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## **An Inventory of Human Rights Law Relevant for Surveyors**

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### **ABSTRACT**

Within FIG, major guidance is provided on issues related to human rights, although often quite implicitly. The definition of a surveyor of 2004 includes -for example- a clear statement that surveyors should take into account the relevant legal, economic, environmental and social aspects affecting their work. As governments are obliged to translate the human rights treaties which they ratified into national legislation, the domestic human rights context is thus present. FIG also issued publications on subject-matters that have -one way or another- a relation with human rights. The starting point of these publications often is ‘good governance’ in general or ‘good land governance’ in particular. This is fine, as the source of many good governance principles are human rights. The main aim of this paper is to make an inventory of the body of human rights law which is relevant for surveyors and –as it were- to feed it explicitly into the fundament of the profession. A derived aim is to identify interfaces with the surveyor’s profession.

# **An Inventory of Human Rights Law Relevant for Surveyors**

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## **1. INTRODUCTION**

The phenomenon of ‘property’ is a complex concept within international human rights law, both in substance and in form. It is complex, because ‘property’ has different connotations amongst states, nations and communities, as -similarly- the interpretation of the concept of ‘human rights’. Yet there are several regional and specific treaties that are binding to the states that ratified them, in which a right to own and/or use land is included, although the wording might differ, such as ‘property’, ‘possession’, or just ‘land’.

The history of those treaties, just as the history of the overarching and guiding UN Declaration of Human Rights (1948), reveals that these wordings are not at all without meaning: they are the outcomes of serious negotiations related to the different understanding among its participants what ownership entails.

International treaties urge the ratifying states to adopt human rights in national legislation and to secure mechanisms of remedy for citizens who feel deprived of or infringed upon their human rights. Also, this might be complicated by the existence in many countries of religious rules or unwritten customary law on allocation, distribution and inheritance of land. Similarly, remedy can be found outside formal courts in customary justice systems that act upon religious and customary rules instead of national legislation. A related debate regards what is framed the ‘human rights approach’, which addresses how social and legal policy should be subjugated to the tenets of human rights. The issue of ‘human right to property’ (see section 2) and ‘the peaceful enjoyment of a possession’ (see section 3) constitute human right principles directly related to the work of surveyors specifically in their role as land professional.

Within FIG, major guidance is provided on issues related to human rights, although often quite implicitly. The definition of a surveyor of 2004 includes a clear statement that surveyors should take into account the relevant legal, economic, environmental and social aspects affecting each project. As governments are obliged to adopt the human rights treaties which they ratified in national legislation, the domestic human rights context is present. Also, last decades FIG issued publications on subject-matters that have -one way or another- a relation with human rights. To name just a few: the ethical guidelines (FIG publication 17), women access to land (publ. 24), improving slum conditions (publ. 44), land acquisition in developing countries (publ. 51), social tenure domain model (publ. 52), compulsory purchase (publ. 54) and fit-for-purpose land administration (publ. 60). In these guiding publications, the relation with human

rights is often implicitly included. Human rights issues are thus far from being alien to the profession. The starting point of many publications, we observe, is ‘good governance’ in general or ‘good land governance’ in particular. This is fine, as the source of many good governance principles are human rights, as explicitly explained in (UNDP, 1997; Graham, 2003).

The main aim of this paper is to make an inventory of the body of human rights law which is relevant for surveyors and -as it were- to feed it explicitly into the fundament of the profession. As far as the author is aware, this was not done earlier in FIG. The second, but derived aim is to identify interfaces with the surveyors’ profession.

To this end, we will invent the status and progress of human rights law. Then we will see, which monitoring bodies and human rights courts came into being and how jurisprudence involves property cases. To understand property and human rights in their context we will reflect on the discourse as it developed since World War II. Because access to land is a condition to housing and food security, we will review how property rights relate to the human rights to housing and to food. Observing further that in literature, authors make up pleas for adopting a human right based approach to -for example- development (Gauri, 2012), land use planning (Mihr, 2009) and land administration (Enemark, 2014), we will address what human right ‘principles’ are and how they refer to land and property matters. Finally, after hopefully having the picture rather complete, we will briefly summarize the interfaces with the profession.

The approach we will take is analytical rather than empirical, relying on existing research. The paper is quite technical, in its primary aspiration to present an inventory.

## **2. INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW**

In 1948, countries participating in the creation of the United Nations in 1945, adopted rather swiftly the Universal Declaration of Human Rights (‘UDHR’). During the preparation phase, many discussions took place in the UN Commission on Human Rights on what property is and why it should be included. It appeared to be highly controversial. Although the Universal Declaration comprises an article 17 stating that ‘everyone has the right to own property’ (for the precise text see annex 2), the right to property was not mentioned in the two international covenants on respectively civil and political rights, and economic, social and cultural rights. These covenants were intended to be the binding follow up of the Declaration. Regarding the first covenant, a resolution in the Commission not to include a right to property was accepted (~~1951~~), as was a resolution to adjourn the consideration to include it in the second one (1951). Also the place of the right to property in the Declaration itself, just between the civil and social rights, left open what it was (van Banning, 2002). As both covenants

are binding to the member-states, van Banning concludes that ‘no comprehensive instrument to protect property had been included’.

The progress regarding a right to property was better in regional human right laws.

The *American* Declaration on the Rights and Duties of Man 1948 included article 23, with a text similar to the Universal Declaration, and the successor named the American Charter on Human Rights 1969 comprises article 21 stating that everyone has the right to the use and enjoyment of his property (precise text annex 2).

In *Europe*, the European Convention on the Protection of Human Rights and Fundamental Freedoms 1952 (often referred to as the European Convention on Human Rights) does not address a right to property. Great controversies existed, in this case between western and eastern European countries. The Convention was finally accepted, under the assumption that a right to property would be mentioned in a Protocol. Protocols aim at elaborating the rights mentioned in the Declaration (meanwhile there are 16 Protocols, making the Convention a ‘living document’). That happened in Protocol 1 in 1952 replacing the word ‘property’ by ‘possession’. Article P1-1 reads ‘every natural or legal person is entitled to the peaceful enjoyment of his possession’ (precise text annex 2; additional European agreements see annex 7)

In *Africa*, the discussion on the right of property took place in a setting of recently gained independence. Many of the natural resources were still in hands of the former colonizers. The new African states therefore were reluctant to adopt protection of private property rights. In addition to the land rights imported by foreign powers, Africa recognized a wide plurality of land rights, mainly originating from customary tradition. Nevertheless, the heads of state accepted article 14 in the African Charter on Human and People’s Rights 1981, stating that the right of property shall be guaranteed, however vesting in the state a rather absolute form of ownership over all natural resources.

What about *Asia*? In Asia a regional human right treaty did not develop until today. Recently, Asian states united in ASEAN, accepted an Asian Human Rights Declaration (2012). Under the heading of civil and political rights an article 17 is included, saying that ‘every person has the right to own, use, dispose of, and give, that person’s lawfully acquired possessions alone or in association with others’ (precise text annex 2). The Declaration is highly contested. Right from the beginning, it is accused of not being in accordance with international human rights law with the advice to send it back to the ASEAN Intergovernmental Commission on Human Rights for revision (Amnesty International, 2012; Gerber, 2012). Respect for human rights is made subject to ‘duties’, ‘contexts’, ‘backgrounds’, and ‘national security and public morality’. Also the UN High Commissioner of Human Rights Mrs. Nai Pillay although welcoming ASEAN’s

commitment, expressed concern about its wording (UN Geneva Press Release 19 November 2012). The ASEAN Charter is supervised by the ASEAN Intergovernmental Commission on Human Rights, established in 2009. According to its Terms of Reference (2009) the Commission however is an advisory body. The trend in Asia is to devolve human rights protection to national levels (Shaw, 2007).

While this paper mainly refers to the UN Declaration of Human Rights, and its regional counterparts (Europe, America, Africa), a myriad of specific treaties contributes to international human rights law (see annex 6). These treaties often address the human rights situation of specific groups, such as refugees, women, children, indigenous, tribal people, people with disabilities, or migrant workers. Occasionally a right to property is included. How important these treaties may be, the scope of this paper does not allow the inclusion of all treaties, it is beyond its remit; we limit ourselves to the general international human rights laws.

A caveat concerns the treaties with a legally binding nature. This obligatory nature obliges only the states that signed and ratified the particular treaty. The status of ratification differs from treaty to treaty. There might be reasons for states not to ratify. For example, USA and Canada did not ratify the American Convention. This is considered to be caused by various reasons such as the federal structure of both countries in which states and provinces have a role to play, the requirements of 2/3 majority in the US-senate, the perceived low standards of human rights in the treaty compared with the own Constitution. Although debate continues whether there is a moral obligation to adhere to the Convention, not much benefits of ratification are seen in the USA and Canada; why ratifying a treaty based on compromises when unilaterally a better rights protection is adopted (Canada, 2003; Bradley, 2010)

### **3. MONITORING AND CASE LAW**

Aiming at guaranteeing human rights, all international human rights treaties established a monitoring body and a court of justice, although with different mandates and protocols. Since the coming into fore of the various human right laws, further development of human rights norms and standards depends on the guidance of the monitoring bodies and of the case law of the courts. This creates an evolutionary process of interpretation.

The *American* Charter is supervised by the American Commission of Human Rights (1959) and continues to do so also under the successor of the Charter, the American Convention on Human Rights 1969 (in force 1978). Individuals, groups of individuals and organizations can file a petition against states that ratified the Convention. The Commission aims at settling the conflict, or in case of non-settlement, refer it to the Court. This Inter-American Court of Human Rights, established in 1979, can deliver legally binding rulings, based on cases submitted by states and the Commission (art 61). The Convention does not allow individuals

or groups to lodge a case at the Court. The routing for individuals therefore is via the Commission. When the Commission refers a case to the Court, the Rules of Procedure allow alleged victims to be heard (art. 25).

When it regards property cases, what can we learn from American jurisprudence? The Courts jurisprudence demonstrates priority attention to the issue of indigenous people's communal and ancestral lands and their cultural identity. In such cases the Court confirms the property right to ancestral lands and right to cultural identity against infringements by their states. (*Kichwa People v. Ecuador* 27 June 2012 C/245, *Xákmók Indigenous Community v. Paraguay* 14 August 2010 C/214, *Yakye Community v. Surinam* 6 February 2006 C/142, *Maoiwana Community v. Surinam* 8 February 2006 C/145, and cases under procedure *Kundu Indigenous People v. Panama* 12.354, and *Kaliña and Lokono People v. Surinam* 12.369). The Inter-American Commission even more urges to pay full respect to peoples living in voluntary isolation and initial contact (IACHR, 2013). In a similar vein, self-regulation and self-government should be fully respected, also with regards to property (Ardito, 1997; Henders, 2005).

The situation in *Africa* is not yet completely settled. The Organization of African Union, established in 1963, created in 1987 the African Commission on Human and People's Rights (briefly the 'African Commission'), mandated to perform promotional, interpretive and protective functions (African Charter 1981 articles 30-62). The Commission's mandate allows individuals -besides states- to lodge a complaint, in the form of a written communication, even when the author requests anonymity (articles 55, 56).

African states were rather reluctant to support the UN Declaration on the Rights of Indigenous Peoples 2007, driven by conflicting visions on what 'indigenous' meant, on indigenous land rights and on self-determination. Nevertheless, the African Commission guides Africa to align with international human rights law (Pentassuglia, 2010). Rather well known is the '*Ogoni*' case (*The Social and Economic Rights Action Centre v. Nigeria* 155/61) in 2001. There, the Commission found that Nigeria by its oil development activities violated the right of the Ogoni people to freely dispose of their natural resources. Later, in 2010, the Commission brought this further in the '*Endorois*' case (*Centre for Minority Rights Development v. Kenya* 276/03) judging that Kenya violated the rights to property of the Endorois people by evicting them for purposes of tourist development. By that, the Commission confirmed that 'the rights of traditional African communities in their traditional lands, constitute 'property' under article 14 of the African Charter'. Although during the development of the Charter in the '70 the article 14 was understood as regarding individual private property, the Commission made clear that also communal land rights must be considered as 'property'. (Pentassuglia, 2010). Still, there are worries concerning the implementation of the Commissions' decisions. Progress is to be made (Hansungule, 2009; Keetharuth, 2011).

In 1998 the African Union approved a Protocol to create an African Court on Human and Peoples' Rights. This Court was formally established in 2004. It started its work in 2006. The judgments of the Court are binding. Article 30 stipulates that states guarantee execution. Entitled to access to the court are the Commission itself, and states. Also NGOs with observer status and individuals can institute a case. Summoned states however should have submitted a declaration ex art 34(6) of the Protocol, accepting the competence of the Court in individual cases. So far only a few countries did this. Interestingly, this requirement was brought to the Court in the cases *Atabong Denis Atemnking v. African Union (014/2011)* and *Femi Falana v. African Union (001/2011)* claiming that the said requirement prevented individuals to lodge a complaint. The applicants considered this to contradict with the African Charter and thus asking for its abolishment. In both cases the Court judged not to be competent and dismissed the claim. The threshold erected is highly criticized amongst human right scholars and activists (Juma, 2007; du Plessis, 2007). A consequence is that it prevents citizens to lodge alleged property violations to the Court. Access to the Commission and to the Court is in particular important for African NGOs, as they are at the forefront of creating awareness of the rule of law, and of protection of human rights and property (Welch, 2003). According to the list of cases as published by the Court, only one case regards property rights, namely that of the Ogiek Indigenous Groups (*African Commission v. Kenya 006/2012*). The case is still pending.

To make things in Africa complicated, in 2003, the African Union also adopted a plan to create an African Court of Justice: a generic court to address disputes between states. Before becoming into existence, the Union decided to merger both Courts into a single Court, the African Court of Justice and Human Rights. The merger Protocol of 2008 however is not yet in force, as today 5 states ratified it while 15 is required. Also the new Court will have the same threshold for individuals and accredited NGO's: article 8 requires the summoned states to submit a declaration of competence of the Court. Therefore it is unlikely that individual and communal property violations are allowed to be lodged before the new Court. The 'institutional architecture designed for the victims of human rights violations, gets very complicated', says (Hansungule, 2009), which makes scholars not very optimistic (Meijersfeld, 2008; Sceats, 2009; Schulman, 2013). This situation is likely hampering African surveyors to supporting fair enjoyment of their client's possessions and remedy in case of infringement and violations.

In *Asia*, the codification of human rights is still limited. As mentioned earlier, ASEAN accepted an Asian Charter (2012), highly contested amongst civil society. Although the ASEAN Intergovernmental Commission on Human Rights was established in 2009 for providing advice and guidance, no documents on property right issues so far are published. Compared with Africa, Asian surveyors face even more challenges.

Contrary, the *European Court of Human Rights* generated robust case law on property issues. The European Court, set up in 1959, allows individuals -besides states- to apply to the Court in cases of alleged breach of rights. However, only after all domestic remedies have been exhausted (article 34 Convention).

Although the right to property is not included in the Convention, but in article 1.1 of the Protocol ('P1-1') pursuant to the Convention, the Court decided on many cases on property rights: 1953-1970 7 cases, 1970-1993 60 cases, and 1993-2000 100 cases (van Banning, 2002). Up to 2010 the Court decided on 2215 cases on property (ECHR, 2010). What do these decisions tell us? Firstly, the Court ruled that 'possession', 'property', 'biens', 'propriété' have the same meaning (*Marckx v. Belgium, 1979 A31*), which assigns a broad interpretation to 'possession'. Besides that, the Court recognizes also the right of states to control the use of property, even to take it for the general interest (Ggrić, 2007).

Second, the Court explains the definition in article P1-1 in three rules:

- principle of peaceful enjoyment of property
- deprivation is possible but the Court subjects it to certain conditions
- states are entitled to control the use of a property in accordance with the general interest.

The Courts' decisions confirm that it understands 'property' as a 'collection of lawful interests which can be disaggregated into their component parts', thus a 'bundle of rights'. Property is equated with 'any acquired or vested right', which leads to a wide concept of property (intellectual, claim, lease, common land etc.) The Court finds that the right to property refers only to existing possessions, not to a right to acquire possessions.

The relevant questions to be asked when considering whether there has been a violation of the right to property can be summarized by:

- Is there a property right, or possession, within the scope of P1-1?
- Has there been an interference with that possession?
- Under which of the three rules of Article 1 does the interference fall to be considered?
- Does the interference serve a legitimate objective in the public or general interest?
- Is the interference proportionate? That is, does it strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights?
- Does the interference comply with the principle of legal certainty, or legality?

If there has been an interference with a possession, the interference will be incompatible with P1-1 if the answer to any one of questions (4) to (6) is "no". (Carss-Frisk, 2001; Ggrić, 2007).

The point of 'striking a fair balance' brought the Court to judge that expropriation without compensation would violate the owners' rights (*James v. UK 1986 8793/79; Pressos v. Belgium 1995 A32*). -Compensation should be related to the value of the property. The Court ordered therefore increase of the compensation



in the case (*Aka v. Turkey 1998 1998-VI*). (Allen, 2010) observes that in the discussions during the development of the Convention many states were reluctant to include a right to compensation, due to strong social-democrat visions about property as social right. The Court's shift to fair compensation ensues from a more liberal stance towards property, which Allen considers a major political change, not legitimized by the state-parties.

The next step in this paper is to reflect on certain aspects of the human right to property, to place the human right to property in distinct perspectives and to see where the sensitivities are regarding property rights.

#### **4. SOME REFLECTIONS ON THE HUMAN RIGHT TO PROPERTY**

##### *Property and political views.*

In the first place different and competing political opinions exist about the role property in the socio-economic development. Countries following principles of market economy support a liberal connotation of property. Countries following principles of command economy support a social democratic connotation. Simply summarized, on one hand the views of Locke's natural right to private property (Locke, 1690) as it influenced the USA's Constitution 1787 and Bill of Rights 1791 (founding father John Madison: '...the right of property are objects for the protection of which government is instituted'). On the other hand the view of Proudhon's 'property is robbery' (Proudhon, 1841) which found its way through the Communist Manifesto (1848) into article 2 of the Constitution of the Russian Socialist Federated Soviet Republic 1918 ('for the purpose of attaining the socialization of land all private property on land is abolished and the total land is declared to be national property....'). Conceptually however, the Communist Manifesto 1848 originally only related to so called bourgeois property, thus the ownership of means of production, not the 'hard-won, self-acquired, self-earned property by the petty artisan and small peasants'. By that, in the discussions prior to the Universal Declaration of Human Rights, political positions determined to a great extent the understanding of what a property right is. Today, different opinions about property still ensue from different political visions (Allen, 2010).

##### *Property and wealth distribution.*

Secondly, the awareness of private property being unequally distributed amongst people, raised a concern whether private property rights owned by the wealthy minorities, powerful and elites (the 'happy few') should be protected by human rights law. The rest of mankind after all lacked access to such property, such as the landless, poor, indigenous, women and other vulnerable groups (Chevenal, 2006). As (Rook, 2001) says: 'whilst it rings true to protect a person from torture, family land private life, it does not sit comfortably with the protection of property as a human right'. Also today, property is unequally distributed since globally inequality of income (OECD, 2014) and wealth (Credit Suisse, 2013) increases,

both within countries and between countries, China excluded (UN, 2013) (see annex 1). Popular publications ('Who owns...') assert that unequal distribution of landed property is still manifest (Cahill, 2002, 2010; Jacobs, 1998). Evaluations of (older) titling projects and land reform indicate that introduction of protection of property by titling favored the elites in the first place (see e.g. Powelson, 1988; von Benda Beckman, 2003; IFAD, 2008; Bruce, 2012).

Although the skew distribution of landed property might not justify protection of the property of the wealthy minorities, the world faces a reality that globally over a billion people suffer from hunger and malnutrition, almost 1 billion people have an income of less than 1 USD per day, of which 40-60% (Africa) and 60-80% (Asia) are landless (IFPRI, 2007). 1 billion people are inadequately housed (800 million in slums, UN/Habitat, 2008) of which 100 million are without a place to live at all (Kucs, 2008). Over 4 million people were affected by both threatened and implemented forced evictions in 2007 and 2008 (COHRE, 2009). Human rights theorists recognize that property rights are naturally linked to housing and land. Property is related to the need and ability of people to provide food for their substance (Chevenal, 2006). Therefore people should not be excluded from an universal right to own property and from protection against unlawful state interference. This makes the right to property fulfil the characteristics of a human right. As (Jacobs, 2013) stipulates: 'is the right to property a human right: yes!, but the challenge is to foster forms of property rights whose benefits will be realized by those most in need of them'.

*Is property a civil or social right.*

Thirdly, a the question is whether a right to property is a civil right or a social right. In general, a right is a human right when is it universal, inherent to human beings by virtue of humanity alone, cannot be purchased or sold, is alienable and cannot taken away, and is equally applicable to all human beings. It regards the relation between a human being and the state, not amongst human beings themselves (van Banning, 2002). So, by consequence, a human right to property is not about the relation between a human being and land (as we tend to define 'land tenure'), but about the relation between a human being and the state. It concerns the protection of the individual against interference by the state. Although Court decisions can form jurisprudence which might influence future judgements, strictly spoken all cases are individualized (van Banning, 2002). Ensuing from the two Covenants on respectively Civil and Political Rights 1966, and Economic, Social and Cultural Rights 1966 one might wonder to which category a human right to property belongs. What is the meaning of such category?

In general, a 'civil and political' right is an individual right that must be protected by the State. An 'economic, social and cultural' right requires the State to implement a policy that all citizens in society can have access to it. Human rights theorists have argued that the right to property is an economic, social and cultural right (Chevenal, 2006; Wickerie, 2010; Cruft, 2009; Jacobs, 2013; Joireman,

2013), which -as art 2.1 of the Covenant says- should be realized progressively. That brings (Cruft, 2009) and (Montgomery, 2002) to the question whether there exists an hierarchy of human rights, in which certain rights (e.g. speech, assembly, not to be tortured) have priority over others (property). Empirical research by Montgomery demonstrates that this is a common perception by a sample of respondents. Also (Rook, 2001) maintains that there are apparently different levels of human rights protection. And indeed, we observe that massive violations of civil rights can provoke international coalitions to fight wars, which would be inconceivable in cases where people somewhere are not adequately housed. Linking property to civil rights would be also questionable, as property can be alienated and purchased, inherited, given away as a gift, or even taken through adverse possession and expropriation. These are not quite characteristics of a human right. This brings (Joireman, 2013) to the question whether a property right is a human right or just a commodity: maybe we might de-link property and identity in certain circumstance, she argues.

Besides, international human rights treaties can be ratified by countries while limiting or restricting their obligations: there are three options, 'limitation', 'derogation' and 'restriction' (Neumayer, 2008). Regarding the fundamental human rights (such as right to life, no torture, no slavery), derogation is not permitted (art. 4 International Covenant Civil and Political Rights, art. 15 European Convention). Other rights (most economic, social and cultural rights) are derogable rights, and indeed regarding the European right to possession (art P1-1) at least 6 countries declared restrictions when ratifying, namely Luxembourg (in 1953), Austria (in 1958), Spain (in 1990), Estonia (in 1996), Latvia (in 1997) and Georgia (in 2002). This had to do with restoration of private property problems after the demise of communism.

Another distinction is about the obligation a human right might impose on the state: positive and negative obligations. Many human rights require both (Akandji-Kombe, 2007). Concerning a human right to property, a positive obligation for the state might be the adoption of a legal framework under which citizens can have access to property rights without discrimination and in a form that fits their culture and being protected against third parties (similar to a definition of 'land tenure security'). This includes, we argue, for example regulation of land administration, planning, land reform and eminent domain. On the other hand, negative obligations require the state to refrain from unlawful takings, forced eviction, and excessive land use control (Mchangama, 2011). A human right to property however, does not guarantee that anyone will become an owner of property or get the state pay for the bills (Chevenal, 2006), nor the state providing anyone with a house (UN/Habitat, 2014) or food (Künnemann, 2013). The human right regime requires that human beings can rely on the state not to be excluded from property, housing and food based on gender, race, or social status, not the state to be the supplier of all this. Thus positive obligations do not oblige the state to 'do something', but to 'regulate something'.

With regard to surveyors, who often work amidst citizens, the concept of ‘horizontal effect’ of human rights is also of interest. Although human rights concern the relation human being-state, it might be that also violations amongst citizens fall under human rights law, but only when states fail to enforce its regulation or tolerates infringements (Akandji-Kombe, 2007).

### *Property and plurality.*

Fourthly, a relevant issue is the right to property in states which also know other concepts of property than the ‘western’ concept. Paying respect to other cultures is part and parcel of modern global documents (UN/Habitat, 2011; Deininger, 2012; FAO, 2012). Respect for land rights as part of cultural identity is the main driver behind various international conventions on indigenous land rights. It might be, however, that local customs contradict with international human right standards. For example when decision making has a low level of democracy or when persons are treated differently under traditional law (Gauri, 2012). So a debate develops whether legal pluralism is an obstacle to human rights, also on property (Farran, 2006).

Besides, international human rights law also assumes adoption of human rights in national or domestic law. Access to Human Rights Courts is only open when domestic remedies have been exhausted (*art. 1 jo. 35 European Convention 1950, art. 2 American Convention 1969, art. 7 jo. 26 African Charter 1981*). A question is whether customary law and customary justice warrant human rights within this framework. Until now, the Human Rights Courts did not generate jurisprudence, so the question remains open. In the past, anthropologists like (Hoebel, 1954) defined law as ‘a social norm if its neglect is met by the application of physical force by an individual or group possessing the socially recognized privilege of acting’, which represents a propensity to accept customary rules as ‘law’.

Well documented consideration from -for example- the Pacific reveals that some Constitutions permit discrimination in relation to land and that customs forms the basis of ownership (Farran, 2006). Observation in Botswana, a country well known for its integration of customary and statutory law, reveals that domestic applications of customary law promote and maintain men’s control over land, inheritance via the male line. Women are excluded to gain access to land. Control over land depends on a woman’s marital status. That brings (Kumar, 2009) to the recommendation that the Government of Botswana should do more on the ‘legislative compliance with international obligations’. These studies show that the position of women under customary law should be improved also regarding access to property.

Informal legal systems in many countries include Islamic principles. Islamic rules may vary, but women may face significant obstacles in accessing land rights as part of a certain resistance against gender equality. At the same time inheritance is an important source for access to land rights by women even when they receive a less share than male heirs. A lot of landless people benefit from the link between

use of land and land rights, in getting their informal rights over unused land formally recognized (Sait, 2006).

Regarding the dispute resolution mechanism in customary areas, also on property, it appears that customary justice systems are the first choice of a majority of citizens. Positive points are that customary justice is experienced as fair, cheap, accessible, and transparent in the sense that the courts meet in open space amidst community members (Haki, 2011; Harper, 2011). A negative point appears to be that customary justice tolerates inconsistencies with international law regarding human rights principles, with a focus on women rights in general and access to property specifically (Harper, 2011). One can level criticism against procedural flaws: preferences of individual authorities prevail, elite capture, no supervision and no documentation (jurisprudence) (Haki, 2011). Because of the important role of customary justice, again also in property matters, the general trend amongst NGOs is to support customary justice, but embedded in a reform, comprising formal recognition, harmonization with statutory law, more training and better documentation (case law development).

#### *Property and state control.*

Fifthly, a concern raised whether and how the state could control the use of landed property, limit its use, or even take it. What was more important, the absolute property right of an individual owner, or the social function of property (see the ‘wise property movement’ in the USA; Jacobs, 1998) When property would be a civil right, would states be obliged to provide anyone with a portion of land sufficient for a life in dignity? African states wondered whether they would be obliged to guarantee the property rights of the former colonizers, whilst perceiving those rights as belonging to African peoples. No wonder that the right to property was finally understood as an economic, social and cultural right, of which ‘no one shall be deprived except in the public interest and subject to the conditions provided for by law’ (see texts annex 2). The human right to property does not exclude the power of states to make land use plans, town development plans and expropriation plans. As seen in section 3, the European Court is rather advanced in qualifying this state power. A crucial role here is granted to what ‘general interest’ entails.

One of the aspects ensuing from these reflections, is that property rights are naturally linked to housing and land rights (Chevenal, 2006) and that landlessness frustrates the enjoyment of many other human rights, such as housing and food (Wickeri, 2010). Therefore, as an annex, we pay attention in the following sections to the human right to housing and to food (see annexes 8 and 9)

## **5. THE HUMAN RIGHTS BASED APPROACH**

A concept often aired is ‘human rights approach’. For example (Mihir, 2009), stipulates that only ‘human rights based approach to urban governance can solve

the challenges of sustainable urban development’, or (FAO, 2012) with its ‘human rights based approach to food security’.

Our interpretation is that human rights provide a normative framework. This framework applies to what (Akandji-Kombe, 2007) calls substantial obligations (measures to define human rights in domestic law) and procedural obligations (measures to create domestic procedure aiming at compliance). What is also helpful, is the interpretation of the Committee on Economic, Social and Cultural Rights that ‘progressively’ realizing the rights mentioned in the Covenant (such as property, housing and food) comprises a right to respect, to protect and to fulfil. This relates to the issue of (land) governance: the development by UNDP of indicators of good governance, is directly related to human rights. For example, the indicator of ‘legitimacy and voice’ is based on Universal Declaration of Human Rights articles 19 (freedom of opinion and expression), 20 (freedom of peaceful assembly), 21 (take part in the government), 29 (having duties to the community), 21 (the will of the people is the basis of the authority of the government), and 29 (subject to limitations by law) and the indicator ‘fairness’ on articles 1 (free in dignity and rights), 2 (no discrimination), 7 (rule of law), 10 (impartial tribunal), 5 (no arbitrary arrest), and 17 (not arbitrarily deprived of property) (Graham, 2003). FAO applied the so called PANTHER principles to materialize a human rights based approach to the development of the Global Strategic Framework for Food Security and Nutrition, which stands for participation, accountability, non-discrimination, transparency, human dignity, empowerment, and the rule of law (FAO, 2012).

## **6. INTERFACES WITH THE SURVEYORS PROFESSION**

The main aim of this paper, an inventory of human rights law relevant for surveyors is hopefully realized at this point. The derived aim, viz. interfaces with the profession, is now at stake. To structure this section we propose to build on the ‘policy cycle’ as commonly used in political science, thus (a) assessment of a given situation in society, (b) development of a policy and (c) implementation.

### *Assessment of human rights in domestic land issues.*

First, taking cognizance of how the right to property is embedded in international and regional human rights law, we argue, is a baseline in the expertise of surveyors. Many surveyors work either in state service, are licensed in order to act on behalf of the state, or work in commercial practice as contractor to the state. As human rights primary concern the relation between a human being and the state, surveyors often represent the state in its role to respect, protect and fulfil human rights and within that framework the human right to property.

Second, as we saw earlier, no international definition exists of what ‘property’ is. Recognizing this, it is clear that ‘property’ in human rights law and jurisprudence is understood as a very broad concept, that covers a wide range of relations between citizens and land. It appears that hardly any kind of possession, formal

and informal statutory and customary, individual and indigenous communal, even illegal when exerted in a sustainable way, is considered to be ‘property’. The notion, sometimes pursued by surveyors that ‘property’ equals ‘titled land’, should be left. Similarly, when it regards the human right to ‘housing’, where ‘house’ is not only referring to a construction with 4 walls and a roof on it, but to a ‘home’ in a broad sense.

Third, the political and cultural approach to ‘property’ requires thorough understanding of domestic society. Is common sense leading to liberal or social democratic ‘property’? To which extent can the state control land use, take property for the general interest and is obliged to pay compensation. In the global human rights discourse special attention is given to the rights to property for specific groups, such as women, children, refugees, disabled people and indigenous groups. The nature of ‘property’ as an ‘economic, social and cultural right’ does not mean that the state is obliged to give land to all, but to generate regulations to allow access to property without any discrimination based on for example gender, race, or religion. Knowledge about such regulations is necessary.

Fourth, the human right to property covers a substantial part of the field monitoring manual in (Jacobsen, 2008), providing a checklist on how to assess a domestic situation of legislation an implementation: it can help surveyors is getting an understanding of the actual situation in their country. Additionally, the World Bank land governance assessment framework includes human rights aspects, for example regarding equity, equality, transparency.

Fifth, the ‘natural’ link between property and the human rights to housing and to food, gives an extra load to the surveyors’ profession, because access to land appears to be conditional for fulfilling adequate housing and sufficient food for a life in dignity.

Sixth, as surveyors are sometimes involved in conflict resolution, they should pay extra attention to the existence of transparent and accessible procedures for appeal and remedy, also when disputes are resolved within customary justice systems. That is also relevant to conflicts between property owners and the state concerning the exertion of state control over land use and the enforcement by coercive power of takings, evictions and land grabbing. Is this control lawful and legitimized by democratically defined general interest? As said in the beginning, within FIG many guidance is already available to further assist surveyors in this.

*Contribute to the inclusion of human rights in domestic land policy.*

Developing a land policy that includes human rights has two aspects, we believe, the substantive aspect and the procedural aspect. First, regarding the substance of human rights, surveyors should encourage a land policy which pays respect to property in the broad sense and thus include measures to respect the different forms of property rights, whether formal or informal, individual or communal,

even illegal forms when they exist sustainably. This counts in an extra way for vulnerable groups, such as women and children. (Randolph, 2012) explains that how states constitutionalize property rights already makes a big difference, so the constitution is of primary interest.

Second, measures to protect all those forms of property are part of a good policy, not only the protection against unlawful and non-legitimized state interference, but also against coercive pressures by elite groups and the powerful. If states fail to protect vulnerable citizens against the powerful, an incumbent state is thought to violate human rights and can thus be summoned both for domestic court and the international human right commission and courts.

Third, contextual is here art 2 of the International Covenant on Economic, Social and Cultural Rights (1966), in that these human rights are to be realized 'progressively'. States have to 'take steps' for that purpose. What these steps might entail, is extensively explained in the General Comment No.3 of the Committee on Economic, Social and Cultural Rights (1990). Surveyors, when involved in policy analysis, can find support in the FAO Voluntary Guidelines (FAO, 2012).

Fourth, the three elements of a state's obligation, to respect, to protect and to fulfil, materialize in a set of positive and negative obligations. Sometimes a state has to refrain from something (for example unlawful takings and forced eviction) and sometimes a state has to do something, such as developing policies. From case law (especially under the American Convention and the African Charter) we learn that traditional and ancestral land owned by indigenous groups are to be protected, and that self-regulation should be respected. From case law under the European Convention we learn that interference from the state in private property should be proportional and strike a fair balance between private and general interest. Furthermore, that deprivation of private property requires sufficient compensation for the infringed, and the absence of such compensation might be considered as a violation of human rights by the incumbent state. FIG-Publications on land acquisition and compulsory purchase can be helpful.

Fifth, regarding the procedural part of the land policy, surveyors can apply the human rights based approach as mentioned earlier. They can contribute to the design of procedures and systems that meet human rights principles, such as participation, accountability, non-discrimination, transparency, human dignity, empowerment, and the rule of law. In the monitoring checklist of (Jacobsen, 2008) a prominent place is reserved for land administration and its procedures. From this we learn that the complex and cumbersome cadastral and registration procedure as sometimes applied (see e.g. the annual Doing Business Reports) do not always favour the human rights approach. In general, the World Bank Land Governance Assessment Framework and FAO Voluntary Guidelines for Governance of Tenure appear to be helpful when adopting human rights principles in a land policy as are FIG publications on land governance.



*Take care of human rights when implementing domestic land policies.*

Implementing a land policy through a system of land administration, within the context of land tenure, land markets, and socially desirable land use (the three chapters in Deininger, 2003) are typically part of the professional domain of the surveyor. Despite sometimes disappointing results of conventional land administration projects ('titling') the quest for systems that deliver services on a country wide scale is manifest. Global documents on housing, food security, eviction, large investments in agriculture, urge once and again for the design and development of innovative land administration systems. Guiding publications are of the high level of experts on large investments in agriculture (FAO/HLPE, 2011) and the one of the special UN-rapporteur on food (de Schutter, 2009).

Definitely this is a top-priority for the profession, which requires an interdisciplinary approach, because the domains of social scientists, lawyers and surveyors are strongly connected in land administration. As land administration will remain within the remit of national legislation, it is extremely important to realize that without property systems that are not embedded in the common sense of the society, without appropriate legal regulations, and without expertise on land management and information technology, attempts will fail, as many evaluation reports show. Within FIG, publications on innovative approaches to land rights, innovative technology, domain models and on fit-for-purpose philosophy, are helpful in this. In addition, the adoption these new ideas is urgently recommended by global funding agencies (Adlington, 200; Bell, 2014).

In the implementation of land policy, we argue surveyors should maintain their high ethical standard in providing their services to government agencies and in case of infringement and violation of human rights develop an activist attitude. Support for this can also be found by outsiders (Southall, 2005; Manji, 2012)

## **7. CONCLUSION**

Land is an important asset in any society. The way states regulate access to land and its related benefits is of paramount importance for the development of a society: respect, protection and fulfilment are the key words ensuing from human rights law. Surveyors play an important role in meeting human rights and applying human rights principles in their daily work, as exchange of knowledge within FIG demonstrates. This daily work focuses on three levels, we argue, viz. assessing the domestic human rights situation, influencing the development of human rights based land policies, and encouraging human rights based implementation. When states violate human rights in land matters, surveyors are in particular the ones to denounce what they observe and liaise with other disciplines, such as land lawyers, to urge for improvement. They can give a good example in pursuing their profession with the ethical standards as applied within FIG and others. Hopefully this paper provides a well understood relationship

between human rights and the surveyors' profession, establishing a good basis for them to being an advocate for human rights in land. In the redefinition of the profession, as proposed by (Coutts, 2012; Coutts, 2013), it would not be a bad idea to include a specific reference to the human rights.

### **BIOGRAPHICAL NOTES**

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## REFERENCES

- Adlington, G., 2009, The ECA Land Assessment, Annual World Bank/FIG Land Conference 2009 Washington DC USA
- African Union, 2006, Framework for African Agricultural Productivity, Accra Ghana
- Akandji-Kombe, J-F, 2007, Positive Obligations under the European Convention on Human Rights, Human Rights Handbook No. 7 Council of Europe Strasbourg France
- Allen, T., 2010, Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights, International and Comparative Journal Quarterly 59, pp. 1055-1078
- Amnesty International, 2012, Civil Society rejects flawed ASEAN Human Rights Declaration, Public Statement IOR 64/005/2012 Phnom Penh Cambodia
- Ardito, W., 1997, The Right to Self-regulation; legal pluralism and human rights in Peru, Journal of Legal Pluralism 1997 No. 39, pp 1-42
- Banning, T.R.G. van, 2002, The Human Right to Property (diss. University Utrecht The Netherlands), Intersentia Publishing Antwerp Belgium
- Bell, K., 2014, A Review of the land sector in East Asia, Annual World Bank Land Conference Washington DC USA
- Benda-Beckmann, F. von, 2003, Mysteries of capital or mystification of legal property? Focaal-European Journal of Anthropology No 41(2003)
- Bradley, C.A., 2010, The US and Human Rights Treaties, Chinese Journal of International Law Oxford University Press 2010 pp. 321-344
- Bruce, J.W., 2012, Simple Solutions to Complex Problems: Land Formalization as a 'Silver Bullet', in: Otto, J.M., Hoekema, A.J., Fair Land Governance, Leiden University Press
- Cahill, K., 2002, Who Owns Britain, Cannongate Books Ltd
- Cahill, K., 2010, Who owns the World, Hachette Book Group NY USA
- Canada, 2001, Report of the Standing Senate Committee on Human Right on adherence to the American Convention of Human Rights, Parliament of Canada
- Carss-Frisk, M., 2001, The right to property: a guide to the implementation of Article 1 of Protocol No. 1 to the European Convention of Human Rights, Human Rights handbooks No. 4 Council of Europe Strasbourg France

Chevenal, F, 2006, Property Rights as Human Rights, in De Soto, H, Chevenal, F., 2006, Realizing Property Rights, Rüfer & Rub, Zürich Switzerland

COHRE, 2009, Global Survey on Forced Evictions 2007-2008, Geneva Switzerland

Coutts, B., McCoy, M., 2012, Towards 2020-Critical Developments in Land Surveying in 60 years, Proceedings FIG Working Week 2012 Rome Italy

Coutts, B., 2013, Redefining the Profession of Land Surveying, Proceedings FIG Working Week 2013 Abuja Nigeria

Credit Suisse, 2013, Global Wealth Data Book, Zurich Switzerland

Cruft, R., 2009, Are Property Rights Ever Basic Human Rights?, British Journal of Politics and International Relations Vol. 12, pp 142-154

Deininger, K, 2003, Land Policy for Growth and Poverty Reduction, World Bank Policy Research Paper Washington DC USA

Deininger, K., Selod, H., Burns, A., 2012, The Land Governance Assessment Framework, The World Bank Washington DC USA

ECHR (European Court of Human Rights), 2010, 50 Years of Activity: The European Court of Human Rights in some facts and figures, Strasbourg France

Enemark, S., Hvingel, L, Galland, D, 2014, Land Administration, Planning and Human Rights, Planning Theory November 2014 Vol. 13:4 pp 331-348

FAO/HLPE, 2011, Land tenure and international investments in agriculture, Rome Italy

FAO, 2012, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, Rome Italy

FAO, 2013, The Human Right to Adequate Food in the Global Strategic Framework for Food Security and Nutrition, Rome Italy

Farran, S., 2006, Is Legal Pluralism an obstacle to Human Rights? Considerations from the South Pacific, Journal of Legal Pluralism 2006 (No. 52).

Gauri, V., Gloppen, S., 2012, Human Rights Based Approaches to Development, The World Bank Policy Research Paper 5938 Washington DC USA

Gerber, P., 2012, ASEAN Human Rights Declaration: a step forward or a slide backwards, The Constitution 21 November 2012

---

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FIG Working Week 2015  
From the Wisdom of the Ages to the Challenges of the Modern World  
Sofia, Bulgaria, 17-21 May 2015

Gilbert, J., 2013, Land Rights as Human Rights: The Case for a Specific Right to Land, International Journal on Human Rights Vol. 10 No. 18, pp 114-227

Graham, J., Amos, B., Plumptre, T, 2003, Principles for Good Governance in the 21<sup>st</sup> Century (Policy Brief 15), Institute on Governance, Ottawa, Canada

Grgić, A., Mataga, Z., Longar, M., Vilfan, A., 2007, The Right to Property under the European Convention on Human Rights, Human Rights handbooks No. 10 Council of Europe Strasbourg France

HAKI Network, 2011, Engaging Customary Justice Systems, HAKI White Paper October 2011

Hansungule, M., 2009, African courts and the African Commission on Human and People's Rights, in: Bósl, A., Diescho, J., 2009, Human Rights in Africa, Konrad Adenauer Foundation Windhoek Namibia pp 233-271

Harper, E., 2011, Engaging with Customary Justice, Working paper No.7 International Development Law Organization IDLO Rome Italy

Henders, S.J., 2005, Ecological Self-government: Beyond individualistic paths to Indigenous and Minority Rights, Journal of Human Rights 2005 4:1, pp 23-36

Hoebel, E.A., 1954, The Law of Primitive Man, Harvard Massachusetts

IACHR (Inter-American Commission on Human Rights), 2013, Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas: Recommendations for the Full Respect of their Human Rights, Organization of American States Doc. 47/13 30 December 2013

IFAD, 2008, Improving access to land and tenure security, Rome Italy

IFPRI, 20097, The World's Most Deprived, Washington DC USA

Jacobs, H.M., 1998, Who owns America, University Wisconsin Press Madison (W) USA

Jacobs, H.M. 2013, Private property and human rights: A mismatch in the 21st century?, International Journal of Social Welfare 2013(22), pp 85-101

Jacobsen, A.F. (ed.), 2008, Human Rights Monitoring, Nijhoff Publishers Leiden The Netherlands

Joireman, S.F., Brown, J., 2013, Property: Human Right or Commodity?, Journal of Human Rights 12:2, pp 165-179

Juma, D., 2007, Access to the African Court on Human and People's Rights: a case of the Poacher turned Gamekeeper, Essex Human Rights Review Vol. 4 No. 2 pp 1-21

Keetharuth, S., 2011, Implementation of Decisions of the African Commission on Human and People's Rights, Proceedings Expert Seminar University of Bristol November 2011 Bristol UK

Kothari, M., 2006, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council' A/HRC/4/18 (Report Special Rapporteur on adequate Housing), United Nations New York USA

Kucs, A., Sedlova, Z., Pierhurovica, L, 2008, The Right to Housing: International European and National Perspectives, Journal Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol No. 64/65, pp 101-123

Kumar, R.A., 2009, Customary Law and Human Rights in Botswana, Journal Human Rights & Human Welfare Working Paper 52 (2009) University of Denver, Denver USA

Künnemann, R., Epal-Ratjen, S., 2004, The Right to Food: A Resource Manual for NGOs, FIAD/AAAS Science and Human Rights Program Washington DC USA

Künnemann, R., Monsalve Suárez, S., 2013, International Human Rights and Governing Land Grabbing: A View from Global Civil Society, Globalizations 10:1, pp 123-129

Locke, J, 1690, Two Treatises of Government (part 2), Gutenberg e-Book 2005

Manji, A., 2012, The Grabbed State, Journal of Modern African Studies 50 Issue 3 September 2012

Mchangama, J., 2011, The right to property in global human rights law, CATO Policy Report May/June 2011

Meyersfeld, B., 2008, Why Africa, The World Today Aug/Sept 2008 pp 12-15 The Royal Institute of International Affairs Chatham House London UK

Mihr, A., 2009, Urbanization and Human Rights, Proceedings Amsterdam Conference Human Dimensions of Global Environmental Change ( 2-3 December 2009) Volendam, the Netherlands

Montgomery, J.D., 2002, Is there a hierarchy of human rights?, Journal of Human Rights 2002 (1:3), pp 373-385

Neumayer, E., 2008, Qualified Ratification: reservations to international human rights treaties, Journal of Legal Studies 36(2) pp 397-430

OECD, 2014, Focus on top incomes, Paris France

---

Property, Human Rights and Land Surveyors (7539)  
Paul van der Molen (Netherlands)

FIG Working Week 2015  
From the Wisdom of the Ages to the Challenges of the Modern World  
Sofia, Bulgaria, 17-21 May 2015

Payne, G., 2004, Land tenure and property rights: an introduction, *Habitat International* 28(2004) pp 167-179

Pentassuglia, G., 2010, Indigenous Groups and the Developing Jurisprudence of the African Commission on Human Rights and People's Rights: some Reflections, UCL (University College London) *Human Rights Review* No 3 (2010) London UK pp 150-163

Platteau, J.P., 1996, The Evolutionary Theory of Land Rights as applied to Sub-Saharan Africa, *Development & Change* Vol. 27 pp 29-86

Plessis, M. du., Stone, L., 2007, A court not found?, *African Human Rights Law Journal* 2007(7) pp 522-544

Ploeger, H., Groetelaers, D., 2006, Informal Settlement and Fundamental Rights, Proceedings FIG Congress Munich Germany

Powelson, J.P., 1988, *The Story of Land*, Lincoln Institute of Land Policy Cambridge USA

Proudhon, P.J., 1841, *Que est-ce que La Propriété*, Gutenberg e-Book 1995

Randolph, S., Hertel, S., 2012, The Right to Food: a Global Overview, in : Minkler, L (ed.), 2012, *The State of Economic and Social Human Rights: a Global Overview*, Cambridge University Press, Cambridge UK pp 21-60

Rook, D., 2001, *Property Law and Human Rights*, Blackstone Press London UK

Sait, S., Lim, H., 2006, *Land, Law, and Islam: Property and Human Rights in the Muslim World*, Zed Books London UK

Sceats, S., 2009, Africa's new Human Rights Court: Whistling in the Wind?, The Royal Institute of International Affairs Briefing Paper Chatham House London UK

Schulman, M., 2013, The African Court of Justice and Human Rights: a beacon of hope or a dead end odyssey?, (2013) *Ikundla* No. 2, University Witwatersrand Johannesburg South Africa

Schutter, O. de, 2009, Large-scale Land Acquisitions and Leases, Human Rights Council of the UN Geneva Switzerland

Shaw, C.M., 2007, The Evolution of Regional Human Rights Mechanisms: a Focus on Africa, *Journal of Human Rights* 2007(6:2), pp 209-232

Southall, R., 2005, The Ndung'u Report, *Review of African Political Economy* 32.103

---

Property, Human Rights and Land Surveyors (7539)  
Paul van der Molen (Netherlands)

FIG Working Week 2015  
From the Wisdom of the Ages to the Challenges of the Modern World  
Sofia, Bulgaria, 17-21 May 2015

UN, 2013, Inequalities Matter, New York USA

UN/DP, 1997, Governance and Sustainable Human Development, New York USA

UN/Habitat, 2004, Pro Poor Land Management, Nairobi Kenya

UN/Habitat, 2008, State of the World's Cities, Nairobi Kenya

UN/Habitat, 2011, Proceedings Governing Council 23<sup>rd</sup> Session HSP/GC/23/7, Nairobi Kenya

UN/Habitat, 2014, The Right to Adequate Housing (reprint from 2009), Fact Sheet No. 21 UN/Habitat Nairobi Kenya

Welch, C.E., 2003, Human Right NGOs and the rule of law in Africa, Journal of Human Rights 2003 (2:3), pp 315-327

Wickeri, E., Kalhan, A., 2010, Land Rights Issues in International Human Rights Law, Malaysian Journal on Human Rights Vol. 4 No. 10, pp 16-25

World Bank, 2009, Awakening Africa's Sleeping Giant, Washington DC USA



## ANNEX 1: inequalities today

From (OECD, 2014)

Unit: **income and economic growth:**

Shares of top 1% top income earners from pre-tax incomes, in some countries:

Denmark was in 1981 7% remained 7%

USA was in 1981 8% increased to 20%

Share idem from economic growth:

Denmark 2%

USA 47%

From (Credit Suisse, 2013)

Unit: **wealth** = marketable value of financial assets plus non-financial assets (houses, land)

Denmark: 10% individuals owns 70% of the country's wealth

The Netherlands: idem but 40%

USA: idem but 95%, 1% individuals own 34%

From (UN, 2013)

Unit: **wealth of countries**

GINI coefficient as measure of inequality (GDP/capita)

Un-weighted 1980 = 52, 2010 = 56

Weighted (with population) 1980 = 63 2010 = 53

Weighted (without China) 1980 = 56 2010 = 56

*All three reports comprise information about (almost) all countries in the World.*

## ANNEX 2: The Right to Property

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## United Nations Declaration on Human Rights 1948

### *Article 17*

- (1) Everyone has the right to own *property* alone as well in association with others
- (2) No one shall be arbitrarily deprive of his *property*

## European Council: the European Convention on Human Rights 1950 (formally European Convention for the Protection of Human Rights and Fundamental Freedoms), Protocol 1 (1952)

### *Article 1*

Every natural or legal person is entitles to the peaceful enjoyment of his *possession*. No one shall be deprived on his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

## The American Charter on Human Rights 1969

### *Article 21*

Everyone has the right to the use and enjoyment of his *property*. The law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest. Usury and any other form of exploitation of man by man shall be prohibited by law.

## Convention on the Elimination of All Forms of Discrimination against Women

### *Article 14*

(...) to have (...) equal treatment in *land* and agrarian reform as well as resettlement schemes.

### *Article 15*

(...) in particular, they (States) shall give women equal rights to conclude contracts and to administer *property* (...)

### *Article 16*

(h) The same rights for both spouses in respect of ownership, acquisition, management, administration enjoyment and disposition of *property* (...)

## The African Charter on Human and Peoples Rights 1981

### *Article 13*

(3) Every individual shall have the right of access to public property (...)

### *Article 14*

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.

### *Article 21*

(1) All peoples shall freely dispose of their wealth and natural resources (...)

(4) States (...) shall exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

(5) States (...) shall undertake to eliminate all forms of foreign economic exploitation (...)

## ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries 1989

### *Article 14*

(1) The rights of *ownership* and *possession* of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use *lands* not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect

(2) Governments shall take steps as necessary to identify the *lands* which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession

(3) Adequate procedures shall be established within the national legal system to resolve *land* claims by the peoples concerned.

## European Union: Charter of Fundamental Rights 2000 (2010/C83/02)

### *Article 17*

#### Right to property

1. Everyone has *the right to own*, use, dispose of and bequeath his or her lawfully acquired *possessions*. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

ASEAN: Human Rights Declaration 2012

*Article 17*

Every person has the right to own, use, dispose of and give, that person's lawfully acquired *possessions* alone or in association with others. No person shall be arbitrarily deprived of such *property*

## ANNEX 3: The right to housing

### United Nations Declaration on Human Rights 1948

#### *Article 25*

Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including (...) *housing*.

### UN International Covenant on Civil and Political Rights 1966

#### *Article 17*

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

### UN International Covenant on Economic, Social and Cultural Rights 1966

#### *Article 11*

- (1) (...) recognize the right of everyone to an adequate standard of living for himself and his family, including *housing* (...)

### European Council: Social Charter 1996

#### *Article 31*

Everyone has the right to *housing*.

## ANNEX 4: The right to food

### United Nations Declaration on Human Rights 1948

#### *Article 25*

Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including (...) *food*.

### UN International Covenant on Economic, Social and Cultural Rights 1966

#### *Article 11*

(2) (...) recognize the right of everyone to an adequate standard of living for himself and his family, including adequate *food* (...)

(3) (...) recognize the fundamental right to *freedom from hunger and malnutrition*.

## ANNEX 5 Women

### UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 1979 into force 1981

#### *Article 1*

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

#### *Article 2*

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

#### *Article 15*

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

## ANNEX 6 A selection of Human Rights Laws

Adapted from (UN/Habitat, 2009)

1948 Universal Declaration of Human Rights

1951 Convention on the status of refugees

1966 International Covenant on Civil and Political Rights (Protocol 1998)

1966 International Covenant on Economic, Social and Cultural Rights (Protocol 1998)

2002 Convention against torture and other cruel, inhumane or degrading treatment

2007 Declaration on the rights of indigenous peoples (GA 61/295)

1965 International Convention on the elimination of all forms of racial discrimination

1979 Convention on the elimination of all forms of discrimination against women

1989 ILO Convention 169 concerning indigenous and tribal peoples

1989 Convention on the rights of the child

1990 International Convention on the protection off all migrant workers and families

2006 Convention on the rights of persons with disabilities

1981 *African* Charter on human and people's rights

1990 *African* Charter on the rights and welfare of the child

1950 *European* Convention on the protection of Human Rights & fund freedoms

1961 *European* Social Charter (revised 1996)

1977 *European* Convention on the legal status of migrant workers

1969 *American* Convention on Human Rights

2012 *Asian* Human Rights Declaration ASEAN

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## ANNEX 7 Other European Agreements addressing human rights to property.

In addition to the European Convention on Human Rights, the Council of Europe revised in 1996 its Social Charter 1961, confirming the right to *housing* by citizens (article 31) and obliging its member-states to pursue the economic, social and cultural rights as protected by the Convention within their own jurisdiction. The Charter is supervised by the European Committee on Social Rights, which is open for lodging complaints against states, however according to the Protocol only approved NGOs are permitted to lodge such complaints (Kucs, 2008).

The European Union, being distinct from the Council of Europe, maintains that *property* issues are a responsibility of the member-states. The Treaty of Lisbon 2007 ('EU Constitution') says in Article 345 that 'the treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. Property is seen as social policy, subject to the subsidiarity principle. Still the protection from the European Convention and other human rights law apply, therefore the Treaty of Lisbon adopted the European Charter of Fundamental Rights 2000 (reconfirmed 2010) as a binding treaty for member-states: article 17 applies a similar wording as the European Convention.

## ANNEX 8 The right to housing

The *European Convention on Human Rights* 1950 does not comprise a right to housing. However, it contains article 8 providing for ‘respect for private life, family life and home’. A question is whether ‘home’ is synonymous with ‘house’? Based on interpretation of the jurisprudence of the European Court of Human Rights (Kucs, 2008) concludes that a ‘home’ is even more than a ‘house’. It is the place (houses, land, caravans etc.) where private life and family life develops. Thus it is the function rather than the form that is leading. Neither the legality of tenure is leading, because under certain conditions also an illegally or informally occupied place can qualify as a ‘home’.

The *African Charter* 1981 does not explicitly refer to a right to housing. However, in its communications the African Commission on Human Rights asserts that the combination of the right to health (art. 12 and 16), to property (art. 14) and to the protection of family life (art. 18) de facto entails a right to housing (UN/Habitat, 2014).

The right to adequate housing (formal texts see annex 3) is not a civil right that requires states to house their citizens. It is a social right, which means that states should develop policies and laws to facilitate adequate housing. This is a progressive government action. However, in case of an acute disaster for example, also immediate measures can be required, to provide victims with emergency shelter. This kind of measures is called ‘positive’, as the state has to do something. On the other hand, the treaties also oblige states to pursue ‘negative’ measures, such as refraining from forced eviction.

In all cases, forced evictions are considered as gross violations of human rights, although eviction as such can be justifiable in cases in accordance with the law, and international human rights law. Examples are foreclosures or evictions for people who do not pay back their loans or do not pay rents, or expropriations because of the public interest.

What is the relation between the right to adequate housing and other human rights? In general, many human rights are considered to be interdependent, indivisible and interrelated (UN/Habitat, 2014). That counts for the human right to a home, work, privacy, dignity and alike, but also for the link between the right to housing and the right to property (Jacobs, 2013). The right to housing is generally considered as being broader, because it aims at providing adequate shelter for everyone, not just property owners. Thus all kind of other forms of tenure are optional, such as house rent, cooperative housing, lease, and informal tenure just to name a few. We refer here to what is framed now as the continuum of rights, which entails respect for a variety and plurality of rights to land and houses (Platteau, 1996; Payne, 2004) and is widely recognized at international political level today (UN/Habitat, 2004; UN/Habitat, 2011; Deininger, 2012; FAO, 2012).

In any case, security of tenure is considered to being a fundamental condition to meet the requirements of adequate housing (UN/CESCR, general comment 4 and 7). Notwithstanding the importance of the security issue, access to land in general constitutes

a fundamental aspect of realizing adequate housing, because how to construct a house without having access to land? Inadequate housing can relate to people being denied access to land or access to common land resources, and therefore adequate housing, access to land and control over land, are three associated concepts. That brings some human rights theorists to advocate a ‘human right to land’: such a right is currently not included in international human rights law (Gilbert, 2013; Wickeri, 2010).

Regarding forced eviction, the Special Rapporteur on adequate housing (a special function created in 2000 by the Human Rights Commission, since 2006 named Human Rights Council) presented in his report in 2006 ‘Basic Principles on development-based evictions and displacements’ (Kothari, 2006). Evictions often violate a wide range of internationally recognized human rights, and leave without a home and land, without effective juridical remedy. The UN Committee on Economic, Social and Cultural Rights, who monitors the International Covenant of Economic, Social and Cultural Rights (1966) published already in 1991 a General Comment No 7 on evictions. These Comments are aimed at offering guidance to states how to implement the Covenant. As the Covenant is legally binding, the Comments are important for the interpretation of the right to housing (Kucs, 2008). However, courts most likely will not order a specific policy to pursue, rather set general but binding parameters for policy development (Gauri, 2012).

The Committee considers that states should recognize citizen’s entitlement to security of tenure, land and property restitution. They should fulfil conditions to create adequate housing such as security of tenure and available service. In general states should protect against forced eviction. Building on the General Comments, the Special Rapporteur declares that the right to housing includes protection against eviction, and that the right to housing and of secure tenure should be guaranteed without any discrimination. Eviction is only permitted (statement 21), when (1) authorized by law, (2) carried out in accordance with international human rights law, (3) solely serving the general welfare, (4) when reasonable and proportional, (5) with fair compensation and rehabilitation, and (6) undertaken in accordance with the basic principles provided. Evictions which are not in conformity with the basic principles should be absolutely prohibited (Kothari, 2006).

## ANNEX 9 The right to food

The almost 1 billion people, as mentioned earlier, suffering from hunger and malnutrition, consist roughly out of 300 million small farmers, 200 million landless agricultural workers, 200 million people living in the urban slums in the cities, and 100 million other people living in rural areas (Künnemann, 2004)

Without access to land rights the human right to adequate food (formal texts see annex 4) is difficult to obtain, and many people will be severe trouble (Gilbert, 2013). Inequality in the distribution of land appears to be a major source of food insecurity in rural areas (Randolph, 2012).

The human right to food, is a social right that progressively can be realized, says art 2.1 of the International Covenant on Economic, Social and Cultural Rights, although art 11.2 of the Covenant recognizes that immediate measures can be necessary for example in case of prevailing hunger and malnutrition. In 2012, the FAO Commission on Food Security (CFS) adopted a first version of a Global Strategy for Food Security and Nutrition aiming at providing guide to countries on how food security can progressively achieved The Strategy recommends to ensure access to land ownership, natural resources and productive resources to realizing food security for all, with priority attention to - amongst others- small scale farmers, women and the landless (FAO, 2013).

In ensuring secure access to tenure of land, fisheries and forests the Strategy makes a prominent reference to the Voluntary Guidelines on Responsible Governance of Tenure which ‘serves as a reference and provides guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security’ (FAO, 2012).

Both Strategy and Guidelines are based on the General Comment No. 12 of the Committee on Economic, Social and Cultural Rights, the supervisor of the International Covenant. It elucidates the need to guarantee full and equal access to economic resources, particularly for women, including the right inheritance and ownership of land and other property and the maintenance of registries on rights in land (article 26 of the Comment). A question is whether the right to property, as mentioned in the Universal Declaration of Human Rights 1948, is adequate to promote access to land, as the right to property is perceived by many people as a right that protects the landed elites, and does not include the right to acquire land holdings: the controversy is mentioned earlier in this paper. (Gilbert, 2013) analyses the role of access to land for the indigenous, for gender equality, for housing and or food security and concludes that it would be better to include a ‘right to land’ in international human right law.

Regarding the situation of increased commercial farming, there are two main questions (a) how can land rights be secured for the local population in order to avoid eviction and marginalization, (b) how can (foreign) investors be provided with access to land that is already claimed and used by indigenous peoples (World Bank, 2009). The increased investments in large-scale agriculture jeopardize local land rights, while meanwhile about 50-80 million ha worldwide already have been transferred to large investors (FAO/HLPE,

2011). This phenomenon is also related to the African Union's Comprehensive African Agricultural Development Programme of 2003. This programme urged African States to invest 10% of government expenditures in agriculture and to increase the amount of irrigated lands, for which governments have to seek private investors (African Union, 2006). Local land rights often are not documented, registered or secured; in addition, governments still consider themselves as the underlying owner of land, forest, water and mineral rights. As a consequence, local people using these resources can be easily displaced with little or no compensation. (FAO/HELP, 2011) makes clear that that registration of land and natural resource rights is critical to providing security to rural people and to enabling them to negotiate from a better position with both investors and government. This recording should be done quickly compared with 'old fashioned land registration'. For example through community land registration, whereby land is mapped and registered at the level of a village as a whole, rather than plot by plot.

The human right's challenge of large scale acquisitions of land urged the Special Rapporteur on the right to food to propose a set of minimum human right principles applicable on large scale investments (de Schutter, 2009) (see Annex 8), comprising amongst others that they are only allowable under international law, when they are in accordance with the locally applicable legislation, when they are justified as necessary for the general welfare, and when they are accompanied by adequate compensation and alternative resettlement or access to productive land. Moreover, that states should assist individuals and local communities in obtaining individual titles or collective registration of the land they use, in order to ensure that their rights will enjoy full judicial protection, and that states shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent.