[F]ailure of States to demarcate indigenous lands.”*¹²⁷
- *“Failure of States to enforce or implement laws protecting indigenous lands.”*¹²⁸
- *“Problems in regard to land claims and return of lands.”*¹²⁹
- Expropriation of *“indigenous lands, territories and resources for national economic interests, including development.”*¹³⁰
- Removal of indigenous peoples from their lands and territories. On this issue, the report notes that this practice is so widespread that the international community has responded by incorporating protections against

Table 9. Special Rapporteur on indigenous people and their relationship to land

Name:	Erica Daes
Body appointing Special Rapporteur:	Sub-Commission on the Promotion and Protection of Human Rights
Resolution of appointment:	Sub-commission resolution 1996/38; CHR decision, 1997/114
Date and period of appointment:	1997

forced removals in international and regional human rights instruments.^p The report also notes that “*involuntary transfers and relocations have meant the loss of traditional lands and traditional ways of life, with devastating consequences for the social and economic welfare of the communities concerned.*”¹³¹

- Other issues such as:
 - ü the allotment of land to individuals;
 - ü the encouragement of settlement by non-indigenous people on indigenous peoples’ lands; and
 - ü holding title to indigenous lands ‘in trust’ for indigenous nations, tribes and peoples.¹³²
- “*Failure to protect the integrity of the environment of indigenous lands and territories.*”¹³³
- State failure to allow indigenous peoples “*internal self-determination, in the form of control over and decision-making concerning development, use of natural resources, [and] management and conservation measures.*”¹³⁴

With this framework regarding the problems concerning indigenous land rights, the report provides an overview of five effective measures that have been used to advance indigenous peoples’ land rights:

“(a) *judicial mechanisms; (b) mechanisms for negotiation; (c) constitutional reform and framework legislation; (d) indigenous peoples’ initiatives; and (e) human rights standards.*”¹³⁵

This study provides an important framework for understanding the housing and land situation of indigenous peoples around the world. The report demonstrates that historical and contemporary dispossession of lands and insecure tenure experienced by indigenous peoples has had a direct impact on where indigenous peoples are housed, the accessibility of their housing and the adequacy of their housing. Many aspects of this framework are elucidated in chapter IV of this report, which provides an overview of the status of indigenous peoples’ housing and land rights in specific country contexts.

III.D. World conferences

Conferences have played a key role in guiding the work of the United Nations since its inception.¹³⁶ The world conference process brings together the entire

p. Such as, ‘ILO Convention No. 169’, the ‘draft United Nations declaration on the rights of indigenous peoples’ and on the proposed ‘Inter-American declaration on the rights of indigenous peoples’.

international community – government representatives, NGOs, CBOs, individuals – and provides an opportunity to reach consensus on shared values and goals and strategies to achieve them.¹³⁷ World conferences have focused on particular groups of disadvantaged people, such as the Fourth World Conference on Women, as well as on issues of particular concern such as the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance; and the Second United Nations Conference on Human Settlements (Habitat II).

Like United Nations resolutions, documents which emerge from world conference are not legally binding on States *per se*. They do, however, carry political and moral persuasion because they emerge from a political process and have been agreed to by a majority of States. To ensure that States are working toward achieving the goals they committed to at each World Conference, special sessions at the United Nations General Assembly have been held to assess implementation of each Conference action plan at the five year mark.¹³⁸

What follows is an overview of some of the key provisions related to indigenous women’s and men’s housing rights as contained in the documents that emerged from the World Conference Against Racism; the Fourth World Conference on Women; and Habitat II.

III.D.1. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance

In early September 2001, the Durban Declaration and Programme of Action were adopted at the World Conference Against Racism. While there is no explicit recognition of housing rights for indigenous peoples in this document, it enunciates key principles necessary if indigenous peoples, particularly women, are to exercise and enjoy equally and fully the right to adequate housing. These principles, which are outlined in the Durban Declaration, include:

- Indigenous peoples should fully and equally enjoy **all** human rights – civil, political, economic, social and cultural.¹³⁹
- For indigenous peoples to freely exercise their rights, they must be “*free from all forms of discrimination*”.¹⁴⁰

Table 10. World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance

Abbreviated title: World Conference Against Racism	
Dates:	31 August - 7 September 2001
Location:	Durban, South Africa
Main output:	Durban Declaration and Programme of Action

- Indigenous peoples have a special relationship with “*the land as the basis for their spiritual, physical and cultural existence*” and therefore, it is necessary for States to ensure that “*indigenous peoples are able to retain ownership of their lands and*” of natural resources.¹⁴¹
- Racism and racial discrimination and related intolerance are experienced differently by women and girls and contribute to women’s inequality and experiences of multiple forms of discrimination and poverty.¹⁴²

Drawing on these principles, the Programme of Action calls for States to undertake a number of actions, including some that are relevant to the promotion and protection of housing rights and indigenous women’s equality, including, *inter alia*:

- The adoption or application of “*constitutional, administrative, legislative, judicial and all necessary measures to promote, protect and ensure the enjoyment by indigenous peoples of their rights, as well as to guarantee them the exercise of their human rights and fundamental freedoms on the basis of equality, non-discrimination and full and free participation in all areas of society, in particular in matters affecting or concerning their interests.*”¹⁴³
- The adoption of public policies and implementation of “*programmes on behalf of and in concert with indigenous women and girls, with a view to promoting their civil, political, economic, social and cultural rights*”; ending “*their situation of disadvantage for reasons of gender and ethnicity*”; and “*eliminating the situation of aggravated discrimination suffered by indigenous women and girls on multiple grounds of racism and gender discrimination.*”¹⁴⁴
- The incorporation of a gender perspective in all programmes of action against racism, racial discrimination, xenophobia and related intolerances and to consider the burden of such discrimination, which is experienced particularly by indigenous women and girls, and ensuring women’s equal access to resources as a means of promoting indigenous women’s participation in the economic and productive development of their communities.¹⁴⁵
- The collection of disaggregated data which takes into account economic and social indicators, including, health and health status, infant and maternal mortality, life expectancy, literacy, education, employment, housing, land ownership, mental and physical health care, water, sanitation, energy and communications services, poverty and average disposable income. This information should be used to elaborate social and economic development policies with a view to closing the gap in social and economic conditions.¹⁴⁶

- States and international financial and development institutions should reduce potential negative effects of globalization through an examination of how their policies and practices affect indigenous peoples. They should also ensure that their policies and practices contribute to the eradication of racism by including indigenous peoples in development projects and consulting with them on any matter that may affect their physical, spiritual or cultural integrity.¹⁴⁷

These provisions are highlighted because they are central to the denial of housing rights of indigenous peoples. As chapter II of this report has exposed and as chapter IV demonstrates, there is a deep connection between the deprivation of adequate housing for indigenous peoples and the history – and continuing practice of – colonialism, land dispossession, and discrimination. For indigenous women, their housing conditions are further informed by intersecting disadvantage of race and sex. The articulations of indigenous women’s disadvantage excerpted above are particularly noteworthy as no other inter-governmental documents pertaining to indigenous peoples reviewed for this study include such provisions.

III.D.2. Second United Nations Conference on Human Settlements

In June 1996, the Istanbul Declaration and the Habitat Agenda were adopted at the Second United Nations Conference on Human Settlements (Habitat II). The Istanbul Declaration and the Habitat Agenda contain numerous provisions affirming and elaborating on the right to housing and related rights, particularly as these rights pertain to women and indigenous peoples. What follows is an overview of some of the key provisions in these documents.

Table 11. Second United Nations Conference on Human Settlements

Abbreviated title:	Habitat II
Dates:	3-14 June 1996
Location:	Istanbul, Turkey
Main output:	The Istanbul Declaration and Habitat Agenda

The Istanbul Declaration reaffirms a commitment to the:

*“full and progressive realization of the right to adequate housing as provided for in international instruments.”*¹⁴⁸

It highlights the stress on cities and concomitant deterioration of housing and living conditions in cities, as the world becomes increasingly more urbanized.¹⁴⁹ The Declaration specifically calls for gender equality in policies, programmes and projects related to shelter and human settlement development and suggests that government, private and non-governmental actors can work together to ensure:

*“legal security of tenure, protection from discrimination and equal access to affordable, adequate housing for all persons and their families.”*¹⁵⁰

It also notes that *“particular attention should be given to the needs and participation of indigenous people”* with respect to shelter and urban development and management policies.¹⁵¹ It further stipulates that these policies should fully respect the identity and culture of indigenous peoples and provide:

*“an appropriate environment that enable them to participate in political, social and economic life.”*¹⁵²

The Habitat Agenda underscores and expands on many of these points. In this regard, it articulates a number of overarching goals and principles such as:¹⁵³

- *“adequate shelter for all and sustainable human settlements development in an urbanizing world”*;
- *“the full realization of the human rights set out in international instruments and in particular, in this context, the right to adequate housing”*; and
- *“equitable human settlements ... in which all people without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, have equal access to housing ... equal access to economic resources, including the right to inheritance, the ownership of land and other property ... [and] equal opportunity for participation in public decision-making.”*

Seven commitments are laid out in the document including: ‘adequate shelter for all’, ‘enablement and participation’, and ‘gender equality’. Under the objective of ‘adequate shelter for all’, paragraph 40 commits states to provide legal security of tenure and equal access to land to all people, including women,^q and those living in poverty. It also commits States to promote shelter and basic services and facilities for education and health for indigenous peoples, women and other disadvantaged groups. It further commits States to protect the *“legal traditional rights of indigenous people to land and other resources, as well as [strengthen] land management”*.^r Lastly, it calls for the

q. In total, 37 paragraphs of the Habitat Agenda mention the constraints faced by women in obtaining access to secure and adequate shelter and ways to remove these constraints. See: paragraphs 15, 27, 28, 31, 37, 38, 40, 42, 43, 46, 48, 61(b), 63, 72, 75, 76(m), 78, 79, 81(j), 82(c), 83, 86(g), 93, 98, 115, 116, 117, 118, 119, 122, 123, 124, 141, 162, 182, 186 and 201.

r. Other references to indigenous peoples can be found in the Commitment section of the Habitat Agenda, for example: Paragraph 43(r) commits States to: *“Protecting and main-*

protection of all people from forced evictions and for ensuring alternative suitable solutions should evictions be carried out.

The goals and commitments in the Habitat Agenda are complemented by strategies for implementation. States are called upon to take action to address women's housing disadvantage. For example, States should.¹⁵⁴

- review legal and regulatory frameworks to ensure that equal rights of women and men are clearly specified and enforced;
- *“support ... community projects, policies and programmes that aim to remove all barriers to women's access to affordable housing, land and property ownership, economic resources, infrastructure and social services, and ensure the full participation of women in all decision-making processes”*; and
- *“promote mechanisms for the protection of women who risk losing their homes and properties when their husbands die.”*

States are also required to undertake strategies to improving the housing and living conditions of indigenous peoples. The section of the Habitat Agenda pertaining to social development, including the eradication of poverty, outlines a number of strategies for States to undertake in order to:

*“promote the continuing progress of indigenous people and to ensure their full participation in the development of the rural and urban areas in which they live, with full respect for their cultures, languages, traditions, education, social organizations and settlement patterns.”*¹⁵⁵

These strategies include.¹⁵⁶

- ensure the full and equal access of indigenous peoples to social and economic services and *“their participation in the elaboration and implementation of policies that affect their development;”*
- *“integrate indigenous women, their perspectives and knowledge, on an equal basis with men, in decision-making regarding human settlements, including sustainable resource management and the development of*

taining the historical, cultural and natural heritage, including traditional shelter and settlement patterns, as appropriate, of indigenous and other people, as well as landscapes and urban flora and fauna in open and green spaces”; and paragraph 44 (h) commits States to: *“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.”* See also paragraphs: 38, 45, 62, 69, 76, 90, 103, 105, 116, 122, 136, 164, 167, 182, 184 and 213.

policies and programmes for sustainable development, including, in particular, those designed to address and prevent environmental degradation of land;” and

- “[a]ddress the particular needs of indigenous children and their families, especially those living in poverty, thereby enabling them to benefit fully from economic and social development programmes.”.

In June 2001 the General Assembly convened a special session to review and appraise the implementation of the Habitat Agenda, popularly known as ‘Istanbul+5’. At that session, government representatives adopted the ‘Declaration on Cities and Other Human Settlements in the New Millennium’. The only specific reference to indigenous peoples in this Declaration is in paragraph 9, which notes with approval the:

“growing awareness of the need to address in an integrated manner poverty, homelessness, unemployment, lack of basic services, exclusion of women and of children and marginalized groups, including indigenous communities, and social fragmentation in order to achieve better, more liveable and inclusive human settlements worldwide.”

Though this Declaration does not make further comments specifically about indigenous peoples, it does include a number of provisions of relevance to indigenous peoples on issues such as poverty eradication, security of tenure, gender equality in human settlements, and upgrading slums and informal settlements.¹⁵⁷

III.D.3. Fourth World Conference on Women

The Beijing Platform for Action was adopted at the Fourth World Conference on Women in September 1995. It highlights women’s access to housing as a pressing issue, confronting women worldwide:

*“Many women face particular barriers because of various diverse factors in addition to their gender. Often these diverse factors isolate or marginalize such women. They are, inter alia, denied their human rights, they lack access or are denied access to ... housing”*¹⁵⁸

Table 12. Fourth World Conference on Women

Dates:	4-15 September 1995
Location:	Beijing, China
Main output:	Beijing Declaration and Platform for Action

The Platform for Action recognizes the importance of land, property and housing to women’s livelihood, drawing the important link between women’s poverty and women’s homelessness, inadequate housing and lack of access to

economic resources such as credit, land ownership and inheritance.⁵ The Platform for Action also notes the connection between women's poor health and women's poor housing conditions.¹⁵⁹ The Platform for Action commits governments:

- to enable women to obtain affordable housing and access to land by removing all obstacles to access;¹⁶⁰
- to undertake legislative and administrative reforms to give women full and equal access to economic resources, to ownership of land and other property;¹⁶¹ and
- to enhance, at the national and local levels, rural women's income generating potential by facilitating their equal access to and control over productive resources, land, credit capital, and property rights.¹⁶²

The Beijing Platform for Action includes several provisions specific to indigenous women and relevant to their housing rights, such as: barriers to equality for indigenous women,¹⁶³ respect for cultural diversity,¹⁶⁴ participation of indigenous women in decision-making,¹⁶⁵ and support for their economic activities.¹⁶⁶

Indigenous women who attended the Conference assert that the Platform for Action did not acknowledge the systemic causes of their disadvantage and accepted too readily the 'New World Order' as its overriding framework.¹⁶⁷ In turn, they adopted the 'Beijing Declaration of Indigenous Women', which sets the indigenous women's platform firmly within the indigenous movement as a whole.¹⁶⁸ This document does not refer to the housing conditions of indigenous women; however, it does contain provisions that are relevant to the enjoyment of housing rights by indigenous women. For example, it calls on the international community and governments to respect indigenous peoples' rights to decide what to do with their lands and territories, especially in the context of national governments opening-up indigenous territories to foreign investors such as mining corporations.¹⁶⁹ The document demands that all internally displaced indigenous peoples be allowed to return to their own communities and the necessary support services be provided to them.¹⁷⁰ It also recognizes that indigenous women suffer sex-discrimination within their own cultures.

s. See for example, Beijing Platform for Action, which state: "*More than one billion people in the world today, the great majority of whom are women, live in unacceptable conditions of poverty, mostly in the developing world ... Poverty has various manifestations, including ... homelessness and inadequate housing ...*" (paragraph 47); "*Women's poverty is directly related to the absence of economic opportunities and autonomy, lack of access to economic resources, including credit, land ownership and inheritance ...*" (paragraph 51).

In 2000 the United Nations General Assembly held a special session in New York (Beijing +5) to evaluate the progress of women since the 1995 Conference. The resulting United Nations resolution¹⁷¹ includes six paragraphs which refer to indigenous women,¹⁷² two of which are of particular relevance to indigenous women's rights to housing:

- The first recommends that governments undertake “*socio-economic policies that promote sustainable development and support and ensure poverty eradication programmes, especially for women, by, inter alia, providing skills training, equal access to and control over resources, finance, credit, including microcredit, information and technology, and equal access to markets to benefit women of all ages, in particular those living in poverty and marginalized women, including rural women, indigenous women and female-headed households.*”¹⁷³
- The second instructs governments to undertake data collection and research on indigenous women, with their full participation, to foster accessible, culturally and linguistically appropriate policies, programmes and services.¹⁷⁴

A number of paragraphs address women's housing issues. For example, the resolution calls on governments to ensure that national legislative and administrative reform processes, including those linked to land reform, decentralization and reorientation of the economy, promote women's rights, in particular the rights of rural women and women living in poverty. Governments are also called upon to:

*“take measures to promote and implement those rights through women's equal access to and control over economic resources, including land and property rights, rights to inheritance, credit and traditional saving schemes, such as women's banks and co-operatives.”*¹⁷⁵

III.D.4. World Conference on Human Rights

In June 1993 over 7,000 delegates met in Vienna, marking the beginning of a concerted effort by the global community of States to renew, strengthen and implement the body of international human rights jurisprudence that has evolved out of the Universal Declaration of

Table 13. World Conference on Human Rights

Dates:	14-25 June 1993
Location:	Vienna, Austria
Main output:	Vienna Declaration and Programme of Action

Human Rights. The Vienna Declaration and Programme of Action was hailed by the then United Nations Secretary General, Boutros Boutros-Ghali, in a

speech to conference delegates as the “*new vision for global action for human rights into the next century.*”¹⁷⁶

The Vienna Declaration explicitly recognizes the disadvantage experienced by indigenous peoples and, to this end, urges States to recognize:

*“... the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them”*¹⁷⁷ [emphasis added].

Although this passage does not deal directly with the question of indigenous peoples housing or land rights, it does urge full participation in matters of concern to indigenous people. Given the significance of land and resources to the survival of indigenous cultures,¹⁷⁸ and by implication housing, a suitable interpretation of this passage in the Vienna Declaration by States would ensure full participation in all decisions respecting indigenous land and housing.

III.E. Forthcoming law

III.E.1. Draft Declaration on the Rights of Indigenous Peoples

The ‘Draft Declaration on the Rights of Indigenous Peoples’,¹⁷⁹ prepared by the Working Group on Indigenous Populations, is “*undoubtedly the most important human rights document for indigenous peoples*”.¹⁸⁰ Like ILO Convention No. 169, the Declaration focuses on the dispossession of lands and resources and the corollary of rights to land and resources. At the same time, it goes beyond the Convention, for example, by providing unequivocal rights to self-determination.

There is no explicit reference to housing rights. However, it can be read into Article 1, (on the right to all human rights recognized under international law) and Article 3 on self-determination.^t The right to be free from forced eviction can be read in Article 10, which states:

“Indigenous people have the right not to be removed from their lands by force. No relocation should take place without their free and informed consent and only after adequate compensation is paid or the option of return is provided.”

t. Which states that indigenous peoples can freely determine their political status and identity and pursue their own economic, social and cultural development.

Articles 21-23 set out indigenous peoples' rights to their own economic activities, to special measures to improve their economic and social conditions and to set their own priorities for development.

Article 2 states that indigenous peoples have equal rights and dignity with all other peoples including freedom from any kind of negative discrimination. Article 43 grants equality between indigenous women and men.^u

The adoption of the draft by the international community has, however, stalled due to debates on several issues, such as the use of the term 'peoples'. Several States oppose the use of this term on the basis that – in their view – it may be used to grant sovereignty or separate statehood to indigenous peoples. Since the September 2003 session of the Working Group, discussion on the draft has been paralyzed. At that session, Canada and Australia presented a new set of proposals regarding indigenous lands, weakening the normative content of the draft. As a result of this situation:

“Indigenous representatives and the majority of governments (particularly the Scandinavians and Latin Americans) have refused to discuss this new proposal and want to focus on the draft text.^v Only the United States and the United Kingdom support a discussion of the Australian-Canadian proposal.... Indigenous representatives are very frustrated and angry.”¹⁸¹

They are seriously concerned that the draft will not be adopted within the time lines of the Working Group. To date, agreement has only been reached on two out of 45 articles.¹⁸² Confronted with this division, the Chairperson suspended the Working Group and has offered his services as a mediator. He will submit his own text in an attempt to bridge the gap between the divergent positions.

Despite the lack of progress on the adoption of the Draft, it is increasingly being invoked by indigenous organizations in their struggles for human rights and in their negotiations with States and other agents.¹⁸³

u. Article 43 states: “All rights recognized in this declaration apply equally to men and women.”

v. Which was approved by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994.

Notes

1. UN-HABITAT and OHCHR, 2002b: p. 2.
2. UN-HABITAT and OHCHR, 2002b.
3. Anaya, 1996: pp. 9 and 49.
4. ILO, n.d.a.
5. ILO Convention No. 169, Article 2(2)(b).
6. ILO Convention No. 169, Article 2(2)(c).
7. ILO Convention No. 169, Article 3.
8. ILO Convention No. 169, Article 7(1).
9. ILO Convention No. 169, Article 7(3).
10. ILO Convention No. 169, Article 13(1).
11. ILO Convention No. 169, Article 14(1).
12. ILO Convention No. 169, Article 14(2).
13. ILO Convention No. 169, Article 16(1)-(5).
14. ILO Convention No. 169, Article 18.
15. ILO Convention No. 169, Article 17(3).
16. ILO Convention No. 169, Article 1(3).
17. See for example, Schulting, 1997.
18. UN Doc E/CN.4/2002/97: paragraph 12.
19. CEACR, 2004: paragraph 2.
20. CEACR, 2004.
21. All information in this paragraph has been drawn from: ILO, n.d.c.
22. UN Doc CERD/C/63/CO/5: paragraph 12.
23. ICESCR, Article 2(1). For more on the legal obligations of State parties see the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights; and UN-HABITAT and OHCHR, 2002b: Chapter II.
24. UN-HABITAT and OHCHR, 2002b.
25. UN-HABITAT and OHCHR, 2002b: p. 4.
26. ICESCR, Article 11(1).
27. CESCR General Comment No. 4: paragraph 6.
28. UN-HABITAT and OHCHR, 2002b: p. 5.
29. CESCR, General Comment No. 4: paragraph 7.
30. CESCR, General Comment No. 4: paragraph 8.
31. For a discussion of how General Comment 4 and 7 might be interpreted and used to ensure their relevance to women, see: Farha, 2002.
32. CESCR, General Comment No. 7: paragraph 2.
33. CESCR, General Comment No. 7: paragraph 4.
34. CESCR, General Comment No. 7: paragraph 10.
35. CESCR, General Comment No. 7: paragraph 9.
36. CESCR, General Comment No. 7: paragraph 10.
37. COHRE, 1999: p. 8.
38. CESCR, General Comment No. 7: paragraph 13.
39. CESCR, General Comment No. 7: paragraph 15.
40. UN Doc E/C.12/1991/1.
41. UN Doc E/C.12/1/Add.50: paragraph 15.

42. UN Doc E/C.12/1/Add.14: paragraph 26.
43. UN Doc E/C.12/1/Add.31: paragraph 17.
44. UN Doc E/C.12/1/Add.31: paragraph 18.
45. UN Doc E/C.12/1/Add.31: paragraph 29.
46. See for example: UN Doc E/C.12/1/Add.70: paragraphs 16, 17 and 28; and UN Doc E/C.12/1/Add.64: paragraphs 6, 12, 18, 28, and 31-33.
47. UN Doc E/C.12/1/Add.90: paragraphs 23, 27.
48. OHCHR, 1991.
49. OHCHR, 1991.
50. ICERD, Article 5(e).
51. CERD General Recommendation XXV: paragraph 1.
52. CERD General Recommendation XXV: paragraph 3.
53. See for example, concluding observations on Finland (UN Doc CERD/C/63/CO/5, paragraph 12) and Australia (UN Doc CERD/C/304/Add.101: paragraphs 8-10).
54. These are the only three relevant references found in concluding observations during the research activity on which this report is based; namely UN Docs CERD/C/304/Add.45: paragraph 19; CERD/C/304/Add.34: paragraph 17; and CERD, 2002: paragraph 332.
55. United Nations Division for the Advancement of Women, n.d.
56. United Nations Division for the Advancement of Women, n.d..
57. CEDAW: Article 13.
58. CEDAW: Article 14(2)(h).
59. CEDAW: Article 14(2)(h).
60. CEDAW: Article 15(2).
61. CEDAW: Article 16(1)(h).
62. CEDAW, 1997; CEDAW, 2003; CEDAW, 1998; and CEDAW, 2001 respectively.
63. CEDAW, 1997: paragraph 390.
64. CEDAW, 1997: paragraph 405.
65. CEDAW, 2001: paragraph 356.
66. CEDAW, 1998: paragraph 389.
67. CEDAW, 2003: paragraph 361.
68. CEDAW, 2003: paragraph 361.
69. CEDAW, 2003: paragraph 328.
70. OHCHR, n.d.b.
71. OHCHR, 2001c.
72. Australia: HRC, 2000: paragraphs 507-508; Canada: UN Doc CCPR/C/79/Add.105: paragraphs 7, 8, 19; Ecuador: UN Doc CCPR/C/79/Add.92: paragraph 19; Finland: UN Doc CCPR/C/79/Add.91: paragraphs 5, 11, 12; Israel: UN Docs CCPR/C/79/Add.93: paragraphs 13, 14, 23, 24, 25, and 27; and CCPR/CO/78/ISR: paragraph 16; Mexico: UN Doc CCPR/C/79/Add.109: paragraph 19; the Philippines: UN Doc CCPR/CO/79/PHL: paragraphs 15-16; and Sweden: UN Doc CCPR/CO/74/SWE: paragraphs 3 and 15.
73. UN Doc CCPR/C/79/Add.93: paragraph 25.
74. UN-HABITAT and OHCHR, 2002b: p. 7.
75. OHCHR, 2001b.
76. OHCHR, n.d.a
77. OHCHR, 2001a: p. 7.

78. UN Doc E/CN.4/RES/2003/56.
79. UN Doc E/CN.4/RES/2003/56: paragraph 8.
80. UN Doc E/CN.4/RES/2003/56: paragraph 14.
81. UN Docs: E/CN.4/RES/1986/36; E/CN.4/RES/1987/22; and E/CN.4/RES/1988/24.
82. UN Docs: E/CN.4/RES/2001/28; E/CN.4/RES/2002/21; and E/CN.4/RES/2003/27.
83. UN Docs: E/CN.4/RES/2001/28: paragraph 10(e)(i); E/CN.4/RES/2002/21: paragraph 10(e)(i); and E/CN.4/RES/2003/27: paragraph 11(e) (i).
84. UN Docs: E/CN.4/RES/1993/77; and E/CN.4/RES/2004/28.
85. UN Doc E/CN.4/RES/1993/77: Operative paragraph 1.
86. UN Doc E/CN.4/RES/1993/77: Preambular paragraph 6.
87. UN Doc E/CN.4/RES/2004/28: Preambular paragraph 7.
88. UN Doc E/CN.4/RES/2004/28: Operative paragraph 3.
89. UN Docs: E/CN.4/RES/2000/13; E/CN.4/RES/2001/34; and E/CN.4/RES/2003/22.
90. United Nations Department of Public Information, n.d.a. See also UN Doc E/RES/2000/22.
91. United Nations Permanent Forum on Indigenous Issues, n.d.
92. UN Doc E/C.19/2004/43: paragraph 3.
93. UN Doc E/C.19/2004/43: paragraph 3.
94. UN Doc E/C.19/2004/43: paragraph 3.
95. UN Doc E/C.19/2003/10.
96. United Nations Office at Geneva, 2003.
97. UN Doc E/C.19/2004/43: paragraph 12.
98. UN Doc E/C.19/2004/43: paragraph 57(b) and (c).
99. UN Doc E/C.19/2004/43: paragraph 59(a).
100. UN Doc E/C.19/2004/43: paragraph 68.
101. See for example: E/CN.4/Sub.2/RES/1992/26; E/CN.4/Sub.2/RES/1993/36; E/CN.4/Sub.2/RES/1994/8; E/CN.4/Sub.2/RES/1995/27; E/CN.4/Sub.2/RES/1997/6; and E/CN.4/Sub.2/RES/1998/9.
102. UN Docs E/CN.4/SUB.2/RES/1997/19; and E/CN.4/SUB.2/RES/1998/15.
103. UN Doc E/CN.6/1998/12.
104. OHCHR, n.d.c.
105. UN Doc E/CN.4/2002/97.
106. UN Doc E/CN.4/2002/97: paragraph 37.
107. UN Doc E/CN.4/2002/97: paragraph 41.
108. UN Doc E/CN.4/2002/97: paragraph 49-50.
109. UN Doc E/CN.4/2002/97: paragraph 107.
110. UN Doc E/CN.4/2003/90.
111. UN Doc E/CN.4/2003/90: Executive Summary.
112. UN Doc E/CN.4/2003/90: paragraphs 53-58.
113. UN Doc E/CN.4/2003/90: paragraphs 74-75.
114. UN Doc E/CN.4/2001/51: paragraphs 74-76.
115. UN Doc E/CN.4/2001/51: paragraphs 75-76.
116. UN Doc E/CN.4/2001/51: paragraph 31.
117. UN Doc E/CN.4/2003/55: paragraph 21.
118. UN Doc E/CN.4/2003/55: paragraphs 42 and 45.
119. UN Doc E/CN.4/2003/55: paragraph 49.
120. UN Doc E/CN.4/2003/55: paragraph 8.

121. UN Doc E/CN.4/2003/55: paragraph 31.
122. UN Doc E/CN.4/2003/55: paragraph 34.
123. UN Doc E/CN.4/Sub.2/2001/21.
124. UN Doc E/CN.4/Sub.2/2001/21: paragraph 12.
125. UN Doc E/CN.4/Sub.2/2001/21: paragraph 34.
126. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 41-49.
127. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 50-54.
128. UN Doc E/CN.4/Sub.2/2001/21: paragraph 55.
129. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 55-65.
130. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 66-69.
131. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 71-72.
132. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 74-76.
133. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 79-82.
134. UN Doc E/CN.4/Sub.2/2001/21: paragraphs 83-84.
135. UN Doc E/CN.4/Sub.2/2001/21: paragraph 87.
136. United Nations Department of Public Information, n.d.c.
137. United Nations Department of Public Information, n.d.c.
138. United Nations Department of Public Information, n.d.c.
139. Durban Declaration: paragraph 41.
140. Durban Declaration: paragraph 42.
141. Durban Declaration: paragraph 43.
142. Durban Declaration: paragraph 69.
143. Durban Programme of Action: paragraph 15(a).
144. Durban Programme of Action: paragraph 18.
145. Durban Programme of Action: paragraph 50.
146. Durban Programme of Action: paragraph 92(c).
147. Durban Programme of Action: paragraph 208.
148. Istanbul Declaration: paragraph 8.
149. See for example Istanbul Declaration: paragraphs 1, 3, 4, and 5.
150. Istanbul Declaration: paragraphs 7-8.
151. Istanbul Declaration: paragraph 14.
152. Istanbul Declaration: paragraph 14.
153. Habitat Agenda: paragraphs 25-27.
154. Habitat Agenda: paragraphs 78(c); (e); and (g).
155. Habitat Agenda: paragraph 122.
156. Habitat Agenda: paragraphs 122(a); (c); and (d).
157. Declaration on Cities and Other Human Settlements in the New Millennium: paragraphs 33 and 36; 38; 44; and 46 respectively.
158. Beijing Platform for Action: paragraph 31.
159. Beijing Platform for Action: paragraph 92.
160. Beijing Platform for Action: paragraph 58(m).
161. Beijing Platform for Action: paragraph 60(f).
162. Beijing Platform for Action: paragraphs 61(b) and 166(c).
163. Beijing Platform for Action: paragraph 48.
164. Beijing Platform for Action: paragraph 60(s).
165. Beijing Platform for Action: Strategic Objective G.1 (g).
166. Beijing Platform for Action: paragraph 177(f).

167. See: BDIW, 1995: paragraphs 10-16.
168. Jackson, 2003: p. 22.
169. BDIW, 1995: paragraphs 22 and 23.
170. BDIW, 1995: paragraph 37.
171. UN Doc A/RES/S-23/3.
172. Jackson, 2003: p. 22.
173. UN Doc A/RES/S-23/3: paragraph 74(a).
174. UN Doc A/RES/S-23/3: paragraph 93(d).
175. UN Doc A/RES/S-23/3: paragraphs. 68(a), (b), (f) and (h).
176. OHCHR, n.d.d.
177. Vienna Declaration: paragraph 20.
178. See: Anaya, 1996: pp. 104-107.
179. UN Doc E/CN.4/Sub.2/1993/26.
180. UN Doc E/CN.4/2002/97: paragraph 15.
181. Rights and Democracy, 2003.
182. Rights and Democracy, 2003.
183. UN Doc E/CN.4/2002/97: paragraph 16.

IV. Case studies

IV.A. Australia

IV.A.1. Background

There are currently between 410,000 and 458,500 Aboriginal and Torres Strait Islanders in Australia, representing 2.4 per cent of the total population.^{1,a} The colonization of indigenous peoples began when the British landed at what is now Sydney in 1788. The relationship between indigenous tribes and the British was acrimonious, characterized by land dispossession, violence and the disruption of kinship and family ties.² The ramifications of colonization have been felt by indigenous people in Australia on many fronts: economically, socially, and culturally.³

During the 20th Century, the British administration began implementing a policy of assimilation. According to a former Aboriginal and Torres Strait Islander Social Justice Commissioner, housing was used as a central mechanism to achieve the integration of the indigenous community with the broader community.⁴ The rationale underpinning the use of housing to this end was that indigenous people would eventually behave like other Australians if they lived in houses similar to those occupied by non-indigenous people.⁵

For example, ‘transitional housing’ was the mechanism for assimilation adopted in remote areas during the 1950s. Transitional housing worked as follows: indigenous people living on established reserves were first provided with simple dwellings without amenities (stage one), before being allowed to progress to similar dwellings with basic amenities (stage two) and finally to fully equipped suburban-type dwellings like those occupied by the non-indigenous population (stage three). To move from one stage to the next, an indigenous family had to demonstrate that they could live like a non-indigenous family.⁶

The houses provided by the government for indigenous people in remote and other areas were generally of inferior quality to those occupied by non-indigenous people. Commonly, their housing did not have internal water supply, had no electricity or had low voltage supply; lacked adequate communal facilities; and, overall was poorly maintained. This inferior housing had potentially very grave consequences for indigenous families as inadequate housing was a reason for children to be apprehended by authorities.⁷

a. 458,500 is the “*experimental estimated resident Indigenous population*”. 410,000 is the number of people who identified as Aboriginal and/or Torres Strait Islanders in the 2001 Census. Experimental estimates are higher than the Census counts because they make allowances for instances in which Indigenous status was not stated in the Census and for net undercount.

IV.A.2. Current housing and living conditions

“...no other group in Australia experiences the same level of social, economic, health and educational disadvantage as indigenous Australians.”⁸

The disadvantage experienced by indigenous people in Australia is reflected in the following statistics regarding their living conditions:

- The average life expectancy for indigenous people is close to 20 years below the non-indigenous average.^b Despite the fact that Australia is one of the richest countries in the world, in 1999 *“Indigenous female life expectancy [in Australia was] comparable to that for females in Iraq, Western Sahara, Bolivia and Pakistan”*.⁹
- Babies born to indigenous mothers are twice as likely to be of low birth weight,¹⁰ and the infant mortality rate for indigenous infants in 1999-2000 was 2.5 times greater than for non-indigenous infants.¹¹
- According to the 2001 census, indigenous people are only half as likely as non-indigenous people to have completed secondary school.¹²
- According to recent statistics, *“indigenous persons in the labour force were almost three times more likely than non-indigenous persons to be unemployed”*.¹³
- *“Indigenous women are the least likely of all groups to be in the labour force, with a participation rate of 43%. Of those that are in the labour force, 20% were unemployed in 1996”*.¹⁴
- 72 per cent of indigenous people are in the lowest or second lowest household income bracket.^c In remote areas, 91 per cent of indigenous people are in the lowest income bracket.¹⁵

Indigenous people are less urbanized than the non-indigenous population. Approximately 30 per cent of the indigenous population live in major cities, as compared to 67 per cent of the non-indigenous population, and just over 40 per cent live in inner and outer regional areas (smaller cities and towns). Some 27 per cent of the indigenous population live in remote or very remote areas.^{16,d}

b. Life expectancy for indigenous women is 63 years, as compared to 82 for non-indigenous women; life expectancy for indigenous men is 56 years as compared to 77 for non-indigenous men. See: Australian Institute of Health and Welfare, 2003: p. 182.

c. Earning Australian \$ 418 (US\$ 294) or less per week.

d. As these statistics indicate, the indigenous population is largely located outside major urban centres, with the highest proportion of the population living in country towns and environs. Historically these communities did not receive housing and infrastructure or essential services from state or local governments, nor did they have access to the range of

The poor housing conditions of indigenous women, men and children throughout Australia are well documented.¹⁷ Overall, indigenous people lack adequate, affordable, culturally appropriate, and safe housing. This can be attributed to, at least in part, mainstream housing and homelessness strategies and policies which have yet to fully consider the unique needs of indigenous people in the context of their distinct culture, and experiences of land dispossession, colonialism and its legacy.¹⁸ What follows is an overview of some of the housing conditions and experiences of indigenous Australians.

IV.A.2.a. Overcrowding

Indigenous households tend to be larger than non-indigenous households (3.5 people on average compared to 2.6 people),¹⁹ and 15 per cent of indigenous households live in what can be considered overcrowded dwellings compared to 4 per cent of non-indigenous households.²⁰ Conditions of overcrowding increase with location. For example, in major cities 11 per cent of indigenous households require at least one extra bedroom, as compared to 42 per cent of indigenous households in very remote regions of Australia.²¹ Crowded living conditions pose particular health risks such as the spread of infectious diseases,²² and can exacerbate tensions within a household.

IV.A.2.b. Quality of housing

Indigenous housing conditions tend to be worse than for non-indigenous populations. For example, the 1999 Australian Housing Survey reported that indigenous households in non-remote areas

“were almost three times more likely than non-indigenous households to report their homes to be in high need of repair (19 per cent to 7 per cent respectively) and a higher proportion of non-indigenous households reported no need for repair (44 per cent to 34 per cent respectively).”²³

Estimates indicate that Australian \$ 3.5 billion^e would have to be invested to raise indigenous housing standards to an adequate level. It will take up to 20 years to make a significant difference at the current rate of expenditure.²⁴

services provided to other Australians. When services were finally provided, they were different from those provided to non-indigenous people.

e. Equivalent to US\$ 2.4 billion.

IV.A.2.c. Tenure

“Homeownership provides the most secure housing tenure and is a common goal for many Australians.”^{25,f}

Homeownership and purchasing rates for indigenous persons are “well below” those for other households, with only 13 per cent of indigenous household owning their home outright, as compared to 40 per cent of non-indigenous households.²⁶ Indigenous households were more than twice as likely as other households to be living in rental accommodation, with 63 per cent renting accommodation as compared to 27 per cent of non-indigenous households.²⁷ Indigenous people living in rental accommodation are more likely, than non-indigenous people, to be living in government subsidized housing.²⁸

The relatively low rates of homeownership for indigenous people can be attributed to the following factors: indigenous families have lower average incomes, the indigenous population has a young age profile, significant numbers of indigenous people live on community land where individual title is not possible, and historically low rates of ownership mean low rates of inter-generational asset transfer.²⁹

IV.A.2.d. Access to services

Access to services such as water, electricity, hospitals and schools is an issue that most effects ‘discreet indigenous communities’.^g In 2001, the drinking water of 33 per cent of 169 discreet indigenous communities fell below national standards.³⁰ Close to 70 per cent of all discrete indigenous communities, in 2001, were located 100 kilometres or more from the nearest hospital.³¹ 13 per cent of discreet indigenous communities are located 100 kilometres or more from the nearest primary school and 70 per cent of the indigenous population living in discreet communities did not have secondary schools up to Year 12 located either in their community or within 10 kilometres.³²

IV.A.2.e. Homelessness

Although homelessness is difficult to measure, it has been reported that indigenous families are 16 times more likely to be homeless than non-indigenous families.³³ One measure to determine levels of homelessness is to

f. For a general discussion of this type of bias towards ownership, see UN-HABITAT, 2003a.

g. A geographic location, bounded by physical or cadastral (legal) boundaries, and inhabited or intended to be inhabited predominantly by indigenous people, with housing or infrastructure that is either owned or managed on a community basis. This definition covers discrete communities in urban, rural and remote areas.

count the numbers of people staying in boarding houses and using emergency shelter services, such as the Supported Accommodation Assistance Program (SAAP).^h In 2001-2002, indigenous people represented 17 per cent of the population who used SAAP services (a 3 per cent increase from the previous year).³⁴ This is a substantial over-representation of indigenous people using these services, given that they comprised just over 2 per cent of the Australian population at that time. Indigenous women are more likely to use these services than indigenous men, in particular women escaping domestic violence.ⁱ During 2001-2002, 54 per cent of all SAAP clients were women, but of the indigenous clients, 69 per cent were women.³⁵

As the above descriptions indicate, indigenous women and men find themselves over-represented among Australia's homeless and inadequately housed. What follows is an overview of specific and substantial barriers to adequate housing experienced by indigenous Australians.

IV.A.2.f. Discrimination

Discrimination is a serious barrier to housing experienced by indigenous people in Australia. According to research undertaken in 2000, discrimination by landlords against indigenous people and other marginalized groups such as single mothers, and people with disabilities, include denial of access to housing, negative variations to the terms and conditions of the tenancy agreement, sub-standard housing, and evictions.^{36,j}

In Western Australia, a researcher found that indigenous tenants in the private rental market are perceived to be a high risk: landlords expect that with indigenous tenants comes overcrowding, property damage and rent arrears.³⁷ The Tenant's Advice Service in Western Australia reports that it is difficult for indigenous families to access the private rental market, as they are often told nothing is available or when they fill out an application form it is declined. When indigenous people are shown housing in the private rental market, it is

h. *"The Supported Accommodation Assistance Program (SAAP) is jointly funded and managed by the Commonwealth and state governments to provide assistance to homeless people. The program aims to help them achieve self-reliance and independence. Families, single people, young people, and women and children who are escaping domestic violence are assisted under the program ... SAAP provides temporary accommodation and support services, such as domestic violence counseling, employment assistance and living skills development."* (Australian Institute of Health and Welfare, 2003: p. 95).

i. In 2001-2002 the most common reason for using emergency accommodation services was domestic or family violence.

j. These findings are consistent with those made by UN-HABITAT in a global survey on rental housing (UN-HABITAT, 2003a).

invariably of poor quality. When they rent units, they are often in poor condition and only provided with a short, fixed term lease.³⁸

The discriminatory practices by landlords and their agents in the private market forces many indigenous people to access inadequate accommodation in boarding houses or caravan parks, as well as subsidized housing.

Though public housing may be somewhat more accessible (when stock is available) to indigenous people, discrimination remains a barrier, especially with respect to maintenance issues. For example, it has been reported that discriminatory attitudes toward indigenous tenants results in their being blamed for the deterioration of housing stock.³⁹ Also, the Tenants Advice Service in Western Australia has indicated that indigenous families are often the subject of complaints by intolerant non-indigenous neighbours. There are numerous cases of racially based complaints being made to the public housing provider, Homeswest.⁴⁰

IV.A.2.g. Public housing

The combination of poverty and systemic discrimination in the private rental market results in many indigenous people and families having no choice but to seek subsidized, public housing. As it stands, there is a national shortage of public and community housing stock, which results in indigenous families living in overcrowded conditions as they double or triple-up with family members. These housing conditions are only exacerbated by the poor management, quality and design of some public housing stock.⁴¹ Of the stock available, it is rarely culturally appropriate and is often of very poor quality.

Beyond supply issues and issues around discrimination, public housing has been widely criticized with respect to its administration (see box 1). Providers have been accused of implementing culturally insensitive policies and practices, particularly in relation to extended family issues, and temporary absences from housing due to cultural obligations and ill health. Other problems cited with respect to public housing include: policies and practices regarding rental arrears and other debts that disadvantage indigenous people, inappropriate or insensitive housing allocation practices, the lack of support available to indigenous people to manage their tenancies, and the lack of effective indigenous involvement in housing policy development and service delivery.⁴²

Box 1. Policy and practice: Public housing in Western Australia and the impact on indigenous tenants

Homeswest is the government housing provider in Western Australia. What follows is an overview of some of Homeswest's policies and practices and the impact of these on indigenous tenants.

Eligibility criteria: Homeswest has a policy called: “*Eligibility relating to an applicant with a poor tenancy history with Homeswest – such as debt, antisocial behaviour, poor property standards.*” This policy provides Homeswest with the discretion to refuse assistance, or to place conditions on assistance. Applicants with a previous debt to Homeswest are ineligible for public housing until the debt is repaid in full.^a Applicants may enter into an arrangement to repay the debt in order to secure a place on the waiting list but will still not be provided with housing until the debt is repaid. If a payment is missed, the applicant can be removed from the waiting list. Anecdotal information indicates that this policy has had a particularly harsh impact on indigenous people, leading some to sleep in parks and in cars.^b This is not surprising given the poverty levels of indigenous people in Australia.

Management practices: It is common for Homeswest to commence legal action against tenants alleged to be in breach of their tenancy agreement. Often the tenant will then engage in a process or enter into an agreement in an attempt to deal with the issue at hand. In these cases Homeswest does not withdraw their legal action but instead, they request that the court adjourn the matter *sine die*. In turn, if the tenant fails to maintain the terms of the arrangement legal action will immediately recommence. This means that many indigenous families are living in fear of legal action.^c

a: Homeswest, n.d.a. Policy 24 and Preamble.

b: Tenants Advice Service, 2001: p. 11-12.

c: Tenants Advice Service, 2001: p. 22.

IV.A.2.h. Cultural inadequacy and inappropriateness

In general, public housing policy in Australia has not taken account of the cultural needs of indigenous people such as extended kinship ties, responsibilities among family members and visiting patterns.⁴³

The notion of home for indigenous people is intimately tied to land and to family. In turn, an indigenous person living with relatives would never be considered ‘homeless’ by members of their community.⁴⁴ The indigenous community has disproportionate numbers of large families living together in comparison with the non-indigenous community, especially in remote areas.⁴⁵ Researchers on indigenous homelessness recently explained the higher density living of indigenous people in Australia as follows:

“Among Indigenous Australian groups, the occupants of houses do not necessarily belong to one family unit. Contrasting with the national trend toward an increased proportion of households being

made up of single persons and childless couples, Indigenous households still tend to be larger and more complex, often made up of a number of family units or subgroups. In these large households, one is likely to find each bedroom occupied by a family unit, possibly including a couple with infants, a single parent with a child, a group of single men or single women, or a grandparent with several infants or teenagers, as well as conventional nuclear families. These larger households are explained partly by the fact that many Indigenous people today maintain certain practices from their traditional cultures, where households were often comprised of a number of sub-units based on kinship norms. ...

Thus Indigenous household sizes of 6 to 12 people are common and much larger households can be regularly encountered (up to 20 members). A single Indigenous house may be doing the job of three or more houses as we might conceive their use in mainstream society.”⁴⁶

The cultural differences between indigenous and non-indigenous families regarding ‘home’, and the family unit, are at the core of many of the problems in housing policy and provision in Australia (see also box 2). For example, an indigenous family may consider the essential features of a home as including space for extended family, abundant outdoor areas, ease of access to the outside of the house and appropriate buffer zones between houses within a community. Government housing policies often deny indigenous concepts of what constitutes a living space and how a living space should be used. These policies and laws prevent indigenous people from living according to their cultures.⁴⁷

Box 2. Homeswest’s neutral housing policies: Disadvantageous effects for indigenous tenants

Homeswest – the public housing provider in Western Australia – has a three-pronged policy for all tenants. Tenants are required to:

1. Maintain the house and garden to an acceptable standard;
2. Maintain the rental account in good order; and
3. Maintain good neighbour relations.^a

When a tenant violates one or more of these requirements, they can be subject to eviction.

While the three requirements appear neutral on their face, they are interpreted and applied in a manner that disadvantages indigenous tenants. For instance, the acceptable standard of housekeeping is based on white middle-class notions and is determined without due consideration for the circumstances of the tenant.^b Due to overcrowding in

Continues...

Box 2: Continued

many indigenous tenancies, the families find it difficult to keep washing the walls clean or keeping the bare floorboards swept because of the numbers of young children. Due to the poverty of most indigenous tenants in Homeswest units, they struggle to afford the necessary products and equipment to maintain the homes to the satisfaction of their housing provider.^c Homeswest's tenancy agreement prohibits having an un-roadworthy vehicle on the property and families are forced to dispose of the vehicle if they cannot afford to repair it immediately, otherwise they risk eviction. Often families cannot afford to repair their cars or pay to have them removed from their property.^c

As a result of these circumstances, many indigenous tenants in Homeswest units face eviction. Disputing an eviction order is time consuming and complicated. Not surprisingly, many tenants do not challenge the eviction and do not attend the court hearing. In turn, the eviction becomes a technical process with justification seldom required.^d

As the primary caregiver to children, indigenous women often bear the brunt of the effects of eviction actions. Once evicted, families are often homeless for years, moving between other family's tenancies and often being split up for periods of time.^d

a: Homeswest, n.d.b.

b: Tenants Advice Service, 2001: p. 13. The Tenants Advice Service reported two anecdotes: a pregnant woman was expected to climb up and clean an exhaust fan, and an elderly arthritic woman was required to scrub a mouldy ceiling.

c: Tenants Advice Service, 2001: p. 13.

d: Tenants Advice Service, 2001: p. 15.

IV.A.2.i. Eviction

As mentioned previously, many indigenous people and families have to rely on public housing. Despite the fact that this housing is provided by the government, eviction is a real threat. Box 2 illustrates the ways in which seemingly neutral policies – aimed at ensuring good order within public housing – can be interpreted and applied in a manner that disadvantages indigenous people and results in evictions.

The enormous human cost of being evicted – the disruption, instability, scarcity of housing options – can and often does lead to homelessness. For indigenous families, eviction often compounds their marginalization and disadvantage. A very real link exists between eviction, increased levels of homelessness in the indigenous community and the removal of indigenous children from their families.⁴⁸

IV.A.2.j. Domestic violence

“Women bear the overwhelming brunt of violence in the home. Emotional damage, constant denigration and verbal abuse reduce self-esteem whereby women find themselves unable to function.”⁴⁹

There is clear statistical evidence that violence is a critical housing issue for indigenous women and children. Indigenous women are 45 times more likely to be victims of domestic violence than women in the broader population,⁵⁰ and their use of housing crises services is disproportionately high. The Queensland Domestic Violence Task Force estimated that domestic violence affects 90 per cent of indigenous families living in indigenous communities in that State.⁵¹

Violence in indigenous communities is not inherent in indigenous cultural traditions⁵² and can be attributed to (at least in part) both the history and effects of colonialism on indigenous people.⁵³ In other words, the structural violence that accompanies race dynamics: the dispossession of land and traditional culture; the breakdown of community and kinship systems and indigenous law; racism and economic exclusion.⁵⁴ The effects of these experiences are manifested in continuing stress, anxiety and violent behaviour. Although violence affects indigenous communities as whole, indigenous women’s experiences of violence are gendered, rooted in the:

“system of sexual subordination which exists in traditional Aboriginal society, and which is buttressed in the wider Australian society.”⁵⁵

Domestic violence refers to the abuse of weaker members of a household, usually women, children and elderly. Indigenous and non-indigenous men are most often the offenders.⁵⁶ The physical violence experienced by women often involves random assaults, bashings or rape. Women often suffer serious injuries and flee to refuges and shelters to get away from the violence in their homes.⁵⁷ It is not just wives that are affected; it is grandmothers, daughters, ‘aunties’, and children. Many cases of rape or sexual abuse occur in a domestic situation, yet these are rarely identified as rape by indigenous women or addressed as such by the courts.⁵⁸

When indigenous women leave an abusive relationship, they often have nowhere to go; this is particularly so for women with limited financial means.⁵⁹ The lack of affordable housing and long waiting lists for assisted housing⁶⁰ mean that women, and many women with children, are forced to choose between remaining in an abusive home (where their children may be apprehended by child protection authorities) or living on the street (where their children may also be apprehended) and all that entails. Aboriginal refuges are filled to capacity; they are turning away women and their children.⁶¹

The issue of housing is consistently raised as a major factor with respect to domestic violence or violence against women. In the Queensland's Women's Taskforce on Violence Report, indigenous women in rural and remote communities expressed concerns not only about the quality of the houses they were allocated, but also about the overcrowding, and lack of security especially during periods of violence. One woman reported:

*"When I was living with my defacto he was doing [domestic violence] on me. I come away from him, with my baby K ... and took out an order on him and my baby and me we are trying to live by ourselves. But they gave me a bad house. I am not safe there. I can't lock the doors and there are no windows. It is all smashed up and dirty. I can't live here. When K ... was a little baby her father fired a shot at us. When you are living with a man and he hits you, you can't do anything. Your family can't do anything, so you have to fight back to defend yourself. I drink more now because it feels good. I don't hurts as much. I always feel frightened."*⁶²

Obviously, access to safe housing is imperative to protect women from domestic violence.⁶³ In the absence of such housing, sleeping in the bush is not an uncommon way for women to avoid domestic violence. The Queensland Taskforce reported a case of a young mother who fled from a violent relationship with her baby. She had been allocated a government-subsidized house but it had no windows, no lockable doors and did not provide safety. The young mother was sleeping in the bush because she was frightened her partner would come back at night and "get her". She felt she had no protection.⁶⁴

The scarcity of suitable housing is a concern raised by indigenous women across all regions of Australia. Many women from urban areas spoke to the Queensland Task Force about their difficulties in finding affordable housing after leaving a violence relationship. It was particularly difficult when they were left with limited finances and no support from the former partner, who in many cases continued to reside in the family home.⁶⁵

There is also a desperate shortage of emergency safe houses and shelters for indigenous women in both urban and rural communities. In some cases, to fill this gap, indigenous women have opened their own homes to other women fleeing violence, at considerable risk to themselves. Even when safe houses are available, women often choose not to access them. Mainstream safe houses or shelters often do not have suitably trained indigenous staff in case-management roles, including counselling services. This would provide culturally sensitive service provision, and policy and program management.⁶⁶ Moreover, some safe houses have regulations that would prohibit the women's children from remaining with them at the safe house. In turn, many indigenous women fleeing violence will sleep with their children in their cars rather than being separated.⁶⁷

The federal government has acknowledged the seriousness of ‘family violence’ in indigenous communities in Australia. In July 2003, Prime Minister John Howard met with 15 indigenous leaders, 11 of whom were women, from across the country, to discuss the causes of and solutions to ‘family violence’.⁶⁸ As a result of this meeting it was agreed that a working party be established to examine the issues and recommendations which came out of the meeting.⁶⁹

IV.A.3. Laws, policies and programmes relevant to housing

Domestically, housing rights are protected and enforced through a variety of laws, policies and programmes. Many of these are of general application, and thus apply equally to indigenous and non-indigenous communities. There are, however, policies and programmes of particular application to indigenous peoples’ housing, such as those administered by the Aboriginal and Torres Strait Islander Commission.

What follows is an overview of selected laws, policies and programmes of relevance.

Table 14. Australia: Ratification of relevant international treaties

Treaty	Date of ratification
ILO Convention No. 169	--
ICESCR	10 March 1976
ICERD	30 October 1975
CEDAW	27 August 1983
ICCPR	13 November 1980

IV.A.3.a. The Constitution

The Australian Constitution does not codify economic and social rights or equality rights and there is no Bill of Rights in Australia. Though Australia has ratified the ICESCR, it is not automatically part of domestic law. Individuals cannot base an action on a breach of Australia’s international legal obligations *per se*.⁷⁰ In turn, Australia relies on a complex web of indirect legislative and policy measures in order to fulfil human rights enshrined in international treaties, such as the right to adequate housing.

IV.A.3.b. Human rights legislation

The Human Rights and Equal Opportunity Commission (HREOC) is an independent, statutory organization that reports to the federal parliament through the Attorney-General. It is charged with promoting respect for and observance of human rights. It does this through: education and public awareness; administering discrimination and human rights complaints, overseeing human rights compliance, and policy and legislative development.⁷¹

In administering discrimination and human rights complaints,^k HREOC investigates and attempts to settle individual human rights complaints that allege discrimination based on race, sex or disability in the areas of employment, accommodation and services. If the Commission decides not to deal with a complaint, the complainant has the option of having an oral hearing at a Federal court. A parallel structure to the Commission exists in every State across the country. In most cases a complaint can be brought either to the federal Commission or to a State or Territory Commission.

HREOC and the state/territory based equal opportunity commissions have been used by indigenous people alleging race-based discrimination in the area of housing.⁷² For example, Mrs. Joan Martin, an indigenous woman living in public housing in Perth, complained to the Equal Opportunity Commission in Western Australia that Homeswest had discriminated against her on the ground of her race in the provision of accommodation. She, specifically, challenged Homeswest's decision to evict her because of an alleged nuisance – overcrowding.⁷³ Mrs. Martin argued that the nuisance policy constituted indirect discrimination^l and that she could not avoid overcrowding because of cultural norms which obliged her to take in family members who had been evicted from their own homes. When she received the eviction notice, there were 17 people living in her house, many of them children. Though Mrs. Martin was unsuccessful through the court process, her case garnered a good deal of attention and increased awareness of some of the housing issues confronting indigenous peoples in Australia.^m

HREOC is also responsible for overseeing Australia's obligations under seven international human rights instruments which are scheduled to the *HREOC Act* 1986. The ICESCR is not attached to the schedule, although, the CEDAW and the ICCPR are. Scheduling does not have the effect of incorporating the instruments into Australian law; however, it does define 'human rights' for the purposes of the Act.⁷⁴ The implication of this is that the rights contained in the ICESCR are not necessarily considered 'human rights' in the Australian domestic context.

HREOC also has an Aboriginal and Torres Strait Islander Social Justice Commissioner, a position that was created by the federal parliament in

k. HREOC is responsible for the *Human Rights and Equal Opportunity Act 1986*, *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Age Discrimination Act 2004*, and assists the Privacy Commissioner in administering the *Privacy Act 1988* (HREOC, n.d.a; and HREOC, n.d.c).

l. The policy appears neutral on its face but has discriminatory effects.

m. For example, the CERD questioned the Government of Australia about this case during its 1394th meeting. See UN Doc CERD/C/SR.1394.

December 1992 in response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence. It was also a response to the extreme social and economic disadvantage faced by indigenous Australians. An important role of the Commissioner is to keep indigenous issues before the federal government and the Australian community to promote understanding and respect for the rights of indigenous Australians.

The Aboriginal and Torres Strait Islander Social Justice Commissioner advocates for the rights of indigenous peoples, promotes an indigenous perspective on different issues, builds support and understanding for an indigenous perspective, and empowers indigenous peoples. A central function of the Commissioner is to report annually to federal Parliament on significant social justice and native title issues facing indigenous Australians. As a member of the HREOC the Commissioner works closely with others in the organization to promote and protect the rights of indigenous Australians. This happens in a variety of ways, such as participating in significant court cases through the Commission's *amicus curie* and intervention functions and holding public inquiries into issues of national importance.⁷⁵

The Aboriginal and Torres Strait Islander Social Justice Commissioner is not able to receive complaints from individuals.

IV.A.3.c. Landlord/tenant legislation

Every State and Territory has legislation that governs the rights and responsibilities of landlords and tenants in the private rental market. This legislation applies to all tenants – including indigenous tenants – who enter into contractual agreements with one another in the private rental market. The legislation covers issues such as: maintenance of units, peaceful enjoyment of property, and rental payments.

IV.A.3.d. National homelessness strategy

The federal government recently released a report outlining a national plan of action to address homelessness.⁷⁶ The report was based on consultations with stakeholders across the country, examines the causes and effects of homelessness and offers areas for action and further research. It includes a discussion of indigenous homelessness, noting that it is a chronic problem affecting metropolitan, regional and remote communities.⁷⁷ The report also notes that indigenous people have a different idea of what constitutes homelessness as compared to non-indigenous populations. In particular, that homelessness has spiritual as well as physical dimensions. It also identifies several causes of indigenous homelessness including poverty, discrimination, and the absence or inaccessibility of appropriate housing.⁷⁸ The report offers several long term goals such as:

“increasing awareness and understanding of how the legacy of history continues to affect the emotional and social wellbeing of Indigenous people”, reducing barriers to mainstream private rental accommodation, and providing culturally appropriate, affordable, safe and secure housing.⁷⁹ Priority actions identified include:

- working with federal, state and territorial housing providers to *“develop and coordinate appropriate local housing responses and strategies to address Indigenous homelessness and related matters”*; and
- convening a national forum for indigenous people on homelessness to develop and confirm a set of priorities for action.⁸⁰

The new strategy has been both well received and criticized by those working in the area of housing in Australia. It has been recognized as an important initiative, raising awareness about a serious national problem, identifying some of the key structural causes of homelessness for indigenous and other communities. At the same time, it has been criticized for its lack of a serious long-term plan of action addressing the identified causes of homelessness.⁸¹

IV.A.3.e. National Action Plan on Human Rights

The right to housing is recognized and supported in Australia’s National Action Plan on Human Rights.⁸² The plan outlines targets for Australia in the area of all human rights, including economic and social rights and the right to an adequate standard of living with particular reference to housing. Features of the policy include:⁸³

- The improvement of the housing and living conditions of all Australians including indigenous people.
- All Australians should have access to affordable, adequate and appropriate housing.
- Programs and initiatives directed towards achieving an adequate standard of housing. These include access to housing that is secure, affordable and suited to their needs, whether they are home buyers, public housing tenants or renters in the private sector. These programs include: provision of funds to the State and Territory governments to assist people, particularly low to moderate income earners to access affordable and adequate housing; and provision of rent assistance to low income renters in the private rental market.

The Plan also specifically refers to indigenous housing. It states that: *“Aboriginal housing, particularly in rural and remote areas is grossly inadequate [and that] Federal government funds are*

*provided to both State and Territory Governments and ATSICⁿ for the provision of housing and infrastructure. Low interest housing loans are also provided for Aboriginal and Torres Strait Islander peoples.*⁸⁴

This recognition of the right to housing and its application for indigenous people is important; however, as its status as policy, rather than law, means that it cannot be enforced. In this regard, the Plan:

*“contains no steps for redressing current deficiencies in the enjoyment of housing. There is no conception that government’s overarching responsibility is to ensure that individuals’ have access to adequate housing. There is no conception that government’s overarching responsibility is to ensure that individuals’ have access to adequate housing.”*⁸⁵

It is also unclear whether there is a correlation or relationship between the National Action Plan on Human Rights and the National homelessness strategy currently being developed.^o

IV.A.3.f. Housing policy

The right to housing in Australia is also realized through housing policy and programmes that are developed between the Commonwealth government and state and territory governments.

The major mechanism for providing public housing assistance in Australia is the Commonwealth-State Housing Agreement (CSHA), a series of financial assistance agreements between the federal government and the states and territories. These agreements fund the construction and acquisition of public rental housing, which indigenous people are eligible to.

Under CSHA, approximately Australian \$ 1 billion^p is provided annually to States and territories for the provision of social or public housing. These funds are supplemented by state and territory governments under specific arrangements.

*“While these funds provide housing assistance for all Australians, in most jurisdictions the practice has been that little or no public housing is provided outside the urban centres and larger rural towns.”*⁸⁶

n. Aboriginal and Torres Strait Islander’s Commission.

o. The National Human Rights Policy is currently being revised, and a draft has already been approved by the Government. See: Attorney-General, The Hon. Philip Ruddock, MP, and Minister of Foreign Affairs, the Hon. Alexander Downer, 2004.

p. Equivalent to US \$700 million.

As such indigenous peoples do not benefit substantially from this funding.

Further assistance of Australian \$ 1.7 billion,^q as rental assistance for low-income earners is available through the Department of Family and Community Services. To qualify for rental assistance, recipients have to be living in private or community rental accommodation, receive a social security payment, and have their family income means tested.⁸⁷

In 1979, recognizing the acute disadvantage of indigenous Australians, the Commonwealth government established the Aboriginal Rental Housing Program (ARHP). ARHP is administered by the Department of Family and Community Services and is intended to supplement, not replace, general public housing services. Each state and territory is guaranteed a minimum amount of funding under the programme and is not required to match the funds. Funds of Australian \$ 91 million^r are allocated annually for indigenous-specific housing. A further Australian \$ 29 million^s over four years was allocated to the ARHP in the May 2001 budget. Release of ARHP funds each year to states and the Northern Territory is conditional upon Commonwealth, state and territory ministers approving annual strategic plans.⁸⁸

In 1989 the Aboriginal and Torres Strait Islander's Commission (ATSIC) was established, with the statutory function:

“to ensure the maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them”.^t

ATSIC runs the Community Housing Infrastructure Program (CHIP) funded by the Commonwealth government. CHIP is a single program that comprises five elements: housing; infrastructure; municipal services; national aboriginal health strategy; and program support.^u

q. Equivalent to US \$ 1.2 billion.

r. Equivalent to US \$ 63 million.

s. Equivalent to US \$ 20 million.

t. ATSIC has 20 Commissioners and 60 Regional Councils. The Commissioners and Regional Councillors are all elected by Aboriginal and Torres Strait Islander people and are themselves Indigenous.

u. **Housing:** Provides for: capital construction, purchase and upgrade of adequate and appropriate rental housing with an emphasis on quality health hardware; supplementary recurrent funding for general administration costs of Indigenous housing organizations; and recurrent funding for repairs and maintenance of existing housing stock where rental income and service charges are not sufficient to meet the costs involved.

Infrastructure: Provides capital funding for essential services such as water, roads, sewerage, power, etc. to rural and remote communities to accelerate the provision of essential and municipal services to severely disadvantaged rural and remote communities.

ATSIC and the Department of Family and Community Services have 'Indigenous Housing Agreements' with governments in several states and the Northern Territory. According to ATSIC:

*"the agreements maximize efficiency and effectiveness of program delivery, and better coordinate the Commonwealth's two Indigenous specific housing programs (CHIP and ARHP) with state/territory Indigenous housing programs."*⁸⁹

A key principle of these agreements is the establishment of an indigenous housing authority in each state and territory to provide for greater indigenous decision making and community involvement in the implementation, delivery and management of housing. Each housing authority develops and administers its own policies and guidelines. In some of the states, ATSIC's Regional Council housing funds are pooled with state funds through these state housing authorities and delivered as a single program. In other states the indigenous Housing Agreements provide for an indigenous decision-making structure and joint planning of ATSIC Regional Council housing programs with the state housing program.

The administration of housing policy, supply and services by federal as well as state/territory governments has been critiqued by many as complex, and confusing.⁹⁰ This is exemplified in several research studies, which indicate that in most cases indigenous peoples do not know what housing and housing related services are available to them in their respective communities.⁹¹

While there are indeed progressive laws, policies and programmes in place in Australia to address the housing disadvantage experienced by indigenous Australians, much work is still required if indigenous Australians are to enjoy the right to adequate housing. While the federal government has taken some constructive steps in this direction, such as the convening of the 'family

Municipal services: Provides recurrent funding for maintenance of community power, water and sewerage services, garbage collection, internal road maintenance, dog health programs, operational costs associated with the administration and functions of organizations which provide infrastructure and municipal services.

National aboriginal health strategy: Provides capital funding for housing and related infrastructure (power, water, sewerage, drainage and dust control) to improve environmental living conditions, generally to rural and remote Aboriginal and Torres Strait Islander communities. Stringent eligibility criteria and rigorous assessment of priorities including Health Impact statements, ensure that the highest need communities are funded. The scheme is administered on a State-wide basis by external program managers who have construction management and engineering expertise.

Program support: Funding may be available for surveys, organizational reforms, planning and delivery of programs, needs analysis, technology research and design.

violence' summit with indigenous leaders (see section IV.A.2.j above), and the adoption of the national homelessness strategy, the government has also recently taken some potentially deleterious steps. It was recently announced that ATSIC will be abolished effective 1 July 2004 and will not be replaced with an alternative, elected body.⁹² The functions of ATSIC will be "*devolved to mainstream [government] Departments*",⁹³ and a national indigenous council will be formed, "*on the basis of merit to interact with Government and provide Indigenous specific advice and advocacy*".⁹⁴ It has also been reported that the Commonwealth government intends to dismantle the Aboriginal Legal Service by contracting out its work to private companies. The recipient of the contract will not be required to employ indigenous staff or to be an indigenous organization.⁹⁵ Though a recent governmental review of ATSIC suggested that major restructuring was required,⁹⁶ its dismantling by the Commonwealth government is regarded by many as a hostile move against indigenous peoples in Australia. Moreover, there is real concern that the demise of ATSIC will only result in poorer living conditions for indigenous Australians, because studies have shown that mainstream programs do not meet the needs of indigenous people.⁹⁷

Notes

1. Australian Bureau of Statistics, 2001a.
2. Suter and Stearman, 1988 and 1994: p. 5.
3. State of Queensland, 2000: p. 61.
4. 1957 Queensland Native Affairs Annual Report, cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996: p. 6.
5. Royal Commission into Aboriginal Deaths in Custody, 1991: Vol. 2 p. 437.
6. Paris, 1993: p. 215, cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996: pp 8-9.
7. Royal Commission into Aboriginal Deaths in Custody, 1991: Vol. 2 p. 512.
8. Reed-Gilbert, 2003.
9. ATSIIC, 2000a: p. 4.
10. ATSIIC, 2000a: p. 5.
11. Australian Institute of Health and Welfare, 2003: p. 184.
12. Australian Bureau of Statistics, 2003.
13. Australian Bureau of Statistics, 2003.
14. ATSIIC, 2000a: p. 12.
15. Australian Bureau of Statistics, 2003.
16. Australian Bureau of Statistics, 2003.
17. See, for example: Parity, 2003 and ATSIIC, 2002.
18. See: Dodson, 2003a.
19. Australian Bureau of Statistics, 2001b.
20. Australian Institute of Health and Welfare, 2003: p. 38.
21. Australian Institute of Health and Welfare, 2003: p. 38.
22. Australian Institute of Health and Welfare, 2003: p. 38.
23. As cited in: Australian Institute of Health and Welfare, 2003: p. 42.
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25. Australian Institute of Health and Welfare, 2003: p. 39.
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27. Australian Institute of Health and Welfare, 2003: pp. 31 and 39.
28. Australian Institute of Health and Welfare, 2003: p. 89.
29. ATSIIC, 2002: p. 2.
30. Australian Bureau of Statistics, 2001c: pp. 18-19.
31. Australian Bureau of Statistics, 2001c: p. 28.
32. Australian Bureau of Statistics, 2001c, p. 27.
33. Council to Homeless Persons, 2003a: p. 3.
34. Australian Federation of Homelessness Organizations, n.d.
35. Australian Institute of Health and Welfare, 2003: p. 97.
36. San Pedro, Discrimination in Private Rental, in Parity, Vol. 13, Issue 5, pp. 10-11 as quoted in, Tenants Advice Service Inc. Western Australia, 2001.
37. Tenants Advice Service Inc. Western Australia, 2001: p. 7.
38. Tenants Advice Service Inc. Western Australia, 2001: p. 7.
39. Tenants Advice Service Inc. Western Australia, 2001: p. 14.
40. Tenants Advice Service Inc. Western Australia, 2001: p. 14.

41. Reed-Gilbert, 2003.
42. Reed-Gilbert, 2003.
43. Social Justice Commissioner, 1996: p. 8.
44. Royal Commission into Aboriginal Deaths in Custody, 1991: Vol. 2, p. 433.
45. Australian Bureau of Statistics, 2002.
46. Memmott, Long, Chambers, and Spring, 2003: p. 12.
47. Human Rights and Equal Opportunity Commission, 1996: p. 8.
48. Tenants Advice Service, 2001: p. 16.
49. State of Queensland, 2000: p. 35.
50. Barker, 2001.
51. State of Queensland, 2000: p. 97.
52. See: Dodson, 2003b. See also: Memmott, and others, 2001: pp. 24-25.
53. Andrews, 1997: p. 917. See also: Memmott, and others, 2001: pp. 10-18.
54. See: Dodson, 2003b. See Also: Andrews, 1997.
55. Andrews, 1997, p. 928.
56. See also: Memmott, and others, 2001: p. 35.
57. Cadd, 2003. Muriel Cadd is the Chief Executive Officer of the Victorian Aboriginal Child Care Agency.
58. Cadd, 2003.
59. Cadd, 2003.
60. Cadd, 2003.
61. Cadd, 2003.
62. State of Queensland, 2000: p. 145.
63. State of Queensland, 2000: p. 145.
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65. State of Queensland, 2000: p. 145.
66. State of Queensland, 2000: p. 147.
67. State of Queensland, 2000: p. 146.
68. The Age, 2003.
69. McGrath, 2003.
70. Devereux, 2003: p. 82.
71. HREOC, n.d.a; and HREOC, n.d.c.
72. See for example: *King & Anor v. Meilman East Pty Limited & Ors* (2004). In this case the applicant alleged that she was served with an eviction notice because she is indigenous. For more cases see: <<http://www.austlii.edu.au/au/cases/cth/hreoc/>>.
73. *Martin v. State Housing Commission* P1/1999.
74. WRANA, 2000.
75. HREOC, n.d.e.
76. Commonwealth Advisory Committee on Homelessness, 2003.
77. Commonwealth Advisory Committee on Homelessness, 2003: p.73.
78. Commonwealth Advisory Committee on Homelessness, 2003.
79. Commonwealth Advisory Committee on Homelessness, 2003: p. 72.
80. Commonwealth Advisory Committee on Homelessness, 2003: pp. 72-73.
81. Creswell, 2004. Ara Creswell is the Executive Office Australian Federation of Homelessness Organisations.
82. Department of Foreign Affairs and Trade (Australia), 1994; 1995; 1996.
83. Department of Foreign Affairs and Trade (Australia), 1996: 26-29.

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85. Devereux, 2003: p. 81.
86. ATSIIC, 2002: p. 11.
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90. ATSIIC, 2002: p. 10.
91. Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996. See also Commonwealth Department of Family and Community Services, 2001.
92. Senator Amanda Vanstone, 2004.
93. Senator Amanda Vanstone, 2004.
94. Senator Amanda Vanstone, 2004.
95. Pearson, 2004.
96. Hannaford, Huggins, and Collins, 2003.
97. Commonwealth Grants Committee (2001) and the Productivity Commission (2003) cited in: Bullimore, 2004.

IV.B. Canada

IV.B.1. Background

The indigenous peoples of Canada make up approximately four per cent of the national population.^a Approximately half of the indigenous population live in urban areas;¹ the rest live in communities on or near what remains of their traditional lands across the entire country. Since the rise of European settlement in the nineteenth century, there has been a steady erosion of the land and cultural base of indigenous peoples. This loss results from a range of policies of colonization and assimilation, which include: the denial of indigenous rights to land and government; the development of exploitative treaties which were later ignored; the residential school system; the criminalization of traditional ceremonies; and the stripping of group membership from individuals.²

Today, lands officially set aside for indigenous peoples make up less than 0.5 per cent of total Canadian land; most of these lands are in the near and far north where there is an indigenous majority.³

The Canadian constitution recognizes three distinct groups of indigenous peoples in Canada:⁴

- **Indians**, comprising over fifty different cultural groups or “First Nations”, of whom approximately sixty per cent live in 614 indigenous communities across Canada. There are 800,000 First Nations people in Canada, comprising 631 First Nations.⁵ Most indigenous peoples in Canada (approximately 62 per cent) are Indians.⁶ First Nations’ remaining lands – where collective title is clearly recognized – are called ‘reserves’ and administered under the federal *Indian Act*. Many, but certainly not all First Nations live on reserves.
- **Inuit**, arctic peoples who live in the very far North of the Canadian Arctic, and make up five per cent of the indigenous population. They do not live on reserves.⁷
- **Métis**, descendants of relationships between Indians or Inuit and early settlers with a distinct collective cultural history.^b Métis constitute

a. There are various definitions in use for indigenous peoples. According to Statistics Canada, 1.3 million Canadians reported Aboriginal ancestry, making up 4.4 per cent of the total population (up from 3.8 per cent in 1996); while 976,305 individuals identified themselves as Aboriginal, making up 3.3 per cent of the total population. There is some under-representation of on-reserve Indians as 30 reserves did not participate in the survey. See Statistics Canada, 2003b: pp. 5-6.

b. See for example the discussion of the Supreme Court of Canada in *R. v. Powley* (2003), identifying the *Metis* as “distinctive peoples who, in addition to their mixed ancestry,

approximately 30 per cent of the indigenous peoples in Canada and like the Inuit do not live on reserves.⁸

IV.B.2. Historical and ongoing dispossession

In 1996, the Royal Commission on Aboriginal Peoples (RCAP) issued a comprehensive and authoritative report to synthesize the research about circumstances facing indigenous peoples and to develop proposals which might address these conditions.⁹ The report identified the cultural and economic dispossession of Canada's indigenous peoples as the fundamental issue underlying today's harsh social realities. The Commissioners urged the governments of Canada (federal, provincial and territorial) to work to restore lands and resources to indigenous peoples in order to support their self-determination, and the economic viability of indigenous communities.¹⁰

The dispossession of indigenous peoples in Canada can be attributed to a number of factors, including *inter alia*:

- the denial of indigenous rights to land;
- imposed administrative and governance structures;
- the breach of fiduciary duty by the federal government;
- the mal-administration of indigenous resources; and
- the involuntary relocation of indigenous peoples from their lands.

A brief overview of these factors follows in the sections below.

IV.B.2.a. Denial of indigenous rights to land

Until forced by the Courts to change in 1973, it was the position of the government of Canada that indigenous rights – particularly title to land – were not enforceable.¹¹ Even after 1973, indigenous rights – whether arising through practice or solemn treaty – were subject to *unilateral* extinguishment by the Crown until their constitutional status was 'recognized and affirmed' in 1982.¹² This legal position justified the large-scale takings of indigenous lands. To this day, even after the recognition of a broad constitutional right of indigenous title to land,¹³ most of the indigenous groups in Canada have been unable to make significant progress in negotiating land claim treaties to permit the exercise and benefit of these rights.^c The few indigenous groups who have succeeded in

developed their own customs, way of life, and recognizable identity separate from their Indian or Inuit and European forbears."

c. In 2002, there were 71 comprehensive claims processes underway in Canada – mostly in British Columbia and northern Canada. Since the beginning of the comprehensive claims process (in 1987), fifteen agreements have been concluded across Canada. See DIAND, 2002: p. 96.

achieving modern treaties note that these treaties have not been effectively implemented.¹⁴

IV.B.2.b. Imposed administrative and governance structures

The federal government has imposed systems of governance on indigenous peoples since the mid-nineteenth century. The most notorious instrument of this imposition is the *Indian Act*¹⁵ which, even today, establishes the parameters for many, if not most, aspects of the Indian Government on reserve:

- it establishes administrative units (“bands”, which may or may not correspond with indigenous First Nations);¹⁶
- it prescribes a code of membership^d (“Indian status”) controlling access to public benefits including possession of land;
- it establishes the default^e structure and powers of the Government for each band (a ‘band council’);¹⁷
- it regulates inheritance,¹⁸ and guardianship of infants and their money;¹⁹ and
- it also regulates all aspects of the ownership, possession, transfers, and management of lands on reserve,²⁰ requiring Ministerial approval of any transfers between Indians, and sharply limiting any alienation of lands including their use as security.

IV.B.2.c. Breach of fiduciary duty and maladministration of indigenous resources

Since the earliest days of settler presence in the Americas, there has been a special relationship of protection between the Crown and indigenous Peoples.^f Specifically, since confederation in 1867, the Federal Government has exclusive jurisdiction over ‘Indians and Indian Lands’.²¹ In the nineteenth century, as government intervention into First Nations and Métis lands and governments intensified and the legal capacity of indigenous peoples and

d. *Indian Act*, 1985: s.5-10. Since 1985, bands have had the power to create their own membership Code. *Indian Act*, 1985: s.10. (R.S., 1985, c. I-5, s. 10; R.S., 1985, c. 32 (1st Supp.), s. 4.)

e. Since 1985, individual bands have been empowered under the *Act* to enact their own leadership selection process through negotiation with the Minister (Canadian Parliament, 1985: I-5, s.2).

f. Early recognition of this relationship is contained in the *Royal Proclamation of 1763*, R.S.C. 1985, App.II, No.1, a document with constitutional status, regarded by many indigenous leaders as the early defining statement of the relationship between First Nations and the Crown.

individuals was circumscribed,^g the relationship became explicitly trustee-like.^h However, under governmental stewardship, indigenous rights and interests were frequently ignored in the process of opening Indian lands for development together with ongoing efforts at assimilation resulting in massive losses of lands and resources.²² Throughout this century, whole communities have been involuntarily relocated as a result of government initiatives (see below). In 1998, the Minister of Indian Affairs and Northern Development, speaking on behalf of the federal government, acknowledged:

“We must recognize the impact of [past] actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act.”²³

To this day, however, indigenous organizations argue the federal government has been remiss in living up to its fiduciary duty to act in their best interest. Failure to provide for basic social needs including adequate housing at least to levels comparable with Canadian averages – particularly in light of the government responsibility for dispossession – is seen as a breach of duty and calls in question the honour of the Crown.²⁴

IV.B.2.d. Involuntary relocation

A key aspect of dispossession undermining indigenous housing rights throughout this century has been involuntary relocations.²⁵ The RCAP groups the reasons for these relocations into two broad categories: administrative convenience (for example, to centralize nomadic populations for purposes of service delivery), and development, including replacing pastoral activities with agriculture, urbanization, and hydroelectric development. Relocation of Inuit communities has also served the national interest in defining Canadian sovereignty, particularly in the high arctic. These relocations have been described as a ‘trauma’ at the individual and collective levels. RCAP observed:

“Relocation separated Aboriginal people from their homelands and destroyed their ability to be economically self-sufficient. This loss of economic livelihood contributed to a decline in living standards, social and health problems, and a breakdown of political leadership.”²⁶

g. Notably, indigenous individuals did not have the right to vote until the 1960s, and it was illegal for a band to retain a lawyer to pursue a land claim from 1926 (*Indian Act*, RSC 1927, c.98, s.141) until 1951 (*Indian Act*, S.C. 1951, c.29).

h. However, only in 1984 did the Courts expressly find that the fiduciary duty owed by the Crown created legally enforceable rights on the part of Indigenous peoples. See *Guerin v. R.*, 1984.

The profound effects of relocation demonstrate the integral relationship between home, community, and cultural survival for indigenous peoples in Canada. They show that adequate protection of the right to housing involves more than providing the materials for construction of comparable dwellings. Effective protection of the right to housing requires solutions that are generated with the informed participation of affected groups, and integrated with traditional and evolving means of subsistence and other economic resources.

IV.B.3. Current housing and living conditions

Although the standard of living in Canada as a whole is considered among the best in the world, international and national bodies have criticized the country for social conditions facing indigenous peoples, which are worse than national averages, both on reserves and in non-reserve settings. In 1998, in its review of Canada's compliance with international obligations, the CESCR made the following 'concluding observations':

*"The Committee is greatly concerned at the gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights. There has been little or no progress in the alleviation of the social and economic deprivation among Aboriginal people. In particular, the Committee is deeply concerned at the shortage of the adequate housing, the endemic mass unemployment, and the high rate of suicide..."*²⁷

A large body of research documents and analyzes levels of poverty in indigenous communities. For example, the latest census information from 2001 reveals, the median pre-tax income of all persons indicating indigenous identity is just 61 per cent of median income for all Canadians.²⁸ Among urban indigenous people living in cities, four times as many indigenous people as other citizens live below the poverty line.²⁹ According to the 1996 census, 43 per cent of indigenous women aged 15 and over were living in poverty compared with 35 per cent of indigenous men, and 20 per cent of non-indigenous women.³⁰ The poverty rates for indigenous single mothers were even higher. Among this group, 73 per cent were living in poverty. This was substantially worse than the 45 per cent of families headed by non-indigenous female lone parents.³¹

Research also exposes the poor health status of indigenous peoples, including widespread exposure to violence, and communicable diseases associated with crowded living conditions;³² and it documents elevated rates of incarceration, child apprehension and other negative contacts with the justice system.³³

Indigenous organizations and governments have all identified housing as a matter of central concern for indigenous peoples in Canada today³⁴ – both because of the acute housing problems facing indigenous communities and individuals, and because of the serious impact of inadequate housing on their well-being.

The RCAP documented the housing crisis facing indigenous peoples on reserves in Canada today relative to the general population.³⁵

- major repairs are required in twice as many households;
- more than ninety times as many indigenous households have no piped water, and available water is not suitable for drinking in one-fifth to one-quarter of indigenous households;
- the average number of people in each dwelling is thirty per cent higher in indigenous households, despite the fact that the houses are generally smaller; and
- the rates of tenancy, as compared to homeownership, are thirty per cent higher in the indigenous population than the Canadian average.¹

In 1996, less than three per cent of Canadian households were indigenous, yet indigenous households constitute nine per cent of those in ‘core housing need’.³⁶ Approximately one third of non-reserve indigenous households were in core housing need; on-reserve, only half of households met national standards for suitability and adequacy.³⁷ Overall, 40 per cent of Indians living on-reserve report their housing does not meet their needs; as do 33 per cent of Inuit, 19 per cent of Métis, and 17 per cent of off-reserve Indians.³⁸ The 2001 Census showed minor improvements in the housing situation of off-reserve Indians, Métis and Inuit, but 17 per cent of that group live in crowded conditions (compared to 7 per cent nationally); and 18 per cent live in homes needing major repairs (compared to 8 per cent nationally).³⁹

Poor housing conditions are also a key factor affecting elevated rates of mobility among indigenous peoples. In the year before the 2001 Census, 22 per cent of indigenous people had moved, relative to 14 per cent in the overall population; approximately two-thirds of moves took place within the same community.⁴⁰ This mobility, in turn, affects the ability of governments – both First Nations governments and the federal government – to plan and deliver social programming including housing programs. High mobility has a particularly harsh impact where there are long waiting lists for available housing – the norm across Canada in both indigenous and non-indigenous communities.

i. This statistic does not take into account houses on-reserve which are owned by Band Councils. See discussion of Indian Act and Indian reserves, below.

Approximately half the indigenous population lives in cities.⁴¹ The situation amongst the urban indigenous population is far worse than that of the non-indigenous population. Indigenous women are more likely than men to live off-reserve, mostly in urban areas: 68 per cent of Métis women, 46 per cent of First Nations women and 30 per cent of Inuit women.⁴² Estimates suggest that between fifteen and one-quarter of the total homeless population in Canada's largest city (Toronto) is indigenous⁴³ – which is grossly disproportionate to their representation in the general population. The total number of federally assisted social housing units across Canada is close to 600,000; the number of urban housing units designated for indigenous peoples is just over 10,500, or 1.8 per cent of the total number of units, despite the fact that indigenous people constitute 4.4 per cent of the national population.⁴⁴

However, homelessness is not a uniquely urban issue. For example, in the new arctic territory of Nunavut, the government has made submissions to the national Task Force on Homelessness to better recognize the 'northern face' of homelessness. Approximately 54 per cent of the Inuit population live in extremely overcrowded conditions.⁴⁵ Because of the extreme climate, people do not live on the street, instead families frequently double and even triple up. As a result, families have no choice but to bear the strain of dealing with individuals with serious mental health and other problems who have nowhere else to go (where the main institutional supports are the hospital or the correctional system). Too often, people – women in particular – stay in violent situations because there is nowhere else to go.⁴⁶ Severe overcrowding has been identified as a major risk factor contributing to suicide, violence, and the spread of disease in indigenous communities.

IV.B.4. Laws, policies and programmes relevant to housing

Indigenous people living on-reserve are subject to the *Indian Act*, which covers social benefits (including housing) and incorporates several federal housing programs. The government has interpreted the *Indian Act* to apply only to indigenous peoples living on federally recognized reserves and has absolved itself of fiscal responsibility for indigenous peoples living in non-reserve settings, such as in urban centres. At the same time, the provinces also deny any responsibility for providing services for non-reserve and non-status indigenous peoples, on the basis that the federal government has full

Table 15. Canada: Ratification of relevant international treaties

Treaty	Date of ratification/ accession
ILO Convention No. 169	--
ICESCR	19 August 1976
ICERD	15 November 1970
CEDAW	9 January 1982
ICCPR	19 August 1976

responsibility for providing services to indigenous peoples regardless of where they live.⁴⁷ Though non-reserve indigenous communities do receive some project-specific funding, which is discussed below, they are compelled to rely on laws and programs of general application to meet their specific needs.

In terms of laws of general application, there is no explicit recognition of the right to adequate housing – as an enforceable right or as a policy commitment of government – within Canadian domestic law. No such recognition is found in the *Constitution Act*, 1982, including the *Canadian Charter of Rights and Freedoms*,⁴⁸ in provincial or federal human rights legislation, in national, provincial or territorial housing legislation or in federal-provincial agreements.⁴⁹ The rights contained in international human rights treaties ratified by Canada are not directly enforceable by domestic courts unless they have been incorporated into Canadian law by parliament or provincial legislatures.⁵⁰ As such, the right to adequate housing as codified in Article 11(1) of the ICESCR cannot be invoked by claimants.⁵¹ Therefore, the most widely referred to legislation that pertains directly to housing rights is national/provincial/territorial human rights legislation, which protects against discrimination in accommodation, and landlord-tenant legislation which governs landlord-tenant relations.

It should be noted, that section 67 of the *Canadian Human Rights Act* (CHRA) states that:

*“Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act”.*⁵²

In practice, this means that indigenous Band Councils are exempt from the provisions of the CHRA if they can show that their actions or decisions are made pursuant to the *Indian Act*.⁵³ This provision has prevented claims against Band Councils on issues such as restrictions on services or membership to those reinstated with Indian status or their children.⁵⁴ In turn, though section 67 of the CHRA was originally intended to prevent non-Indians from claiming discrimination because they do not receive the benefits that Indians receive under the *Indian Act*, its effects have been to insulate from scrutiny the discriminatory acts of Band Councils.⁵⁵ This has had a particular impact on indigenous women, who have been subject to discriminatory practices of Band Councils.⁵⁶ It has also been argued that section 67 similarly protects the Federal Government from claims of discrimination by indigenous people, in so far as the Federal Government can characterize their activities as pertaining to a provision of the *Indian Act*.⁵⁷

IV.B.4.a. On-reserve housing laws and programs

The Government of Canada has constitutional responsibility for on-reserve indigenous housing under the *Indian Act*. Though the Government has acknowledged the inadequate desperate housing and living conditions of indigenous peoples on-reserve in Canada,⁵⁸ to date it has not responded to these conditions with the urgency that many indigenous groups believe is required to address their housing needs.

The *Indian Act* governs all aspects of lands administration, housing conditions and community services. Frequently – almost 60 per cent of the time – First Nations Band Councils own the housing on reserves, as well as the land. Among some First Nations, individual possession is governed by custom; in others, Band Councils grant Certificates of Possession. However, the wide authority of the Minister under the Act is not being exercised – cuts and staff shortages at the central level, and a lack of capacity or clear responsibility at the First Nations level has led to what the Royal Commission describes as a ‘vacuum’ where uncertainty about land tenure and responsibilities of different parties has led to a lack of investment in housing and deteriorating housing stock.⁵⁹

There are two major Government departments with responsibility to improve the quantity and quality of affordable housing on-reserve: The Department of Indian and Northern Development (DIAND), and the Canadian Mortgage and Housing Corporation (CMHC). In a recent report, the federal Auditor-General was critical of the complexity and unaccountability of on-reserve housing programs, and points out that, at current levels of investment:

*“the high levels of substandard housing and overcrowding are expected to continue given the growing population, rising construction and maintenance costs, limited access to non-governmental resources, and growing debt levels.”*⁶⁰

DIAND supports on-reserve housing primarily through housing subsidies, conditional contributions to the building and renovation of housing on reserves. It contributes an additional amount directly to First Nations for infrastructure such as roads and sewers, and contributes to shelter allowances for social assistance recipients in rental housing. Finally, DIAND guarantees loans to individuals and communities. CMHC provides an interest-rate subsidy to promote rental housing on reserves. Government expenditures for on-reserve housing were frozen in the early 1990s. In 1996, DIAND and CMHC introduced a new housing policy calling for community-based planning and administration, with some additional one-time funding attached.⁶¹

In its 1998 submission to the CESCR, the Grand Council of the Crees^j issued a critique of on-reserve housing programs. Among other points, they were particularly critical of the following issues:⁶²

- Capped housing subsidies resulting in declining real purchasing power – to a maximum of Canadian \$ 46,000 for new home construction (where actual costs are closer to \$ 90,000), and \$ 6,000 for renovations (where major required renovations cost, on average, closer to \$ 20,000).^k
- CMHC loan subsidies able to support the construction of fewer dwellings.
- Failure of expenditures (and reports) to reflect actual housing need, particularly growing backlogs. The Grand Council of the Crees cited a study showing a shortfall in 1996/97 of 59,294 adequate units required for on-reserve housing to be brought up to the Canadian standard of one housing unit for every two people over twenty – in that year, the actual net increase in housing was 2865 new units.

Indigenous women on-reserves are even more deeply affected by the housing crisis, given their greater poverty and responsibility for families (particularly high numbers of women who are lone-parents). In addition to this systemic problem, indigenous women living on reserve face discrimination which directly affects their access to housing. What follows is an overview of two issues of particular concern to indigenous women: the manner in which on-reserve matrimonial property is divided upon marital breakdown; and the relationship between women's Indian status and their access to housing.

IV.B.4.b. Division of matrimonial property on reserve

In all provinces and territories, legislation governing marital breakdown provides for equal sharing of assets between a husband and wife;^l most often, the main family asset is the house. Due to the constitutional division of powers

j. The Grand Council of the Crees is the political body that represents approximately 14,000 Indigenous peoples who are *Crees* or '*Eeyouch*' ('*Eenouch*' – Mistissini dialect), of eastern James Bay and Southern Hudson Bay in Northern Quebec. The Grand Council has twenty members: a Grand Chief and Deputy-Grand Chief elected at large by the Eeyouch, the chiefs elected by each of the nine *Cree* communities, and one other representative from each community (Grand Council of the Crees, n.d.).

k. US \$ 34,000; US \$ 66,400; US \$ 4,400; and US \$ 15,000 respectively.

l. Different jurisdictions treat married and common law relationships differently. Most provinces do not provide for a division of property at the break up of a common law relationship. Approximately half of the provinces create a right to apply to a court for occupancy of the family home regardless of whether spouses were married at the time of the break up.

in Canada, the Supreme Court has held that provincial legislation does not apply if it affects real property on reserve.⁶³ Although some individual First Nations have made rules for matrimonial property division, neither the *Indian Act* nor any federal legislation provides for a division of property on reserve and the result is frequently a legislative vacuum. This jurisdictional technicality has dramatic real-world results as women are forced to choose between staying in a bad, often violent situation or leaving the matrimonial home and, very often, leaving their community and access to their culture. The relatively little empirical research to date strongly suggests that most marriage breakdowns result in the woman leaving the matrimonial home, usually with children – the reverse of the common situation where the custodial parent is more likely to be able to stay in the home.^{64,m}

The lack of protection for on-reserve indigenous women has been a matter of concern to international⁶⁵ and national bodies. Recently, the Canadian Senate Standing Committee on Human Rights issued an interim report that urged immediate action on the part of the Federal Government. After extensive evidence showing that the effect of this legislation was discrimination against on-reserve women relative to off-reserve women, and relative to on-reserve men, the Committee wrote:

*“This initial series of hearings has... enabled the Committee to understand the devastating effects on the lives of Aboriginal women and their children on reserve of a situation that is unacceptable in Canadian society.... It is a matter of compatibility with the Canadian Charter of Rights and Freedoms, with Canada’s international human rights obligations, and it is a matter of honour and dignity.”*⁶⁶

The Committee urged that the *Indian Act* be amended, to incorporate provincial statutes by reference unless there are First Nations rules that provide for sharing of property. Apart from the discriminatory effect on women, the Committee was particularly appalled at the impact of the legislative void on indigenous children; who are likely to lose contact with their home community when their mothers are forced to leave because of inability to access the matrimonial home and a lack of alternative housing on-reserve.

The lack of right to housing on marriage breakdown has numerous serious impacts on indigenous women. It accelerates urbanization, and ruptures connection with community. In most cases, there will not be assets which can compensate a spouse for the loss of value represented by the inability to share the home; accordingly, these women are likely to be further impoverished

m. Of course, in many cases, neither parent can afford to keep the home.

relative to women who have access to a division of real property. Where women are able to stay on reserve with family or friends, it intensifies problems of overcrowding in these communities. Lack of suitable housing increases the very real risk that child welfare will become involved with a family whether the issue is exposure to violence in the home or a chaotic situation resulting from homelessness.

IV.B.4.c. Women's Indian status and access to housing

After the HRC issued its decision in *Lovelace v. Canada* the Federal Government was forced to amend the law to remove a sexist provision which had automatically stripped Indian women of their Indian status if they married a non-Indian.⁶⁷ With the passage of *Bill C-31*,⁶⁸ *An Act to Amend the Indian Act* the provision was revoked and women no longer automatically lost their Indian status on marriage. Moreover, *Bill C-31* provided that women who had historically lost status under the old law were to be reinstated. This decision dramatically affected demographics, as over 95,000 women and their children sought to resume (or acquire) Indian status under the amended legislation. With Indian status come rights such as on-reserve schooling, financial support for higher education and housing, as well as the fundamental right to live on the reserve as part of a community.ⁿ The passage of *Bill C-31* was accompanied by special one-time payments,^o but these payments were completely inadequate to cover the cost to the indigenous governments for the new members, particularly in light of the very serious housing backlogs.

In effect, the women who resumed status were put on the bottom of interminable waiting lists for on-reserve housing. More perniciously, there has been documented discrimination against the reinstated women and their families.⁶⁹ In one case, the Canadian Human Rights Commission (CHRC)

n. There is a serious critique of *Bill C-31* for continuing sexism through the operation of s.6 of the *Indian Act*, the so-called second generation cut-off. The rule requires that a person has two status Indian grandparents in order to maintain status. An Indian man who married a non-Indian woman before *Bill C-31* automatically passed to her his status; therefore, his grandchild would automatically have status. An Indian woman who married a non-Indian would not pass her status to him, even after *Bill C-31*. Accordingly, her grandchild would not automatically inherit status; her grandchild's status would be dependent on having two status parents. Internationally, the issue has raised concerns; see UN Doc CERD/C/384/Add.8, suggesting that this provision interferes with the rights to marry and choose your own spouse, and rights of property and inheritance. See also UN Doc CCPR/C/79/Add.105: paragraph 19.

o. For example \$43 million for housing from DIAND in 1994.

found that a Band Council had discriminated against a reinstated woman in allocating housing on-reserve.^p

IV.B.4.d. Reserves administered under the First Nations Lands Management Act (FMLA)

Fourteen First Nations (with another 17 who have an Agreement in Principle and will soon be eligible) have entered into agreements with the DIAND under the FMLA. Under these agreements, the First Nation membership ratifies a lands management code which may be consistent with their own laws and/or traditions. While the Framework Agreement prohibits alienability of land, typically, the codes provide for enhanced ability to use land as collateral – i.e., leasehold interests can be mortgaged. First Nations who are signatories to the Framework Agreement negotiate a separate funding arrangement with the Federal Government to cover costs associated with the new lands regime, which would include costs for subsidized housing.

Box 3. Pooling technical services between First Nations within a region

There is a consensus that an improvement in the quality of indigenous housing stock requires enhanced community services. For example, there are few assurances that even new, publicly funded housing meets the National Building Code.^a Development and maintenance of community services such as delivery of water and plumbing in remote areas require expertise that may not exist within individual communities, particularly the very small communities where a significant portion of indigenous people live. However, it is equally clear that there are benefits to ensuring that the capacity to perform required inspections and to develop and operate community services exists within the indigenous community. Some First Nations within defined regions have 'teamed up' to train and employ indigenous people who will be able to fill these vital roles.

a: See e.g. Auditor General of Canada, 2003: Chapter 6, paragraph 6.50; RCAP, 1996e, Chapter 4, section 4.1.

IV.B.4.e. Off-reserve housing laws and programs

The off-reserve population is comprised of indigenous people who may be living in urban, rural or Arctic settings, in the North or the South of Canada.

p. See *Laslo v. Gordong Band Council* (1997). The CHRC found there was discrimination, but declined jurisdiction over the decision of the band. On judicial review, the Federal Court found the CHRC erred in declining jurisdiction and sent the matter back for a re-hearing.

As noted above, most indigenous people in Canada do not own their own homes. Access of indigenous households to private rental housing is poor, for a variety of reasons. First and most importantly, the poverty of indigenous people renders most housing unaffordable. In remote areas, high costs of construction and maintenance combined with low rates of employment put adequate housing out of reach for the majority of people.

IV.B.4.f. Urban housing laws and programs

Though there are no legal barriers for urban indigenous people in terms of access to housing or services, there are a number of social barriers that prevent them from acquiring adequate housing. Off-reserve, indigenous people are covered under human rights legislation which bans discrimination in accommodation on the basis of prohibited grounds, including race, sex and in some cases, indigenous status.⁶⁹ Discrimination, however, is a significant factor affecting access to private housing, even where government subsidies may be available. As noted in the RCAP report,⁷⁰ urban indigenous people seeking housing frequently face multiple forms of discrimination: as women, as single parents, as social assistance recipients, and/or race-based discrimination on the basis of their indigenous status.

Human rights mechanisms are not widely used by indigenous peoples to address housing discrimination. To date, only one case across the Country, has been heard at a human rights tribunal on housing discrimination of indigenous peoples. In that case two women of *Cree* ancestry applied for private rental accommodation but were rejected by the landlord who claimed:

*"I don't rent to Indians. All you people are drunks. All you do is get drunk and pass out on the lawn."*⁷¹

As a result of the discrimination the women were forced to live in a motel and then moved to an inadequate basement apartment for four months. The British Columbia Human Rights Tribunal found that the landlord had discriminated against the women and fined the landlord.⁷² Despite small victories such as this one, many legal practitioners and academics have argued that Canada's human rights mechanisms are ineffective; they are slow, backlogged, and offer limited remedies for individuals;⁷³ certainly, they cannot act fast enough to secure an apartment in a crowded housing market. Moreover, evidence suggests that disproportionately few indigenous individuals are making use of existing human rights mechanisms.⁷⁴

Access to social housing is also problematic for indigenous people in urban centres. The Urban Native Non-Profit Housing Program, initiated by the

q. Every province has a Human Rights statute.

Federal Government, provided subsidized units that were designated specifically for indigenous tenants. These units were unique as they were predominantly owned and operated by indigenous people and were developed and designed in a culturally sensitive manner.⁷⁵ In 1999, urban indigenous housing providers owned and managed over 10,000 rental units serving an estimated 35,000 individuals. Over half the households served are single-parent families, mostly headed by women.⁷⁶ The tenants report high levels of satisfaction; apart from rent geared to income affordability and adequate physical plant, the organizations provide stability, improved access to education, counselling and connection to cultural identity.⁷⁷ Unfortunately, Federal Government funding for new units under this program ceased in 1993 and waiting lists are now very long. Moreover, most of the housing stock is quite old and as a result, repair and maintenance costs are burgeoning. In November 1999, CMHC – on behalf of the Federal Government – signed an agreement to transfer most of its social housing programs (including the Urban Native Non-Profit Housing Program) to the provinces. Although CMHC has assured indigenous housing institutions that provincial governments will respect original agreements, this remains uncertain especially given the jurisdictional disputes between the federal and provincial governments regarding indigenous housing.

Indigenous people in urban areas are eligible for general social housing programs. However, there are not nearly enough units to meet households in need. Even if units were available, many indigenous people are reluctant to seek subsidized housing in non-indigenous run housing projects because housing is strongly linked with their culture. The Canadian Housing and Renewal Association (CHRA) recently reported that the Federal Government intends to reduce spending on social housing significantly over the next three decades, placing indigenous social housing significantly at risk.⁷⁸

In 1998, the Government of Canada introduced the ‘Urban Aboriginal Strategy’ with a view to addressing the socio-economic needs of Canada’s urban indigenous population.⁷⁹ In 2003, Canadian \$ 25 million^r was allocated over three years to the programme. Most of the funding is being used to support pilot projects in eight urban areas: Vancouver, Calgary, Edmonton, Saskatoon, Regina, Winnipeg, Toronto and Thunder Bay, with each area receiving approximately \$ 1 million per annum.^s The pilot projects:

“are meant to test new ideas on how to better respond to the local needs of urban Aboriginal people. The Government of Canada is

r. US \$ 18 million.

s. US \$ 735,000.

committed to working with provincial organizations, non-government organizations, and the private sector to develop innovative solutions to address local priorities.'⁸⁰

Priorities in several communities have included homelessness and housing. For example, in Vancouver monies were used to establish a child-friendly facility with an after-school program in the largest family housing complex for indigenous peoples in the city, and a peer outreach project was created to improve the quality of life for indigenous women and men who are homeless or at risk of homelessness.⁸¹ The Urban Aboriginal Strategy has not yet been assessed, thus it is difficult to determine whether it has resulted in substantive changes to the housing conditions of indigenous peoples in urban areas in Canada.

IV.B.4.g. Rural housing laws and programs

In the Territories, and rural areas more generally, the most common form of housing assistance is home-ownership subsidies. Typically, these subsidies have been inappropriate for indigenous households for a variety of reasons, including higher rates of unemployment among indigenous peoples disintitling them to this assistance, and low cash incomes making even requirements of a 25 per cent of income contribution unaffordable. The RCAP quoted the then Minister of Housing for the Northwest Territories, who pointed out that in the early days of the 'Home-ownership Assistance Program', only one subsidy in a hundred went to an Inuit family – despite the fact that they made up thirty per cent of the population in need.⁸² Under the federally managed Rural Housing Program for Aboriginal People, just over 9,000 new affordable units were built for indigenous people between 1974 and 1994 (of a total 25,000 units). However, funding for new housing was eliminated in 1994.

Federal funding to support affordable housing for Inuit has not been comparable to the levels of direct transfers going to on-reserve Indians. Prior to 1993, limited economic development opportunities, the high costs of housing construction and maintenance, with the small rental housing market, led the government to increase its role in social housing in the north. The supply, however, has never met the demand.⁸³ The housing supplied to the permanent Inuit communities by the Federal Government has also been culturally inappropriate. Traditionally, Inuit lived in small, nomadic family-based groups. The Government housing failed to accommodate larger families and extended family members; it was also not suitable for cultural practices.⁸⁴

IV.B.4.h. Lands held under modern treaties (land claim and self-government agreements)

A handful of indigenous groups (in the north, and in the province of British Columbia) have negotiated comprehensive self-government or land claim

agreements which provide legislative authority over aspects of housing to the First Nations.^{85,t}

The Prime Minister of Canada, Paul Martin, has taken a number of steps which indicate a willingness to work more constructively with indigenous groups and to be more proactive in addressing indigenous housing and living conditions. For example, when he first came to office Prime Minister Martin dismissed *Bill C-7, An Act to Amend the Indian Act*. *Bill C-7* was very controversial and had sparked real animosity between the Government of Canada and indigenous groups.⁸⁶ Immediately thereafter, while opening a new session of Government, Prime Minister Martin and his government made the following statements and commitments to indigenous peoples in Canada:

“Aboriginal Canadians have not fully shared in our nation’s good fortune. While some progress has been made, the conditions in far too many Aboriginal communities can only be described as shameful. This offends our values. It is in our collective interest to turn the corner. And we must start now. ... Our goal is to see real economic opportunities for Aboriginal individuals and communities. To see Aboriginal Canadians participating fully in national life, on the basis of historic rights and agreements – with greater economic self-reliance, a better quality of life. ... In order to support governance capacity in Aboriginal communities and to enhance effective dialogue, the Government will, in co-operation with First Nations, establish an independent Centre for First Nations Government. ... Too often, the needs of Aboriginal people off reserve are caught up in jurisdictional wrangling. These issues cannot deter us. The Government of Canada will work with its partners on practical solutions to help Aboriginal people respond to the unique challenges they face. To this end, the Government will expand the successful Urban Aboriginal Strategy with willing provinces and municipalities.”⁸⁷

Following-up on this commitment, the Prime Minister held the first Canada-Aboriginal Peoples Roundtable in April 2004. In attendance were representatives from five national indigenous organizations, including the

t. Among the legislative powers exercised by the First Nation is provision of social and welfare services to all First Nation citizens in the Yukon; and, on Settlement Lands, the First Nation is responsible for legislation of a local and private nature governing, use, management, control and protection of Settlement Lands (which are collectively held) (Art. 13.3.1), allocation of rights and interests in the lands (Art. 13.3.2), control over construction and maintenance of structures on land (Art. 13.3.8), prevention of overcrowding of residences (Art. 13.3.9), and control of sanitary conditions (Art. 13.3.10).

Native Women's Association of Canada. In the speech by the Prime Minister, which opened the meeting, he explicitly stated that the Government of Canada has to do better in the provision of adequate housing. He stated that this will require the advancement of:

*“alternative models for housing development on reserve, while working towards a national strategy to deal with housing issues off reserve”.*⁸⁸

He also stated that he would consider establishing “*reserve housing authorities*” as apart of his plan to redefine the Government's relationship with indigenous peoples.⁸⁹ Prime Minister Martin also became the first sitting Prime Minister to recognize the historic Métis Nation in Canada.⁹⁰ Though some indigenous leaders were disappointed with the resources allocated for indigenous communities in the Prime Minister's first budget,⁹¹ they have welcomed his focus on their interests and are hopeful that the government will develop a concrete plan of action to address the most pressing issues facing indigenous peoples in Canada immediately.

Notes

1. Canadian Council on Social Development, 2003.
2. For an overview, see RCAP, 1996c. See also Miller, 1989. See also *Lovelace v. Canada*, 1981.
3. RCAP, 1996d: p. 422.
4. Section 35, *Constitution Act, 1982* R.S.C. 1985 App. III.
5. Saganash, 2003.
6. Statistics Canada, 2003a.
7. Statistics Canada, 2003a.
8. Statistics Canada, 2003a.
9. RCAP, 1996b.
10. RCAP, 1996d: p. 5.
11. *Calder v. Attorney General of Canada*, 1973.
12. Section 35, *Constitution Act, 1982* R.S.C. 1985 App. III.
13. *Delgamuukw v. British Columbia*, 1997.
14. See e.g., Moses, 2003.
15. R.S.C. 1985, Ch.I-5. A useful overview of the *Indian Act* is contained in Imai, S., and others, 1999. See also Woodward, 1993.
16. *Indian Act*, 1985: s. 17.
17. *Indian Act*, 1985: ss. 74-86.
18. *Indian Act*, 1985: ss. 42-50.1.
19. *Indian Act*, 1985: ss. 52-52.5.
20. *Indian Act*, 1985: ss. 20-41.
21. *Constitution Act 1867* (U.K.), 30 & 31 Vict., c.3, s.91(24), reprinted in R.S.C. 1985, App. II, No. 5.
22. See, e.g.: *Chippewas of Sarnia Band v. Canada (Attorney General)* Ontario Court of Appeal December 12, 2001 (SCC leave denied, [2001] S.C.C.A. No. 63); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* 1995] 4 S.C.R. 344.
23. Minister of Indian Affairs and Northern Development, 1998.
24. RCAP, 1996c: Chapter 7.
25. See RCAP, 1996c: chapter 11. See also numerous research studies prepared for the Royal Commission on individual relocations, e.g.: RCAP, 1994; Brice-Bennett, 1994; Petch, 1997; Coates, 1994; Emery and Grainger, 1994; and Rudolph Marcus, 1994. See also Tester and Kulchyski, 1994.
26. RCAP, 1996c: chapter 11, Introduction.
27. UN Doc E/C.12/1/Add.31: paragraph 17.
28. Canadian Council on Social Development, 2003.
29. See DIAND, 1999.
30. Statistics Canada, 2002: pp. 248-249.
31. Statistics Canada, 2002: p. 259.
32. See e.g., Statistics Canada, 2003c; Health Canada, 1999; Health Canada, 2002a; RCAP, 1995.
33. See e.g. RCAP, 1996b; Aboriginal Justice Inquiry of Manitoba, 1991; Royal Commission on the Donald Marshall Jr. Prosecution, 1989.
34. See e.g., RCAP, 1996e; Government of Nunavut, 1999.

35. These statistics drawn from RCAP, 1996e: section 4.1.1.1. More recent figures on housing status for non-reserve Indians, Metis and Inuit only are available: Statistics Canada.
36. CMHC, 2001.
37. CMHC, 2001: pp. 3-4.
38. RCAP, 1996e: section 4.1.1.2.
39. Statistics Canada, 2003b: p. 24.
40. Statistics Canada, 2003a: p. 11.
41. Statistics Canada, 2003a: p. 9 (49 per cent of indigenous people live in cities).
42. Statistics Canada, 2002: pp. 248-249.
43. See Mayor's Homelessness Action Task Force, 1999: p. 66 which reports that fifteen per cent of the homeless population in Toronto (Canada's largest city) is indigenous, and Toronto Star, 27 March 1999. See also Obonsawin-Irwin Consulting Inc., 1998.
44. Social Planning Council of Winnipeg, 2004: slide #9.
45. Statistics Canada, 2003b: p. 25.
46. Canadian Feminist Alliance for International Action, 2003: p. 23.
47. Reid, 2002: p. 50.
48. *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.
49. Porter, 2003: p. 100.
50. Porter, 2003: p. 101. See also: See *Baker v. Canada* (Minister of Citizenship and Immigration), 1999: paragraphs 69-71.
51. Porter, 2003: p. 101.
52. *Canadian Human Rights Act*, Section 67 (RS 1985, c. H-6).
53. Chartrand, 1999.
54. Chartrand, 1999. For more on this issue, see section IV.B.4.c below.
55. Eberts, 1999 and Chartrand, 1999.
56. Eberts, 1999.
57. Eberts, 1999.
58. Martin, 2004a.
59. See e.g. RCAP, 1996e. A similar issue is raised in Auditor General of Canada (2003), dealing explicitly with housing programs administered by DIAND and CMHC.
60. Office of the Auditor General of Canada, 2003: paragraph 6.12.
61. See Koeck, 1999.
62. Grand Council of the Crees, 1998.
63. *Derrickson v. Derrickson*, (1986), *Paul v. Paul* (1986). Rose Paul, the appellant, was a victim of violence. See Mary-Ellen Turpel's influential case comment: Turpel, 1991 and Eberts, 1999.
64. Abbott, 2003.
65. See CEDAW, 2003: paragraphs 37 and 38; and UN Doc E/C.12/1/Add.31.
66. Senate Standing Committee on Human Rights, 2003. See also Cornet and Lendor, 2002; Abbott, 2003.
67. See generally, Day, 2000.
68. R.S.C. 1985, c.32 (1st Supp)
69. See Eberts, 1999.
70. RCAP, 1996b.

71. *DesRosiers v. Kaur*, (2000).
72. *DesRosiers v. Kaur*, (2000).
73. See for example: Day, S., and Brodsky, G., 1999; and Birenbaum and Porter, 1999. See also: Cornish, 1992.
74. Greschner, 1992. See also Chartrand, 1999 and Eberts, 1999; Native Womens's Association of Canada, 1992.
75. Congress of Aboriginal Peoples, 1998.
76. See e.g., Devine, 1999.
77. See RCAP, 1996e: section 3.5.2.
78. Social Planning Council of Winnipeg, 2004: slide #10.
79. Government of Canada Privy Council Office, 2003: p. 1.
80. Government of Canada Privy Council Office, 2003: p. 2.
81. Minister of Public Works and Government Services Canada, Stephen Owen, 2003: pp. 2-4.
82. RCAP, 1996e, Chapter 4.
83. CERA, 2002: p. 36.
84. CERA, 2002: p. 36.
85. See e.g. Indian Affairs and Northern Development, 1993.
86. Lunman, 2004a. For a critique of *Bill C-7*, see for example: Canadian Bar Association, 2003; Assembly of First Nations, 2004, and Ad Hoc Coalition of the Rights of Aboriginal Children in Canada, 2003.
87. Martin, 2004a.
88. Martin, 2004b.
89. Lunman, 2004b: p. A4.
90. Metis National Council, 2004.
91. Assembly of First Nations, National Chief Phil Fontaine, 2004.

IV.C. Ecuador

IV.C.1. Background

While Ecuador¹ is one of the smallest countries in Latin America, it is known for its cultural diversity. Its more than 12 million inhabitants include 13 indigenous nationalities and 18 peoples^a who share collective rights recognized by the Constitution, and who inhabit the three geographic areas of the country: the Coastal region, the Andean region, and the Amazon region.^b

Each nationality retains its own language, political and judicial legal system, religious practices and culture. While not all relevant data pertaining to land and territory are available, table 16 provides the following essential facts:

- **Amazon region:** With nine indigenous nationalities, the greatest diversity is found in this region. This is also the region with the highest percentage of land to which legal rights adhere, and the largest territory belonging to indigenous nationalities. It should be noted, however, that while there are many indigenous nationalities here, each is few in numbers. Their main economic activities are related to hunting, fishing and other means of relating to and coexisting with the tropical rain forest.
- **Andean Region:** Although there is just one indigenous nationality in the Andean region, *Kichwa*, it comprises several indigenous peoples each of whom, while sharing a similar language and history, has its own political system, geographic distribution, and distinctive cultural traditions. The *Kichwa* have the largest population of any of Ecuador's indigenous nationalities. These peoples have also faced some of the most traditional

a. Official documents by the Permanent Specialized Commission of Indigenous and other ethnic groups Affairs of the National Congress of Ecuador refer to 18 peoples as constituents of a sole *Kichwa* nationality, with one people living in the Amazon and the 17 others in the Andean region. However, official government documents and the census only include information about 14 of these peoples, as shown in table 16 below.

b. In 1996, the Confederation of Indigenous Nationalities of Ecuador (CONAIE) established definitions of "indigenous peoples" and "indigenous nationality". CONAIE was established in 1986 and represents the majority of Ecuador's Indigenous federations and political bodies. It is the main Indigenous confederation in the country. The definitions CONAIE established are as follows: **Indigenous peoples:** "*Aboriginal groups composed of communities or centres with cultural identities that are distinct from those of other sectors of Ecuadorian society and their own social, economic and political structures and belonging to one of the indigenous nationalities.*" **Indigenous nationality:** "*Ancient people or group of peoples pre-dating the foundation of the Ecuadorian State, who define themselves as such. They have a common historical identity, a culture and a language, and they live in a specific area and maintain traditional institutions, social, economic, judicial and political structures, and forms of authority.*"

forms of colonization and discrimination in the last centuries. According to leaders of the indigenous movement, and several of the documents they have produced, these 18 groups are currently involved in a “*process of organic territorial reconstitution in order to exercise their constitutional rights and to achieve their full identity.*”²

- **Coastal Region:** Characterized by small numbers and with a lower political profile, these indigenous nationalities have suffered from the effects of timber extraction and the destruction of mangroves. Violence from various armed groups along the Colombian border has forced members of these nationalities, who formerly lived on the Colombian side (*Epera* mainly, but also *Awa* and *Chachi*), to move into Ecuadorian territories.

A crucial limitation in the analysis of indigenous peoples’ rights is the absence of reliable, disaggregated data, updated systematically. Often, official numbers differ substantially from the numbers cited by indigenous political bodies and federations. This problem has been noted by the CERD:

*“The Committee expresses its concern about the lack of consistent statistical data on the ethnic composition of the Ecuadorian population. While it recognizes the difficulties in establishing criteria for defining the different ethnic groups, the Committee emphasizes that such data are necessary to ensure the application of special legislation in favour of these groups.”*³

CONAIE and its member indigenous federations estimate that indigenous people comprise 20-35 per cent of the national population. As noted above, official data vary. According to the last national census in 2001, a total of 830,418 people (6.8 per cent of the total population) self-identified as indigenous.^{4,c} According to a survey carried out by the ‘Development Project for Indigenous and Black Peoples of Ecuador of the Council for the Development of Ecuadorian Nationalities and Peoples’ (PRODEPINE-CODENPE), in 1998 the indigenous population represented approximately 13.9 per cent of the population. A recent population survey carried out in 2002 by PRODEPINE on the various indigenous communities reached a final count of 1,525,421 indigenous people,⁵ or approximately 13 per cent of the country’s population.

c. The latest consolidated text of the Draft Declaration on the Rights of Indigenous Peoples, currently under discussion for approval in the General Assembly of the Organization of American States, states that: “*Self-identification as indigenous people will be the fundamental criteria to determine to whom this Declaration is applied. States must ensure the respect to the right to self-identification as indigenous, individually or collectively, in compliance with each peoples own institutions*” (Organization of American States, 2003, Article 1(2)).

These figures vary depending on the instruments used to collect the data. Previously, spoken language was the sole criteria used to determine ethnicity. Currently, 'self-identification' is being used as a means of determining indigenous population counts. Self-identification is a broad category that can encompass many criteria such as: wearing traditional dress, spoken language, religion and traditional spiritual practices, geographic location and/or heritage. A

Table 16. Indigenous land distribution, Ecuador

Geographical region	Indigenous nationality	Indigenous people	Legalized lands (ha)	Lands which remains to be legalized (ha)
Costal region		<i>Awá</i>	121,000.00	5,500.00
		<i>Chachi</i>	N/A	105,468.52
		<i>Epera</i>	N/A	N/A
		<i>Tsa'chila</i>	19,119.00	---
		<i>Manta</i>		
		<i>Huancavilca</i>	515,965.00	---
		<i>Karanki</i>	N/A	N/A (all)
		<i>Natabuela</i>	N/A	N/A
		<i>Otavalo</i>	N/A	---
		<i>Kayambi</i>	N/A (in process)	---
Andean region		<i>Kitu-Kara</i>	0.60	0.40
		<i>Panzaleo</i>	N/A	N/A
		<i>Chibuleo</i>	0.70	0.30
		<i>Kichwa</i>		
		<i>Kichwa del Tungurahua</i>	N/A	N/A
		<i>Salasaka</i>	N/A	N/A
		<i>Puruhá</i>	N/A	N/A
		<i>Waranka</i>	N/A	N/A
		<i>Kañari</i>	N/A	N/A
		<i>Saraguro</i>	N/A	N/A
Amazon region		<i>A'I Cofán</i>	33,571.00	112,000.00
		<i>Secoya</i>	39,414.50	---
		<i>Siona</i>	7,888.00	40,000.00
		<i>Huorani</i>	716,000.00	---
		<i>Shiwiar</i>	89,377.00	100,000.00
		<i>Zápara</i>	54,000.00	---
		<i>Achuar</i>	884,000.00	133,014.00
		<i>Shuar</i>	718,220.00	182,468.00
	<i>Kichwa</i>	<i>Kichwa de la Amazonía</i>	N/A	N/A

Source: SIISE 3.5, 2003.

N/A: No information available.

national survey, undertaken in 2000, included a set of racial and ethnic categories for respondents to choose from and produced, for the first time, some crucial data about self-identification. Consequently, a similar question was incorporated in the 2001 National Census. The results provide information that is useful in attempting to understand indigenous self-identification that goes beyond spoken language.^d

While these new criteria might not provide the objective social indicators necessary to construct public policies, self-identification questions have highlighted the perception that the countryside of the Andean and Amazon regions are safer environments in which to publicly express one's indigenous identity. Of the general national average of 6.8 per cent already mentioned, 14.4 per cent of residents of the countryside self-identified as indigenous, as opposed to only 2 per cent in the urban sector. These statistics do not necessarily reflect the actual ethnic and cultural composition of the two geographic regions. Rather, they reflect the fact that indigenous people in urban settings are subject to discrimination and social exclusion and thus less likely to self-identify, publicly, as indigenous. In this context, it should be noted that it is incorrect to infer that indigenous peoples are more likely to inhabit rural areas. Simply put, not all indigenous peoples in Ecuador live in rural areas, nor are all inhabitants of urban areas non-indigenous.

Indigenous housing and land rights must be understood within the historical context of the legalization of land, and the political processes and policies pertaining to land reforms, particularly in the Andean region. Historically, the Andean region was organized around a system known as *huasipungo*.⁶ This system was informed by slavery which had started in the colonial times,^e and in particular by a social structure that set apart the few privileged *mestizo*-urban families who owned the *haciendas* (some of whom, even now, regard themselves as 'white'- European), and the Catholic Church, which was one of the main landowners in the region, from the indigenous-rural landless slaves. In

d. Several peoples have migrated to urban areas, and hence their languages have been forced into becoming secondary means of communication and elements for discrimination by the prevalent Spanish-language education systems throughout the country, even though there is a specific provision for intercultural bilingual education systems (Asamblea Nacional Constituyente, 1998, Art. 69). Less than 50 per cent of those citizens with a mother or father who speak a native language continue to do so when living in the cities.

e. Although Ecuador became a Republic in 1822, several of the colonial interactions between indigenous and non-indigenous groups were maintained with little change for over 100 years more. The land was still owned by '*mestizos*', many Creole descendants of Spaniard families who lived in the cities, had full control over political decisions, and based their economy on the exploitation of the labour force, land and rural production in general.

the 1950s, tension began to build up in the Andean region between indigenous communities and *hacienda* landowners. The process of legalizing lands to some of these communities started during the 1960s, and in 1964 the *huasipungo* system officially ended. A second land reform process began in the 1970s, with land reform laws being both passed and implemented with little consultation with and participation of indigenous organizations.

The results of this land reform^f process show that it was not undertaken in recognition of indigenous peoples as holders of rights, nor was it motivated by social conscience. Instead, much of the land distributed to indigenous communities was of sub-standard quality, inadequately irrigated, and less productive than that in other areas. In several cases, not enough parcels were given to sustain extended families and the traditional indigenous nucleus. The concept of ‘peoples’ was not taken into account either and, as a result, collective property was not respected as such.

The 1970s are also marked by the petroleum boom, which was a critical factor in transforming Ecuador’s socio-economic structure from its rural base into a highly urbanized one. Consequently, in the last thirty years, the size of its main cities – Quito and Guayaquil – have grown four or five times, while other cities, such as Santo Domingo, have virtually sprung up from nowhere. Meanwhile, several traditional agricultural/rural-based provinces such as Cañar, Azuay and Cotopaxi are facing declining populations.

Since the 1980s, indigenous peoples and organizations have become a growing political actor and a more visible force nationally.

IV.C.2. Current housing and living conditions

Generally speaking, in Ecuador, ethnicity and socio-economic conditions have often been linked. For that reason, it is difficult to describe general living and housing conditions without a reference to poverty indicators. Self-identification in the National Census has shown that approximately 24 per cent of the population in the richest quintile^g identified themselves as ‘white,’ while 11 per cent

f. Table 16 shows land figures legalized to peoples and nationalities. According to Ruiz, 2000: p. 71, “From 1964 to 1992 three thousand two hundred fifty hectares of land have been legalized in benefit of indigenous people” [unofficial translation from Spanish]. Some scattered official information on the status of legal granting of land to indigenous peoples and communities are included in UN Doc CERD/C/384/Add.8. (Note: it is not clear whether the legalized lands are property of communities, peoples or nationalities, and whether the titles refer to collective or individual property.)

g. In Ecuador, as in most other Latin American countries, income distribution is highly inequitable, with the richest quintile earning 29 times more than the poorest.

of the poorest households identified themselves as indigenous.⁷ Meanwhile, 61.3 per cent of Ecuadorians live in poverty, and an alarming 31.9 per cent of those persons live in extreme poverty. And while 85.5 per cent of rural inhabitants live in poverty, a significantly lower 45.8 per cent of the urban population experience these conditions. Given that the majority of indigenous peoples and nationalities live in rural areas, it can be inferred that indigenous peoples represent the poorer segment of Ecuadorian society.^h

However questionable these statistics might be, this poverty indicator appears to be relevant, as it is based on a series of basic variables, including housing, health, education and working conditions,⁸ derived from a survey⁹ which takes into account key elements of the right to housing, such as adequacy,¹ accessibility, availability of services and infrastructure, and location, in order to determine poverty conditions.¹

A total of 79 per cent of rural dwellers own their homes, as compared to 60 per cent of urban dwellers. This imbalance can be attributed to the petroleum boom in the 1970s which rapidly changed the demographic composition of the country from rural and agricultural to urban, without the concurrent

h. The CERD has stated that: *“While welcoming the sincerity with which the State party recognizes the existence of de facto discrimination against indigenous people [...] the Committee is concerned that a disproportionately high percentage of persons belonging to ethnic minority groups often do not enjoy equal access to the labour market, land and means of agricultural production, health services, education and other facilities and, accordingly, a disproportionately high percentage of members of these groups live in poverty. The Committee urges the State party to intensify its efforts to raise the living standards of these groups, with a view to ensuring their full enjoyment of the economic, social and cultural rights enumerated in article 5 of the Convention. The State party is requested to include in its next report precise figures as well as some key indicators relating to the enjoyment of economic, social and cultural rights by the different ethnic groups, disaggregated by urban/rural population, age and gender”* (UN Doc CERD/C/62/CO/2: paragraph 13).

i. Even though General Comment 4 of the ICESCR has underlined the significance of the concept of ‘adequacy’ and ‘adequate housing’ as encompassing a number of factors (see section III.A.2.a above), such as legal tenure, availability of services, affordability, and accessibility, the survey to which this paragraph refers, has not taken into account this concept. The survey incorporates adequacy as one of several components, in equal ranks, and its meaning is similar to ‘habitability’ as defined in the General Comment 4. It does not refer to cultural adequacy either.

j. As stated by the Inter American Commission on Human Rights in 1997: *“The indigenous peoples of the country face a number of serious obstacles to obtaining the full enjoyment of their rights and freedoms under the American Convention. Significant segments of the indigenous population suffer the effects of pervasive poverty, and little social spending is directed toward this sector. Indigenous individuals are subjected to discrimination, from both the public and private sectors”* (Organization of American States, 1997: paragraph 6).

development of adequate public policies to address the rising demand for urban housing units. The inability of urban dwellers to purchase land or housing is exacerbated by high cost of housing and land in urban centres. Only 40 per cent of the country's close to three million housing units are equipped with basic services such as running water, sewage systems, garbage collection and electricity.¹⁰ More than 26 per cent of the population live in crowded houses,^k with more than three members of the household sharing the same bedroom.

Only 16.3 per cent of tenants of agricultural land are women. These women bear sole responsibility for their households, and are the main source of income and sustenance.^l Women's access to land has been limited by legal norms, cultural trends and institutional weaknesses that make it easier or more common for men to obtain land titles, and to buy or sell land without explicit consent from their wives. For instance, the former Land and Colonizing Institute^m would adjudicate land to the person who requested it (primarily men) without following explicit procedures that included on-site inspection and confirmation of marital status. Hence, it was not recorded that the adjudicated new owner was married, so the land did not become part of the joint property.^{11,n} Similar practices were in place in relation to the selling of land, both in the countryside and in the cities, until 1989 when a legal reform enforced joint decision-making and joint signatures.

IV.C.2.a. Housing and land issues for indigenous peoples and nationalities

Of the many housing and land issues that relate to indigenous peoples in Ecuador, two are addressed below. First is the question of 'territorial circumscriptions' or territorial units recognized by the Constitution which is of particular relevance to the Andean peoples. Secondly, the specific threat to Amazon indigenous nationalities posed by oil exploitation and extraction.

IV.C.2.b. 'Territorial circumscriptions' and the Andean indigenous peoples

Ecuador's Constitution states that:

"Ecuadorian territory is indivisible. For the administration of the State and for political representation, there will be provinces, cantons and parishes.^o There will be indigenous and Afro-Ecuadorian territorial circumscriptions, established by law."¹²

k. In Spanish referred as: '*hacinamiento*'.

l. In Spanish referred as: '*mujeres jefas de hogar*'.

m. *Instituto Ecuatoriano de Reforma Agraria y Colonización* (IERAC).

n. In Spanish, the legal figure is know as '*sociedad conyugal*'.

o. In Spanish referred as: "*provincias, cantones y parroquias*".

‘Territorial circumscriptions’ are specific political and administrative units, with established territorial boundaries or limits, which have indigenous political representation. In several cases, however, these units conflict with other administrative divisions of the country (provinces, cantons and parishes), creating an overlap of roles, responsibilities and jurisdictions, and thereby causing disputes. For instance, in some cases, a ‘circumscription’ overlaps with a parish delimitation, resulting in two political representations being legitimate in the same territory at the same time.

The Constitution does not establish how ‘circumscriptions’ will be organized and administrated, leaving these matters to be developed in future law. Hence, the issue of ‘circumscriptions’ continues to be a topic of great complexity for leaders of CONAIE and its various organizations.¹³ While in some respects the concept of ‘territorial circumscriptions’ is related to the *comuna* system,^p ‘circumscriptions’ were intended to carve out certain areas where indigenous conceptions and principles regarding their own rights could be implemented at a political level. The *comuna* experience, on the other hand, was imposed externally on indigenous peoples and was put in place for economic reasons, to organize units of agrarian production.

The colonial system of *haciendas* and agrarian production to which Andean peoples were subjected for centuries has been decisive in recent developments in this region. It is only in the last three decades that indigenous peoples in the Andean region are reconstructing their identities, political systems and territorial units with a more holistic view of collective rights. The issue of ‘territorial circumscriptions’ is very much part of this evolution. Reconstructing a territorial unit becomes essential to the exercise of all other rights, and a prerequisite for the application of their own legal and juridical mechanisms. It also implies moving away from externally-imposed mechanisms, such as *comunas*, and re-inventing the systems that permit a more holistic comprehension of their identities. The broader discussions and debates about indigenous cultural rights, resource-management, economic rights and the political exercise of the right of peoples to self-determination informs indigenous peoples’ housing and land experiences.

IV.C.2.c. Oil exploitation and Amazon indigenous peoples

When referring to the Amazon region, and to how its indigenous nationalities view housing rights, the main (and often sole) point of reference is with respect to land rights and territorial issues,^q since its first and fiercest enemy is oil

p. Described in more detail in section IV.C.3.c below.

q. The link between land issues, state-owned sub-surface minerals and indigenous rights as a whole, has long been referred to by the Inter American Commission: “*The right to own*

exploitation and extraction.⁷ While collective rights have been constitutionally recognized – including the right to own property and its ancestral lands by indigenous nationalities, legally and without charge¹⁴ – the State can claim its own rights over all natural non-renewal resources, all subsoil resources including minerals, and any other substances below the surface, arguing that these resources must be exploited in the ‘national interests.’¹⁵

From the State’s perspective, with the voracious demands of transnational extractive industries on its back, the definition of the ‘national interest’ is undoubtedly determined by the fact that 30-35 per cent of Ecuador’s income in each of the last five years has come from oil exploitation, making it the country’s largest source of funds. But this rationale reflects the narrowly circumscribed notion that the practice of democracy means undertaking what is ‘good’ for a homogeneous majority, with no regard for its impact on the diverse range of ‘others’ who also form part of its population. Thus, in the name of ‘national interests’ it has been deemed acceptable to ignore the Amazon indigenous groups’ right to the land under which this oil flows, and to ignore the fact that their survival, and the protection and exercise of all of their rights, depend entirely on the conservation of these territories.

Even though no ‘forced evictions’ as such have taken place in order to make oil extraction, prospection or exploitation possible, and legal land rights have been extensively granted in the last decades to various indigenous groups in the Amazon, it cannot be assumed that indigenous peoples in this region enjoy land and housing rights. Indigenous land and territorial rights are based on a legal sleight-of-hand. Land is separated from the subsoil minerals it holds, the profits of which sustain powerful transnational corporations and constitute a central part of the national economy, which in turn guarantees payment of Ecuador’s foreign debt.

The negative impact of oil exploitation for indigenous peoples and their lands has been widely reported and documented since the 1990s, and has served as the basis for various legal cases in national and international courts.⁸

real property is limited by, inter alia: [...] the State's ownership of and authority to exploit subsurface minerals. These limitations prompt special consideration as they affect the ability of indigenous peoples to enjoy their rights under the American Convention” (Organization of American States, 1997: paragraph 13).

r. Other extractive industries, such as timber and mining, have also had a great impact in the Amazon indigenous territories.

s. Among these cases, see: the Texaco case; *FIPSE vs. Arco* (now Burlington) Case-Bloque 24 (Centro de Derechos Económicos y Sociales (CDES) & CONAIE, Tarimiat, Firms en Nuestro territorio, 2ed., Quito, Jan. 2002; Centro de Derechos Económicos y Sociales (CDES) -OPIP-Amazanga, “*Petróleo, Ambiente y Derechos en la Amazonía Centro*

There is no doubt that the protection of their territories is a prerequisite for the continued existence, preservation and cultural survival of the indigenous nationalities and peoples as a whole, and that none of their human rights can be fully guaranteed without a clear understanding of their collective rights over land and territories.

The CERD has stated that:

“As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s general recommendation XXIII on the rights of indigenous peoples.”¹⁶

The Committee then goes on to recommend that prior informed consent be sought, and that subsequent benefits are shared. While somewhat protective of the rights of indigenous peoples, the Committee’s recommendation does not tackle a central and most difficult issue, namely that prior consultation and informed consent must include the right of indigenous communities to say ‘no’ to natural resource exploitation in the first place, and therefore that there will be neither benefits to be shared, nor environmental remedies to be put in place.¹ Asking the State to report what was done after the fact and concluding that it is not possible to allege indigenous collective rights to confront natural resource extraction can be viewed as an early acceptance of defeat in the face of powerful transnational economic forces.

Establishing the link between extractive industries in indigenous territories and the violation of indigenous peoples’ basic rights, which has been brought to the fore thanks to political pressure by Ecuadorian indigenous organizations and federations, has had a significant impact. As far back as 1997, the Inter-American Commission began to incorporate in its report on the ‘Impact of Development Activities on the Indigenous Peoples of the Amazon Basin’ an analysis of several of the contacted and non-contacted indigenous

Sur” Quito. Oct. 2002; and most recently, the Sarayaku Community Case against the Argentinean Oil Company CGC, which has been granted Precautionary Measures by the Inter American Commission on Human Rights, and the corresponding petition before the Inter American Court, filed for admission on December 2003.

t. *“The Committee recommends that prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured. Detailed information on land titles of indigenous communities, as well as on remedies available to Indigenous people claiming compensation for the environmental depletion of their traditional lands, should be included in the State party’s next periodic report”* (UN Doc CERD/C/62/CO/2: paragraph 16).

peoples who have suffered directly from the oil extraction industry in Ecuador since the 1970s. A short excerpt from this analysis follows in box 4.

The concept of collective rights within the Inter American System and the great importance of land rights for the exercise of all other rights are further elaborated by the Inter American Court in a judgment of 31 August 2001:

“148. Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention ..., it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property ...

149. Given the characteristics of the instant case, some specifications are required on the concept of property in Indigenous communities. Among Indigenous peoples there is a communitarian tradi-

Box 4. The Inter American Commission on Human Rights' report on the Huaorani people, 1997

“[T]he Commission's examination of the human rights situation in the Oriente was prompted by the filing of a petition on behalf of the Huaorani people which alleged them to be under the imminent threat of profound human rights violations due to planned oil exploitation activities within their traditional lands. The petition indicated that the Huaorani are estimated to number between 1400 to 1500 individuals, and are often referred to as the least assimilated of the Indigenous peoples of Ecuador. They historically occupied roughly 2 million hectares of land between the Napo and Curaray Rivers.[...] An additional land grant of 612,560 hectares was accorded in 1990. The area slated for development, designated as Block 16, is within these titled lands.”

“At the time of the petition, experimental wells had been drilled, and oil discovered in areas throughout Block 16. Initial development plans, as reported by the petitioners, called for the construction of approximately 120 wells clustered in two sectors, an estimated 90 miles [145 km] of roads, a pipeline to connect the production facilities to the existing pipeline structure, an aircraft landing strip, field offices, quarters to house approximately 300 permanent staff, an electrical generating plant, water processing plant and other facilities. CONFENIAE asserted that the activities incident to development of the Block would irreparably harm the Huaorani, threatening their physical and cultural survival, in violation of the protections accorded by the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.”

“The general claims lodged concerning the Huaorani are not unique. Other Indigenous peoples of the Ecuadorian Amazon maintain that the effects of oil development and exploitation in the Oriente have not only damaged the environment, but have directly impaired their right to physically and culturally survive as a people [...]”

Source: Organization of American States, 1997: paragraphs 31-33.

*tion regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. **Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of Indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.** For Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations*¹⁷ [emphasis added].

Thus, rights violations occur in indigenous territories of the Amazon basin as a consequence of any practice, whether directly promoted by State-run companies or indirectly allowed to take place through transnational oil corporations, which is undertaken in the name of so-called 'national interest.' These include:

- the displacement of peoples and communities that formerly moved about freely in wide extensions of land for hunting and fishing purposes;
- the forced reduction in size of hunting or fishing areas and ensuing changes to economic structures and customary eating habits;
- the pollution and destruction of biodiversity;
- trespassing on cultural sanctuaries; and
- excessive pressure on traditional ways of living, including prostitution, migration and community divisions.

It is not surprising, then, that one of the most controversial issues raised frequently among indigenous sectors and organizations, regarding the draft of the American Declaration of Indigenous Rights, is precisely the issue of the subsurface property of lands. Nevertheless, constitutional rights in relation to land are explicit and favourable to the indigenous peoples and nationalities, and some constitutional provisions have been useful in delaying extractive industry projects that have not complied, for instance, with the norms for prior consultation and participation by the communities. Still, it is clear that as long as the State remains the sole owner of the subsoil minerals, and the national economy depends on oil extraction, these dangers will be present, and violations of various collective and human rights will occur.

IV.C.2.d. Urban settlement and migration

As has been noted above, in the last 30 years Ecuador has changed from a predominantly rural country to an urban one. Seventy-five per cent of the population now lives in urban areas, while an estimated 10 per cent has left Ecuador altogether, having emigrated mainly to Spain, Italy and the United States. Since both domestic and international migration has mostly affected poor and traditional rural inhabitants, it can be assumed that indigenous peoples have also been exposed to both trends. No specific data are available, however.

It is common, particularly in the main cities of the Andean region,^u to see increasing numbers of indigenous workers and beggars. Men frequently work in the construction industry, women become domestic workers or informal sellers of goods on the streets, and children wander about with no shelter, and without any programmes or policies to address their needs.

IV.C.3. Laws, policies and programmes relevant to housing

IV.C.3.a. Laws

Ecuador has had a tradition of signing and ratifying most international instruments, both within the United Nations system (see table 17) and Inter American systems.^v

In a country that recognizes itself as multicultural and multiethnic, as Ecuador does,¹⁸ housing rights must be addressed from various points of view. The adequacy of housing for indigenous people cannot simply be examined

by looking at the cultural adequacy of housing programmes and legal provisions, or by addressing the dichotomy between ‘minority’ and ‘majority’ rights. An understanding of the status of housing rights of indigenous peoples in Ecuador must recognize that for indigenous peoples housing is inseparable from the complex notion of collective rights. That is, the right to housing for indigenous people in Ecuador is integrated with their understanding of the right to a land and territory, as well as the right to self-determination of a people or

Table 17. Ecuador: Ratification of relevant international treaties

Treaty	Date of ratification/ accession
ILO Convention No. 169	15 May 1998
ICESCR	3 January 1976
ICERD	4 January 1969
CEDAW	9 December 1981
ICCPR	23 March 1976

u. Namely: Quito, Ambato, Cuenca and Riobamba.

v. Ecuador has signed the American Convention on Human Rights (1977); the San Salvador Protocol (1993); and the American Convention on Women Rights “Belem do Para” (1994).

indigenous nationality, and rights to participate in a meaningful way in State decisions that affect indigenous territories.

In 1997, the Inter American Commission on Human Rights stated that Ecuadorian indigenous peoples:

*“experience obstacles in seeking to pursue their traditional relationship with the lands and resources that have supported them for thousands of years, and in seeking to practice and preserve their own cultures.”*¹⁹

Shortly thereafter, in 1998, a progressive Constitution was put in place,^w which included a comprehensive catalogue of economic, social and cultural rights, women’s rights, and several collective rights and rights of peoples – indigenous and afro-Ecuadorian. To many, this Constitution represented the triumph of social movements – primarily the indigenous movement and women’s organizations – that had not previously been visible in the political arena, and became a landmark of advocacy efforts that ‘paid off.’ This legislation is reviewed below.

IV.C.3.b. The Constitution

In the 1998 Constitution, human rights and collective rights, treaties, covenants, and all international human rights instruments became directly and immediately applicable in national courts,²⁰ and take precedence over national laws.²¹

Specific provisions on the right to housing, within both the civil rights chapter and the economic, social and cultural rights chapter are incorporated in the 1998 Constitution. In the civil rights chapter it enshrines:

*“The right to a standard of living that ensures health, food and nutrition, drinking water ... housing, clothes and other necessary social services.”*²²

There are also specific provisions on the collective rights of indigenous peoples and nationalities in relation to lands and territories, including:²³

- the right to property of communal lands, ancestral lands and their adjudication by law without charge;
- the right to the usage, enjoyment, administration and conservation of the natural resources in their lands; and

w. Since Ecuador became a Republic, in 1830, several Constitutions have been adopted and replaced according to the whims of the political elites or the ruling powers. The fact that many of these human rights are guaranteed by the current Constitution is a triumph. It is not, however, a guarantee of their prevalence over time.

- the right to consultation and participation in all the prospective and exploitation plans of non-renewable resources and the right to formulate their own priorities in relation to plans and projects for the improvement of social and economic conditions.

Another crucial provision is the recognition of indigenous peoples' customary judicial procedures and norms within their jurisdictions.²⁴ As noted above, indigenous institutions have jurisdiction over their people within the limits of territories that have been granted to them.

The Constitution also regulates against all forms of discrimination including ethnicity, gender, language, sexual orientation and social origin.²⁵ In addition, a specific provision guaranteeing equality of opportunity for men and women in relation to any public policies and plans.²⁶ There are no particular provisions for indigenous women.

In reference to evictions, the Constitution allows municipalities to evict and control property in order to develop future programs aimed at ensuring housing rights, or the right to live in a healthy environment.²⁷ It also establishes the State's obligation to develop housing programs of social interest. The State can evict people from land in order to comply with social purposes determined by law.²⁸ These evictions have taken place particularly in urban areas in order to build infrastructure, roads, parks and other public services. Depending on the owner's capacity to present a claim, the corresponding compensatory payment for these areas have varied between commercial or official rates.

IV.C.3.c. Other relevant national law

In general, housing legislation described in this section is not applicable to indigenous individuals, peoples or nationalities, within their own territorial jurisdictions. This legislation applies to an indigenous person only if they apply for a housing program that is developed under general national legislation. Rural housing does not necessarily include indigenous 'circumscriptions' or jurisdiction, although there is some overlap, particularly in the Andean region. In general, if indigenous individuals go to non-indigenous jurisdictions they are subject to Ecuador's federal housing legislation.

Tenancy is regulated by the *Law of tenancy*.²⁹ This law governs the relations resulting from a contract of tenancy of housing units located within the urban perimeter. It establishes minimum conditions with which these units must comply, and recognizes the tenants' right to pay a fair rent that cannot be increased unreasonably, or without adequate notice. This law also determines the rules of procedure for evictions.

The *Law for agrarian development*³⁰ addresses the promotion, development and protection of the agrarian sector.^x This law finally eradicates the ‘colonizing of rustic lands’ or ‘*terra nullius*’ system by which several indigenous territories both in the highlands and in the Amazon regions had been affected.^y This law requires the State to implement policies such as training and credit guarantees for the agricultural sector. In addition, it stipulates that a national marketing system be organized. To encourage agricultural activities, this law requires that agricultural workers’ salaries be raised, the right to property must be guaranteed, and investments in agrarian activity must be promoted. Further, this law permits machinery, equipment and other paraphernalia necessary for undertaking agricultural activities to be imported under special conditions and easier procedures. Because it refers to rural lands and forestry – and as many indigenous peoples and nationalities are still rural – this law could be applicable to indigenous peoples individually or collectively, if they are involved in agricultural activities. Some relevant provisions are:^z

- Article 19: Guarantees the right to property as long as the land complies with its social function.^{aa}
- Article 20: Describes the social function of the land as permitting adequate production in which food for the Ecuadorian people is assured, while natural resources are conserved.

x. Previous provisions and limitations of this Law have been highlighted by indigenous organizations, see Organization of American States, 1997. While several of them have been taken into account, the identified risks remain.

y. “As noted by the Government in its March 19, 1997 submission of observations, the national process of agrarian reform terminated after some 30 years, and the agency charged with its implementation, the Ecuadorean Institute of Agrarian Reform and Colonization (IERAC), was replaced by the National Institute of Agricultural Development (INDA). The Government stated that the processes of ‘directed colonization,’ and the consideration of large parts of the Amazon basin as ‘*tierras baldías*’ or unoccupied lands may be considered superseded.” Also, it noticed that: “Under the *Ley de Colonización de la Región Amazónica*, enacted to encourage the settlement and productive use of the Oriente, once settlers began moving into the territory, much of it was deemed to be ‘*tierras baldías*’ or unoccupied lands. Legislation to encourage the colonization of the Oriente offered title to settlers who demonstrated their domain over these lands by clearing forest for agricultural uses. Estimates of the number of settlers in the Oriente vary, but appear to be at least 250,000 to 300,000” (Organization of American States, 1997: paragraphs 12 and 36).

z. In addition to the three articles listed, Articles 39 and 40 were also relevant, but have since been invalidated by the 1998 Constitution.

aa. Social function means land is used for purposes that benefit the community as a whole (agriculture, cattle farming, production of food). If parcels or land are not used at all, and are just kept unproductive, the State considers it to be not-compliant with its social function.

- Article 32: Sets up the bases on which legitimate evictions from ‘rustic lands’ can occur.

The *Law for the organization and regimen of agrarian communes*³¹ recognizes a political and administrative division for indigenous communities, which runs parallel to the traditional division of the Ecuadorian territory into provinces, cantons and parishes. Relevant issues for indigenous peoples, particularly in the Andean Region,^{bb} are that the inhabitants of a *comuna* can own land collectively, and that this property is intended to be enjoyed and used to promote the well-being of the whole community, mainly with regard to agrarian production units. The elected political and administrative system is known as *Cabildo*, and there is often a title of ‘dominium’ which gives rise to the first legal document governing the relationship between the collectively-owned lands of indigenous peoples and the state.³² This law was the first to clearly define and regulate a distinctive administrative system for indigenous lands, and to grant the *comuna* a collective share in one essential component of the right to property: the dominium of a land. When ‘territorial circumscriptions’ were incorporated in the 1998 Constitution, it regulated a new and more comprehensive dimension of collective rights, moving beyond this 1976 *comuna* law and recognizing an autonomous system that is not merely a production unit, and that incorporates a clearer understanding of collective rights.

The *Ecuadorian Housing Bank law*³³ regulates the role of this national bank as a finance and credit entity, responsible for assisting and cooperating with the National Housing Institution, any civic associations relating to housing, cooperatives, and other institutions that have as their main objective saving and lending for housing.

The *Law for the tax implementation for rural housing of social interest*³⁴ created a tax to be paid by the owners of urban lands to finance rural housing projects.

The *Law for the development of housing with social interest*³⁵ sets up a special taxation reduction and credit system for those involved in the process of building houses that are affordable for poor people.

Finally, it should be noted that Article 284 of the Constitution,^{cc} gives the State full rights over lands that are indigenous territories if they have been

bb. Amazon indigenous peoples and nationalities have other internal political and administrative systems.

cc. Which addresses environmental protection legislation, national parks and natural reserve protections.

declared natural reserves, which has added to the already existing conflicts between the State and indigenous communities.

National legislation does not include laws regarding marital dissolution or inheritance rights for indigenous people, or for Ecuadorian women in general.^{dd} Nonetheless, the legal notion of ‘joint property’ between partners – both married, and those in stable, monogamous unions that have lasted for two years or more – is now accepted. Prior to 1989, the administration of this joint property was in the hands of the husband. Now, both partners must consent to, sign and approve any change in property status. However, within their jurisdictions and territories some indigenous nationalities and peoples have customary provisions and procedures relating to land inheritance and distribution within extended families, which vary among nationalities and people. For instance, some of the Amazon region nationalities, such as *Shuar* and *A’chuar*, recognize polygamy and distribute land according to male lines of heritage.

IV.C.3.d. Housing policies and programmes

In 2002, the Ecuadorian Government reported that the Ministry of Town Planning and Housing had completed the construction of 21,237 dwellings in rural areas for indigenous and Afro-Ecuadorian groups.^{ee} No further details have been provided and there is no information as to whether indigenous organizations and their leaders participated in the design of these programmes, or whether questions of cultural adequacy were addressed. There is no information as to the location of these buildings, nor how many were built specifically for indigenous groups.

The *Decree about communal services in housing programs*³⁶ outlines several criteria that must be met by housing programs in order to ensure living standards that preserve human dignity. These criteria include green areas, parks, gardens, recreation areas, schools, kindergartens, nursery schools, fire stations, police stations, post offices, grocery stores, and laundries. The builder and the municipality are required to decide cooperatively which services will be offered. This law is applicable to any housing program involving 200 or more units, and undertaken by national housing institutions, financed by the Ecuadorian Bank of Housing, the National Institution of Social Security (IESS), or other public institutions. Since no detailed data regarding compli-

dd. These topics are regulated by the Civil Code.

ee. The number of houses were constructed over the course of 6 years, as follows: 824 in 1993; 2,275 in 1994; 2,365 in 1996; 5,062 in 1997; 6,105 in 1998; and 4,606 in 1999 (UN Doc CERD/C/384/Add.8: paragraph 136).

ance with this decree are available it is difficult to assess whether it has been applied effectively. For the purpose of this study, however, it should be noted that the information available indicates that few housing programs consisting of more than 200 units, and specifically designed for indigenous peoples, have been undertaken.

In 1993, following the creation of MIDUVI (the Ministry of Urban Development and Housing), a 'National Policy for Urban Development, Housing and Environmental Sanitation'^{ff} was established. Its five main objectives include providing better access to water and sanitation in rural communities and smaller municipalities; promoting credit and funding for housing programmes for poorer sectors by the private sector; and promoting the participation of organized communities and municipalities in the organization and administration of their territories. There is no mention of indigenous organizations, territories or the cultural adequacy of programmes, nor does the policy address benefits to women.

Currently, there is a government programme aimed at building or improving rural housing or housing for the urban poor.³⁷ In order to receive funds to a maximum of US \$ 500, beneficiaries of this programme must prove legal ownership of their land, and only individually-owned property is included. In addition, applicants must offer their own labour force as part of the arrangement and they must comply with several procedures. Once again, there are no provisions specific to indigenous peoples, or for collective access to credit.

Though the Constitution in place is a powerful tool, and though there are other national laws, policies and programmes in place to protect housing rights of indigenous peoples, it remains to be determined whether these instruments are being used to effectively protect the housing and land rights of indigenous peoples, especially in the face of economic development, which is linked to the burden of foreign debt payment and compliance with international economic policies.

ff. *Política Nacional para Desarrollo Urbano, Vivienda y Saneamiento Ambiental.*

Notes

1. Most documents and sources of information, as well as national legislation consulted for the Ecuador case study are Spanish originals, with no official translations to English. Unofficial translations have been included for the purpose of this report. When available, the English version has been cited.
2. Permanent Specialized Commission of Indigenous and Other Ethnic Groups, Affairs of the National Congress of Ecuador, 2001.
3. UN Doc CERD/C/62/CO/2: paragraph 9.
4. SIISE 3.5, 2001.
5. PRODEPINE data, as cited in UN Doc CERD/C/384/Add.8: paragraph 35.
6. There has been a great deal of writing about this system, including one of Ecuador's best known novels: *Huasi-pungo*, by Jorge Icaza (1934). For a conventional political analysis of the general history of power relations, see: Hurtado, 1989: p. 235 and following page. For a more progressive socio-economic perspective, see Acosta, 1995, p. 23 and following pages.
7. SIISE, 3.5, n.d.a (self-identification indicator).
8. See for details on the construction of this indicator, SIISE 3.5 (n.d.a).
9. This survey is used in the whole Andean Community, not only in Ecuador. ("Survey about homes, work and poverty conditions"- Andean Community of Nations. *Encuesta de hogares, empleo y pobreza- Comunidad Andina de Naciones*). SIISE 3.5.
10. SIISE, n.d.b.
11. Vega, 1998: p. 10 at SIISE 3.5.
12. Asamblea Nacional Constituyente, 1998, Art. 224 (unofficial translation).
13. For a more detailed analysis of the indigenous territorial circumscriptions (Circunscripciones Territoriales Indígenas-CTI), the problems faced nowadays by indigenous federations and organizations in reaching consensus over a specific law, see, for example: CDES, 2003.
14. Asamblea Nacional Constituyente, 1998, Art. 84.
15. Asamblea Nacional Constituyente, 1998, Art. 247.
16. UN Doc CERD/C/62/CO/2: paragraph 16.
17. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Inter-American Court, 2001: paragraphs 148-149).
18. Asamblea Nacional Constituyente, 1998, Art. 1.
19. Organization of American States, 1997: paragraph 6.
20. Asamblea Nacional Constituyente, 1998, Art. 18 in relation to Art. 161.
21. Asamblea Nacional Constituyente, 1998, Art. 163.
22. Asamblea Nacional Constituyente, 1998, Art. 23.20.
23. Asamblea Nacional Constituyente, 1998, Articles 84.3; 84.4; and 84.5 respectively.
24. Asamblea Nacional Constituyente, 1998, Art. 191.
25. Asamblea Nacional Constituyente, 1998, Art. 23.3.
26. Asamblea Nacional Constituyente, 1998, Art. 41.
27. Asamblea Nacional Constituyente, 1998, Art. 32.
28. Asamblea Nacional Constituyente, 1998, Art. 33.
29. *Ley de Inquilinato*, which came into force on 1 November 2000 (RO 196).

30. *Ley de Desarrollo Agrario*, which came into force on 30 April 1997 (RO 55).
31. *Ley de Organización y Régimen de Comunas Campesinas*. 5 October 1976 (RO 186).
32. For a more in-depth analysis of this commune system, its legal consequences within the communities and in relation to the national state legal system, see: Wray and others, 1993: pp. 11-69.
33. *Ley sobre el Banco Ecuatoriano de la Vivienda*, 14 May 1975 (RO 802).
34. *Ley de Creación del Impuesto para Vivienda Rural de Interés Social*, 10 May 1985 (RO 183).
35. *Ley de Desarrollo de Vivienda de Interés Social*, in force on 22 July 1985 (RO 233).
36. *Decreto Supremo sobre Servicios Comunitarios en Programas de Vivienda*, 1 December 1978 (RO 723).
37. *Bono para la Construcción o Mejoramiento de Vivienda Rural y Urbano Marginal*.

IV.D. Kenya

IV.D.1. Background

Kenya houses many diverse ethnic cultures and is the site of ongoing struggles for union between its peoples. Identifying the indigenous peoples of Kenya, like those throughout the African continent, requires a somewhat unique approach, since most Africans are the original inhabitants of Africa and thus ‘indigenous.’¹ However, drawing on the broad definitions of ‘indigenous’ found in ILO Convention No. 169, several marginalized groups have self-identified as indigenous. In Kenya, as in all of Eastern Africa, the indigenous are those who have been marginalized because of their pastoral or nomadic culture such as: the *Maasai*, *Turkana*, *Borana*, *Samburu*, *Bendille*, *Somali*, *Ogiek*, and others.² These indigenous communities comprise about 30 of Kenya’s 100 communities, representing approximately one-third of the total population.³ The exclusion of these communities from mainstream society has resulted in their political, economic and social marginalization and disadvantage, similar to experiences of indigenous groups in other countries.⁴

The marginalization and disadvantage experienced by these communities is largely a result of the history of colonization in Kenya and the impact of this on land rights within the country. At the end of the 19th century, the British Colonial Government declared large amounts of land owned by indigenous Africans to be Crown Land and created indigenous reserves in which indigenous peoples were forced to reside, freeing the arable land for the new colonial settlers.⁵ The expropriation of indigenous lands continued well into the mid-1900s, resulting in the displacement of many from their homes. At the same time, successive governments changed land tenure systems in Kenya away from communal land ownership – which was the tenure system in most indigenous communities in Kenya pre-colonial times – to individualized, private land ownership, which rarely supports indigenous economic activities.⁶ In so doing, the colonial land tenure system disrupted indigenous land-use patterns. Under communal land ownership each clan had a specific area of land. Men typically controlled land allocation; however, women had access to the land and were responsible for most aspects of crop production. Under individual land titling schemes only those with the necessary economic resources can purchase and own land and only landowners are entitled to use the land. Of course, under individual land titling systems, women’s right to use land receives no legal recognition.⁷ In Kenya, few indigenous families gained title deeds. When they did, the title was most commonly in the man’s name. This has resulted in many indigenous peoples being landless, living in informal settlements without security of tenure, and has reduced women’s access to land and resources.⁸

IV.D.2. Current housing and living conditions

According to the United Nations Human Development Report 2003, Kenya is among the poorest countries in the world.⁹ The quality of life for most Kenyans is declining as poverty rates increase. According to the Organisation for Economic Cooperation and Development (OECD), 52 per cent of the population lives below the poverty line of US \$ 1 per day, of which women and children are the majority.¹⁰ These conditions are worse for indigenous peoples in Kenya. For example, 95 per cent of the Ogiek live in poverty. This means that:

“more than 90 per cent of the Ogiek can barely afford one proper meal a day. ...life expectancy for Ogiek people [is ...] about 46 years [and] [f]ive out of ten children die before the age of five.”¹¹

Thirty to fifty per cent of indigenous Kenyans have no guarantee of household food security, even under normal and favourable weather conditions.^a Within indigenous communities and the broader population in Kenya, women are disproportionately poor.¹² Women head 37 per cent of all households in Kenya, and of these, eighty per cent are either poor or very poor, at least in part due to lack of land ownership.¹³ It can be assumed that indigenous women are represented by and within these statistics. Only 5 per cent of registered landholders are women, and yet women constitute over 80 per cent of the agricultural labour force, and 64 per cent of subsistence farmers are women.¹⁴ As the Government has noted:

“Studies in Kenya indicate that women are more vulnerable to poverty than men. For instance, 69 per cent of the active female population work as subsistence farmers compared to 43 per cent of men. Given that subsistence farmers are among the very poor, this relative dependence of women upon subsistence farming explains the extreme vulnerability of women. These problems are most severe in arid and semi-arid areas where women spend a great portion of their time searching for water and fuel.”¹⁵

Given that indigenous women are “disregarded even by indigenous men,”¹⁶ special consideration is needed to address the issue of women’s inequality in the tribal context. Men enjoy a privileged status within tribes and women are excluded from traditional councils, which are ruled by elders and constitute the realm of power and authority within many tribes.

Among the general population in Kenya literacy rates are quite high, reaching 83.3 per cent in 2001.¹⁷ However, this rate drops dramatically for indigenous communities. The literacy rate for Ogiek is the lowest in Kenya, at

a. Kenya has been plagued by natural disasters and poor weather conditions affecting the livelihood of many.

approximately 20 per cent.¹⁸ Overall, indigenous communities receive inferior education to other communities and school curricula do not recognize or teach traditional forms of economic production.^{19,b}

On health matters, indigenous communities are also disadvantaged. They are particularly vulnerable to HIV because of a lack of accurate information, and traditional practices such as polygamy, female genital mutilation or circumcision, and ritual cleansing.^c

With respect to housing conditions, there is limited access to basic services outside the Kenyan capital, Nairobi.²⁰ Less than two per cent of the country's rural households – where many indigenous peoples live – have access to electricity from the grid.²¹ Furthermore, a 2002 survey found that many rural households have no access to any kind of sanitation, and very few have a tap in their yard.²² Relying on shallow streams for water, and with no access to residual water treatment or an adequate waste disposal system, the rural population, including indigenous peoples, is exposed to disease and other health hazards. This lack of infrastructure also means that in some cases women spend more than two hours a day fetching water, in addition to their many other chores.²³

Many indigenous peoples in Kenya live in traditional houses made from poles, thatch, sticks, mud, manure and grass. Originally, these houses were intended to provide the temporary shelter required by a nomadic lifestyle. Nowadays, however, with indigenous lands being taken over for commercial purposes (for example, logging), indigenous peoples are left with fewer places to farm, compelling them to remain in one place. Consequently, their once-temporary houses are now being used as permanent accommodations. Since these houses were constructed from materials whose virtue was their availability rather than their sturdiness, they are characterized by very poor conditions, such as leaking roofs, damp and cramped rooms with poor ventilation, and lack of durability, especially during bad weather.²⁴

Changes in the land tenure system in Kenya from communal to individual title forced many indigenous families to abandon pastoral activities and to engage in income generating activities. Charcoal burning (the burning of

b. For example, out of a population of about 20,000 people, the Ogiek community has fewer than five university graduates. Unemployment is common even among those who have gone to school, because their level of educational attainment is inferior to that of children from communities well-served with educational facilities.

c. Traditionally, one knife is used to circumcise all the candidates. This means that in case one of the candidates is infected, then the chances of transmission to the rest who will share the knife are highly increased, as there is normally exchange of blood. The practice of ritual cleansing is described in section IV.D.2.a below.

forests to create charcoal), out of necessity, has become a popular income generating activity. As a result, deforestation is a major problem in Kenya that has a direct impact on the housing and living conditions of indigenous women. Women in rural areas find that they have to walk increasing distances to find fuel wood to cook. Alternatively, they have to reduce the amount they cook or resort to alternative fuels that are not culturally appropriate.²⁵

IV.D.2.a. Security of tenure and forced eviction

At a recent conference regarding constitutional reform in Kenya, a delegate stated, “[n]obody was born in the air. Each one of us must have land.”²⁶ While this may be true, as it stands, most indigenous communities in Kenya have no land rights and as such cannot build permanent adequate housing²⁷ and are continually threatened with forced eviction. Evictions in Kenya occur for a number of reasons including: development projects such as game parks and other tourist projects, ethnic conflict, and custom and tradition upon marriage dissolution and death of a spouse.

‘Land grabbing’, resulting in forced eviction or the threat of forced eviction, is a common phenomenon in Kenya that has affected indigenous peoples. Land grabbing has largely occurred over the past decade, by the then ruling party, which had allocated vast amounts of ‘public’ land in exchange for political loyalty.²⁸ For example, Majaoni, a prime beach plot comprising over 400 acres of land along the Indian Ocean is home to over 3,000 indigenous people. In 1995 the Ministry of Lands began allocating large tracts to individuals holding positions of power in the Government or ruling party. Since that time residents have been pressured and intimidated by authorities in a bid to have them leave their lands and relocate to smaller, less desirable plots of the land in dispute. So far the indigenous peoples have largely kept the land grabbers at bay, but they do not have title deeds to their lands and thus remain in an insecure position.²⁹ A similar case has been reported among the Ogiek, see box 5.

Indigenous and other women in Kenya often experience insecure tenure and eviction upon marriage dissolution or the death of their husband. Indigenous widows, such as the Maasai, and other widows can be stripped of their property upon the death of the husband.³⁰ They may also be forced to engage in a ‘ritual cleansing’ which involves a widow having sex with a man of low social standing, upon the death of her husband.³¹ When the widow refuses, she may be removed from her home by her own relatives should she refuse to submit to the ‘cleansing’.³² Traditions pertaining to dowries can also result in the eviction of women from their homes upon marriage dissolution. For example, for the Maasai, the payment of dowry means that any property accumulated by the woman during the marriage actually belongs to her husband. As

a result, upon separation, women can be removed from their homes as the family home would not be considered their rightful property.³³

The eviction of women from their homes exacerbates women's poverty and often compels them to live in inadequate housing. Human Rights Watch

Box 5. Forced eviction of Ogiek indigenous peoples

The Ogiek are a self-identified indigenous hunter-gatherer community with a population of approximately 20,000. Today, they occupy the Mau Escarpment and Aberdare around the Rift Valley, as well as part of the Mt. Elgon Forest in western Kenya. From colonial times onwards, successive governments have tried to evict Ogiek communities from their ancestral lands without consultation, consent or compensation. They have been excluded from development plans and pushed onto land that is not suitable for their way of life.

The destruction of forests in Ogiek-inhabited areas, and the displacement of Ogiek people have occurred as a result of:

- Logging, especially from the 1990s onwards;
- Government excision;
- Development projects, such as the establishment of Mt. Elgon Game Reserve; and
- The cultivation of land for export crops by private individuals, which is permitted under existing land laws for cultivation of export crops and flower farming.

Having lost their traditional occupations, the Ogiek themselves have been forced into cultivation farming, though they lack the skills necessary. Moreover, displacement from the forests that are their cultural and spiritual homes has eroded Ogiek culture.

The most recent eviction attempt occurred when the Moi government attempted to excise and then allocated the Ogiek lands to supporters of the administration and tribesmen. In response, the Ogiek launched a legal action, and won an injunction against the government.^a Though the case remains unresolved; there are some indications that the plight of the Ogiek may be resolved in the near future. For example, in 2003 the Minister for Land and Settlement met with representatives of the Ogiek and committed to resolving their plight. The Minister suggested that the Ogiek form land resettlement committees amongst themselves to assist the Government in resettling them on lands from which they had been evicted. Soon thereafter, the Assistant Minister for Environment and Natural Resources, in a ministerial directive, ordered that the Ogiek, be allowed back to their ancestral lands in the forest.

While the situation of the Ogiek is now somewhat optimistic, reaching this point was not easily achieved. The Ogiek have been working for nearly two decades advocating for their rights in both domestic and international forums. The Ogiek now believe that their rights can only be protected through proper constitutional reform, and to this end have engaged in the constitutional review process.

a: On other occasions the Ogiek have not had such success using the courts. For instance, in a ruling of 15 March 2000, two High Court judges found that the Ogiek had renounced their ancient traditions and hence forfeited their land rights.

Source: Adapted from Ohenjo, 2003.

reports that the:

“housing women resort to when evicted by their relatives is often decayed, cramped and unsafe ... women ... consistently described being forced to live in substandard housing: the physical structures are dilapidated; services (including running water, energy, and sanitation) are unavailable; and the locations (in terms of schools, health-care facilities, and safety) are bad”.³⁴

Forced eviction invariably leads to the dislocation of families as men and widows migrate to the cities in search of employment and a place to live.

IV.D.2.b. Urban settlement

Forced eviction, coupled with the centralization of services and job opportunities, has drawn large numbers of rural dwellers to Kenya’s cities, where they ultimately end-up in slums.^d Increased urbanization over a short period of time, coupled with the fact that the State provides no housing for the poor,³⁵ has placed a huge strain on housing stock and services and has resulted in the rise of informal settlements and slums.³⁶ Slums are crowded and ever-growing with new migrants, especially with female-headed households. 60 per cent of Nairobi’s population, for example, live in slums.³⁷ Most slums and informal settlements are severely overcrowded, insecure and unsanitary. Urban infrastructure – such as electricity, proper sanitation and garbage collection – is virtually non-existent, and in many instances potable water has to be purchased from vendors for nearly ten times the rate charged by local authorities.³⁸

Indigenous peoples move to slums for various reasons, among them severe poverty in rural areas and the lure of the ‘good town life’. Historically, men migrated to Kenya’s cities, while their families remained in rural areas where food and education were cheaper, and they could care for the family farm. Today, however, more women are moving to the cities in search of greater socio-economic equality, and to escape the tribal structures and traditional status that reinforce male authority and their own powerlessness. They are also seeking to escape the physical demands of rural life, and in some cases to find husbands, since so many men have migrated to the cities.³⁹ In addition, for those who have secondary school education, pastoral life is no longer attractive. This is due, in part, to children being taught to believe that employment in towns is the only suitable life for a ‘progressive’ person. As a result,

d. UN-HABITAT defines a slum household as *“a group of individuals living under the same roof that ... [experience] one or more of the following conditions: insecure residential status, inadequate access to safe water, inadequate access to sanitation and other infrastructure, poor structural quality of housing and overcrowding”* (2003b: p. 8).

many indigenous rural dwellers are abandoning their homes and moving to urban settings in search of jobs. As the population in these centres increases, secure, adequate and affordable housing is scarce. Most of the rural-urban migrants are very poor, illiterate and if they secure jobs, they are very low paying and menial (security guards, household help). As a result, adequate housing is simply unaffordable.⁴⁰ The vast majority of slum dwellers are tenants, who rent shacks from chiefs – appointed by the Government to oversee certain areas – and wealthy absentee landlords who charge exorbitant rents.⁴¹

While indigenous peoples living in the cities gather regularly with other migrants from their own tribes in an effort to preserve some of their traditions and social structures, they have been unable to prevent the devaluation of some key tribal structures, such as the authority of the elders. This is to the advantage of women who are powerless under those structures:

“While women lose the security of traditional rural life, they clearly gain a sense of personal freedom, empowerment, and independence from life in the city.”⁴²

Nonetheless, living in city slums has a disproportionate impact on women, since they are still responsible for supplying water and domestic energy, taking care of their children and earning money. To do so, these women find work in wholesale and retail trade, or by brewing maize beer, operating kiosks, selling cooked food, working as dressmakers or hairdressers, and in prostitution.⁴³ For their part, men have better employment prospects in both the formal and informal urban sectors as they have higher levels of education and are free of child care and other domestic responsibilities. That being said, like women, men often suffer adverse working conditions, such as racial discrimination, exploitation, poor pay and a lack of basic work tools.⁴⁴

IV.D.3. Laws, policies and programmes relevant to housing

Approximately 9 million Kenyans – many of whom are indigenous – lack adequate housing.⁴⁵ In part, this situation has arisen because economic, social and cultural rights – including the right to housing, as well as indigenous rights and women’s rights – are not adequately codified in the Kenyan Constitution.⁴⁶ It is also due to the fact that the Government has yet to make a firm commitment to enforce the right to adequate housing through effective programmes and policies. As a legal advocate of the High Court of Kenya stated:

“While shelter is easily acknowledged as a basic need [by the

Table 18. Kenya: Ratification of relevant international treaties

Treaty	Date of accession
ILO Convention No. 169	--
ICESCR	3 January 1976
ICERD	13 October 2001
CEDAW	8 April 1984
ICCPR	23 March 1976

government], *it does not enjoy practical acceptance as a basic right.*⁴⁷

And so, despite the fact that Kenya has ratified many important international human rights treaties, there is still much work to be done domestically before the right to adequate housing is enjoyed by indigenous Kenyans. What follows is an overview of some of the various domestic laws, policies and programmes of relevance to indigenous housing.

IV.D.3.a. The Constitution

The current Constitution of Kenya⁴⁸ does not codify the right to housing, though section 75 refers to the sanctity of private property. This section however, only applies to those with title deeds to their properties, and therefore does not extend to slum dwellers.⁴⁹ It does, however, codify the “*Protection of Fundamental Rights and Freedoms of the Individual.*” Indigenous peoples and women are, however, poorly protected. There is no explicit protection of the rights of indigenous peoples within this or any other part of the Constitution. There is a non-discrimination provision that extends protection against discrimination based on:

“race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex”.

However these rights are curtailed as they are:

*“subject to respect for the rights and freedom of others and for the public interest”.*⁵⁰

While the Constitution prohibits discriminatory laws (on their face or in effect), and provides a definition of discrimination,⁵¹ it also circumscribes this definition, stipulating that sex discrimination in personal, customary or tribal law matters, for the purposes of the Constitution, shall not be deemed discriminatory.⁵² In other words, it ensures that in almost every area related to women’s property rights, “*discrimination is sanctioned*”.⁵³

Because of these and other criticisms of the Constitution of Kenya, a review process was initiated in the 1990s, a process which has now reached its final stages. Indigenous groups and women’s groups were active in this review process, demanding that their rights be explicitly recognized. Many of their demands have been included in the ‘*Draft Bill for the Constitution of the Republic of Kenya*’. For example, the Preamble explicitly recognizes and protects diversity, and the Bill of Rights protects the rights of marginalized communities defined as pastoralists, hunter gatherers and other communities that may have suffered discrimination.⁵⁴ It also enshrines the right to adequate housing and offers protection from arbitrary eviction. The Draft further provides for equal rights with respect to marriage and its dissolution, and calls

for “the fullest participation of women, the disabled, and the marginalized communities and sectors of society” in the development process.⁵⁵ Finally, it prohibits any tribal custom or tradition “that undermines women’s dignity, welfare, interest, or status.”⁵⁶ The draft stipulates, however, that these latter protections do not extend to Muslim women.⁵⁷

IV.D.3.b. Land laws and programmes

There are more than twenty laws in Kenya pertaining directly to land, and at least an equal number that deal indirectly with land.⁵⁸ Land legislation can be categorized into three areas: trust land;^e government land; and private land.⁵⁹ In each area, indigenous peoples have been dispossessed of their lands.

Trust land was established ostensibly to protect the land rights, or at a minimum the usufruct rights, of indigenous peoples. However, it has not had this effect. Through a variety of laws and mechanisms, trust land has been taken from indigenous peoples. For example, in 1986 a Presidential Decree permitted ‘ranch land’ – owned communally – to be divided into individual plots, allowing the land to be privately owned with freehold titles.⁶⁰ To purchase this land, prospective buyers would make deals with a group representative,^f who would sell the land and then attempt to purchase a good plot of land for themselves, or take their earnings and move to Nairobi. Not only has this eroded the land base for indigenous communities, it has left many families and women landless and homeless. Though trust land comprises 65 per cent of all land in Kenya, it is difficult to determine how much trust land actually remains.

Government land includes land reserved for the use of Government and the land within forest reserves outside trust land areas.

e. Trust land is land that was designated as ‘native reserves’ or ‘special areas’ during colonial times, found mostly in the northern part of Kenya. According to UN-HABITAT, “All Trust Land is vested in county councils ... any resident tribe, group, family or individual on that land has the right to occupy, use, control, access and possess it, under African customary law. However, a county council may set apart an area of Trust Land public purposes ... Once a county council has done so, any rights or other benefits of that land previously vested in a tribe, group, family or individual under African customary law, are extinguished” (2002b: pp. 145-146). Theoretically the government must compensate those affected, though there are several legal means for the government to avoid paying this compensation.

f. According to UN-HABITAT, “..group representatives are supposed to hold the land for the collective benefit of all members, [however], group land may be sold with only the group representatives’ approval” (UN-HABITAT, 2002b).

“Government land is vested in the President who has the power to make grants and dispositions of any estates, interest or rights in or over this land.”⁶¹

What constitutes Government land has been disputed by indigenous groups. For example, the Ogiek (see box 5 above) have challenged the excision of parts of the Mau Forest by the Government and its allocation to select persons who are currently in the government’s favour.

Informal settlements or slums that are established on Government land can be subject to demolition or eviction if they lack sufficient political patronage and cannot secure a ‘temporary occupation license’.⁶² In other words, security of tenure in informal settlements has less to do with law than with politics.

The shift in Kenya from communal to private land ownership has had negative effects on indigenous peoples. For example, in several High Court cases it has been determined that once land has been privatized and registered under the *Registered Land Act*, the customary rights of access of others on that land are extinguished.⁶³ In turn, in cases where a group representative converts indigenous lands to private registered lands, all of the group members would lose usufructory rights to the land and thus would be forced to find alternate means of sustaining a livelihood.

On the other hand, private land does offer some possibilities for indigenous peoples. The *Registered Land Act* allows for both joint and common ownership. It is not uncommon in Kenya for land to be bought jointly through land buying companies or cooperatives. Once purchased, the land then belongs to the owners in common on a block-registered title.⁶⁴ Female headed household have taken advantage of this co-ownership arrangement, with the assistance of organizations such as the National Co-operative Housing Union (NACHU).⁶⁵ Further research is required to determine whether indigenous women are benefiting from this type of ownership.

IV.D.3.c. Housing programmes and institutions

The Department of Housing is the Government’s central policy body on housing matters. The Ministry of Roads and Public Works, the National Housing Corporation and the Housing and Building Research Institute, provide the structural framework for its shelter policy. The mandate of these three institutions is to work towards the improvement of slums and to promote low-cost housing programmes. Since the establishment of these institutions, the government has also supported the actions of community-based financial institutions and NGOs that aim to make adequate and secure housing available to low-income households. The task of the National Housing Corporation⁶⁶ is

to develop and construct low-cost housing, using both government and donor funding. The Act that created this body has been criticized for limiting the scope of housing development to this Corporation, without addressing other important players and variables in the development of shelter.⁶⁷ While Kenya has an abundance of legal instruments pertaining to housing^g and has established several governmental bodies to address housing issues, there appears to be little coordination of housing related activities. Consequently:

“some local authorities are unable even to approach an understanding of their responsibilities in facilitating provision of adequate and secure shelter for their residents.”⁶⁸

Though the Department of Housing has indicated in numerous papers that its goal is to provide adequate housing to every citizen in Kenya, it has failed to deliver any tangible results.⁶⁹ Perhaps this is not surprising given that the Government has only allocated less than one per cent of its national budget for housing.⁷⁰

Another significant obstacle to addressing Kenya’s housing problem is financing. There is no accessible lending and funding system, and so, only high-income households enjoy access to financing arrangements. Indeed, even the policies and institutions whose task is to address this issue have been financed inadequately.⁷¹

Government officials acknowledge many of the barriers to adequate housing experienced by Kenyan women, and yet, there are virtually no housing policies or programs in Kenya which target women or that address the barriers women experience. The Ministries of Lands does not have any relevant policies or programme, the Attorney General’s office has an understanding of human rights, but not specifically women’s rights and there is no gender unit within the Department of Housing.⁷²

Because the public and private sectors have failed to supply enough affordable housing in Kenya, civil society has been mobilized and has created housing cooperatives. These cooperatives have successfully managed to:

“assist members to purchase land for subdivision into smaller plots, which their members could then utilize to build houses. Much of the

g. Some legal instruments related to housing are: *Rent Tribunal Act*; *Public Health Act*, Cap. 242; *Environment and Construction Act*, No. 1, 1999; *Agriculture Act*, Cap. 318; *Rating Act*, Cap. 267; *Land (Representatives) Act*, Cap. 287; *Land Adjudication Act*, Cap. 284; *Land Consolidation Act*, Cap. 283; *Registered Land Act*, Cap. 300; *Land Titles Act*, Cap. 282; *Registration of Titles Act*, Cap. 281; *Land Control Act*, Cap. 302; *Registration of Documents Act*, Cap. 285; *The Valuation Rating Act*, Cap. 266; *Land Acquisition Act*; Cap. 295; *Trust Land Act*, Cap. 288; *Government Land Act*, Cap. 280; *Forest Act*, Cap. 385; *Mining Act*, Cap. 306, and the various municipal by-laws.

*land purchased was beyond the city and municipal boundaries and this helped such groups to avoid the rigid planning standards required by City and other municipal authorities.*⁷³

NACHU provides technical and financial services for these cooperatives and mobilizes the cooperative sector into provision of housing for the membership. It currently maintains a leading role in facilitating access by low-income

Box 6. Maasai women redesign housing

The Maasai have traditionally been a pastoral, nomadic people. In the last two decades, because of development projects encroaching on their lands, they have been forced to lead more settled lives. As a result, they require more durable and permanent housing structures.

Until now, Maasai settlements were temporary and were used mainly for sleeping and cooking. When it was time to move from one grazing area to another, the settlement structures were simply left to decay. These temporary houses (*enkangs*) are made of poles, twigs, and grass, and plastered with cow dung and mud. They have low, leaking roofs; damp, smoky and dark rooms; and cramped space. They smell of the animals, lack security, have weak, termite-infested foundation posts, and are not durable. Ventilation is channelled through a narrow opening which serves as the *enkang's* entrance, and some have makeshift windows: holes in the wall with dimensions of no more than 20 x 20 centimetres. *“Enkangs are uncomfortable, lack privacy, are susceptible to fire, pests and harsh weather, and pose numerous health risks, particularly eye and respiratory ailments.”*

To improve these conditions, a project has been undertaken by Intermediate Technology Group Kenya (IT Kenya), that focuses on assisting Maasai women (who traditionally are responsible for building their own homes) to use appropriate technologies to develop better housing. Under this project, the women plan and redesign their own homes, using the same internal designs that exist in the *enkangs* which provide the physical setting for family rituals. Any adaptations to the technology respect and maximize the women's indigenous building skills. Following tradition, the Maasai women work together when they are building a new home.

According to IT Kenya, the results have been very promising: *“The new enkangs are more durable and are capable of withstanding extreme weather conditions. The design, with wider entrances and increased roof height, allows for a flexible internal layout. The natural lighting and ventilation are much improved and the fire risk has been reduced. The risk of domestic accidents [has] been minimised due to the increase in lighting and extra space. [...] Improved ventilation and wall heights have lessened the rate of eye and chest infections (from smoke) and backaches (from constant bending). Air circulates more easily and there is less heat inside during cooking.”*

These redesigned homes have also decreased the amount of time Maasai women spend maintaining their homes and fetching water which has allowed them to spend more time on income generating projects.

Source: Equator Initiative, n.d.a.

groups, to decent and affordable shelter through the housing co-operative model.

NACHU has suggested that to tackle the many housing problems in Kenya would require:

*“the re-definition and distribution of responsibilities to a variety of actors, ranging from individual households through cooperative groups in both the informal and formal sector, including Government agencies and Ministries.”*⁷⁴

Key strategies that should be considered are community participation, building partnerships, government and political commitment and support, strengthening and building the capacity of relevant institutions, research, new technologies and the evaluation of the role of the communities in their own development. Box 6 provides an example of a good practice in this respect.

As it stands, the courts have not been particularly useful in the protection of housing rights for indigenous peoples. For example:

*“the courts have turned a blind eye to both the unlawful and forced evictions of residents of the informal settlements and have sanctioned the rabid land grabbing that is endemic in Kenya today.”*⁷⁵

Moreover, most cases that are filed with the courts never make it through the judicial process because of *“inefficiencies, incompetence, and outright corruption”*.⁷⁶

Though there remain many obstacles in the path to the enjoyment of housing rights by indigenous women and men, the Government has recently taken some positive steps that could improve housing conditions. For example, it has committed to constructing 300,000 rural houses in the next five years, it is working on a mortgage scheme adequate for borrowers in rural areas, and is encouraging investment in housing that will be accessible to low-income groups, especially those in the informal sector.⁷⁷ Additionally, a National Housing Policy aimed at urban slum dwellers was recently approved by the Kenya Cabinet and has been sent to Parliament for endorsement.⁷⁸ According to the Special Rapporteur on adequate housing, the policy is based on the presumption that housing is a human right and specifically recognizes women’s rights to housing and land.^{79,h} If implemented and targeted to address the needs of the most disadvantaged groups including indigenous peoples, the policy could effectively address urban slum and housing shortage problems. However, these activities will have to be monitored to assess whether they benefit indigenous peoples.

h. The Special Rapporteur also expressed concern that the recognition of women’s housing and land rights is ‘superficial’ and will not be implemented in a meaningful way.

Notes

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2. Kipuri, 2000.
3. Email correspondence, Nyang'ori Ohenjo, of Centre for Minority Rights Development (CEMIRIDE), 19 April 2004.
4. Indigenous Media Network, 2002.
5. Weru, 2000: p. 1.
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7. Human Rights Watch, 2003b: p. 7.
8. Chandler and Wane, 2002: p. 8.
9. UNDP, 2003b: p. 239.
10. OECD, 2002, cited in: CIVIS, 2003: p. 2.
11. Ohenjo, 2003: p. 2.
12. Gitu, 1999.
13. Human Rights Watch, 2003b: p. 9. See also: Peters, 1998.
14. Human Rights Watch, 2003b: p. 10.
15. Government of Kenya, 2002: p. 4.
16. Kipuri, 2000.
17. UNDP, 2003a.
18. Ohenjo, 2003: p. 2.
19. Ohenjo, 2003: p. 3, footnote 18.
20. Ochieng, 2002.
21. Karekezi, 2003: p. 12.
22. Ochieng, 2002.
23. Ochieng, 2002.
24. Florida Geographic Alliance, 2003: pp. 1-6. See also Elijah Agevi.
25. Chandler and Wane, 2002: pp. 9-10.
26. Sylvanos Onyango, quoted in Rugene and Mugonyi, 2003.
27. Communication with Korrir Singoei, Director of Centre for Minority Rights Development (CEMIRIDE), 18 January 2004.
28. Bodewes and Kwinga, 2003: p. 205.
29. Bodewes and Kwinga, 2003: p. 206.
30. Human Rights Watch, 2003b: pp. 16-18.
31. For more on ritual cleansing see: Human Rights Watch, 2003b: pp. 2-13.
32. Human Rights Watch, 2003b: p. 16.
33. Human Rights Watch, 2003b: p. 27.
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36. Brown, Tilock, Mule, and Anyango, 2003: p. 2.
37. Brown, Tilock, Mule, and Anyango, 2003: p. 1.
38. Bodewes and Kwinga, 2003: p. 199.
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42. Brown, 1994, quoted in Peters, 1998.
43. Peters, 1998.
44. Daily Nation News, 2000.
45. Ministry of Roads, Public Works and Housing (n.d.). No breakdown of these statistics according to ethnic or indigenous group were provided.
46. Mutungi, 2001.
47. Mboya, 2001.
48. Constitution of Kenya, Revised Edition 1992.
49. Bodewes and Kwinga, 2003: p. 202.
50. Bodewes and Kwinga, 2003: See Article 70, Constitution of Kenya 1992.
51. Constitution of Kenya, Articles 82(1) and 82(3).
52. Constitution of Kenya, Article 82 (4). For an in-depth look at the sex discrimination provisions of the current Constitution of Kenya, housing, land and property laws affecting women, see: UN-HABITAT, 2002b: Chapter Five, Kenya.
53. Human Rights Watch, 2003b: p. 32.
54. Minority Rights Group, 2004.
55. Draft Bill, 2002: p. 21.
56. Human Rights Watch, 2003a.
57. See: Draft Bill, 2002: Article 31(4) and Walsh, 2003.
58. UN-HABITAT, 2002b: pp. 145-158.
59. For an examination of these three areas of land law in Kenya see: UN-HABITAT, 2002b: pp.145-158.
60. UN-HABITAT, 2002b: p.149.
61. UN-HABITAT, 2002b: p. 150.
62. UN-HABITAT, 2002b: pp. 150-151.
63. See for example: *Esiroyo v. Esiroyo*, 1972 E.A. 388 and *Obiero v. Opiyo*, 1972 E.A. 227. quoted in UN-HABITAT, 2002b: Chapter Five, Kenya.
64. UN-HABITAT, 2002b: p. 154.
65. A discussion of the cooperative housing sector in Kenya can be found in UNCHS and ICA, 2001b. See also UNCHS and ICA, 2001a.
66. Established through the *Housing Act*, Cap. 117.
67. Mboya, 2001.
68. NACHU, n.d.
69. Bodewes and Kwinga, 2003: p. 203.
70. Bodewes and Kwinga, 2003: p. 204.
71. NACHU, n.d. See Also: Brown, Tillock, Mule, and Anyango, 2003.
72. Human Rights Watch, 2003b: p. 37.
73. NACHU, n.d.
74. NACHU, n.d.
75. Bodewes and Kwinga, 2003: p. 209.
76. Bodewes and Kwinga, 2003: p. 209.
77. Agutu, 2003.
78. UN-HABITAT, 2004c: paragraph 1.
79. United Nations Office for the Coordination of Humanitarian Affairs, 2004.

IV.E. Mexico

IV.E.1. Background

Of Mexico's more than 97 million people, approximately 10 million belong to one of the country's more than 50 indigenous peoples. Before European colonization, these civilizations were nearly autonomous and had developed their own cultures over centuries. Among these peoples, there were dominant and subordinated social groups and communities. However, the Europeans who colonized the country assigned all of them to a general category of 'indigenous' with an inferior social status. This homogenization of their racial, cultural, linguistic, intellectual and religious differences meant that indigenous peoples were denied the possibility of self-development and evolution.¹

With Mexican independence in the early 1800s, indigenous peoples acquired liberties and rights on paper, but were also subject to laws and regulations that marginalized them with respect to the *mestizo* (mixed Spanish and indigenous blood), and white populations. In the decades that followed independence, the privileged classes produced the commercial crops, invested capital in agrarian land, and expanded the rural economic infrastructure. To make this possible indigenous territories were appropriated, and indigenous communities were displaced to the most inhospitable regions of the country, exacerbating the economic disparity. Conflicts in different regions of the country – which culminated in the Revolution in 1910 – also contributed to the appropriation of indigenous lands and the exploitation of indigenous labour. As a consequence, indigenous peoples had to work as labourers on lands that were once theirs. After the Revolution, land was redistributed, and while indigenous communities were granted lands, some argue that the grants were unfair and did not adequately compensate these communities for their loss.

This history has produced several paradoxes. While Mexicans today are proud of their national folklore, which owes much to indigenous culture, indigenous peoples often avoid self-identification as such because of the discrimination and disadvantage that is still associated with the 'indigenous' category. At the same time, the sense of ethnic belonging and indigenous identity inspire solidarity and cohesion within indigenous communities, and motivate those communities to defend their lands and their culture against external threats.

IV.E.2. Current housing and living conditions

From Mexico's northern mountain range through to its southern tropical forests, the remote communities in which many indigenous peoples live lack schools, clinics and access to services, information, jobs and education. While the Government has made some efforts to improve these conditions, malnutri-

tion, poor housing conditions, the devaluation of traditional medicine, alcoholism and inadequate health care persist.

This has resulted in high rates of poor health within the indigenous population, especially among women and children. For example, the infant mortality rate among indigenous children is almost double that of the national rate: 4.83 per cent as compared to 2.82 per cent.² In terms of education, the situation is considerably worse: 44.27 per cent of indigenous peoples are illiterate, compared with the national rate of 10.46 per cent. Naturally, high rates of illiteracy mean that job opportunities are poor. Seventy per cent of indigenous peoples work in the low-wage primary sectors, such as agriculture, cattle ranching, forestry, oil and mineral extraction and fishing, and only 7 per cent earn more than twice the minimum wage.^{3,a}

Similarly, the housing conditions of most of Mexico's indigenous peoples are considerably worse than national averages. For example, close to 60 per cent of dwelling units occupied by indigenous people do not have potable or piped water as compared with 15 per cent of the general population. Further, 35 per cent of indigenous households do not have electricity as compared with 6.5 per cent of the general population. Indigenous houses are often overcrowded (see box 7 below) and constructed from wood slat and mud – materials that provide residents with only the most basic protection from the elements.

Close to 85 per cent of the municipalities with the greatest housing deficit are concentrated in Oaxaca, Veracruz, Chiapas, Puebla, Guerrero, Yucatán and Michoacán – areas with a high concentration of indigenous people. While an average of 7.2 per cent of Mexicans speaks an indigenous language, the concentration of indigenous language-speaking people in six of these seven areas exceeds the national average by a range of 1.4 to 5.2 times.⁴ Indeed, a reported 86.9 per cent of the indigenous municipalities^b experience a high or very high deficit in housing, which is almost double the national deficit.⁵

Indigenous women experience intersecting disadvantage both as women and as indigenous people, which makes improving their living and housing conditions more difficult. Tradition, customs, lower wages for female workers, and discrimination – even inside their own communities, by their own people – have all resulted in indigenous women being denied access to land and house ownership. Traditionally, sons are more likely than daughters to inherit land and property, including housing. Indigenous women rarely qualify for mort-

a. The minimum wage in Mexico in 2004 is 43.29 pesos per day, approximately US \$ 4 (CONASAMI, 2004).

b. An indigenous municipality is one where at least 30 per cent of the population is the indigenous.

gages because they do not have permanent jobs. When they do have jobs, they do not earn enough to meet mortgage criteria. Moreover, often the property title and rent loans are put in the name of the male head of household only.⁶

IV.E.2.a. Forced eviction

Historic land distribution policies, and current commercial development projects such as logging, oil and other natural resource exploitation and the related sale of traditional lands, have resulted in the forced eviction of entire indigenous communities (for instance, the *Montes Azules* in Chiapas), the disruption of family and community life, environmental degradation, urban migration, increased poverty, and the establishment of new “illegal” settlements in areas that are environmentally uninhabitable (see also box 7).⁷

Box 7. Fulfilling the right to adequate housing: Mission to Mexico of the Special Rapporteur on adequate housing

The Special Rapporteur expressed concern with “*the precarious housing conditions of the poor and the indigenous people, in both urban and rural areas.*” In Chiapas, he visited an indigenous community outside of Tenejapa, in which 16 families live in two small wooden huts located on a hillside. These families were members of a community which had been displaced from its original land nine years ago, and had migrated to outside of Tuxtla, only to be evicted again several years later. The community currently does not have access to water or accessible roads. Without land available to cultivate, these families often go hungry, without food for one or even two days.

The Special Rapporteur also visited communities in Chiapas populated by people who have been displaced as a result of conflicts and paramilitary presence. Many of these people are suffering from emotional and psychological problems, in addition to inadequate housing and living conditions.

Source: UN Doc E/CN.4/2003/5/Add.3: p. 18.

IV.E.2.b. Indigenous people in the Mexican cities: urban settlement and exclusion

According to the 2002 census, there are close to 142,000 people in Mexico City that speak an indigenous language, representing approximately 2 per cent of the population. In Guadalajara, the indigenous population (again according to spoken language) is approximately 1 per cent, in Puebla 13 per cent, and in Monterey 0.5 per cent.^c Yet, despite the fact that indigenous peoples have

c. These figures likely under-represent the numbers of indigenous peoples living in these cities, as they do not reflect indigenous peoples who do not speak an indigenous language and therefore were not counted as indigenous in the census poll nor do they reflect temporary indigenous migrants.

always lived in both urban and rural regions of Mexico, the belief that they belong exclusively in the rural areas and countryside prevails. As a result, indigenous peoples are rarely welcomed in the cities and, once there, are pressured to assimilate and renounce their culture. Indeed, the strategy to associate indigenous peoples solely with rural Mexico – and thus ignore their needs within cities – has been used as a mechanism to maintain the current unequal power and economic structures.⁸

Within cities, many indigenous migrants face discrimination and adversity. Given their generally low level of education and poor Spanish language skills, it is difficult for them to navigate urban life. They frequently face discrimination. It has been reported that it is not uncommon for property owners to refuse to rent to them, for health clinics to refuse to serve them, and for employers to refuse to hire them. Their situation is one of marginalization and exclusion.⁹

The labour markets in some regions of Mexico, mainly urban and agro-commercial centres, require manual labour at low wages. As a result, many indigenous teenage girls are sent by their families to the cities in search of employment, so that they can send money home. They are often required to work double shifts in order to make ends meet, few know their rights, and those who do are too afraid to claim the social benefits to which they are entitled.¹⁰ They rarely have a formal contract and are not protected by federal labour laws, which put them at the mercy of their employer. In fact, the situation of indigenous women in Mexican cities is the same as that in most Latin American cities where

“Among the alternatives they have is domestic work, selling on the street, poorly paid services and begging. In some ways, this is the response to the [façade] that life in the city is superior, but also to the perception that they will earn more and have a better living.”¹¹

After being exposed to, or becoming victims of, violence and abuse, including sexual assault which often occurs in urban environments, indigenous women who return to their hometowns face further discrimination and often discover that they are no longer considered members of the community, and have lost their status and privileges as such.¹² In short, they are no longer accepted anywhere.

The availability of housing for indigenous people who migrate to the cities depends on whether their residency there is permanent or temporary, and on the type of work they can find. Domestic workers live in rooms that have most urban services; construction workers live in provisional cabins constructed on their work sites, in unhealthy conditions with no services other than water. Others live in shelters and ‘pension’ rooms with access to few services, or in hotel rooms. Those living permanently in the city sometimes

occupy multiple-dwelling buildings with shared services called *vecindades*. The occupants of a *vecindad* are usually from the same hometown. Families with more than 20 years' residence in the city also live in single-dwelling houses which they own.¹³ Indigenous people who originate from different regions of the country – for example, Michoacán or Oaxaca – establish themselves on the outskirts of the cities and support each other. In addition to the Catholic Church, there are several NGOs that try to address the needs of these urban indigenous 'neighbourhoods'.

IV.E.3. Laws, policies and programmes relevant to housing

As summarized in table 19, Mexico has ratified a number of international treaties, which oblige the Government to ensure indigenous peoples' rights to land, rights to be free from forced eviction, an adequate standard of living, including adequate housing, equality and non-discrimination. Furthermore, the Mexican Constitution and Civil Code protect women's and indigenous peoples' basic rights, although the extent of this protection and the

Table 19. Mexico: Ratification of relevant international treaties

Treaty	Date of ratification/ accession
ILO Convention No. 169	5 September 1990
ICESCR	23 June 1981
ICERD	22 March 1975
CEDAW	3 September 1981
ICCPR	23 June 1981

reforms to the laws themselves are still debated. Regardless, poverty, political conflicts, and ongoing social inequality prevent vulnerable groups (including indigenous peoples) from experiencing equal living conditions. Minority groups are inadequately represented in the decision-making process, the minimum wage does not meet its legal obligation to cover the necessities for a family, and many women are not treated equally nor are they entitled to act independently of the will of spouses or male relatives in accessing housing, credits and inheritance.

Because the State has historically excluded them from the national development process, indigenous peoples, including indigenous women, took it upon themselves to demand a better quality of life. Accelerating this process, the Zapatista National Liberation Army (EZNL), the majority of whose members are indigenous, enshrined these demands in a legal-political document which was the basis of indigenous lobbying efforts. These demands included a guarantee by the State of basic needs, including nutrition, health care, and housing services, and State support for efforts to involve indigenous women in economic, political, social and cultural development and decision-making.¹⁴ After many years of conflict, President Vicente Fox and the EZNL engaged in historic talks which culminated in a proposal for constitutional law reform to

better reflect and promote indigenous rights. Unfortunately, the Senate did not uphold the spirit and substance of the President's proposal and simply dictated constitutional reforms that failed to meet the expectations of the President or the EZNL. Had they been successful, these efforts might have created a much-needed consultative relationship among the Government, indigenous peoples, and the Mexican society at large. Instead, Mexico is left without an effective legal framework to protect the rights of the indigenous communities.¹⁵

In terms of gender equality and housing, the foundations for change have been laid, as women's capacity to acquire, administer and inherit property, including cultivable land, on equal terms with men is now recognized in law. Moreover, in terms of access to housing finance, the rules of INFONAVIT,¹⁶ one of the most important housing programmes in Mexico, were recently amended to afford equal rights and opportunities to both men and women. Furthermore, new rules were adopted in 1999 to give preferential treatment to female heads of household and younger workers. It has been reported that these new rules will extend to indigenous peoples and women,¹⁷ although information as to whether they have benefited from these laws as yet is not available.

After his visit to Mexico in 2002, the Special Rapporteur on adequate housing reported that there is currently a draft housing law under consultation. He notes, however, that it does not include explicit reference to international human rights instruments, and attendant State obligations, with regard to housing. Moreover:

"...it does not clearly establish policy and administrative procedures that recognize and protect the self-built housing which counts for more than 60 per cent of the housing in the country ... It may be necessary to develop other draft documents to complement the proposed law, including on security of tenure of housing and land, self-built housing, and measures against forced eviction and displacement."¹⁸

The Government has undertaken a number of other housing reforms that may assist Mexico's indigenous peoples. The present Government has declared housing a national priority and has appointed a commissioner to coordinate efforts to improve the housing sector. It has also implemented several housing finance programmes. Unfortunately, accessing these programmes remains difficult for indigenous people, as they require employment in the formal sector. The Government has also provided some housing for indigenous people. A full assessment of this housing from the perspectives of the indigenous peoples living there must be undertaken to determine its overall adequacy.

At present, the government is trying to encourage more building within the housing sector as a means of invigorating Mexico's economy. To that end,

it is promoting local projects and the use of local construction materials. In addition, it is implementing a land tenancy programme designed to regularize the land titles of squatter families and to provide basic infrastructure and services such as water and sanitation facilities, education and health care centres. Still, these projects face significant challenges that must be overcome to ensure their success. Moreover, they do not specifically target indigenous peoples. Nonetheless, it is anticipated that they will indeed assist some indigenous populations.

According to the Government, the 2002 Federal budget included the establishment of the Programme for the Development of Indigenous Peoples and Communities. US \$ 100 million was allocated for the programme to be implemented in indigenous regions in order to address “*the most pressing needs of indigenous peoples.*”¹⁹

The Special Rapporteur on adequate housing concludes from his mission to Mexico that:

*“Affordable rental housing is currently very underdeveloped ..., which leaves very few options for the poorer segment of society who cannot qualify for State housing finance programmes.”*²⁰

This conclusion is reflected in a recently published UN-HABITAT report,²¹ which provides recommendations for improving rental housing supply. Indeed, improved supply of rental housing, particularly in urban areas, would facilitate improvements in living conditions of indigenous people as well. In fact it may be even more important to indigenous peoples, at least to those that plan to remain in the urban areas only temporarily, with a view to returning to their homelands when economic and/or other conditions permit.

According to several studies – including that of the Special Rapporteur on adequate housing – there are two additional strategies to improving Mexico’s housing conditions, namely:

- regional planning aimed at accessing additional land that is suitable for housing; and
- “*assistance for upgrading, for which community saving or micro-credit schemes may be more appropriate and effective than formal housing finance schemes.*”²²

Notes

1. Carrasco and Nahmad, 2003a: paragraph 1.
2. World Bank, 2000.
3. Oficina para el Desarrollo de los Pueblos Indígenas, 2000.
4. INEGI, 2001.
5. Programa Nacional para el Desarrollo de los Pueblos Indígenas 2001-2006, 2002: paragraph 4.
6. Telephone conversations with Martha Sanchez, COMISIÓN ENLACE. Coordinadora Nacional de Mujeres Indígenas, 12 November 2003; and with Martha Alidla Ramírez Solorzano, Coordinadora de Planeación, Seguimiento y Evaluación. Instituto Jalisciense de las Mujeres, 18 November 2003. See also: Moreno and Pitarch, 2002: p. 8.
7. UN Doc E/CN.4/Sub.2/2000/CRP.1: p. 20.
8. Escalante, 2002: p. 3.
9. Telephone conversation with Martha Alidla Ramírez Solorzano, Coordinadora de Planeación, Seguimiento y Evaluación. Instituto Jalisciense de las Mujeres, 18 November 2003.
10. Carrasco and Nahmad, 2003b.
11. CEIMM, 2002: p. 11.
12. Telephone conversation with Martha Sanchez, COMISIÓN ENLACE. Coordinadora Nacional de Mujeres Indígenas, 12 November 2003.
13. Bravo, 2002: paragraph 31.
14. Mexican Federal Government and EZLN, 1996: point 6 on guaranteeing satisfaction of basic needs.
15. Zúñiga, 2002: p. 3.
16. National Housing Institute Fund for Workers, *Instituto del Fondo Nacional de la Vivienda*.
17. INFONAVIT, 2001: paragraph 3.
18. UN Doc E/CN.4/2003/5/Add.3: paragraph 11.
19. UN Doc E/C.19/2003/10: paragraph 8. Unfortunately more information about this programme was not available.
20. UN Doc E/CN.4/2003/5/Add.3: paragraph 9.
21. UN-HABITAT, 2003a.
22. UN Doc E/CN.4/2003/5/Add.3: p. 19.

IV.F. The Philippines

IV.F.1. Background

Indigenous peoples in the Philippines represent 15-20 per cent of the total population of 80 million and live in 50 of the 78 provinces.¹ The National Commission on Indigenous People (NCIP) estimates that 61 per cent of indigenous peoples live in Mindanao while one third reside in Luzon. The other 6 per cent live throughout the Visayan Islands.² By retreating to mountainous areas and forest, some Filipinos were able to retain their values, traditions and cultures despite colonization.³ The indigenous economy was traditionally one of subsistence, based on hunting and gathering, fishing, farming and settled agriculture. Property was, and continues to be, considered as communal amongst indigenous communities, with traditional leaders as custodians of the land. Indigenous culture, values, traditions and the economic system has come under increasing pressure as a result of colonial and neo-colonial rule.⁴

In the early 16th century, Spain conquered the Philippines and introduced the Regalian Doctrine, which allowed the Crown to make legal claims to land it acquired through conquest. Communal land ownership was not recognized. As a result, indigenous peoples were deemed illegal occupants of their own land. When the Philippines were ceded to the United States of America, at the end of the 19th century, the Government enacted several laws strengthening its control over the lands it had claimed.⁵ The *Public Land Act* of 1902 required all private land owners to register their lands in order to claim title. Indigenous communities did not do this, and their lands were appropriated by the Government. Subsequently, laws were passed which allowed private enterprises to log and mine the ancestral lands of indigenous peoples.⁶ According to the 1935 Constitution:

*“agricultural, timber and mineral lands of the public domain, waters and minerals, coal and petroleum and other natural resources of the Philippines belong to the State, and indigenous communities were progressively dispossessed of their lands”.*⁷

Despite the Philippines having been granted independence in 1946, indigenous lands continue to be subject to colonial interests, with the International Monetary Fund and the World Bank setting national development priorities and projects, many of which are based on the extraction of resources from indigenous lands.⁸ This is exacerbated by the 1995, Government enacted, *Mining Act*. This law has been critiqued as *“the total liberalization of the mining industry in the Philippines”*.⁹ Under this Act, up to 81,000 hectares of land can be granted by the Government to private corporations for large-scale mineral exploration. Land leases extend between 25-50 years. Incentives for foreign investment include: water and timber rights over exploration areas¹⁰ and 100 per cent profit remittance to mining companies. Mining companies are also given the right to

evict residents in areas of their mining operation. To date, there are now 138 mining applications, covering more than a total area of 500,000 hectares.¹¹ Corporations are responsible for carrying out Environmental Impact Assessments that demonstrate that their activities are environmentally and socially acceptable and safe.¹² However, these projects encourage the exploitation of natural resources by private corporations and ignore the direct relationship between indigenous people's livelihood and their lands.¹³

In some instances the tension between foreign corporations, the Filipino Government that protects the commercial interests of the corporations and indigenous communities – who are concerned to protect their lands and who have organized to protest particular development projects – has resulted in armed conflict.¹⁴ Human rights abuses against indigenous peoples often occur, including:

*“arbitrary detention, persecution, killings of community representatives, coercion, torture, demolition of houses, destruction of property, rape, and forced recruitment by the armed forces, the police or the so-called paramilitaries.”*¹⁵

IV.F.2. Current housing and living conditions

Indigenous people are among the poorest and most disadvantaged social groups in the Philippines, with much higher illiteracy and unemployment rates than the rest of the population.¹⁶ The income of indigenous peoples is below national averages. For example, in the Caraga region, the average income of indigenous peoples was 42 per cent lower than the national average.¹⁷ In the Cordillera region, where many indigenous peoples live, maternal care, and access to water and basic sanitation facilities are a significant problem.¹⁸ The *Agta* people live in dire poverty and poor health. The infant death rate for the *Agta* is 34 per cent, whereas for the general population in the Philippines it is 3 per cent. Life expectancy at birth for the general population in the Philippines is 66 years, whereas among the *Agta* it is only 21.5 years.¹⁹

Because many disadvantaged groups in the Philippines, including indigenous peoples, do not always own property, they are required to rely on access to and use of common resources.²⁰ In turn, indigenous peoples' poverty is often synonymous with landlessness. In the south of Benguet in the Cordillera region, for example, the terms used for 'the poor' and 'poverty' are translated to mean, "*one who has no land to till and lacks the resources to be able to work*".²¹ Similarly, for the *Kankanaey* of Mountain Province a person is considered 'poor' if they have no irrigated rice field of their own, work on land owned by someone else, or live with relatives because they do not have enough food and money to live independently.²²

Indigenous land and housing rights are most informed and affected by economic development projects which take place on their ancestral lands, such as, logging, mining, multi-purpose dams, and commercial plantation projects.²³ Many of these projects have been facilitated by the *Mining Act*. While some indigenous communities have taken advantage of new opportunities provided by these projects, others have suffered serious negative impacts.²⁴

Many cases have been reported where development projects have resulted in the dispossession of indigenous communities of their lands, severe environmental degradation including pollution and the deterioration of fresh water supply, or the destruction of hunting grounds and herbal medicine areas. Other noted effects include the militarization of areas and intimidation of community members by corporate security guards, and disregard and disruption of indigenous lifestyles and culture. As a result, the means of livelihood for many indigenous communities has been severely curtailed and in some instances, completely eliminated. These effects are particularly hard on women and children, especially indigenous girls.²⁵

IV.F.2.a. Forced eviction

One of the most devastating consequences of economic development projects, with respect to housing specifically, is the forced eviction of indigenous peoples from their homes and agricultural lands. For example, it was recently reported that some 67 indigenous families in Sitio Datal Bonlangan, in Mindanao, were evicted from their ancestral homes and lands by a private company. This company took over the land under a Government-approved logging contract. Though some of the evicted families have returned to their village, the community is still seeking a resolution to the dispute that will include rights to their lands.²⁶ Among other examples, the United Nations' Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people also mentions the eviction of a number of indigenous families from their homes and lands in the Caraga region. Their lands were destroyed as a result of open-pit mining operations. By the time the Special Rapporteur made his report, 30 indigenous families were living 'rough' under a concrete bridge.²⁷ Another example is outlined in box 8.

Indigenous Filipino women who work in the agricultural sector are particularly affected by development projects such as mining and by resultant displacement from their homes and lands. Specifically, it means that women's workload is increased, as they:

- are forced to walk long distances to access potable water which they then have to carry home;
- have to buy commercial fuel, which requires money; and

- remain responsible for the health and welfare of other family members.²⁸

Mining projects force women from their subsistence agricultural work, but do not offer new work opportunities. If indigenous families remain on their lands that are being mined, they are often required to live in intolerable conditions. This has been reported with particular reference to housing for indigenous peoples on mining sites such as those in Lepanto, Philex, and Benguet Provinces. Families are often required to inhabit just one room, which increases tension amongst family members, and eliminates any privacy.²⁹ Women bear the brunt of these conditions. According to the Cordillera Women's Education and Resource Center, family breakdowns and domestic violence are increasing in mining camps, due (at least in part) to living conditions on camp sites.³⁰

In the Cordillera region, it has also been reported that militarization has resulted in gender specific human rights violations against women. Violations have included: rape, sexual harassment, forcing girls to serve as 'comfort women' in military camps, and compulsory prostitution:

"This has caused fear, coercion, intimidation, and humiliation of indigenous communities".³¹

Box 8. Forced eviction of indigenous peoples in Lumintao, Mindanao

In the middle of April 2003, 115 *Manobo*, indigenous families living in the Lumintao Sub-district, in the Municipality of Quezon, Bukidnon Province, the island of Mindanao were forcibly evicted from their homes by police forces. This eviction was ostensibly carried out to secure the land for commercial interests. The families reportedly did not receive prior notification of this eviction. The police took no action to stop the destruction of the homes and left the area while the security forces carried out the demolition and burning.

58 families reportedly found shelter with relatives in Lumintao, 57 families were transferred to the Lumintao Elementary School. Only 30 *shanties* were built to accommodate these families, which meant that many were compelled to live in extremely overcrowded conditions, sharing a *shanty* with up to three other families. Reports indicate that the families did not have enough food and were subsisting mainly on porridge. The Lumintao Sub-district officials eventually resettled the 57 families at the end of June 2003 to a new site located less than one mile from where the police evicted them. The uncertain legal status of that resettlement site leaves the 57 families without secure tenure. The water supply in the new location is reportedly contaminated and not safe for drinking.

To date, none of the 115 families has received adequate compensation for the loss of their homes and possessions and no independent inquiry has been carried out into the forced evictions and demolition of houses.

Source: Asian Human Rights Commission, 2003.

Indigenous women and men in the Philippines have repeatedly tried to resist or oppose development projects that they believe will have harmful effects on their ancestral lands and thus, on their livelihoods. They consistently reject their exclusion from development plans and demand that they be allowed to determine their own economic and social development priorities and to participate fully in decision making in any areas that will affect their rights and lives.³²

IV.F.2.b. Urban settlement

As indigenous peoples are evicted from their homes and agricultural lands to accommodate development projects, such as mining and logging projects, many migrate to urban areas in search of employment. Migration to the city as a result of land conversions of agricultural lands has increased by 10 per cent according to research statistics in 2000.³³ For instance, more than half of Baguio City’s total population is comprised of indigenous peoples from the Cordillera villages. One of the main reasons indigenous farmers leave their agricultural settings is because they lack means of livelihood in rural areas, they have no access to basic social services, tribal conflicts or war and militarization.³⁴

In the urban setting, indigenous peoples displaced from their traditional territories live in dismal conditions, because housing is often expensive, social services are inaccessible or inadequate and employment is difficult to secure, especially for women and those with limited formal education. Indigenous women are often excluded from employment because of lack of available jobs³⁵ as well as because of discriminatory attitudes towards indigenous peoples and women. As a result, many indigenous women are forced to rely on the informal economy to survive. To avoid abject poverty, many indigenous women have started to travel overseas to become caregivers and domestic workers, leaving behind their families and communities. It is estimated that more than 50,000 indigenous women are now working abroad, leaving behind their children and husbands.³⁶

IV.F.3. Laws, policies and programmes relevant to housing

Beyond having ratified the ICESCR, the ICERD, the CEDAW and ICCPR (see table 20), the Government of the Philippines has established the legal framework necessary for the realization of the right to adequate housing.

Table 20. The Philippines: Ratification of relevant international treaties

Treaty	Date of ratification
ILO Convention No. 169	--
ICESCR	3 January 1976
ICERD	4 January 1969
CEDAW	4 September 1981
ICCPR	23 January 1987

IV.F.3.a. The Constitution

The 1987 Constitution, for example, requires the State to undertake – in partnership with the private sector – an ongoing programme of land reform and, in urban areas, to provide decent and affordable housing with basic services and access to employment opportunities for the “*underprivileged and homeless*”.³⁷ The Constitution further requires the Government to undertake consultations with communities regarding resettlement options, if an eviction is to take place.^a

The Constitution also includes protections specifically for indigenous peoples, such as:³⁸

- Recognizes and promotes “*the rights of indigenous cultural communities within the framework of national unity and development.*”
- Protects the “*rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being*”.
- Recognizes, respects and protects the “*rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions.*”

Women’s rights are also protected, as the Constitution affirms that “*The state recognizes the role of women in nation-building, and shall ensure the fundamental equality of women and men*”.³⁹

IV.F.3.b. Other legislation

In 1997, the Government enacted the *Indigenous Peoples Rights Act (IPRA)* of 1997. The IPRA recognizes the right to land, self-determination and cultural integrity of indigenous peoples and the right of indigenous people to “*free and prior informed consent*” before the commencement of any project on their lands. The Government, however, maintains control as it is responsible for defining the procedures for consultation, establishing the implementation mechanisms and arbitrating discussions and disputes.⁴⁰

In 2000, the National Commission on Indigenous Peoples (NCIP) – a Government institution – was established to undertake these responsibilities. Some indigenous communities regard this as a first step toward the recognition

a. Constitution of the Republic of the Philippines, 1987: Art. XIII, Sec. 10, Social Justice and Human Rights. Urban Land Reform and Housing, which states: “*Urban or rural poor dwellers shall not be evicted nor their dwellings demolished, except in accordance with law and in a just and humane manner. No resettlement of urban and rural dwellers shall be undertaken without adequate consultation with them and the communities where they are to be relocated.*”

of their rights to their ancestral lands. However, to date, applications to obtain certificates for ancestral land claims have not been successful where such claims compete with mining and logging concessions.⁴¹ According to the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people:

“the NCIP has not yet been able to live up to the expectations and aspirations of indigenous peoples regarding the full implementation of IPRA.”⁴²

At the same time, it is believed that the NCIP could play a significant role in the protection and promotion of indigenous rights as contained in the IPRA.⁴³

The *Urban Development and Housing Act* (UDHA) (1992), which attempts to facilitate the implementation of the constitutional guarantee to housing, mandates the development of a framework that will serve as the country’s urban policy, with housing as a major concern.⁴⁴ The UDHA also outlines the steps required for the implementation of a nation-wide socialized housing program,⁴⁵ and it discourages evictions and demolitions. When evictions are unavoidable, it requires, among other things, a 30-day notice period, adequate consultation with the duly designated representatives of the families affected and the receiving communities, adequate relocation (whether permanent or temporary), and the presence of Government officials during the entire exercise.^{46,b}

IV.F.3.c. Housing policy

The UDHA mandates the formulation of an Urban Development and Housing Framework in consultation with all concerned sectors and groups. This is undertaken by the Housing and Urban Development Coordinating Council (HUDCC). The HUDCC is responsible for coordinating the participation of key Government housing agencies and monitors and evaluates their accomplishments. Under the direction of the HUDCC a number of entities are responsible for improving access to and adequacy of housing for low income Filipinos. For example:

- the National Housing Authority is responsible for the production of housing for the lowest 30 per cent income earners through slum upgrading, squatter relocation, and the construction of core housing needs;⁴⁷
- the National Home Mortgage Finance Corporation is responsible for establishing a viable home mortgage market; and

b. Unfortunately, information as to whether the UDHA has been used to protect the housing rights of indigenous peoples in urban and rural settings is not available.

- the Housing and Land Use Regulatory Board is responsible for encouraging greater private sector participation in low cost housing.

Beyond this:

- the Presidential Commission for the Urban Poor was created in 1986 to coordinate Government and NGO programs for the urban poor, including housing and land related programs;⁴⁸ and
- the Community Mortgage Program is a Government mortgage financing

Box 9. Indigenous poverty reduction strategy

The Kalinga Mission for Indigenous Children and Youth Development, Inc., (KMICYDI) in the Philippines, recently won an Equator Initiative Prize, honouring outstanding community projects that effectively reduce poverty through the conservation and sustainable use of biodiversity.

In the early 1980s the Kalinga were facing extreme poverty, the acculturation of their traditional knowledge and belief systems, and the destruction of mountain biodiversity due to the development projects being undertaken in their region at that time. Women and children were most affected by these conditions. In response to this, the KMICYDI developed and implemented the Sustainable Indigenous Peoples Agricultural Technology (SIPAT) project to ensure food security and to improve the living conditions of the Kalinga indigenous peoples, while protecting and maintaining the biodiversity of the mountains, where they reside.

The project objectives and strategies were threefold:

- to advocate for the termination of environmentally destructive projects;
- to advocate for the adoption of the *Indigenous Peoples Rights Act*; and
- to assist, organize and empower indigenous peoples to use their own technologies, knowledge bases and experience to produce food for themselves.

The project utilized 'AMUNG', an indigenous peoples method of management and decision making, which focused on the active involvement and participation of the indigenous community, particularly women and the youth. AMUNG also promotes a strong sense of ownership amongst those associated with the program.

The initiative produced real results. It reduced poverty. Between 1990 and 1996 a total of 7 indigenous communities with 1,071 households were assisted and increased their production by 27 per cent and ensured their food security. Between 1997 and 2002, three of the poorest indigenous communities were assisted, benefiting 324 households, increasing their household production by 36 per cent. The KMICYDI firmly believes that women and the youth have benefited most from this project. The initiative was also deemed a success because food production increased, while biodiversity was conserved.

Note: The Equator Initiative is a partnership that brings together the United Nations, governments, civil society, business and local groups to build the capacity and raise the profile of sustainable communities in developing countries within the equatorial belt.

Source: *Equator Initiative n.d.b.*

program which aims to help disadvantaged and homeless people living in depressed areas to own either the lots they occupy or lots they want to relocate to, and eventually to improve their communities.⁴⁹

These efforts have not proved particularly effective in addressing the housing needs of the poor in the Philippines⁵⁰ and there is little information as to whether indigenous peoples have benefited at all. That being said, there have been a few projects, developed and implemented predominantly by indigenous NGOs, which have been successful in addressing some of the needs of indigenous peoples.

Box 10. Loans for housing

Although the following ‘good practice’ was not targeted at indigenous peoples, it is included because it has assisted thousands of homeless and disadvantaged households in improving their housing conditions and it provides a model that might be replicated in indigenous communities. In particular, it demonstrates the effectiveness of actively including communities in developing and implementing solutions to housing crises.

The Philippine Undertaking for Social Housing (PUSH) is a non-profit, finance institution that promotes adequate housing for low-income families in the Philippines. It does this, primarily, by improving access to housing loans from Government and other financing institutions. It was created in July 1998 by seven NGOs with revolving funds and aims to deliver housing services in a cost-efficient manner. PUSH provides short-term loans to the social housing projects of NGOs, churches and cooperatives, which they can then use to leverage larger loans from government and other institutions.

The borrowers are poor homeless urban communities who qualify for Government financing. NGO borrowers are those with a track record in housing delivery. PUSH Allocation Centres together with an independent Credit Committee considers loan applications. Upon notice of approval, the Central Management Office releases the approved loan amount.

PUSH has met with considerable success. As of 31 December 2001, it had helped over 7,000 families improve their housing conditions, and had assisted in accessing Government housing assistance worth approximately US \$ 9.5 million.

The availability of interim financing from the PUSH fund facilitated the creation of new community organizations among the underprivileged homeless families and has also empowered them socially and politically.

In conclusion, the legislative framework and the policies and programs in place in the Philippines are a solid foundation upon which to base housing rights for indigenous women and men. Implementing this framework in a meaningful way – i.e. by including the participation of indigenous peoples and their organizations – remains the substantial challenge.

Source: The information about this project is excerpted and modified from: Edmilao-Quizon, 2002: pp. 19-21.

Notes

1. UN Doc E/CN.4/2003/90: paragraph 4.
2. UN Doc E/CN.4/2003/90. See also: IWGIA, 2003: p. 233.
3. Gobrin and Andin, 2003: p. 2. See also: UN Doc E/CN.4/2003/90: p. 2.
4. Gobrin and Andin, 2003: p. 2.
5. Gobrin and Andin, 2003: p. 3.
6. Gobrin and Andin, 2003: p. 2.
7. UN Doc E/CN.4/2003/90: paragraph 9.
8. Gobrin and Andin, 2003: p. 2.
9. Gobrin and Andin, 2003: p. 3.
10. Gobrin and Andin, 2003: p. 3.
11. Carling, 2001: paragraph 44.
12. Gobrin and Andin, 2003: p. 4.
13. Kellett, 2003: paragraph 1.
14. Gobrin and Andin, 2003: p. 3.
15. See for example, UN Doc E/CN.4/2003/90: p. 2.
16. ILO, n.d.b.
17. UN Doc E/CN.4/2003/90: paragraph 40.
18. UN Doc E/CN.4/2003/90: paragraph 41.
19. Early and Headland, 1998.
20. Voluntary Services Overseas, 2003: p. 1.
21. Rovillos and Morales, 2002: p. 26.
22. Rovillos and Morales, 2002.
23. UN Doc E/CN.4/2003/90: paragraph 31.
24. UN Doc E/CN.4/2003/90: paragraph 30; Sanchez, 2001: p. 1.
25. See for example, UN Doc E/CN.4/2003/90: paragraphs 32, 33, 35 and 63.
26. UN Doc E/CN.4/2003/90: paragraph 32.
27. UN Doc E/CN.4/2003/90: paragraph 35.
28. Carino, 2000: paragraph 20.
29. CHR, 2003c: paragraph 43.
30. CHR, 2003c: paragraph 43.
31. CHR, 2003c: paragraph 50.
32. See: Gobrin and Andin, 2003.
33. Task Force of the Detainees of the Philippines, and others, 2003: paragraph 23.
34. Cacho and Carling quoted in: UN Doc E/CN.4/2003/90: paragraph 37.
35. Cacho and Carling quoted in: UN Doc E/CN.4/2003/90: paragraph 37.
36. Carling, 2001: paragraph 52.
37. Constitution of the Republic of the Philippines, 1987: Article XIII, Section 9.
38. Constitution of the Republic of the Philippines, 1987: Article II, Sec. 22; Art. XII, Sec. 5; and Art. XIC, Sec. 17 respectively.
39. Constitution of the Republic of the Philippines, 1987: Art. II Sec. 14.
40. Gobrin and Andin, 2003: p. 3.
41. Gobrin and Andin, 2003: p. 3.
42. UN Doc E/CN.4/2003/90: paragraph 14.
43. UN Doc E/CN.4/2003/90: paragraph 14.

44. Mendoza, 2003: p. 65.
45. Sections 7-24, R.A. 7279.
46. Mendoza, 2003: p. 65. See Also: OHCHR, 1996.
47. Mendoza, 2003: p. 72.
48. Mendoza, 2003: p. 72.
49. Edmilao-Quizon, 2002: p. 19.
50. For an assessment of these programs and policies see: Jose Mendoza, 2003: p. 76.

IV.G. The Saami: Finland, Norway, the Russian Federation and Sweden

This case study is somewhat different from others that appear in this report because it focuses on a group of indigenous peoples – the Saami – living in Finland, Norway, the Russian Federation and Sweden. It is also different because the housing conditions of the Saami, at least in the Scandinavian countries, is comparable to those of the general population. As a result, the central issue confronting the Saami in Scandinavia pertains to the recognition of their land rights. This struggle is connected to housing in so far as recognition of land rights would allow Saami to live and build culturally appropriate housing on their own territories, should they wish to do so. It would also enhance the Saami's ability to engage in traditional income generating activities, which would decrease reliance on government subsidies and aid for housing and other social goods.

IV.G.1. Background

The Saami are indigenous peoples in Scandinavia and the Kola Peninsula. Although accurate data are not available, there are approximately 90,000 Saami dispersed over these four countries, with more than half living in Norway.

“Estimates indicate that 20,000 live in Sweden, 10,000 in Finland, about 50,000 in Norway and about 2,000 in the Russian Federation (Kola Peninsula). The figures are uncertain, and depend on the criteria used as the basis for calculation: Race, language, history, culture-geographic, business association, ethnicity or subjective discretion.”¹

The basis of their cultural development has been the sustainable use of natural resources within their territory. Many Saami rely on public land, which constitutes 90 per cent of their territory, for reindeer herding, fishing and hunting. The Saami also undertake other economic activities, such as small-scale agriculture, traditional handcraft making, and tourism. But while approximately 40 per cent of them continue to sustain themselves by traditional means,² an increasing number of Saami are leaving their rural setting to pursue employment in major cities.

The colonization of Saami territory, *Sápmi*, began in 1673, and many of their communities were relocated to new administrative regions between 1720 and 1729. When the political borders of the Scandinavian countries were formalized, Saami communities were further confined. The majority population attempted to assimilate them, rejecting the Saami's religion and way of life. It was not until the Universal Declaration of Human Rights was ratified in 1948, some 300 years after the deconstruction of their culture began, that the Saami

were able to undertake a new phase of individual and group re-empowerment.³ In fact, in Norway, the use of the Saami language was officially banned in schools until 1959.⁴

The Saami have formed an official Council that is recognized politically, and works with the governments of the Scandinavian countries and the Russian Federation. They also participate in the work of the World Council of Indigenous Peoples, the Nordic Council, the co-operation on the Euro-Arctic Region of Barents⁵ and the HRC.⁶

IV.G.2. Current housing and living conditions

For the Saami of Finland, Norway and Sweden, basic needs such as housing are generally being met. The governments of these three countries have long been committed to providing universal services to all citizens, and in recent decades, there has been a general improvement in the material living conditions of minority ethnic groups within these countries. Moreover, in general terms, Saami communities in the Scandinavian countries enjoy gender equality in social and economic realms.⁷

The housing conditions for most Saami in Finland, Norway and Sweden are at par with those of the general population. Saami homes are of the same structural quality and receive the same services (electricity, running water, sewage) as those of other Scandinavian citizens. The Ministry of Foreign Affairs in Finland asserts that:

“In recent years, Saami livelihoods, living and social conditions have approached those of the main population.”⁸

Similarly, Statistics Norway reports that:

“With some exceptions all demographic groups have access to a dwelling of a reasonable standard.”⁹

And, perhaps as a result, Statistics Norway also reports that housing policy is no longer a prominent concern in terms of addressing issues of equality for minority groups.¹⁰ A survey conducted by Swedish National Rural Development indicates that the Saami population living in the mountains are generally satisfied with their housing, despite the lack of modern facilities, though there is:

“a desire for improved conditions particularly within the area of communication, such as telecommunications, postal services and transport.”¹¹

In general, the Saami in Finland, Norway and Sweden do not face discrimination in accessing housing or with respect to housing conditions.

The primary issues for the Saami in the Scandinavian countries are the protection and development of their culture,¹² their inclusion in decision-

making regarding development projects that affect their traditional territories, and the legal and practical recognition of their land rights. Steps to address these issues are being taken. For example, the Government of Finland has attempted to address the question of land ownership in the Saami area. Its initiatives have included undertaking several studies, and proposing the formation of a separate advisory committee that would have included representatives of Saami people. While this proposal was not approved, the efforts to reach an agreement between the Saami and the Government set the stage for greater communication and cooperation between the Saami and the Government of Finland. Currently, another independent study of land use history since the 1700s is being conducted.¹³

The Saami in the Russian Federation are faced with much harsher living conditions than those of Scandinavia. Despite some measures taken by the Government, the quality of life of the Saami on the Kola Peninsula has worsened significantly in recent years.^a The Saami in this region have a declining birth rate, poor health (including psychological health), and an increasing mortality rate, with an average male life expectancy of just 40-42 years.¹⁴ And although the *Law of 2001 on Territories of Traditional Nature Use of Indigenous Numerically Small Peoples of the North, Siberia and the Far East*, does make provisions for the demarcation of indigenous territories and for the protection of indigenous rights, it has yet to be implemented.^b

The Russian Federation is the only country in which there is documented evidence of worsening housing conditions for Saami communities. Many Saami families and orphaned children live in overcrowded dwellings that lack basic services. In some areas, the living space per Saami does not exceed 6 square meters and the dwellings are falling into decay. In some instances, Saami live in dwellings so lacking in essential services that they can barely be characterized as homes, in others, the Saami have nowhere to live at all and are simply homeless.¹⁵

a. This may be related to the dissolution of communism and the introduction of a market economy, which has had particularly harsh impact on the social and economic welfare of many already disadvantaged groups such as women.

b. In its review of Russia in 2003 the CESCR expressed concern, “*about the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant. The Committee notes that the Law of 2001 On Territories of Traditional Nature Use of Indigenous Numerically Small Peoples of the North, Siberia and the Far East of the Russian Federation, which provides for the demarcation of indigenous territories and protection of indigenous land rights, has still not been implemented*” (UN Doc E/C.12/1/Add.94: paragraph 11).

A more in-depth understanding of Saami living conditions in all of these countries will be possible once the Survey of Living Conditions in the Arctic (SILCA) has been completed.^c Its results are certain to provide useful additional information about the housing conditions of the Saami, and insights into the Saami perspective on this issue.¹⁶

IV.G.2.a. Urban settlement

In Scandinavia and the Russian Federation, the Saami have become more urbanized. Because mining, the clear-cutting of forests and the construction of hydroelectric power plants are occupying much of their territory, many Saami people are compelled to pursue non-traditional careers and thus migrate to major cities such as Oslo and Stockholm.^d In fact, Oslo is the municipality in Norway with the largest Saami population:

“the large urban population of Saami people require specific interventions related to their situation as a minority in a large city.”¹⁷

This trend towards the cities has in turn accelerated the deterioration of the Saami culture and language.¹⁸ Under the communist regime of the former Soviet Union, the Saami people’s traditional means of production, including reindeer-herding, were collectivized, and traditional farms were shared between different ethnic groups. A Government program of forced centralization meant that many Saami and other indigenous peoples were relocated from their traditional villages, which were often destroyed to prevent their return. As a consequence of this relocation, indigenous social, cultural and economic structures were destroyed, and the Saami have become increasingly urbanized.¹⁹

IV.G.3. Laws, policies and programmes relevant to housing

The Nordic countries’ implementation of effective social programmes, welfare protections, and crisis intervention stands as a worthy example. Through the execution of programmes informed by law, well-considered policies, and international instruments, the governments of these countries have been able to effectively address homelessness and ensure adequate housing for much of the population. Moreover, they have taken proactive steps to prevent homelessness by removing obstacles that keep low low-income families from accessing and

c. This joint international project, which is currently in progress, is sponsored by the Sustainable Development Working Group of the Arctic Council, will provide a comparative study of the living conditions of the Inuit and Saami populations of the United States, Canada, Greenland, Norway, Sweden, Finland and the Kola Peninsula, and the indigenous people of Chukotka region in the Russian Federation.

d. Although no accurate data are available, it has been estimated that there are about 5,000 Saami living in Oslo, some 2,000 in Stockholm and some 4-500 in Helsinki.

Table 21. Finland, Norway, the Russian Federation and Sweden: Ratification of relevant international treaties

Treaty	Date of ratification			
	Finland	Norway	Russian Federation	Sweden
ILO Convention No. 169	--	19 June 1990	--	--
ICESCR	3 January 1976	3 January 1976	3 January 1976	3 January 1976
ICERD	13 August 1970	5 September 1970	6 March 1969	5 January 1972
CEDAW	4 October 1986	3 September 1981	3 September 1981	3 September 1981
ICCPR	23 March 1976	23 March 1976	23 March 1976	23 March 1976

maintaining adequate housing. These programmes and policies are equally available to Saami.

The Saami in Scandinavia have equal access to social housing subsidies and systems, including loans and tax relief, which provide them with opportunities to buy, rent or repair their homes. In response to reports of discrimination against minority groups within the housing sector, these governments' social housing policies are explicitly aimed at offering adequate housing for disadvantaged groups, including ethnic minorities. In addition, social housing programmes are holistic, offering services such as counselling, professional training, access to employment, and medical support. Although these programmes are not designed specifically to assist the Saami, many have reached Saami who are in need.

The Saami in the Russian Federation do not enjoy such benefits. Though there are housing laws, it appears that these laws are not being implemented and enforced by the Government.

As can be seen from table 21, all four countries have ratified the ICESCR, ICERD, CEDAW and ICCPR, while Norway has ratified ILO Convention 169 as well. In Finland:

“a Special Rapporteur was appointed in 1999 to clarify how obstacles to ratification of Convention No. 169 in Finland could be removed, and how the Saami could be guaranteed rights to their natural resources, taking into account existing international standards. In November 2000, the Finnish Ministry of Justice set up a special committee, to examine the question of Saami land rights, culture and traditional livelihoods. A similar reflection is taking place in Sweden.”²⁰

Additionally, in November 2002, the ministers responsible for Saami affairs in Finland, Sweden and Norway met with the presidents of the Saami parliaments in these countries and agreed upon the composition of the expert group that will be responsible for drafting the Nordic Saami Convention. The Convention will likely cover issues such as: the status of the Saami people, the definition of ‘Saami’, self-determination, cooperation between the Saami parliaments and the states, preservation of cultural heritage, health, education and Saami means of livelihood. The text will be based at least in part on international instruments by which the three countries are bound. The group began its work in 2003, and the process is expected to take three years.²¹

What follows is an overview of some of the central housing laws, policies and programs in each of the four countries.

IV.G.3.a. Norway

The Constitution of Norway provides a general protection of the rights of the Saami:

*“It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”*²²

The Constitution also includes a general protection of human rights:

*“It is the responsibility of the authorities of the State to respect and ensure human rights. Specific provisions for the implementation of treaties hereof shall be determined by law.”*²³

To this end, the ICESCR has been incorporated into Norwegian law, making the right to adequate housing, and the right to be free from discrimination with respect to housing part of the legal landscape in Norway. Though the Constitution does not incorporate a provision for equality between women and men, these rights are protected under the *Equal Status Act* (1979). This Act has the broad objective of:

*“promoting equality between the sexes within all sectors of society, with special emphasis on improving the situation of women.”*²⁴

In 1999 the Government also developed a ‘plan of action for human rights’ which includes over 300 measures that it intends to adopt to improve the protection of human rights. This includes several legislative initiatives, such as the incorporation into national law of four additional conventions – on the rights of children, the rights of women, the prevention of racial discrimination and the prevention of torture.²⁵

In July 2002 the Government issued a ‘plan of action against racism and ethnic discrimination’. The goal of the plan is to address racism and ethnic discrimination in all areas of economic and social life, with an emphasis on

working life.²⁶ The plan notes, specifically, the importance of combating discrimination against the Saami. In keeping with this plan, in 2003 new provisions under the *Housing Act* went into effect forbidding discrimination in the housing sector. The prohibition applies to discrimination on the basis of creed, colour and language abilities, national or ethnic origin, and sexual orientation.²⁷ The Minister in charge of local government and immigration also recently proposed a new broad-based law prohibiting discrimination on ethnic or religious grounds. The new law would extend to discrimination experienced in the housing market as well as in the work place and would go further than the statutory provisions prohibiting discrimination in the housing market.²⁸ These new laws are also in keeping with the recommendations of the CERD, which in 2000 expressed concern that persons seeking to rent or purchase apartments and houses are not adequately protected against racial discrimination.²⁹

The Government has also developed a plan of action for human rights which has included the opening of a Competence Centre of Indigenous Peoples' Rights in Kautokeino.³⁰ The purpose of the Centre is:

“to increase the general public’s knowledge of indigenous peoples’ rights in Norway. The Centre aims to create a professional network with other institutions dealing with indigenous issues, both in Norway and other countries. Other important tasks include documenting the rights of indigenous peoples and disseminating information to organizations, institutions, lawyers, schools, etc.”³¹

Within Government structures, issues related to housing and indigenous peoples are the responsibility of the Ministry of Local Government and Regional Development.³² The Department of Saami and Minority Affairs is one of six offices within this Ministry, and it is responsible for the development of policies to facilitate the growth of Saami culture, economic and social life.³³ The Housing and Building Department, whose primary responsibilities are housing policy and building legislation, is also part of this Ministry. Its role includes the creation of the legal instruments (such as planning act regulations and building codes) that regulate the rental sector. Public education and the ongoing review and implementation of the current legislation are also crucial activities undertaken by this Ministry. In addition, the Norwegian State Housing Bank provides loans and grants aimed at encouraging the construction of adequate, reasonably-priced housing and housing for people with special needs.³⁴

Though housing for the Saami and other minority groups in Norway are being addressed by the Government through legislation and policy, the issue of Saami control over its traditional homelands remains in dispute. Indeed, in 1997, the United Nations Working Group on Indigenous Populations reported

that the concept of *terra nullius* has continued to guide Norway's land rights policies. As a consequence:

*"the current Norwegian legislation does not acknowledge or grant any special land rights to the Saami people in Norway."*³⁵

For that reason, the Government has been advised to amend its legislation in order to comply with the requirements of ILO Convention No. 169.

Regardless, the Norwegian Government has stood its ground. In April 2003, it proposed new legislation, known as the *Finnmark Act*, aimed at regulating the right to land and natural resources in Finnmark County. The government rejected the 1997 Saami law proposal on the basis that the Saami are not entitled to land rights that are not afforded to non-indigenous Norwegians.

*"Sámis as a people should have the same rights as the non-Indigenous people, and ... this is enough to safeguard [their] future."*³⁶

In response, the Saami Council pointed out that:

*"The Finnmark Act contradicts the basic principles that indigenous land rights rest on under international law. [The Act] fails to recognize that the indigenous Saami people has particular rights to land and resources compared to the non-Saami population."*³⁷

In August 2003, the CERD expressed similar concern:

*"that the recently proposed Finnmark Act will significantly limit the control and decision-making powers of the Saami population over the right to own and use land and natural resources in Finnmark County."*³⁸

Regardless, State Secretary Anders J.H. Eira, insisted that:

"The fundamental principles of the majority proposal of the Saami Rights Committee are clearly accommodated in the Government's proposition".³⁹

Despite these positions, there have been some positive developments within the courts. In 2001, Norway's Supreme Court made two important decisions that recognized previously unacknowledged Saami land rights. In the *Selbu* case, the Court stated that the Saami are an "*indigenous people*," and that:

*"reindeer herders had grazing rights on private wilderness areas within the boundaries of the reindeer-grazing district."*⁴⁰

It should be noted that the *Svartskog* case represents:

"the first (and so far the only) judgment where a group of Saami collectively acquire the right of ownership to a wilderness area on the grounds of age-old use".⁴¹

IV.G.3.b. Sweden

The *Swedish Constitution Act* establishes public responsibility for:

*“The personal, economic and cultural welfare of the private person ... In particular, [the act states that] it shall be incumbent upon the public institutions to secure the right to work, housing and education, and to promote social care, social security, and a good living environment.”*⁴²

And through the country’s policy on gender equality, it aims to create a society in which women and men share the same rights and opportunities.⁴³ The *Swedish Rent Law* is the instrument that deals with landlord-tenant responsibilities. In addition, the Swedish Union of Tenants, founded in 1923, lobbies for policies to:

“ensure the right to good housing at an affordable and fair rent and to guarantee a security of tenure and provide a sense of community”.⁴⁴

Swedish housing policy dates back more than sixty years.⁴⁵ With reforms, new financing systems and simplification efforts that began in 1991, the country’s approach to housing policy is focused *“on giving everybody the chance of a good home, at a reasonable price.”*^{46,e} This policy extends equally to all, including the Saami.

The Saami in Sweden are less concerned with housing than with the recognition of their traditional lands. While the Government of Sweden acknowledges the Saami as indigenous people, unlike the Finnish and Norwegian constitutions, the Swedish Constitution does not provide any explicit guarantees or protection for the Saami and their culture and traditional livelihoods.⁴⁷ The land rights issue has been the subject of debates, proposed legislation, and challenges in the country’s Supreme Court. For instance, the Saami’s right to own and use public land was addressed during the *‘Taxed Mountains Case,’* which took 20 years to resolve. In its 1981 decision, the Supreme Court ruled that the Swedish state owns the mountains in dispute, but that the Saami have reindeer grazing and fishing rights. Moreover, the court stated that the Saami could acquire title to the land by using it for traditional economic activities, while prohibiting them from farming or living permanently on it.⁴⁸ Furthermore, the court acknowledged that its decision could set a precedent for other traditional Saami lands.⁴⁹

e. The Ministry of Finance (2004: p. 3) has stated: *“The social dimension of Sweden’s housing policy is based on the ambitions of integration, justice and equality. Sweden wants to prevent people being divided up into different groups on the basis of income and other social or economic factors. Our aim is to have functional dwellings and an even distribution of housing standards.”*

IV.G.3.c. Finland

In March 2000, a new Constitution of Finland entered into force.⁵⁰ The Constitution secures the right of Saami to maintain and develop their own culture, rights which are interpreted broadly to include traditional economic activities, such as reindeer husbandry.⁵¹ Section 19 of the Constitution codifies the right to housing. However, the wording of this provision renders it more a matter of policy than a justiciable right, stating that:

*“The public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing.”*⁵²

As a result, this provision of the Constitution is enacted through legislation, such as:

- the *Act on the Improvement of Housing Conditions* establishes priorities for public housing policy;
- the *Act on Housing Benefits* is aimed at ensuring that low income families can either rent or own housing that meets their needs, in terms of size;
- the *Arava Act* makes low interest loans available for the building of new houses; and
- the *Tenancy Contract Act* deals with apartment buildings and landlord-tenant contracts.

Presumably the Saami are able to benefit from these laws/programmes of general application regarding housing, though specific information of this nature was not available.

Section 6 of the Constitution Act is a broad non-discrimination clause, guaranteeing that *“everyone is equal before the law,”* and that:

“no one shall, without an acceptable reason, be treated differently from other persons on the grounds of sex, age, origin, language, religion, conviction, opinion, health, disability or any other reason that concerns his or her person,”

Further, the *Act* requires the promotion of sexual equality:

*“in social activities and in working life, particularly in the determination of pay and other terms of employment.”*⁵³

The way in which the Government has addressed the homelessness problem in Finland is indicative of its commitment to ensuring adequate housing for everyone. In the second half of the 1980s, close to 20,000 Finns were homeless. The problem was worst in the large cities, and particularly in the capital, Helsinki. In response, the Government announced its goal to eliminate homelessness and – along with local governments – committed to making 18,000 dwellings available for the homeless. By the end of 2002, the country’s

homeless population had been cut in half. In an ongoing effort to address the problem, the Government is currently implementing a nationwide homelessness scheme. The 'Programme for Reducing Homelessness' (2001-2005) includes such measures as improving subsidies for the production of rental housing, and increasing services and supported housing^f intended especially for groups with multiple social problems, including homelessness. The latest data show that in mid-November 2003 the number of homeless people in Finland had decreased to about 8,200. According to a Government official, this programme is of benefit to the Saami, though more specific information was unavailable.⁵⁴

Because of the environmental conditions in the traditional Saami territory in northern Finland, and the nomadic lifestyle of the reindeer herders, Finnish housing policy is not always appropriate for the Saami. For that reason, the country put in place a system of loans and grants, administered by the Ministry of Agriculture and Forestry, to build or upgrade housing that will support the livelihood in the Saami areas. Currently, under the *Act on Financing Reindeer Husbandry and Natural Means of Livelihood* (45/2000) loans of up to 10 per cent of the investment cost are available to build a residential unit in the Saami area. Thus, through the 'Livelihood Program', the Saami have been able to build their own homes on the land they had inherited. Some have moved and rent accommodation elsewhere, but they might choose to keep their houses too. There is also a grant system offering up to 40 per cent of housing upgrade costs to the *Skolts*,⁵⁵ one of the poorest communities among the Saami. As a result of these programmes, at present, most Saami own their own homes, and few rely on social housing. Indeed, in Lapland there is an excess of vacant, Government-subsidized rental housing.⁵⁶

Though the availability of adequate housing is not an issue for the Saami in Finland, there remain disputes regarding their land rights. Like Norway, Finland adheres to the *terra nullius* principle. Furthermore, current legislation grants to all Finns and citizens of other European Union member states the same rights to land and resources to which the Saami are entitled in the traditional homeland.⁵⁷ For this reason, like those in other Scandinavian countries, the territorial rights of Finland's Saami still require legal resolution. Meantime, however, the Finnish Constitution and the *Saami Act* have recognized a demarcated area, which more than half of Finland's Saami population inhabit and use, as their homeland. It is within this territory that the 1996 amendments to the Finnish Constitution, guaranteeing the right to cultural

f. Supported housing is housing that includes support services such as counselling, and health care services that can be accessed by tenants in a number of ways.

autonomy for the Saami people through the newly-constituted Saami Parliament, are acknowledged.^{58,g}

IV.G.3.d. The Russian Federation

Housing is a constitutional right for all Russian citizens, including the Saami. The basic principles enshrined in this right are set out in the *Law of the Russian Federation on Basic Principles of Federal Housing Policy* of 1992. This law also establishes the legal regulations for stakeholders involved in the housing sector. The federal housing policy of the Russian Federation aims to:

*“accomplish construction and rehabilitation of state, municipal and private housing stock; to create conditions for the attraction of non-budget sources of financing...to develop private property, to protect entrepreneurs’ and owners’ rights in the housing sector; and to promote competition in construction, repair and maintenance of the housing stock, manufacture of building materials, articles and goods to furnish houses.”*⁵⁹

With regard to evictions, the *Housing Code* of 1986 states that tenants may be evicted when necessary either for safety reasons, or due to the conversion of a building for non-residential use. The State is, however, required to provide alternate accommodation.

The State provides residential units for all its citizens, allocating twelve square metres of floor space per person. Everyone has the option of renting, constructing or purchasing housing at their own expense, with no space limit. For those who are not provided with housing, the State grants compensation, subsidies and privileges towards construction, maintenance, and repair of their homes.⁶⁰

g. Horn (2000: paragraph 10) reports: *“At the beginning of 1996 the new Saami Parliament ... was constituted through an Act of Parliament as a representative body for the Saami. It is the successor to the Saami Delegation ... established in 1973. Elections to the Saami Parliament are held every four years. [...] The Parliament decides how money set aside in the national budget for the benefit of Saami culture is to be distributed. Moreover, the Parliament may take initiatives, make propositions and present statements in matters concerning Saami languages, culture and the status of the Saami as an indigenous people. As these factors are interpreted in a broad sense, they cover such matters as mining claims, social planning, leasing state land and establishing nature reserves. In connection with the revision of the national electoral laws in 1989, the possibility was considered of guaranteeing the Saami a seat in the Finnish Parliament. The idea was rejected, but an obligation on the Government and Parliament to hear the Saami in all matters of special concern has been introduced into Finnish legislation.”*

In principle, the Constitution gives indigenous peoples, including the Saami, certain rights to land and natural resources within their own regions.^h The Government has also signed several international agreements with the intention of integrating the guarantees for indigenous peoples into the federal legislation. What is lacking, however, is a framework for moving forward the political and legal implementation measures that would give these rights greater practical value.⁶¹

Between 1999 and 2001, three lawsⁱ were passed that move the country towards legal recognition of socio-economic and cultural development rights. These laws allow indigenous peoples to protect their ancestral habitats, ways of life, livelihoods, and crafts.⁶² However:

“it is clear that the Saami people in Russia today de facto do not hold title to their traditional land and water, and their right to use the land and its resources is also denied. Even basic subsistence use has now been curtailed dramatically.”⁶³

Thus, while the Russian Federation has an adequate legal framework regarding housing rights, the implementation of these laws through the development of policies and programmes, and the allocation of adequate resources, remain major obstacles to the enjoyment of the right to housing for the Saami. At the 2004 session of the Permanent Forum on Indigenous Issues, the Government reported that they have designed a programme for economic and social development for indigenous peoples. The goal of these is to create conditions for sustainable development of traditions industries, and to enhance spiritual, cultural and educational development to increase education levels and employment opportunities for indigenous peoples.⁶⁴

h. Constitution of The Russian Federation, 1993: Article 69, states that: *“The Russian Federation shall guarantee rights of indigenous minorities in conformity with the generally recognised principles and rules of international law and the international treaties of the Russian Federation.”*

i. *The Indigenous Peoples of the Russian Federation (Guarantees of Rights) Act* of 30 April 1999; *The Communities of Indigenous Peoples of the North, Siberia and the Russian Far East (General Principles of Organization) Act* of 20 July 2000 and *The Indigenous Peoples of the North, Siberia and the Russian Far East (Areas Traditionally Exploited) Act* of 11 May 2001.

Notes

1. Ándde, 2002: p. 2.
2. Virtual Finland, 2000: paragraphs 17 and 18.
3. Nystø, 2003: point 9.
4. Sámediggi – Sametinget, 2002.
5. Burmeister Hicks, 2000: p. 6.
6. Virtual Finland, 2000: paragraph 33.
7. Telephone conversations, with Raija Hynynen, Ministry of the Environment, Finland, on 5 February 2004; and with Katarina Hällgren, Chief Editor of ‘Samefolket’ (“the Saami People”, a Saami magazine), Sweden, on 9 December 2003.
8. Virtual Finland, 2000: paragraph 5.
9. Andersen, 2001: p. 143.
10. Andersen, 2001: p. 143.
11. Elg, 2002: p. 1.
12. Smith, 1995: paragraph 3.
13. Raija Hynynen, Ministry of the Environment, Finland, E-mail correspondence, 30 December 2003.
14. Afanasjeva, 2002.
15. UN Doc E/C.12/1/Add.94.
16. For further information, including the questionnaire, progress reports and methodology see: SLICA, n.d.
17. Pedersen, 2000 (unofficial translation). Steinar Pedersen was the then State Secretary (Statssekretær) in the Norwegian Ministry of Local Government and Regional Development.
18. Raija Hynynen, Ministry of the Environment, Finland, Email correspondence, 30 December 2003.
19. Working Group on Indigenous Populations, 1997: paragraph 26.
20. ILO, n.d.c.
21. UN Doc E/C.19/2004/4/Add.4: paragraphs 22-26.
22. Constitution of the Kingdom of Norway, 1814: Article 110a.
23. Constitution of the Kingdom of Norway, 1814: Article 110c.
24. Bekkelund, 1996: paragraph 15.
25. Human Rights Internet, 2001: paragraph 1.
26. Lismoen, 2002: paragraph 1.
27. Ministry of Local Government and Regional Development, 2003a.
28. Aftenposten News from Norway, 5 January 2004.
29. UN Doc CERD/C/304/Add.88: paragraph 15.
30. UN Doc E/C.19/2004/4/Add.4: paragraph 6.
31. UN Doc E/C.19/2004/4/Add.4: paragraph 7.
32. The web pages for this Ministry is available at <<http://odin.dep.no/krd/engelsk/>>.
33. Ministry of Local Government and Regional Development, 2004a.
34. Ministry of Local Government and Regional Development, 2004b.
35. Working Group on Indigenous Populations, 1997: paragraph 18.
36. Sámediggi – Sametinget, 2003: paragraph 1.

37. Saami Council, 2003: point 2.
38. UN Doc CERD/C/63/CO/8: paragraph 18.
39. Anders, 2003: paragraph 6.
40. Nystø, 2003: point 54. See also: UN Doc E/C.19/2004/4/Add.4: paragraphs 19-21.
41. Nystø, 2003: point 55.
42. Swedish Parliament, 2000: point 4.1.7.
43. Ministry of Industry, Employment and Communications, 2001: p. 41.
44. The Swedish Union of Tenants, 2003: p. 5.
45. Ministry of Finance, 2004: p. 4.
46. Swedish Institute, quoted in Martin, 2003: paragraph 18.
47. Working Group on Indigenous Populations, 1997: paragraph 33.
48. Working Group on Indigenous Populations, 1997: paragraphs 37-38.
49. IGWIA, 2001: Chapter 4.
50. Constitution of Finland, Act No. 731 of 1999.
51. UN Doc E/C.19/2004/4/Add.4: paragraph 3.
52. Scheinin, 2003: p. 215; Constitution of Finland, Chapter 2, Section 19 (4).
53. Constitution of Finland, 1999: Chapter 2, Section 6.
54. Raija Hynynen, Ministry of the Environment, Finland, Email correspondence, 28 January and 27 May 2004.
55. Raija Hynynen, Ministry of the Environment, Finland, 2004 telephone conversation, 05 February 2004.
56. This paragraph is based on telephone conversation on 5 February 2004, and Email correspondence, 27 May 2004 with Raija Hynynen, Ministry of the Environment, Finland.
57. Working Group on Indigenous Populations, 1997: paragraph 15.
58. Working Group on Indigenous Populations, 1997: paragraph 13.
59. UN-HABITAT, 2002a: p. 105.
60. UN-HABITAT, 2002a: p. 105.
61. Working Group on Indigenous Populations, 1997: paragraph 32.
62. Khmeleva and Todyshev, 2003: p. 2.
63. Working Group on Indigenous Populations, 1997: paragraph 30.
64. UN Doc E/C.19/2004/4/Add.3. Unfortunately, further information on this programme was unavailable when writing this report.

V. Conclusions

This research indicates that while indigenous peoples and communities across the world are culturally quite distinct, their housing conditions and experiences are very similar.

As illustrated in the case studies, indigenous peoples living within the borders of one country are not always homogenous. Each ethnic group and community has specific characteristics and has a particular relationship with the government and the mainstream population. Moreover, each indigenous community has distinct cultural expressions and approaches to their natural environment.

Each of the indigenous peoples covered in this report continue to struggle with the effects of processes such as colonialism, nationalism and/or privatization. In each instance, the dominant culture used some amount of force to conquer indigenous peoples, and then proceeded to homogenize them and/or compel them to assimilate into the dominant culture. Thus, as a result, indigenous peoples' lives were fundamentally altered and their very existence and identity threatened.

One of the implications of colonialism and nationalization – as exposed in each of the case studies – is the denial of self-determination and the exclusion of indigenous people from decision-making structures and processes. With respect to housing, this has meant that indigenous people have not been able to access and control the resources they need to develop and manage their own housing. At the same time, indigenous peoples and their communities have not participated in a meaningful way in the development and implementation of housing policies and programmes. They have also been largely excluded from participating in discussions or negotiations regarding development projects and other income generating activities, such as mining, on their lands.

Indigenous peoples are subject to discrimination and inequality in almost all aspects of housing, including: laws and policies which have discriminatory effects; discriminatory allocation of resources for housing, including credit and loans; and discriminatory practices of private landlords in the rental market (which often prevents indigenous peoples from renting even the worst accommodation).

Policies and programmes related to housing generally discriminate against indigenous peoples directly or have discriminatory effects. These inadequate and discriminatory conditions prevail even in countries where international human rights treaties have been ratified and where there are domestic laws and mechanisms aimed at promoting equality and protection against discrimination in housing, and/or legislation recognizing land title rights for indigenous

peoples. Simply put, indigenous peoples' human rights often seem to fall on the wayside in the face of economic development interests. Indigenous women experience gender-based discrimination with respect to a number of human rights, directly or indirectly affecting their possibility to enjoy the right to adequate housing.

Drawing on the case studies, and with this general analysis as point of departure, this section provides an overview of some of the most prominent findings in the following areas: housing and living conditions; housing laws and policies; and housing programmes and projects.

V.A. Current housing and other relevant living conditions

With the exception of the Saami in Scandinavia, indigenous communities in each of the case studies have a far inferior standard of living compared to the rest of the population. Poverty is one of the factors that most defines the lives of indigenous peoples in almost every region of the world. The higher incidences of inadequate housing and homelessness among indigenous peoples are clear manifestations of their relative poverty.

A number of the case studies reveal that indigenous poverty and disadvantage and discrimination with respect to the right to adequate housing is closely interconnected with the dispossession of indigenous peoples from their lands. In many instances, land dispossession^a forces indigenous peoples to leave their lands. This impacts on indigenous peoples in several ways. It leaves them with no means to sustain themselves and gain a livelihood, and as a result they often cannot build or create housing for themselves. As a result of both a loss of livelihood and absence of adequate housing, indigenous women and men are compelled to migrate, often to cities and towns in search of both.

The case studies show that indigenous peoples generally do not enjoy adequate housing as defined by CESCR's General Comment No. 4, discussed in section III.A.2.a of this report for the following reasons:

- **Security of tenure:** Indigenous families and communities in different regions of the world lack security of tenure for a number of reasons, such as the fact that their land can be expropriated by the State for the exploitation of resources; they can be forcibly displaced by the State to make way for development projects; custom and tradition can be used by private individuals to dispossess a widow or divorced woman of her home and lands; and that sufficient measures are rarely taken against racist practices by landlords and other actors.

a. Whether as a result of initial colonization processes, changes to land tenure schemes, or forced eviction for private development projects or the exploitation of natural resources.

- **Affordability:** Housing in cities, where land is scarce, is becoming increasingly expensive, which makes owning or even renting prohibitive, especially for indigenous peoples who tend to be amongst the poorest in almost every society. Unless social housing is available, as in the Scandinavian countries, indigenous peoples have no choice but to either live in overpriced rental housing – from which they may be evicted for non-payment of rent – or to live in slums, informal settlements or on the streets.
- **Habitability:** Many of the studies revealed that indigenous peoples often live in overcrowded conditions. Overcrowded housing tends to accelerate the deterioration of dwellings and increases the risk of the transmission of diseases and the promulgation of domestic violence and other abuses and violations. The case studies also reveal that indigenous peoples often live in dwellings that do not protect them from the natural elements, and that there is a close link between poor housing conditions and ill health.
- **Availability of services:** Many indigenous households lack basic services such as drinking water and electricity. The case studies reveal that this is true regardless of the level of development of the country.
- **Accessibility:** Adequate housing is not always accessible to indigenous peoples, especially in urban areas, as a result of the discriminatory attitudes of housing providers, which creates barriers in the rental housing market. Indigenous women encounter further barriers in terms of housing access – as a result of gender-based discrimination in laws, customs and traditions – which prevent indigenous women from owning, renting and/or inheriting land, property and housing, particularly upon marriage dissolution or upon the death of a woman's spouse.
- **Location:** Many indigenous peoples live in remote locations where essential services such as health clinics/hospitals and schools are not available.
- **Cultural adequacy:** Many indigenous peoples are currently living in housing that does not meet their cultural needs. For example, in Australia, many indigenous people live in social housing that cannot accommodate their kinship ties; and many indigenous peoples in different regions have to give up traditional and culturally specific housing when they migrate to cities.

In addition to the above, indigenous women, whether in urban or rural areas, are faced with a number of gender-specific obstacles to the full enjoyment of their right to adequate housing. Violence, particularly domestic violence, can be identified as one of the most serious and pressing obstacles. Poor

and inadequate housing conditions, characterized by overcrowding, lack of privacy, lack of sanitation and basic services exacerbate women's vulnerability to domestic violence. As shown, indigenous peoples are often relegated to intolerable living conditions, such as mining camps or growing urban slums, where women are experiencing increasing levels of domestic violence. Another phenomenon is the fact that indigenous women are unable to acquire housing independently from men. In some circumstances, society alienates women who live alone, be they divorcees, widows, single women, or married women who are separated from their husband. Additionally, often due to customary law, traditions and culture, women do not have the opportunity or possibility to own, acquire, or inherit property. Testimonies indicate that indigenous women are often compelled to remain in abusive relationships and endure domestic violence, due to lack of housing alternatives and financial and moral support.

The case studies reveal that extreme poverty, the deterioration and dispossession of lands, forced evictions, employment prospects, and the centralization of services in cities, combined with the general lure of 'city life', is resulting in many indigenous people migrating to cities and towns. In the cities, indigenous people experience extreme poverty, rampant discrimination and a loss of spiritual, community and family ties as well as a loss of indigenous culture and values. Their housing conditions are often very poor: with home-ownership prohibitively expensive. Many, therefore, live in informal settlements and slums, while others are left homeless.

Forced eviction is one of the most egregious violations of the right to adequate housing facing indigenous peoples across the world, in both rural and urban settings. In most instances, forced evictions are the result of development projects such as hydro-electric dams, mining, and logging. Indigenous lands are targeted for a number of reasons: these lands are often resource rich, located in marginal or remote areas (not populated by the majority population), and often perceived as not legally owned by indigenous peoples. In other instances, forced evictions of indigenous peoples occur as a result of discriminatory housing policies implemented by the State, private landlords and even families and individuals.

The short and long-term effects of forced evictions on indigenous families and communities (regardless of where they occur) are severe. In particular, indigenous peoples suffer both spiritually and physically from the dislocation from their homelands which destroys their ability to be economically self-sufficient, decreases living standards, causes social and health problems and erodes tradition and culture.

Forced evictions and the dispossession of lands have particularly severe impacts on indigenous women. For example, it often results in an increased

workload for women, who must walk long distances to find alternate sources of water or fuel wood. Also, women can lose their integral role in agricultural production, driving them out of income-earning productive activities and into a situation of economic dependence on men.

V.B. Laws and policies relevant to housing

In many of the case studies reviewed in this report, a solid and progressive legal foundation for the rights of indigenous peoples have been adopted or are in the process of being adopted. Some legislation recognize the land rights of indigenous peoples and protect them against forced relocation. In many instances, however, the laws are not being implemented properly.

V.B.1. International law

All States examined in the case studies in this report have ratified or acceded to key international human rights instruments of general application such as the ICESCR, ICERD, CEDAW, and ICCPR. Three of the States reviewed in this report have also ratified ILO Convention No. 169 (Ecuador, Norway and Mexico).

Given the prevailing inadequate housing conditions of indigenous peoples in all of the case studies, except for the Saami, it is clear that ratification of international human rights instruments of general application in itself does not necessarily translate into the exercise and enjoyment of the right to adequate housing and other rights by indigenous people at the national or local level. That being said, the concluding observations and general comments from the treaty monitoring bodies have provided indigenous peoples with increased legal leverage for their human rights claims.

The ratification of ILO Convention No. 169 has also been important for indigenous peoples. First, indigenous peoples view the ratification of the Convention – the only international treaty that specifically protects their specific rights – as an important practical, symbolic and good-faith step by their governments. Secondly, in some instances it has provided a legal framework for the drafting of domestic legislations such as in the Philippines and Ecuador. Thirdly, there may be a more perceptible commitment on the part of these States to engage indigenous peoples and their representative bodies in dialogue and to develop better laws recognizing indigenous rights.

V.B.2. National laws

In many of the States reviewed for this report, indigenous peoples' rights are protected in national constitutions or in Acts specific to indigenous peoples. Some of these Acts include provisions that could be used to protect aspects of

the right to adequate housing for indigenous peoples. For example, in Finland, the Saami's rights to land are demarcated in the national Constitution and in the *Saami Act*. In the Philippines the rights of indigenous peoples are protected in the Constitution and a range of rights are codified in the 1997 *Indigenous Peoples Rights Act*, informed by ILO Convention No. 169. This Act recognizes the right to land, self-determination and cultural integrity of indigenous peoples and stipulates that indigenous peoples have the right to prior consent before development projects can commence on their lands. In Ecuador, the constitution enshrined indigenous peoples' right to communal property land, natural resources, and consultations prior to the implementation of the exploitation of non-renewable resources on their lands. In Canada, the Constitution recognizes rights that exist by way of land claims agreements between the State and indigenous peoples.

Several of the States reviewed in the report have also enshrined the right to adequate housing in their Constitutions, such as in Ecuador, Finland, Norway, the Philippines, the Russian Federation and Sweden. In Australia and Canada, where there is no constitutional recognition of this right, the State purports to implement the right to adequate housing through enabling legislation and policies and programmes specifically on housing. Kenya is in the midst of a constitutional reform process. The draft under consideration at the present time includes recognition of rights of indigenous peoples as well as housing rights.

Indigenous peoples in several States have used the courts to enforce their rights. However, overall, it appears that they are not doing so in large numbers. The results of litigation on issues related to indigenous land and housing rights have been mixed. For example, in Norway, the Supreme Court decided two cases which resulted in the recognition of Saami land rights. In Sweden, the Supreme Court ruled that the Saami have reindeer grazing and fishing rights in a particular mountainous area. In Canada, indigenous tenants challenged the discriminatory comments of a landlord and won. Meanwhile, in Australia, indigenous tenants have challenged State-imposed evictions and discriminatory comments made by a private landlord and have lost. In Ecuador, indigenous peoples have launched numerous cases against companies wanting to exploit oil, and have experienced both victories and losses.

V.C. Housing programmes

The case studies describe a range of different housing programmes, some of which are designed specifically for indigenous peoples, others of which were designed for the general population (but ostensibly can be accessed by indigenous peoples).

The case studies reveal that the most successful programmes and projects are often those that have involved indigenous peoples in meaningful and diverse ways. For example, in Canada, social or public housing that is owned and operated by indigenous peoples and designed in a culturally sensitive manner have proved very popular with indigenous tenants in Canadian cities. In Finland, the Government implemented a loan and grant scheme for the Saami that enables them to build their own houses on their own land and has resulted in high rates of home ownership for the Saami and lower rates of social housing tenancy. In Kenya, Maasai women have been part of a project that enables them to use indigenous skills and materials to redesign existing housing so that it responds more to their needs.^b

The corollary to these successful projects is that housing programmes and projects are less successful if they are not designed or implemented by indigenous peoples. This was seen in the case of social housing in Western Australia. Housing policies and programmes may also lack success if insufficient resources are allocated to them. For example, in Canada, access to social housing, for indigenous peoples, has been dramatically reduced (along with all low-income Canadians) by the withdrawal of support for social housing by all levels of Government since 1993.

b. It should be noted that there are exceptions to this general principle. In Australia, for example, social housing for indigenous peoples is implemented, delivered and managed by indigenous peoples (through ATSIC), and yet these housing programmes are not considered to be successful, overall.

VI. Recommendations

The following recommendations are based on the findings and proposals made by the researchers for the present report. They are intended to address the most prominent housing issues confronting indigenous men and women as revealed in this report. The recommendations which have been narrowed to those that are specific to housing for indigenous peoples are largely aimed at governments, though some are directed at other relevant stakeholders such as financial institutions, indigenous communities and leaders and NGOs.

Recommendations have been grouped as follows: general issues; housing and living conditions; matters of legislation; housing policy and programmes; and other matters.

At both the international and national levels, a number of reports have been prepared by various actors offering an overview of some of the most pressing issues confronting indigenous peoples, and which offer a variety of recommendations on how States and other stakeholders can address those issues.^a States and other stakeholders are encouraged to initiate or continue discussions with indigenous communities about how those recommendations, as well as the ones contained in this report, can best be implemented.

Furthermore, it will be very useful if all relevant United Nations and other intergovernmental organizations (including UN-HABITAT, the OHCHR and the Permanent Forum on Indigenous Issues) could strengthen their focus on the housing rights of indigenous peoples and elaborate appropriate new standards, programs and policies (including resolutions from their policy bodies), so as to influence and direct all relevant stakeholders, particularly governments, to contribute, more effectively, to the full and progressive realization of the right to adequate housing of indigenous peoples.

VI.A. General issues

VI.A.1. Identity and self-determination

1. The right to self-determination for indigenous peoples is an important element in ensuring the preservation of indigenous cultures and identities.

a. For example: Royal Commission on Aboriginal Peoples (Canada), Royal Commission into Aboriginal Deaths in Custody (Australia), Aboriginal and Torres Strait Islander Women's Task Force on Violence Report (Australia). On the international level, see recommendations and calls for action regarding indigenous people contained in United Nations world conference documents, particularly the Habitat Agenda; United Nations human rights resolutions; treaty monitoring body concluding observations or comments; and the recommendations contained in the reports of United Nations Special Rapporteurs referred to in chapter III of this report.

It is also an important element in the realization of human rights, including the right to housing. This is not to say that the right to housing for indigenous peoples cannot be achieved without the realization of self-determination, nor is it to say that self-determination for indigenous peoples would ensure their enjoyment of the right to housing. It is to say, however, that enjoyment of the right to self-determination could assist in the realization of the right to adequate housing by indigenous peoples as it would allow for indigenous self-governance and the participation of indigenous peoples in decision-making processes and policy development that directly affect them.

2. Specific group rights for indigenous peoples (including self-governance rights) should not be used to exclude or discriminate against members of indigenous communities, such as women and youth. Indigenous communities who are currently self-governing should, therefore, also ensure the equal participation of indigenous women and the youth in all aspects of self-governance, including in the design and implementation of laws, policies and programmes that affect their rights to land, property and housing.

VI.A.2. Participation in decision-making processes

3. Indigenous women and men will continue to be marginalized if they are excluded from decision making processes. Governments must ensure that indigenous peoples are included as equal partners in all decision making processes, particularly on those issues of interest and importance to indigenous communities. With respect to housing, indigenous men and women must participate freely and equally in the development of any legislation, policies, or programmes that may have an impact on their housing conditions. Indigenous men and women must also participate equally in discussions, negotiations and decisions regarding development projects that are to take place on their lands. The principle of free, prior and informed consent should be applied at all stages of the project cycle. This means that their voices must be heard and their demands and grievances must be met when major decisions are taken regarding development priorities and the allocation of resources.¹

VI.A.3. Discrimination and inequality

4. In accordance with international human rights law, States must urgently address the discrimination, inequality and historical injustices experienced by indigenous peoples. This requires that rights and laws be interpreted, and policies and programmes be designed in ways that take indigenous men and women's socially constructed disadvantage into account, and that secure equality of access and outcome for indigenous women and men.

5. Indigenous communities must ensure that indigenous women are not subject to discrimination and inequality within their own communities,

including through customary law and traditional practices. As indigenous peoples achieve greater levels of participation in decision-making processes, the principles of equality and non-discrimination must guide this process, in particular with regard to the perspectives of indigenous women.

VI.A.4. Connecting land and housing

6. The dispossession of indigenous peoples from their lands has far reaching consequences, resulting in the violation of a number of other rights, such as the right to adequate housing. The connection between land rights and economic, social and cultural rights deserves further attention at the international level. In particular, it would be useful to explore whether indigenous peoples' struggles for land rights could benefit from a housing rights perspective. To this end, the following activities could be undertaken:

a) The United Nations Housing Rights Programme could host a seminar on indigenous peoples and the right to adequate housing that would bring together indigenous and non-indigenous experts, governments and NGOs in order to share the conclusions of this report and elaborate recommendations on how to promote and protect indigenous peoples' rights to adequate housing more effectively, including land rights issues.

b) UN-HABITAT, OHCHR and the United Nations Permanent Forum on Indigenous Issues should elaborate new standards, programs and policies for the advancement of indigenous peoples' right to adequate housing that respect the principle of free, prior and informed consent of indigenous peoples.

c) The Permanent Forum on Indigenous Issues could focus on the connection between economic, social and cultural rights and indigenous peoples' demands for the recognition of their land rights and their right to self-determination.

VI.B. Housing and living conditions

VI.B.1. Addressing poverty

7. A key aspect of improving the housing conditions of indigenous peoples is to address their poverty. This is in keeping with the principle that the right to adequate housing is a constituent element of the right to an adequate standard of living as articulated in the ICESCR. Governments must create the circumstances for indigenous peoples to become economically self-reliant. This can be done through a number of effective measures, the most important of which is, perhaps, ensuring that indigenous peoples retain access to their lands

and other productive resources such as credit and loans, and education and training. Governments must also develop specific economic policies that stimulate employment opportunities in urban areas and development in rural areas taking into account indigenous peoples' needs, rights and modes of production.

8. Other socio-economic disadvantages experienced by indigenous peoples such as poor health, and low levels of education must also be addressed through the provision of adequate services (both in terms of culture and quality) by governments to all indigenous communities.

VI.B.2. Housing policy and programmes

9. Within the overall framework of enabling shelter policies and strategies, governments and housing providers must take steps, to the maximum of their available resources, to achieve the full and progressive realization of the right to adequate housing. Creative housing programmes and projects that ensure the availability and accessibility of affordable housing for the poorest segments of society, including indigenous people, should be developed and implemented. For example, in the urban context, governments could explore how rental accommodation might be further developed and/or improved to meet the needs of indigenous urban dwellers.²

10. Governments may be required to formulate temporary special measures for indigenous peoples and indigenous women specifically, as a means of accelerating their equal enjoyment of housing rights with the non-indigenous population.^b

11. Governments should also invest in the development of indigenous expertise in the full range of technical capabilities for effective housing program design, delivery and management.

VI.B.3. Ensuring housing adequacy

12. In order for indigenous peoples to enjoy the right to adequate housing, governments could undertake actions in the following areas of housing adequacy:

a) Security of tenure: Governments should ensure indigenous peoples with legal security of tenure, which must include effective protection from forced evictions^c and might include the legalization of

b. For example, the grant system developed by the Government of Finland to encourage Saami home-ownership or the development of social housing specifically for indigenous peoples as was done in Canada.

c. More recommendations pertaining to the practice of forced eviction follow.

informal settlements. This is commonly achieved through the enactment and enforcement of legislation. Legal recourse should also be available and accessible to those indigenous peoples whose security of tenure is threatened, taking into account customary law where possible.

b) Affordability and habitability:

- i) Governments must undertake measures to provide housing assistance targeted specifically at indigenous peoples who cannot afford market housing prices because of their continued disadvantaged position in society. This might be accomplished by ensuring there is an adequate supply of social or public housing designated specifically for indigenous peoples. It might also be accomplished if governments supported and encouraged self-built housing for indigenous peoples.
- ii) Governments could also provide housing subsidies and shelter allowances to indigenous households living in poverty. These allowances would be attached to the individual (rather than a specific housing unit) and could be used to pay for adequate units within the private rental market.
- iii) Governments could also offer private sector housing providers incentives to build and provide affordable and culturally adequate housing units.
- iv) Alternative housing delivery and management arrangements, such as cooperatives, particularly by indigenous peoples themselves, should also be supported by governments.^d
- v) To improve habitability of existing units, indigenous peoples should have equal access to existing grants or loan schemes devised to assist in upgrading or renovating housing.^e

c) Accessibility: In keeping with recommendations 4 and 5 above, the following actions could be undertaken to ensure accessibility to housing by indigenous peoples:

- i) Governments, local authorities and indigenous leaders should immediately address the discrimination and inequality

d. NACHU has undertaken a number of successful cooperative housing projects for low income people in Kenya that could serve as examples.

e. This type of programme was offered to the Saami in Finland and proved quite successful.

experienced by indigenous peoples, including indigenous women, in the housing sector. *Inter alia*, this will require governments to repeal laws and policies that discriminate – on their face or in their effects – and to enact and enforce legislation that prohibits discrimination.

ii) Governments could provide targeted assistance to indigenous dwellers while upgrading living conditions in informal settlements as well as in other substandard urban housing.

iii) Governments should also undertake initiatives to raise awareness about what constitutes discrimination against indigenous peoples – including, specifically, indigenous women – in the housing sector. These initiatives should be targeted at housing providers, as well as the general public. Governments, together with indigenous communities, should ensure that custom and tradition are interpreted and evolve in a manner that ensures indigenous women’s equal rights to own, rent, lease and access land and housing regardless of her marital and other status.

d) Location: Governments must also ensure that health, educational and other services respect and promote indigenous languages and cultures and are located in close proximity to indigenous communities.

e) Availability of services: One of the obstacles to adequate housing in rural areas is access to infrastructure and essential services such as water and electricity. Sustainable technologies and networks must be developed to ensure all indigenous communities have sustained access to potable water and electricity.

f) Cultural adequacy: To ensure that housing is culturally adequate for indigenous peoples, they must be included in the design, development and implementation of housing projects.

VI.B.4. Violence against women and children

13. Governments, NGOs and indigenous communities should ensure the provision of shelters, services and alternative livelihoods, specifically, for indigenous women having to leave situations of domestic violence. It is imperative that these services are culturally appropriate. This includes ensuring that staff are indigenous or are trained to work effectively with indigenous women. Similarly, sexual and other abuse of indigenous children who have been separated from their families should be redressed taking into account their specific needs.

VI.B.5. Forced evictions

14. Governments, the private sector and financial institutions should do everything possible to avoid the eviction of indigenous peoples from their homes and lands including the following:

a) Governments, in conjunction with international financial institutions and other lending agents, should undertake human rights impact assessments with indigenous communities prior to initiating development projects in indigenous areas ensuring the principle of free, prior and informed consent. If the assessment reveals that violations of the rights of indigenous peoples may result, such projects must be re-negotiated.

b) International, regional and national financial institutions and other organizations play a vital role in facilitating major development projects by providing various forms of financial and technical support. It is imperative that the internal policies regarding development projects and indigenous peoples of these institutions be revised and applied in a manner that ensures conformity with contemporary international human rights norms of general application such as the ICESCR, the CEDAW and the ICERD, as well as international law particular to indigenous peoples such as ILO Convention No. 169 and any relevant national laws, treaties, agreements or pending agreements regarding the rights of indigenous peoples.³

15. When evictions and relocations are unavoidable, they must be undertaken in a manner that conforms with international human rights standards as contained in CESCR General Comment No. 7 and the United Nations comprehensive human rights guidelines on development-based displacement.⁴

VI.C. Legislation and institutional framework

VI.C.1. International level

16. Member States are encouraged to ratify ILO Convention No. 169 and other relevant international human rights treaties such as the ICESCR, the CEDAW, ICERD, as well as relevant regional instruments.

17. When reviewing State parties' compliance with treaty obligations, all treaty monitoring bodies should ensure that due attention is given to the situation of indigenous women and men. Treaty monitoring bodies should encourage indigenous NGOs to attend these sessions and/or provide information regarding the status of their human rights.

18. Indigenous issues – with a focus on indigenous women – should be mainstreamed in relevant intergovernmental processes throughout the United Nations system.

19. States should advance the prompt finalization of the draft United Nations Declaration on the Rights of Indigenous Peoples and its adoption.

20. This report has revealed that the housing conditions of indigenous peoples across the world – in industrialized and developing countries alike – are inadequate. Thus, the United Nations Housing Rights Programme must continue its work to advance the housing rights of indigenous peoples.

VI.C.2. National level

21. Once ratified, the international legal instruments mentioned above should be incorporated into domestic law and jurisprudence and its application in the domestic context should be ensured.

22. States that have ratified international human rights laws of general application should interpret and implement their legal obligations under these instruments in the light of indigenous peoples' specific needs and circumstances.

23. States should guarantee the application of the principle of non-discrimination and to the equal exercise and enjoyment of housing rights by indigenous women and men in appropriate domestic laws, such as national constitutions and human rights legislation, and in the interpretation of customary and civil law.

24. The principles of non-discrimination and equality will only be meaningful for indigenous peoples if they are interpreted and implemented through policies and programmes in a manner that addresses structural disadvantage and historical injustice experienced by indigenous peoples. To determine whether laws and policies address the inequality suffered by indigenous peoples with respect to housing and land rights, States must assess these laws and policies/programmes in terms of their effects.

25. Many countries now have national human rights institutions. These institutions must be available to protect the human rights and specific rights of indigenous peoples. This is particularly important in the context where an indigenous person is being discriminated against within their own community.

26. As it stands, many indigenous peoples are not using judicial or quasi-judicial mechanisms to claim their rights. States must assess the extent to which existing enforcement mechanisms are accessible to indigenous women and men, bearing in mind factors such as: lack of knowledge regarding mech-

anisms, expense, location, and cultural and linguistic barriers that may impede access. Addressing these may require restructuring existing mechanisms or developing new mechanisms. It may also require the establishment and management of such mechanisms by indigenous people themselves.

27. Governments and indigenous community leaders must enact and implement laws and policies that legally protect the housing rights of all women, including indigenous women, upon marriage breakdown or death of a husband/spouse. This should include, laws ensuring that women, including indigenous women, can remain in their homes upon marriage dissolution or the death of a husband/spouse. Moreover, efforts must be made to ensure that customs, traditions and laws are interpreted in a manner that ensures women's equal right to inherit land, property and housing irrespective of their marital or other status.

VI.D. Other matters

28. Through the course of preparing this report it became clear that in many countries there is a paucity of data pertaining, specifically, to the housing conditions of indigenous peoples. Furthermore, it was noted that indigenous women's organizations are often marginalized, poorly funded and thus prohibited from engaging in dialogue and discussions within their own communities as well as with government representatives and other stakeholders. The following two recommendations are aimed at addressing these issues:

a) International organisations, States, universities, research institutions and NGOs should collect detailed and accurate qualitative and quantitative information regarding the housing conditions and experiences of indigenous peoples. This information should be gathered in close association with indigenous peoples' organizations. All information should be gender disaggregated and rights based and, where possible, comparisons with non-indigenous populations should be made. Differences between urban and rural indigenous dwellers should also be provided. The CESCR has developed reporting guidelines⁵ that may prove useful in the collection of this data. All data should be made available to the indigenous peoples concerned.

b) States and other funders should provide financial resources for indigenous organizations, including urban-based and women's groups, to assist them in conducting research and participating in activities that will enhance their living and housing conditions.

Notes

1. UN Doc E/CN.4/2003/90: paragraph 70.
2. See: UN-HABITAT, 2003a.
3. See UN Doc E/CN.4/2003/90: paragraph 67.
4. UN Doc E/CN.4/Sub.2/1997/7.
5. UN Doc E/C.12/1991/1.

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