

# THE RIGHT TO PROPERTY AND COMPULSORY LAND ACQUISITION IN GHANA: A HUMAN RIGHTS PERSPECTIVE

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## ABSTRACT

Using a human rights-based approach and Ghana as a case study, this article examines the scope and content of the right to property in relation to compulsory land acquisition under international law. It argues that while the exact frontiers of the right to property remain quite uncharted at the global level the vacuum has been filled by the regional human rights systems and soft law. In the context of Ghana, the Constitutional protection of the right to property and quite elaborate rules to be followed during compulsory acquisition have not translated into revision of the compulsory acquisition laws, which remain largely incoherent and inconsistent with the requirements of the Constitution and international human rights law.

**Key words: right to property; compulsory land acquisition; African Commission; Ghana; human rights**

## 1. INTRODUCTION

*There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property...<sup>1</sup>*

The right to property is fundamental pillar of all democratic societies.<sup>2</sup> Whilst the right to property is broad and may encompass any 'vested interest',<sup>3</sup> access to land is arguably the most fundamental of all property rights. This is even more relevant for developing countries where land makes up three quarters of wealth.<sup>4</sup> For many people, access to land is essential for the

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<sup>1</sup> W. Blackstone, *Commentaries on the Laws of England* (1765-69) cited in C. M. Rose 'Canons of Property Talk, or, Blackstone's Anxiety', 108 *Yale Law Journal* (1998-99): 601.

<sup>2</sup> A. Alias & N. Daud, 'Payment of Adequate Compensation for Land Acquisition in Malaysia', 12 *Pacific Rim Property Research Journal* (2006): 326.

<sup>3</sup> T.R.G. van Banning, *The Human Right to Property*, Intersentia (2002): 12.

<sup>4</sup> H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Basic Books (2000): 86; USAID, *Land and Conflict: A Toolkit for Intervention* (2005): 35; K. Deininger, 'Land Policies for Growth and Poverty Reduction: A World Bank Policy Research Report' (2003): 292.

attainment of a dignified life.<sup>5</sup> Land rights serve as a catalyst for economic growth, social development and poverty alleviation.<sup>6</sup> It is a crucial issue for 'social justice and equality'.<sup>7</sup> Access to land constitutes the basis of access to food,<sup>8</sup> housing<sup>9</sup> and development and the lack of access creates vulnerability and economic insecurity for many people.<sup>10</sup> 'Access to land is one of the key elements necessary for eliminating hunger in the world'.<sup>11</sup>

Despite the importance of land in the lives of many people it is estimated that half of the world's rural population are faced with insecure property rights in land and about a quarter of the world's population are landless making insecure land titles and landlessness a major contributory factor to poverty around the world[and food insecurity].<sup>12</sup> The situation is exacerbated by renewed interest in large scale land acquisition in Africa by multinational corporations and sovereign states for 'agro-industrial enterprises, forestry and mineral exploration'.<sup>13</sup> For these many reasons, access to land is clearly a human rights issue.

While highlighting the importance of the property right to land, it is also essential to emphasise that it is almost universally recognised that governments have the rights to compulsorily acquire property in the public interest subject to the payment of adequate compensation.<sup>14</sup> The situation is not different in Ghana. The constitution guarantees the right to property<sup>15</sup> and also recognises that government may compulsorily acquire land in the public interest or for public

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<sup>5</sup> P. Gelbspan and F.G.V. Thea, 'Land in the Struggle for Social Justice: Social Movement Strategies to Secure Human Rights' (2013) available at <http://www.terradedireitos.org.br> (accessed 16 September 2014).

<sup>6</sup> J. Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' 18 *SUR International Journal on Human Rights* (2013): 115.

<sup>7</sup> *Ibid*, p 116.

<sup>8</sup> Commission on Human Rights, *Report of the Special Rapporteur on the Right to Food, Jean Ziegler*, U.N. Doc. A/57/356 (27 August 2002) (Ziegler Report): para 22.

<sup>9</sup> Commission on Human Rights, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari*, U.N. Doc. E/CN.4/2005/48 (3 March 2005): para 41.

<sup>10</sup> International Land Coalition, 'Towards a Common Platform on Access to Land: The Catalyst to Reduce Rural Poverty and the Incentive for Sustainable Natural Resource Management' (2003) available at <<http://www.landcoalition.org/sites/default/files/legacy/legacypdf/CPe.pdf?q=pdf/CPe.pdf>> (accessed 2 August 2014); Minority Rights Group International, 'Moving towards a Right to Land: The Committee on Economic, Social and Cultural Rights' Treatment of Land Rights as Human Rights (2015): 3.

<sup>11</sup> Ziegler Report, *supra* note 8, para 22.

<sup>12</sup> UN-HABITAT, 'Secure Land Rights for All' (2008): 4.

<sup>13</sup> R. S. Knight, 'Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Law Making and Implementation' (2010): vi

<sup>14</sup> See Article 14, African Charter on Human and Peoples' Rights (1981); article 1, Protocol No.1 to the European Convention on Human Rights (1952); Article 21, American Convention of Human Rights (1969), among others. See also J.L. Knetsch, *Property Rights and Compensation: Compulsory Acquisition and Other Losses*, Butterworth's (1988) 142; B. Denyer-Green, *Compulsory Purchase and Compensation*, Estates Gazette (2005): 64.

<sup>15</sup> Constitution of Ghana (1992), article 18.

purpose.<sup>16</sup> Because land in Ghana is primarily owned by customary institutions and the state can only access land through the instrument of compulsory acquisition,<sup>17</sup> the use of government's power of compulsory acquisition is essential for several purposes. The use of compulsory land acquisition powers by government has however, often left a trail of unsolved problems such as unpaid compensation, absence of consultation with land owning communities and divestiture of compulsorily acquired land for the use of private persons to the dissatisfaction of the original owners among others.<sup>18</sup>

Against this background, this article discusses the compulsory land acquisition regimes in Ghana and assesses their conformity with international and regional human rights norms and standards for the protection of the right to property. Before embarking on the examination of the compulsory land acquisition regime in Ghana, two essential topics are discussed. First, the normative framework for the right to property under international human rights law is studied. Second, an exposition of the emerging international best practice in compulsory land acquisition is made. These provide the background and standards to which compulsory land acquisition in Ghana is measured. The rest of the article is organised as follows: section 2 revisits and evaluates the international and regional human rights law protection of the right to property; section 3 provides an overview of emerging best practice in compulsory land acquisition; section 4 evaluates compulsory land acquisition regimes in Ghana and highlights their imperfections, drawing on lessons from other jurisdictions; section 5 provides conclusions and recommendations.

## **2. UNPACKING THE RIGHT TO PROPERTY UNDER INTERNATIONAL HUMAN RIGHTS LAW**

The right to property has always been and continues to be subject to political contestation.<sup>19</sup> Even seven decades after it was proclaimed as a fundamental human right in the Universal Declaration of Human Rights (UDHR), its status as a universal human right is still contested by many mainly as a result of ideological disparities

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<sup>16</sup> *Ibid* article 20.

<sup>17</sup> W. O. Larbi, 'Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies' (2008): 2.

<sup>18</sup> *Ibid*.

<sup>19</sup> Banning, *supra* note3, 5.

between the East and the West.<sup>20</sup> Thus, while western countries with mainly capitalist economies favour the universal recognition of the right to property, eastern states and many third world countries have been opposed to the full recognition of the right to property.<sup>21</sup> Even though this dichotomy in ideology regarding property rights has somehow waned subsequent to the end of the cold war<sup>22</sup> the exact frontiers of the right to property in international human rights law remain very much uncharted. With this background in mind, this section evaluates the development of the right to property at the international level through various instruments with the aim of identifying the relevant human rights standards that states are required to abide by during compulsory acquisitions and identifies some of the gaps in operationalising these instruments. It must, however, be clarified from the outset that the right to property in this article is discussed in the context of its narrow meaning as a negative right of non-interference arbitrarily, with already existing property rights rather than the broader context as an economic, social and cultural right which would require states to take positive measures to ensure that everyone has at least a minimum of property rights.<sup>23</sup>

That said, under conventional human rights law, the right to property can be traced to the UDHR, - the cornerstone of modern international human rights law.<sup>24</sup> Article 17 of the UDHR provides that '[e]veryone has the right to own property alone as well as in association with others' and that 'no one shall be arbitrarily deprived of his property'.<sup>25</sup> Article 17 thus, recognises in general terms the fundamental nature of the right to property and limits the ability of states to arbitrarily interfere with the enjoyment of the

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<sup>20</sup> C. Krause & G. Alfredsson, 'Article 17', in G. Alfredsson and A. Eide (eds.), *Universal Declaration of Human Rights, A Common Standard of Achievement*, Martinus Nijhoff Publishers (1999): 359.

<sup>21</sup> C. Krause, 'The Right to Property' in A. Eide, C. Krause, & A. Rosas (eds.) *Economic, Social and Cultural Rights: A Text Book*, Springer (2001) 191-193.

<sup>22</sup> *Ibid*, 193

<sup>23</sup> *Ibid*, 192. .

<sup>24</sup> W.A. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires, Volume 1, October 1946 to November 1947*, Cambridge University Press (2013): xxxvii; L. Cotula, 'Property Rights, Negotiating Power and Foreign Investment: An International and Comparative Law Study of Africa' (2009): 87, Unpublished PhD thesis, University of Edinburgh.

<sup>25</sup> Article 17 (1) & (2), Universal Declaration of Human Rights (1948).

right. It is worthy to note that article 17 protects both individual and collective property ownership rights.

It must, however, be acknowledged that article 17 is quite vague<sup>26</sup> as it fails to provide guidance on the terms of deprivation such as the requirement of a public interest consideration, payment of compensation or seeking informed consent of the property owners. Similarly, article 17 does not provide much guidance on the content and scope of the right nor the types of things that may be owned.<sup>27</sup> Despite the vagueness of article 17, it has played a significant role in affirming the right to property and has become the standard to which the United Nations General Assembly (UNGA) has repeatedly called on states through resolutions to respect the right to property.<sup>28</sup> It has been suggested by some scholars that the apparent vagueness can be addressed by ascertaining the implications of the 'arbitrariness' standard included in article 17.<sup>29</sup> To that extent the 'arbitrariness' standard has been interpreted to implicitly require the payment of compensation for compulsory acquisition.<sup>30</sup> It has also been interpreted to implicitly require a public purpose justification, non-discrimination and procedural fairness.<sup>31</sup> Non-discrimination is supported by article 2 of the Universal Declaration. We further suggest that implicit in the 'arbitrariness' standard is the requirement of participation and informed consent of the property owners during compulsory acquisitions.

The right to property was omitted from the International Covenants because of disagreements between the negotiating states relating to the extent of restrictions that states could place on the right.<sup>32</sup> Scholars, however, argue that the omission of the right

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<sup>26</sup> Banning, *supra* note 3, 41.

<sup>27</sup> J.G. Sprankling, 'The Emergence of International Property Law', 90 *North Carolina Law Review* (2012): 461.

<sup>28</sup> G.A. Res. 41/132, U.N. Doc. A/RES/41/132(Dec. 4, 1986); G.A Res. 43/123, U.N. Doc. A/RES/43/123 (Dec. 8, 1988); G.A. Res. 45/98, U.N. Doc. A/RES/45/98 (Dec. 14, 1990).

<sup>29</sup> Cotula, *supra* note 24, 91.

<sup>30</sup> Krause *supra* note 22, 201.

<sup>31</sup> Cotula, *supra* note 24, 91.

<sup>32</sup> Banning (n 3 above) 45; W. A. Schabas, 'The Omission of the Right to Property in the International Covenants', 4 *Hague Yearbook of International Law* (1991): 135-170; Krause, *supra* note 21, 194; Annotations on the Text of the Draft International Covenants on Human Rights, 1 July 1995, UN Doc. A/2929, paras 197, 202, 206.

to property is by no means a denial by states of the existence of the universal right to property.<sup>33</sup> Louis Henkin for instance, notes that the omission 'can hardly be construed as a rejection of the existence of the principle of a human right to own property and not to be arbitrary deprived of it'.<sup>34</sup> This is evidenced by the explicit protection of the right to property in group specific treaties that preceded the Covenants as well as those subsequent to the Covenants. For instance, the Convention relating to the Status of Refugees, while not expressly providing for the right to property has several provisions requiring states to respect the right of refugees to movable and immovable property,<sup>35</sup> intellectual property<sup>36</sup> and transfer of property brought into the host country to another country.<sup>37</sup> Similarly, the right to property is recognised in varying degrees by the Convention relating to the Status of Stateless Persons,<sup>38</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>39</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>40</sup> the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families<sup>41</sup> and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>42</sup> It must be highlight that the recognition of the right to property in CEDAW, ICERD and CRPD relates mainly to non-discrimination in the enjoyment of the right to property and not an independent right to property.<sup>43</sup> In this regard article 26 of the International Covenant on Civil and Political Rights (ICCPR) which provides a free-standing right to non-discrimination offers protection against

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<sup>33</sup> Schabas, *ibid.*

<sup>34</sup> L. Henkin, 'Introduction' In L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press (1981): 21.

<sup>35</sup> Article 13, Convention Relating to the Status of Refugees (1951).

<sup>36</sup> *Ibid*, article 14.

<sup>37</sup> *Ibid*, article 30.

<sup>38</sup> Articles 13, 14 & 30, Convention relating to the Status of Stateless Persons (1954).

<sup>39</sup> Article 16(1) (h), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) September 30, 1981, 1249 U.N.T.S. 13.

<sup>40</sup> Article 5(v), International Convention on the Elimination of All Forms of Racial Discrimination 1965.

<sup>41</sup> Article 15, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3.

<sup>42</sup> Article 12(5), Convention on the Rights of Persons with Disabilities (2006).

<sup>43</sup> Krause, *supra* note 21, 197.

discrimination of all forms including in the enjoyment of the right to property, even though the right to property is not specifically guaranteed in the ICCPR.<sup>44</sup>

Despite the recognition of the right to property in these treaties, there is limited guidance on the safeguards to be adopted in the event of expropriation of such property. The only exceptions appears to be the International Labour Organisation Convention 169 relating to indigenous and tribal people (ILO Convention 169) and UN Declaration on the Rights of Indigenous People, which provide a more expansive right to property for indigenous people including the right to participate in any decision that affects this right.<sup>45</sup> In cases where relocation of indigenous people is unavoidable their consent is required.<sup>46</sup> Whilst the ILO Convention 169 and the UN Declaration provides some instructive guides on the safeguards that should precede deprivation of the right to property, they are not of universal application as these requirements only apply to indigenous people – a rather contested issue in many African countries. As a result, whilst the concept of free prior and informed consent of communities affected by development initiatives that deprives them of their property rights in land is gaining international attention as an essential element of sustainable development, focus has been on indigenous communities with little attention paid to ‘non-indigenous’ communities.

Apart from conventional human rights law, there is compelling evidence to support the conclusion that the right to property has received recognition as a rule of customary international law. State practice is almost unanimous of the recognition of the right to property as evidenced by the inclusion of the right to property in the constitutions and legislation of 95% of the 193 UN member states.<sup>47</sup>

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<sup>44</sup> This has been the position of the Human Rights Committee in a number of communications including Communication No. 202/1986, *Ato del Avellanal v Peru*; Communication No. 516/1992, *Alina Simunk et al v Czech Republic*; Communication No. 586/1994, *Josef Frank Adam v Czech Republic*; see also Krause *supra* note 21, 197.

<sup>45</sup> Article 4, ILO Convention 169; Article 19, UN Declaration on the Rights of Indigenous People.

<sup>46</sup> Article 16, ILO Convention 169; Article 32, UN Declaration on the Rights of Indigenous People.

<sup>47</sup> Sprankling, *supra* note 27, 480.

However, beyond the recognition of the right to property as a universal right, the protection of the right under international human rights law is rather weak. There is limited guidance on the normative content of the right as well as the human rights standards that should be adhered to when the right is deprived, for instance through compulsory acquisition. The omission of the right to property from the two covenants has meant that no elaboration in terms of general comments, concluding observations or communications has been given to the right to property unlike other rights which are specifically recognised by the covenants. Consequently, issues such as determination of compensation and participation of affected persons are left to the discretion of national legislation. The weakness of the right to property under international human rights law is somehow compensated by protection under regional human rights systems which are discussed next.

## **2.1 The right to property in regional human rights systems**

All the regional human rights systems recognise the right to property, encompassing the right to be compensated for involuntary deprivation and procedural fairness.<sup>48</sup> Whilst it would be desirable to examine the scope and content of the right to property under these regional systems, this article focuses on the African human rights system, which is directly applicable to Ghana, the case study country.

The right to property is protected under article 14 of the African Charter on Human and Peoples' Rights (ACHPR) which affirms that

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.

Subsequent instrument such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of women in Africa (Maputo Protocol) also protects the

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<sup>48</sup> Article 1, Protocol No.1 to the European Convention on Human Rights (ECHR); Article xxiii, American Declaration of the Rights and Duties of Man; Article 21, American Convention on Human Rights (ACHR); Article 14, African Charter on Human and Peoples' Rights (ACHPR); Article 31, Arab Charter on Human Rights.



right of women to own property.<sup>49</sup> The Maputo Protocol also provides for the right to land as one of the key elements of the right to food security.<sup>50</sup> It further requires states to guarantee all women the right to property as an essential component of the right to sustainable development.<sup>51</sup>

Unlike Protocol No 1 to the European Convention on Human Rights and American Convention on Human Rights, the ACHPR does not provide details on the right holders (whether individuals, groups or legal persons) nor the normative content of the right but merely commit states to guarantee the right to property.<sup>52</sup> Article 14 does not also explicitly require the payment of compensation for compulsory acquisitions; neither does it provide protection against arbitrariness nor proportionality. The inclusion of the right to property in the ACHPR has even been criticised by Oloka-Onyango as being of ‘questionable facility in the African context’ given the varied tenure systems in African societies and the fear that the right to property ultimately favours entrenched interests.<sup>53</sup> Article 14 has also been criticised as having ‘the most far reaching claw-back clause in the Charter’, which makes it subject to abuse, which could potentially defeat the purpose of the right.<sup>54</sup>

Thankfully, the African Commission on Human and Peoples’ Rights (African Commission) has provided some clarity on the content of the right through several soft law instruments. For example, the Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter adopted by the African Commission in 2011 provides that the right to property protects the rights of both individuals and groups to the acquisition and peaceful enjoyment of property. It also clarifies that the right to property protects the communal ownership of land and other natural resources and

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<sup>49</sup> Article 6(j), .Maputo Protocol.

<sup>50</sup> *ibid*, article 15(a).

<sup>51</sup> *ibid*, article 19(c).

<sup>52</sup> F. Ouguergouz, *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Brill | Nijhoff (2003): 153.

<sup>53</sup> J. Oloka-Onyango, ‘Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa’, 26 *California Western International Law Journal* (1995): 49.

<sup>54</sup> C.A. Odinkalu, ‘Implementing Economic Social and Cultural Rights under the African Charter on Human and Peoples’ Rights’ in M.D Evans & R. Murray (eds.) *The African Charter on Human and Peoples’ Rights: The System and Practice, 1986-2000*, Cambridge University Press (2002): 191.

places an obligation of states to ensure security of tenure, prevent interference by third parties as well as state agents. The right may only be limited by states for legitimate public interest in a 'non-arbitrary manner, according to the law and the principle of proportionality'. Effective public participation in any acquisition process and the payment of fair compensation which must generally be reasonably related to market value of the property are prerequisites for the deprivation of the right to property, except in exceptional circumstance where less than market value compensation or none at all may be required.<sup>55</sup>

The State Party Reporting Guidelines for Economic Social and Cultural Rights in the African Charter adopted by the African Commission in the same year mirrors these requirements and emphasises on the obligations of states to report on legislative and practical measures taken to ensure the enjoyment of the right to property on a non-discriminatory basis. It also provides indication that compulsory acquisition of property must be conducted transparently, should balance the public interest with the right to own property and subject to the payment of fair compensation.<sup>56</sup>

In addition to these, the African Commission in performing its protective mandate as a quasi-judicial organ has developed jurisprudence through a number of communications which provide further clarity on the scope and normative content of the right to property. For instance, in the *Constitutional Rights Project* case the African Commission held that 'the right to property necessarily includes a right to have access to one's property and the right not to have one's property invaded or encroached upon'.<sup>57</sup> Consequently, a law that allows the deprivation of property through seizure which is not justified by a public interest imperative is a violation of the right to property.<sup>58</sup> In the *Mauritania* case<sup>59</sup> the African Commission held that the arbitrary expropriation of

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<sup>55</sup> African Commission, *Principles and Guidelines on Economic Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (24 October 2011), Principle 51-55.

<sup>56</sup> African Commission, *State Party Reporting Guidelines for Economic Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (24 October 2011), Guideline 7(A).

<sup>57</sup> *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 54.

<sup>58</sup> *ibid*

<sup>59</sup> *Malawi African Association and others v Mauritania*, Communication 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, Eighteenth Annual Activity Report.

the lands of black Mauritians without adequate compensation amounted to a violation of the right to property. In *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola* the African Commission emphasised that compensation must be determined by an 'impartial tribunal'.<sup>60</sup> Similarly, in the *SERAC* case<sup>61</sup> the African Commission held that the eviction of people from their homes arbitrarily was a violation of the right to property as well as the right to housing which according to the African Commission was implicit in the right to property. The Commission stressed that states must always provide meaningful opportunity for individuals to participate in development decisions affecting them.<sup>62</sup>

The most extensive expatiation on article 14 of the ACHPR was expressed by the African Commission in the *Endorois* case.<sup>63</sup> Here, the African Commission interpreted the right to property to include the right of indigenous communities to the possession and use of their communal lands without registered formal legal title<sup>64</sup> and laid down detailed justifications for the deprivation of the right to property. The justifiability of the deprivation of the right to property of the Endorois community by way of eviction from their communal lands was examined by the African Commission against the criteria of public interest, proportionality, effective participation, prior consent, adequate compensation and prior impact assessment.<sup>65</sup> The African Commission held that proportionality requires that a measure as least restrictive as possible which does not erode the right or make it illusory should be preferred.<sup>66</sup> The Commission also noted that consultation and fair compensation are essential components of the article 14 requirement of 'in accordance with law' and in the case of indigenous people consent

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<sup>60</sup> *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola* 2008) AHRLR 43 (ACHPR 2008) para 73.

<sup>61</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC case*).

<sup>62</sup> *ibid* Para 53.

<sup>63</sup> *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois Case*).

<sup>64</sup> *ibid* paras 187-209.

<sup>65</sup> *ibid* paras 212-218 & 224-228; S.A. Yeshanew, 'Approaches to the Justiciability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples Rights: Progress and perspectives', 11 *African Human Rights Law Journal* (2011): 317, p328.

<sup>66</sup> *Endorois Case, supra note 63*, paras 214-215.

must be obtained.<sup>67</sup> Failure to allow effective participation or prior consultation, and absence of prior social impact assessment amounts to a violation of the right to property.<sup>68</sup>

While the jurisprudence focuses on indigenous communities, it is submitted that the challenges faced by many rural communities in Africa are not much different from those of indigenous peoples. Majority of rural African communities depend on land for their livelihood and food security<sup>69</sup> in much the same way as indigenous peoples. In fact, many customary communities in African qualify as 'tribal peoples', thereby providing them recognition and protection of their customary ownership.<sup>70</sup> In addition, the right to culture protected in the African Charter provides a basis for the recognition of customary tenure in Africa as a system that deserves protection.<sup>71</sup> In the absence of such recognition and protection of customary communities 'the majority of the continent (living on communal land under customary law) will remain onlookers of the human rights discourse in Africa'.<sup>72</sup> As such, it is submitted that the same precautions that apply when indigenous peoples are deprived of their property rights should apply to all rural African communities who are dependent on access to land held under customary systems for their livelihood and sustenance. The next section briefly examines some of the emerging soft law standards that call for equal attention for all customary land owning systems.

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<sup>67</sup> *ibid* paras 225-226.

<sup>68</sup> *ibid* paras 227-228.

<sup>69</sup> L. Cotula, S. Vermeulen, R. Leonard & J. Keeley, *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa* (2009): 17.

<sup>70</sup> W. Wicomb & H. Smith, 'Customary Communities as "Peoples" and their Customary Tenure as "Culture": What can we do with the *Endorois Decision*', 11 *African Human Rights Law Journal* (2011): 422, p440. See also *Case of the Saramaka People v Suriname*, Inter-American Court of Human Rights (judgment of 28 November 2007) where the Inter-American Court held that the 'tribal peoples' are entitled to the same protection afforded to indigenous peoples.

<sup>71</sup> Wicomb & Smith, *ibid*, 446.

<sup>72</sup> *ibid*, 424.

### 3. COMPULSORY LAND ACQUISITION: EMERGING INTERNATIONAL BEST PRACTICE

The vacuum left by the omission of the right to property in either of the Covenants<sup>73</sup> has led to the development of many soft law instruments aimed at addressing property rights in land and providing guidelines to be adhered to when the right is interfered with.<sup>74</sup> For the purpose of this article, particular attention is paid to the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Voluntary Guidelines). The Voluntary Guidelines were chosen over others because their drafting was broadly consultative, having been negotiated by more than 70 countries across the various regions, international organisations, civil society and the private sector and therefore has broad legitimacy.<sup>75</sup> The Voluntary Guidelines have subsequently received broad support and their implementation has been encouraged by the UNGA, RIO+20 and G20.<sup>76</sup> The Voluntary Guidelines are not only attentive to indigenous people; the rights of other groups subject to customary land tenure who are not necessarily indigenous people are also given equal attention. This is essential for the context of Ghana and many African countries where a significant proportion of lands are held under customary tenure systems.

The Voluntary Guidelines are the most advanced of all efforts by international organisations to provide guidance on land tenure issues<sup>77</sup> and are the first guidelines negotiated by states at the international level.<sup>78</sup> They are consistent with and draw on

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<sup>73</sup> As discussed in section two, neither the ICCPR nor the ICESCR provides for the right to property.

<sup>74</sup> Notably most international financial institutions including the World Bank, IMF, African Development Bank and Asian Development Bank have policies or guidelines on compulsory land acquisition and resettlement.

<sup>75</sup> IFAD, 'Voluntary Guidelines on the responsible governance of tenure of land, fishes and forests: Implications for IFAD' (2014) 1.

<sup>76</sup> *ibid.*

<sup>77</sup> S.G Abebe, 'The Need to Alleviate the Human Rights Implications of Large-scale Land Acquisitions in Sub-Saharan Africa', 4 *Goettingen Journal of International Law* (2012): 873-890.

<sup>78</sup> OHCHR/UN Women 'Realizing Women's Rights to Land and Other Productive Resources', HR/PUB/13/04 (2013): 10.

existing international and regional human rights instruments.<sup>79</sup> The Guidelines seek to improve land tenure governance for all with emphasis on the vulnerable and marginalised. The Guidelines are grounded on ten main principles, including human dignity, non-discrimination, equity and justice, gender equality, participation, transparency and accountability.<sup>80</sup>

The Voluntary Guidelines enjoins states to provide legal recognition for the various tenure rights that may exist in land and other resources especially those held by indigenous people and other tenure systems subject to customary law.<sup>81</sup> States are also enjoined to ensure that their laws, policies and institutional framework for land and other resource tenure issues are coherent and compliant with international human rights law.<sup>82</sup> Vulnerable groups are to be afforded legal support to enable them effectively participate in decisions that affect their land and other resource tenures.<sup>83</sup>

With regards to compulsory acquisition, states are enjoined to recognise all tenure right holders especially the marginalised and vulnerable and provide prompt and just compensation for the deprivation of such tenure rights.<sup>84</sup> In line with the guiding principles, states are also enjoined to ensure that the planning and process of acquisition are transparent and affected persons are properly informed and allowed to effectively participate.<sup>85</sup> Where expropriated land is not used for the purpose for which it was acquired, the pre-acquisition holders should be given the opportunity to reacquire the land<sup>86</sup> and in cases where evictions or relocations are required, it must be done in a humane manner that respects the rights of the persons affected.<sup>87</sup>

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<sup>79</sup> Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, FAO 2012 (Voluntary Guidelines): vi.

<sup>80</sup> *ibid*, para 3B.

<sup>81</sup> *ibid*, para 4.

<sup>82</sup> *ibid*, para 5.

<sup>83</sup> *ibid*, paras 7.4 & 7.5.

<sup>84</sup> *ibid*, para 16.1.

<sup>85</sup> *ibid*, para 16.2.

<sup>86</sup> *ibid*, para 16.5.

<sup>87</sup> *ibid*, para 16.9.

The UN Working Group on the issue of human rights and transnational corporations and other business enterprises has recently called on the government of Ghana to implement the Voluntary Guidelines to ensure better protection of customary landholders.<sup>88</sup> The Voluntary Guidelines enjoins states to ensure that the implementation of programmes and policies on land tenure should be consistent with international human rights law.<sup>89</sup> The mainstreaming of human rights in the Voluntary Guidelines necessitates the adoption of a human rights-based approach in land tenure management.<sup>90</sup> The next sub-section provides a brief overview of human rights-based approach to development.

### 3.1. Human rights-based approach (HRBA)

The HRBA is a conceptual framework normatively based on international human rights standards with the aim of promoting and protecting human rights and premised on the principle that all development processes should be guided by human rights.<sup>91</sup> The HRBA thus necessitates the integration of human rights in all laws, policies, processes and institutions so that both the process and outcome of development activities are consistent with human rights principles and standards.<sup>92</sup> This promotes sustainability and empowers people – especially the marginalised in the development processes. In a broad sense the HRBA rest on four main principles, namely:<sup>93</sup>

- **Guided by human rights:** HRBA implies that all legislation, policies and practices are guided by human rights principles and standards. For instance, whilst ordinary approaches to compulsory land acquisition would involve

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<sup>88</sup> Human Rights Council, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 6 May 2014, A/HRC/26/25/Add.5 para 39.

<sup>89</sup> Voluntary Guidelines, *supra* note 79, para 1.1.

<sup>90</sup> ActionAid, 'A brief Introduction to the Voluntary Guideline on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (2012) 4.

<sup>91</sup> Office of the United Nations High Commissioner of Human Rights (OHCHR) *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* :HR/PUB/06/8 (2006): 15.

<sup>92</sup> *ibid*, 15-16.

<sup>93</sup> *ibid*.

compensation of only legal title holders, HRBA would consider the impacts of the acquisition on the rights and livelihoods of all affected persons including informal land holders, squatters and the usage rights of non-owners.

- **Equality and non-discrimination:** HRBA emphasises on giving particular consideration to groups that are vulnerable and marginalised including gender. This includes taking measures to ensure that all affected persons are empowered to appreciate and participate in decisions affecting them.
- **Participation and empowerment:** HRBA considers participation as both an objective and an essential tool for development. Creating genuine involvement of people in development decisions that affects them should be the aim of participation. Participation should therefore be 'active, free and meaningful' - not mere consultation.
- **Accountability, transparency and the rule of law:** HRBA sees individuals as right holders who are entitled to the protection of their rights by the state rather than as subject of charity. The state as the duty bearer in return has an obligation to respect and promote the rights concerned.

In terms of the right to property, this would entail adherence to the standards set by various human rights instruments, which were examined in the previous sections as well as other human rights principles espoused in other human rights instruments in any process that leads to the involuntary deprivation of the right, such as compulsory land acquisition.

#### **4. THE RIGHT TO PROPERTY AND COMPULSORY LAND ACQUISITION IN GHANA: PRAXIS, LAW AND POLICY ANALYSIS**

Having considered international standards for compulsory land acquisition, the next section examines the legal regimes for compulsory land acquisition in Ghana to assess



their conformity with international standards. A brief overview of the land tenure system is initially provided, to provide context for the discussions that follow.

#### **4.1 Overview of land tenure systems of Ghana**

Ghana like many African countries operates a pluralist land tenure system consisting of state sanctioned land titles and lands held under customary law. Both systems are recognised by the constitution.<sup>94</sup> Public lands are held in trust by the President on behalf of the people of Ghana whilst lands held under customary law are held by the relevant communities or families.

As noted earlier, approximately 80% of lands in Ghana are held under customary systems.<sup>95</sup> The remaining 20% is held by government and individual freehold owners.<sup>96</sup> It must be clarified that customary law in Ghana is relative to specific tribes, ethnicities and communities and is generally unwritten. This article therefore relies on generalisations reflecting customary land laws as recognised by statutory courts and academics. That said, it is generally recognised that customary land tenure recognises several interests including the allodial title, usufruct/customary freehold, customary leaseholds and other lesser interests.<sup>97</sup>

The allodial title is the highest interest that can be held in land under customary law, beyond which there is no superior title.<sup>98</sup> The allodial title entails corporate ownership by the community as whole and not personal ownership by the head of the land owning community. Depending on the applicable customary law, the allodial title is

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<sup>94</sup> Articles 36(8) & 257, Constitution of Ghana.

<sup>95</sup> J.M. Ubink and J.F. Quan, 'How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana', 25 *Land Use Policy* (2008): 198;

<sup>96</sup> E.O. Akrofi & J. Whittal, 'Compulsory Acquisition and Urban Land Delivery in Customary Areas', 2 *South African Journal of Geomatics* (2013): 280.

<sup>97</sup> K. Bentsi-Enchill, *Ghana Land Law: An Exposition and Critique*, Sweet & Maxwell (1964); N.A. Ollennu, *Principles of Customary Land Law in Ghana*, Sweet & Maxwell (2nd ed. 1985); G. Woodman, *Customary Land Law in the Ghanaian Courts*, Ghana Universities Press (1996).

<sup>98</sup> G.A. Sarpong, 'Improving Tenure Security for the Rural Poor- Ghana Country Case Study- Towards the Improvement of Tenure Security for the Poor in Ghana: Some Thoughts and Observations', FAO, Rome (2006) 2.

held by communities, clans or families. The chief or head of the land owning group holds the allodial title in trust for the entire group.<sup>99</sup>

The usufruct or customary freehold is the interest that members of the land owning group are entitled to as of right. It is usually acquired by occupation and cultivation of any part of the land under the allodial title not previously occupied by another member of the community or by allotment. It is superior to all interests except the allodial title.<sup>100</sup> The customary freehold is potentially perpetual and can be held for as long as the higher interest of the allodial title is acknowledged.<sup>101</sup> It can be freely transferred to other members of the land owning community although transfer to non-community members must be consented to by the customary head and elders of the land owning community.<sup>102</sup> Once the customary freehold is created the land cannot be transferred to another person or group without the prior consent of the customary freeholder.<sup>103</sup> As a result of the legal effect of the customary freehold it 'effectively supersedes the allodial title' - its creation makes the allodial title only a nominal interest.<sup>104</sup>

Other tenancies such as customary leases and sharecropping arrangements are also recognised under customary law.<sup>105</sup> These are interests usually held by persons or groups who are not natives of the land owning group/community.

The extent to which these customary land rights are protected under Ghanaian law during compulsory land acquisition are examined in the next section.

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<sup>99</sup> Article 36(8), Constitution of Ghana; J.B. Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution*, George Routledge & Sons (1928) 200.

<sup>100</sup> L.K. Agbosu, M. Awumbila, C. Dowouna-Hammond & D Tsikata *Customary and statutory land tenure and land policy in Ghana*, Institute of Statistical, Social & Economic Research, University of Ghana (2007).

<sup>101</sup> J.B. da Rocha & C.H.K. Lodoh, *Land Law and Conveyancing in Ghana*, DR & L Print & Publishing Services (1999) 27.

<sup>102</sup> Ollennu, *supra* note 97, 34; Centre For Democratic Development (CDD), *Organisational Study of Land Sector Agencies*, (2002) 14..

<sup>103</sup> *Ohimen v Adjei & Another* (1957) 2 WALR 275; *Mansu v. Abboye & Another* [1982-83] GLR 1313.

<sup>104</sup> Woodman, *supra* note 97, 87.

<sup>105</sup> M.N. Knudsen & N. Folds, 'Land Distribution and Acquisition Practices in Ghana's Cocoa Frontier: The Impact of a State-Regulated Marketing System', 28 *Land Use Policy* (2011): 378.

## 4.2 Legislative framework

Presently, there are 166 laws and subsidiary legislation which relates to land administration in Ghana.<sup>106</sup> Of these, the most relevant to compulsory land acquisition are the Constitution, State Lands Act, 1962 (Act 125), Administration of Lands Act, 1962 (Act 123) and the Minerals and Mining Act, 2006 (Act 703) which are discussed below.

### 4.2.1 The Constitution of Ghana

The Constitution expressly provides for the right of everyone to own property 'alone or in association with others'.<sup>107</sup> However, the right to property may be interfered with in accordance with laws that are 'necessary in a free and democratic society' for the public safety, economic wellbeing of the state and the protection of the right of others.

In terms of compulsory acquisition of property, article 20(1) of the Constitution requires the state to satisfy that:

- (a) the taking of possession or acquisition [is] necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of property in such a manner as to promote the public benefit; and
- (b) the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.<sup>108</sup>

Article 20(1)(b) clearly recognises the human right principle of proportionality as it requires the acquiring entity to justify the necessity of the acquisition as against the hardship that would be caused to the property owner as a result of the deprivation of the right.

Article 20(2) further requires the 'prompt payment of fair and adequate compensation' as well as access to the High Court to challenge the acquisition or the amount of

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<sup>106</sup>B.A. Quaye, 'Towards an Appropriate Framework for the Effective Utilization/Management of Geoinformation: A Case Study of Ghana', (2006) 3.

<sup>107</sup> Article 18(1), Constitution of Ghana.

<sup>108</sup> *ibid*, article 20(1).

compensation payable.<sup>109</sup> Where compulsory acquisition leads to the displacement of people, the state has an obligation to resettle the affected persons on 'suitable alternative land with due regard to their economic wellbeing and social and cultural values'.<sup>110</sup>

Other safeguards include the requirement that property compulsorily acquired should only be used for the purpose for which it was acquired.<sup>111</sup> Where the property compulsorily acquired is not used for the required purpose, the state must give the original the option to reacquire the property subject to the return of the compensation paid or some other amount as agreed.<sup>112</sup>

These are welcome steps that provide a largely human rights compliant approach to compulsory land acquisition and the right to property. However a critical evaluation of the constitutional provisions brings to fore some inherent weaknesses. First it is noteworthy that the public purpose clause is overly broad encompassing any activity that can be categorised as having a 'public benefit'. Such a broad provision can be used to justify almost all types of acquisitions which contribute to public welfare even where they confer a direct benefit such as profit on a private individual.<sup>113</sup> This wide scope of the public benefit clause may be subject to abuse by the state. International best practice requires that 'public interest' should be clearly defined in order to allow for judicial review.<sup>114</sup> Section 2 of Kenya's Land Act (2012) provide a good example of a public purpose clause by setting out an inventory of the purposes for which government may compulsorily acquire land.<sup>115</sup> In its current form, it is virtually impossible to challenge compulsory acquisition under article 20 of the Constitution given the broad scope of activities that can be covered.

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<sup>109</sup> *ibid*, article 20(2).

<sup>110</sup> *ibid*, article 20(3).

<sup>111</sup> *ibid*, article 20(5).

<sup>112</sup> *ibid*, article 20(6).

<sup>113</sup> N.A. Kotey, 'Compulsory Acquisition of Land in Ghana: Does the 1992 Constitution Open New Vistas?' In C. Toulmin, P.L. Delville & S. Traore (eds.) *The dynamics of resource tenure in West Africa*, James Currey Publishers (2002): 121.

<sup>114</sup> Voluntary Guidelines, *supra* note 79, para 16.1; FAO, 'Compulsory land acquisition and compensation' (2009): para 2.12-2.15.

<sup>115</sup> Land Act No 6 of 2012, sec 2.

Another significant challenge with the constitutional protection against arbitrary deprivation of property through compulsory land acquisition is the failure to specifically address human rights standards such as participation and emerging concepts such as the free prior and informed consent of the affected persons or communities. Whilst this may be inferred from article 37(2)(a) of the Constitution which requires the state to ensure that people effectively participate in the development process, an express inclusion of the right to participation in article 20 would have further affirmed the right of affected persons to participate in the decision making when their rights are interfered with. The absence of the requirement of participation has led to situations where land owners only become involved in the process after the acquisition instrument has been published and affected parties are notified to submit claims for compensation. Participation of the affected persons ensures that all the competing rights and interests in the land are identified in order to ascertain the proportionality of the acquisition by balancing the proposed public purpose with the hardship that may be suffered by the affected persons. Participation also ensures that the acquiring authority becomes well informed of nature of interests or rights that need to be compensated and the peculiar vulnerabilities of the affected persons so as to be able to appropriately plan for the relevant compensation or other remedial actions. Similarly, whilst the Constitution provides for the prompt payment of compensation, this has not always translated into practice. Compensation payments have taken years sometimes, with government occupying large tracts of land without paying compensation.<sup>116</sup> International best practice requires the payment of all or at least part of the compensation prior to taking possession.<sup>117</sup> To better secure the property rights of persons affected by compulsory land acquisition the Constitution should require that compensation be paid prior to taken possession of the land or at least within a specified period, after which the assessed compensation attracts interest. This ensures that the

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<sup>116</sup> W.O. Larbi, A. Antwi & P. Olomolaiye, 'Compulsory Land acquisition in Ghana - policy and praxis', 21 *Land Use Policy* (2004): 115, p124. The study estimates that compensation has not being paid in 79.6% of all post-independence land acquisitions.

<sup>117</sup> FAO, *supra* note 114.

value of the compensation does not depreciate when payment is delayed. Ghana can learn from the Constitution of Uganda (1996) which provides that government must pay compensation prior to taking possession of property compulsorily acquired.<sup>118</sup>

#### **4.2.2 State Lands Act, 1962 (Act 125)**

The State Lands Act provides a legislative framework for the ‘acquisition of land in the national interest or other purposes connected’.<sup>119</sup> It would have been expected that amendments to the Act would contain more elaborate provisions to operationalise the constitutional requirements for compulsory land acquisition. Regrettably, amendments to the Act subsequent to the promulgation of the Constitution have not made any significant inroads to bring the act in conformity with the Constitution. The Act is rather brief in terms of content and length; it is approximately five pages. It empowers the President to compulsorily acquire land through the publication of an executive instrument where it ‘appears’ to the President that land is required in the public interest.<sup>120</sup> The vesting of the power to compulsorily acquire land in the President is itself problematic as it enables political authority to unilaterally acquire land without any oversight. International best practice requires that the body conducting compulsory land acquisition should be an independent entity to ensure impartiality in the process.<sup>121</sup>

The publication of the executive instrument automatically vests the land in question in the President and all interests of the owner are extinguished.<sup>122</sup> Notice of the acquisition is given to the land owners/occupiers after the publication of the acquisition

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<sup>118</sup> Article 26, Constitution of Uganda (1996).

<sup>119</sup> Long title, State Lands Act, 1962 (Act 125).

<sup>120</sup> *Ibid*, section 1.

<sup>121</sup> International Federation of Surveyors, ‘Compulsory Land Acquisition and Compensation: Recommendation for Good Practice’ (2010), General principle 4.1.

<sup>122</sup> Section 2(3), State Lands Act .

instrument.<sup>123</sup> Affected persons may make claims for compensation within six months of being served with the notice of acquisition with the following details;

- a) particulars of [the] claim or interest in the land;
- (b) the manner in which [the] claim or interest has been affected by the executive instrument issued under [the] Act;
- (c) the extent of any damage done; and
- (d) the amount of compensation claimed and the basis for the calculation of the compensation.<sup>124</sup>

Compensation is assessed by the Lands Commission and persons dissatisfied with compensation assessed may challenge it before the High Court,<sup>125</sup> with a further right to appeal to the Court of Appeal if dissatisfied with decision of the High Court.<sup>126</sup> Displaced persons are required to be resettled by the Lands Commission in line with the requirement of the Constitution.<sup>127</sup>

It must be highlighted that, like the Constitution, the Act focuses on the payment of compensation to the neglect of other human rights standards. First, the procedure for acquisition does not follow the HRBA. The HRBA emphasises on human rights standards such as participation and transparency which are not required under the Act. Land acquisition is essentially treated as an executive act which is complete upon the publication of an executive instrument. The determination of what is in the 'public interest' is at the discretion of the President who is not required to consult the affected persons or communities. Regulations<sup>128</sup> made under the Act mandate the formation of a Site Advisory Committee (SAC) which is responsible for identifying suitable land and making recommendations to the President. However, the regulation does not require the SAC to consult affected persons prior to the publication of the acquisition instrument. Additionally, only government institutions are represented on the SAC.<sup>129</sup>

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<sup>123</sup> *Ibid*, section 2(1).

<sup>124</sup> *Ibid*, section 4(1).

<sup>125</sup> *Ibid*, section 4.

<sup>126</sup> *Ibid*, section 4A.

<sup>127</sup> *Ibid*, section 4(4).

<sup>128</sup> State Lands Regulations, 1962 (LI 230).

<sup>129</sup> *ibid*, Regulation 1.

This top-down approach falls short of the HRBA, which emphasise that affected persons should be allowed to participate in the decision making and be provided with assistance to enable them make informed decisions. Transparency and participation are core principles emphasised by the African Commission ESCR Guidelines and jurisprudence as well as the Voluntary Guidelines.<sup>130</sup> The non-participation of affected persons means that in some instances affected persons only got to know about the acquisition when government surveyors went to their premises and attempted to survey the land.<sup>131</sup> The very complex nature of customary landholding makes it even more imperative that affected communities effectively participate from the planning stages so that the concerns of all affected persons can be heard and catered for.

Similarly, contrary to the constitutional requirement that the state must satisfy that the acquisition is justifiable vis-a-vis the hardship that would be caused to the land owner or occupier,<sup>132</sup> the Act makes no reference to providing justification for the acquisition in the executive instrument. The Act therefore does not satisfy the requirement of proportionality as stressed by the African Commission.<sup>133</sup> Without information on the proposed use of the land and justification for such acquisition it is impossible for the land owners to challenge the acquisition. It is also notable that unlike the Constitution, the State Lands Act does not provide the right to challenge the acquisition itself. The Act only provides for the right to challenge compensation assessed.<sup>134</sup> Without the right to challenge the acquisition itself, transparency in the acquisition cannot be ensured. Whilst the acquisition itself can still be challenged through a constitutional claim, it is essential that there is harmonisation between the Constitution and the Act.

In addition to the procedural weaknesses, compensation payments also face many challenges. Whilst the Act requires affected persons to submit claims for compensation, in practice only the holder of the allodial title, registered freehold owners and

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<sup>130</sup> Voluntary Guidelines, *supra* note 79, para 16.2.

<sup>131</sup> Kotey, *supra* note 113, 126.

<sup>132</sup> article 20(1), Constitution of Ghana.

<sup>133</sup> African Commission ESCR Guidelines, para 51-55.

<sup>134</sup> Section 3, State Lands Act.



documented leaseholds are compensated.<sup>135</sup> Holders of customary rights such as the customary freehold and other informal occupiers who do not have formal documentation are not eligible for compensation.<sup>136</sup> To put the situation in context, a holder of a registered leasehold interest would receive compensation for the value of the unexpired term of the lease; a customary freeholder who holds the land perpetually would, however, not receive compensation for the value of the land. Compensation for customary land is paid to the holder of the allodial title (chief or head of the community or family) who even though a trustee of the land, until 1985 could not held liable in court to account to the subjects under customary law.<sup>137</sup> There are several instances where customary authorities have in connivance with public officials received and used compensation for their personal benefit to the detriment of the communities they represent.<sup>138</sup> International best practice<sup>139</sup> requires that all interests in the affected land be compensated including those of customary land users and informal occupants.

Further, gender differentiation with regards to land access reported in Ghana and other intersectional issues make women within this group even more vulnerable.<sup>140</sup> The Act however, does not make any provision for gender issues to be particularly catered for during compulsory land acquisition. Thus, although the compulsory land acquisition regime in Ghana appears gender neutral, it is quite evident that it indirectly discriminates against women and other vulnerable groups who are disproportionately affected by compulsory land acquisition. This is particularly important because under many customary practices women and vulnerable groups such as persons with disabilities rarely hold positions of authority within traditional or family set ups.

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<sup>135</sup> Larbi, *supra* note 17, 12.

<sup>136</sup> *Ibid*, 12.

<sup>137</sup> See *Abude v Onano* (1946) 12 W.A.C.A 102 and *Gyamfi & another v. Owusu & others* [1981] GLR 612 628. See also Ollennu, *supra* note 97 and A.K.P. Kludze, 'Accountability of the Head of Family in Ghana: A Statutory Solution in Search of a Problem', 31 *Journal of African Law* (1988): 107; This rule was abolished by the Head of Family (Accountability) Law, 1985 (P.N.D.C. Law 114).

<sup>138</sup> Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 6 May 2014, A/HRC/26/25/Add.5 para 40.

<sup>139</sup> Voluntary Guidelines, paras 5.3 & 16.1; J. Wallace, 'Land Acquisition in Developing Economies' (2010) 10-13.

<sup>140</sup> M. Kevane, *Women and Development in Africa: How Gender Works*, Lynne Rienner Publishers (2004) ; W. Anseeuw, L.A. Wily, L. Cotula & M. Taylor, *Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project*, International Land Coalition (2012): 44.

In addition, compulsory land acquisition processes can be very challenging for the poor and vulnerable. For instance making claims and valuations would require an understanding of the technical issues involved so that the property is not undervalued. Many poor rural folk whose lands are usually the subject of compulsory acquisition lack both the skill and resources to employ the services of professionals to enable them participate meaningfully to safeguard their rights during the compulsory acquisition process. The HRBA requires the empowerment of the poor and vulnerable to enable them effectively participate in the process.<sup>141</sup> This could be done by government providing independent valuers and other professionals to the affected persons or communities, including the cost of procuring the services of such professionals as part of the compensation. The second approach is currently what pertains under the State Property and Contracts Act (1960) which allows claimants to include the cost incurred in the procurement of valuation services as part of the Compensation.<sup>142</sup>

Another issue relating to compensation payment that is pertinent is the manner in which compensation is assessed and the time frame for payment. The Act relies on the Lands Commission which is the government agency responsible for land acquisition to determine the compensation instead of an uninterested independent entity. This leads to an inherent conflict of interest essentially allowing the state to determine the compensation it desires to pay for the property compulsorily acquired. The African Commission has stressed that compensation must be assessed by an 'independent tribunal'.<sup>143</sup> Whilst compensation assessed by the Lands Commission can be challenged in court, as indicated in the preceding paragraph, many of the affected persons are not resource sufficient to understand the process or procure the services of relevant professionals who can challenge such assessment. Some countries identify independent valuation commissions or agencies to make the process more transparent and impartial which is accepted as international best practice.

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<sup>141</sup> FAO, *supra* note 114, 18.

<sup>142</sup> Section 11, State Property and Contracts Act, 1960 (CA 6).

<sup>143</sup> *IHRDA v Angola*, *supra* note 52, *para* 73.

Further to this, the Act does not establish any time frame within which government must pay compensation even though the Constitution requires the 'prompt' payment of compensation.<sup>144</sup> The Act, however, allows the government to take possession of the land prior to the payment of compensation. This has resulted in many instances where government have occupied customary lands for several years without paying compensation.<sup>145</sup> Once government takes possession there is no incentive to make prompt payment of compensation.<sup>146</sup> As discussed above, international best practice requires that at least part of the compensation be paid prior to taking possession. At a minimum the law must provide a clear time limit for the payment of compensation which entitles affected person to claim interest from the day of dispossession.

Other notable deficiencies in the Act includes the omission of the obligation to return unused compulsorily acquired land to the pre-acquisition owners where it is no longer needed for the purpose for which it was acquired as required by the Constitution<sup>147</sup> and international best practice.<sup>148</sup>

Ghana can learn from the experience of India which recently passed the Right to Fair Compensation and Transparency in Land Acquisition Act (India Acquisition Act) 'to ensure a humane, participative, informed and transparent process for land acquisition.'<sup>149</sup> The India Acquisition Act provides extensive safeguards to be adhered to during compulsory land acquisition. These include conducting a comprehensive pre-acquisition social impact assessment, setting up an independent expert group to appraise the social impact assessment and advice on whether the project satisfies the public purpose requirement, receiving objections from the public on the acquisition, conducting public hearings and requiring the consent of 80% of the affected persons or

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<sup>144</sup>Article 20(1), Constitution of Ghana.

<sup>145</sup> Larbi et al, *supra* 116, 124.

<sup>146</sup> FAO, *supra* note 114, 26.

<sup>147</sup> Article 20(6), Constitution of Ghana.

<sup>148</sup> Voluntary Guidelines, *supra* note 79, para 16.5.

<sup>149</sup> Preamble, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (2013).

families where the acquisition is in favour of a private company performing a public purpose.<sup>150</sup>

In summary the many gaps in this law shows its inadequacy to effectively comply with human rights standards. By not incorporating a HRBA the Act does not effectively protect the right to property during compulsory land acquisition processes. A full overhaul of the Act is needed to bring it into harmony with the Constitution and international human rights standards.

#### **4.2.3 Administration of Lands Act, 1962 (Act 123)**

This Act is a consolidation of laws relating to the management of customary lands.<sup>151</sup> Apart from making provisions for the management of customary lands, it grants the President the power to vest any customary land in himself/herself as trustee where it appears to the President that it is in the public interest to do so.<sup>152</sup> In theory, the vesting of customary lands in the President transfers the legal title to the President whilst the beneficial interest is held by the community. However, in practice both the legal title and beneficial interest are transferred to the President who subsequently delegates the management functions to state institutions such as the Lands Commission.<sup>153</sup> Customary landowners are completely divested of their land management rights in such instances. Consequently, the 'vesting' of land under this Act is indeed compulsory acquisition.<sup>154</sup>

This Act has the same defects as the State Lands Act (discussed above) in terms of procedural requirements such as transparency, consultation and participation of the affected communities. More significantly, despite its expropriatory nature, the Act is silent on the payment of compensation for the lands acquired in this manner and

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<sup>150</sup> *Ibid*, sections 1 -15.

<sup>151</sup> Long title, Administration of Lands Act, 1962 (Act 123).

<sup>152</sup> *ibid*, section 7.

<sup>153</sup> K. Kassanga & N.A. Kotey, 'Land Management in Ghana: Building on Tradition and Modernity' (2001) 20.

<sup>154</sup> *Gyamfi and another v Owusu and others* [1981] GLR 612 628.

compensation is not paid in practice. The absence of the requirement of compensation in this Act has led to a situation where it has been used by government to compulsorily acquire land in favour of mining companies, while avoiding the payment of compensation because the Act makes no provision for the payment of compensation.<sup>155</sup> The importance of the right to be compensated for deprivation of the right to property cannot be overemphasised.

Similarly, contrary to the constitutional provision that affected communities should be resettled at the cost of the state where compulsory acquisition necessitates the displacement of people, this Act does not make provision for resettlement of displaced persons, which is a clear breach of the constitution.

#### **4.2.4 Minerals and Mining Act, 2006 (Act 703)**

The Minerals and Mining Act provides the legal framework for mining in Ghana. In accordance with the Constitution, the Act provides that all minerals in Ghana are vested in the President in trust for the people of Ghana.<sup>156</sup> Section 2 of this Act allows the President to compulsorily acquire land or authorise its occupation for the development of mineral resources. Like the other Acts already discussed above, there is no requirement for consultation or participation of the affected persons or communities prior to the grant of mineral rights, which would eventually occasion the compulsory acquisition or occupation of their lands contrary to established international standards.

Under this Act, the holder of the mineral rights is required to compensate the 'owner or lawful occupier' of any land affected by the mineral operations.<sup>157</sup> The wording of this provision provides a basis for excluding from compensation persons who may informally occupy lands affected by mining operations even if their livelihood depends on the occupation and use of the land. International best practice requires that all

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<sup>155</sup> R. Mares, 'Corporate Responsibility and Compliance with the Law: A Case Study of Land, Dispossession, and Aftermath at Newmont's Ahafo Project in Ghana', 117 *Business and Society Review* (2012): 233-280.

<sup>156</sup> Section 1, Minerals and Mining Act.

<sup>157</sup> *Ibid*, section 73(1).

persons who are in occupation of the affected lands including customary and informal land users should be entitled to compensation or resettlement.<sup>158</sup>

The Act also requires land owners to reach an agreement on compensation with mining companies.<sup>159</sup> In theory this is a laudable provision as it gives communities the opportunity to negotiate for the deprivation of their rights to the affected lands. However, in practice this provision ignores the power imbalance between the usually well-resourced mining companies as against the poor mining communities. Without adequate safeguards such as detailed guidelines for determining compensations and technical support to the affected persons, land owners are essentially left at the mercy of the mining companies and state agents who often coerce them into accepting low compensation.<sup>160</sup> In this regard, it is commendable that new regulations have been adopted to provide guidelines for the assessment of compensation and resettlement.<sup>161</sup> A further human rights based safeguard would include assisting affected persons and communities to procure the services of relevant professionals such as lawyers and valuers to enable them effectively participate in the negotiation process.<sup>162</sup> The cost of procuring the services of the professionals would be included in the compensation claim and paid by the acquiring entity. As discussed earlier, this approach is not unknown in the land management system of Ghana. This is the approach adopted under the State Property and Contracts Act which allows affected property owners to include the cost incurred in procuring valuation services in the claim for compensation.

It is significant to also highlight that this Act does not clearly indicate a time limit for the payment of compensation. As discussed, compensation, especially where the land is acquired for the benefit of private entities, should be paid before the acquiring entity takes possession of the land to enable affected persons quickly re-establish their livelihoods.

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<sup>158</sup> Voluntary Guidelines, *supra* note 79, para 5.3.

<sup>159</sup> *Supra* note 156, sec 73(3).

<sup>160</sup> Sarpong, *supra* note 98, 16.

<sup>161</sup> Minerals & Mining (Compensation & Resettlement), Regulations, LI 2175 (2012).

<sup>162</sup> FAO, *supra* note 114 26.

Apart from this, the land *per se* and the interest held in the land is not subject to compensation. What the law compensates is the deprivation of use of land and damage caused to chattel on the land.<sup>163</sup> It is noteworthy that deprivation of use can potentially be in perpetuity for example in cases of surface mining which renders the land of no beneficial use to the owners after the mining activities. There is therefore, the need for further clarity to be provided on the scope of compensation where there is potential permanent deprivation of use and where the initial mining license is extended beyond the number of years of deprivation of use paid by the mining company.

The inefficiencies in the compulsory acquisition system under this Act put women more at a disadvantage mainly because in 'rural areas and among the urban poor, women tend to be almost entirely dependent on the land for their livelihood and have the fewest options when deprived of their lands.'<sup>164</sup> A HRBA approach would therefore required that special attention be paid to vulnerable groups such as women, children, persons with disabilities and the aged during this processes, which is not provided in the Act.

### **4.3 Policy framework**

The main policy that regulates land management in Ghana is National Land Policy. This is the first comprehensive land policy that was formulated to address key issues in the land management sector which needed reform including compulsory land acquisition by government.<sup>165</sup> The policy acknowledges that government acquisition of large tracts of land without the prompt payment of compensation has left many communities landless, denying them of their source of livelihood.<sup>166</sup> It also identifies that there is general lack of consultation with land owners and or users concerning the acquisition and utilisation of land.<sup>167</sup> It therefore, emphasises as one of its guiding

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<sup>163</sup> *Supra* 156, section 74(1).

<sup>164</sup> Sarpong, *supra* note 98, 16.

<sup>165</sup> Foreword, National Land Policy (1999).

<sup>166</sup> *ibid*, para 2.2(c).

<sup>167</sup> *ibid*, para 2.2(g).

principles the need for ‘community participation in land management and development at all levels’ as an essential tool for sustainable development.<sup>168</sup> The policy also gives due consideration to the land rights of communities and individuals ensuring the payment of fair and adequate compensation within reasonable time for land compulsorily acquired.<sup>169</sup> The policy further provides that compensation paid through compulsory land acquisition should be determined by negotiation with the affected persons.<sup>170</sup> Additionally, it recognises all forms of customary landholding as ‘legitimate sources of land titles’ which the state must respect<sup>171</sup> and requires decision making with regards to disposal of land adhere to principles of accountability.<sup>172</sup> To ensure security of tenure, the policy recognises that there is the need the registration of all customary rights that individuals or groups may hold in land. <sup>173</sup>

Clearly, this policy substantially reflects international best practice and the HRBA, however, since the adoption of this policy in 1999, the relevant legislations under which compulsory acquisition is done have not be amended to bring them in conformity with the rather elaborate provisions of the policy. The major challenge with the policy is its silence on the participation of women and the impact compulsory land acquisition has on vulnerable groups including women, children, persons with disability and the aged. There is no mechanism provided by the policy to ensure that such vulnerable groups are catered for during compulsory land acquisition processes. Consequently, the policy is in need of revision to make it more comprehensive and HRBA compliant by explicitly making provision for vulnerable groups.

## 5. CONCLUSION

The exact frontiers of the right to property remain quite uncharted at the global level. This vacuum has however, been filled by the regional human rights systems and soft

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<sup>168</sup> *ibid*, para 3.1.

<sup>169</sup> *ibid*, para 3.3.

<sup>170</sup> *ibid*, para 4.2(e).

<sup>171</sup> *ibid*, para 4.3(a).

<sup>172</sup> *ibid*, para 4.3(b).

<sup>173</sup> *ibid*, para 5.3(a) &(b).



law. Within the African human rights system, the African Charter and its protocol on the rights of women recognises the rights to property. These have been supplemented the work of the African Commission through the individual communications procedure and relevant soft law instruments. Specifically, the African Commission has elaborated that the right to property connotes that individuals and groups have the right to the acquisition and peaceful enjoyment of property. Where the right is interfered with such as through compulsory land acquisition, it must be in the public interest, in a non-arbitrary manner and strictly in accordance with the principle of proportionality. Compulsory acquisition should also be preceded by effective public participation and accompanied by the payment of fair compensation which should be reasonably related to the market value of the property, save for exceptional situations where less than market value compensation or none at all may be paid. Where indigenous people are involved there must be prior and informed consent. These requirements must of necessity apply to customary African communities who face similar challenges to tenure security as indigenous people. International best practice also requires that states recognise all tenure rights including customary tenure, give due consideration to the disproportionate impact of compulsory acquisition on vulnerable groups and ensure that persons and or communities affected by compulsory land acquisition are provided with the necessary legal and other technical assistance to enable them effectively participate in the process.

In the context of Ghana this article has shown that the Constitution of Ghana explicitly guarantees the right to property in line with international human rights law. The Constitution also provides a substantially human right compliant procedure for compulsory land acquisition. Whilst the Constitution provides quite a liberal protection of the right to property and quite elaborate rules to be followed during compulsory acquisition, these inroads have not led to a revision of the compulsory acquisition laws, which remain largely incoherent and inconsistent with the requirements of the Constitution and international human rights law. The top-down approach to compulsory land acquisition currently pertaining in Ghana, with little or no participation of affected persons or communities has had 'disastrous long-term consequences'.<sup>174</sup> To ensure the effective enjoyment of the right to property, serious

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<sup>174</sup> Akrofi & Whital, *supra* note 96, 293.

revisions need to be made to the compulsory land acquisition laws and policies to incorporate human rights principles and standards.

A revision of the laws should provide for compulsory acquisition as a measure of last resort only. Government must give preference to negotiating with property owners in good faith with the aim of agreeing on a fair market value for the purchase of the property without the need to resort to compulsion. The new legislative framework should therefore, provide for negotiation as a first step. The property owners or occupiers should be empowered to understand their rights during the process. The reasonable cost of procuring the services of lawyers and valuers and other technical assistance should also be covered as part of the compensation claim to ensure that property owners or occupiers are able to secure independent advice to secure their rights.

The revision of the law must also specifically recognise the right of customary land owners or occupiers and accorded the same legal status as statutorily registered land titles even where these customary interests are not documented. Additionally there is the need to strengthen the constitutional protection of the right to property by incorporating international human rights principles such as transparency and participation at all stages of the compulsory land acquisition process. Informed consent or at the minimum, meaningful participation should be procured prior to taking any decision on whether on or not to proceed with compulsory land acquisition. This will ensure that affected persons or communities have the opportunity to partake in making decisions that affect them as required by international human rights standards. Similarly, pre-acquisition human rights impact assessment should be incorporated in the compulsorily land acquisitions process, to ensure that all the human rights issues that may arise out of the process are taken into account and prevented, suppressed or remediated promptly.

Additionally, compensation should be promptly paid and in any event before the acquiring entity takes possession of the land. Further, affected persons and

communities should be provided with the necessary legal and technical assistance to enable them better protect their rights during compulsory land acquisition. Finally, the revision of the compulsory land acquisition regimes should ensure that all the laws are harmonised to provide a uniform standard applicable to all processes that leads to the involuntary deprivation of property. The HRBA to compulsory land acquisition will ensure that the right to property of affected persons is effectively protected.