Property, human rights law and land surveyors

Paul van der Molen*

Land surveyors have a lot to do with property rights. This paper presents an inventory of international human rights law regarding property rights, relevant for land surveyors. It addresses the history and current status of international law and case law, and it reflects on the aspects that shape the human right to property as a controversial human right. The paper includes a consideration on related rights, such as the human right to housing and to food. The paper concludes that human rights form an important context for the land surveyor's profession and ends with describing interfaces between the human rights to property and the profession.

Keywords: Human rights, Property, Land surveyors

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 among 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. The issue of 'human right to property' (see Property rights in international and regional human rights law section) and 'the peaceful enjoyment of a possession' (see Property rights in monitoring and case law section) constitutes human right principles directly related to the work of land surveyors specifically in their role as land professional.

The main aim of this paper is to make an inventory of the body of human rights law, which is relevant for land surveyors and – as it were – to feed it explicitly into the fundament of the profession. The second, but derived aim is to identify interfaces with the surveyors' profession.

To this end, the author invents the status and progress of human rights law. Then, he sees 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, the author reflects on the discourse as it developed since Second World War. Because access to land is a condition to housing and food security, the author reviews how property rights relate to the human rights to housing and to food. Finally, he briefly summarises the interfaces with the profession.

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

Property rights in 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 (1) 'everyone has the right to own property' and (2) 'no one shall be arbitrarily deprived of his property', the right to property was not mentioned in the two international covenants on civil and political rights, and economic, social and cultural rights, respectively. 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 as was a resolution to adjourn the consideration to include it in the second one (1951). As both covenants are binding to the member states, van Banning (2002) 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

[1]Department of Geoinformation Science and Earth Observation, University Twente, Enschede, The Netherlands

*Corresponding author, email p.vandermolen-2@utwente.nl

Received 13 January 2015; accepted 21 February 2015
DOI 10.1080/00396265.2015.1097594

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' that 'the law may subordinate such use and enjoyment to the interest of society' and that 'no one shall be deprived of his property except upon payment of just compensation for reasons of public utility or social interest'.

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; no one shall be deprived of his possession except in the public interest and subject to the conditions provided for by the law and by the general principles of international law'.

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.

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 the hands of the former colonisers. 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 recognised 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, it may only be encroached upon in the interest of public need', however vesting in the state a rather absolute form of ownership over all natural resources: 'states shall exercise the right to free disposal of their wealth and 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; no person shall be arbitrarily deprived of such property'. 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 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).

Although 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. 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; hence, it is limited to the general international human rights laws.

Property rights in 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 force 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 Convention on Human Rights 1969 (in force 1978) is supervised by the American Commission of Human Rights (1959). Individuals, groups of individuals and organisations can file a petition against states that ratified the Convention (currently 25 states, not Canada and USA). 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 (article 61). The Convention does not allow individuals or groups to lodge a case at the Court directly.

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 situation in *Africa* is not yet completely settled. The Organisation of African Union, established in 1963, created in 1987 the African Commission on Human and People's Rights (briefly the 'African Commission'). The Commission's mandate allows individuals—besides states—to lodge a complaint, in the form of a written communication (articles 55, 56).

African states were rather reluctant to support the UN Declaration on the Rights of Indigenous Peoples 2007. 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. Later, in 2010, the Commission brought this further in the '*Endorois*' case (*Centre for Minority Rights Development v. Kenya 276/03*). 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, article 14 was understood as regarding individual private property, the Commission made clear that also communal land rights must be considered '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 judgements of the Court are binding. 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 article 34(6) of the Protocol, accepting the competence of the Court in individual cases. So far, only a few countries did this.

To make things complicated in Africa, 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 coming 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.

In *Asia*, the codification of human rights is still limited. As mentioned earlier, ASEAN accepted an Asian Charter (2012), highly contested among 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 land surveyors face even more challenges.

Contrary, the European Court of Human Rights (ECHR) 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 [European Court of Human Rights (ECHR), 2010]. What do these decisions tell us? First, 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 recognises also the right of states to control the use of property, even to take it for the general interest (Grgić, Mataga, Longar and Vilfan, 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 summarised 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; Grgić *et al.*, 2007).

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.

Controversies around a 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. To simply summarise, on one hand, the views of Locke's natural right to private property (Locke, 1690)

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) 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 socialisation 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 before the UDHR, 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

Second, the awareness of private property being unequally distributed among 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: 'while 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 and wealth are unequally distributed. 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 favoured the elites in the first place (see e.g. Powelson, 1988; von Benda-Beckmann, 2003; [International Fund for Agricultural Development (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/day, of which 40–60% (Africa) and 60–80% (Asia) are landless [International Food Policy Research Institute (IFPRI), 2007]. One 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, Sedlova and Pierhurovica, 2008). Over 4 million people were affected by both threatened and implemented forced evictions in 2007 and 2008 [Centre on Housing Rights and Eviction (COHRE), 2009]. Human rights theorists recognise 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 a 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 realised by those most in need of them'.

Is property a civil or social right?

Third, a question is whether a right to property is a civil right or a social right. In general, a right is a human right when it is universal, inherent to human beings by virtue of humanity alone, cannot be purchased or sold, is alienable and cannot be taken away and is equally applicable to all human beings. It regards the relationship between a human being and the state, not among human beings themselves (van Banning, 2002). So, by consequence, a human right to property is not about the relationship between a human being and land (as the author tends to define 'land tenure'), but about the relationship between a human being and the state. It concerns the protection of the individual against interference by the state. Although Court's decisions can form jurisprudence, which might influence future judgements, strictly spoken all cases are individualised (van Banning, 2002). Ensuing from the two Covenants on Civil and Political Rights 1966 and Economic, Social and Cultural Rights 1966, respectively, 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; Wickeri and Kalhan, 2010; Cruft, 2009; Jacobs , 2013; Joireman and Brown, 2013), which—as article 2.1 of the Covenant says—should be realised progressively. That brings (Cruft, 2009) and (Montgomery, 2002) to the question whether there exists a 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, the author observes 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.

Human rights, positive and negative state obligations

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 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 and Monsalve Suárez, 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 land 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 among citizens fall under human rights law, but only when states fail to enforce its regulation or tolerate infringements (Akandji-Kombe, 2007).

Property and plurality

Fourth, 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, Selod and Burns, 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 and Gloppen, 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 (*article 1 jo. 35 European Convention 1950, article 2 American Convention 1969, article 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 recognised privilege of acting', which represents a propensity to accept customary rules as 'law'. What we learn from international literature is that the variety of customs between groups does not prevent scholars to distinguish certain general features, such as the position of women, the coercive power to enforce, and the poor if not absent justification of decisions and jurisprudence under customary justice: reason why some assert customary law is no law at all (Gauri and Gloppen, 2012).

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 Network ('Fighting Poverty with Justice'), 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 (article 2.2 on equal rights in particular to administer property in the UN Convention on the elimination of all forms of discrimination against women 1979 CEDAW) (Harper, 2011). One can level criticism against procedural flaws: preferences of individual authorities prevail, elite capture, no supervision and no documentation (jurisprudence) [HAKI Network ('Fighting Poverty with Justice'), 2011]. Because of the important role of customary justice, again also in property matters, the general trend among NGOs is to support customary justice, but embedded in a reform, comprising formal recognition, harmonisation with statutory law, more training and better documentation (case law development), recognising that human rights consciousness and social change can take a long time to flourish (Gauri and Gloppen, 2012).

Property and state control

Fifth, 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 colonisers, while 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'. The human right to property does not exclude the power of states to make land use plans, town development plans and expropriation plans. As mentioned in Property rights in monitoring and case law section, the European Court is rather advanced in qualifying this state power. A crucial role here is granted to what 'general interest' entails, over which we published elsewhere.

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 and Kalhan, 2010). Therefore, the author pays attention in the following sections to the human right to housing and to food.

Property rights and the human right to housing

The Universal Declaration 1948 comprises article 25 saying 'everyone has the right of a standard of living adequate for the health and wellbeing of himself and of his family'. 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 the interpretation of the jurisprudence of the ECHR (Kucs *et al.*, 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 (article 12 and 16), to property (article 14) and to the protection of family life (article 18) *de facto* entails a right to housing (UN/Habitat, 2014).

The right to adequate housing is not a civil right that requires states to house their citizens. Article 17 of the International Covenant on Civil and Political Rights 19 676 reads '...no one shall be subjected to arbitrarily or unlawful interference with his home...'. Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966 reads '...to recognise the right of everyone to an adequate standard of living...'. Housing is considered to be 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 measure 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 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 relationship 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 being broader, because it aims at providing adequate shelter for everyone, not just property owners. Thus, all kinds of other forms of tenure are optional, such as house rent, cooperative housing, lease, and informal tenure just to name a few. The authors 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 recognised at international political level today (UN/Habitat, 2004; UN/Habitat ,2011; Deininger *et al.*, 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 realising 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 and Kalhan, 2010).

Forced evictions often violate a wide range of internationally recognised human rights, and leave people 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.

The Committee considers that states should – among others – recognise citizen's entitlement to security of tenure, land and property restitution. They should fulfil conditions to create adequate housing such as – again among others – security of tenure and available service. In general, states should protect against forced eviction. Evictions that are not in conformity with human rights basic principles should be absolutely prohibited (Kothari, 2006).

Property rights and the human 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 and Epal-Ratjen, 2004).

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

The human right to food is included in article 25 of the Universal Declaration reading 'everyone has the rights to...food'. It is a social right that progressively can be realised, says article 2.1 of the International Covenant on Economic, Social and Cultural Rights, although art 11.2 of the Covenant recognises 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 human rights based Global Strategy for Food Security and Nutrition aiming at providing a frame and guide to countries on how food security can progressively achieved The Strategy recommends a policy and legal framework to ensure access to land ownership, natural resources and productive resources to realising food security for all, with priority attention to – among 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 realisation of the right to adequate food in the context of national food security' (FAO, 2012).

Both Strategy and Guidelines are also 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 UDHR 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 marginalisation and (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 jeopardise local land rights, while meanwhile about 50–80 million ha worldwide already have been transferred to large investors [High Level Panel of Experts on Food Security and Nutrition (FAO/HLPE), 2011]. 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/HLPE (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), comprising among 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.

The human right to property and its interfaces with the land surveyor's profession

The main aim of this paper, an inventory of human rights law relevant for land surveyors is hopefully realised at this point. The derived aim, namely interfaces with the profession, is now at stake. To structure this section, the author proposes 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. Translating this to the land surveyors' profession, it means (a) identifying human rights aspects in particular on property, (b) contributing to the inclusion of human right in domestic land policy, and (c) taking care of human rights when implementing domestic land policies.

Assessment of human rights in domestic land issues

First, taking cognisance of how the right to property is embedded in international and regional human rights law, we argue, is a baseline in the expertise of land surveyors. Many land surveyors' work either in state service, are licenced 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 relationship between a human being and the state, land 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 mentioned earlier, no international definition exists of what 'property' is. People, and thus also legislators, can have different views to 'property', ensuing from political and cultural backgrounds: is it 'property absolutism' or 'property relativism', as (Gray, 2002) roughly says. Recognising this, it is clear that 'property' in human rights law and jurisprudence is understood as a very broad concept, which covers a wide range of relationship 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 land 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 four 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 check list on how to assess a domestic situation of legislation an implementation: it can help land surveyors to understand the actual situation in their country. In addition, the World Bank land governance assessment framework includes human rights aspects, for example, regarding equity, equality, and transparency.

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

Sixth, as land 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 legitimised by democratically defined general interest?

Contribute to the inclusion of human rights in domestic land policy

Developing a land policy that includes human rights has two aspects, we believe, such as the substantive aspect and the procedural aspect. First, regarding the substance of human rights, land 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 and Hertel (2012) explain that how states constitutionalise 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-legitimised 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 article 2 of the International Covenant on Economic, Social and Cultural Rights (1966), in that these human rights are to be realised '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). Land 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, materialise in a set of positive and negative obligations. Sometimes a state has to refrain from something (e.g. unlawful takings and forced eviction) and sometimes a state has to do something (e.g. developing policies). From case law (especially under the US, the USA Convention and the African Charter), we learn that traditional and ancestral lands 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. It is thus important that land surveyors are critical to the level of compliance with international obligations states adopt in their regulations (Kumar, 2009).

Fifth, regarding the procedural part of the land policy, land surveyors 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 check list 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.

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 the study by Deininger, 2003), is typically part of the professional domain of the land surveyor. Despite sometimes disappointing results of conventional land administration projects ('titling'), the quest for systems that deliver services on a countrywide scale is manifest. Global documents on housing, food security, eviction, and 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 land surveyors are strongly connected in land administration. As land administration will remain within the remit of national legislation, it is extremely important to realise 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 the International Federation of Surveyors, publications on innovative approaches to land rights, innovative technology, domain models and on fit-for-purpose philosophy are helpful in this.

In the implementation of land policy, we argue land 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.

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. Land surveyors play an important role in meeting human rights and applying human rights' principles in their daily work. This daily work focuses on three levels, we argue, namely 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, land 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. Hopefully, this paper provides a well-understood relationship between human rights and the land surveyors' profession, establishing a good basis for them to being an advocate for human rights in land.

References

Akandji-Kombe, J.-F. 2007. *Positive obligations under the European convention on human rights*. Human Rights Handbook No. 7. Strasbourg, France: Council of Europe.

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, Phnom Penh, Cambodia. [64/005/2012].

van Banning, T. R. G. 2002. *The human right to property*. Antwerp: Intersentia Publishing. [diss. University Utrecht The Netherlands].

von Benda-Beckmann, F. 2003. Mysteries of capital or mystification of legal property? *Focaal European Journal of Anthropology*, 41, pp. 187–191.

Bruce, J. W. 2012. Simple solutions to complex problems: land formalization as a 'silver bullet', In: J. M. Otto and A. J. Hoekema, eds. *Fair land governance*. Leiden, The Netherlands: Leiden University Press, pp. 31–57.

Cahill, K. 2002. *Who owns* Britain. Edinburgh, UK: Cannongate Books Ltd.

Cahill, K. 2010. *Who owns* the world. New York, NY, USA: Hachette Book Group.

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. Strasbourg, France: Council of Europe.

Chevenal, F. 2006. Property rights as human rights, In: H. De Soto and F. Chevenal, eds., *Realizing property rights*. Zürich, Switzerland: Rüfer & Rub.

Centre on Housing Rights and Eviction (COHRE). 2009. *Global survey on forced evictions 2007-2008*. Geneva, Switzerland: COHRE.

Cruft, R. 2009. Are property rights ever basic human rights? *British Journal of Politics and International Relations*, 12, pp. 142–154.

Deininger, K. 2003. *Land policy for growth and poverty reduction*. Washington, DC, USA: World Bank Policy Research Paper.

Deininger, K., Selod, H. and Burns, A. 2012. *The land governance assessment framework*. The right to property: a guide to the implementation of article 1 of protocol No. 1 to the European convention of human rights.

European Court of Human Rights (ECHR). 2010. *50 years of activity: the European court of human rights in some facts and figures*. Strasbourg, France: ECHR.

High Level Panel of Experts on Food Security and Nutrition (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.

FAO. 2013. *The human right to adequate food in the global strategic framework for food security and nutrition*. Rome, Italy: FAO.

Farran, S. 2006. Is legal pluralism an obstacle to human rights? Considerations form the South Pacific. *The Journal of Legal Pluralism and Unofficial Law*, 38(52), pp. 77–105.

Gauri, V. and Gloppen, S. 2012. *Human rights based approaches to development*. The World Bank Policy Research Paper. Washington, DC, USA, p. 5938.

Gerber, P. 2012. *ASEAN human rights declaration: a step forward or a slide backwards*. London, UK: The Constitution.

Gilbert, J. 2013. Land rights as human rights: the case for a specific right to land. *International Journal on Human Rights*, 10(18), pp. 114–227.

Gray, K. 2002. Land law and human rights, In: L. Tee, ed. *Land law: issues, debates, policy*. Oxon, UK: Willan Publishing (Routledge), pp. 211–245 .

Grgić, A., Mataga, Z., Longar, M. and Vilfan, A. 2007. *The right to property under the European convention on human rights*. Human Rights handbooks No. 10. Strasbourg, France: Council of Europe.

HAKI Network ('Fighting Poverty with Justice'). 2011. *Engaging customary justice systems*. Washington DC, USA: HAKI White Paper.

Hansungule, M. 2009. African courts and the African commission on human and people's rights. In: A. Bősl and J. Diescho, eds. *Human rights in Africa*. Windhoek, Namibia: Konrad Adenauer Foundation, pp. 233–271.

Harper, E. 2011. *Engaging with customary justice*. Working paper No.7. Rome, Italy: International Development Law Organization IDLO.

Hoebel, E. A. 1954. *The law of primitive man*. Cambridge MA, USA: Harvard University Press.

International Fund for Agricultural Development (IFAD). 2008. *Improving access to land and tenure security*. Rome, Italy: IFAD.

International Food Policy Research Institute (IFPRI). 2007. *The world's most deprived*. Washington, DC, USA: IFRI.

Jacobs, H. M. 1998. *Who owns America*. Madison, WI, USA: University Wisconsin Press.

Jacobs, H. M. 2013. Private property and human rights: a mismatch in the 21st century? *International Journal of Social Welfare*, 22(Suppl. S1), pp. 85–101.

Jacobsen A. F. (ed.) 2008. *Human rights monitoring*. Leiden, Netherlands: Nijhoff Publishers Leiden.

Joireman, S. F. and Brown, J. 2013. Property: human right or commodity? *Journal of Human Rights*, 12(2), pp. 165–179.

Keetharuth, S. 2011. Implementation of decisions of the African commission on human and people's rights In: *Proceedings expert seminar*. University of Bristol. Bristol, UK. November 2011.

Kothari, M. 2006. United Nations, New York, USA 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).

Kucs, A., Sedlova, Z. and Pierhurovica, L. 2008. The right to housing: international European and national perspectives. *Journal Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, 64(65), pp. 101–123.

Kumar, R. A. 2009. Customary law and human rights in Botswana, *Journal Human Rights & Human Welfare Working Paper 52*. Denver, USA: University of Denver.

Künnemann, R. and Epal-Ratjen, S. 2004. *The right to food: a resource manual for NGOs*. Washington, DC, USA: FIAD/AAAS Science and Human Rights Program.

Künnemann, R. and 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.

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

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

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*. London, UK, pp. 150–163.

Platteau, J. P. 1996. The evolutionary theory of land rights as applied to Sub-Saharan Africa. *Development & Change*, 27, pp. 29–86.

Powelson, J. P. 1988. *The story of land*. Cambridge, USA: Lincoln Institute of Land Policy.

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

Randolph, S. and Hertel, S. 2012. The right to food: a global overview. In: L. Minkler, ed. *The state of economic and social human rights: a global overview*. Cambridge, UK: Cambridge University Press, pp. 21–60.

Rook, D. 2001. *Property law and human rights*. London, UK: Blackstone Press.

de Schutter, O. 2009. *Large-scale land acquisitions and leases*. Geneva, Switzerland: Human Rights Council of the UN.

Shaw, C. M. 2007. The evolution of regional human rights mechanisms: a focus on Africa. *Journal of Human Rights*, 6(2), pp. 209–232.

UN/Habitat. 2004. *Pro poor land management*. Nairobi, Kenya: UN/Habitat.

UN/Habitat. 2008. *State of the world's cities*. Nairobi, Kenya: UN/Habitat.

UN/Habitat. 2011. *Proceedings governing council 23rd session HSP/GC/23/7*. Nairobi, Kenya: UN/Habitat.

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

Wickeri, E. and Kalhan, A. 2010. Land rights issues in international human rights law. *Malaysian Journal on Human Rights*, 4(10), pp. 16–25.

World Bank. 2009. *Awakening Africa's sleeping giant*. Washington, DC, USA.