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Procedural law and pluralism, disadvantaged groups of people and an approach to litigation stemming from land dispossession and forced displacement. How to settle private (non-state) land disputes involving members of indigenous and other disadvantaged groups in a just way while guaranteeing due process of law? General report

SUMMARY. I. Introduction; II. Scope and methodology of research; III. Indigenous and disadvantaged groups included in this report and the historical and legal background of their dispossession and displacement; a. General Remarks; b. Australia; c. Norway; d. South Africa; e. Brazil; f. Argentina; g. Peru; h. Russia; i. Italy; j. Indigenous and disadvantaged groups in other jurisdictions not covered in this report; IV. Attempts to reverse or mitigate the effects of land dispossessions and forced displacements: legislation and policies recognizing in justice and aimed to cure it; a. General-typology of situations related to land dispossession and forced evictions; b. Policies addressing land dispossession in the analysed jurisdictions; V. Litigation as a tool for correcting past in justice regarding land dispossession and forced displacement; a. Civil Courts and their decisions as catalysts of change; b. Special court structures and proceedings; c. International law and international tribunals and their impact on litigation regarding land rights of indigenous people and other disadvantaged groups; d. Regular civil litigation in dispossession and eviction cases involving disadvantaged groups; VI. Conclusions: the role of litigation in resolving complex land disputes, and how to increase effectiveness and accessibility court procedures; Annex I: Questionnaire for national reporters; Annex II: Literature and sources.

I. INTRODUCTION

Past conflicts and past injustice have shaped the present controversies of many countries. The nation states that experienced a colonial past, and the post-war societies in which large groups of people experienced a traumatic period of collective deprivation, dispossessions, evictions and displacement, still struggle with a difficult challenge – the challenge of collective and individual restoration of peace and justice. The ultimate aim is to achieve stability through a process of reconciliation, but even though there may be a political consensus about that general goal, the real issue lies in the selection of appropriate tools and methods to achieve it.

Can procedural law contribute to the goals of reconciliation? Is legal process such as litigation, which has been traditionally used as the standard and default method of settling individual disputes, able to address successfully difficult

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problems arising from a systematic and persistent history of discrimination and oppression which now needs to be remedied and neutralized? Can members of disadvantaged groups, such as indigenous people whose basic rights to possession of their native land and homes have been systematically denied, achieve effective legal protection through conventional court proceedings? Should conventional means of litigation be supplemented with special institutional framework, special procedures or special rules adapted to special requirements of litigation stemming from land dispossession and forced displacement of large groups of people? These difficult questions are the background and the essential topic of this general report.

The assignment given to the national reporters sought to address an uncharted territory of comparative civil procedure. While collective litigation and multi-party civil proceedings started to gain considerable global attention among scholars in the past decade, very little if any of that discussion deals with matters covered in this general report. For comparative civil procedure, correction of past injustice to disadvantaged groups was largely a non-issue, a matter that, if relevant at all, passed under the radar. Conversely, a significant body of literature produced by scholars, NGOs and international organizations on the issues of restitution of land to indigenous populations and restoration of housing, land and property rights for members of disadvantaged groups, generally has little or no relevance for civil procedure. The main perspectives that are addressed are those of anthropology, governmental policies, international fight against poverty and discrimination, human rights and socio-economic studies. Dealing with the way in which these policies affect judicial proceedings was and still is a rare perspective.

Keywords used in this general report were also a part of the assignment given to the national reporters by the organizers of the Bogotá IAPL conference. They are indicated in the title, and they combine several features and aspects of the topic, which might be of special interest to the Colombian audience and to the South American audience as a whole. Coming from a different part of the world, I would like to start with an explanation of my understanding of these keywords, in order to facilitate understanding of the structure and composition of this general report.

“*Procedural law and pluralism*”: conventional civil procedure is the realm of dispute resolution between supposedly equal rational individuals in the context of societies governed by relatively homogeneous rules of law operating within one legal tradition. Moreover, in Aristotelian language, classic civil procedure is concerned about “commutative justice” (*iustitia commutativa*), and not about

“distributive justice” (*iustitia distributive*), not to speak of “corrective justice” (*iustitia correctiva, aequitas*). If there is an element of pluralism – such as pluralism of legal perceptions, cultures, traditions and beliefs, ethnic and social status and economic wealth – this element is generally likely to be intentionally disregarded by courts and judges, which tend to pretend that all elements but those strictly specified in applicable legal norms do not exist at all. To that extent, ceasing to pretend that pluralism of laws, traditions, cultures and beliefs does not exist and taking it as an element relevant for decision-making in individual and collective litigation significantly changes the philosophy of civil procedure.

For procedural law, pluralism is a difficult challenge, because it may contest some of the basic postulates of legal process – the equal rights of the parties and the strict neutrality towards the litigants. Thus the keyword “due process” indicated in the subtitle. The underlying dilemma is whether court-based individual dispute resolution arising from relations which are individual, but connected to public policies of restitution and reconciliation, also known as the policies of restorative justice, can maintain the fundamental procedural guarantees contained in the notion of due process of law. This dilemma especially arises if due process guarantees lead to results that are incompatible with the public policies advocated at the highest political levels.

Finally, the keywords “disadvantaged groups”, “indigenous people” and “land dispossession and forced displacement”: all of these notions indicated in the title serve to narrow down a potentially vast subject, and connect it to concrete examples in different jurisdictions around the globe. Their understanding and definition will be explained in the next chapter.

II. SCOPE AND METHODOLOGY OF RESEARCH

This report is based on several sources. Written as a general report for the IAPL Colloquium, it is primarily based on the knowledge compiled through the reporting of several key experts who contributed the national perspectives of selected jurisdictions. Secondary sources were books, articles and reports of international organizations written on topics connected to national experiences with land dispossession and forced displacement (though, as already stated, they rarely address issues related to private litigation).

According to the Anna Karenina Principle, happy families are all alike – but every unhappy family is unhappy in its own way. The same applies to unhappy episodes in which colonizers or war victors dispossessed and displaced large groups of people. Every such episode would deserve a separate case study.

But the format of this report and limitations of time and space commanded a selective approach. The national reporters covered only a limited number of jurisdictions, selected to be illustrations of specific situations from very different areas of the globe. Though partial and limited, I hope that this selection still gives a good overview of highlights and contrasts, and that it includes experiences of some of the most topical jurisdictions for the main issues covered in this report.

A few additional words on the criteria for selection of national reporters and jurisdictions covered.

Firstly, the national reporters were selected from among experts in civil procedure, and not from among experts in land dispossession and forced displacement. This was due to the desire to put in the forefront the perspective of civil litigation, and the analysis of its reaction and transformation when used as a tool for the high social goals of reconciliation and restoration for past injustice.

Secondly, the reporting had to put the focus on the oldest and the most complex issues related to the experiences of indigenous people who suffered from the most intense and long-lasting denial of rights and deprivation of essentials such as land and housing. Other disadvantaged groups – though their experiences could also be very interesting and relevant – were only a secondary and incidental target of research. However, as I come from the region of the former Yugoslavia which recently experienced collective displacements, evictions and land/home dispossession, some of that experience is also built into this report.

And thirdly, as this comparative report was written to be presented to a mainly Colombian audience that has much more thorough and detailed knowledge of the local situation than this writer, a conscious decision was made not to include Colombia and the details already known to that audience, but to present to the Colombian audience the experiences from other corners of the globe.

Consequently, in the preparation of this report, eight national reports were collected. They cover the following jurisdictions:

- Australia, by Professor David Bamford (Flinders Law School, Flinders University, Adelaide);
- Argentina, by Professors Eduardo Oteiza and Francisco Verbic (Ciencias Jurídicas y Sociales, Universidad Nacional de La Plata);
- Brazil, by Professor Teresa Arruda Alvim Wambier (Pontificia Universidade Católica de São Paulo);

- Italy, by Professor Elisabetta Silvestri (Dipartimento di Giurisprudenza, Università di Pavia);

- Norway, by Professor Magne Strandberg (Det juridiske fakultet, University of Bergen);

- Peru, by Professor Christian Alex Delgado Suárez (Pontificia Universidad Católica del Perú, Lima);

- Russia, by Professor Dmitry Maleshin (Department of Law, Lomonosov Moscow State University); and

- South Africa, by Rashri Baboolal-Frank (Lecturer at the Department of Procedural Law, University of Pretoria).

Although the series of reports collected contains examples from five continents (South America, Europe, Asia, Africa and Australia), it is by no means exhaustive. Many other examples were left out. Some of the relevant literature on other jurisdictions (such as Canada, Romania, Mexico, and the United States) was consulted and is contained in the list of relevant literature and sources in Annex II. However, the intention of this report was not to be exhaustive, but to raise some topical issues related to global efforts to restore justice through judicial litigation processes after conflicts that led to large-scale dispossession and displacement of particular groups of populations.

The basis for the reports submitted by national reporters was a questionnaire (Annex I) which asked for comments on the following issues:

1. Indigenous and other disadvantaged groups that suffered from land dispossession and forced displacement (their definition and relation to the general population);

2. Legal framework and context in which dispossessions and evictions took place in the past, and the current situation (including legal framework) which is the basis for restitution of property/possessions that were taken away;

3. Jurisdiction for current restitution claims, with a special emphasis on the division of labour between the bodies of the judicial and executive branches of government, and on the specialization of such bodies for particular claims of indigenous groups;

4. Details of national judicial and other procedures which address issues of land dispossession and forced displacement, and a description of leading cases regarding restitution claims;

5. Role and influence of international law sources and international tribunals;

6. Nature of rights that indigenous populations and other members of disadvantaged groups had over land; and

7. Effectiveness and fairness of the available restitution procedures, including the assessment of their use, availability of adequate remedies, length of proceedings and access to courts and other tribunals.

The national reporters were also invited to give their personal opinion and to evaluate the present situation and possible future developments regarding claims arising from land dispossession, evictions and forced displacements of large groups of indigenous populations.

III. INDIGENOUS AND DISADVANTAGED GROUPS INCLUDED IN THIS REPORT AND THE HISTORICAL AND LEGAL BACKGROUND OF THEIR DISPOSSESSION AND DISPLACEMENT

a. GENERAL REMARKS

The history of modern industrial societies rests at least partly on large-scale evictions. As argued by Fay and James, land dispossession is one of the issues central to the creation of modern capitalism¹. It was a feature that accompanied colonial expansion, and in many instances it facilitated the conversion of old forms of collective use and possession of land to new forms of land use based on private ownership and market economy. However, the historical periods, forms and circumstances of land dispossession cannot be reduced to the common denominator of a colonial past. Large-scale dispossessions happened under socialist rule in the countries of the Eastern Bloc, and big migrations and forced displacements of large groups of people also accompanied past and present wars and armed conflicts. Dispossessions and evictions, this time on other grounds, continued in the period of transition in post-Communist countries, up to the present day.

A full list of countries and territories deserving of attention from the perspective of the topic of this report would be a long one, and would need constant updating. One of the relatively new surveys of the most important internatio-

¹ Cfr. FAY, DERICK and JAMES DEBORAH (eds.), *The rights and wrongs of Land Restitution. Restoring What Was Ours*, Routledge-Cavendish, Oxon, 2009, p. 1.

nal, regional and national standards and judicial decisions addressing actual problems of land and property restitution related to refugees and displaced persons, published by the executive director of one of the most important global NGOs for issues of housing rights and evictions (COHRE)², lists documents relating to about fifty countries and territories. Still non-exhaustive, here is the alphabetic list that may be compiled from that and other sources: Abkhazia, Afghanistan, Albania, Algeria, Angola, Armenia, Azerbaijan, Bhutan, Bosnia and Herzegovina, Bulgaria, Burundi, Cambodia, Colombia, DR Congo, Croatia, Cyprus, Czech Republic, East Timor, Estonia, Georgia, Germany, India, Iran, Iraq, Israel, Kosovo, Kuwait, Liberia, Lithuania, Mexico, Middle East, Mozambique, Myanmar (Burma), Near East, Nepal, Palestine, Poland, Peru, Romania, Russian Federation, Rwanda, South Africa, Sudan, Syria, Tajikistan, Turkey, Uganda, Vietnam, former Yugoslavia and Zambia.

The specific instances of dispossession and restitution efforts included in this report are much less numerous and partly refer to best practices in dealing with past injustice that have proved to be sufficiently effective in raising any need for international human rights attention and intervention.

b. AUSTRALIA

Dealing with the indigenous population in Australia is perhaps the best example of a comprehensive and effective policy of restitution, which has been so successful that very little international monitoring and engagement is needed today.

The indigenous groups in Australia refer today to two distinct groups – the *Aboriginal population* of mainland Australia and Tasmania, and the *Torres Strait Islanders* of the group of islands in and around the strait that separates Papua New Guinea from Australia³. The definition of these two groups as indigenous peoples was adopted by the government in the 1980s⁴, and was later

² Cfr. LECKIE, SCOTT (ed.), *Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons. Laws, Cases, and Materials*, Cambridge, 2007. Cfr. see also: LECKIE, SCOTT and HUGGINS, CHRIS. *Conflict and Housing, Land and Property Rights. A handbook on Issues, Frameworks, and Solutions*, Cambridge University Press, 2011.

³ Cfr. BAMFORD, DAVID. *National Report Australia*. (NR Australia), at 1, p. 1.

⁴ Cfr. GARDINER-GARDEN. *The Definition of Aboriginality: Research Note 18*, 2000-01 (2000) Parliament of Australia, 2000, 2. In: BAMFORD, DAVID. *National Report Australia*. (NR Australia), at 1, p. 1, *Ibidem*.

recognized by the case law of the highest courts⁵. As of 2011, these indigenous groups make up approximately three per cent (or about 669,000 people) of the national population.

The history of dispossession and displacement of Australian indigenous populations ranges back to the beginnings of permanent white occupation in 1788. Indigenous people were effectively driven from most of their lands by white settlers. The colonial governments played an ambiguous role, partly allowing violent conflicts and massacres of indigenous people, partly adopting formal policies of "protecting" them by imposing a "protectorate" system in which government officials were appointed as guardians and controllers of indigenous groups, which were displaced to government land assigned as reserves, where they were subject to near total control⁶.

As argued by Professor Bamford:

The combination of social Darwinism and racial theories led to widespread belief by the early years of the twentieth century that full descent indigenous peoples were not going to survive and that a growing population of mixed descent people needed to be separated from them so that they could benefit from the benefits of 'civilisation'. This history of the forced displacement of these children from their parents continued up until the 1960s with devastating consequences for many families and children⁷.

The legal basis for dispossession of indigenous populations was the prevailing common law principle that colonized land was *terra nullius* – nobody's property or uninhabited land. Once an uninhabited country is discovered and settled by English subjects, English laws are immediately in force there⁸. But, as described in the next chapter (see *infra* at IV.b), in the last fifty years the courts in Australia came to recognize native rights even at the cost of abandoning well-established principles of common law.

⁵ *Cfr. Mabo v. Queensland (No. 2)*, High Court of Australia (1992) 175 Commonwealth Law Reports 1, 70 (Brennan J).

⁶ *Cfr.* 1997 statement of the Human Rights and Equal Opportunity Commission. In: BAMFORD, DAVID, *National Report Australia*. (NR Australia), at II, p. 2.

⁷ *Ibidem*.

⁸ According to William Blackstone in his 1765 *Commentaries on the Laws of England*.

C. NORWAY

Another example of successful dealing with the past may be found in Norway. In that country, the officially recognized indigenous group that suffered from dispossession in the past is the *Sami population*, an indigenous group of Finno-Ugric people inhabiting the Arctic area. They are the northernmost indigenous people of Europe and the world. In Norway, Sami mostly inhabit the area of Finnmark in the north of the country. Another similar group, but not officially recognized as indigenous, are the *Kvens* – a people of Finnish descent in northern Norway⁹.

The exact Sami population is not precisely known, but in Norway they make up about 50,000 to 65,000 people, which is roughly one per cent of the total population of Norway today.

The history of the relationship between the Sami population and the rest of the Norwegian population is described by Magne Strandberg as "highly complex"¹⁰. Official Norwegian policies from the 1850s on encouraged assimilation of the Sami population. This was accompanied by the dispossession of parts of Sami land by Norwegian authorities and Norwegian settlers. In particular, in the period 1900–1940, Norway invested considerable money and effort to wipe out Sami culture.¹¹ The situation started to change only since the 1970s and 1980s, and ever since Sami identity has been recognized, and their right to land affirmed.

D. SOUTH AFRICA

In South Africa, indigenous groups include various ethnic nomadic tribes that originated within South Africa, such as the **Khoe-San tribe** and other tribes that are governed by customary law. Although there is still no clarity about the exact definition of indigenous groups, this notion mainly refers to black people indigenous to South Africa, to those who nourish traditional tribal leadership

⁹ *Cfr.* STRANDBERG, MAGNE, *National Report Norway*, (NR Norway), at I, p. 1.

¹⁰ *Op. cit.*, at II, p. 2.

¹¹ *Cfr. Ibidem*.

and had traditional tribal structures.¹² In this sense, the indigenous population makes up a bit over one per cent of the total number of South Africans¹³.

However, due to the policies of apartheid, the notion of disadvantaged groups in South Africa used to be broader, as the non-white population among the 54 million people of South Africa made up the vast majority of South African citizens. According to 2014 statistics, the population of South Africa is 80.2 per cent black, 8.8 per cent coloured, 2.5 per cent Indian and Asian, and 8.4 per cent white. Legally, all of those who have been discriminated against by past discrimination laws are considered to belong to disadvantaged groups which in principle have a right to restitution of land¹⁴.

Historically, until 1994, when South Africa became a constitutional democracy, policies of racial segregation of various ethnic groups (also known as apartheid) were in force. Beginning in 1913, black people were prevented by legislation from owning land¹⁵. People of different races were segregated, i.e. they were required to live in different areas and communities. If the apartheid government decided to change the designated areas, the members of discriminated groups were dispossessed of their property¹⁶. Various acts enacted during the era of apartheid applied the principles of segregation, and had impact on dispossession and displacement of discriminated racial and ethnic groups¹⁷.

12 *Cfr.* BABOOLAL-FRANK, RASHRI. *National Report South Africa* (NR South Africa), at I, p. 1.

13 *Cfr.* Data of the International Work Group for Indigenous Affairs (IWGIA). In: *Ibidem*.

14 See Preamble of the Restitution of Land Rights Act 22 of 1994.

15 *Cfr.* KLOPPERS, HJ, and PIENAAR GJ. "The Historical Context of Land Reform in South Africa and Early Policies", *PER* 2014 (17) 2 680. In: *Ibidem*. *Cfr.* See also: Natives' (Black) Land Act No 27 of 19 June 1913 that prevented black people from being the owners or tenants of land outside the reserves. Available at: <http://www.sahistory.org.za/politics-and-society/apartheid-legislation-1850s-1970s>. According to the 1913 Natives' Land Act, only 8% of land was earmarked for black occupancy.

16 See to that effect Group Areas Act No 41 of 1950.

17 See *inter alia*: Durban Land Alienation Ordinance, No 14 of 1922 (prohibiting ownership of property to Indians in the designated white areas); Natives (Urban Areas) Act 21 of 1923 (regulating the number of Africans in the urban areas); Development Trust and Land Act No 18 of 1936 (expanding reserves to 6% of the land in South Africa and authorizing elimination of "Black Spots", i.e. of black-owned land surrounded by white-owned land); Native Trust and Land Act of 1936 (formalizing the segregation of white urban areas and black rural areas); Bantu Authorities Act 68 of 1951 (prohibiting permanently the black population from residing in urban white areas); Prevention of Illegal Squatting Act No 52 of 1951 (on the forced removal of squatting communities); Natives Resettlement Act No 19 of 1954 (authorizing police to "remove Africans from any area within and next to the magisterial district of Johannesburg"); Bantu Homelands

e. BRAZIL

The Brazilian indigenous population comprises, according to official data, 305 different indigenous ethnic groups that speak over 274 different languages (in addition, 17.5% of indigenous people do not speak Portuguese as their official language)¹⁸. In total, the number of indigenous people is according to official statistics about 900,000, which is about one-half per cent (0.47%) of the national population. Some of the indigenous people living in the Brazilian Amazon are even today almost totally isolated from the rest of the country, and their number and customs are largely undetermined and therefore not included in statistical surveys.

The indigenous population was systematically dispossessed of their land since the beginning of the Portuguese colonization of Brazil. During the colonization period, Portugal actually declared war on some indigenous groups. In that period, over 2 million people were killed, and many were subject to conditions similar to slavery. Later, the main policy of the government was to "integrate" indigenous people into "civilization", which effectively meant motivating them to abandon their traditions and customs, which were regarded as primitive¹⁹. The Brazilian Civil Code²⁰ mirrored this attitude by providing that native South Americans were "relatively incompetent" to perform civil acts (conclude contracts, etc.) until they had adapted to the country's civilization²¹.

In addition to indigenous populations, there are two other disadvantaged groups that were involved in controversies regarding dispossession and forced evictions. One is composed of *small rural producers* who became landless due to the expansion of large farms in the second half of the twentieth century. Their loss of land ownership generated a socio-political movement MST (*Movimento dos Trabalhadores Rurais Sem Terra* – Movement of Landless Rural Workers),

Citizens Act of 1970 (disqualifying the black population from obtaining South African nationality); Black (Urban Areas) Amendment Act No 97 of 1978 (introducing a 99-year lease so that full ownership could not be acquired).

18 *Cfr.* WAMBIER, TERESA ARRUDA ALVIM. *National Report Brazil* (NR Brazil). *Cfr.* See also: <http://www.funai.gov.br/index.php/indios-no-brasil/quem-sao>.

19 *Cfr. Ibidem*, at II.

20 Federal Law no. 3.071 of 1 January 1916.

21 *Cfr.* WAMBIER, TERESA ARRUDA ALVIM. *National Report Brazil* (NR Brazil). *Op. cit.* According to the 1850 Law of Lands, lands in Brazil could only be occupied by those who bought them or who received the king's authorization. Furthermore, by the same law, all lands became the property of the State, which could sell them by auction.

which promotes land reforms. Another group is made of *urban homeless people* who, due to economic difficulties and unemployment, live in squatter camps and shanty towns, which are irregular and largely illegal as they occupy public or private property in the cities. According to official data²², about six per cent of the population (11.4 million people) live in “subnormal agglomerations”, under constant threat of being dispossessed.

f. ARGENTINA

The indigenous population in Argentina comprises about one million inhabitants (955,032 out of 43 million inhabitants in 2010). It is composed of 32 *different ethnic groups*. According to data from a national register, there are 1,359 *indigenous communities*. Similarly as in other Latin American countries, the indigenous population largely belongs to particularly vulnerable social groups that used to be discriminated against in the past and that now experience problems with adequate housing and land possession²³. The first constitution of Argentina, enacted in 1853, referred to indigenous people as “Indians” and promoted their conversion to Catholicism²⁴.

Indigenous people make up only a part of the population that lives in extreme poverty (estimated at approximately 2 million inhabitants of Argentina). In addition, some sources assess that about 11 million people in Argentina experience housing problems, and about a half million live in squatter settlements (*Villas miseria*)²⁵.

g. PERU

Peru also has a considerable indigenous population. National statistics for 2009 list 173,000 *indigenous men* and 159,000 *indigenous women*. Among the indigenous tribes, the largest are the *Asháninkas* and *Aguaruna*. They also share the history of other South American indigenous communities, suffering

²² Cfr. WAMBIER, TERESA ARRUDA ALVIM. *National Report Brazil* (NR Brazil), *Ibidem*. Quoting data of Brazilian Institute of Geography and Statistics (IBGE).

²³ Cfr. OTEIZA, EDUARDO and VERBIC, FRANCISCO. *National Report Argentina*, (NR Argentina), p. 2.

²⁴ See Art. 67, para 15.

²⁵ Cfr. ROLNIK, RAQUEL, report, A/HRC/19/53/Add. 1, 2011. In: OTEIZA, EDUARDO and VERBIC, FRANCISCO. *National Report Argentina*, (NR Argentina), n.1.

from dispossession and forced displacement in the past. As remarked by the national reporter, since the beginning of the Spanish colonization, indigenous people were systematically annihilated, enslaved or displaced from their lands, resulting in Peru becoming a completely *creole country*²⁶.

A significant part of dispossessions and displacements, in particular related to communities living in the Peruvian Andes area, were relatively recent, and relate to the situation of armed conflicts and terrorism between 1985 and 2001, when, according to Professor Delgado, the displacement of indigenous people was the only way for them to survive amidst the conflicts between the army and guerrilla groups like Sendero Luminoso and Túpac Amaru. The result was massive internal (and partly external) displacement beyond the borders of their native lands and territories.

After the cessation of armed conflicts, return to indigenous territories was impeded by the economic policies that gave foreign investors (in particular: mining and energy companies) broad rights to exploit natural resources in the indigenous lands.

h. RUSSIA

Russia is one of the most ethnically diverse countries in the world. However, Russian legislation recognizes as indigenous people only the so-called “*numerically small indigenous people*”, i.e. ethnic communities that live in territories traditionally inhabited by their ancestors, maintain a traditional way of life and have a population of fewer than 50,000 people²⁷. There are officially 46 *such traditional groups*, ranging from less than 300 members to more than 40,000 people. In total, these groups comprise 244,000 people in 28 administrative units, mainly in the north, Siberia and the far east of Russia²⁸.

The problems of the indigenous populations in Russia have been similar to the problems experienced by the indigenous communities in Scandinavian countries. In the tsarist era, the 1822 “Regulation of Indigenous Population” recognized the indigenous communities and even prohibited Russians from settling in the territories of indigenous people without the permission of their

²⁶ Cfr. DELGADO, CHRISTIAN. *National Report Peru*, (NR Peru), II, p. 2.

²⁷ Cfr. MALESHIN, DMITRY. *National Report Russia*, (NR Russia), p. 1.

²⁸ Cfr. UN Special Rapporteur CR Russia, p. 5. Some ethnic communities that formally do not satisfy the conditions for “small-numbered indigenous peoples” due to larger size (e.g. Altai Kezhi in the Altai Republic) share similar characteristics as recognized indigenous groups.

leaders. However, indigenous communities still suffered many effects of “colonization, military conflicts, loss of autonomy and lands, and heavy taxation”²⁹. After 1917, the Socialist Revolution brought further traumatic experiences to indigenous people in Russia:

[Though] Soviet leaders were known to take pride in the diversity of ethnicity and culture in the Soviet Union ... indigenous peoples’ traditional leadership structures and communities, their religion, customary law and traditional medicine, and their capacity for self-reliance and economic subsistence built up over hundreds of years were radically affected by the paternalistic and intrusive management and control, forced integration, and ‘collectivization’ during communism³⁰.

The situation of the indigenous peoples did not much improve during *Perestroika*. On the contrary, as reported by the UN Special Rapporteur James Anaya, they were in a particularly vulnerable position, as the indigenous communities “experienced something of an organizational void, lacking the former structure imposed by the communist government, yet unable to shape or define their new role in a drastically shifting political and economic atmosphere”. All of that led to soaring unemployment, poverty and alcoholism in the indigenous communities³¹.

i. ITALY

As an example of a jurisdiction which currently does not have an indigenous population, but still has issues with dispossessions and forced evictions, this report includes information provided by the Italian national reporter Elisabetta Silvestri. Indeed, as she states “the possibility to identify indigenous Italians probably ended at the time of Ancient Rome”³². However, Italy has a number of national minorities, and, particularly in recent times, it has been subject to massive immigration from North Africa, Eastern Europe and South America.

The issues with land dispossession and forced evictions in Italy do not, however, arise from a specific position or discrimination of any particular minority, but happen in respect to *all members of disadvantaged groups due to the*

29 *Ibidem*.

30 *Cfr.* UN Special Rapporteur CR Russia, *Ibidem*, pp. 5-6.

31 *Cfr.* *Ibidem*, p. 6.

32 SILVESTRI, ELISABETTA. *National Report Italy*, (NR Italy), p. 2.

persistent and ongoing economic crisis. Evictions affect a large number of people, and this number is growing: while in 2005 there was one evicted family for every 515 families, in 2014 the official ratio increased to one for every 334. The cause of eviction in 89.3 per cent of cases is non-payment of rent³³. The legal basis of evictions are either ordinary or special summary procedures initiated by landlords to evict the tenants. To a lesser extent, dispossession and eviction is based on the provisions regarding expropriation, when the executive authority exercises its power of eminent domain (*espropriazione per pubblica utilità*).

In this report, the Italian example will be used as an indicator of problems that accompany litigation related to large-scale land dispossession and forced evictions in themselves, unconnected with additional special issues related to a particular group. Some of these problems triggered the reaction of international tribunals, such as the finding of human rights violation by the European Court of Human Rights.

j. INDIGENOUS AND DISADVANTAGED GROUPS IN OTHER JURISDICTIONS NOT COVERED IN THIS REPORT

Many other indigenous and disadvantaged groups could and should be included in this report. However, due to limitations of space and time, a narrow selection had to be made. A future continuation and expansion of this report may find it necessary to expand the list and examples given herein. Here are only a few of those examples of indigenous and disadvantaged groups which have suffered from land dispossession or forced displacement that unfortunately had to be left out:

- Ancestors of the Inuit who moved to Labrador in the north of Canada about 1,000 years ago³⁴;
- Arab Bedouin citizens of Israel, inhabitants of the Naqab (Negev) Desert, who have inhabited this territory since the seventh century³⁵;

33 *Cfr.* SILVESTRI, ELISABETTA. *National Report Italy*, (NR Italy). *Op. cit.*, at VII.

34 *Cfr.* PLAICE, EVIE. “Identity politics and the Canadian land claims process in Labrador”, in FAY, DERICK and JAMES, DEBORAH (eds.). *The Rights and Wrongs of Land Restitution, Restoring What Was Ours*, Routledge-Cavendish, Oxon, 2009, pp. 67-84.

35 *Cfr.* ADALAH-Legal Center for Arab Minority Rights in Israel. “Demolition and Eviction of Bedouin Citizens of Israel in the Naqab (Negev)-The Praver plan”, 2013.

- Native Americans in the United States, who still cause anger by their land claims, and invoke "reservations about reservations"³⁶;
- Tribal farmers in Andhra Pradesh, India whose land was subject to forced acquisition for special economic zones³⁷;
- Rarámuri and other indigenous ethnic groups in northern Mexico, in particular in the Sierra Tarahumara in the state of Chihuahua³⁸;
- Populations belonging to at least three waves of historic migrations in East Timor with overlapping claims to land titles and possession³⁹;
- Victims of complicated housing and property issues relating to the Georgian-Ossetian conflict⁴⁰;
- Rohingya people and other internally displaced persons and refugees from Burma (Myanmar) whose land was confiscated by *Tatmadaw* (the Army)⁴¹;
- Complicated post-communist processes of denationalization of the property confiscated or nationalized in past times, but also processes of privatization which negatively affected segments of underprivileged populations and their traditional use of land and natural resources, (e.g. Roma and Rudari ethnic minorities in Romania)⁴²; and

36 Cfr. BLANCHE, BRIAN. "'We'll never give in to the indians': Opposition to restitution in New York State", in FAY, DERICK and JAMES, DEBORAH (eds.). *The Rights and Wrongs of Land Restitution. Restoring What Was Ours*, Routledge-Cavendish, Oxon, 2009, p. 235.

37 Cfr. RAMACHANDRAIAH, C. and VENKATESWARLU, A. "Dispossessing and the poor from lands: Land Laws and Administration in Andhra Pradesh, India", Report Submitted to the IS Academy Land Governance at Utrecht University, The Netherlands, 2011.

38 Cfr. ALCALDE, HORACIO ALMANZA. "Land Dispossession and Juridical Land Disputes of Indigenous Peoples in Northern Mexico: A Structural Domination Approach", diss. (University of East Anglia), 2014. On the situation in Mexico: Cfr. TIEDJE, KRISTINA. "¿Qué sucede con PROCEDE? The end of land restitution in rural Mexico", in FAY, DERICK and JAMES, DEBORAH (eds.). *The Rights and Wrongs of Land Restitution. Restoring What Was Ours*, Routledge-Cavendish, Oxon, 2009.

39 Cfr. DU PLESSIS, J. "Slow Start on a Long Journey: Land Restitution Issues in East Timor, 1999-2001", in: *Housing and Property Restitution Rights of Refugees and Displaced Persons-Volume 1*, New York: Transnational Publishers, 2003.

40 Cfr. LECKIE, SCOTT. "Housing, Land, and Property Restitution Issues in the Context of Return to and Within Georgia: An International Legal Perspective", UNHCR, July, 1998.

41 Cfr. COHRE Country Report. "Displacement and Dispossession. Forced Migration and Land Rights in Burma", Centre on Housing Rights and Eviction (COHRE), Geneva, 2007.

42 Cfr. DORONDEL, STEFAN. "'They should be killed': Forest restitution, ethnic groups and patronage in post-socialist Romania", in FAY, DERICK and JAMES, DEBORAH (eds.). *The Rights and Wrongs of Land Restitution. Restoring What Was Ours*, Routledge-Cavendish, Oxon, 2009.

- People displaced due to continuing armed conflicts in many countries of the world, from Abkhazia and Nagorno Karabakh to Syria and Iraq.

IV. ATTEMPTS TO REVERSE OR MITIGATE THE EFFECTS OF LAND DISPOSSESSIONS AND FORCED DISPLACEMENT: LEGISLATION AND POLICIES RECOGNIZING INJUSTICE AND AIMED TO CURE IT

a. GENERAL – TYPOLOGY OF SITUATIONS RELATED TO LAND DISPOSSESSION AND FORCED EVICTIONS

In present times, many national and international programmes and initiatives try to reverse the effects of past injustice, recognize violations of rights of the indigenous and other vulnerable and disadvantaged groups, and grant them rights to land and homes, making restitution and compensating where possible. Some international organizations, such as UNHCR and ILO, and international NGOs, like COHRE, have contributed greatly to the recognition of the land and housing rights violations throughout the world and the need to remedy them. As situations in different countries and in particular cases may vary greatly, at least four different types of model situations can be distinguished.

The first type related to land dispossession and forced evictions deals with rights of indigenous people who were dispossessed mainly during the periods of colonization. In post-colonial times, the rights of such indigenous populations (including specific rights connected to their tradition and culture) are being recognized, and their past violations are being addressed by a series of economic, political and legal measures. This type of situation (which I will call *post-colonial restitution*) can be of older origin (e.g. dispossession of the Australian Aboriginal population), or may stretch to relatively newer times, where it is mixed with other elements (e.g. apartheid in South Africa and its effects on the land rights not only of indigenous populations, but also of the non-white majority).

The second type relates to *post-conflict restitution*, where dispossessions and evictions are a by-product of forced displacement in the context of wars or armed conflicts, sometimes (as in the former Yugoslavia, Georgia, Sudan and India) coupled with the dissolution of composed states or secessionist agendas. The background of the conflict is often connected with the ethnic elements, and disadvantaged groups affected often (but not always) belong to a specific ethnic minority. After the end of conflicts, as a part of the policies of recon-

ciliation, programmes of return of refugees and internally displaced persons target some kind of restitution of their land and housing rights.

The third type deals with the consequences of the transformation of Socialist economies of former Communist countries back to a capitalistic market economy based on private property (also regarding land and housing). I will call this type the **transition restitution**. In transition countries, the issues of dispossession are typically twofold. On the one hand, the object of restitution are the rights of people whose property was nationalized or confiscated during the times of Communist rule. On the other hand, there are issues that arise from the general transformation of the past ownership structure over land or housing. In the transformation of state or social ownership into privately owned property, limitations to restitution based on the impossibility of natural restitution or public interest create complicated issues of partial redress (or redress to only some), which creates new disadvantaged groups and a feeling of injustice among those excluded from full compensation.

Finally, the fourth type is that which generally does not have a basis in any historical injustice, conflict or transformation of the social and political system, but occurs as a product of large-scale economic crisis, accelerated processes of industrialization and natural disasters (such as global warming and rising sea levels). This cluster of situations, which may be labelled as *crisis-driven land and housing emergencies*, requires a different approach, one that is not based on "restitution" in the narrow sense of the word (as the loss of land and housing was the result of misfortune or legitimate legal action). Instead, the approach to crisis-driven emergencies requires comprehensive land and housing reforms and efforts to prevent or mitigate the social consequences of large-scale migrations and dispossessions while securing a general human right to adequate and honourable living conditions and environment.

In practice, these four model situations may overlap: for instance, members of indigenous populations whose ancestors were dispossessed in the past can be involved in armed conflicts which cause further forced migrations, while the causes of the conflict may be connected to underlying economic interests that are forcing industrialization and urbanization of a previously rural area (a scenario not so far from the realities in some South American territories). Or, transition in post-Communist countries can be coupled with armed conflicts, dissolution of states and fighting between different ethnic groups, as in the former Yugoslavia. Indeed, all these variations and combinations make the issues of reconciliation and land restitution even more complex and difficult.

b. POLICIES ADDRESSING LAND DISPOSSESSION IN THE ANALYSED JURISDICTIONS

In *Australia*, the policies towards the indigenous population gradually changed in the 1960-1980 period. After dismissal of the first claims for recognition of communal native title⁴³, in several parts of Australia the local governments had attempted to redress dispossession by enacting legislation granting freehold rights to indigenous peoples⁴⁴. In 1976 the Aboriginal Land Rights Act (Northern Territory) enabled granting land rights to the indigenous population, which today owns about 49 per cent of this area that covers 771,747 square kilometres⁴⁵. This legislation also provided for the accumulation of funds which would enable indigenous peoples to purchase freehold land on the open market. The big shift in the legal approach to rights of the indigenous population happened in 1992, when the High Court of Australia in the *Mabo* case overturned the *terra nullius* principle, recognizing native title for indigenous claimants who had maintained an ongoing relationship with the land under customary law⁴⁶. Following that landmark decision, the Native Title Act 1993 was passed, defining how native title may be identified, used and extinguished. A number of ambiguities regarding native land rights were later resolved by another leading court decision in 1996 that provided greater opportunity for indigenous claims to native title⁴⁷.

Policies towards indigenous peoples in *Norway* started to shift in the 1970s, and developed rapidly from the 1980s, facilitated by a high profiled dispute in 1979 which brought Sami rights onto the political agenda⁴⁸. In 1988 the Constitution was amended by a provision granting the Sami population their

43 See in particular the *Milirrpin* case (1971), initiated after the government refused to prevent the use of some traditional land of the Yolgnu people for a bauxite mine in 1963. *Cfr. See: BAMFORD, DAVID. National Report Australia. Op. cit., p. 3.*

44 *Cfr. Ibidem*, p. 4.

45 The ownership of land (mostly in the form of communal ownership) is controlled by the Central Land Council, which represents some 24,000 Aboriginals of fifteen different language groups. Similar legislation has been enacted in other parts of Australia, e.g. in the State of South Australia in 1981 and in New South Wales in 1983.

46 *Mabo v. Queensland n.º 2* (1992) 175 Commonwealth Law Reports 1.

47 *Wik Peoples v. Queensland* (1996) 187 Commonwealth Law Reports 1. *Cfr. See: BAMFORD, DAVID. National Report Australia. Op. cit., pp. 3-4.*

48 The dispute regarded construction of a hydro-electric power station in Alta. *Cfr. STRANDBERG, MAGNE. National Report Norway. Op. cit., II, p. 2.*

came a constitutional democracy⁵⁷. In the same year, the Restitution of Land Rights Act was passed, allowing the government to offer restitution or compensate natural persons and communities for the injustice of dispossessions caused by discriminatory laws. Other relevant legislation enacted after 1994 include the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 (PIE), dealing with evictions from residential property, and the Extension of Security Tenure Act of 1997 (ESTA), governing eviction of farmworkers when they work on farm lands⁵⁸. However, as stated by Rashri Baboolal-Frank, land reform addressing past dispossessions is “a mammoth task”⁵⁹. A civil society declaration adopted in 2013 by the People’s Assembly pointed to the continued existence of “rural geography of apartheid” (Bantustans and white South Africa), and argued that “[n]early twenty years after the end of apartheid, the 1913 Natives’ Land Act continues to haunt the South African countryside” while the “land question, which was central to the struggle against apartheid, remains unsolved”⁶⁰.

In **Russia**, policies towards indigenous populations developed through a network of national and local legislative acts, starting with the three framework laws specifically addressing indigenous people that were enacted in the 1999–2001 period⁶¹. There was also a series of funding initiatives targeting indigenous communities. In 2009, the federal government adopted a concept paper on the sustainable development of indigenous peoples, defining policies in the 2009–2025 period. Among their objectives these policies also have the protection of traditional use of land and natural resources. However, according to some criticisms, the policies adopted are phrased in overly general terms, and the modest funding for their implementation is often spent on problems

57 *Cfr.* BABOOLAL-FRANK, RASHRI. *National Report South Africa. Op. cit.*, pp. 7–8. Section 25 of the Constitution grants land rights to all people, subject to implementation in special legislation.

58 *Cfr. Ibidem*, p. 8.

59 *Cfr. Ibidem*, p. 13.

60 As published by the Institute for Poverty, Land and Agrarian Studies (PLAAS), see: <http://www.plaas.org.za/news/declaration-landrestitution-peoplesassembly>. On ambiguous results of the land restitution programme in South Africa, *Cfr.* See also: WALJER, CHERRYLL. “*Landmarked. Land Claims & Land Restitution in South Africa*”, Ohio University Press, 2008.

61 “On Guarantees of the Rights of Numerically-small Indigenous Peoples of the Russian Federation”, 1999; “On Territories of Traditional Nature Use of the Numerically-small Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation” 2001; and “On General Principles of Organization of Obshchina of Numerically-small Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation”. 2000.

that have little to do with indigenous issues. While some regions of Russia are more advanced in the protection of indigenous peoples’ rights (e.g. the Khanti-Mansiyeveski region), in general, the assessment of outside observers is that “effective enjoyment of the [indigenous] rights remains precarious in many if not most situations”⁶².

For very different types of issues, belonging to crisis-driven land and housing emergencies described above, *Italy* uses different policies. On the one hand, a large number of evictions of people due to non-payment of rent is addressed by introducing special, a summary procedure (*convalida di sfratto*) that is supposed to work more effectively than the ordinary one. However, the social edge of land and housing dispossessions is softened by rules enabling the tenants to ask for grace periods if they experience “well-substantiated difficulties”. If the tenant can prove that his failure to satisfy his debt is due to circumstances for which he cannot be held accountable (no-fault delay, *morosità incolpevole*), evictions can be avoided or at least postponed. Such circumstances include job loss, protracted unemployment, serious medical conditions, etc. The tenants belonging to economically disadvantaged groups also have access to a special public fund established in 2013 (*Fondo destinato agli inquilini morosi incolpevoli*) from which they can receive a maximum of €8,000 for payment of rent arrears and renegotiation of the lease with the landlords. However, according to Silvestri, it seems that the management of this fund experiences difficulties: of €83 million, “only the ‘crumbs’ end up in the pockets of individuals under threat of eviction”⁶³.

V. LITIGATION AS A TOOL FOR CORRECTING PAST INJUSTICE REGARDING LAND DISPOSSESSION AND FORCED DISPLACEMENT

a. CIVIL COURTS AND THEIR DECISIONS AS CATALYSTS OF CHANGE

The history of changes in the attitude towards dispossession of indigenous people and other disadvantaged groups in the analysed countries shows that,

62 “On Guarantees of the Rights of Numerically-small Indigenous Peoples of the Russian Federation”, 1999; “On Territories of Traditional Nature Use of the Numerically-small Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation” 2001; and “On General Principles of Organization of Obshchina of Numerically-small Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation”, 2000. *Ibidem*, p. 9.

63 SILVESTRI, ELISABETTA. *National Report Italy. Op. cit.*, p. 7.

at least in some cases, courts played a decisive role and contributed greatly to catalysing the social and political developments in favour of recognition of rights to land, housing and property of the vulnerable parts of the society. Thereby, big steps were undertaken in the evolution of legal concepts. A good example is the key decision in the Australian *Mabo* case, in which the High Court abandoned well-established common law doctrine and gave precedence to the demands of modern times and freshly developed international standards:

Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. ... A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands⁶⁴.

Similarly, the Norwegian Supreme Court in two cases decided in 2001, according to Strandberg, contributed to a “shift of paradigm concerning Sami rights to land” insofar as that they, relying on the oral nature of Sami culture, softened the criteria for establishing their legal rights to land as a result of consistent and prolonged use, in comparison to other groups and cultures⁶⁵. In South Africa, a Constitutional Court decision found that “the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of law” and found that “[i]n the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law”⁶⁶.

It seems, however, that the level of the courts’ intervention and their contribution to developments regarding rights of disadvantaged groups varies greatly from country to country. In general, as one could expect, common

law jurisdictions have had courts more active in policy-shaping than civil law jurisdictions. The composition of national courts and the openness of the highest instances to reforms also play an important role, as conservative and traditionalist supreme and constitutional courts are less likely to adopt new trends and set the pace for new policies.

In recent times, trends may be changing, at least in some places. Partly under the influence of international law and the cases of international tribunals, some highest courts in the civil law countries also take a more activist and progressive stance. For instance, following the practice of the ICHR⁶⁷, the Federal Supreme Court of Argentina issued in the cases *Eben Ezer*, *Qom Potae Navogoh* and *Mapuche ‘Las Huaytekas’* decisions in favour of indigenous communities, affirming their collective (communal) rights over particular territories that arise from their special relationship with native land that forms a part of their cultural identity⁶⁸.

b. SPECIAL COURT STRUCTURES AND PROCEEDINGS

There are good reasons to establish special bodies and procedures, adjusted to specific legal, cultural, anthropologic and linguistic demands of cases dealing with specific land and other rights of indigenous communities. Yet, only some of the analysed jurisdictions actually have such bodies and procedures.

A good example of a relatively high level of adjustment to particular needs of land rights cases can be found in *Australia*. Under the Native Title Act of 1993, a special Native Title division designated for determination of native title claims was established in the Federal Court. The same Act also established a Native Title Registrar and the National Native Title Tribunal. While the former helps in filtering the cases⁶⁹, the latter assists the court and mediates the claims. Alongside the judicial bodies, special administrative bodies exist in the federal units (e.g. the Aboriginal Land Commissioner in the Northern Territory, or Minister of Lands in New South Wales) which make initial determination of

64 (1992) 175 Commonwealth Law Reports 1, 42. *Cfr.* See: BAMFORD, DAVID. *National Report Australia*. *Op. cit.*, at IV.

65 *Cfr.* Norsk Retsidende 2001/769 and 2001/1229, in: STRANDBERG, MAGNE. *National Report Norway*. *Op. cit.*, p. 3.

66 *Alexcor Ltd and Another v. Richtersveld Community and Others*, 2003 (12) BCLR 1301 (CC). BA-BOOLAL-FRANK, RASHRI. *National Report South Africa*. *Op. cit.*, p. 4.

67 See more *infra*, at c.

68 FSCJ, *Comunidad Indígena Eben Ezer v. Provincia de Salta Sentencia*, 2008; *Comunidad Qom Potae Navogoh v. Provincia Formosa*, 2015; *Comunidad Mapuche ‘Las Huaytekas’*, opinion of the Attorney General of 24 February 2015. *Cfr.* See: OTEIZA, EDUARDO and VERBIC, FRANCISCO. *National Report Argentina*. *Op. cit.*, pp. 6-8.

69 The task of the Registrar is to consider whether application meets the 12 conditions from the NTA before entering the claim in the Register of Native Title Claims.

land claims⁷⁰. Their decisions may be subject to appeal before judicial bodies, such as the Land and Environment Court. The registration of native title claims gives the right to indigenous claimants to be notified and consulted regarding any applications to mine or conduct mineral exploration on the disputed land. Moreover, the native title claims are publicly advertised, and any person who may be affected by the claim can apply to become a party and participate in the proceedings within three months. The cases are usually first referred to mediation. If a settlement is reached among all parties, the Federal Court will make a consent determination. Otherwise, the case is scheduled for hearing and further determination. That part of the process is also specially adjusted to indigenous participation. As remarked by David Bamford:

The Federal Court has developed a range of procedures for hearing native title cases which attempt to address to some degree the cross-cultural and other difficulties that arise. ... Aboriginal history is oral and courts have traditionally privileged written tradition. [Today, much] of the evidence in native title cases, involves historical and anthropological experts as well as that of indigenous elders recounting the oral history of the claimants⁷¹.

Since constitutional changes in 2004, some specialized court structures also exist in **Brazil**, with jurisdiction limited to agrarian issues. The specialized Agrarian Courts are currently part of 11 of 27 State Courts of Appeal, and 2 of 5 Regional Federal Appellate Courts⁷². They decide, among others, possessory class actions and land reform-related expropriation actions. As to specialized procedures, it may be noted that in the process of demarcation of indigenous land (which is essentially of an administrative nature) the facts related to indigenous occupancy have to be established by anthropologists with accredited qualifications, assisted by "complementary studies of ethno-historical, socio-

logical, legal, cartographic and environmental nature as well as land surveys, if necessary for the delimitation"⁷³.

Peru does not have specialized tribunals for land rights of disadvantaged people, but every indigenous community has its Justice of the Peace (*Juzgados de Paz*) who is competent to resolve matters involving rights of indigenous groups⁷⁴.

Since September 2014, *Norway* also has one specialized court which is relevant for land rights of the indigenous population. It is the Finnmark Land Tribunal, established under the Finnmark Act. This court has jurisdiction for disputes regarding rights to native Sami land that remain after the investigations and determinations of the Finnmark Commission. This court is composed of a chairman, a vice-chairman, three members and two deputy members. They are judges of high standing (fulfilling criteria for Supreme Court judges) who carry out their work for the Land Tribunal on a part-time basis. The court has its seat in Tromsø, but the hearings may take place at any convenient location in Finnmark. Its decisions may be appealed directly to the Supreme Court. As this is a new court, there have been no leading cases yet. But, some special procedural rules are to be found in the Finnmark Act. For instance, any person who claims a right to land may initiate litigation at the Land Tribunal within one-and-a-half years after publication of the Finnmark Commission Report if he or she is not satisfied by its findings. The Tribunal has the obligation to consider *ex officio* information contained in that report.

South Africa also has bodies dealing with claims of land dispossession and displacement: the Land Claims Commission and the Land Claims Court. The latter, established in 1995, has the same status as High Courts. It is competent for claims arising from the Restitution of Land Rights Act of 1994 and other claims related to land reform and restitution for people and communities who had been dispossessed due to the 1913 apartheid legislation.

It may be worth noting that one of the first specialized land courts for indigenous matters was established in 1865 in *New Zealand* – the Native Land Court (which was later renamed the *Māori Land Court*). Although it has continued to exist to the present day, its original function was opposite to the current policies of courts specialized for indigenous people. Established under

70 Cfr. BAMFORD, DAVID. *National Report Australia*. *Op. cit.*, pp. 4–5. In June 2015, there were 28,019 claims to government land awaiting determination, with the oldest having been commenced in 1984 (*Ibidem*).

71 BAMFORD, DAVID. *National Report Australia*, *Ibidem*, p. 6.

72 Cfr. See: WAMBIER, TERESA ARRUDA ALVIM. *National Report Brazil*. *Op. cit.*, quoting the National Council for Judiciary (CNJ); see <http://www.cnj.jus.br/noticias/cnj/61158-onze-tjs-e-dois-trfs-possuem-varas-especializadas-em-questoes-agrarias>.

73 WAMBIER, TERESA ARRUDA ALVIM. *National Report Brazil*. *Op. cit.*, citing Decree no. 1.775 of 8 January 1996.

74 Cfr. DELGADO, CHRISTIAN. *National Report Peru*. *Op. cit.*, p. 3.

and autonomy and the right to free, prior, and informed consent⁸². Though the Declaration was a non-binding instrument, it initially gave rise to reservations of some important UN members with significant indigenous populations, like the US, Canada, New Zealand and Australia, which all subsequently changed their views and endorsed the Declaration⁸³.

As regards litigation and other forms of court protection of indigenous rights, Article 27 of the UN Declaration proclaims the obligation of the states to establish and implement, in conjunction with the concerned indigenous peoples, "a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used". It seems that the Declaration, which was adopted only eight years ago, still has not significantly impacted on changes in national judicial processes, but its potential is significant. In any case, the international standards set by Article 27 (including transparency, right to recognition of traditional rights and right to consultation) will govern the assessment of the national procedures involving forced dispossession and evictions of indigenous groups in the decades to come.

For more general problems related to land dispossession and forced evictions of disadvantaged groups, the work of other UN human rights bodies, in particular those related to rights of refugees and displaced persons, also deserves mention. The UNHCR has led and co-ordinated efforts aimed to protect refugees, efforts which include projects that supported strategic court litigation of land issues⁸⁴. At the normative level, in 2005 the United Nations Sub-

Commission on the Promotion and Protection of Human Rights adopted the Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles). The Principles recognized the right to housing, land and property restitution as an element of international law, granting to all refugees and displaced persons the right to restitution of their land and property, which they were arbitrarily or unlawfully deprived of, and the right to be compensated where such restoration is not possible. The Pinheiro Principles also guarantee proceedings before an independent and impartial body in regard to restitution claims, and affirm the right to repatriation and restitution on the basis of programmes carried out in adequate consultations with affected groups and communities, including women, indigenous peoples and racial and ethnic minorities⁸⁵. Some cases regarding evictions and land dispossession occurred also before the Human Rights Committee established under Article 28 of the International Covenant on Civil and Political Rights⁸⁶.

In addition to global international instruments, some regional international instruments and case law of regional tribunals also have contributed to the development of national adjudication of indigenous claims to land. For instance, the Inter-American Court of Human Rights (ICHR) issued a leading case regarding rights of the *Yakye Axa* community in Paraguay⁸⁷. This case, alongside other cases such as *Sawhoyamaxa*⁸⁸ and *Xákmok Kásek*⁸⁹, affirmed the indigenous rights to land, and utilized for that purpose the provisions of ILO-C169. The jurisprudence of the ICHR influenced significantly some decisions of the national courts. So, for example, the Federal Supreme Court of Argentina relied on it when adjudicating in the *Eben Ezer* and *Qom Potae Napocna Navogoh* cases⁹⁰.

In a similar way, but related to broader issues regarding housing and land rights of disadvantaged groups, the European Court of Human Rights (ECtHR)

82 For land issues, of particular importance are the provisions of Art. 10 and Arts. 25-30 of the UN Declaration. They provide indigenous rights to land such as: right to spiritual relationship with the traditionally owned or occupied land; right to control it by way of traditional ownership; right to respect for indigenous laws, traditions, customs and land tenure systems; right to restitution and other forms of redress for dispossession and displacement; right to free, prior and informed consent regarding use of traditional lands, the protection of the environment in the traditional lands, the prohibition of military activities in indigenous territories; etc.

83 See more on the Declaration at: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.htm>.

84 For instance, UNHCR supported a number of legal aid projects for the assistance of refugees and internally displaced persons in Croatia. See also UNHCR Office Memoranda on Voluntary Repatriation and the Right to Adequate Housing and EXCOM Conclusion n.º 101 – Legal Safety Issues in the Context of Voluntary Repatriation of Refugees (2004).

85 See <http://www.unhcr.org/50f94d840.html>. *Cfr.* See also: COHRE Country Report, "Displacement and dispossession. Forced Migration and Land Rights in Burma". *Op. cit.*, p. 28.

86 See a line of cases against the Czech Republic in the 1995-2001 period; see: LECKIE, SCOTT (ed.). *Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons. Laws, Cases, and Materials*. Cambridge, 2007, p. 362-387.

87 I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay, June 17, 2005. Series C n.º 125. See: http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf.

88 *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006. Series C n.º 146.

89 *Xákmok Kásek Indigenous Community v. Paraguay*, 24 August 2010. Series C n.º 214.

90 *Cfr.* OTEIZA, EDUARDO and VERBIC, FRANCISCO. *National Report Argentina*. *Op. cit.*, p. 7.

has also had an impact on identification of substantive and procedural problems in dealing with the land dispossession and forced eviction issues in several countries of the Council of Europe. A long list of these cases include *Scordino v. Italy*⁹¹, *Broniowski v. Poland*⁹², *Brumarescu v. Romania*⁹³, *Bilgin v. Turkey*⁹⁴, *Valová, Slezák and Slezák v. Slovakia*⁹⁵, and *Blečić v. Croatia*⁹⁶, to name only some of the more important ones.

It is hard to draw general conclusions out of an ever-growing number of cases of international tribunals regarding situations of diverse legal, social and historical background connected only with the common context of land and housing rights violation of underprivileged social groups. But it is undisputed that international law and the case law of the international judicial *fora* significantly gained in importance when dealing with the cases of large-scale land dispossessions and forced evictions. It has also become the leading source of inspiration for the adjudication of many national tribunals, in particular those at the highest level of the judicial hierarchies.

91 36813/97, ECHR 29 July 2004 and 20 March 2006 (Grand Chamber). In the *Scordino* case, the ECtHR found a violation of Art. 6 § 1 (right to a fair trial) of the European Human Rights Convention on account of the application of Law no. 359/1992 which established criteria for calculating compensation for expropriation. It also found a violation of Art. 1 of Protocol n.º 1 (right to peaceful enjoyment of possessions) on account of the inability to obtain expropriation compensation "reasonably related to the value of the property". As several dozen similar cases had already been referred to the ECtHR, it concluded that these violations were the result of a systemic problem, and ordered Italy to remove every obstacle for awarding adequate compensation for expropriation.

92 31443/96, ECHR 22 June 2004. This case dealt with the right of people repatriated after post-WWII changes to the eastern borders of Poland to receive compensation for land and property abandoned after their displacement from the area beyond River Bug. In the 1944-53 period, about 1.24 million people were repatriated, but until 2003 a significant number of them still had not received adequate compensation in the form of substitute land or money, as the state had continuously failed to fulfil its legislative duty to regulate the matter properly and timely, enacting laws that had rendered adequate compensation practically impossible. This was the first case decided in the so-called pilot procedure, as all similar applications were suspended pending decision in this leading case.

93 28342/95, ECHR, 28 October 1999. The case dealt with the failure to make restitution with respect to the house of the applicant's predecessors during the 1950s.

94 25659/94, ECHR, 17 January 2001. The application concerned the applicant's allegations that his house and other possessions in Yukarıgören were destroyed by security forces.

95 44925/98, ECHR, 1 June 2004. The case dealt with the restitution of property of expropriated land.

96 59532/00, ECHR, 8 March 2006. The case dealt with the restitution of specially protected tenancy on a flat that was temporarily vacated by the tenant during the armed conflict in Croatia (finally dismissed by majority due to inadmissibility *ratione temporis*).

In spite of the divergence of cases submitted to international tribunals, a few additional lessons may be stated regarding the specific common problems in special judicial and other procedures aimed at the redress of injustice caused by land dispossessions and forced evictions:

- The procedures established by national authorities are often ineffective;
- The specific collective rights and non-standard (traditional, historical) forms of possession and ownership cause significant problems when evaluated and adjudicated in a conventional administrative and judicial context;
- The aggregate length of proceedings is regularly very long, and frequently quite excessive;
- The restitution of property is often difficult or impossible, and forms of redress insufficient or inappropriate, in particular for large classes of claimants;
- When decisions on restitution or reparation are made, members of specific groups are often discriminated against on grounds of an arbitrary or inappropriate nature;
- The individual cases decided by the highest tribunals regularly reveal systemic problems for which a whole range of measures and policies, and a persistent and coherent multi-disciplinary approach is needed;
- Some governments unwillingly or incompletely discharge their obligations, even when they were imposed by national law, international instruments or case law of domestic or international courts and tribunals.

Some of these lessons are also applicable to regular civil litigation when it is used instead of specialized procedures. The regular civil litigation in land rights cases is the topic of the next section.

d. REGULAR CIVIL LITIGATION IN DISPOSSESSION AND EVICTION CASES INVOLVING DISADVANTAGED GROUPS

Most national reporters emphasized in their reports that, apart from occasional special procedures (see *supra* at b.), the litigation in land dispossession and forced evictions cases is governed by the regular rules of civil procedure, and applied in proceedings before the ordinary civil courts⁹⁷. On this background,

97 *Cfr.* MALESHIN, DMITRY. *National Report Russia. Op. cit.* For instance, points to a situation where there are virtually no specialized judicial bodies or court proceedings. *Cfr.* See also: OTIIZA,

it seems that the case law of the few specialized tribunals and the occasional leading cases of the highest judicial *fora* make up only the tip of the iceberg. As dispossession and eviction proceedings before ordinary courts in cases regarding vulnerable groups intersect with other categories of cases, they are difficult to extract, analyse and summarize. National reporters were regularly unable to provide exact data about the number and length of proceedings in land dispossession cases, though their educated guess was that it took “years” to conclude them⁹⁸.

Generally, legal mechanisms for the protection of land and housing rights affecting various disadvantaged groups occur in the form of multiple proceedings. They can be best distinguished by their function. Some proceedings, particularly important for rights of indigenous populations, relate to *identification and demarcation* of the traditional lands and territories. Such proceedings are often of an administrative nature, with greater or lesser court involvement (courts mainly serve as means of control and review of decisions taken at an administrative level). The *(re)establishment of native collective (communal) rights* usually needs special hybrid proceedings adjusted to the specific nature of indigenous customs and legal cultures. In case of communities or classes of people that experience violence and *threat of dispossession or eviction*, regular legal proceedings generally provide some form of *possessory actions*, eventually supplemented by recognition of legally permitted self-help. But, as possessory protection is rarely effective for large-scale disturbances and forced migrations caused by armed conflicts or natural disasters, the more frequent function of civil proceedings is to grant *restitution, reparation or compensation for loss of property or possessions*. The legal protection can then be provided either through *petitory actions* for recognition or reinstatement of title to land and other property, or through *compensatory actions*, either in the form of restitution in kind or by *actions for damages* (which may be governed either by special legislation or by general rules of civil law). If title is not disputed, but the situation of dispossession persists (e.g. due to political sensitivity of the matter or factual

difficulties), the focus of the legal protection moves to *effectiveness of enforcement proceedings*, addressing the causes of delayed implementation or non-enforcement of judicial and other decisions. Restitution of possessions may in such a way be possible only if effective instruments for *lawful eviction of present illegal occupants* are available. But, as illegal occupants may themselves belong to disadvantaged groups, additional proceedings that address their social rights – rights to dignity, appropriate dwelling and subsistence – may be required.

The above listing of functions, and the multitude of interconnected proceedings that should be in place and which need to be coordinated, demonstrate the complexity of procedural issues regarding all forms of redress for past dispossessions and forced evictions. The litigation segment is only one of the aspects, and in itself it cannot work well unless it is embedded in a well-planned and comprehensive system of policies and administrative measures. It should be synchronized with a whole network of non-contentious proceedings, and with various options for peaceful dispute settlement (including availability of collective and individual consultations and negotiations, and options for mediation of conflicting rights and interests). Unfortunately, the collected information shows that such comprehensive policies and well-thought-out system of proceedings are rarely present.

In the end, the evaluation of the quality and efficiency of the existing litigation practices seems to depend on the general effectiveness and quality of the national civil justice system. Thus, for instance, national reporters from Australia, Norway and South Africa – the countries that seem to have a high level of trust and confidence in their justice systems – gave more favourable assessments of court litigation in land dispossession and eviction matters in these jurisdictions⁹⁹. But, even there, the national reporters pointed to factual obstacles regarding the effectiveness of legal procedures.

One set of obstacles is connected with evidentiary difficulties. In order to establish original native titles, and define boundaries of lands that were possessed by original indigenous or other disadvantaged owners, appropriate evidence needs to be found, and that is often very difficult due to external reasons (a court needs to establish what has been happening over a long period of time to a whole class of people, often in isolated places and in chaotic circumstances,

EDUARDO and VERBIC, FRANCISCO. *National Report Argentina*. *Op. cit.*, p. 5, and Brazil: Cfr. WAMBIER, TERESA ARRUDA ALVIM. *National Report Brazil*. *Op. cit.*, p. 8 – no specialized courts for disputes regarding dispossession in urban areas.

⁹⁸ Cfr. BABOOLAL-FRANK, RASHRI. *National Report South Africa*. *Op. cit.*, p. 5. If a country is generally suffering from the “endemic problem” regarding length of court proceedings, the situation with the duration of these cases is even more critical (See: OTEIZA, EDUARDO and VERBIC, FRANCISCO. *National Report Argentina*. *Op. cit.*, p. 14).

⁹⁹ For instance, the South African report describes the existing legal procedures as “satisfactory and suitable”; the Norwegian report speaks of “dramatic improvements” in the last 30 or 40 years (at VII).

involving a population that has meagre legal and general literacy). One way in which these difficulties are being met is the creation of special structures, which include not only lawyers, but also a broader inter-disciplinary team of researchers that includes historians and social scientists¹⁰⁰. The rules on the evaluation of evidence and the assessment of facts may also need to be adjusted. If, for instance, the law regularly requires written evidence, or if the courts assign to such evidence an increased evidentiary value, the approach should be changed in the cases involving indigenous right to land¹⁰¹.

The second set of obstacles relates to problems that indigenous populations and members of other disadvantaged groups may have when accessing civil courts and other bodies competent for protection of their rights. By definition, the abilities of indigenous and underprivileged claimants to understand and utilize legal procedures are limited. Many of them live in rural areas, in places situated far away from the seat of regular courts, so that access to courts is literally difficult, requiring considerable time and expense. Providing sufficient legal assistance and legal aid for parties in these processes is of utmost importance, in particular when the proceedings are organized in an adversarial manner. Impediments also include reliance on communitarian culture, lack of orientation in the legal system, patterns of discrimination and linguistic barriers¹⁰².

There are several examples of best practices in dealing with the mentioned obstacles. For instance, in order to overcome physical difficulties in accessing courts, court hearings in indigenous land rights cases can be held in any location that is most convenient¹⁰³. In Australia, the specialized state bodies like Land Councils assist native title claimants with a large specialized team of their own lawyers, and there are also some private legal services that provide indigenous groups with teams consisting of one senior lawyer, one or two additional lawyers, an anthropologist, a historian and a community liaison officer¹⁰⁴. In Norway, taking a case to the land tribunal is free of charge, and specialized legislation provides that the state also covers all necessary legal costs¹⁰⁵. If costs are not covered by the state, legal aid for the claimants is granted¹⁰⁶. In some

countries, it is common practice that legal and other assistance comes from NGOs and public interest groups that are close to indigenous communities¹⁰⁷.

But, in total, all examples of best practices demonstrate that regular means of civil procedure are not entirely adequate for dealing with the difficult problems of land dispossession and forced evictions. For many situations, departures from standard procedural principles and regular procedures are necessary to offer at least some chance for the just, equitable and timely solution of the individual cases. The conclusion which follows will go a step further and discuss in general the effectiveness and accessibility of existing tools of civil procedure and the preconditions for making them appropriate for resolving land disputes involving large numbers of underprivileged groups and persons.

VI. CONCLUSIONS: THE ROLE OF LITIGATION IN RESOLVING COMPLEX LAND DISPUTES, AND HOW TO INCREASE EFFECTIVENESS AND ACCESSIBILITY OF EXISTING COURT PROCEDURES

This report has in its subtitle a question: *How to settle private (non-state) land disputes involving members of indigenous and other disadvantaged groups in a just way while guaranteeing due process of law?* After analysis of some global experiences with litigation stemming from large-scale land dispossession and forced evictions, in reply to this question several cautious conclusions may be drawn.

1. Even though land disputes involving disadvantaged groups may take the form of private disputes, they are in their essence rarely private, as they often involve collective rights, collective problems and many issues of eminent public interest. To that extent, a just resolution of land-related conflicts caused by past injustice should not be tossed to the regular courts, to be decided in regular litigation proceedings, in isolation from comprehensive public policies that are designed to address the fundamental causes of the problem. Though courts and judges are important as independent and impartial guarantors of fundamental rights and due process, their abilities should not be overestimated. To borrow the final insight of Elisabetta Silvestri, no judicial procedure, not even one wholly respectful of human rights and due process, can solve societal problems caused by a deep and long-lasting crisis¹⁰⁸.

100 See *supra*, note 71 (an example from Australia).

101 See *supra*, note 65 (an example from Norway).

102 Cfr. OTEIZA, EDUARDO and VERBIC, FRANCISCO. *National Report Argentina. Op. cit.*, p. 12.

103 E.g. STANDBERG, MAGNE. *National Report Norway. Op. cit.*, p. 3.

104 Cfr. BAMFORD, DAVID. *National Report Australia. Op. cit.*, p. 10.

105 Cfr. See Finnmark Act § 43.

106 Cfr. STANDBERG, MAGNE. *National Report Norway. Op. cit.*, p. 6.

107 Cfr. OTEIZA, EDUARDO and VERBIC, FRANCISCO. *National Report Argentina. Op. cit.*, p. 13.

108 Cfr. SILVERSTRI, ELISABETTA. *National Report Italy. Op. cit.*, p. 8.

2. If litigation of land disputes is to reach desired policy goals, it has to be carefully coordinated with other procedures and policies. Overlapping jurisdiction has to be avoided, and all bodies involved need to honestly and sincerely share the same vision (e.g. the vision of reconciliation) and the same national policy objectives (e.g. just restitution and compensation for a certain group)¹⁰⁹.

3. Disputes involving collective interests are best decided by proceedings adjusted to their collective nature, i.e. in some form of collective proceedings. Yet, collective litigation and class actions are a very novel topic for civil procedure in most countries (with the notable exception of the USA and, partly, Brazil), and most recent attempts to introduce forms of collective relief have generally not functioned well¹¹⁰. Professors Oteiza and Verbić rightly noted that lack of adequate collective procedural devices with respect to indigenous peoples' rights causes particular problems, due to "their inherent collective social dynamics and the inherent incapacity of the judicial system to include all the voices within the proceedings"¹¹¹. Until adequate collective court mechanisms are found, the only court cases with significant collective impact are those that are made in the form of precedents (or leading judgments) at the highest levels of judicial hierarchies, by supreme and constitutional courts – provided that they share the general policy visions and take a progressive stance. For this purpose, the case law of the international tribunals and the development of international law can serve as catalysts – but cannot replace the lack of appropriate collective redress mechanisms (which, at this point, in most civil law countries may only be granted as a part of broad governmental administrative measures).

4. Though civil litigation may not be the optimal instrument for social conflicts of a collective nature, some of its elements can still be improved and

adjusted as much as possible to the needs of land rights disputes involving disadvantaged groups. These elements include extension of rules on *locus standi* (adequate representation of collective interests should be found, enabling groups or tribes to act as parties); third-party intervention (broader right of organizations or individuals to intervene as *amici curiae*); forms of proceedings (giving more weight to oral evidence and oral stages of the proceedings); the place where procedural actions are taken (stimulating meetings and hearings in places convenient for indigenous and disadvantaged parties); language (effectively securing the right of parties to understand and use their native language and/or the language of the proceedings); burden of proof and standard of proof (introducing fair rules that effectively enable parties to prove their land title); costs (which should not be excessive, and optimally should be covered using state funds); etc. The composition of tribunals dealing with these matters and their jurisdiction should be adequate, securing the sufficient special skills and knowledge of judges, experts, interpreters and other participants. Even though specialization of court proceedings sometimes brings more problems than benefits¹¹², proceedings in land rights cases dealing with large groups and their members are one of the very few areas where specialization is indisputably desirable.

5. Best solutions for complex situations, in which correction of one injustice almost inevitably causes another one, are those based on consultations, agreement and consensus of all sides. Just as general policy decisions regarding remedies for land dispossession and forced evictions have to be taken by the government based on consultations, the court proceedings in individual cases need to have a multi-door approach, opening throughout the proceedings options for direct or mediated settlement of some or all elements of the dispute. Such settlements should enable broad participation of all interested sides, and pay due attention to the systemic nature of the dispute and the need to adopt solutions that do not discriminate against other members of the affected groups. Adequate rules, facilities and staff should be available for effective and appropriate individual and collective negotiation and mediation processes.

6. A precondition for fair settlement of land disputes is adequate knowledge and ability to make use of rights granted by the law. Therefore, litigation of cases dealing with dispossession and evictions can be really fair and just only if

109 Some examples of situations where these preconditions were not fulfilled: in Peru, the government failed to consult the indigenous peoples when it adopted the procedures for consultations, and effectively undermined that right by setting unrealistic deadlines (Cfr. DELGADO, CHRISTIAN, *National Report Peru. Op. cit.*, p. 5). In Croatia, when the government, after negotiations with the international community, adopted the 1998 programme of return of refugees (mainly Serbs) who fled after recapture of occupied Croatian territories in 1995, its provision on court control of administrative decisions caused confusion regarding competence for restitution of possession of land and houses, preventing effective restitution and return instead of accelerating it. Cfr. See: Human Rights Watch Report, "Broken Promises. Impediments to Refugee Return to Croatia", 2003; and Human Rights Watch Report, "Croatia: A Decade of Disappointment", 2006.

110 Cfr. HARSAGI, V. and VAN RHEE, C.H. (eds.), *Multi-Party Redress Mechanisms in Europe: Squeaking mice?*, Intersentia, 2014. (For European experiences).

111 OTEIZA, EDUARDO and VERBIĆ, FRANCISCO. *National Report Argentina. Op. cit.*, pp. 13–14.

112 See: UZELAC, ALAN. "Mixed Blessing of Judicial Specialisation: the Devil is in the Detail", *Russian Law Journal* 2 (2014), 4, pp. 146–164.

necessary legal information, assistance, advice and aid are provided. The forms of legal support for indigenous and disadvantaged groups should be diversified and versatile, involving broader educational initiatives, involvement of NGOs and their legal advice centres, mobile legal clinics, advice through governmental offices and lawyers, and sufficiently generous legal aid schemes¹¹³.

7. One of the principal enemies of effectiveness in court litigation is excessive length of proceedings. For various reasons, proceedings in cases related to restitution of land rights regularly last longer than other civil cases. The more numerous those who seek to have their rights recognized and adjudicated, the longer will be the average duration of their processes. This duration also increases with the time that has passed since the original dispossession took place, and with the economic consequences and lobbying potential of those whose interests would be negatively affected by restoring justice. For resolving some fundamental dilemmas, long periods of gestation in proceedings before independent and impartial tribunals may be justified, but for hundreds and thousands of disadvantaged and underprivileged applicants, every day of further deprivation of rights only adds insult to injury. Excessive duration of administrative and judicial proceedings leads to violations of human rights obligation of the states to secure due process and effective exercise of rights of indigenous communities¹¹⁴.

8. Finally, if redress for land, territories and resources that were taken, occupied, used or damaged is to be effective, the awarded remedies for the wrong done need to be realistic and effective, and not inoperative and illusory. Effective redress can be provided only if the judicial decisions are respected and enforced. Ineffective and delayed enforcement compromises the whole process. Unfortunately, many governments are prepared to put the red hot potatoes in the hands of the courts, but are reluctant to recognize and implement their decisions if they are politically sensitive or expensive for the national budget¹¹⁵.

113 Compare the assessment of the South African report, which also suggests support for satellite education clinics and government initiatives for educating the young. *Cfr.* BABOOLAL-FRANK, RASHRI. *National Report South Africa. Op. cit.*, p. 15.

114 Compare the *Yakye Axa* case of the ICHR, *cit. supra* note 87, paras 86 and similar (finding that protracted delay constituted in itself a violation of the right to a fair trial).

115 Many cases of the ECtHR found violations of fair trial rights on account of the non-enforcement of final and enforceable judicial decisions. Starting with the *Hornshy* case, for the purpose of assessing compliance with the right to fair trial within a reasonable time, effective and timely enforcement is considered to be an integral part of the judicial proceedings. *Hornshy v. Greece*, 18357/91, ECHR, 19 March 1997, § 40. Many non-enforcement cases dealt with the failure to

These are not the only challenges in the process of establishing “a fair, independent, impartial, open and transparent process” regarding “recognition and adjudication” of indigenous peoples’ rights as required by Article 27 of the UN Declaration on the Rights of Indigenous Peoples. Due to the emergence of new armed conflicts and continuing crises in many areas of the world, new mass displacement and dispossession waves are occurring. Compared to issues that these new disasters raise, the challenges of adequate protection of indigenous rights look like minor and trivial glitches. And while indigenous communities are important in part also because they may serve as an example that restoring justice is, in the end, feasible, when and if this is demonstrated, through court proceedings or otherwise, instances of post-conflict and transition restitution will have to be addressed next, with tens and hundreds of times more potential victims. And their number is still small compared to the number of those disadvantaged due to persistent economic crises and endemic poverty¹¹⁶. For these challenges, not even the best national policies and most effective court systems and procedures will be sufficient, unless they are matched with the orchestrated global efforts of nations, and supported by local, national and international consensus and common resolve to change things for the better.

ANNEX I. QUESTIONNAIRE FOR NATIONAL REPORTERS

1. Defining groups of indigenous and disadvantaged groups in a national context

How are indigenous groups defined in your country?

What is their share of the general population?

Which groups of disadvantaged people are relevant for the issues of land dispossession and forced displacement?

evict illegal occupants in the attempt to reinstate property rights in real estate – see e.g. *Ilčić v. Serbia*, 30132/04, 9 October 2007; *Majski v. Croatia*, n.° 33593/03, ECHR, 1 June 2006; *Pibernik v. Croatia*, 75139/01, ECHR, 4 March 2004.

116 As argued by researchers, “lack of access to land is strongly related to poverty and inequality”, and therefore resolution of land issues are a precondition in the global campaign against poverty (*Cfr.* BORRAS, S. M; KAY, C, AKRAM-LODHI, HAROON. “Agrarian reform and rural development: historical overview and current issues”, in AKRAM-LODHI, HAROON *et al.* (eds.). *Land, Poverty and Livelihoods in an Era of Globalization. Perspectives from developing and transition countries*. Routledge, 2007, p. 1). Yet, in very few countries (Vietnam being one of them) has the current neoliberal policy of land reform fostered rapid reduction of poverty rates (*Cfr.* AKRAM-LODHI, HAROON *et al.* (eds.). *Land, Poverty and Livelihoods in an Era of Globalization. Perspectives from developing and transition countries*. Routledge, 2007, p. 385).

2. Background and relevant national legal framework

Please describe the historical context of the problems related to land dispossession and/or forced displacement of particular disadvantaged groups and briefly describe developments in the past. Was there a particular legal basis (e.g. a law) under which dispossession and displacement took place?

Please present national legal sources (acts, statutes, precedents) that are currently relevant for the issues of land dispossession and forced displacement.

3. National courts, tribunals and forums having jurisdiction in cases of land dispossession and forced displacement

Are there any specialized tribunals for cases regarding breach of land rights of disadvantaged groups of people in your country? Describe their origin, composition and jurisdiction. Do they belong to the judicial or to the executive branch of government?

Are there any other courts, tribunals or forums that deal with land dispossession and forced displacement cases?

4. National legal procedures and case law

What legal procedures are provided for decision-making in current cases seeking to address land dispossession and forced displacement issues? Please describe their main features. Who has *ius standi* before the court? Are any third parties involved in the process as intervenients or *amici curiae* (NGOs, national or international organizations, ombudspersons, etc.)? Right to request interim relief (provisional measures, etc.)? Any other special procedural rules that depart from the regular legal proceedings?

Describe the current leading cases that deal with the consequences of land dispossession and forceful eviction from the past. Has effective relief been granted to the litigants in these cases?

5. International legal framework and approach

Which sources of international law play or have played a role in your country (e.g. UN Declaration on the Rights of Indigenous Peoples; ILO Convention on Indigenous and Tribal People)? Have they influenced legislation and case law in your country? Are there any international tribunals that have dealt with the issues of land dispossession and forced displacement in your region?

6. Position of former and current landowners

What kind of legal land rights were indigenous/disadvantaged groups of people entitled to before that land was taken from them? How were these rights exercised in practice?

How was the ownership of the land acquired from their original inhabitants and/or owners?

What is the current legal status of the landowners? What are their views on the problems related to land restitution? In which way does the process in current land restitution cases affect their rights?

7. Fairness and effectiveness of the procedure(s)

Are there any legal and/or factual obstacles regarding access to legal procedures in land dispossession and forceful eviction cases? Is it possible to obtain legal aid or free representation for the members of indigenous/disadvantaged groups?

What kind of relief can be awarded in the process? Natural restitution or compensation? Does compensation correspond to the true value of the land? Other relief (e.g. rent for the use of land or interest, pain and suffering)?

Is impartiality and due process in the proceedings properly assured? Are there any problems in this respect?

What is the length of proceedings in land dispossession cases? Please assess the total length and the length of individual procedural stages (first instance adjudication, appeal stages if available).

Are decisions in these cases respected? Is the enforcement of decisions in land dispossession and forceful eviction cases effective?

8. Opinion of the national reporter

What is your personal evaluation of the existing situation regarding land dispossession and forceful eviction of underprivileged groups of people? Are new injustices being created? Is a just and equitable balance of interests of all stakeholders achieved in practice?

What is your opinion on the existing legal remedies and procedures? Strengths and weaknesses? Need for change? Evaluate in particular the existing role played by civil procedures in land dispossession cases in the light of due process of law, protection of human rights and the need to find a long-lasting peaceful solution to the underlying problems?

Predictions for future development? How can the situation be improved?

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