**Presentation by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz**

**For the Expert Seminar on Right to Land under the UN Declaration on the Rights of Indigenous Peoples: A Human Rights Focus**

**Organized by the United Nations Expert Mechanism on the Rights of Indigenous Peoples and the Centre for Human Rights, Faculty of Law, Pretoria University, South Africa**

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**Introduction**

I would like to thank the Expert Mechanism on the rights of indigenous peoples and the Centre of Human Rights of the Faculty of Law at Pretoria University for organizing this important seminar on indigenous peoples’ right to land under the UN Declaration on the Rights of Indigenous Peoples (“Declaration”).

As you all know under my mandate I am specifically tasked to promote the Declaration and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate (A/HRC/RES/33/12). As Special Rapporteur I have emphasized the importance of the Declaration as the most advanced and comprehensive international human rights instrument on the rights of indigenous peoples which reflects the wide global consensus on the minimum content of the rights of indigenous peoples. It contains rights and principles enshrined in widely ratified international human rights treaties and conventions; and norms related to fundamental principles of customary international law, such as non-discrimination. This underlies the importance of the Declaration as a historical opportunity to change the relationship between States and indigenous peoples from one of exclusion and marginalization into one of reconciliation, cooperation and respect. [[1]](#footnote-1)

In assessing the level of implementation of the Declaration a decade after its adoption, I have concluded that despite important legal, policy and other developments in many countries, there has been limited progress in the actual implementation of the rights of indigenous peoples. Certain core rights have proven particularly difficult to implement. This includes self-determination and land and resources rights along with other closely linked rights relating to consultation and free, prior and informed consent and the respect of customary indigenous governance and justice systems.[[2]](#footnote-2)

Violations of indigenous peoples’ collective rights to their lands, territories and natural resources have been the most common and persistent type of complaints brought to the attention of my mandate. This is due to, among other factors, legacies of colonization and discrimination against indigenous peoples,[[3]](#footnote-3) continued difficulties in ensuring coordinated actions within State institutions to implement human rights standards, conservation undertaken without respecting the rights of indigenous peoples,[[4]](#footnote-4) and the higher priority given to economic and political interests favoring extractive, energy and other development projects on or near indigenous lands and territories. The denial of land rights continues to be the root cause for other human rights violations that indigenous peoples face and a key triggering factor behind the increasing attacks and criminalization of indigenous human rights defenders.[[5]](#footnote-5)

With the above in mind, I will address some of the ongoing problems that I have observed over the course of my mandate that hinder the full realization of the land, territorial and other rights under the Declaration. I will begin with noting the challenges presented by **national policies and programs that prioritize extractive, energy and other development projects**. I will then discuss previous observations and recommendations I have made with respect to **State mechanisms for the recognition and legalization of indigenous lands**. I will conclude commenting on the role of other agencies, programs and supervisory bodies within the UN and regional human rights systems in the promotion of the Declaration.

I hope these brief comments can be a useful contribution to your discussions and the elaboration of the upcoming report.

**Challenges in implementation of indigenous land rights in the context of development projects and conservation**

Indigenous peoples’ rights are most vulnerable in the context of natural resource development projects promoted or approved by States without consideration of land, territorial and resource rights of affected indigenous peoples and without consultation and free, prior and informed consent. I have noted that even in contexts where a State supports the Declaration and has ratified other relevant international human rights treaties, and where domestic constitutions and laws recognize indigenous peoples’ land rights, this is rarely translated into effective coordinated action by State authorities, particularly in the process of determining development policies and programs and in approving or promoting extractive, energy and other development projects. In this sense, I have repeatedly pointed out the lack of coherence between the State international and even domestic obligations regarding indigenous peoples’ land and resources rights and the legislation concerning extractive sectors, such as mining, logging or hydrocarbon exploration and exploitation. This results in lack of legal clarity, usually to the detriment of the rights of indigenous peoples.

I have also noted that when conflicts arise over development project issues, State Governments, international agencies and the business sectors tend to focus the discussions on the implementation of prior consultation. In the Latin American region, for example, discussions revolve around the implementation of the consultation provisions of *International Labour Organization Convention 169 on indigenous and tribal peoples in independent countries* (‘ILO Convention 169’), which is widely ratified in that region. There are deep divergences among indigenous peoples, States and private business actors in the interpretation of ILO Convention 169 consultation provisions. I have emphasized that the Declaration, relevant general recommendations and comments of UN treaty bodies and jurisprudence of regional bodies (in this case, the inter-American system) also constitute legal sources of interpretation and obligation for States with regards to consultation and free, prior and informed consent.

Equally as important are international standards on indigenous land, territorial and resource rights. In addition to implementing consultation and consent standards at the domestic levels, States must reinforce domestic legal, administrative and other mechanisms to protect indigenous land and resource rights, consistent with the Declaration and the other international standards. This must also be seen as a priority within discussions relating to extractive, energy, infrastructure and other development projects. I have noted the issue of consultation and consent is particularly conflictive where indigenous land rights are not effectively recognized and protected in accordance with international standards.

A comprehensive analysis of the impacts of proposed economic activities on indigenous lands, territories and resources needs to be the central point of reference, not just whether prior consultation procedures were followed by a State or company. The full panoply of rights, including lands, territories, resources as well as culture, religion and other human rights enshrined in the Declaration need to form the basis of independent and impartial impact assessments carried out in connection with development projects. Human rights impact assessments need to be implemented in a manner that takes into account not just environmental impacts but also impacts to indigenous rights to lands and resources - in their social, economic, cultural and spiritual dimensions. Consistent with the Declaration, land rights in this sense need to be understood to include the lands, territories and natural resources indigenous peoples traditionally own, occupy or otherwise use or acquired, respecting their customs, traditions and land tenure systems (Art. 26). The jurisprudence of the regional bodies of the Inter-American and African human rights systems also further the understanding of the basic nature, content and character of indigenous land, territorial and natural resources rights.

Additionally, it is important to recall the Declaration’s provisions on self-determination (Art. 3) and on the right to determine their own development priorities including with regards to their lands, territories and resources (Arts. 23, 32). These are important elements to exercise the right to land recognized in Article 26(2) which asserts indigenous peoples’ rights to own, use, develop and control their lands, territories and resources. The element of effective control and self-determination is essential to the implementation of the Declaration’s land rights provisions, especially in the context of natural resource development and other projects affecting indigenous peoples.

In my country visit and thematic reports, I have recommended that indigenous peoples and Government authorities engage in discussions in equal terms with a view to adopting joint decisions on proposed activities in indigenous territories. Indigenous peoples’ own development proposals should take priority within their territories and should be taken into account in national policies, laws, and plans related to extractive, energy, agricultural and other forms of development.

Recognition and respect for indigenous peoples’ land and self-determination rights should not only be a cornerstone of any economic or infrastructure development projects, but must guide biodiversity conservation initiatives. Indigenous peoples are the guardians of many of the world’s last reserves of biological diversity. Yet, they are driven away from these lands because governments and conservation organizations continue to fail in applying a human rights-based approach to conservation, despite the numerous international commitments to do so. The lack of legal recognition by States of indigenous peoples’ rights and the failure to provide collective land tenure continues to undermine the ability of indigenous peoples to effectively protect their traditional lands, territories and natural resources. Conservation organizations should advocate for the legal recognition of indigenous peoples’ land rights at the national level in order to create enabling conditions for conservation to be sustained.[[6]](#footnote-6)

Furthermore, with regard to climate change, all necessary policy, legal and administrative measures should be adopted to effectively engage indigenous peoples in climate change adaptation and mitigation measures with full recognition of their rights over their lands, territories and resources as enshrined in international human rights law and recognized in the United Nations Framework Convention on Climate Change, the Paris Agreement and the Sustainable Development Goals. States, funds and donors all carry responsibilities in this regard. Climate finance has the potential to reinforce the efforts of indigenous peoples to adapt to the impacts of climate change and contribute to climate change mitigation. However, unless based on respect for their land rights, such funding without adequate human rights safeguards has the potential to create adverse impacts which undermine the rights of indigenous peoples.[[7]](#footnote-7) As noted by the Intergovernmental Panel on Climate Change, indigenous traditional knowledge systems and practice are a major resource for adapting to climate change and can contribute to making such measures more effective globally.

Given the importance of emphasizing land rights in the context of development projects, natural resource exploitation, conservation and climate change initiatives and other activities, including tourism, that affect indigenous peoples, there needs to be a particular focus on ensuring there are effective legal and other mechanisms to adequately recognize, adjudicate and protect indigenous peoples’ rights to their lands, territories and natural resources and to obtain redress for violations of those rights.

**Challenges in implementing mechanisms related to the recognition and legalization of indigenous land rights**

In my various country visits, I have obtained information about many different mechanisms for indigenous land registration, demarcation, titling and land dispute resolution. Many national land registration systems do not provide for effective recognition of indigenous collective land rights, thus favoring individual property rights to the detriment of indigenous land rights. Even where indigenous collective land rights are legally recognized at the constitutional or legislative levels, there are many challenges that need to be addressed in order for these mechanisms to be in line with the Declaration.

In some countries, I noted that State land registration systems and related institutions are based on agrarian regime models that, although they recognize collective land ownership, do not reflect international standards on indigenous land rights. Such is the case of the system of *ejidos* and agrarian institutions and tribunals in Mexico. In addition to instituting land registration procedures that do not always respond to indigenous peoples’ demands for recognition of their traditional territories, agrarian authorities do not effectively represent indigenous traditional authorities. Therefore, in my country visit report I recommended a comprehensive reform of the agrarian legal regime in order to align it with current international standards on indigenous land rights. This requires training for agrarian authorities on international standards. Regarding indigenous people’s requests for resolution of land disputes and recognition of their lands, I also recommended the formation of interdisciplinary working groups made up of indigenous, civil society and government representatives in order to propose suitable mechanisms for the resolution of these cases. Such working groups would need to be developed in full cooperation with indigenous peoples and be based on international human rights standards on the rights of indigenous peoples.[[8]](#footnote-8)

In the case of Guatemala, following my country visit, I noted the lack of a legal framework or allocation mechanism to identify and apply the collective ownership rights of indigenous peoples in accordance with their traditional land tenure systems. Deep and longstanding historical factors have led to deeply rooted discrimination against indigenous peoples, extreme inequality in the distribution of land and insecurity of land tenure, all factors which were further aggravated by the internal armed conflict. Although land issues were an important component of the 1996 Peace Accords, measures intended to develop a new legal framework to benefit rural and indigenous communities have not been properly implemented, and thousands of indigenous families and communities still await access to land. A great number of land disputes have arisen due to overlapping land registers and the issuance of licenses for mining, energy and other development projects. To address this situation, I recommended that all branches of Government take coordinated action to confront the situation faced by indigenous peoples over their lands, territories and natural resources. This requires the development of a legal framework for the recognition and protection of indigenous peoples’ rights to own, use, develop and control their lands, in addition to the respect of indigenous development priorities, protections against forced evictions, and effective implementation of consultation and consent standards.[[9]](#footnote-9)

In Ecuador, the important constitutional recognition of indigenous land and resource rights, as well as provisions for the creation of indigenous territorial districts, was unfortunately followed by legislation that did not fully recognize indigenous land rights. I noted in my country visit report that the Organic Act on Rural Lands and Ancestral Territories, which established procedures for requesting land legalization, was not adequately consulted with indigenous peoples, its procedures lacked an intercultural approach and were not consistent with international standards. There has been limited progress in the creation of indigenous territorial districts due to the complexity of establishing these districts and concerns that these would still be subordinate to the administrative division and procedures of the State. I called on the urgent need for indigenous peoples to have legal certainty over their lands and territories through an accessible and effective system for recognizing land rights and for the establishment of indigenous territorial districts (where these are desired by indigenous peoples), that is in line with international standards.[[10]](#footnote-10)

Following my most recent country visit, to Timor-Leste, I observed the constitutional recognition of traditional Timorese norms and customs related to landownership and management. I was informed of government land registration schemes and legislation to address complex land issues and conflicts deriving from the previous colonial era and the period of occupation when indigenous Timorese were forcibly displaced. However, there are concerns that said efforts have so far resulted in few communal titles being awarded and that the lack of knowledge among the Timorese population about the land registration process has the potential for causing further conflicts over lands and resources. I recommended the legal framework to be oriented towards respect and recognition of customary land systems and traditional practices governing lands and resources. In line with the Declaration, culturally appropriate and good-faith consultations with communities prior to enacting land registration schemes and legislation is needed, including with those persons knowledgeable of traditions and customs, women and other stakeholders. I noted the need for equal guarantee of individual and community land claims, the rights of women to own property and for consideration of the elderly, widows, persons with disabilities and other populations in vulnerable situations.[[11]](#footnote-11)

In India, the Forest Rights Act of 2006 recognizes the collective rights of Scheduled Tribes, known as Adivasis, to the forest lands they have traditionally occupied for habitation and for self-cultivation livelihood. The Forest Rights Act provides that no forest rights holders shall be resettled unless critical wildlife habitats are being damaged irreversibly and co-existence is not possible. In such circumstances, a resettlement package for the communities’ secure livelihood must be prepared and their free informed consent received. The Act further stipulates the right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land without receiving their legal entitlement. In practice however, displacement of Adivasis from protected forest areas has continued across India. I am particularly concerned that current litigation in the Supreme Court, initiated by national conservation organizations, may result in mass evictions across 21 States following the rejection of 1.2 million forest rights claims. [[12]](#footnote-12)

The 1987 Constitution of the Philippines recognizes the right of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being. The Indigenous Peoples Rights Act of 1997 asserts indigenous peoples’ collective rights of ownership, management and development of their traditional lands and resources and affirms that indigenous peoples not be relocated without their free and prior informed consent, and that whenever possible, they shall be guaranteed the right to return to their ancestral domains and be fully compensated for any resulting loss or injury.

Cambodia has adopted specific provisions to deal with indigenous peoples’ rights over lands and natural resources. The Cambodian Land Law of 2001 recognizes indigenous peoples’ collective ownership over the lands on which they have established their residence and where they carry out traditional cultivation. Subsequent decrees and regulations have set out procedures to be complied with in order to claim and obtain collective communal land titles. The process is burdensome due to its complexity, costs and the documentary proof required. I have expressed concerns over the lengthy procedural steps required for the collective titling of indigenous lands, and noted that these result in a protracted titling process which jeopardizes the effective protection of indigenous peoples’ lands from encroachment by outsiders. [[13]](#footnote-13)

In Tanzania, I continue to receive complaints from indigenous Maasai of continuing harassment, intimidation, evictions, confiscation of livestock and arrests of community members who are contesting the provision of Maasai ancestral lands to tourism and gaming companies. Despite that the East African Court of Justice has issued an interim order in September 2018 to halt the evictions, allegations of violations persist.[[14]](#footnote-14) In Kenya, the Endorois and the Ogiek have successfully litigated their land rights in the regional human rights system, however challenges persist in the effective implementation of these rulings.

In the Republic of Congo, where I am about to conduct a follow-up country visit, a law on the promotion of indigenous peoples adopted in 2011 affirms indigenous peoples’ rights to land and resources on the basis of traditional patterns of use and occupancy. However, to date no decree has yet been adopted to clarify the process for land demarcation and registration. I am concerned that current land reforms have so far failed to recognize collective rights of indigenous communities to land and resources.

In Australia, where the 1993 Native Title Act has set out a specific process for adjudicating native title rights, I was informed during my visit that the rights of Aboriginals and Torres Strait Islanders to around 30 per cent of the land area of the country is formally recognized, albeit mostly as “non-exclusive” rights. A further one third of Australian territory is subject to native title claims, in processes that have become extremely protracted. Native Title claims have been hampered by requirements imposed on claimants such as proving uninterrupted connection to the area claimed and the continuation of traditional laws and customs. This requirement is problematic given the context of historical forced removals and dispossession faced by indigenous peoples. I recommended the review of the current system which has multiple and overlapping legal regimes applicable to native title claims at the federal, state and territory levels in order to align them with the Declaration. I pointed out the need that any reform to the Native Title Act, including with regards to indigenous land use agreements, be adequately consulted. More training of indigenous legal professionals is also needed to assist indigenous communities with native title claims. In positive terms, I noted the availability of federal funding for the designation of protected areas in lands where native title is recognized, as well as programs for the joint management of protected areas and the training of indigenous rangers program.[[15]](#footnote-15)

In general, I have observed many instances where land titling and demarcation efforts have entailed prolonged and protracted processes that have left indigenous peoples vulnerable to intrusions by outsiders as well as by extractive, energy or other development projects. This situation was attested in various country visits, including to Brazil, Paraguay, Mexico and Honduras. Even where demarcation processes have been undertaken, conflictive situations are still present due to overlapping land claims or titles awarded to third parties. In certain countries, this has been particularly grave for indigenous peoples when those third parties include members of organized crime and drug traffickers. For example, in Honduras, demarcation processes in the region of La Moskitia have resulted in collective titling of indigenous lands. However, the ongoing presence of cattle-ranchers, loggers and drug-traffickers has resulted in constant tension and conflict that puts indigenous communities at risk. Thus, demarcation and titling efforts must be accompanied by effective systems of title-clearing (*saneamiento*) to address the presence of third parties on indigenous lands, measures to investigate and sanction invasions of indigenous lands, as well as effective protection mechanisms, including early warning and urgent action systems, for indigenous persons and communities facing threats from these actors.[[16]](#footnote-16)

Related to the above, I have noted that many of the obstacles indigenous peoples face in the recognition of their land, territorial and resource rights are linked to their inability to access justice, particularly when third parties’ claims are involved. Thus, justice continues to be elusive due to numerous geographic, cultural, economic and other obstacles indigenous peoples face to access national justice systems and due to the lack of adequate recognition of their customary laws, justice systems and jurisdiction.[[17]](#footnote-17) Increased access to justice, through access to general domestic legal systems as well indigenous customary law systems, are important elements for the effective enjoyment of land rights by indigenous peoples.

**Promotion within UN and Regional Human Rights Systems**

I have previously emphasized that the United Nations system has a particular role to play in the implementation of the Declaration. I have noted the need for increased coherence within the UN system itself in their actions and programs related to indigenous peoples, particularly at the country level.

UN agencies, programs and funds engaged in development work that potentially involves or affects indigenous peoples need to apply a human rights-based approach grounded in the Declaration.[[18]](#footnote-18) This includes attention to land, territorial, consultation and consent standards that could be affected by actions and programs on the field. These programs and agencies need to promote these human rights-based approach in their interaction with government partners.

National and international actions to promote the Sustainable Development Goals (SDGs) must also incorporate indigenous rights standards. While there are targets and indicators within the 2030 Agenda and SDGs that are relevant to indigenous peoples, increased work must be done to ensure UN agencies and State Governments pay attention to the particular rights and concerns of indigenous peoples when implementing and evaluating the achievement of the SDGs. The development of disaggregated data on indigenous peoples would be an important element in this regard, as well as indicators that fully reflect and take into account the paramount importance of land, territorial and resource rights for the realization of economic, social, cultural and other rights of indigenous peoples as part the overall goals of the 2030 Agenda.

The understanding of indigenous land rights standards is also necessary with respect to the implementation of multilateral environmental agreements. I have engaged with the Conferences of the Parties of the Convention on Biological Diversity and of the UN Framework Convention on Climate Change to advocate for the recognition of the Declaration, the inclusion of safeguards and the adoption of a human rights-based approach.[[19]](#footnote-19) Similarly, the adoption of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) could provide another important opportunity to mainstream indigenous land rights and the Declaration in the Latin American region within this context.[[20]](#footnote-20)

The role of UN and regional treaty supervisory bodies is also essential. I have previously noted that universal treaty bodies have referred to the Declaration as a source on State obligations regarding indigenous peoples in assessing State compliance with their respective treaties. Observations and recommendations by these treaty bodies provide valuable insight on the implementation of the Declaration in specific contexts and situations. The growing jurisprudence emanating from universal and regional human rights bodies, including regional human rights courts can significantly assist in strengthening the understanding and realization of the rights contained in the Declaration, and evaluating appropriate remedies when those rights have been violated. I consider it important that my mandate, the Expert Mechanism and the Permanent Forum continue to engage with these UN and regional bodies in order to promote a coherent understanding and application of international standards on indigenous peoples’ rights to their lands, territories and natural resources, among others.

**Conclusion**

To conclude, there has been limited progress in the implementation of the Declaration with regards to the key provisions related to rights to lands, territories and natural resources. Land rights violations continue to be one of the most pressing problems indigenous peoples face and the underlying reason behind the increasing attacks and criminalization of indigenous human rights defenders.[[21]](#footnote-21)

Key challenges to indigenous peoples’ land rights include national development priorities centered on extractive, energy and other development projects, as well as conservation and tourism initiatives. Therefore, indigenous rights to land, self-determination, their own development and protection of the environment need to be made a key element in the discussions on national development projects and conservation measures, including by ensuring consultation and free prior informed consent of affected indigenous communities before implementing any such project or initiative.

Ongoing deficiencies in State mechanisms for the recognition and legalization of indigenous lands need to be addressed in order to make them consistent with the Declaration. Efforts must be made to ensure State authorities have the training and capacity to understand and implement international standards on indigenous rights. A particular point raised in some of my country visit reports is the need for effective consultation with indigenous peoples themselves regarding the development or improvement of these mechanisms. Protection of land rights also entails access to justice, especially with regards to the actions of third parties, as well as protection mechanisms for indigenous persons and communities facing grave risks when asserting their land rights.

The UN system at the country level and the jurisprudence of universal and regional human rights bodies can play an important role in ensuring a coherent interpretation and application of the Declaration’s standards on indigenous land and other rights. The promotion of the Declaration within processes related to international and regional environmental agreements must also be continued as part of ongoing efforts to mainstream indigenous rights. The UN system and other international and regional mechanisms can also play an important role in promoting effective channels of dialogue, consultation and cooperation between States and indigenous peoples in order to address the ongoing impediments indigenous peoples face in the full realization of their rights.

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1. A/72/186, paras. 9, 84, 85. [↑](#footnote-ref-1)
2. A/72/186, paras. 15, 86. [↑](#footnote-ref-2)
3. A/HRC/27/52 [↑](#footnote-ref-3)
4. A/71/229 [↑](#footnote-ref-4)
5. A/HRC/39/17 [↑](#footnote-ref-5)
6. A/71/229 [↑](#footnote-ref-6)
7. A/HRC/36/46; <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25003&LangID=E>;

   UA KEN 1/2018; UA OTH 1/2018; <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22584&LangID=E> [↑](#footnote-ref-7)
8. A/HRC/39/17/Add.2, paras. 17-21; 99 [↑](#footnote-ref-8)
9. A/HRC/39/17/Add.3, paras. 29-35, 103 (a)-(d) [↑](#footnote-ref-9)
10. A/HRC/42/37/Add.1, paras. 21-23, 81 [↑](#footnote-ref-10)
11. A/HRC/42/37/Add.2, paras. 39- 47, 85-87 [↑](#footnote-ref-11)
12. A/71/229, para. 57; Communications UA IND 13/2019, UA IND 9/2017; and press release https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24786&LangID=E [↑](#footnote-ref-12)
13. Communication OL KHM 6/2017 [↑](#footnote-ref-13)
14. UA TZA 1/2016 [↑](#footnote-ref-14)
15. A/HRC/36/46/Add.2, paras. 98-103; 118 [↑](#footnote-ref-15)
16. A/HRC/33/42/Add.2, paras. 89, 90, 96; A/HRC/39/17 [↑](#footnote-ref-16)
17. A/HRC/42/37; A/72/186, para. 57 [↑](#footnote-ref-17)
18. A/72/186, paras. 65, 75, 76, 98(c) [↑](#footnote-ref-18)
19. Ibid, para. 71, A/71/229 [↑](#footnote-ref-19)
20. https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23557&LangID=E [↑](#footnote-ref-20)
21. A/HRC/39/17 [↑](#footnote-ref-21)