

HOUSING AS A HUMAN RIGHT WITHIN AN ERA OF INTERNATIONAL EXCEPTIONALISM

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Abstract

The right to adequate housing is an internationally recognized human right, yet it has been incontrovertibly desecrated by a lack of recognition, disproportionately affecting vulnerable groups. Economic, social, and cultural rights have encountered many challenges in an ever-increasing era of international exceptionalism and challenges arise in the protection of these rights. The right to housing is achieved in two ways: as a normative right and as a derivative right encompassed within economic, social, and cultural rights. This article introduces: (1) the normative development of economic, social, and cultural rights as recognized human rights, and their regulatory implementation through international instruments; (2) the concept of individuals as right-holders and duty-bearers of economic, social, and cultural rights; (3) understanding how the restriction of the right to housing leads to the violation of other human rights, including (a) the right to life, (b) the right to freedom from discrimination, and (c) the right to humane treatment – and the types of vulnerable groups that face the most discrimination, such as indigenous persons and women; and (4) protection against forced evictions, through an examination of the jurisprudence of the Inter-American System, European Court of Human Rights, and African Court on Human and Peoples' Rights.

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I. INTRODUCTION

The evolution of economic, social, and cultural rights is a development that has been met with acceptance, although it has been highly criticized because of concerns that vulnerable groups face a violative lack of recognition. While an ever-increasing level of international exceptionalism has developed in terms of state parties declining to recognize economic, social, and cultural rights as fundamental basic human rights, recognizing and establishing adequate housing as a basic human right could ultimately lead to enhanced protections of other rights and eliminate secondary violations of other internationally recognized rights. The objective of this article is to seek a better understanding of the concept of establishing housing as a human right, and to identify the types of groups that are most affected when the right is breached; as well as to ascertain ways in which the protection of the right to adequate housing can be achieved in order to effect change on an international level.

II. THE CONCEPT OF HOUSING AS A BASIC HUMAN RIGHT

International acceptance of adequate housing as a human right has progressed, particularly through regulatory implementation via international instruments. Regional mechanisms have also prescribed the development of housing as a human right, and established a precedent within their respective mechanisms. Certain international instruments explicitly declare that adequate housing is a protected human right that all persons have the right to enjoy; while other instruments, although not explicit, incorporate the right through a broader meaning.

2.1. International Instruments and Regional Mechanisms

2.1.1. Universal Declaration of Human Rights

In 1948, the Universal Declaration of Human Rights (UDHR) was a stepping stone in the progressive acknowledgement that adequate housing is a right afforded to all individuals. Specifically, Article 25 provides for the right to an

adequate standard of living, which explicitly includes housing.¹ Established as one of the earliest instruments to protect and promote human rights with an explicit reference to the right to adequate housing, the UDHR was followed by similar instruments.

2.1.2. International Covenant on Economic, Social, and Cultural Rights

Subsequent to the creation of the UDHR, in 1966 the International Covenant on Economic, Social and Cultural Rights (ICESCR) created an added layer of protection in the recognition of the right to adequate housing. Article 11(1) provides:

“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.”²

The right to adequate housing is explicit within the ICESCR and provides for the “continuous improvement of living conditions” for all.³ Furthermore, the Covenant places an obligation upon State Parties to adhere to the “realization of this right”.⁴

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

The realization of adequate housing as a human right was continued and further explained in 1997 through the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR or the Committee). The Committee provides an expanded definition of the right to adequate housing and further explores forced evictions in its General Comment No. 7. First, the Committee notes that most forced evictions occur in times of armed conflict and mass

¹ Universal Declaration of Human Rights, December 10, 1948, Art. 25, <https://www.refworld.org/docid/3ae6b3712c.html>.

² International Covenant on Economic, Social and Cultural Rights, December 16, 1966, *United Nations Treaty Series* vol. 993, p. 3, Art. 11(1), <https://www.refworld.org/docid/3ae6b36co.html>.

³ *Ibid.*

⁴ *Ibid.*

displacement due to violence.⁵ Forced evictions also occur during development projects and in land disputes.⁶ Regardless, the Committee notes that forced evictions can only be justified if done so for lawful reasons, such as failure to pay rent.⁷ Furthermore, all legal remedies must be available to the individual prior to being removed from his or her home.⁸

The Committee lends particular importance to the fact that while forced evictions may be lawful and reasonable in certain situations, in general, a State has an obligation to uphold the individual's right to housing in the form of refraining from forcibly removing the individual from his or her home without lawful justification. The Committee takes the concept of housing as a human right a step further than both the UDHR and ICESCR, by expanding the definition of the right to include an explanation of how the right is breached.

2.2. Regional Mechanisms

Protection of the right to housing has been adopted in various forms by different regional mechanisms, including the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the American Declaration on the Rights and Duties of Man, and the European Convention on Human Rights.

2.2.1. African Charter on Human and Peoples' Rights

Article 14 of the African Charter on Human and Peoples' Rights (African Charter) provides for the protection of the right to housing implicitly through the recognition of the individual's right to property.⁹ The right to property is an explicit right within Article 14 of the African Charter and may only be infringed upon in the interest of public need.¹⁰

⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions, May 20, 1997, E/1998/22, par. 6, <https://www.refworld.org/docid/47a70799d.html>.

⁶ *Ibid.*, par. 7.

⁷ *Ibid.*, par. 11.

⁸ *Ibid.*

⁹ "African Charter on Human and Peoples' Rights," June 1981, entered into force October 21, 1986, *African Commission on Human and Peoples' Rights*, Art. 14, <https://www.achpr.org/legalinstruments/detail?id=49>.

¹⁰ *Ibid.*

The African Charter's recognition of the right to housing is implied through Article 14's right to property; however, it is important to note the limited situation in which the individual may lose this right: in the interest of public need. This provides the State with the power to determine when and how the interest of the public can be measured in terms of certain property, giving credence to the unfortunate fact that the right to housing is a derogable right.

2.2.2. European Convention on Human Rights

The European Convention on Human Rights (European Convention) requires the specific protection of the right to housing, outlined in its Article 8(1). Within the European Convention, an individual has the right to respect for his private and family life, home and correspondence.¹¹ The right to housing is explicit within Article 8(1) and it is implicit in numerous other articles within the European Convention, including the right to life.

2.2.3. Revised European Social Charter for the Council of Europe

The European System of human rights protection also explicitly provides for the right to housing in Article 31 of the Revised European Social Charter for the Council of Europe, which states: "Everyone has the right to housing."¹²

2.2.4. American Declaration on the Rights and Duties of Man

In 1948, the American Declaration on the Rights and Duties of Man (American Declaration) was the first international instrument to provide for the protection of the individual's basic human rights. Although not legally binding upon all States, the Inter-American System for the protection of human rights, through the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, has proven that the American Declaration is binding upon all members of the Organization of American States.

Articles 8 and 9 of the American Declaration offer the most protection in terms of the right to housing for the individual. Article 8 provides that all

¹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, November 4, 1950, *Council of Europe*, <https://www.refworld.org/docid/3ae6b3b04.html>.

¹² European Social Charter (Revised), May 3, 1996, *Council of Europe*, Art. 31, <https://www.refworld.org/docid/3ae6b3678.html>.

persons have the right to have a residence and move freely about the State for which he or she is a national.¹³ Furthermore, Article 9 declares that every individual has the right to the inviolability of his or her home.¹⁴ Separately, these two articles protect the individual in choosing where to reside within the territory of the State and to move freely. Together, it can be inferred that the right to housing is encompassed in these protections and the obligation of the State is to not infringe upon a person's decision of where to live.

2.2.5. American Convention on Human Rights

Adopted in 1969, the American Convention on Human Rights (American Convention) is an international instrument applied within the Inter-American System. Within the Convention, Article 7 protects the right to property for all individuals.¹⁵ Similar to the African Charter, the American Convention offers the limited exception in which a State party may contravene its obligation to protect this right: if just compensation is provided, and in times of public utility.¹⁶ The right to housing is implied within the meaning of the American Convention's acknowledgment of the right to property, specifically, as it is applied through the jurisprudence arising from the Inter-American System.

2.2.6. Charter of the Organization of American States

Article 34 of the Charter of the Organization of American States provides that the elimination of extreme poverty, equality, and equitable distribution of wealth and income are all basic objectives.¹⁷ These aims can be achieved in various ways, including, "adequate housing for all sectors of the population".¹⁸

2.3 Adequate Housing as a Normative Right

There are certain human rights that are internationally recognized as guaranteed rights. These normative rights attach to the individual as basic rights

¹³ American Declaration of the Rights and Duties of Man, May 2, 1948, *Commission on Human Rights (IACHR)*, Art. 8, <https://www.refworld.org/docid/3ae6b3710.html>.

¹⁴ *Ibid.*, Art. 9.

¹⁵ American Convention on Human Rights, Pact of San Jose, November 22, 1969, *Organization of American States (OAS)*, Art. 7, <https://www.refworld.org/docid/3ae6b36510.html>.

¹⁶ *Ibid.*

¹⁷ "Charter of the Organization of American States," April 30, 1948, Art. 34, <https://www.refworld.org/docid/3ae6b3624.html>.

¹⁸ *Ibid.*, Art. 34, Section K.

and the State may not deprive people of such rights without just compensation. To achieve adequate housing and to ensure the protection of the individual, it is imperative to recognize housing as a normative right – one that is explicitly guaranteed through specific laws and applied in practice. The explicit recognition of these rights through national and international instruments can assist in ensuring the right is absolute. The international instruments that have been established thus far, have guaranteed many rights for the individual and have placed certain obligations on States. Ensuring that the protection of the right to housing achieves recognition as a normative right, coupled with explicit protection through international norms and practice, can help it to become a right guaranteed in the most basic form.

2.4 Adequate Housing as Derivative Right

The second way in which housing as a human right can be achieved is as a derivative right through other recognized rights. The protection can derive from the identification and protection of similar rights, including but not limited to, civil and political rights, the right to life, rights of the child, the elimination of discrimination and the right to be free from cruel, degrading, and inhuman treatment. The idea that other rights can encompass the right to adequate housing is not a new phenomenon, but is one that is seemingly not internationally accepted. This could be due to institutional discrimination, lack of resources, or other types of inequities that individuals are subjected to within their State of nationality. However, there are ways in which the right to adequate housing can be derived from other protected rights.

First, it is necessary to identify the types of groups or individuals that are most vulnerable and likely to be subjected to discrimination in terms of housing. Second, instituting governmental programs or resources, if available, can be useful in creating programs to help protect absolute rights. This may include enhanced training for governmental officials. It can also include developing programs and resources for minority groups. States may have instruments and laws in place for protecting internationally recognized rights, such as the right

to life; however, understanding that a lack of adequate housing can lead to a breach of other guaranteed rights is an essential realization for all to understand. Only through the recognition that certain rights encompass other rights and that a dereliction of one can lead to an ever-increasing negligence of other rights, will housing be recognized as an essential human right.

III. INDIVIDUAL RIGHTS AND DUTIES OF THE STATE

Perhaps one of the most basic notions of human rights that has developed over the history of international human rights law is that of the individual as a right-holder and States as duty-bearers; that an individual possesses certain basic human rights, while it is the duty of the State to protect such rights. While an individual is guaranteed certain rights, a State must either make those rights available to the individual or ensure those rights are not infringed upon by the State itself or third parties. Direct state action in the restriction of a human right is a violation, while the omission of protection itself is enough to hold a State accountable.

3.1. Forced Evictions

While the right to adequate housing is not always explicitly stated within an international instrument, it can be implicitly recognized. In such cases, a State may be held accountable for not only its inaction in providing adequate housing for its citizens, but also in its direct interference with the individual's right through forced evictions. A number of cases have been decided through regional mechanisms that have recognized that forced evictions are a violation of human rights. These cases provide color as to the ways in which forced evictions have a negative impact on the individual and the obligation of the State to protect individuals from forced evictions.

3.1.1. African System

3.1.1.1. Centre on Housing Rights and Evictions v. Sudan

In 2010, the African Commission on Human and Peoples' Rights (COHRE or the African Commission) rendered its decision as it relates to the violation of human rights through forced evictions. Of the two communications submitted before the African Commission, the second is applicable to the issue of forced evictions. The Centre on Housing Rights and Evictions brought a petition before the African Commission, alleging that two armed groups had formed in the Darfur region of Sudan to protest the lack of development within the region.¹⁹ In response, the State formed its own armed militia group, which targeted civilians and caused hundreds to be forcibly removed from their homes and villages, when the State bombed and raided the villages.²⁰

Upon consideration of the allegation of forced eviction, the African Commission held that the State of Sudan violated Article 27(2) of the African Charter.²¹ Specifically, the African Commission quantified that had the State's forcible eviction of the civilian population within Darfur been a genuine effort as "collective security" or any other legitimate ground, the forced evictions may have been permissible.²² However, no such justification could be found and the African Commission therefore held that the State failed to uphold its obligation to protect its citizens.²³

3.1.1.2. The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria

Prior to the African Commission's ruling in *COHRE v. Sudan*, in 2002 it similarly found that the destruction of homes of the Ogoni community by the State of Nigeria against its citizens was a human rights violation. In its final decision, the African Commission first addressed the duties of the State in terms of its obligations to the individual by stating:

¹⁹ Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan, 279/03-296/05, (African Commission on Human and Peoples' Rights, May 2009).

²⁰ *Ibid.*, pars. 11-14.

²¹ *Ibid.*, par. 166.

²² *Ibid.*

²³ *Ibid.*, par. 229.

“Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights – both civil and political rights and social and economic – generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.”²⁴

In its analysis of the alleged violation by Nigeria, the African Commission directly applied Article 14 of the African Charter and the implicit protection of adequate housing found in Article 18(1).²⁵ Article 14 of the African Charter states: “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”²⁶ The African Commission recognized the implicit protection of the right to adequate housing within Article 18(1), which provides: “The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.”²⁷ Most notably, the African Commission stated:

“At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State’s obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual’s right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes

²⁴ The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (The Ogoni Case), par. 44 (African Commission on Human and People’s Rights, Comm. No. 155/96 (2001), May 27, 2002).

²⁵ Ibid.

²⁶ African Charter on Human and Peoples’ Rights.

²⁷ Ibid, Art. 18, Section 1.

further than a roof over one's head. It extends to embody the individual's right to be let alone and to live in peace – whether under a roof or not.”²⁸

The African Commission held that the State of Nigeria failed in its obligation, when it destroyed the homes of the Ogoni community and moreover when it shot and killed the citizens who returned to the village to rebuild their homes.²⁹ It is clear from the African Commission's final judgment that the State is under the minimum obligation not to destroy the homes of its citizens and to not inflict force or injury upon an individual attempting to rebuild his or her home. The African Commission set a clear precedent in upholding Article 14 of the African Charter and to hold the State to an obligatory standard of respect and protection of the individual's right to property.

3.1.2 European System

3.1.2.1. Connors v. United Kingdom

In 2004, the European Court of Human Rights (ECHR or the Court) issued a judgment against the United Kingdom, in part, finding the United Kingdom had violated Article 8 of the European Convention,³⁰ which states that all persons have the right to respect for his or her family life and home.³¹ This case involved the forced eviction of a family of gypsies by the government of the United Kingdom. Specifically at issue was whether the forced eviction of the applicant and his family was proportionate and necessary, given the alleged nuisance caused and minor infractions allegedly committed by the applicant and his family; and whether a fair opportunity to be heard was given prior to the eviction, which occurred over five hours and involved police officers, police dogs, and a police helicopter.³²

In its analysis, the ECHR first acknowledged that an interference with an individual's rights can only be necessary if there is a “pressing social need” and it

²⁸ The Ogoni Case, par. 61.

²⁹ *Ibid*, par. 62.

³⁰ *Connors v. The United Kingdom*, 66746/01 (Council of Europe: European Court of Human Rights, May 27, 2004).

³¹ *Ibid*.

³² *Ibid*, par. 28.

is proportionate with a legitimate aim.³³ The Court further stated that a margin of appreciation must be applied when there is an interference of the individual's rights and a legitimate governmental aim, and went as far as to purport that national courts are better situated than international courts in determining the aim.³⁴ However, in determining the aim, the margin of appreciation will be more narrow "where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights".³⁵ The Court also stated that the margin of appreciation is wide in situations involving the application of economic and social policies, and that in issues such as housing, the national authorities are more attuned to evaluate the local needs and conditions, such as the need to restrict an individual's rights.³⁶

The Court made important note of the fact that the applicant and his family were gypsies and deserved special consideration because of their vulnerable status as a minority.³⁷ Additionally, supplementary procedural safeguards were deemed necessary in determining the scope of the margin of appreciation.³⁸ The applicants in this particular case sought judicial review upon eviction and were denied this right, leaving no other avenue or opportunity to appeal their case.³⁹ The ECHR ultimately held that there was no reasonable justification for the forced eviction of the applicant and his family, particularly because the Government failed to provide reasons for the eviction and that in the broader context, the conditions in England during the time of this case tended to show that there are many impediments faced by the gypsy community.⁴⁰

The ECHR's finding that the United Kingdom violated Article 8 of the European Convention provides particular color to the fact that forced evictions without proportionality, justification, or due process are a violation of the right

³³ Ibid, par. 81.

³⁴ Ibid, par. 82.

³⁵ Ibid, par. 82; citing *Dudgeon v. the United Kingdom*, judgment of October 22, 1981, Series A no. 45, p. 21, Section 52, *Gillow v. the United Kingdom*, judgment of November 24, 1986, Series A, no. 104, Section 55 (European Court of Human Rights, May 27, 2004).

³⁶ *Connors v. The United Kingdom*, par. 82.

³⁷ Ibid, par. 84.

³⁸ Ibid, par. 92.

³⁹ Ibid.

⁴⁰ Ibid, par. 95.

to housing. The European Convention's provision of the right to housing and the Court's analysis exemplify the obligation of the State to respect the right, and also provide for the limited situation in which the right may be limited.

3.1.3. Inter-American System

3.1.3.1. *Maria Mejia v. Guatemala*

The Inter-American Commission (the Commission) in 1996 issued a ruling on a case involving the forced displacement of an indigenous population and the death of Maria Mejia, a Guatemalan national and member of the Parraxtut Segundo community. The decision was one of the first within the Inter-American System to apply Article 22 of the American Convention and address forced eviction. This particular case was brought against the State of Guatemala and alleged that in 1982, the Guatemalan government created Civilian Autodefense Patrols (PACs) to relocate the indigenous population and eliminate all suspicious persons.⁴¹ Refusal by the Parraxtut Segundo community to participate in the PACs led to 39 members of the community being threatened and harassed, causing them to live in fear and they were forced to leave their homes.⁴²

Among the various rights breached, including the right to life, right to humane treatment, and the prohibition of slavery and servitude, the Inter-American Commission held that the State of Guatemala violated the applicants' right to freedom of movement and residence under Article 22.1 of the American Convention.⁴³ Specifically, the Commission held that the actions taken by Guatemalan officials in blocking the road when the displaced Parraxtut Segundo community members had attempted to return to their homes was a violation of their right to freely choose their place of residence.⁴⁴

The case of *Maria Mejia* was crucial in the recognition of housing as a human right within the Inter-American System of jurisprudence, as the case was decided directly within the plain meaning of Article 22 of the American

⁴¹ *María Mejia v. Guatemala*, Report N. 32/96 - Case 10.553, par. 1 (Inter-American Commission on Human Rights, October 16, 1996).

⁴² *Ibid*, par. 60.

⁴³ *Ibid*, par. 64.

⁴⁴ *Ibid*, par. 65.

Convention, which provides for the freedom of movement and residence. It can be implied that freedom of residence can encompass the right to housing through the recognition that an individual has the right to choose where he or she lives and the State is under the obligation not to restrict this right and to respect the choice of the individual. The Commission in this case went even further to hold that a State violates this right when, through its agents, the State forcibly evicts individuals from their home through violence and threats of violence, as well as when the State takes measures to restrict the individual's access to the home.

IV. SUBSEQUENT VIOLATION OF OTHER RIGHTS

A State's failure to uphold its duty to protect the rights of the individual has a more fluid effect on vulnerable groups of people and can, in turn, have secondary effects upon other rights of the individual. Additionally, vulnerable groups tend to be most affected by a State's lack of recognition of the right to adequate housing and suffer from its effects disproportionately. Indigenous populations are among the vulnerable groups most affected when a State fails to provide adequate housing and are most often the victims of forced evictions and homelessness than other types of groups. Women are also disproportionately affected when adequate housing is not provided and are at risk of forced evictions and lack of protection when it comes to securing housing. While indigenous populations and women are among the most vulnerable groups in terms of having access to and protection of the right to adequate housing, successes have been made in the form of regional mechanisms.

General Comment No. 7 of the UN Committee on Economic Social and Cultural Rights provides the strongest recognition of how other rights can be affected when restricting an individual's right to adequate housing. Particularly, the Committee states:

“The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions

frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.⁴⁵

4.1. Right to Life

Article 3 of the Universal Declaration of Human Rights provides that all persons have the right to life, liberty, and security of person.⁴⁶ The right to life is a basic human right and is internationally recognized. The right encompasses more than the explicit definition of the term; specifically, it is violated when other rights are breached. An individual's lack of access to adequate housing due to discrimination can violate the right to life. For instance, if a woman is denied housing or is not provided the same opportunities as her male counterpart, arguably, her right to life has been violated. Lack of access to adequate housing can lead to homelessness, causing even more difficulty in maintaining adequate living conditions.

A person's life expectancy can be measured against the availability and access to certain basic resources in order to survive. One of the resources necessary to live is adequate housing and an adequate standard of living. Therefore, lack of access to adequate housing can negatively impact a person's right to life, which women and minority groups are confronted with on a disproportionate level.

4.2. Right to not be subjected to cruel, inhuman or degrading treatment

Article 5 of the Universal Declaration of Human Rights provides that all persons have the right not to be subjected to cruel, inhuman or degrading treatment.⁴⁷ Barriers to access of adequate housing can be a form of cruel and inhuman treatment. Without access to adequate housing, the individual does not have the opportunity to have an adequate standard of living, resulting in inhuman treatment.

⁴⁵ CESCR, *General Comment No. 7, Article 11.1*, par. 4.

⁴⁶ Universal Declaration of Human Rights, Article 3.

⁴⁷ *Ibid*, Article 5.

4.3. Right to be free from discrimination

Article 2 of the Universal Declaration of Human Rights holds that all persons are entitled to the rights set forth within the Declaration without distinction of any kind, such as race, sex, language, color, religion, political opinion, birth, property, or social origin.⁴⁸ This all-inclusive right to be free from discrimination provides a protective barrier against discrimination in any form and against any person, and provides for the right to enjoyment of the rights within the Declaration. The statement that all persons are entitled to the rights within, regardless of sex, provides an explicit example of the intent to protect women from any form of discrimination. Not providing adequate housing to a woman on the basis of her gender and status as a woman, is a form of direct discrimination, yet one to which women are still subjected. Furthermore, indigenous groups should be protected from discrimination as well, given that Article 2 prohibits discrimination based on a person's religion or status at birth.

4.4. Right to a standard of living adequate for health and well-being

Article 25 of the Universal Declaration of Human Rights provides for the right to “a standard of living adequate for the health and well-being of himself and his family”.⁴⁹ This right includes food, clothing, housing and medical care, among other subsets of rights.

5. VULNERABLE GROUPS

5.1. Indigenous Populations

Through an examination of cases, regional mechanisms have been imperative in recognizing housing as a basic human right and have acknowledged situations in which that right has been violated by a State. One of the key challenges in gaining international recognition of housing as a basic human right is the unparalleled differences between populations within a State. Different types of

⁴⁸ Ibid, Article 2.

⁴⁹ Ibid, Art. 25..

individuals are affected disproportionately more than others groups of people, which is also dependent upon the advances of different States. Furthermore, as seen through jurisprudence of the various regional mechanisms, there is no universal definition of ‘indigenous peoples’. Nevertheless, recognition of housing as a human right for all, includes indigenous populations.

5.1.1 European Roma Rights Centre v. Greece

The European Committee of Social Rights (ECSR) in 2005 transmitted a decision on the merits of a complaint involving indigenous populations, specifically the Roma community within Greece. The complaint related to the Roma people’s right to housing within the State. The petitioners alleged that the laws within the State of Greece discriminated against the Roma community, particularly in relation to housing rights, and that the Roma people suffer from forced evictions on a disproportionate level.⁵⁰ Due to the legislative discrimination against the Roma community, the petitioners argued the State had violated Article 16 of the European Social Charter, which provides for the right of the family to social, legal and economic protection.⁵¹ The State violated the right to housing through the lack of homes available to meet the needs of the Roma community, lack of resources for Roma community members who choose to exercise the Roma lifestyle, and the increased number of systematic forced evictions of the Roma people.⁵²

The ECSR stated that the civil and political, as well as economic, social, and cultural rights are encompassed within the right to housing.⁵³ The right to housing means the right to an actual home, as well as access to essential aspects of the home, including electricity.⁵⁴ A State’s failure to uphold its obligation to provide housing that meets a minimum standard is in violation of the obligation to promote the right of families to adequate housing.⁵⁵

⁵⁰ European Roma Rights Centre v. Greece, Complaint No. 15/2003, par. 11 (European Committee of Social Rights, June 8, 2005).

⁵¹ “European Social Charter,” Article 1, opened for signature October 18, 1961, *European Treaty Series* no. 163, <https://rm.coe.int/168007cf93>. Also citing, European Roma Rights Centre v. Greece, Complaint No. 15/2003, par. 11.

⁵² European Roma Rights Centre v. Greece, Complaint No. 15/2003, par. 17.

⁵³ *Ibid*, par. 24.

⁵⁴ *Ibid*, par. 24.

⁵⁵ *Ibid*, par. 42.

In its decision on the merits, the ECSR made it apparent that the right to housing is inherent within civil and political rights, as well as economic, social, and cultural rights. Also of importance, is the obligation that a State has to provide a minimum standard of care when it comes to housing, in addition to an awareness that indigenous communities are among the types of vulnerable groups that are systematically discriminated against, particularly in the right to housing.

5.1.2. Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya

In 2010, the African Commission on Human and Peoples' Rights (African Commission) decided the State of Kenya violated a petitioner's right to property, among other rights, when it forcibly removed the indigenous Endorois community from its land and had not provided adequate compensation.⁵⁶ The African Commission was tasked with determining whether the Endorois community within Kenya was an indigenous population, thereby requiring special protection, or whether it was a sub-group of a larger tribe, which would differentiate it from that of an indigenous group.⁵⁷ In its analysis, the African Commission stated:

“The African Commission, nevertheless, notes that while the terms ‘peoples’ and ‘indigenous community’ arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems... The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.”⁵⁸

Relying upon Articles 19 and 24 of the African Charter and the UN Working Group on Indigenous Populations' definition, the African Commission found that

⁵⁶ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (The Endorois Case), 276/2003 (African Commission on Human and Peoples' Rights, February 4, 2010).

⁵⁷ *Ibid.*, par. 145.

⁵⁸ *Ibid.*, par. 148.

the Endorois community was in fact an indigenous population that must have special protection.⁵⁹ The African Commission also analyzed whether or not the State of Kenya had violated the property rights of the indigenous population under Article 14 of the African Charter. The African Commission looked to its own jurisprudence, specifically the *Ogoni* case, in which ‘property rights’ were deemed to include access to one’s property, to not have one’s property invaded, and the right to possession and control of such property.⁶⁰ By and through its analysis, the African Commission held that the State of Kenya had a duty to not only respect the right to property, but also the right to protect it.⁶¹ Of particular importance was the African Commission’s reliance of its decision in the *Ogoni* case, stating:

“Similarly, in *The Ogoni case 2001* the African Commission addressed factual situations involving removal of people from their homes. The African Commission held that the removal of people from their homes violated Article 14 of the African Charter, as well as the right to adequate housing which, although not explicitly expressed in the African Charter, is also guaranteed by Article 14.”⁶²

Additionally, the African Commission made note of the fact that the term ‘indigenous peoples’ does not have a universal definition and that “the relationships between indigenous peoples and dominant or mainstream groups in a society vary from country to country”.⁶³ This is an important concept provided by the African Commission, as it tends to argue that because there is no universal definition of ‘indigenous persons’, a case-by-case analysis must be taken into account when defining a particular vulnerable group. It seems to suggest that a particular State must look to its own citizens and that what defines an indigenous person may vary between States due to the differences that each State possesses.

⁵⁹ Ibid, pars. 152-162.

⁶⁰ Ibid, par. 186. Also citing, *The Ogoni Case*.

⁶¹ *The Endorois Case*, par. 191.

⁶² *The Ogoni Case*. Also citing, “The Right to Adequate Housing,” Art. 11, Section 1 of the Covenant: forced evictions, par. 4. UN Doc. E/C.12/1997/4 (1997).

⁶³ *The Endorois Case*, par. 147.

5.1.3. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua

The case of the Awas Tingni community was one of the first cases that involved an indigenous population, decided on by the Inter-American Court of Human Rights (IACHR). The decision, delivered in 2001, also set a precedent within the Inter-American System regarding State obligations to protect the individual's right to property. The Awas Tingni is an indigenous community located within Nicaragua and its people speak Sumo (also known as Mayagna).⁶⁴ The State of Nicaragua violated their right to judicial protection, right to private property, right to life, right to privacy, freedom of conscience and religion, freedom of association, right to the family, freedom of movement, and right to participate in government, under the American Convention.⁶⁵

The State's violation of the Awas Tingni community's right to property was a result of the State's grant of logging on the ancestral lands of the Awas Tingni, which they used for traditional practices since inhabiting the land in 1940.⁶⁶ The IACHR applied Article 21 of the American Convention in its conclusion that the State of Nicaragua violated the Awas Tingni community's right to property. According to the IACHR's judgment, all persons have "the right to the use and enjoyment of his property" and the only time in which a person may be deprived of this right is in the situation of "public utility or social interest".⁶⁷

Significantly, the IACHR noted that international human rights instruments cannot be read to have the same meaning as domestic law, and that human rights treaties must adapt and change over time to meet the needs of the individual.⁶⁸ Furthermore, it said special attention must be paid to the rights of indigenous communities, as their land is more than a physical aspect, it is also spiritual, and customary law must be taken into account in protecting the property rights of indigenous communities.⁶⁹

⁶⁴ Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (The Awas Tingni Case), (Inter-American Court of Human Rights, August 31, 2001).

⁶⁵ *Ibid.*, par. 156.

⁶⁶ *Ibid.*, par. 140(b), (h).

⁶⁷ *Ibid.*, par. 143. Also citing, "American Convention on Human Rights," Art. 21, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica (November 22, 1969).

⁶⁸ The Awas Tingni Case, par. 146.

⁶⁹ *Ibid.*, pars. 149, 151.

The analysis of the IACHR and the judgment of the Court to find that the State failed its obligations under the American Convention to protect the rights of the Awas Tingni indigenous population, particularly as it related to their right to property, set a precedent within the Inter-American System of jurisprudence for property rights, namely housing rights of indigenous communities. This case also signified that one of the reasons why indigenous persons face discrimination in terms of the right to housing, is that the State may fail to realize an indigenous community's customary practices and the importance of their spiritual connection to their land.

5.2. Women

In addition to indigenous populations, women are also negatively affected by a lack of adequate housing on a disproportionate level. While various international instruments that provide guidance on the concept of housing as a human right do not explicitly state that it applies to women, the right does in fact encompass women as a protected class of persons in terms of receiving and protecting the right to housing, particularly in instruments that state 'all' persons have certain rights. Furthermore, various instruments were created to protect women, including the Convention on the Elimination of All Forms of Discrimination Against Women. However, women are still discriminated against, even in terms of adequate housing. This is due to the fact that women continually face barriers to access. Discrimination in the forms of lack of educational opportunities, access to land, healthcare, and employment, can all lead to the lack of adequate access to housing for women.

Institutional discrimination is one of the strongest forms of discrimination against women and can lead to secondary violations of other rights, including the right to life, right not to be subjected to cruel, inhuman or degrading treatment, and right to be free from discrimination. General Comment No. 7 of the UN Committee on Economic, Social and Cultural Rights states:

“Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups

are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.”⁷⁰

The UN Office of the High Commissioner for Human Rights in 2012 published a study on woman and right to adequate housing, which examined the relationship between adequate housing and living standards. Significantly, it found:

“Women face discrimination in many aspects of housing, land and property on the basis of their gender, which is often compounded by other factors such as poverty, age, class, sexual orientation or ethnicity. Numerous testimonies from the regional consultations highlight that intersectional discrimination represents a key obstacle to the realization of the right to adequate housing, as it often leads women to live in inadequate housing or in segregated communities without basic services such as safe drinking water, sanitation or electricity. Women living in extreme poverty or under occupation, indigenous and tribal women, widows, divorced or separated women, women head of households, girls, elderly women, women with disabilities, migrant women, domestic workers, and lesbian, bisexual and transsexual women are particularly vulnerable.”⁷¹

The study also found that discrimination can be found in the form of “exclusionary policy development”.⁷² This point is notable, as although various international instruments were created explicitly to protect women and protections for women can be implicitly implied in others, a lack of policy development can also affect women on a disproportionate level.

It is important to recognize that women are subjected to innumerable forms of discrimination which have secondary effects. Both direct and indirect failures to provide adequate housing or access to housing is a form of discrimination and among its consequences are violations of other guaranteed rights. Protections for women have been implemented within international instruments and regional mechanisms. However, it is important for enforcement of the protections to

⁷⁰ CESCR, *General Comment No. 7, Article 11.1*, par. 10.

⁷¹ UN Office of the High Commissioner for Human Rights, *Women and the Right to Adequate Housing* (OHCHR, 2012), p. 36. (2005), https://www.ohchr.org/Documents/publications/WomenHousing_HR.PUB.11.2.pdf.

⁷² *Ibid*, p. 37.

take place. For example, in the Protocol to the African Charter on Human and Peoples' Rights, Article 16 outlines specific protections for women. Within the text of the Charter, it states that:

“Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.”⁷³

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) specifically defines what constitutes ‘discrimination’ against a woman, including any exclusion based on her sex for the purpose of impairing the enjoyment of her rights.⁷⁴ Women must be guaranteed the same rights as men in terms of “ownership, acquisition, management, administration, and enjoyment and disposition of property”,⁷⁵ which, by virtue of the text, requires equal protection of the right to property as men enjoy.

Given that there are protections for women through national, regional, and international instruments, it seems there should be no valid reason for the discrimination of women to still be abundantly present, yet women still face ever-increasing discrimination. Women play an important role within their respective societies; therefore, it is imperative for women to be treated equally, especially when it comes to housing rights.

VI. COMMONALITIES AND DIFFERENCES AMONGST REGIONAL SYSTEMS

6.1. Commonalities

Each of the three respective regional systems on human rights has in some way adopted a form of protection of the right to housing through various instruments. The African System has established through jurisprudence that the State has a minimum duty not to infringe upon an individual's right to

⁷³ “Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,” Art. 16, African Union, July 11, 2003, <https://refworld.org/docid/3f4b139d4.html>.

⁷⁴ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), December 18, 1979, United Nations, Treaty Series, vol. 1249, Art. 1, <https://www.refworld.org/docid/3ae6b3970.html>.

⁷⁵ *Ibid.*, Art. 16(h), <https://www.refworld.org/docid/3ae6b3970.html>.

property. The European System has established that the right to housing is inherent within the right to the family; and that forced evictions are a violation of an individual's right to housing. The Inter-American System has held through jurisprudence that a State is in violation of its obligations and duties to the individual when it restricts the right to access of the individual's home.

6.2. Differences

While the regional mechanisms contain similarities in their attempt to protect the individual in terms of housing, whether through rights of the family, property rights, the right to move freely, or through protection against forced evictions, those systems also have their differences. One of the main distinctions between the regional mechanisms and their corresponding instruments is whether protection is guaranteed through explicit terms or is implicit within other rights.

The African Charter on Human and Peoples' Rights appears to address the right to housing implicitly through the protection of an individual's right to property. The European Convention on Human Rights provides for the explicit protection of the right through Article 8 of the Convention and also implicitly through various other articles. The American Convention on Human Rights explicitly provides for the protection of the right to property. While each of the instruments attempts to address the right to housing in some form, each varies in terms of implicit versus explicit recognition.

VII. COMPARISON OF STATE APPROACHES TO HOUSING RIGHTS

7.1 The United States

The United States has a long history of examining the role of the federal government in providing housing. The right to housing is not explicitly written within the Constitution; however, the United States has taken efforts to provide for this right by passing various federal acts and policies that attempt to provide housing protections. Some of those policies have fallen short and it is

important to note the consequences of not adequately providing for the right to housing. When housing rights are not provided, it can affect other human rights, as stated by Mayra Gómez and Bret Thiele:

“Without it, employment is difficult to secure and maintain, health is threatened, education is impeded, violence is more easily perpetrated, privacy is impaired, and social relationships are frequently strained.”⁷⁶

7.1.1 Affordable Housing

Affordable housing continues to be a longstanding topic of research in the United States, with various state and federal programs being implemented to assist individuals with securing affordable housing. To understand how to develop solutions to the affordable housing issue, it is important to define ‘affordability’, for which the UN has determined, “housing is not adequate if its cost threatens or compromises the occupants’ enjoyment of other human rights”.⁷⁷

One essential concern with developing affordable housing is the income gap that exists between the rich and the poor in the United States and the ability for low income individuals to obtain housing. In her article, “Housing: Commodity versus Right”, Mary Pattillo states:

“Those with the greatest resources are able to buy or rent the best housing in the best locations, with each income stratum down the ladder buying successively lower-quality housing in worse locations (with the important caveat of the distorting effects of discrimination). In theory, the market should produce enough to satisfy the demands of those throughout the socioeconomic spectrum. However, housing problems do not arise because of a lack of supply. At the end of 2012, there were nearly 18 million vacant housing units in the United States (US Census Bur. 2012).”⁷⁸

Affordable housing continues to be an issue in the United States, most notably when it comes to inequities that exist between individuals economically.

⁷⁶ Mayra Gómez and Bret Thiele, “Housing Rights Are Human Rights,” *Human Rights* 32, no. 3 (2005), p. 2–24. <http://www.jstor.org/stable/27880484>.

⁷⁷ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 21/Rev.1*, 2009, <https://www.refworld.org/docid/479477400.html>.

⁷⁸ Mary Pattillo, “Housing: Commodity versus Right,” *Annual Review of Sociology* 39 (2013), p. 509–31. <http://www.jstor.org/stable/43049647>. Citing, US Census Bureau, *Residential Vacancies and Homeownership in the Fourth Quarter 2012*. News Release, Jan. 29, US Census Bureau News, Washington, DC. <http://www.census.gov/housing/hvs/files/qtr412/q412press.pdf>.

While various federal instruments have been created in an effort to provide housing fairness, such as the Fair Housing Act of 1968, the main compliance mechanism – the sanction of withholding US Department of Housing and Urban Development funds – has rarely been attempted and may be inconsequential.⁷⁹

Discrimination is also a problem in affordable housing in the United States. According to Lincoln Quillian, it is difficult to measure discrimination, partly “because of the incentives for perpetrators to hide discrimination”.⁸⁰

This can be true when it comes to affordable housing and the disparate treatment between individuals, even when federal policies are created to address housing. Assistant Professor Emily Bergeron states in her article, “Adequate Housing is a Human Right”:

“These decades-old discriminatory federal policies created a foundation for economic inequality, decreasing opportunities for upward mobility for those living in segregated neighborhoods. For example, though African American incomes average about 60 percent of white incomes, African American wealth is about 5 percent of white wealth. As middle-class families derive wealth from home equity, this disparity is clearly attributable to twentieth-century federal housing policy.”⁸¹

7.1.2 Evictions

As with affordable housing, evictions are problematic in the United States. As discussed in previous sections of this article, forced evictions are a widespread problem internationally. An eviction of an individual can provide further negative consequences, such that it can be difficult for the individual to find future adequate housing. In his article “Eviction and the Reproduction of Urban Poverty”, Matthew Desmond states:

“When evicted tenants do find subsequent housing, they often must accept conditions far worse than those of their previous dwelling. Because many landlords reject applicants with recent evictions, evicted tenants are pushed

⁷⁹ Dan Immergluck, “Commentary: Encouraging Housing Equity,” *Cityscape* 19, no. 2 (2017), p. 129–36. <http://www.jstor.org/stable/26328330>.

⁸⁰ Lincoln Quillian, “New Approaches to Understanding Racial Prejudice and Discrimination.” *Annual Review of Sociology* 32 (2006), p. 299–328. <http://www.jstor.org/stable/29737741>.

⁸¹ Emily Bergeron, “Adequate Housing is a Human Right,” *Human Rights Magazine* 44, no. 2 (2019). https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--44--no-2--housing/adequate-housing-is-a-human-right.

to the very bottom of the rental market and often are forced to move into run-down properties in dangerous neighborhoods.”⁸²

The consequences of an eviction can have immediate and subsequent negative effects on an individual who is already in a vulnerable situation. Evictions will continue to be an issue as long as affordable housing and systematic discrimination and inequities exist within the United States. Even presently, evictions are on the rise. The global COVID-19 pandemic brought brief housing relief to Americans when the federal administration implemented an eviction moratorium, making it unlawful for landlords to evict a tenant for late rent payments during the pandemic. However, although the global pandemic is still present, the US Supreme Court voted to end the eviction moratorium on August 26, 2021, thereby failing to extend protection against eviction for individuals unable to pay their rent due to the pandemic, furthering the ongoing crisis of evictions in the United States.

7.2 Poland

7.2.1 Evictions

Poland has also seen a rise in evictions amid concerns over the issue of affordable housing. In his article, “The Right to Adequate Housing in International Human Rights Law: Polish Transformation Experiences”, Bogumil Terminski pointed out that the issue of evictions had raised the attention of the UN Economic Commission for Europe, which noted:

“In countries with economies in transition where social protection has declined considerably, there is a strong need to address the situation of tenants, as housing markets are becoming increasingly commercialized. In Poland, the rents and service charges are too high for poor people. Notwithstanding the housing allowances, some households cannot afford such expenditures, which, in extreme cases, lead to evictions. There has been an increase in evictions in Poland.”⁸³

⁸² Matthew Desmond, “Eviction and the Reproduction of Urban Poverty,” *American Journal of Sociology* 118, no. 1 (2012), p. 88–133. <https://doi.org/10.1086/666082>.

⁸³ Bogumil Terminski, “The Right to Adequate Housing in International Human Rights Law: Polish Transformation Experiences,” *Revista Latinoamericana de Derechos Humanos* 22, no. 2 (2011): p. 219, <https://www.corteidh.or.cr/tablas/r31406.pdf>.

Similar to the United States, Poland has experienced an increase in evictions in what seems to be largely due to housing affordability and the economic gap between individuals.

7.3 Germany

7.3.1 Affordable Housing

Germany has addressed affordable housing through the implementation of federal programs that assist individuals with obtaining housing through funding distributed to the individual, and with vouchers that provide direct payments from the federal government.⁸⁴ Germany has also transitioned to ‘cooperative housing’, a concept described by Kathryn Reynolds in her article, “Creating Permanent Housing Affordability: Lessons From German Cooperative Housing Models”. She defines the concept as, “many different forms of housing, ranging from for-profit cooperative owner-occupied housing to affordable cooperative housing to cohousing.”⁸⁵

VIII. CONCLUSION

The recognition of economic, social, and cultural rights has developed through the creation of international instruments implementing such rights. However, an era of ever-increasing international exceptionalism, through failure of state recognition and implementation, has created challenges to the protection of the rights. Among the economic, social, and cultural rights facing challenges is the right to adequate housing; however, it can be achieved through both a normative and derivative framework. Direct and indirect failure to recognize and protect the right to adequate housing has various consequences, and its effects are most inflicted upon minority groups, such as indigenous populations and women.

Implementation of the right to housing through the jurisprudence of regional systems has brought success in the form of international dialogue. An analysis

⁸⁴ Kathryn Reynolds, “Creating Permanent Housing Affordability: Lessons From German Cooperative Housing Models,” *Cityscape* 20, no. 2 (2018), p. 263–76, <https://www.jstor.org/stable/26472178>.

⁸⁵ *Ibid*, p. 263–76.

of case law from the various regional mechanisms provides evidence that each of the various systems seeks guidance from cases decided in other regional systems when determining an appropriate analysis of each case. Further, it provides examples to the international community of the ways in which the individual is a holder of these rights, but also infers it is a State's duty and obligation to protect and respect such rights. The key to continuing the pursuit of protection of the right to housing for all is through international dialogue, state accountability, and eradication of institutional discrimination.

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