La loi du plus fort: l'expropriation dans la perspective des droits de l'homme

Cet article expose quelques éléments clés d'une approche de l'acquisition forcée de terres fondée sur les droits de l'homme. Il montre que l'acquisition forcée de terres est souvent rapide lorsque les personnes directement concernées ont le pouvoir politique, économique et juridique le plus faible. L'expropriation devrait être un outil puissant et bénéfique pour les personnes défavorisées, mais elles en sont fréquemment les victimes. Les évictions forcées par expropriation continuent à se multiplier – des millions de personnes sont dépossédées chaque année, ce qui est à l'origine de conséquences graves et traumatiques pour les familles et les communautés, pour les femmes et les pauvres. S'il est vrai que le droit international en matière de droits de l'homme et de nombreuses constitutions interdisent les évictions forcées, les dispositifs d'application favorisent généralement ceux qui ont des droits de propriété forts, en particulier les investisseurs étrangers. De nombreux cas mettent aussi en évidence la nature de plus en plus «privée» des acquisitions publiques et la façon dont la législation en matière d'acquisition forcée tend à faire l'objet d'abus concrets, notamment dans les domaines de la justification, de la participation et du dédommagement.

Vía de la mínima resistencia: la expropiación desde la perspectiva de los derechos humanos

En este artículo se esbozan algunos elementos clave de un enfoque de la adquisición de tierras por expropiación basado en los derechos humanos. Se muestra que la adquisición de tierras por expropiación procede a menudo con rapidez allí donde el poder político, económico y jurídico de quienes resultan directamente afectados es más débil. Si bien la expropiación debería ser un poderoso y beneficioso instrumento para las personas desfavorecidas, con frecuencia éstas son en realidad víctimas de ella. Los desahucios forzosos mediante la expropiación continúan aumentando; millones de personas son desahuciadas cada año, con graves, traumáticas consecuencias en las familias y las comunidades, las mujeres y los pobres. Aunque el derecho internacional relativo a los derechos humanos y muchas constituciones prohíben los desahucios forzosos, los regímenes de puesta en aplicación tienden a favorecer a quienes gozan de derechos de propiedad más sólidos, en particular los inversores extranjeros. Muchos casos demuestran también la naturaleza crecientemente "privada" de la adquisición pública, y ponen de relieve que en la práctica tiende a abusarse de la legislación sobre adquisición por expropiación, especialmente en lo relativo a la justificación, la participación y la compensación.

Path of least resistance: a human rights perspective on expropriation

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This article outlines some key elements of a human-rights-based approach to the compulsory acquisition of land. It shows that the compulsory acquisition of land often proceeds rapidly where the political, economic and legal power of those affected directly is weakest. While expropriation should be a powerful and beneficial tool for disadvantaged people, they are in fact often its victims. Forced evictions through expropriation continue to grow – millions of people are evicted each year, bringing severe and traumatic consequences for families and communities, for women and for the poor. While international human rights law and many constitutions prohibit forced evictions, enforcement regimes tend to favour those with stronger property rights, in particular foreign investors. Many cases also demonstrate the increasingly "private" nature of public acquisition and underline how compulsory acquisition legislation tends to be abused in practice – particularly in the areas of justification, participation and compensation.

EXPROPRIATION FOR WHOM?

Expropriation[1] of land usually follows the path of least resistance. It proceeds rapidly and more harshly where the political, economic and legal power of those directly affected is weakest. Where the affected landowners or occupants are socially marginalized, they are more likely to be underrepresented in relevant decision-making processes, lose land to questionable uses and receive lower compensation. This is true for any attempt to reallocate land and resources. One study (Cities Alliance, 2003) concluded that the likelihood and degree of land division/sharing between private landowners and informal settlers in urban Thailand was directly proportional to organizing power and political connections.

In theory, state power to expropriate land for public purposes should be a powerful and beneficial tool for the rural and urban poor, for women, and for indigenous peoples. The realization of economic and social rights through the establishment of public utilities, schools, hospitals and particularly transport infrastructure is often not possible without the purchase of private land, which sometimes must be executed against the will of the owner. Expropriation powers are also essential for wider land redistribution. The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly acknowledges the importance of agrarian reform for realizing the right to food (see Article 11). Recent democratic changes in Latin America and South Africa have been partly driven by the injustice of heavily skewed land distributions that created large numbers of landless labourers and feudal-like tenant farmers.

However, land reform programmes have met fierce resistance from landowners, even where land is not developed, spawning growing self-help movements such as Movimento dos Trabalhadores Rurais Sem Terra (MST) in Brazil. In Asia, decades-long

[1] In this article, expropriation is used to designate a situation where a state forcibly acquires property from a private individual or entity. It is synonymous with terms such as compulsory purchase, compulsory acquistion and eminent domain.

agrarian reform programmes and legislation in many countries remain part-implemented (Borras, 2006). The same is true in urban areas. In Nairobi, Kenya, at least 60 percent of the population live in informal settlements that cover only 5 percent of the city's land (the same percentage devoted to golf courses). Despite the existence of undeveloped land in Nairobi, few efforts have been made to acquire it for the poor while many resettlement proposals involve locations far from the city centre and places of work.

Instead of being the direct or indirect beneficiaries, the marginalized can often be the victims of expropriation. Large-scale public infrastructure projects such as dams, roads, electrical networks and the holding of major events such as the Olympics, have resulted in tens of millions of people being forcibly evicted[2] without adequate remedies over the last decade alone (UN-Habitat, 2007; COHRE, 2006, 2007; du Plessis, 2005). The victims not only include small and poorer property owners but also informal occupiers. The latter remain largely invisible in expropriation laws, which tend be heavily property-rights-centric. This is despite the pervasiveness of informal land occupation in "the South" and among some low-income and minority communities in "the North". The asymmetry in treatment between different groups is perhaps well exemplified by the furore that greeted the *Kelo* v. *City of New London* 545 U.S. 469 (2005) decision by the Supreme Court of the United States of America. Courts in the United States of America had previously interpreted the public interest test for expropriation expansively to include for-profit projects such as shopping centres. However, the *Kelo* case was the first time such expropriation, or use of "eminent domain" as it is known in the United States of America, was fully targeted at a largely middle-class or "non-blighted" locality (Robbins and Svendsen, 2007). The wave of constitutional amendments and citizen mobilization across the United States of America to trim these powers only transpired when the middle class was affected directly.

The consequences of forced eviction for families and communities, particularly for the poor, are severe and traumatic (UNHCHR, 1996; du Plessis, 2005). Property is often damaged or destroyed; productive assets are lost or rendered useless; social networks are broken up; livelihood strategies are compromised; access to essential facilities and services is lost; and often violence, including rape, physical assault and murder, are used to force people to comply. In the case of children, Bartlett found: "The impacts of eviction for family stability and for children's emotional well-being can be devastating; the experience has been described as comparable to war for children in terms of the developmental consequences. Even when evictions are followed by immediate relocation, the effects on children can be destructive and unsettling." (Bartlett, 2002, 3). Non-owners and occupiers are also affected. In one expropriation process, not only was compensation for farmers one-sixth of market value but agricultural labourers and small support businesses received no support despite the collapse of livelihoods with the loss of the local agricultural economy (FIAN, 2008).

This article therefore sets out to examine expropriation briefly in the context of international human rights law and practice, with a particular focus on countries in the South. The first section argues that while international human rights law provides strong protections against unjust expropriations and positively encourages expropriation in the realization of certain human rights, enforcement mechanisms are heavily tilted towards the powerful. The subsequent section examines common problems in the South with a particular focus on outdated legal frameworks, the interpretation of public

[2] The UN Committee on Economic, Social And Cultural Rights (1997) defines "forced eviction" to mean an involuntary eviction without due process and remedies. See below in the section "Human rights".

interest, arbitrary expropriation processes and compensation all in the context of a modernist and "neoliberal" model for development. The article concludes with recommendations on incorporating a human rights approach into expropriation law and practice.

HUMAN RIGHTS

The former UN Commission on Human Rights, made up of states, called forced evictions a "gross violation of human rights", and international and regional human rights law is unequivocal on the obligation of states to protect individuals from forced eviction from their homes and, thus, from unjust expropriation (Langford and du Plessis, 2005). One can find it particularly in the right to housing, recognized in the ICESCR, and the right to respect for the home in the International Covenant on Civil and Political Rights (ICCPR).

In interpreting the former covenant, the UN Committee on Economic, Social and Cultural Rights (1991 and 1997) has stated that:

- Eviction should proceed only in "exceptional circumstances".
- Substantial justification must exist for any eviction.
- All feasible alternatives to eviction must be explored in consultation with the affected persons.
- There must be due process, including: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice; (c) information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used; (d) government officials or their representatives to be present during an eviction especially where groups of people are involved; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons in order to seek redress from the courts as needed.
- All individuals concerned have a right to adequate compensation for any property, both personal and real, that is affected.
- Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the state party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.
- Legislation must be enacted to ensure effective protection from forced eviction.

The UN Human Rights Committee (2005) enunciated similar principles when it reviewed evictions of residents in informal settlements in Kenya. The above comments have also been affirmed by the European Ministers at the Council of Europe and the African Commission on Human and Peoples' Rights (Langford and du Plessis, 2005). Guidelines on development-based displacement endorsed by the UN Secretary-General are also notable for their detailed prescriptions on adequate resettlement and compensation (UN Economic and Social Council, 1997).

The human right to food is enshrined in Article 11 of the ICESCR. In General Comment No. 12, the UN Committee on Economic, Social and Cultural Rights (UN Committee on Economic, Social and Cultural Rights, 1999) states that the right is realized when every man, woman and child, alone or in community with others, has *physical and economic access* at all times to adequate food or means for its procurement. This includes both the use of productive land or other natural resources to obtain food and income as well as functioning distribution, processing and market systems that can move food from the site of production to where it is demanded. Based on this interpretation, it is clear that the ability to cultivate land

individually or communally (on the basis of ownership or other form of tenure) is part of the basic content of the right to adequate food that must be respected, protected and fulfilled by states. The *Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security*, drawn up and adopted by states at the 127th Session of the FAO Council in 2004 (FAO, 2005), explicitly provides: "8.10 States should take measures to promote and protect the security of land tenure, especially with respect to women, poor and disadvantaged segments of society, through legislation that protects the full and equal right to own land and other property, including the right to inherit. As appropriate, States should consider establishing legal and other policy mechanisms, consistent with their international human rights obligations and in accordance with the rule of law, that advance land reform to enhance access for the poor and women. Such mechanisms should also promote conservation and sustainable use of land. Special consideration should be given to the situation of indigenous communities."

The right to property has received comparatively less recognition in international law. Incorporated in the Universal Declaration of Human Rights, it was omitted in the ICESCR and ICCPR. Agreement could not be reached on the concept of property, the restrictions to which the right could be subjected and the principles by which compensation should be calculated (Jayawickrama, 2002). Nonetheless, some argue that the right to property now forms part of international customary law (American Law Institute, 2008). The right to property has been strongly recognized in the context of discrimination (included in treaties concerning racial discrimination and women's rights). In addition, International Labour Organization (ILO) Convention No. 169 recognizes indigenous property rights, such as the recognition of ownership, safeguarding of natural resources, protection from removal, and restitution and compensation. Relocation is forbidden except in exceptional circumstances and only where there is free and informed consent, although the latter protection is later watered down in the text. While ratifications of this convention are not numerous, similar provisions were included in the UN General Assembly's Declaration on the Rights of Indigenous Peoples in 2007.

Regional human rights treaties in Africa, Europe and the Americas and the Arab Charter on Human Rights do recognize the right to property. Unlike their international counterparts, the European Court of Human Rights (ECHR) and Inter-American Court of Human Rights can make enforceable orders when complaints are made concerning human rights violations. However, the ECHR cannot adjudicate on rights to housing and food *per se* while the Inter-American Court of Human Rights has infrequently addressed express socio-economic rights (Melish, 2008). This raises the possibility that regional systems favour property over socio-economic rights in expropriation-related cases. The possibility is only partly evident in practice. For example, the ECHR has recognized that forced evictions of tenants and informal occupiers can violate the civil right to protection of the home and family life[3] and that the right to property extends to compensation for the value of structures of slumdwellers.[4] The court also employs a wide margin of appreciation in the case of the right to property (Emberland, 2006) and has been somewhat cognizant of housing policy concerns in determining whether interferences with property rights are permissible (see Clements and Simmons, 2008). The Inter-American Court of Human Rights has extended the right to property to protect the ancestral lands of indigenous peoples and has used General Comment No. 4 (The Right to Adequate Housing) on

[3] See for example, *Connors* v. *United Kingdom* (ECHR, Application No. 66746/01, 27 May 2004) and *Khatun* v. *United Kingdom* (1998) 26 EHRR CD 212.

[4] *Öneryildiz* v. *Turkey* No. 48939/99), European Court of Human Rights, 18 June 2002.

the ICESCR in fashioning remedies.[5] Thus, there is evidence of some convergence between civil and political rights and socio-economic rights. However, property owners with formal and freehold title are likely to fare better than informal owners and the homeless.

More striking is the bipolarism in the international activities of the World Bank and the Organisation for Economic Co-operation and Development (OECD), which have supported strong property rights protections for multinationals through bilateral investment treaties (BITs). Such treaties have flourished, increasing from 385 to 1 857 between 1990 and 1999 (Peterson, 2006), with the total now well over 2 000. Companies can directly lodge complaints against host countries and the decisions are legally binding. The treaties provide for arbitration by the World Bank-hosted International Centre for Settlement of Investment Disputes (ICSID) or private arbitration. Cases are now regular. In 1995, a single case was lodged; in 2005, 42 were filed. In the area of expropriation, BITs provide strong protection to investors. The standard treaty provides for market value compensation for expropriation, which is drafted (and enforced) widely to cover all types of regulations that may affect the value of land or other type of property. Peterson (2006) notes that many of the treaties signed by South Africa provide greater property rights protection to foreign investors than locals.

However, the World Bank has made only timid steps to promote security of tenure for other groups. Its Operational Policy on Involuntary Resettlement (World Bank, 2007) states that "Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs" (para. 2) and acknowledges that "resettlement of indigenous peoples with traditional land-based modes of production is particularly complex and may have significant adverse impacts on their identity and cultural survival" (para. 9). The guidelines are backed by the World Bank Inspection Panel, which can receive complaints from affected persons.

Nevertheless, the framework is barely consistent with a human rights approach. The guidelines essentially presume expropriation is necessary without any strong public interest test or process for consultation and negotiation. The focus is principally on compensation and relocation schemes. Only the World Bank's Indigenous Peoples Policy is more explicit, with a requirement for majority community support for resettlement. Revisions to the resettlement guidelines in 2001 also narrowed compensation to social and economic impacts, excluding psychological and cultural dimensions. In addition, the Inspection Panel has no explicit mandate to look at human rights standards and its findings are not enforceable on World Bank management. Studies have found that World Bank-sponsored resettlement programmes have rarely provided adequate compensation or livelihoods (Clark, 2002). The inability of the Inspection Panel to supervise its recommendations means it has little control over the remedying of violations. A former panel member, Scudder (2005) believes the guidelines are fundamentally the problem with their focus on restoration not improvement of livelihoods, as livelihoods post-eviction almost always decline.

Conflicts between investors' property rights and human rights have also manifested themselves in a similar way to the regional systems. In some cases, investors and marginalized groups contest the same piece of land. For example, the Government of Paraguay refused to expropriate lands of German owners that, according to the Paraguayan constitution, are suitable to be acquired for agrarian-reform purposes or for returning to indigenous peoples. The state cited the BIT between Paraguay and Germany in support of its stance even though it allowed for expropriations "in public interest". In

[5] Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, Judgment of 31 August 2001.

an interesting decision on one of these cases, in 2006, the Inter-American Court of Human Rights (*Sawhoyamaxa* v. *Paraguay*) held "that the application of bilateral commercial agreements do not provide a justification for the breach of states obligations emanating from the American Human Rights Convention; on the contrary, their application must always be compatible with the American Convention".[6] Civil-society groups also argued that Germany, as a state party to the ICESCR, was obliged under Article 2.1 to cooperate with other state parties, among them Paraguay, to realize the right to food of the landless peasants in Paraguay (see Brot für die Welt, FIAN and EED, 2006). However, international arbitration panels, which mostly adjudicate BIT-related disputes, are yet to incorporate clearly international human rights law in their interpretation of investment treaties.

Thus, the effective protection of the property and land rights for all seems not to be on the World Bank agenda. The World Bank has not moved to ensure that the decisions of the Inspection Panel are binding nor has it strongly encouraged states to develop broader protections from expropriation or forced eviction. Equally, the OECD's *Guidelines for multinational enterprises* (OECD, 2000), which would regulate foreign investor behaviour, are non-enforceable. The OECD appears content to promote a situation where multinational corporations have enforceable rights but only optional responsibilities. In the era of globalization, the effects of expropriation are tilted ever more downwards. A rule of thumb in international news coverage seems to be that the nationalization of one foreign company is equivalent to the eviction of 200 000 people.

The "other" development community has not fared much better. Of the much-trumpeted Millennium Development Goals (MDGs), the most relevant target (11) calls for the improvement of the lives of 100 million slumdwellers by 2020. Yet, there are almost 1 billion slumdwellers today with forecasts of 1.4 billion by 2020. The indicator for measuring this target is security of tenure but it may only cover the 100 million targeted. The vagueness of the target also allows some governments to cite policies, such as slum clearance, which on the face of them would violate human rights (see Government of Viet Nam, 2005). A much better target might have been basic security of tenure for all, which would have ensured protection from forced eviction, including unjust expropriation. The same concern can be extended to Target 2 on halving hunger by 2015. The qualified goal means one can potentially avoid focusing on the poorest farmers, possibly avoiding addressing forced evictions as well as accelerating agrarian land reform, although the United Nations Development Programme has called for agrarian reform as one of the strategies to reach MDG Target 2 (UNDP, 2003).

COMMON PROBLEMS WITH EXPROPRIATION IN THE SOUTH

The magnitude of the negative impact of unjust expropriations is often greatest in the South although one can find many alarming instances in the North (see COHRE, 2007). This is because of both the large number of people living in poverty and the current state of law, developmental ideology and governance. In some cases, it is also a question of resources – local municipalities may simply lack adequate funds to purchase land at market value for utilities and infrastructure development. More powerful economic actors, such as transnational corporations and foreign and domestic investors, are also exposed to the vagaries of expropriation in the South. However, it is arguable that the significant power of such actors minimizes the frequency and severity of expropriations. Indeed, even in the period between 1960 and 1976, when nationalization of foreign-owned firms was at its peak in the South,

[6] Corte Interamericana de Derechos Humanos *Caso comunidad indígena Sawhoyamaxa* v. *Paraguay*, Sentencia de 29 de Marzo de 2006.

less than 5 percent of such corporations were affected (Kobrin, 1984).

The first issue in some countries in the South is that expropriation legislation stems from colonial times and provides very limited legal protections in terms of defining public interest or with regard to providing due process and adequate compensation. In one state, expropriation legislation has not been amended since 1894 and the land records have not been updated since that time, while large-scale improvements to the land such as multicropping are not recognized in the payment of compensation.

Even contemporary Western-style legislation is not necessarily appropriate. It rests on the assumption that most land is registered formally. However, few developing countries have more than 30 percent of their land accounted for in land records. Land records are also often linked to the middle and commercial classes. This can exclude up to 85 percent of the population in some countries, the majority of whom are often people living under customary law systems or in informal settlements and often in poverty. It might be argued that these broader flaws in the distribution of land and housing rights should not be linked solely to expropriation legislation and that broader legal and policy developments are necessary instead. While this is true, expropriation legislation could be easily adjusted to include recognition of other property interests that are fundamental for human rights to housing, food and livelihoods.

A second important issue is that the interpretation of the public interest test, always controversial, can sometimes be more skewed. Leckie notes that: "[V]irtually no eviction is carried out without some form of public justification seeking to legitimize the action. Many of the rationale behind the eviction process are carefully designed to create sympathy for the evictor, while simultaneously aiming to portray the evicted as the deserved recipient of these policies – a process appropriately labelled 'bulldozer justice' by the retired Indian Supreme Court Justice Krishna Iyer." (Leckie, 1995, 17).

What is in the public interest is inherently subjective (Kalbro and Lind, 2007). Its definition is likely to be influenced by prevailing views of what constitutes "fairness" and the party with the greater bargaining power is most likely to influence its definition. The current vision of development in many countries in the South favours "big" over "small", even though institutions such as the World Bank have conceded that small-scale farmers are economically more efficient than large farmers (see van den Brink *et al.*, 2006). Alternative development paradigms that would allow people to define better their priorities and needs in pursuit of development still receive short shrift. In the era of globalization, the introduction of liberal economic policies, and many market-oriented "development" programmes also favour rapid public expropriations for large-scale private interest. In its new industrial policy, India has welcomed foreign technology and investments and taken the initiative to develop Special Economic Zones (SEZs) and Export Processing Zones (EPZs). Approximately 35 000 acres (about 14 000 ha) of agricultural land will be compulsorily acquired for this purpose in West Bengal alone.

The result of these ideologies and power imbalances is that the magnitude and pace of *pro-poor* expropriation is outstripped by *pro-big business* expropriation. For example, in India, a domestic and a foreign motor corporation were able to acquire private land from peasants by compulsory purchase in less than a year with government assistance. However, an evaluation of West Bengal's achievements in agrarian land reform since the early 1980s reveals that out of the 1 million acres (more than 400 000 ha) of land acquired for distribution only 250 000 acres (about 100 000 ha) were actually distributed (*Liberation*, 2002). The result is that 41 percent of households remain landless, while 13.23 percent of land-reform recipients have lost possession of lands and 14.37 percent of share croppers have been evicted (Government of West Bengal, 2004).

Moreover, what is pertinent about most official discourse concerning evictions is the virtually total absence of attempts by authorities to find creative alternatives in order to prevent evictions (du Plessis, 2005; Langford and du Plessis, 2005). Once an expropriation or other planned eviction project has been decided on, discussion usually turns to the more logistical issues of why, how and when. Consideration is seldom given to possibilities of averting evictions through community-based, locally appropriate alternatives. This unfortunate gap in thinking and practice relates to the fact that the input to be made by the affected groups is almost universally underrated and discounted against the technical expertise commissioned by the implementers of such eviction projects. In one case, the affected groups in partnership with experts developed detailed alternative plans that were arguably more affordable for the city and had far less impact on the environment (K. Fernandes, personal communication, 2007).

The third key problem is governance and particularly respect for other human rights in the process. Consultation with local actors on alternatives to eviction is often never carried out and expropriations can be marked by silence and secrecy. Rarely are impact assessments conducted to determine the nature and severity of economic, social and cultural losses together with a comprehensive and up-to-date list of affected persons. Such impact assessments are critical as they affect the entire discussion over whether an expropriation is in the public interest. They can also evaluate the wider impact. For example, compensation may be available to displaced owners of agricultural land but the expropriation can destroy the livelihoods of those engaged in the agricultural economy, such as unregistered sharecroppers, agricultural labourers and small entrepreneurs who depended on the agrarian economy (small shop owners, transport providers, and vendors). The physical acquisition of land can be violent and media representatives restricted from observing the process. Moreover, corruption can cloud the process. As land values increase during development, access to land by private interest or government officials is profitable and creates opportunities to circumvent fair processes (see *The Statesman*, 2007).

Last, women's land rights and the rights of marginalized groups are often less protected, and they may be excluded from both the process and design of any compensation payment. To take the case of women, legal frameworks may not take into account the particular rights and interests of women to ownership of the land, depriving them of a voice in the process and of compensation. Recent property law in China has been criticized for not only continuing to allow easy expropriation and the payment of inadequate compensation (which, remarkably, can include social security payments) but because it also fails to address women's rights to compensation – particularly for those women working in urban areas with property in rural areas (Tang, 2007). Women are also most likely to suffer the brunt of violence when evictions are carried out by force. Domestic violence also often increases before and after forced evictions because of a heightening of family tensions, and male family members often feel a loss of identity and control as economic providers for the family (COHRE, 2002). Where forced evictions lead to a long-term lack of economic and housing security, women are again placed at increased risk of violence and exploitation because of systems of gender-based discrimination.

TOWARDS A HUMAN RIGHTS APPROACH

While it is not possible within this article to outline a fully-fledged human-rights-based approach to expropriation and compensation, we do want to highlight some principles and approaches that are often lost in exercises to develop both laws, guidelines and processes. These principles also draw partly on work undertaken for the Global Land Tool Network in developing grassroots mechanisms for

land administration and management (see Langford and Goldie, 2007):

- Land equality: Macro analyses should be conducted to determine the extent to which expropriation is currently contributing to land *equality* or *inequality*. The UN Committee on Economic, Social and Cultural Rights (1999) has noted the importance of ensuring "full and equal access to economic resources, particularly for women ... including the right to inheritance and the ownership of land". If a particular expropriation will only exacerbate this trend, consideration should be given to whether it should be prioritized. Embodying such a principle in policy or law may spur greater attention to redistributive land reforms in contexts of high inequality of landownership.
- Protection from forced eviction: A baseline protection from forced evictions is needed in order to ensure that unjust expropriations are less likely to occur. Such protection could also be included in expropriation legislation. However, the protection needs to extend beyond law – an institutional culture that requires strong justification and due process for eviction needs to be encouraged. In addition, a full review of other laws that may permit forced eviction should be undertaken and appropriate action taken.
- Last resort: Displacement of people from their homes and basic livelihoods should be considered an action of last resort and evictions should only occur in exceptional circumstances. Public interest justifications for expropriation should be explicitly proved and verified according to clearly defined criteria including not violating human rights. Otherwise, the public interest should be disqualified as such. This should be enshrined as the key principle in any law or guideline.
- Consideration of alternatives: A full and transparent process should be adopted to determine whether there are alternatives to the planned expropriation and eviction. This should precede the decision and it should not be assumed that the standard consultation/objections processes in expropriation law are sufficient. Such a process should extend beyond the preparation of impact assessments and involve the active partnership of the state and the affected peoples in assessing various alternatives. If the state and the affected persons cannot agree, there should be an independent review of the decision.
- Effective participation: Most processes of participation in compulsory acquisition presume that affected individuals and groups can easily access information, organize collectively and make interventions effectively. While this is usually the case for a foreign investor, it is not always so for large urban settlements or disparate rural areas. An expropriation process should include: (i) a preliminary phase for independent assessment of the best means to engage with those affected; (ii) a determination of whether there are existing and adequate structures for participation in the group; (iii) a decision on whether separate channels of participation are needed in order to ensure the voices of marginalized groups can be heard; and (iv) a discussion on whether technical/non-governmental organization/legal support is needed at the preliminary stage of negotiations (see Langford and Goldie, 2007). All information concerning the expropriation should be made public. Consent for expropriation should be required, at least in cases involving indigenous peoples. Where compensation is ongoing (for example, recurring payments for expropriation of natural resources from indigenous lands), the participation mechanism should be reviewed constantly. Dorney (1990) suggests that if the Government of Papua New Guinea and the transnational mining company

concerned had paid attention to the changing and differing views on compensation and environmental issues within the Landowners Association (which represented villagers on Bougainville Island displaced by a large copper mine), the resulting conflict and ten-year civil war might have been averted.

- Customary and informal rights: These must be given sufficient attention. In many countries, customary rights stretch back centuries, while in urban informal settlements in all regions of the world, including Europe, one can find a fourth generation of families continuously occupying land plots. The UN Committee on Economic, Social and Cultural Rights has emphasized that all persons have the right to security of tenure of housing, for example, including those living in informal settlements. While a number of countries have adopted legislation recognizing customary law, this is not uniform. Most critically, for both customary and informal rights, up-to-date land records need to be developed before any expropriation process begins.
- Women's rights: Expropriation may affect women in different ways from men. In many cases, their joint rights to family property may not be recognized in either formal or customary law. They may also access land resources differently from men and their loss of livelihoods should be individually assessed. Compensation packages (including resettlement) should also take account of women's future livelihoods.
- Legal aid: In order for affected groups to participate effectively throughout the whole process, they should be given access to legal representation free of charge if they cannot afford a lawyer. For example, the South African Lands Claim Court has mandated this in cases of evictions: "Persons who have a right to security of tenure … and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources."[7]
- Compensation: While much has been written on the various ways of providing just or fair compensation, strong consideration should be given to making the objective the improvement of the situation of the affected people. This is for two reasons. First, if the overall aim of the project is development, then the affected group should be expected to improve its development along with others who may benefit from the project. Second, most evidence suggests that compensation packages, including resettlement schemes, have rarely prevented people from becoming worse off. Compensation should cover cultural and psychological losses and it is pertinent to note that the ECHR recently awarded EUR14 000 (about US$18 000) for the "emotional distress" caused by an eviction (*Connors* v. *United Kingdom* [see fn. 3]). If the expropriation will be for profit, a people-centred approach to development demands that they be included in the ongoing profits as far as possible. Kalbro and Lind (2007) also note that in experimental bargaining processes compensation tended to be higher when profits would be made from the new use of the property. In Papua New Guinea, legislation actually requires that landowners and provincial governments receive a certain share of ongoing profits from mining projects and that they must give their consent.
- Resettlement: The United Nations' human rights guidelines on development-based displacement provides detailed recommendations on

[7] *Nkuzi Development Association v. Government of the Republic of South Africa and The Legal Aid Board*, LCC 10/01, decided 6 July 2001 (see also (2002) 2 SA 733 (LCC)). See discussion in Budlender (2004).

resettlement plans (UN Economic and Social Council, 1997). If compensation partly takes the form of resettlement, then it must include the right to alternative land or housing that is safe, secure, accessible, affordable and habitable. No resettlement should take place until such a time that a full resettlement policy that is consistent with these guidelines and internationally recognized human rights is in place. If agricultural land is provided, there must be equivalent quality in terms of soil quality, access to water and agricultural support services and infrastructure. Attention should also be given to non-farm activities that support livelihoods or other economic, social and cultural rights. If land or space for housing is provided, then there should be strong consideration of access to livelihoods as well as basic services, education and health facilities. Most urban resettlement schemes fail because they are too far from the urban centre where people previously had their livelihood.

CONCLUSION

Ensuring that expropriation is for the common good and public interest is highly contingent on context. Strong large-scale development and market-based ideologies, unfair laws, poor governance and a lack of respect for human rights usually combine to ensure that the poor are victims not beneficiaries. Developing a human-rights-based approach to expropriation laws, guidelines and practices is essential but this also needs to be in a participatory fashion. The views of the disenfranchised, particularly those who have been affected by expropriation, should be directly heard and the discussion on guidelines, etc. should not be limited to technicians alone.

ACKNOWLEDGEMENTS

The authors would like to thank the Global Land Tool Network (GLTN) and Centre on Housing Rights and Evictions (COHRE) for support in preparing a background paper on this topic.

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