

Foreigners' Right to Acquire Land under International Human Rights Instruments

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Abstract: This article offers an assessment of treaty law on foreign land ownership in the context of international human rights agreements, which still remains relatively unexplored. While international human rights law is very cautious as to whether foreigners' right to acquire land within a host state should be recognized as a human right, this article suggests that the recognition of such a right is the logical development of accepting free trade and free investment as human rights. The specific protection of indigenous people, on the other hand, could be taken as an exception to foreigners' right to acquire land. So far foreigners' right to acquire real property is only incorporated into a small number of human rights treaties. Its linkage with human rights law, in most circumstances, is achieved through some of the existing human rights norms. The first norm is the right to property, the protection of which is of significance to the right to

acquire real property. The second norm is grounded on the concept of the right to housing, the attainment of which, in many cases, relies on access to land property and the right to acquire land.

Keywords: Foreigners' right to acquire land; human rights instruments; the right to property; the right to housing.

1. Introduction

Traditionally the matter of land ownership, in particular the right to acquire, has been regarded as the exclusive power of the sovereignty of state, due to the significant role of land in maintaining state authority and also in promoting human settlement. It is thus open to a state to determine, as a matter of its domestic law, whether access to land should be open to aliens and upon what conditions such access should be offered. In the Vancouver Declaration on Human Settlements (Habitat I) (1976), it is noted that:

Land is one of the fundamental elements in human settlements. Every State has the right to take the necessary steps to maintain under public control the use, possession, disposal and reservation of land. Every State has the right to plan and regulate use of land, which is one of its most important resources, in such a way that the growth of population centers both urban and rural are based on a comprehensive land use plan. Such measures must assure the attainment of basic goals of social and economic reform for every country, in conformity with its national and land tenure system and legislation. (Section II(10))

International human rights instruments have long provided for the protection of property rights. However, these instruments have been confined to the matter of protection,

leaving the issue of the acquisition of property largely unregulated, in particular when the objective is real estate property. For example, the European Convention of Human Rights (ECHR), the only international human rights agreement providing a high degree of individual protection thus far, explicitly indicates in Article 1 of Protocol No. 1 that the protection applies only to existing possession, and not to the right to acquire property.

This article argues that foreigners' right to acquire real property partakes of the transnational economic right of the individuals in ensuring the fulfillment of free trade and investment, which, according to Petersmann's proposition, is an inalienable natural right of human beings (Petersmann,2002). The right to acquire real property, in spite of being narrowly construed, has been recognized by several international human rights treaties, explicitly providing for the effective achievement of such a right in the context of non-discrimination. The Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons are two such examples. On the other hand, the specific protection of indigenous people could be taken to be an exception to the general principle of non-discrimination. The protection of indigenous peoples' rights to their traditionally-occupied land under international human rights instruments means that people outside those communities, including both non-indigenous nationals and foreigners, should not be granted the same access to their land as indigenous peoples themselves.

Furthermore, there are two human rights notions that are interrelated with the right to acquire land: the right to property and the right to adequate housing. Although they do not make a case for the explicit recognition of the right to land, their correlation with the right to acquire land is obvious. In certain contexts, the right to acquire real property may be seen as being complementary to the right to property. The right to acquire land is also seen as an indispensable means through which people can enjoy the right to adequate

housing and, in that sense, may be said to be instrumental to the right to housing.

This article seeks to provide an overview of the issue of land ownership in international human rights regimes. Section 2 analyzes whether foreigners' right to acquire land may be recognized as a human right and protected on the grounds of non-discrimination. It also provides an overview of some of the existing international human rights treaties which make express reference to foreigners' right to acquire real property. Section 3 examines indigenous peoples' rights to the land they have traditionally occupied and concludes that such a right may act as an exception to the non-discrimination rule applied with respect to foreign land ownership. Section 4 examines the relationship between the right to property and the right to acquire property, while section 5 examines the correlation between the right to housing and the right to acquire property, by especially looking at the relevant provisions on the basic human right to housing. Section 6 concludes.

2. Universal Rules Relating to Foreigners' Right to Acquire Property

The recognition of the right to acquire property as a human right is based on the assumption of a human rights dimension to free trade. According to Petersmann, freedom to trade across national boundaries can be seen as a human right. His argument is based on the premise that the right to free trade is derived from the inalienable natural rights of self-development that should be enjoyed by all people. The objective of individual self-determination and self-development entails economic and social rights to allow for the acquisition of the economic resources and social security needed in order to live and develop human potential. If the objective of human rights is to promote and

protect the enjoyment of the maximum equal liberty of human beings, and liberal trade across borders facilitates the maximization of such liberty, then national boundaries should not become barriers to individuals' freedom to trade outside their national territory.

If freedom of trade should be taken as a human right, then freedom of investment could be taken as a human right under the same logic, as it is also linked to respect for self-determination and self-development. Foreigners' right to acquire real estate is in actual fact the essential condition for the development of freedom of trade in services and investment, as a result of which it could be recognized as a human right in itself. In the light of the foregoing analysis, the author argues that the right to acquire land partakes of a human right, and thus equal access to land ownership should be granted to aliens, on the grounds of non-discrimination.

So far only a few international instruments have specifically addressed the issue of land ownership rights of foreigners, in spite of the fact that these instruments are designed to guarantee only the rights of certain groups of foreigners. The most typical examples are treaties applied to refugees and stateless persons. The Convention relating to the Status of Refugees (1951) also stipulates a general undertaking of states to accord to refugees treatment no less favorable than that accorded to aliens generally, in the same circumstances, *inter alia*, "the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property". The same provision is contained in the Convention relating to the Status of Stateless Persons.

3. Indigenous Peoples' Rights to Land as an Exception to Foreigners' Right to Acquire Land

Indigenous peoples are ethnic groups with historical ties to land in a given territory, prior to its colonization or conquest by settlers. Land carries social, economic, cultural and political significance for the survival and development of indigenous communities. Recognition of the foundational nature of indigenous peoples' relationship to their homeland is a crucial element of the protection of such peoples. Respect for the special relationship indigenous peoples have with their land requires states to ensure they have legitimate access to the land they traditionally occupied to the exclusion of all other people. International human rights instruments have also provided for the protection of indigenous people, in terms of their rights to own, develop and control the land which they traditionally occupied and also prohibit the illegal alienation of their land by those external to the indigenous communities.

Convention No. 169 on Indigenous and Tribal Peoples, which was adopted by the International Labour Organization (ILO) in 1989, is the only legally binding international instrument related to the rights of indigenous peoples, affirming the collective rights of indigenous peoples with regard to their land.

Article 14 deals with indigenous peoples' rights to land:

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.

Article 14 paragraph 1 refers to two types of land rights to which indigenous peoples may be entitled, based on their relationship with the land: with respect to the lands “they traditionally occupy”, “the rights of ownership and possession” are recognized; on the other hand, in circumstance where lands are “not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities”, measures shall be taken to safeguard their rights “to use lands”. While the second case was intended to provide indigenous peoples with the rights of use, the assertion of the rights of “ownership and possession” in the first case may need to be interpreted in a different way.

Implicit in this is the notion that the recognition of “ownership” rights under Article 14 does not entail indigenous peoples being given the right to exercise legal powers that require formal title. It follows that ownership rights provided for indigenous peoples cannot be assumed to indicate the same rights that accrue to land owners in the legal sense (Swepston, 1990). This understanding of the wording has been widely accepted in

the literature (Ulfstein, 2004). On the other hand, while the second case safeguards rights of use, the use of the terms of “ownership and possession” under the first case means something more than the right to use the land. Based on the the inherent logic of Article 14(1) itself, indigenous peoples’ rights of ownership and possession over their traditionally occupied lands are recognized as something more than right to use the land but less than full ownership rights (Swepston, 1990).

In addition, Convention 169 states in Article 17(2), that indigenous peoples must be consulted with respect to “their capacity to alienate their lands” or “transmit their rights outside their own community”. It also prohibits non-members from taking advantage of the customs of the indigenous community or their lack of knowledge of relevant laws in order to secure ownership of the land. The Convention further states that “adequate penalties shall be established for upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences”. It also protects them against forced removals. When relocation is considered necessary, it can take place only with their free and informed consent and they must be fully compensated in their preferred way. Also, Article 10 of the UN Declaration of the Rights of Indigenous Peoples indicates that the relocation of land or territories traditionally occupied by indigenous peoples can occur only with “the free, prior and informed consent” of the indigenous peoples concerned and “on just and fair compensation...with the option of return”.

All of these international instruments recognize and protect the rights of all indigenous peoples to the lands which they have traditionally owned or occupied, to the exclusion

of non-indigenous people. Although non-discrimination has been established as a general principle under international human rights law, non-indigenous peoples may not appeal to such a general principle to secure their rights to lands traditionally owned or occupied by indigenous peoples. The recognition of foreigners' human right to land cannot be applied to justify settlers' exploitation of the land of indigenous peoples. In other words, respect for the rights of indigenous peoples to their ancestral land and the prohibition of non-members from encroachment may serve as an exception to the general principle of non-discrimination with respect to foreign land ownership.

4. Established Linkage between Right to Property and Right to Acquire Property

4.1 Correlation

The formulation of the property protection provisions in human rights conventions tends to emphasize the significance of the right to property, which guarantees peaceful enjoyment of existing property rights. The right to acquire property, therefore, does not fall into the scope of the right to property. However, the two norms are closely connected: the right to property ensures the effective achievement of the right upon the acquisition of property; without the protection of the property being acquired, the recognition of the right to acquire property is meaningless.

4.2 Universal Rules Relating to Foreigners' Right to Property

With regard to property rights, the UDHR states in Article 17 that:

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

The commission which drafted the UDHR also expressed the view that the right to own property was a human right. Furthermore, the UN General Assembly proclaims that UDHR, as a common standard of achievement, applies to "all people and all nations". So member states are required to promote human rights and fundamental freedoms not just of their own nationals, but also of those who are non-nationals within their jurisdictions. In this context, it is surprising that the International Covenant on Civil and Political Rights (ICCPR) and ICESCR, both adopted in 1966, do not contain regulations on the right to property, which is believed to originate from the antagonistic ideological conflicts between the Western and Eastern blocs (Rosas, 1992). However, the absence of an express provision regarding the right to property in the covenants, as Ebe Riedel suggests, may not be interpreted as a denial of such rights (Riedel, 1986).

The same ideal was addressed in the Declaration on the Human Rights of Individuals Who Are not Nationals of the Country in which They Live, which states that aliens shall enjoy "the right to own property alone as well as in association with others, subject to domestic law subject to the restriction as prescribed by law and which are necessary to protect national security, public safety, public order, public health or morals or the rights and freedoms of others"; and that "no alien shall be arbitrarily deprived of his or her lawfully acquired Assets."

5. Established Linkage between Right to Adequate Housing and Right to Acquire Property

5.1 Correlation

The link between the right to adequate housing and the right to acquire land is obvious. Access to land can be seen as a fundamental component of the realisation of the right to adequate housing. When access to land is denied, adequate housing, in many cases, cannot be obtained. The Special Rapporteur recognized and emphasized the importance of land as a “critical element” of the right to adequate housing, and called on the Human Rights Council to ensure “the recognition in international human rights law of land as a human right.”

5.2 Universal Rules Relating to Foreigner’ Right to Adequate Housing

There are international instruments which specifically mention the subject of accommodation for non-nationals, in particular the rights of migrant workers. One of the primary objectives of the establishment of the ILO was to ensure that migrant workers be granted the same treatment as nationals, not only in respect of work-related rights, but also other rights pertaining to quality of life (Cholewinski, 2003). For example, Article 6(1)(iii) of the ILO Convention No. 97 on Migration for Employment (revised in 1949), as a legally-binding instrument ratified by members of the ILO, affirms the equal rights of “lawful immigrants” with those of the nationals of the contracting states, with respect to accommodation.

Migrant workers are also guaranteed equal treatment to that of the nationals of the countries in which they are working, in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) in relation to

“access to housing, including social housing schemes and protection against exploitation in respect of rents” .

Housing is an essential component of human settlements and also an indispensable factor in ensuring human dignity. At the most elemental level, it addresses basic physical needs by serving as a shelter from the weather. It also fulfills psychological needs for privacy and personal space, as well as social needs for interaction within the broader scope of the community, as a basic gathering point. On the basis of these considerations, it is argued that the fulfillment of the right to housing is also required for the full enjoyment of other human rights, including:

- the right to family;
- the right to participate in government;
- the right to work;
- the right to rest and leisure;
- the right to food and water;
- the right to the highest attainable level of physical and mental health;
- the right to education;
- the right to participate in the cultural life of the community.

The human right to have adequate housing is therefore of central importance for the enjoyment of all economic, social and cultural rights. This right, as codified in the wide spectrum of international instruments, is a right enjoyed by everyone, without distinction of any kind, including “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” . In the same vein, any distinction based on nationality regarding the acquisition of a decent standard of living must be eliminated, as aliens have the same human needs of shelter as nationals, in the states where they reside.

6. Conclusion

This article argues that free trade is not only good economic policy, it is also a human right. Foreigners' right to acquire real property, which is an indispensable part of achieving free trade and free investment, may be regarded as a human right and thus subject to the fundamental rules of non-discrimination. So far only a limited number of international treaties have explicitly recognized the right to acquire real property and guaranteed that no discrimination should be applied between nationals and foreigners with respect to such rights, and this is confined to limited groups of persons, such as refugees and stateless persons.

International human rights law protects indigenous peoples' relationship with their land, territories and resources, by imposing on states the requirement to protect such land against dispossession and intrusion by peoples outside such communities. Respect for the special relationship indigenous people have with their land suggests that peoples who do not belong to the indigenous communities should not be entitled to land ownership on the same grounds as indigenous peoples. From this point of view, foreigners' right to land that has traditionally been used by indigenous people may not be asserted, and this, therefore constitutes an exception to the general rule of non-discrimination.

In other contexts, the foreigners' right to acquire land has not been explicitly recognized in international human rights law. Its recognition may be achieved by resorting to some other closely-linked human rights norms, including the right to property and the right to

housing. The recognition of the right to property could be complementary to the right to acquire property, as it promotes protection for the property that is acquired, and access to housing in foreign states could be based on the right to adequate housing, as the right to land and the right to adequate housing are integrally related to one another.

The international rules on foreign land ownership remain an issue of complexity and sensitivity. This is in conflict with the significant role land plays in fulfilling human rights in both economic and non-economic areas. People in the globalized community move more frequently across borders as a result of the increased movement of goods, services and capital around the world. Essential to the achievement of this movement, and also to the fulfillment of the basic physical needs of such migrant people, is the right to acquire land and the right to housing. Only by recognizing the complex relationship between land, livelihood and development, as well as their instrumental role in guaranteeing other social and economic rights, can progress be made towards a human right to land. Based on these considerations, the principle of ensuring equal treatment of nationals and aliens with regard to the right to acquire real property may deserve express recognition under international human rights law.

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